Trade-Off Proposed for Protection

Senate Standing Committee on Legal and Constitutional Affairs, Inquiry into the Rights and Obligations of the Media, *Off the Record: Shield Laws for Journalists' Confidential Sources* October 1994, 160pp

As a trade-off for greater protection for their sources, journalists may be expected to improve their accountability through self-regulation.

A move to enact a qualified protection for journalists is the key recommendation of the recent Senate Committe report Off the Record, the result of an inquiry into journalists' confidential sources chaired by Senator Barney Cooney.

The Cooney Report also refers to the work of the Brennan committee which is currently reviewing the Code of Ethics of the Australian Journalists' Association section of the Media, Entertainment & Arts Alliance. While the report represents a positive development, there are concerns about the workability of the criteria for the exercise of the proposed structured discretion.

The key recommendation in means that the Court may, on the basis of a structured discretion, order a journalist to reveal her or his source where the public interest in the administration of justice in a particular case outweighs the public interest in maintaining the confidentiality of the source. The discretion would apply in all legal and quasi-legal proceedings, including proceedings before investigative bodies. The report lists a series of factors that the Court may consider in the exercise of its discretion, for example whether evidence about the source's identity is essential to the issue of a case; whether the evidence is necessary to test the veracity of information; whether maintenance of the confidentiality conceals criminal activity.

The Committee's reasoning in reaching this recommendation makes encouraging reading for the advocates of shield laws, demonstrating an awareness of the broader public interest in the free flow of information and an effective media.

The Committee said that the public attention given to the recent spate of Australian cases involving Tony Barrass, Joe Budd, David Hellaby, Chris Nicholls and Deborah Cornwall highlighted the confrontation between journalists and the legal system, and the need for resolution of this issue. It also noted concerns about the wide powers of statutory investigative bodies to require information and their potential to intrude upon personal and press freedom. Many submissions to the Committee argued that if journalists are given privilege in relation to their sources, they will abuse it by fabricating sources.

The Committee noted however that the majority of journalists behave ethically, and in fact expressed concern that a number of conscientious journalists had been fined or imprisoned for upholding their ethical obligations.

Watchdog Role

Chapter 4 of the Committee's report examines the role of the media as the Fourth Estate. The starting point of the analysis is the High Court's statements in *Australian Capital Television Pty Ltd v Cth* and *Nationwide News Pty Ltd v Wills* about importance of freedom of communication to the effective functioning of our system of representative democracy. (The Committee's report preceded the decision in *Theophanous v Herald & Weekly Times Ltd* which recognised specifically that public discussion and criticism largely take place through the media.) The Committee said that 'the media therefore plays an integral part in the maintenance of representative government in this country' and 'provides maximum effectiveness for freedom of communication'. The Committee highlighted the importance of investigative reporting, which enables the media to fulfil its watchdog role. Confidential sources are crucial to investigative reporting and, if protection from disclosure cannot be assured, those sources may dry up. Having regard to the public interest in the flow of information to the media and the ethical or moral obligations of journalists to maintain the confidentiality of sources, the Committee concluded that 'the current law has not yet reached the proper balance between the public interest in having a fearless press serving the community's right to freedom of information and the public interest in the proper administration of justice'.

While recognising the need to restore the balance in favour of journalists and their sources, the Committee rejected an absolute privilege for journalists. It said that the proposed structured discretion would allow determination of the issue on a case-by-case basis, based on the importance of the identity of the source to the particular proceeding.

While the recommendation of the enactment of a statutory judicial discretion is a move in the right direction, many of the proposed criteria for the exercise of the discretion may be criticised on the grounds that they do not accord sufficient weight to source protection. For example, veracity of information will often be in dispute in defamation cases, and this factor could be dealt with adequately under the criterion of necessity of the information to the case. Concealing criminal activity could be interpreted in such a way as to produce a situation similar to *Branzburg v Hayes*, the famous American case in which journalists were called before a grand jury to give evidence about their observations of drug users and members of the Black Pan-

Continued on page 18 ...

... Continued from page 17

thers movement. It could also apply to offences under s 70 of the *Crimes Act* (Cth), which relates to unauthorised disclosure of information by public servants.

