

Chapter 6 - Balancing Competing Public Interests

What is public interest?

6.1 The public interest was much discussed during the Committee's inquiry. However there was limited debate about what public interest actually means. It has been distinguished from public curiosity. A witness from the Queensland Parliamentary Committee on the Criminal Justice Commission described it as 'something in which the public, the community at large, has some pecuniary interest or some interest by which their legal rights or liabilities are affected'.¹ It appears to be an elusive concept but one on which a number of arguments about privilege has been based. In this debate, the appellation 'public interest' has been attached to widely differing matters. For example, there is a public interest in the maintenance of free speech. There is a public interest in maintaining a legal system which strives to ensure every person has a fair trial. There is a public interest in the free flow of information. There is a public interest in keeping public authorities accountable. All of these play a part in the debate surrounding confidential sources.

6.2 On the basis of the High Court's decisions in *Nationwide News v Wills* and *Australian Capital Television v The Commonwealth*², there is clearly a public interest in freedom of communication in a democracy. The media's argument might go like this: the public interest necessitates freedom of the media, because of the crucial part the media plays in the

¹ *Evidence (Dr Watson)*, p.528

² *Op cit.*

communication of information and debate about issues of interest to the public. The public has an interest in the supply of information to the media in order to facilitate its role in communication. The argument might go on that without confidentiality the supply of information is threatened. This information is important to the ability of the media to perform its role. Should these sources dry up many matters of major public concern, ranging from maladministration through misconduct to criminal activities, would not be made known to the public, and this would harm the public interest.³

6.3 On the other hand there is public interest in the maintenance of our system of justice. In the general sense, public confidence in the administration of justice requires an assurance that all persons are subject to the law which the courts administer, and will obey a lawful direction of the court, particularly where the rights and liberties of an individual are at stake. In the context of a specific case, it must be possible for the court to have access to all relevant and admissible information in order to make a full assessment of the evidence and come to the appropriate conclusion on guilt or innocence.

Which public interest?

6.4 The public's right to be informed about matters which affect them is integrated with concepts of freedom of communication and freedom of expression. This right can come into conflict with an individual's right to have all relevant information before the court which is charged with the

³ Flint, D. "Complaints and Confidentiality", *Australian Centre for Independent Journalism, Seminar Papers No 5, October 1992 : Journalism and the Law*, p.16

determination of his or her guilt or the resolution of his or her dispute with another person. This conflict results from the proposition that the ability to withhold information about the identity of a source, even in the face of a court order to do so, is fundamental to the preservation of the right of the public to be informed. This belief in the importance of confidentiality to the public interest is the basis for clause 3 of the AJA's Code of Ethics, namely that such confidences be respected at all times. The confidential nature of the relationship is crucial to the free flow of information.

6.5 In its submission to this inquiry, the Communications Law Centre put the proposition this way:⁴

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.

The journalists' ethical obligation to maintain the confidentiality of her or his sources in all circumstances may come into conflict with the wish of a litigant, prosecutor or investigating authority to ascertain the identity of the source for the purposes of proof, taking further action against the source or conducting further investigations. In resolving this conflict, courts are required to balance the public interest in having all relevant information available in order to facilitate the due administration of justice against the public interest in maintaining the confidentiality of the relationship between the journalist and the source and the broader public interest in maintaining the free flow of information.

⁴ *Submission 113, p.1190*

6.6 When there are a number of competing public interests involved in the resolution of an issue, a balancing exercise has to be undertaken in order to determine which of them ought properly take priority. In *Cojuangco* the High Court affirmed the need for a balancing approach to be taken to resolve the conflict between competing public interests. It explained the reasons for such an approach as follows⁵:

The point is that there is a paramount interest in the administration of justice which requires that cases be tried by courts on the relevant and admissible evidence. This paramount public interest yields only to a superior public interest, such as the public interest in national security. The role of the media in collecting and disseminating information to the public does not give rise to a public interest which can be allowed to prevail over the public interest of a litigant in securing a trial of his action on the basis of the relevant and admissible evidence. No doubt the free flow of information is a vital ingredient in the investigative journalism which is such an important feature of our society. Information is more readily supplied to journalists when they undertake to preserve confidentiality in relation to their sources of information. It stands to reason that the free flow of information would be reinforced, to some extent at least, if the courts were to confer absolute protection on that confidentiality. But this would set such a high value on a free press and on freedom of information as to leave the individual without an effective remedy in respect of defamatory imputations published in the media.

