

William & Lonsdale – Lives in The Law

Ep 72. Nick McKenzie

voiceover : [00:00:07] This is William and Lonsdale, a podcast about the legal ecosystem and the fascinating people who make it tick. Today, your host Michael Green welcomes renowned Australian investigative journalist Nick McKenzie. Although Nick doesn't work directly in the law, his work intersects with it almost daily. Describes in this episode, some of his greatest collaborators have been lawyers, as have some of his greatest foes. He has enormous respect for the law, but equally, he sees its limits and believes journalism has the capacity to bring justice where the law cannot. And Nick has certainly used his craft time and again to do just that, exposing police corruption, foreign interference in Australian politics, and war crimes. His work has even instigated a royal commission. But long before the exciting and dangerous reporting, the countless awards, and the frenetic pace of his career, like many of us, Nick's family were both his greatest influence and an enduring source of fascination. And considering his lauded career, he appreciates the irony that it was a lack of clear communication that once helped foster friendship and harmony among his otherwise disparate extended family.

Michael Green: [00:01:21] Nick, you've got two very different families that you're the product of. Polish Jewry family on one side, establishment Melbourne family Anglo Saxon wasps almost on the other side. Did they mix? Did they get on well together?

Nick McKenzie: [00:01:37] I often ask myself this. I mean, I've asked my mother and father the same question. You know, my grandfather, mum's Polish father, he was an orphan. He did a couple of years in jail overseas for his politics. He was an avowed communist, and as it happens, he was a Yiddish revivalist. He wanted to make the Yiddish language, the global lingua franca, what a ridiculous aim. Dirt poor, he worked stuffing sausages in a factory, and I think they sold shoes at the Vic Market. And then the grandfather on the other side, my father's father, wealthy, politically connected, an industrialist on the boards of major companies. We heard about leading conservative politicians would sometimes ring the house. He was no doubt on the conservative side of politics. How would this communist rabble rouser who'd done him at a jail time overseas get on with my other grandfather? And apparently they got on like a house on

fire, the reason being is because my grandfather spoke Polish and the other grandfather spoke English. So when they spoke, they couldn't understand each other, and they never understood. And I think the communist was probably having a crack at the capitalist, but it was done with a smile and a wink, And so the story goes, they were the best of friends.

Michael Green: [00:03:18] Good morning. Our guest this morning in lives in the law is Nick McKenzie. Nick is not one of our typical lawyer guests. Nick is an investigative journalist with The AID, Sydney Morning Herald, and other mastheads in the Nine Network. Nick, is it?

Nick McKenzie: [00:03:32] Sixty Minutes, the the TV show, the financial review owned by Nine now as well, and and other parts of the of the Nine enterprise.

Michael Green: [00:03:40] Thanks for coming in this morning, Nick. Can you start by telling us, because you're not a typical legal guest, what exposure to the legal system have you had? How do you come in contact with it? How often do you come in contact with it? In what way do you come in contact with it?

Nick McKenzie: [00:03:54] Well, as an investigative reporter, you are utterly enmeshed with the law. You know, we cover court cases. Sometimes we are defendants in court cases. Me most, I guess, famously as the defendant in the Ben Robert Smith defamation trial of the century. And the job of the journalist is at its core. One of the jobs is to expose injustices, and that's the job of the law as well. So the man who's wrongfully convicted or important prosecution or a case of corruption, police corruption, lawyer wrongdo, these are all things that would bring us into contact with the law's reporters. So often, so many of my stories have been brought to me by lawyers who see that the law also plays a vital part, of course, but journalism, public exposure can actually do so much more in some cases than the law can do. Where the law falls short, the media steps in, journalism steps in and shines that light. The law is a very constrained environment, journalism far more freewheeling, but applied together, the power of the law and journalism, it can lead to great injustices being corrected.

Michael Green: [00:05:08] So as an investigative journalist, you are working with the law almost on a daily basis?

Nick McKenzie: [00:05:13] In one way or another, yes. I mean, I'm grappling with legal issues all the time. I'd like to joke, but it's perhaps not a joke. I speak to our defamation lawyers more than sometimes my own editors. And in just your day to day, I mean, some of my greatest collaborators lawyers. They tend to be the lawyers on the edgier side of the profession, those who understand or say the law as a tool of justice rather than merely a job. And and those who are more inclined to see the world that way, they wanna work with journalists or at least decent journalists to to help their clients, but ultimately to to fix broken systems and the like.

Michael Green: [00:05:52] Okay. Well, I guess that's gonna be what we talk about for most of this discussion, Nick. But maybe let's get back to the start and your family background because you've got an interesting family background and a mum and dad who come from very different backgrounds themselves. So maybe tell us about that and what helped form you?

