

Chapter 4 - The Fourth Estate

The Argument

4.1 From time to time during the course of the debate in this inquiry, both in written submissions and in oral evidence, there have been references to the place of the media in our constitutional democracy as the 'fourth estate'. This proposition places the media alongside the Parliament, the Executive and the Judiciary as a fundamental component of our constitutional system of government. It was described in evidence as follows:

Mr McLachlan--If I can just pick up on two themes, as I see them. On the role of the media as the **fourth estate**, obviously it is our belief that the media has a very important role to play in ensuring the maintenance of our democratic society. It does act as a watchdog and provides a forum for accountability of the exercise of public and private power. The importance of the media in that regard is internationally recognised in a number of international treaties and instruments to which Australia is a signatory. So we say that freedom of expression and freedom to publish are of the utmost importance in maintaining the fourth link in the whole estate.¹

The Constitutional Basis

4.2 The supporters of this proposition will have been encouraged by the decisions of the High Court in *Nationwide News Pty Ltd v Wills*² and

¹ Evidence (Mr McLachlan), p.4

² [1992] 66 ALJR 658

*Australian Capital Television Pty Ltd v The Commonwealth [No 2]*³, although judicial statements in these cases stop short of specific reference to the part the media plays in Australia's constitutional balance.

4.3 In the former case Brennan J starts from the proposition that the Constitution creates the repositories of legislative, executive and judicial power and a system of government in which the Houses of Parliament are chosen by the people. The Constitution prescribes a system of responsible government, that is one which is ultimately answerable to the Australian people and in which the executive is responsible to the legislature. To sustain this system of responsible government, freedom of public discussion, particularly of political and economic matters, is essential. The public cannot adequately influence decisions which affect their lives unless they are adequately informed. His Honour referred to *Attorney-General v Times Newspapers*⁴, where Lord Simon of Glaisdale said:

The first public interest involved is that of freedom of discussion in a democratic society. People cannot adequately influence the decisions which affect their lives unless they can be adequately informed on facts and arguments relevant to the decisions. Much of such fact-finding and argumentation necessarily has to be conducted vicariously, the public press being a principal instrument.

4.4 This statement was quoted with approval by some of the other judges in both the cases referred to, the second of which confirmed the approach taken in the first. It is as close as any of the judgments get to

3 [1992] 66 ALJR 695

4 [1974] AC 273 at 351

asserting a specific place for the media in ensuring freedom of communication.

4.5 These two decisions have emphasised the essential character of the freedom of communication in facilitating the discussion of political and economic issues in a democracy. Such a freedom is implicit in a representative government because the people who elect it must be able to make informed decisions at the ballot box. In practice, this freedom is facilitated by the media as the instrument affording the widest dissemination of information. The media therefore plays an integral part in the maintenance of representative government in this country and claims a place alongside the other three integral parts, or "estates", the Parliament, the Executive and the Judiciary. The media provides maximum effectiveness for freedom of communication.

4.6 Brennan J said that there is no right to free discussion of government at common law but:

Where a representative democracy is constitutionally entrenched, it carries with it those legal incidents which are essential to the effective maintenance of that form of government.⁵

Qualifications

4.7 Importantly, the court emphasised that the freedom is not absolute but is subject to legal restrictions, such as the law of defamation or

5 [1992] 66 ALJR at 669

the criminal law, which are legitimately in place to protect interests which might otherwise be affected. Deane and Toohey JJ said at p. 682 "It is an implication of freedom under the law of an ordered society" (emphasis added). In *Australian Capital Television Pty Ltd v The Commonwealth* [No 2], the Chief Justice said at p. 705 "the guarantee does not postulate that the freedom must always and necessarily prevail over competing interests of the public."

4.8 To some extent the qualification on the freedom of speech articulated by the High Court has been acknowledged by submitters. The Nine Network made the following comments in its submission⁶:

Nine Network believes that freedom of expression is integral to the maintenance of Australia's democratic traditions, and should be subject to legal constraints or restrictions only where such constraint or restriction is essential for the protection of established individual rights or public interests.

...

The right of freedom of expression carries with it the right (and social obligation) of the media to investigate and report on all matters of public interest to the fullest extent permissible by law. Ultimately, the mass media plays a vital role in informing the general public of events affecting them, individually and collectively; and which provides scrutiny of, and accountability for the exercise of public and private power.

