Profile: Associate Professor Jason Bosland

Associate Professor Jason Bosland is the Director of the Centre for Media and Communications Law at Melbourne Law School, where he teaches media and communications law. He holds degrees from the University of Melbourne and the London School of Economics. His primary research interests lie in media law, including defamation and privacy, open justice and the media, contempt of court and freedom of speech. He is an Editorial Board Member of the Media & Arts Law Review and a Research Committee Member of the Public Interest Journalism Initiative.

Associate Professor Bosland recently spoke with barrister Claire Roberts about academia, suppression orders, and what's wrong with Australian defamation law.

CLAIRE ROBERTS: Hi Jason, thanks for chatting with us. To kick off: how did you end up in academia, and what drew you specifically to the media law space?

JASON BOSLAND: I ended up in academia almost by accident. I was completing my undergraduate degree here at the University of Melbourne and I was doing some research work for some academics here in IP. And then, it just sort of happened!

I finished my LLB, then I was doing more research work and then I enrolled in a Master's. After doing that I decided that I wanted to be an academic. In terms of media law: after undertaking some research work I thought, this is really interesting. There were many IP academics at the time, but fewer people doing media law in academia so I also saw an opportunity. It's a growing area and raises all sorts of interesting issues.

ROBERTS: For anyone reading the *Communications Law Bulletin* who might be toying with the idea of further study – are there any broad areas of media law scholarship that are crying out for attention?

BOSLAND: I would say things around the national security space; government censorship; and generally I think there is a need for empirical work in the media law space. Claims are often made about the way in which media law operates to restrain journalists but this should be examined empirically.

Defamation law remains an ongoing issue in Australia; there is certainly work that needs to be done around how we reform our laws in this country. There are obviously some reforms in train – whether or not they are enough is something that could be explored. There is also a lot more work to be done around data protection. I think the questions of whether Australia should have a tort of privacy and the implications of that for privacy have been explored enough.

ROBERTS: So, defamation reform. Let's start with the serious harm threshold. Do you think it is needed? Do you think it would do anything?

BOSLAND: It depends on how the courts are going to interpret it. We have seen that the UK Supreme Court in *Laucaux v Independent Print* [2019] UKSC 27 has treated an equivalent provision as a real additional step that needs to be satisfied in order to bring an action.That is obviously a good development if you are thinking of ways of avoiding defamation litigation being brought. I would hope that the Australian courts will interpret it in the same way that the UK Supreme Court has.

ROBERTS: Do you think there are other proposed reforms that are likely to have a big impact in the defamation litigation space?

BOSLAND: No, probably not. Obviously the reforms around intermediaries are off the table at the moment to be dealt with at a separate time. The changes to the Contextual Truth defence probably will have an effect. That was obviously a drafting error in the existing Acts so to fix that is important. The changes to Honest Opinion might have some impact although it depends again how the courts interpret it. But I think, overall, the reforms that are currently on the table are not particularly bold. They are really focused on tinkering around the edges of the existing law.

The main problem I see with defamation law – and I think a lot of practitioners would agree with me on this – is the obsession with imputations and the idea that a plaintiff is bound to their imputations and a defendant must meet those pleaded imputations in their defences. There is very little room to argue for alternative imputations. For freedom of speech and defendants, the media in particular, that poses all sorts of problems because the plaintiff gets to set the ground rules for the entire litigation going forward. That doesn't happen in other countries. Unless we deal with some of those fundamental practice and pleading issues, some of the substantive changes may not have so much of an impact. So I think what we really need is a combination of reforming the substantive law and then also looking at the practice and procedural aspects of defamation law.

ROBERTS: We are speaking on the 12th of March, and as you know the High Court is hearing the Pell appeal today. It feels timely to ask: what is your view on the suppression orders in that case? Were they appropriate? Did they work?

BOSLAND: I am actually writing an article about this at the moment. Prominent people came out and said that this order wouldn't have been made by other judges, that Victoria doesn't have the same necessity test that exists in other jurisdictions. I think some of those comments were misguided, to be honest. Victoria *does* have a necessity test – it is there in the legislation. I don't think there is any substantive difference between the law in NSW and the law in Victoria when it comes to making these types of orders.

On the point that other judges would not have come to the same view – I think other judges would have, actually. The paper that I am writing is looking at all decisions that have been handed down where a suppression order has been granted to restrain the publication of prejudicial material in the context of back to back trials. There are very few decisions that are available – there are obviously a lot of orders made but courts usually don't issue publicly available reasons for those orders. In all of the cases I have located involving back to back trials, the orders were granted. So if you look at those decisions and you look at the circumstances in Pell – the decision in Pell is wholly consistent with those decisions – including a decision by the NSW Court of Appeal in *Nationwide News Pty Ltd v Quami* (2016) 93 NSWLR 384. So, I don't think the judge can be criticised for making the order. I think it was one that – on the current approach – was warranted.

An additional fact I suppose to be put into the mix is that it was clear from the time the order was made that the trial would almost certainly attract widespread media interest, including international media interest, and that the order would therefore be rendered futile. Now – whether that should be a factor in the judge's decision making when it comes to making this type of order is pretty controversial, actually. So you might say, well, the judge should have foreseen that the order would be ineffective because of the likelihood that there would be widespread international media attention and those international media organisations wouldn't necessarily be bound by the order. If you take that view, what you're effectively saying is that there is an expectation that someone within the jurisdiction would breach the order by conveying information to those international organisations so that they can then include that information in their publications. If a judge assumes that their order won't be followed and on that basis refuses to make it, the concern is that this has the potential to undermine the rule of law and public confidence in the courts, perhaps just as much as judges making ineffective orders. It's clearly a conundrum.