Nick McKenzie: [00:06:08] It's a question I ask myself often because I'm certainly very passionate about doing what I do and confronting injustice, standing up to bullies, looking at abuses of power, and when you do that, you often run into difficult circumstances, the corrupt, the wealthy who wish to shut you down, organised crime figures, bikies, threats to my safety and that of my family. So I ask myself the question, why the hell do I do this? Because it's hard. And guess I look back, my father came from a very well-to-do sort of Melbourne establishment family, big Catholic family, all the trappings of a well-to-do family, but my mother came from a dirt poor family, she was an immigrant, came from Poland, she lost her relatives, several of them in the Holocaust, my grandparents are Holocaust survivors, they're in war camps during the war, and they came with nothing and scraped together a living. And so it was these two different worlds colliding in my parents coming together. And then our family had its own ups and downs, which you write out as a kid and then as young adult. And I think I got to see both privilege and suffering. And when you experience tough times up close and you understand what sadly some parts of your family have been through and then you look at other parts of your family and see great privilege, you start to think, geez, maybe maybe the world isn't such a fair place, and perhaps my role in it is to make it a bit fairer.

Michael Green: [00:07:35] What about education? What role did education play? I mean, did your father, who came from a privileged background, as you say, did you as a family go down that path, the MacKenzies, you and your siblings?

Nick McKenzie: [00:07:48] Most of my cousins went to private schools, and Xavier being the classic family school of the Mackenzie family, but my parents couldn't afford to send us to private schools, so we went to state schools. We were a bit different from other parts of the family in that respect. We also didn't go to church, and my family was not religious compared to the rest of the sprawling Mackenzie clan, but I was lucky enough to go to Melbourne High School, get into a selective school, so I had a tremendously good education, and my siblings also went to good state schools. Education was critical if you are the kid of an immigrant. Mother, as I said, came from Poland, they really value education, and they want you to become it's a great my mom is Jewish, it's a good cliché, a doctor or a lawyer, but I can tell you my mom wanted me to become a doctor or a lawyer. My twin brother is a lawyer. My great joke is my mother would introduce me and say, this is my son Nick, his twin brother is a lawyer. But I learned through education, was a hit and miss student at times, but I learnt from that very privileged education I got that I did want to do something that not just was interesting, that was sort of meaningful. I think when my brother went to the law, which is a classic choice of, I think, privileged kids or those who want to have a safe, secure life or there's a lot of status in the law, it's tremendous thing. But you lose a lot of great thinkers in the law, I think, because it's such a constrained, limited, often conservative environment, and I didn't like that environment. I wanted to be a bit more freewheeling. And journalism is the great place for, I guess, the undisciplined lawyer to end up, and that's where I ended up.

Michael Green: [00:09:31] To end up there, you had to get good VCE marks, and your mum incentivised you to get good VCE marks. What was the incentive she gave you?

Nick McKenzie: [00:09:39] You've done your homework. Yeah. So it was a classic Jewish mother in the form of a bribe. So if you get above x, it was a thousand bucks, which back in 1998 as a 17 year old was lot of money. I had to get above 90 in my score, 90 out of a 100. I And don't think mum ever thought I would get above 90. So that thousand, that's a bit like, you know, when you bet bet with someone for a million bucks and then you lose it, you'd never expect you'd pay. My mum never thought I'd get above

90. And I did get above 90 and it took me, I can say, some time to collect, but I did collect.

Michael Green: [00:10:17] Yes. And that tenacity has been a hallmark of your career as I understand it, Nick, but we'll get to that. So in the Mackenzie clan, so your dad's side of the family, there are several lawyers, but you decide not to go down that route, you go to journalism. One why? Why I mean, it's not a typical thing that good year 12 students think I wanna be a journalist. What made you want to do journalism, and how did it how'd you do it?

Nick McKenzie: [00:10:40] Well, journalism is actually a course that many bright young students want to do. It requires good marks to get into a good journalism course. So many lawyers want to be journalists and so many journalists want to be lawyers. So it comes down to personality, I think. If you're a bit more of an edgier or activist type person, and I'm not saying I'm an activist, but I do, I'm not easy to manage, put it like that. I'm not highly organised at times. I have a system, but it's not a system that would flourish within a law practice. I wouldn't have thought so if you're more of that sort of person, but you have a great instinct for justice, you end up in journalism, I think. If more structured, if you're more pedantic, if you're more willing to be part of the system than to be scrutinising that system, agitating is still, but you might end up in the law, and I think I could have gone either ways. But journalism, I found this sense of sort of excitement, adventure. What's a job where I don't have to be stuck behind a desk? I think very unappealing for young people, and it certainly was for me, it comes to the law is all the hard yak. I mean, journalism you get to quicker, it's three year study, and you can be out there, and I like to say, the youngest journalist in the newsroom can break the biggest story of the day, the week, or the year. Nothing holds you back. Law is much more structured. Climb the ladder slowly, you do your time, and I wanted to race to that finish line more quickly. Of course, now twenty one, twenty two years in, I'm still racing.

Michael Green: [00:12:08] When you graduate with a journalism degree, is it easy to get a job?

Nick McKenzie: [00:12:13] It's hard to get a job because well, it's hard to get a good job. Back in 2001 when I graduated, there was a much, much bigger industry, the huge consolidation and the great arrival of the internet that's changed existentially the role of

the media in Australia, that was coming. But it hadn't yet started to wash through. So there was lots of jobs. There were a few very good jobs, and the jobs you wanted to get in Melbourne was a cadetship at the AAG, a cadetship at the ABC, or a cadetship at the Herald Tribune of Australia, the big majors. And there was very few of those, and I got none of those. My first job, I went for, I think, about 25 jobs all over the country. Name a small speck of a town on the map, mostly with the ABC, which has radio back then, radio stations all over the joint. And finally got the call up to Alice Springs, and I literally had my Mitsubishi nineteen eighty nine green sedan packed to go to Alice Springs when I learned that someone had pulled out of the job at the ABC. They'd pulled out, and I was the Stephen Bradbury who skated through and got the cadetship in Melbourne very luckily, and never looked back.

