

Privileged Communications

Queensland Attorney General Deane Wells revisits the issue of privileged communications

A number of professions have ethical rules which require certain communications between the professional and certain other parties to be kept secret. The clergy, the medical profession and journalists all subscribe to codes of ethics which say that in certain circumstances communications cannot be divulged, even to a court of law. The code of ethics of the medical profession even spells out that in certain circumstances the medical practitioner will have to make a decision as to whether to divulge information or to go to jail.

The law however recognises legal professional privilege, but describes this as a privilege which is vested in the client not in the lawyer. It is clear at any rate that the legal system, as we know it, would be unworkable if clients did not have that privilege at law. The assumption that a person is innocent unless proven guilty and the proposition that an accused person should not be found guilty unless admissible evidence is available to prove that person's guilt, together require that a client must be able to have confidential discussions with a legal adviser to determine what evidence in his or her interests can be put before the court.

Conflicting principles

The question of privileged communication has become one of heightened interest in Queensland since the jailing of a journalist earlier this year for refusing to divulge the source of confidential information. That event highlights a problem which needs to be addressed on a national scale. There are two conflicting principles at stake. The first is that honourable men and women should not be required to go to jail merely for acting in accordance with the code of ethics of an honourable profession. The second is that no person should be judge (and jury) in their own cause by denying the court access to part of the truth which is essential to the just determination of a case before it. Just to spell this antimony out a little further — it is all very well if the professional claiming confidentiality of communication is telling the truth. In such cases the professional (whether it be a clergyman, a doctor or a journalist) should not have to reveal sources. However, on the other hand, unless the

sources are revealed, how can the court know that the professional is telling the truth? And, of course, courts can only convict someone, or find them liable, on the basis of what has been proved — not on the basis of what somebody, using the shield of a code of ethics, asks the court to take on faith.

A middle ground?

One might have thought that there would be some middle ground here that everybody could, with comfort, occupy.

Surely it is possible for the law to recognise ethical constraints upon professionals, while still maintaining the position that whatever part of the whole truth which is essential for the delivery of justice should not be withheld from the court. The debate has, I think, become too polarised, with two sides standing firm on immovable ground. Journalists and the media argue that their professional ethics cannot be compromised, and the legal community argues that journalists should not regard themselves as above the law.

Judicial comment on the subject has not always been conducive to promoting an equitable compromise. For example, the High Court has said:

"The recognition of an immunity from disclosure of sources of information would enable irresponsible persons to shelter behind anonymous, or even fictitious sources"

Undoubtedly there are liars and crooks in every profession. Clerics, doctors, lawyers, journalists and even politicians would all admit that there are, among their number, corrupt persons or persons capable of being corrupted. But this should not prevent the recognition of codes of ethics subscribed to by members of those honourable professions. The fact that some journalists do sometimes make up fictitious sources for their stories should not, by itself, be a bar to the recognition that journalists have a code of ethics to which the law should have regard, when justice will allow that to be done.

An interesting judgment along these lines was advanced by Lord Denning:

"It seems to me that the journalists put the matter much too high. The only profession that I know which is given a privilege from disclosing information to a court of law is the legal profession, and then it is not the privilege of the lawyer,

but of his client. Take the clergyman, the banker or the medical man. None of these is entitled to refuse to answer a question when directed to by a judge. The judge will respect the confidence which each member of these honourable professions receives in the course of it, and will not direct him to answer unless not only is it relevant, but also a proper and indeed necessary question in the person entrusted, on behalf of the community to weigh these conflicting interests — to weigh on the one hand the ultimate interests of the community, in justice being done, or ... a proper investigation being made into these serious allegations. If the judge determines that the journalist must answer, then no privilege will avail him to refuse."

Lord Denning's remarks were made in the context of what is possibly a slightly different common law tradition from Australia, and latterly a different statutory environment. It does, however, represent an emphasis which I think it would be desirable for Australian law also to highlight.

Review of contempt laws

The Standing Committee of Attorneys General is currently examining the law relating to contempt of court, and the law of evidence, with a view to drafting uniform statutory provisions to be adopted by all jurisdictions. One specific matter which is under consideration is the question of whether a judge should be capable, at law, of dealing with contempt of his or her own court. The argument is that a judge who perceives contempt to have been committed, should not then determine whether such contempt has been committed. The argument is that this makes the judge a judge in his or her own cause. That, of course, is contrary to the principles of natural justice. Another matter which will be reviewed is the question of the recognition to be granted to codes of professional ethics. The United Kingdom and New Zealand statutes, which reflect a policy which is also evident in the remarks of Lord Denning which I quoted above, are on the table.

It would be useful at this point to recur to an earlier theme. Legal professional privilege is said to be the privilege of a client not of the lawyer. In addition legal professional privilege is crucial to the effective functioning of the legal system.