6.7 Most submitters and witnesses accepted the proposition that an absolute privilege in favour of confidential sources would not allow for the proper balancing of competing interests.⁶ The importance of one over the

⁵ *John Fairfax & Sons v Cojuangco* (1988) 165 CLR 346 at 353, 354

⁶ *The Communications Law Centre, the Australian Press Council, the Media Entertainment and Arts Alliance*

other will not be the same in every case.

6.8 The Law Reform Commission of Western Australia concluded in its Report that the public interest in the protection of confidential information in the hands of journalists, including the identity of the sources, does not by its very nature outweigh the public interest in courts' having all relevant evidence available to them so as to justify the creation of a privilege. The Commission favoured a structured discretion so that in appropriate circumstances the information could be withheld subject to the order of the court.⁷ The Commission recognised the importance of the role played by the media in the provision of accurate information to the public but said that creating an absolute right to keep sources secret would be to the detriment of judicial proceedings to which such information would always be denied. It went on to point out that even without such a privilege matters of major public interest have been exposed⁸, although possibly as a result of an express or implied undertaking as to confidentiality.

6.9 Justice for each and every individual in our society is essential.

It is a fundamental obligation of the state to provide a system that enables its citizens to get justice according to law, in both criminal and civil matters. It is in the public interest that the innocent are not convicted, but that the guilty are convicted.⁹

⁷ *LRC of WA, Project No 90, pp. 57-58*

⁸ *Ibid, p.60*

⁹ *Attorney-Generals Department, Submission 115, p. 1341*

6.10 It goes without saying that the public interest lies in ensuring that everybody receives a fair trial. It is in the interests of a fair trial that all relevant evidence be available at that trial. To create a situation which makes it impossible in some cases to access relevant evidence potentially defeats a fair trial. To protect that public interest in the face of the competing public interest that information be freely available courts recognise that neither can be absolute.

Who determines the balance?

6.11 The important thing to remember here is that the direct conflict arises during legal proceedings. Who, in those circumstances, should decide which public interest should prevail? Should it be the journalist to whom the confidence was given and who would be the only person (apart from the source him or herself) equipped with the full knowledge of the circumstances in which the communication was made? Should it be the responsible officer or senior employee of the media organisation by which the journalist is employed, such as the editor of the newspaper? After all it is the media organisation which ultimately carries the responsibility for what it publishes. Or should it be the judge who has ultimate control over the proceedings before her or him, who is responsible to see that the trial in issue is fair and who must decide the questions of relevance and admissibility of all the evidence?

6.12 The Committee acknowledges that, in determining the balance, it must be possible in the interests of justice in a particular case to defeat the claim for privilege. As the issue arises predominantly before courts

(refusal to answer a question before a statutory or investigative body can only be punished by a court) it is the court which has to be the ultimate decision maker. Logically therefore the judge must have the power to determine the appropriate balance between competing interests.

Significance of information

6.13 One crucial aspect of the balancing exercise which has been discussed is: how important is it to the determination of the legal proceedings that the court be informed of the identity of the source of the information provided by a journalist? The resolution of this issue is affected by the importance the evidence has to the matter before the court, and by the nature of the proceedings in question. That is, whether they are criminal or civil, or whether the issue arises in interlocutory or pre-trial applications or during trial. It seems accepted that the earlier the stage in the proceedings, the less likely it is that disclosure will be of vital importance. This is the basis upon which the newspaper rule is held not to apply during trial, but only to interlocutory proceedings.

6.14 On one approach, the identity in question should only be revealed if that information is necessary to the determination of the issue before the court. This approach has been adopted in section 10 of the *Contempt of Court Act 1981* (UK), which creates a statutory privilege for journalists. It provides that no court may require a person to disclose the source of information contained in a publication unless it is established that the disclosure is necessary in the interests of justice [as well as national security or the prevention of disorder or crime]. What this recognises is that journalists will often have information which must be made available as

evidence in judicial proceedings in order for justice to be done. It is argued that it would be detrimental to the public interest in the proper administration of justice to interfere with this by giving journalists a privilege to withhold information without very good reason.¹⁰

6.15 There are a variety of positions taken as to when it is necessary to have the identity of a source revealed. The Nine Network, for instance, accepts that it would be appropriate for disclosure to be ordered if evidence is critical to establishing the innocence of a person¹¹. They say that the evidence must be 'absolutely necessary'¹² to the case for the public interest in confidentiality to be overruled.