Michael Green: [00:13:27] Cadetships last one year, like articles used to in the law?

Nick McKenzie: [00:13:31] Cadetships last one year, and then you're meant to be sent off to the bush. I had a bit of a different path. I did my one year, and again, I was a young man in a great rush. Really loved investigative journalism, loved investigating things and I loved breaking a big story. Found it really, really exciting and meaningful. So my second year, I've meant to be off to the bush, but I'd won this thing called the Andrew Ollie scholarship, which allows you to be anywhere in the ABC, including overseas. So most people go to Washington or London. I chose to go to Sydney. That was the heart of the ABC, and I wanted to do investigative reporting. And at that time, the gangland wars in Melbourne were kicking off, and the the most serious police corruption scandal that I think Victoria Police has seen, at least in its modern history, was also kicking off. This allegation the drug squad of the Victoria Police was itself dealing vast amounts of drugs, and worse than that, or even worse than that, working with gangland figures like your Carl Williams and your Tony Mockbells in a corrupt fashion to do away with their rivals at the height, but there was an allegation that sometimes corrupt police were in bed with organised crime figures procuring or involving themselves in the murder of other ganglion figures.

Nick McKenzie: [00:14:46] So this was all blowing up. I was 22 years old in Sydney and had a couple of contacts already from Melbourne's legal fraternity, largely, and who in turn met I got to meet some underworld figures, got to meet some detectives, and so I began to do this reporting on the gangland wars, but more significantly on police

corruption, and that really brought me into contact with the law in Melbourne. And it was that work over a couple of years that sort of embedded me as an investigative reporter, came back to Melbourne in the end, and then joined The Age, and really never stopped. Those contacts are made in the law, in the police force, in the criminal underworld. I've never lost those and have been a thread in the next twenty years of my reporting.

Michael Green: [00:15:35] Nick, before we go too far down the path of your career, I'd like to learn about, or have you tell us about, a case that came up, I think during your cadetship, McCabe and British American Tobacco, a woman who was dying of cancer because of smoking. How did you become involved in that, and what

Nick McKenzie: [00:15:53] Was it about? I had really a peripheral involvement, but in the end, was for me the most dramatic and memorable involvement. So youngest reporter on the news floor, I think I was 19 or something, maybe just 20, and for some reason the court reporter wasn't around or was crook, and I was told this case is coming perhaps back sooner than expected. Race up to the old supreme court buildings and see what's happening. So there was a judgment being delivered. It was a landmark judgment, not just for Australia, but for the world. This woman dying of cancer, who in the end died of cancer, had sued big tobacco alleging that they'd effectively killed her, knowing that their products were evil and had covered that up. And this incredible court case had been brought by Peter Gordon, a very well known lawyer, and I I do remember seeing the judge deliver I mean, it was it was like a Hollywood movie being in that court. The old court, the old wood panels, it was packed to the brims of people. Qs an army of QCs on the side of big tobacco, and then Roland McCabe's legal team, Peter Gordon and Co, and their barristers. They were the underdogs, of course. And British American tobacco, big tobacco had had decades of using the legal firepower to shut down claims just like this all over the world, not just in Australia. And here, you hear the judge demolishing not just British American tobacco and giving the case to Rollin McCabe, but also questioning the integrity of Clayton Utz, a major law firm, and their so called document retention policy, was shredding documents.

Nick McKenzie: [00:17:40] And as this incredible judgement's being read out, this thing dawns upon not only am I sitting through history here, how exciting, but Christ, I've got to go outside and do a live cross and then tell this story on the news, and I've got no

idea what I'm doing. And an oversized suit, I was a very poor broadcaster back then, and it was the biggest story. It was gonna lead the bulletins all over the country. It did lead the bulletins all over the country, and somehow got it out there. I mean, most exciting moment in a young journalist's career to be part of that, moment of justice, of great justice, of dramatic justice. And then the great fall the next morning when I'm called in by my ABC boss in Melbourne and the big ABC boss in Sydney had said, why the F is this I looked about 16, this 16 year old kid doing the lead story in the news. He looks like crap. He can't he's no broadcaster. He can't talk properly. This is not what the ABC is all about, and that great sort of sense of, jeez, I've got a lot to learn.

