Pressure on to replace D-notices

If the Federal Government can be persuaded to bury its proposed secrecy legislation which it trumped up in response to the Chinese Embassy bugging affair, the media will be under new pressure to enter a reformed D-notice system.

On what terms? And can even voluntary suppression by mass media be effective when the information superhighway makes us all publishers?

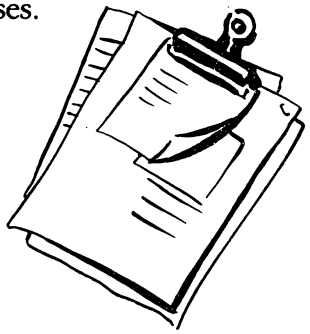
Government and major media outlets established the D-notice system in 1952, but its existence was not revealed until 1967 when the independent *Nation* did so almost as an aside. In 1971 another independent, the *Review* reported Defence Department confirmation that D-notices were issued confidentially to media executives.

In 1978, *Nation Review*, larrikin successor of those two journals, disclosed the items then subject to D-notices: the whereabouts of Soviet defectors, Vladimir Petrov and his wife; details of defence capability and planning; activities and identities of Australian Secret Intelligence Service personnel; and, crucially in the current context, the monitoring and exploitation by Australia of the communications of foreign countries.

Gentlemen's agreement

Australia copied the D-notice system from the UK, where this gentlemen's agreement among proprietors, editors and civil servants was developed in 1911 in an atmosphere of growing concern about a threat from Germany. The climate of acceptance of secrecy which the system engendered saw, within the year, the press acquiesce in the passage of the infamous section 2 of the Official Secrets Act. It created wide new criminal offences of communicating official information without authority and receiving or possessing such information. The burden of proof lay on the accused to prove the communication was contrary to his or her desire. Although presented as an anti-espionage measure, official papers have since revealed that the legislation was aimed at plugging civil service leaks.

Successive UK Governments of all political complexions have used section 2 to intimidate potential whistleblowers, journalists and Opposition MPs into silence, not to protect national security but to shield officialdom from accountability. Civil servants who have revealed cover-ups, official mendacity or worse, have been prosecuted and imprisoned for up to two years. Prosecutions have been brought selectively for political purposes.



Australia already has a rough equivalent of section 2 of the UK Official Secrets Act in sections 70 and 79 of the Commonwealth Crimes Act. Broadly, they make it an offence punishable by up to two years' imprisonment to disclose without authorisation information obtained in the course of public service duty or knowingly to receive such information. After particularly embarrassing leaks, prosecution is sometimes threatened but not pursued.

Other legal tools, such as actions for breach of copyright or breach of confidence, may be turned into cudgels by governments bent on suppression.

All things considered, self-regulation is far preferable to the tougher secrecy law which Senator Evans has proposed. But what kind of reformed D-notice system should the media enter? And would it work anyway?

Journalists gamble with their credibility when they collude with government to withhold information from the same people on whose behalf the media claims to be a watchdog, scrutinising government and holding it to account.

In certain circumstances, notably during hostage crises, it is ethical for journalists to co-operate with authorities in withholding information. The usual rule is that, when the danger passes, journalists should disclose to their audience what they withheld and the reasons they co-operated in its suppression. Openness about why you were closed helps to maintain trust. Justifiable secrecy has a use-by date.

The practice of not identifying our spies need not rest on national security grounds, but on the ethical rule that journalists should not knowingly endanger the life or safety of another person. Each case should be decided on its circumstances. That is why the blanket D-notice against identifying ASIS agents, and the statutory prohibition on naming ASIO agents, are misguided.

Reforms

Any reformed system should, as a minimum:

- name the members of the D-notice committee and limit their terms to ensure a healthy turnover;
- disclose how the criteria for determining what is to be subject to a D-notice were established;
- include among those criteria that: 'national security' be defined narrowly and precisely;

- any damage to national security said to justify suppression be immediate, direct, inevitable and irreparable, a test applied by the US Supreme Court in *Pentagon Papers*, a national security case;
- publish a general description of the matters covered by D-notices;
- fix dates at which a D-notice will expire unless renewed after fresh examination of the need for it;
- be reviewed regularly.