4.9 Importantly, the Nine Network's submission points out that even internationally, the subjection of the right of freedom of expression to individual rights and other public interests is recognised. Accepting this qualification, the issue in the Committee's inquiry then becomes one of

⁶ Submission 77, pp.472-473

balancing the basic freedom of expression with the individual and public interests so recognised. In *Nationwide News Pty Ltd v Wills* and *Australian Capital Television Pty Ltd v The Commonwealth*, the High Court undertook this balancing exercise in deciding upon the validity of some provisions in amendments to the *Industrial Relations Act 1988* and *Political Broadcasts and Political Disclosures Act 1991*.

The Role of the Media

4.10 Many submitters and witnesses argued strongly that the media's role in the collection and dissemination of information is vital to the protection of freedom of speech, whether or not that right is guaranteed or implied by the Constitution. The Communications Law Centre put it as follows⁷:

The activities of the media in gathering and disseminating information is vital to the proper functioning of a democratic society. Without it, citizens cannot make informed decisions. Much illegality, corruption, dishonesty and hypocrisy would go undetected were it not for the investigative activities of the media.

4.11 Another account of this role was given in evidence before the Committee by Mr Chadwick as follows:

...the media vessels we use in this community animate freedom of speech in a practical sense. And they attempt to seek information and disclose it so that consequences flow.⁸

⁷ *Submission 113, p.1190*

⁸ *Evidence (Mr Chadwick), p.176*

In reality the media is by far the best means available to keep the public in general informed about the activities of government and about other issues of public concern.

Investigative Journalism

4.12 It has been said that "news is what someone somewhere does not want printed and all the rest is advertising"⁹. If there is someone who wants to suppress the information which is of consequence to the public interest journalists will need investigative skills to overcome such resistance to publication. Sometimes restrictions on publication are legitimised by legislation, usually on the grounds that the public interest is served in the particular circumstances by the maintenance of confidentiality. Information will often be known only to those intimately acquainted with the subject-matter. These people may have very good reason for wanting to facilitate the dispersal of the information to the public, for example because they consider that it relates to some so far concealed criminal activity or corruption.

4.13 Investigative journalism usually involves searching out the kind of information which is not readily available. People who disclose confidential information may have good reasons, other than possible breach of some statutory prohibition, to not want their identity revealed. Some of the consequences may be legal, for example the risk of exposing oneself to a defamation action, or personal, for example the fear of revenge by those whose activities are exposed by the release.

⁹ *Evidence (Mr Chadwick)*, p. 190

4.14 The following discussion before the Committee is particularly relevant to this issue¹⁰:

Mr Hellaby - Historically, there is quite a bit of evidence around that individuals who provide information of this nature are subjected to quite considerable persecution. In my specific case, we had very grave fears for the safety of the source. My own family was placed under armed guard for three months. They were subjected to a very organised terror campaign to try to force me to reveal the name of the source. This matter was put before the court at the time but the court did not seem to take it into consideration. As far as an investigative journalist goes, he or she is absolutely reliant on sources. Without them, they basically do not have information.

CHAIRMAN - How valuable is it for us to have investigative journalism?

Mr Hellaby - If you do not have investigative journalism, you basically have information sheets that process press releases, government statements or formalised information that has been released. The whole point of investigative journalism is to look at an issue and probe deeper, to look into areas that a lot of people do not want you to look into. The whole point of having sources is to be able to provide you with the information to assist you to carry out that probing. It may be that an investigative journalist only succeeds in getting a formal inquiry. If they have gone that far, they have succeeded for the public good.

Mr Hippocrates - Without investigative journalism, everything else, if you think about it, is just public relations. It is just a matter of what other people want to get into print. It is the stuff that people do not want published that the investigative journalist deals with. It is the prime job of the investigative journalist to find out - from within the darkened corners of bureaucracies and other institutions, banks et cetera - what people do not want published.

¹⁰ Evidence (Mr Hellaby), p.392

4.15 Mr Hellaby went on to say that people in authority think that they can sweep the things they do not want generally known under the carpet. "The whole aim of investigative journalism is to lift the carpet."¹¹

Investigative journalism and confidential sources

4.16 If the media's role as the fourth estate is accepted and the importance of investigative journalism in that role is recognised, there is a strong argument that confidential sources are important. They serve to ensure the continuing free flow of information which enables the public to keep the government, and public institutions generally, accountable for their actions.

Of vital importance to this process of public disclosure is the information provided by those who are in a position to know of the relevant conduct. Many sources will provide information only on the basis that their identity will not be disclosed. They fear the repercussions, legal or otherwise, that may flow from disclosure.