Michael Green: [00:18:39] But despite all that, did this case open your eyes about the potential of what the law could do for good if it's done properly? I'll tell you

Nick McKenzie: [00:18:49] What it opened my eyes to, the way the law, when it works with journalism, can do good, because what happened in that case is that investigative reporter from the age Bill Bernbauer was working with Peter Gordon, the lawyer, and Peter's one of those activist lawyers who pushes the boundary in a great way to get things done and to achieve justice, and Bill was that sort of reporter. And it was our own version of a minor version of those great American journalism stories, the Panama Papers, etcetera, where this critical material was ending up on the front page of The Age. Now, in time, I believe that lawyers on the other side would accuse Peter Gordon of working with the papers in a, say, activist or unusual way to expose their wrongdoing and accuse him of wrongdoing. But what I saw was justice being achieved, accountability coming out, even it was through not necessarily through just the court, through the paper. It was a really, really powerful moment for me knowing that, you know what, geez, justice just doesn't happen in the courtroom, and looking at those leaked documents, there's somehow some leaked documents that the other sides in the big tobacco did not want ever to reach beyond the courtroom walls were getting splashed on the front page of the AIDS newspaper, and they were furious, but it opened up the whole scandal for what it was, and that sticks in my mind today as a really, really good example of the power of journalism, and when a clever lawyer works with a journalist, what can be achieved?

Michael Green: [00:20:22] Interesting. It must be challenging, I guess, for that clever lawyer to take the risk of involving a journalist and wondering, this

Nick McKenzie: [00:20:28] Could all rebound on me. My best friend in the law is a lawyer called Robert Starry. A magistrate now? Magistrate, yeah. She's recently stepped aside from the bench to return to the law, actually. Now Rob, he's a great person, but he's an unusual lawyer, because he always thought that law wasn't just a tool to be deployed in the courtroom. It was a tool to get things done, to get justice, to give the little fellow a voice. And if it was all those things, it had to be done in tandem with journalism. And as a very young reporter, Rob and I, I say this now, we work together on different stories. You know, some poor Tamils were accused, I think, unjustly of involvement in terrorism, and Rob was fighting those allegations through the courts, but also saw a role for the media in exposing perhaps what was police overreach. Many lawyers wouldn't do that.

Michael Green: [00:21:25] I think most lawyers wouldn't do that.

Nick McKenzie: [00:21:26] Well, think they're making a mistake when they don't do that. Because all those lawyers who don't do that, surely when they're having a quiet cup of tea would say, geez, the limits of the law are so obvious to everybody within it. It's not a perfect system. And sometimes, you know, that public accountability that only comes with journalism is just without it, nothing gets done.

Michael Green: [00:21:47] It surprises me, Nick, you as a young journalist in your early twenties, I think, are involved in stories involving Al Qaeda in Australia, gangland murders here in Melbourne. How did you get the stories? How did a young whip behind the ears journo get these huge stories?

Nick McKenzie: [00:22:03] Young whip behind the ears journo was precisely what the commander of the anti corruption task force, a guy called Commander Danny Maloney, called me to my face. He said, Listen, son, you're wet behind the ears. And the circumstances of him calling me that tells, I think, the story of where I got to as a young reporter. I mean, was a bit of an unstoppable force when it came to the gangland stuff, for instance, which brought me into touch with Danny and anti corruption fighters. I knew I had to develop police contacts, and that requires getting detectives effectively to break the law to give you information that's in the public interest. But I also knew I needed to hear the underworld side of things. So as a 20 year old, would travel to

Bowen Prison Maximum Security, where I'd be signed in to meet with notorious underworld figures who were alleging things around police corruption.

Michael Green: [00:22:52] Did you have a feeling you're putting your own safety at risk?

Nick McKenzie: [00:22:54] Listen, I was too stupid back then to think that. I mean, now I'm very acutely aware of the threats that come with this work, but back then I was just a bull at a gate, and it was foolish. And yeah, took risks I wouldn't take now. Dealing with serious criminals is not a business to take lightly, but I did take it too lightly as a much younger reporter. I recall going to meet the wife of a very feared, now dead ganglion figure in Hitman, as she was doing time in the Dane Fellas Frost Centre for very serious crimes of violence, and I never understood why I could so easily go and visit her, because normally it's a bit of a rigmarole to get signed up on the prison list. You're either a lawyer or a family friend, and I don't like journalists coming into prison, but I figured out quickly, I think on my fifth or sixth visit, one of the guards said, Oh, g'day, Nicky, here to see your mum again, and she told them that I was this criminal matriarch, told them I was her son. You have a chuckle now, but there were some pretty serious forces back then, and and it's the first time I came up close with some of the leaders of the underworld in Melbourne, people like Mick Gatto, and I never took people like Mick Gatto lightly. Can tell you that.

Michael Green: [00:24:05] Why would people like that talk to a journalist? The lady who's in prison, a gangland figure. If I'm a gangland figure, why don't I talk to a journalist?

Nick McKenzie: [00:24:14] Well, I'll tell you why. Head of the Bandidos, biker club, Kim Sloane, was set up by the Victorian drug squad. They planted half a kilo, thereabouts, of methamphetamine in his fridge when they were conducting a search. Now, I've no doubt Kim was a bad boy at times. He was the leader of a bikey club, but the rules of the law require the police to get him honestly. Police couldn't do that, so someone decided to stick those drugs in his fridge, and that was wrong. And Kim was stitched up and went to jail. Now, how do I say that with such confidence? Well, another great activist man in the law, Lenny Hartnett, a barrister. He was Kim's lawyer. He introduced me to Kim. I got to know Kim. It was a relationship of begrudging respect. Knew that Kim was

involved in the criminal world in his own way. As a bikie boss, I never crossed any lines with he's not a friend, but I did see he was a man, the evidence showed that it had been set up. In the end, was released and paid, I think, a million bucks by the police force. That's why many players in the underworld were wanting to talk to journalists back then. Of course, Kim's one case, there was another very notorious, dangerous criminal, I won't say his name because I still fear him to this day. He was seeking to contact me and use me to claim that he too had been set up, but I don't think he had been set up. He was seeking to use the press to press a case that was unjust, and that was very murky territory, and dangerous territory, because you annoy somebody like that, they don't see you for defamation, they take other means to shut you up.