The other claim that has been made following Pell is that suppression orders are completely futile in the digital environment. In my view that argument is completely flawed. I think suppression orders are effective in 99.9% of cases; I can count on one hand the number of cases where a suppression order has been rendered futile by overseas media publishing material where an order exists. I receive and consider all the suppression orders that are sent to the media in NSW and Victoria. The ones that I think have been rendered futile or undermined by internet media publications are incredibly limited: eg, Underbelly, *DPP v Brady*, Pell.

To be clear: I don't want to be seen as apologising for the courts in making suppression orders. They do grant too many. There is definitely a problem with suppression orders in this country, but it is not around the *efficacy* of orders, I think it is around the fact that the courts make too many. The other point that I would make is that there has been a myth circulating among media for years and years that Victoria is the suppression order capital of Australia. That is absolutely not the case.

ROBERTS: Do you think the myth arises because Victoria reports more completely?

BOSLAND: Victoria and South Australia are the only two jurisdictions which send all orders made by the courts to the media. In NSW it is only the Supreme Court and sometimes the District Court – very rarely the Local Court will send out orders. Western Australia – the courts almost never sent orders out to the media. I contacted the WA Supreme Court to ask how many orders were made in recent years and the number was significant. Whereas, for example, WA made only one media notification during 2017. So, if you're relying on media notifications you're not getting a complete picture.

The other thing that needs to be factored in is caseload and population. Once you do that, surely Victoria cannot be seen as issuing orders at a greater rate per judge or capita than the WA courts.

ROBERTS: This is the first edition of the *Communications Law Bulletin* for 2020 and we are looking at the decades past and to come. Looking backwards over the last decade: what do you think are meaningful or important developments that we have seen, internationally or at home?

BOSLAND: I think the *Defamation Act 2013* in the UK was really important. We have not seen so much flow from the Leveson Inquiry in terms of substantive legal change, but I think that it promoted reflection on the conduct of the media - and that was significant. Of course, the Finkelstein Inquiry that followed in Australia did not have as much impact here as the Leveson Inquiry did in the UK.

The other big issue has probably been around data protection issues. The recent Digital Platforms Inquiry is a really important turning point in terms

of the relationship between digital platforms and traditional media organisations and consumers. This will also be very important in over the next ten years.

National security, journalists' sources and whistle-blower protection have also been very significant; in particular the mandatory data retention regime. The regime is extremely concerning when it comes to media freedom. I think that that has been wholly inadequate in terms of the measures that have been included to protect journalists' sources.

On journalists' sources more broadly: one of the major things is the privileges in the Uniform Evidence Acts. I think the way that has been interpreted in Victoria in particular has really shifted the legal landscape when it comes to journalists' sources. Interestingly, on the one hand you've got that measure which is meant to provide greater protection – and on the other hand you have a competing force which is the data retention regime, which as a practical matter means journalists are much less able to protect the confidentiality of their sources in the digital sphere.

ROBERTS: Now, looking forward. What do you expect to see, or not see, in the next ten years?

BOSLAND: I don't want to be pessimistic, but I think given history we have to be. I *don't* think we're going to see the type of reform to defamation law that I would like. I would like to see a three, four year ALRC inquiry into defamation law. Similar to what has happened in Canada: the Law Commission of Ontario has undertaken a big project on defamation law and they have basically said that anything is on the table: 'let's completely re-examine this area of law and see what we can do.' I think we need to do the same thing here. Obviously there are constitutional issues around federal legislation and things like that which would need to be ironed out – but I don't think we're going to see that sort of bold reform.

In terms of what we *are* going to see – I think we're going to see litigation involving traditional media outlets who operate on online platforms. I'm thinking particularly of the *Voller* case here – that is such a significant case, and it is so important that the Court of Appeal comes to the right decision.

ROBERTS: Dare I ask what the right decision is?

BOSLAND: The right decision is that they are not primary publishers of third party comments. For me, treating them as primary publishers of third party comments gives rise to a completely new basis for liability for publication in defamation law. They are at most secondary publishers of those comments, and if they take them down once they have notice they will be able to rely upon the innocent dissemination defence.

Returning to changes that I expect to see over the next decade: another would be I suppose – coming out of the ACCC's Digital Platforms report and the subsequent inquiry that is going on around the relationship between traditional media and online intermediaries; that's really significant as well.

Another major issue will be around data protection regimes and the liability of intermediaries when it comes to consumers. So if we treat them as media entities, which we probably should now, then I think that their responsibility will become important when it comes to things like the right to be forgotten, the use of data, transparency. If we are thinking about broad themes for the next ten years: transparency and accountability are two things that will become more important when it comes to intermediaries.

Regulation of intermediaries will also be important. For example, the *Criminal Code Amendment (Sharing of Abhorrent Violent Material) Act 2019* (Cth). Similarly, issues around the liability for intermediaries when it comes to the publication of 'fake news'. Singapore has introduced some legislation which hopefully is not replicated around the world because it is extremely draconian and contrary to press freedom. I think these issues can be dealt with in a much more measured way.

ROBERTS: Finally, the readership of the *Communications Law Bulletin* includes a lot of practitioners. Do you think that practitioners and academics engage with one another enough?

BOSLAND: There should be more engagement between academia and the profession – and not just those advising clients, but also the judiciary. I would like to see more empirical research based on the collection of data to come to conclusions about certain assumed things. The reverse is that academia can really benefit from the insights of practitioners. To get the perspective of what is happening 'on the ground' is very valuable for academics. I am lucky in that the Centre for Media and Communications Law has an active advisory board comprised of practitioners - I get tips and insights from them that I find really useful. Engagement amongst the profession, through events and seminars and that kind of thing, is very important as well.

Claire Roberts, barrister, Eight Selborne, is a member of the CAMLA Young Lawyers Committee.