The American philosopher, Sissela Bok, observed that secrecy can become an end in itself, 'creating subtle changes in those who exercise it, in how they see themselves, and in their willingness to manipulate and to coerce in order to uphold the secrecy and so shield themselves.' Knowledge being power, the 'professionally informed' try to increase their superiority by keeping more and more secrets.

Publicity is vital to good decision-making because it opens the options to inspection and criticism, challenges private biases, reveals errors and 'allows the shifting of perspectives crucial to moral choice,' argued Bok in her book *Secrets: on the ethics of concealment and revelation.*

The recent controversy over media coverage of complaints by former ASIS agents illustrates these tendencies. According to media reports, before the agents' claims were aired in February 1994 on ABC TV, the Government tried to dissuade Opposition MPs from pursuing the issue in Parliament. It provided briefings that included a bogus psychological report on one agent which described him as a 'psychopath'.

The episode also illustrates a danger of the Government's proposed amendments to the Commonwealth Crimes Act to punish more severely damaging disclosures about security, unless the defendant can show the activity disclosed was illegal. It is usually not illegal to tell vicious lies, but it is improper, harmful and destroys trust. When incompetence short of illegality is covered up it often produces compounded damage.

Practical enforceability of suppression is becoming increasingly difficult. Governments may convince a small number of mass media organisations to participate in a voluntary scheme, and agile governments may obtain injunctions before a bulletin can be broadcast or a newspaper distributed. But cable TV will soon offer dozens of channels, we are repeatedly assured.

Every Internet user is a potential publisher. The whistleblower with on-line access can bypass journalists altogether and directly leak official information instantly to millions. Information, as the cybernauts say, wants to be free.

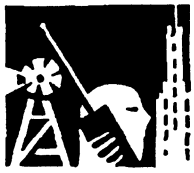
These developments help us focus on the core issue of who leaks and why. Leaving aside government-approved 'leaks', money, spite, and altruism are the common motives of those who disclose what government really wants to keep secret. The gold digger is irrelevant here because making information public devalues the wares.

If the spiteful or altruistic whistleblower does go to the media, most journalists will attempt to verify the information, consider the leaker's motive and weigh up the public interest in disclosure against any public interest in withholding. A D-notice committee may be a valuable forum for debating the case for proper secrecy.

Governments should have learned by now that concentrating on suppression, rather than on the ills the leak reveals, is usually futile because it guarantees wider publicity. Other potential whistleblowers may be watching the resort to secrecy, as with the Embassy bugging injunctions, and deciding that going through the 'proper channels' may be futile.

Far from tougher secrecy laws, we need a federal whistleblower protection law as soon as possible. ❑

Paul Chadwick



Silence over info council

THERE HAS been a long silence from the PM's office since he launched the Broadband Services Expert Group's report *Networking Australia's Future* on 1 March. Many interested parties are on tenterhooks to know whether they will join the select group of 20 to advise Keating on implementation strategies. It was thought that he would announce the composition of the National Information Services Council (NISC) before his trip to Japan in late May. Meanwhile, the bureaucracy is gearing up to develop a national information strategy on information and communications networks and technologies to be announced by the PM at the end of the year.

CU understands that the NISC will act as a high level discussion and consultative forum for Keating. It is expected to meet twice, in August and October. Its meetings will consider agenda items extensively worked through by government departments and agencies. These pre-meeting processes are intended to be more or less public and consultative, designed to tease out points of view, and bring all members of the NISC up to speed in advance of the formal meetings. Proceedings of the meetings themselves will apparently be published both on-line and on paper.

An inter-departmental committee (IDC), chaired by the Secretary of the DOCA, has been established to advance proposals adopted at a special meeting of Cabinet in early April - these include the Government's 'leading edge user' on-line services strategy, including an education network proposed by the Department of Employment, Education and Training, and Social Security's Community Information Network.

It is understood that there are four items on the agenda for the NISC's first meeting: access and equity, legal, international, and industry issues. 'Scoping papers' on each issue are being developed through the IDC. ❑

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