Michael Green: [00:25:53] Let's go back to your career path. Clearly you are an unstoppable force, as you said, and hence the ABC said, you need some time in Wagga. Why did they send you up to Wagga?

Nick McKenzie: [00:26:04] Well, have been described more than once in my career as unmanageable. I don't think that's necessarily a bad thing. You want, in journalism, someone who's determined I mean, anyone can be a great journalist if they've got the determination to you never stop. Once you're on something, you don't let it go until you've achieved a just outcome, and that was my how I applied myself back in the early two thousands. It's how I apply myself now. That, though, has the tendency to annoy those up the food chain in a very conservative bureaucratic organisation like the ABC, and I was effectively saying to Wagga Wagga, Do your time, son. Yeah, we like the stories you're breaking, but you need to learn how to walk before you run. Wagga Wagga was a great experience for a young reporter. Of course, I was there, and I broke the rules. I just kept reporting on the police corruption stuff in Victoria, and the stories got better and better.

Michael Green: [00:27:00] And you were reporting on that via your informants?

Nick McKenzie: [00:27:03] Correct, via my informants, but while I was also reporting on the tractor pull in Hay and the weather in Danilquin, reading the news at 5AM, trying not to stutter and stammer, and the great thing about working in a small town as a baby journalist, you're quite a big cog because, yeah, you are the local ABC. I remember the senior cop coming in and saying, pissed off at a report I'd done about a case of police

brutality, a local case, and he said, Son, I want speak to someone here, your boss. Where's your boss? And I said, Boss isn't here. Well, anyone here is more sad. So I said, Sir, I'm the only person in station where you'll have to speak to me, and he's straight out of the office. But I like to say, as a reporter working the beat and wagga, it's the same tools you're using as a reporter working the beat at Canberra Parliament House, the Federal Parliament. You're gathering contacts, you're developing relationships, sometimes deep relationships of trust with human informants, and you're doing it with purpose, to shine a light, to find things that are being covered up and to report them.

Michael Green: [00:28:10] Nick, it's very it's obviously important what journalists do, and it sounds very noble to me anyway, but they must sometimes cross the line and actually break the law. Under what circumstances? Are there circumstances where you believe it's justifiable for a journal to break the law, to break

Nick McKenzie: [00:28:26] A story? Well, it's funny you ask that, because I was asked that by Arthur Moses SC recently before the full court of the federal court. Now, of course, Arthur Moses SC was the barrister for Ben Robert Smith, the war criminal, and he was seeking to try to make a point that I'm a lawbreaker, and I made the point to him and the court, and I make it here. Yes, journalists sometimes have to break the law, but that's not necessarily crossing the line, because one can act in breach of the law and yet still be ethical. Now what do I mean by that? And the classic if I get a Defence Department official to leak me information about the execution of Afghan by an Australian soldier, which involves a war crime, that would otherwise be covered up if it not for that leaking, and not for that publication of that story, but that Defence Department official is breaking the law, and I'm a accessory to that illegality. In fact, if I'm encouraging it, I'm part of that conspiracy. That's breaking the law. That is what investigative journalists do, and not every day of the week. I utterly respect the law. I think long and hard before I seek access to something classified, and I'll do it in a way that minimises any potential breach of the law. But sometimes ethics and the requirements of journalism to tell the public what the hell is going on does require us to be in conflict with the law.

Nick McKenzie: [00:29:44] It's very, very difficult. It's not taken lightly, but it is the reality of it. Anyone who feigns shock and horror, when hearing that, is living under a rock. So

many times, those who uphold the law break it themselves. And I think about those very small number of people, but they're there in the legal fraternity, in the police force, in other positions of power, be they engaging in corruption or abuse. The only way sometimes to expose those people is through practices which some lawyers would shirk at, but are fundamentally driven by a desire to tell the public what they need to know and to right a wrong. And it's a really difficult juggling act that we make as journalists, and again, I want to really stress this, of course I respect the law. There are journalists who are gung ho, who don't think about whether they're breaking the law if they are, and I think about it every time. Not only do I think about it, if I'm going to do it, I'll seek advice, I'll seek legal counsel, I'll seek ethical counsel, will navigate a path that really takes into account what our actions involve. But to bring it back, I mean, sometimes I've got to get that public official, that detective, that parliamentary insider to break the law to tell me something, and I'll do it if it's important.

Michael Green: [00:31:02] And if you get charged, if you got charged, would you plead not guilty and fight it, or would you say, yes, I do break the law and plead guilty?

