



Protecting Journalists *and* Whistleblowers

Two more journalists face jail for refusing to disclose identities of sources and again the cry is heard for 'shield laws' to protect reporters. But should the debate be broader, at least to embrace the developments in whistleblower protection as well?

It is important to bear in mind that the claim for protection for journalists is based primarily on the need to protect sources, actual and potential.

Incidents in which journalists must either breach their code of ethics (by revealing confidential sources) or be in contempt of court (by refusing to disclose) seem to be increasing. Perth reporter Tony Barrass was the first to be jailed for contempt in 1989 and former Brisbane journalist Joe Budd served time last year.

In unrelated actions, *Adelaide Advertiser* journalist David Hellaby and *Sydney Morning Herald* reporter Deborah Cornwall also face contempt proceedings at the time of writing.

Journalists argue that if they reveal sources then potential 'whistleblowers' will be deterred, on pain of reprisal, from airing through the media information of considerable public interest.

They seek a privilege - absolute or qualified, the thickness of the shield can vary - for the journalist-source relationship similar to those recognised for lawyer-client, doctor-patient and priest-penitent relationships.

The courts and other bodies with legal powers argue that the journalists' commitment to their sources must yield to the interests of justice when it is necessary, for instance when a potential plaintiff wants to know the identity of a source so as to sue him or her, or when the source has breached the law or could assist the processes of law.

This clash of competing values occurs in a variety of legal contexts: courts, statutory bodies, commissions of inquiry; criminal and civil; pre-trial

and during trials.

A prior question, which deserves more attention within journalism than it gets, is whether some sources are promised confidentiality too easily, so that reporters are bound by the code of ethics and at risk from the law more often than necessary. It may be that more caution would reduce the number of incidents where the public interest in disclosure and in confidentiality genuinely clash.

Less use generally of anonymous sources may also ease the suspicion in many minds that, as the High Court put it in *John Fairfax v. Cojuangeo*, 'recognition of an immunity from disclosure of sources of information would enable irresponsible persons to shelter behind anonymous, or even fictitious, sources'.

Whatever the outcome of the shield law debate, it is generally acknowledged that the unauthorised leak is an important safety valve against wrongdoing in both the public and private sectors.

The need to maintain *sources'* confidence in the media as outlets for information which ought to be disclosed, even when it puts the source at risk so that anonymity is crucial, lies at the heart of the journalists' claim to privilege.

In the final analysis, the journalists are merely the whistle. Society's interest is in the blower.

Aid to Exposure

Queensland's Fitzgerald Report drew attention to the importance of legal protection for whistleblowers and the Fitzgerald creation, the Electoral and Administrative Review Commission, has recommended legislation to achieve a measure of it. Last year the royal commission into WA Inc. also suggested whistleblower protection as part of the remedy for the type of official corruption it uncovered. The

South Australian Parliament recently passed a Whistleblower Protection Bill.

Broadly, such schemes aim to protect from reprisal a person who reports illegal, improper or wasteful conduct to the proper authorities. They also provide for punishment of those who make false reports.

If recent inquiries into corruption in Australia show anything, they show that reports to the proper authorities may be the least effective way of tackling official wrongdoing. In recognition of this, but only to varying degrees, whistleblower protection schemes allow a person to 'go public' through the media.

The trend to protect whistleblowers has considerable implications for journalists seeking shield laws, at least in so far as the sources they wish to keep confidential are the same people that whistleblower laws are designed to protect.

It seems inevitable that opponents of shield laws will argue that the need for such laws diminishes if the sources have other separate legal protection, both while their identities are known only to the proper authorities and especially after they are revealed as the sources of the information.

If sources can be protected by law even when their identities are known, journalists will be asked, why then should courts and other legal bodies be denied the ability to inform themselves fully by knowing the identity of the source and cross-examining him or her?

The challenge for journalists is to persuade doubters that even the most carefully crafted whistleblower protection schemes will fail sometimes and the last resort for sources of confiding in a journalist will still be a necessary feature of the democratic society.

A corollary is that journalists as a group must boost their credibility. □

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