... The disclosure of journalists' sources may harm the free flow of information both from the particular source whose identity has been revealed and potential future sources who may refuse to provide information to the journalist who disclosed the identity of the source. Sources of information to the media in general may diminish.¹²

4.17 The Australian Press Council has advocated the importance of the media in exposing bad government and corruption and the importance of confidential sources to that exposure:

¹¹ *Evidence (Mr Hellaby)*, p.393

¹² *Communications Law Centre, Submission 113*, p.1190

We have learned of bad administration, broken promises, unpopular proposals and corruption, not from press releases but from journalists. It has been journalists, and not lawyers or law enforcement agencies, who have triggered the great exposes that have been such landmarks in our recent history.

Fundamental to the very concept of such reporting is the journalist's confidential source. Whistleblowers and dissidents, aware of the facts and even aware of wrongdoing, are central to this monitoring role that the press must have if it is to serve the public.¹³

The Nine Network added another layer of evidence before the Committee:

If you accept that confidentiality of sources is integral to ensuring the free flow of information to the media ... then it is an integral part of the right of freedom of expression.¹⁴

4.18 The argument is not universally accepted. The Commonwealth Attorney-General's Department states that the arguments about sources drying up have not been tested.¹⁵ In its *Interim Report on Evidence*, the Australian Law Reform Commission had this to say about the matter:¹⁶

Deterrent Effect of Lack of Privilege. It is argued that the absence of a privilege and, particularly, the publicity that a privilege does not exist has a deterrent effect upon those wishing to give information to the press. It is further alleged that this has an adverse effect upon the free flow of information and upon the ability of the press to expose corruption, negligence and malfeasance in government and multi-national corporations. In general, it is said, that there is an inhibiting

13 Flint, Prof. D., "Protecting Sources", *Australian Press Council News*, August 1993, p.3

14 *Evidence (Mr McLachlan)*, p.30

15 *Evidence (Mrs Jackson)*, p.198

16 *The Law Reform Commission, Report No. 26 Evidence*, p.525

effect upon the capacity of newsmen to complete the professional tasks assigned to them by the community.

Guest and Stanzler¹⁷ comment that they cannot measure the effect upon informants of the absence of a privilege. Perhaps more informants would reveal more matters to more newsmen if they knew that the newsmen were totally unlikely to reveal their identity. This is, however, only a matter of hypothesis. Were lack of confidentiality about the identity of the informant to be an inescapable result of the relationship between newsmen and informant, then and only then would there be a significant deterrent effect. However, this is not so. It is by no means a difficult process for the source to keep his identity from the newsmen to whom he gives information. Because of this, the deterrent effect of the absence of a privilege cannot be said to be substantial.

4.19 The Attorney-General's Department is of the view that if people become aware of illegal activity there are proper authorities to whom they can and should report and for this there are protections already in place such as whistleblowers legislation in some jurisdictions (for example Queensland) and witness protection schemes. In its written submission, the Department pointed to the fact that much information has been forthcoming and many cases of corruption have been revealed under the present law which does not accord any privilege against disclosure.¹⁸

4.20 In evidence, Mr Stewart Cockburn suggested that there are many who talk confidentially to journalists who would be happy to talk confidentially to others, such as a judge, so long as their name was not

¹⁷ JA Guest & AL Stanzler, 'The Constitutional Argument for Newsmen Concealing their Sources', (1969) 64 *NWUL Rev* 18, 57ff

¹⁸ Submission 115, p.1321

published. Mr Cockburn was adamant that a requirement to reveal a source to a judge in chambers would not affect the supply of whistleblowers.¹⁹

4.21 The experience of police services with informants (to be discussed more fully in the next chapter) also seems to contradict this argument. Police informants have always risked the possibility of identification during court proceedings. There was no evidence before the Committee that this has affected supply.

Conclusions

4.22 The Committee accepts that without investigative journalism, the media and its news would be generally bland and their utility to the public truncated. The Committee does not wish to see this kind of journalism diminish. However, the Committee must address the questions of how vital the ability of a journalist to keep a source secret is to his or her capacity to obtain information. Put another way the question is whether that information will continue to be forthcoming if journalists cannot guarantee that the source will not be identified - in any circumstance.

4.23 The Committee accepts that sources are an important tool the media uses in fulfilling its role as a facilitator of free communication. It is recognised that there will be circumstances where information will not be provided if anonymity cannot be offered to the source. There is a risk that the failure to recognise such circumstances will lead to some diminution in

¹⁹ Evidence (Mr Cockburn), p. 356. The Nine Network's response to this was that this is because journalists are prepared to go to gaol.

the availability of important information. If this did happen, it would be detrimental to the success of the media as the vehicle for general communication. The Committee is not convinced, however, that the risk is so great that absolute and permanent anonymity is appropriate. The issue has to be considered in light of competing public interests.