Nick McKenzie: [00:31:09] Well, I've been called before coercive hearings. These very powerful different agencies have the power to summons you in, force you to answer questions, to refuse to answer questions is a criminal offence, and it's terrifying because you have a council assisting and the commissioner there, and it's all in secret. Mind you, I've had some of the great barristers of Melbourne, Julian Burnside at my side, Paul Holdenstein at my side, but they can't do their fall because these coercive powers are so immense. And in those circumstances, I did refuse to answer questions, and I was threatened, Mr McKenzie, if you don't answer this question, you are committing a criminal breach. I've had briefs referred to the DPP in respect of me remaining silent. I did break the law. Thankfully, wiser heads prevailed and said, well, why is he staying quiet? He's protecting the confidentiality of sources. He's not revealing sources. He's doing the right thing here. But it's a great example of preparedness to stick by your ethics in order to achieve, I guess, a higher purpose despite being in conflict with the law. I can tell you this, when I was summoned to one entity and forced to they were trying to understand what I knew about it to do with the whole Lawyer X, Nicola Gobo fiasco. It was a closed hearing by a criminal intelligence agency. I can't say too much about it, but it was so nerve racking was that experience, I refused to answer questions.

I was physically unwell. I vomited. It was terrifying. Don't want to be in that situation, but I had no choice but to stay silent, and I did that.

Michael Green: [00:32:44] Which makes me think, Nick, whistleblowers actually seem to play an important role in shining a light on some wrongdoing within government departments, etcetera. How do we draw a line with whistleblowers? Should we change our laws? Should there be less prosecution of them? How do we protect them to be able to tell the truth and improve our system, but at the same time, as I say, draw a line so it doesn't go

Nick McKenzie: [00:33:08] Too far. Well, there's a great, I think, case study. The law is a very blunt and heavy instrument if it's applied without nuance and discretion. One of the great things in the legal system is the prosecutorial discretion, not just whether there's a strong enough brief, but is it in the public interest to prosecute somebody? Right now, there's a bloke called David McBride. He was an army lawyer who was convicted of leaking military secrets to the ABC. Now McBride does a complicated story, and McBride's a complicated person, but he's doing a couple of years in prison now for helping the ABC, whatever his intent, to expose war crimes. I tell you who's not doing a couple of years in prison is any of those soldiers who executed innocent Afghans. So how can we have a system in which a let's call them a self styled whistleblower, cops it right whack between the eyes and is sent to jail, and those actually doing far graver crimes, up until now at least, get away with it. At the moment, our agencies deal with whistleblowers in a far too onerous fashion. They don't recognise that there is a real public service involving the blowing of that whistle by that public official.

Nick McKenzie: [00:34:19] And I think lots of judges are also hesitant to see that public service. But of course, this is back to the original thoughts in this discussion. The law is a very narrow constrained beast. It's a law to leak a classified document. You do it, you cop it. And whistleblowing doesn't feature much. So, of course, there needs to be overhauling of whistleblower legislation to provide greater protections. But I often think there's the law, and then there's this great act of discretion that prosecutors have. There's an act of discretion detectives have when they're going about their job. Of course, judges and sentencing have huge discretion most often. We need our criminal justice system to to deeply recognise in a sort of cultural, systemic fashion the role of whistleblowers, and then apply that discretion they have today. They don't need to wait

for whistleblower legislation, it makes their life easier if there was those reforms, but having a healthier regard for whistleblowers, at the moment the courts don't have that, and that's great show.

Michael Green: [00:35:15] Hard to argue against that too. Would have thought, Nick.

voiceover : [00:35:25] William and Lonsdale is brought to you by Greenslist, one of the leading multidisciplinary barristers lists in Australia. Greenslist believe in promoting conversation around the ideas and issues that shape not only our legal system, but our wider community.

Nick McKenzie: [00:35:46] Nick, you have been the subject of litigation. You've spent your day in the witness box being cross examined. Tell us about that. It was over two days I was cross examined by counsel for Ben Robert Smith, Arthur Moses, and it's funny, you hear about cross examination, how difficult it is, and this is part of litigation that ultimately went on for eight years. And many witnesses, some who are people I respect greatly, are personal friends of mine, who are on I don't want to call it our side, it's not our side, they were on the side of the truth. They were cross examined and told me how arduous it was. We had SAS soldiers who featured in this case testifying about the truth, and they came out, they'd been to war, they'd served sometimes multiple deployments to Afghanistan, they'd seen more up close, and they said to me, It was tougher being grilled in that box than it was deploying, and some of them broke down in tears afterwards. But until you're actually in that hot seat yourself, I don't think you really understand how uncomfortable it is.

Nick McKenzie: [00:36:47] There's the anxiety leading up to the days in court where you end up, at least for myself, endlessly questioning yourself as you I wasn't sleeping, I was just cross examining myself. So you're losing sleep, you're becoming this bundle of utter nerves, and then you hit the box, and the full bench of the federal court, the three judges sit upon high, the courtroom was packed, Ben Robert Smith was sitting in the corner, he's a massive unit, he'd come especially just to steer me down, such as his maturity, and he had his legal team assembled there who really don't hold me in high esteem, and they wanted to destroy me, and I knew that. So it wasn't just a case of come and tell the truth, it was a case of these people want to bring you down in the most public and aggressive fashion. And sometimes I think to myself, they knew that

their case was legally hopeless, and it was, not just thrown out ultimately by the full bench, but the High Court ruled it in our favour.