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BBC News Services

The BBC has also been expanding its own international news gathering base for its television and radio services, both domestic and international. The BBC now has more than 50 bureaux and well over 250 correspondents and stringers around the world. As BBC World Service Television Limited has developed, it has also made arrangements for expanded international picture supply with third parties. BBC World Service Television Ltd has been talking to the ABC in Australia about the possibility of complementary coverage with access to ABC bureaux and correspondents in those areas — particularly in South-east Asia — where ABC has developed its news gathering expertise. We believe that, as an alternative to the approach adopted by NBC and CBS, collaboration with other newsgatherers in order to secure a greater return on the high fixed costs entailed in newsgathering, is a step forward. It also helps secure plurality of news supply.

This is a vital corollary of freedom of information to which BBC World Service Television is committed. We are committed to the principle that a better informed world makes for better international relations. Constraints on plurality of sourcing and the freedom of information are the handmaidens of bigotry and bias. The BBC's international reputation rests on its commitment to impartiality and accuracy and its readiness to reflect a diversity of views. Newsgathering partnerships around the world are an important element of this, as is the international polyglot expertise that can be found in the BBC World Service.

BBC World Service Television

It was an awareness of the brand strength of the BBC internationally that led to the creation of BBC World Service Television Limited. The company was established as a wholly owned commercial subsidiary of the BBC in March 1991. Its mission statement sets it the task of "creating a self-funding television equivalent of BBC World Service Radio, with the aim of being in every continent by the end of 1993". It has already launched services with regional partners covering Europe, Asia and Africa and we are in various stages of development with plans for services for Japan, America and the Pacific. The ventures are wholly self-funding. BBC World Service Television Limited has

recourse neither to BBC domestic licence revenue nor to grant-in-aid. Relations with the BBC and other suppliers are governed by normal commercial contracts and licences.

The logic for the creation of BBC World Service Television was governed by a number of considerations. First, there was the desire for the BBC to retain its competitive position as a respected provider of impartial and accurate information as the growth of television attracted listeners away from radio. Second, there was a realisation that without an international television presence, the BBC might find itself marginalised in the increasingly competitive global market for rights. Finally, it was considered that the status of the BBC as an international broadcaster might temper attempts to interfere with the future operation of the BBC on purely domestic grounds. Those of us who work for the BBC or who, around the world, rely on its contribution to the free flow of information internationally, see it as a global asset.

Regional partners

At this stage of its development, BBC World Service Television provides primarily news and information services, tailored to the needs of the different regional markets covered by its satellite outlets. We rely on our strategic regional partners to secure the revenue for the service and to advise the company on the best way of tailoring its services to the needs of each region.

These important relationships have helped already to shape the service and to reinforce our recognition of the need for a two-way street in the field of information flow. A World Service cannot achieve its aim if it does not actively promote that flow by, for example, entering into collaborative newsgathering arrangements. Cultural imperialism is inimicable to the free flow of information and a better informed world. We believe that in working with others who broadly share this vision, drawing on their resources to improve international coverage and by making that international coverage available to supplement national news services, we can make a contribution to global information that is both outstanding for its breadth and cost-effective in its provision.

The development of BBC World Service Television as a commercial, wholly self-funding subsidiary of the BBC is also helping to ensure that the BBC, as the UK's principal broadcaster, is streamlined

for a new, more competitive era. It avoids the Corporation being marginalised in a multi-channel environment whilst reinforcing the disciplines of competition and the need to adapt rapidly to survive in a harsher economic world. This strategy seems to us to be the most desirable way of exploiting the opportunities created by the new distribution technologies, whilst tempering the globalisation of programme supply and ensuring responsiveness to national tastes and interests.

Chris Irwin is Chief Executive of BBC World Service Television.

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to read the signals of the market and not to repress them. Then, we may well see Bishop Berkeley's prophecy finally completed, with the world reaching new heights as it comes full circle, and Australia playing an important part.

This is an edited version of a paper delivered by Rupert Murdoch at an Asia-Pacific Congress in Sydney on 18 October 1992.

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However, it might be argued that in some circumstances the same claims may be fairly made for the ethically secret communications of other professionals. Certain communications of other professional groups may also be the privilege of the client (or patient or penitent) rather than of the professional. And the effective operation of a code of professional ethics often serves the ends of the legal system, by promoting its spirit. Should it be possible to delineate circumstances in which these two conditions obtained, it would be hard to see what objections could be made to according legal recognition to professional privilege of professions other than lawyers.

The bottom line, however, is that any protection which is afforded must be protection which serves the end of justice. A code of ethics should not be a shield which prevents a court from having access to information which is crucial to the dispensing of justice in the case before it. Nevertheless, this still leaves a great deal of scope for just recognition of codes of ethics. It should not be beyond the wit of our lawmakers collectively, to devise a system in which the courts are required to obtain from witnesses only that portion of the truth which is necessary to serve the ends of justice.

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