The 'shopping list' approach used by the Committee attempts to define in advance the specific situations in which disclosure may be compelled. The limitation of this approach is that it is not possible to define in advance all the circumstances in which disclosure of sources may be an issue, and such categories may be interpreted too narrowly in favour of dislcosure.

The Committee said that if journalists are to receive preferential treatment, the public must be confident that this treatment is deserved and that it will not be abused. To this end, enactment of the proposed legislation would be conditional on the adoption of a new Code of Ethics and an effective disciplinary mechanism.

The Committee rejected any external regulation of journalists on the grounds of potential political interference and fetters on freedom of speech. The key recommendation in this section of the report is an amendment to the Code of Ethics of the Australian Journalists' Association section of the Media, Entertainment & Arts Alliance ('in all circumstances they shall respect all confidences received in the course of their calling') to remove the absolute character of the obligation it imposes on journalists. The journalists' Code of Ethics must acknowledge that in some circumstances the interests of justice may require disclosure. This would enable journalists to obey court orders to reveal their sources without breaching the Code. Among the other measures that the Committee recommended to improve self-regulation were the formation of closer links between the MEAA and the Australian Press Council (in relation to print media); the adoption of codes of ethics by key players in the media who are not covered by the AJA code; and that the Press Council be given the power to impose and enforce sanctions (Recommendation 8).

The Committee's report increases the momentum for reform of the law relating to journalists' sources. The review of the AJA's Code of Ethics already under way provides the AJA with the opportunity to meet the Committee's requirements that legislative reform will be conditional upon amendment of clause 3 and improvement of disciplinary mechanisms. There may be further calls for legislative reform as a result of the new 'political discussion' defence to defamation developed in the Theophanous matter, which requires proof that publication was reasonable. At the same time, the emphasis upon the free flow of information in the High Court's free speech decisions provides a sound basis for recognising, through legislative reform, the broader public interest that is served by protection of the confidentiality of journalists' sources. ❑

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Privacy Charter

The Australian Privacy Charter, launched in Sydney on 5 December, attempts to encapsulate in 18 principles the basics of privacy protection, applicable to private as well as public sector organisations, and extending beyond information privacy to include concepts such as the privacy of one's own body.

The intention of the promoters, the Australian Privacy Charter Council, is that the principles should be incorporated into a range of enforcement strategies, including legislation, industry self-regulatory codes, and individual voluntary adoption as internal codes of practice.

One of the authors, Graham Greenleaf from the Law Faculty at UNSW, claims novel status for two of its principles, taking the charter beyond the OECD benchmark. One is that citizens 'should have the option of not identifying themselves when entering transactions' (principle 10). Examples of situations where individuals should not have to disclose their identities are straightforward shopping (people should be able to use cash rather than credit or debit cards), and use of public transport (presumably intended to cover things such as electronic payment of road tolls by remote sensing).

The other new principle is that people should not have to pay for privacy protection, nor suffer any disadvantage - that 'the provision of reasonable facilities for the exercise of privacy rights should be a normal operating cost' (principle 18).

Underlying the charter is the principle that the onus of justification should be on those who wish to interfere with privacy, rather than vice versa; that privacy is a basic human right and the reasonable expectation of every person. Privacy, like free speech, seems to be getting a toehold in Australian public policy and jurisprudence, but so far privacy legislation covers only the public sector, and the common law barely touches on it. Graham Greenleaf said that a powerful external incentive for Australian private sector privacy protection will be given when the European Union directive on data protection comes into force in 1995. This will make it impossible for Australian companies which do not guarantee equivalent levels of protection to exchange or access data of European companies.

The Charter opens up debate about how far the basic principles should extend and raises some vital questions, such as under what circumstances should privacy principles take precedence over free speech principles in regulating reporting? The Charter says that 'in exceptional circumstances the use or establishment of a technology or personal data system may be against the public interest even if it is with the consent of the individuals concerned.'

Copies of the charter are available from the Australian Privacy Charter Council c/- Faculty of Law UNSW fax 02 313 7209. ❑

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