Michael Green: [00:37:44] Can I ask you there, Nick, you say they, being the legal team, wanted to bring you down, do you think it was personally they wanted to personally bring you down, or they were doing their job on behalf of their client, following their client's instructions?

Nick McKenzie: [00:37:56] Well, you'll have to get this podcast legal by defamation lawyers. I think there was personal avarice within the cross examination. I think Arthur Moses SC is, I think it's a fact to say this, can be a nasty cross examiner. I argue actually, I think it's a very effective tactic. I do think there were questions asked that certainly didn't further their legal case, that was hopeless at the end of the day at any rate, but was designed to embarrass me and embarrass my employer. And I think let's say it was on instructions. Let's presume it was, of course, barristers act on instructions, but nevertheless, a barrister has carriage of a matter and the forensic decision making when it comes to what questions to ask. You know, one thing I think many outsiders who deal with the law see is this great rush by lawyers, solicitors, barristers, when things go a bit amiss, to blame the client, and the public, and those who are in the box, that cross examination procedure. Barristers forget how friggin' powerful they sometimes are when they have that person in the box. There's not a more powerful stance that the cross examiner has. That person is in the box like a frightened, startled rabbit, and the barristers who know that and appreciate the huge power the law gives them to crunch a person, use it wisely and fairly and justly, but not all do.

Nick McKenzie: [00:39:20] And in our case, I think the great tragedy of the litigation of the Ben Robert Smith affair is at the heart of this, what's this all about? It's not really about journalism, although it's an important part of it. It's about war crimes and the death of innocents abroad, and that's a criminal matter. So there was this huge sideshow that went on for years in the end at great expense, it wastes the court's time to cover up what should eventually result in a criminal prosecution. That's where this case should have been heard, before a criminal jury. And when you think of it like that, all the posturing and nasty questions not just bowled up to me, but many of our witnesses over months of trial, did that serve the public interest and the justice system and the people of Australia, if you want to put it that broadly? Absolutely not. And yet we

sit here talking, and we still wait for there to be criminal justice applied in this case. And, you know, it will find, if Robert Smith is charged as he should be near the end of the year, and as as I'm told he will be, end of the year or early next, it'll be up to the courts then to find him guilty or not guilty. I'm not prejudging that, but that's where the main game is.

voiceover : [00:40:22] Lives in the Law is proudly sponsored by City Maps Illustrated. Their recent publication, The Melbourne Map, is a celebration of our wonderful city. This stunning hand drawn illustration, which took more than three years to create, is available as an art print, jigsaw puzzle, and calendar. The perfect acquisition for your home, office, or corporate gifting.

Michael Green: [00:40:51] Nick, you're in a unique position in some ways, in that your whole professional life has been as an observer of the legal system, but then, in the last year or two, you become personally, or the subject of the legal system, in being a witness in a case and being cross examined for two days as you say. Do you therefore respect the system? It changed your view of the system having been the subject of the system?

Nick McKenzie: [00:41:16] So I explained my experience of cross examination, and I've made the point that this war crimes matter was a huge waste of the court's time, but all that said, when a very, very wealthy, well backed litigant, Ben Robert Smith, he was backed by Kerry Stokes, billionaire, when they choose to bring this case, then we get to see whether our legal system works. And my great fear, as an outsider, sometimes participant in it over two decades, was, you know what? We'll get a we'll get a judge that he's conservative, thinks even though these allegations are deadly serious and the evidence is compelling, it's just not the place of of a civil court to weigh into war crimes or we didn't get that. What we got was the most rigorous judicial interrogation of this matter. I sat there for weeks watching justice Besanko of the federal court. I never knew whether he was thinking that our case was good or Robert Smith's case was good, such was his professionalism, but I did know that he was listening to every word because the questions he would ask would always be there were few, but they were cutting, and they were to the point, and they were smart.

Nick McKenzie: [00:42:21] And this was a judge utterly engaged in the task of finding the truth. And when his judgement came out and you read his judgement, it's a work of art. A, it's simple. B, it covers a huge amount of ground. It's it is such a absorption of evidence, a reading of that evidence, and then an articulation of why this is the truth. I would say this, we won the case, a judicial master class in how the law and the courts do work, not as a servant of the wealthy, but as a tool of finding the truth. And then to see the full bench of the federal court once again facing an armada of lawyers on Ben Robert Smith's side, and there's a real uncomfortableness many Australians have for good reason where we have a war hero being in the civil court system or being in cases that he's brought. He's politically backed. Will our courts be independent and just find the truth and deliver a judgment based on the principles of the law? And, again, we saw the full bench. I saw the full bench up close do that. Weigh it carefully. Weigh it thoroughly. And, I mean, ultimately, it goes to the high court, which finds in our favor.

Nick McKenzie: [00:43:28] That for me utterly restored my faith in in the judicial system, except there's a catch. I was backed by Fairfax Media, then Fairfax was taken over by Nine Entertainment, but two massive companies worth billions of dollars. I so I too had money, big money on my side. I too had our lead barrister, Nick Owens, is now a federal court judge. We had top barristers. So we brought our own strength to this fight. Now most people who get before our judicial system don't have that backing, and I think that's where the law falls down. But in our case, in this very important case, important for journalism, but more important for actually understanding what the hell went on in Afghanistan involving Ben Robert Smith and parts of the Special Air Service Regiment. The court served a huge service to the public, and for me, I thought one of the great things in Australia we have is an independent judicial system, and it was really a life changing event, not just to observe it, but to be a participant. I was the defendant, and to have justice served is something that will stay with me till my final days.

Michael Green: [00:44:35] Nick, I'd like to finish by going actually away from the law into your profession of journalism, because it seems to me that journalism has undergone and is undergoing a huge revolution brought about by social media, where anyone can be a journalist, and I can go online and write any rubbish I like to write, and I might get 100,000 people who will read it and take notice of it. The important role that you play in tandem with the law, is that possibly under threat in any way?

Nick McKenzie: [00:45:05] It's listen. It's under existential threat. It has been for the last ten, fifteen years. And the bleak side of things is we live in a world of misinformation, disinformation, of propaganda, and one just needs to look at The United to see the way the media is divided there, the way partisanship is driven throughout the media. I mean, you've got certain outlets cheering on Trump. You've got Trump ripping shreds off institutions of truth, be they media organisations like the New York Times or academic institutions. Trump is also, of course, politicising the justice system through his appointments. We have a system in a democratic system under attack, arguably in a state of decay, and the media is part of that, and then there's these financial business forces. Know, the Internet has meant that there can be I mean, anyone can be a journalist, sure, but not everyone can be a good journalist. And I think this is the point I I wanna make when we acknowledge that journalism is under threat and young people aren't reading papers like I did growing up. I was fortunate enough to have the hard copy of The Age, you would go thump on the porch and I'd spend hours going through it on a Saturday because it was big and hefty. But you know what? The age back then and the age now, the journalism we're doing arguably is better now than it was back then. We're reaching our readers quicker and faster through our digital platforms. The consolidation of the media, while terrible in many ways, lots of journalists lost their jobs, is one of the worst things that's happened, but also now I can work for the Financial Review of The Age, the Sydney Morning Herald, but also a major television station on Channel nine.

Nick McKenzie: [00:46:35] We also have a streaming service. And so I'm sixty minutes, but I'm on Stan's streaming service, all part of the one company, and great impact can flow from that. But at the end of the day, people in democracies and Australians want good journalism. They want good storytelling, and they know when they're served crap. Now some people are happy to exist in an echo chamber, but many don't, and so they'll pay for it. They'll pay for good journalism and they want it. And we see that in our metrics. And the wonderful thing about, I think, our society here, which gives me a huge amount of hope in these sometimes bleak times, is that people are rooting for justice, and people do see the media as playing that critical role in holding politicians etc. To account. And I'm often asked about what is my favourite story or what had the biggest impact, and I'd like to mention one, it was a case involving the rape of a profoundly disabled woman called Jules, and she was disabled, sure, but she was actually a ripper of a person and she was profoundly brave more than anything else. And she stood up

to her rapist, she was in a care home, and he was charged. An incredible moment in the courtroom where he never thought that she'd have the guts to turn up because he underestimated her because she was disabled.

Nick McKenzie: [00:47:50] But when she wheeled herself with a robotic wheelchair into that courtroom, it was the moment where he thought this defendant thought the gig is up, and I think he pleaded, and it was a moment of great justice in that courtroom, but she was abused because the system of care homes involving a very big care provider in Victoria was broken, so disabled people, not just her, were getting sexually assaulted, raped, and it was happening in a systemic fashion. So she turned to the media to tell her story, and I told her story on four Corners as it was back then and in The Age, and that changed that system, that led to parliamentary inquiries and ultimately fueled a Royal Commission. And there you have it, the work of journalism in addition to the law, working to right a systemic wrong, but more than that, the public connection to her story, people were moved by her. People moved by that story, and people really applauded her bravery in coming forward. People respect that sort of journalism, and they want it. And I'm sure they're willing to keep supporting it and keep paying for it. And while we have people who care a lot about democracy as cliched and as high minded as that sounds, we'll be in business as investigative journalists for some time yet. I often say this, there's lots of villains out there, there's lots of badness, I ain't going out of business, so

Michael Green: [00:49:08] Nick, it's been a fascinating morning. Thank you very much for coming and giving us your time, and please continue to do what you're doing. We do need it.

Nick McKenzie: [00:49:16] Great to be with you.

voiceover : [00:49:26] Show notes from today's episode can be found at greenslist.com.au/podcast. There, you'll find links to things we've talked about in this episode, a transcript of the show, and some wonderful photos of our guests. If you're enjoying lives in the law, please tell your networks, subscribe, rate, and review the show. Your host is former lawyer and Greens list clerk, Michael Green. Our show is produced and edited by me, Catherine Green, mixed and mastered by Windmill Audio, and recorded by Alex McFarlane, who also wrote and performed all the music for the

series. We're coming to you from the iconic Owen Dixon Chambers on the corner of William And Lonsdale Streets in our beautiful city of Melbourne. We acknowledge the Wurundjeri people of the Kulin nation as the traditional custodians of this land and pay our respect to their elders past and present. There is no doubt that conversations about justice have been taking place on this land for thousands of years, and we are privileged to continue that discussion here today.