6.16 The High Court's view of necessity was expressed in *Cojuangco* when it approved the balancing approach in pre-trial applications. The Court held that this required the applicant to demonstrate more than relevance to the proceedings. The applicant had to show that disclosure is "necessary in the interests of justice."¹³

6.17 Another proposition is that the court should have access to all relevant admissible evidence. If the information provided in confidence is relevant to the proceedings, the court should be able to call the source to test the veracity of that evidence. Usually, if such evidence is given by the journalist to whom it was provided, it is hearsay and therefore, at best, of

¹⁰ *LRC of WA, Project 90, p.62*

¹¹ *Evidence (Mr McLachlan), p.11*

¹² *Evidence (Mr McLachlan), p.12*

¹³ *Op cit at p.351*

limited weight. In fairness to the parties in any legal proceedings the opportunity to adduce evidence of significant weight should not be denied. Therefore, if it is possible for the evidence of the journalist to be tested fully, or, if it can be given in circumstances which do not amount to hearsay, the opportunity to call the source should not be denied.

6.18 Whether or not evidence about the identity of the source of certain information is necessary or relevant will always be determined on a case by case basis. For example, in *DPP v Luders*, Luders was convicted without the identity of Barrass's source being ascertained. In the Nicholls case, on the other hand, the defendant was accused of criminal behaviour. His response to the accusation was that it was not him who had engaged in the criminal behaviour but his confidential source, whom he refused to identify. This is a clear case where the information about identity was central to the question of guilt or innocence.

6.19 Various commentators have alleged that the fact Mr. Nicholls was acquitted without disclosure was relevant to the question of the significance of the identity of the source to the case. On the other hand, it is possible that the lack of sufficient evidence to prove the case against Mr. Nicholls beyond reasonable doubt was to a degree exacerbated by his refusal to answer the question about the identity of the source. (He was not claiming privilege against self-incrimination as a reason for not disclosing.) In that case the court considered the question whether the source existed at all, rather than whether it was able to test the veracity of the information provided by the source by having the unnamed person called and cross-examined.

Defamation

6.20 The law of defamation highlights the conflict between vindicating the freedom of the press and seeing to the proper administration of justice in civil proceedings.

6.21 It was put to the Committee by a number of witnesses and submitters that the laws of defamation act as a grave fetter on the practice of journalism by seriously impinging upon the freedom of expression. The Law Reform Commission of Western Australia suggested that the law of defamation may be a greater restriction on the freedom of the press than the lack of a privilege for journalists.¹⁴ It can inhibit public investigation and media discussion of events which are important to the public interest. This contention is particularly significant in the light of the High Court's conclusions about the implied right to freedom of communication in *Nationwide News v Wills* and *Australian Capital Television v The Commonwealth*, discussed in Chapter 4.

6.22 The Nine Network stated that the lack of uniformity in the law of defamation makes it a particularly difficult restriction for mass media to grapple with.¹⁵ Defamation laws differ from State to State and, so far, all efforts to attain uniformity have failed.

6.23 Whatever the state of the law of defamation, to allow a journalist to keep secret the source of allegedly defamatory material denies

¹⁴ *Project 90*, p.61

¹⁵ *Submission 77*, p.477

the person defamed the fullest opportunity to obtain redress for the wrong done to her or him by the publication. The newspaper rule recognises at least a prima facie need to respect confidences. However, it applies only at the interlocutory stage. At a defamation trial, the question of malice is commonly in issue and it becomes important to identify the source in order to assess the motive behind the disclosure of the allegedly defamatory material. For the media this operates as a fetter on free speech. For the victim of the publication the denial of access to the source frustrates the legal process on which he or she relies for redress.

6.24 Despite these legitimate criticisms of the substantive law relating to defamation, the cost and complexity of defamation proceedings mean that an action for it can be resorted to by only a minority of people. Accordingly, the Committee is not convinced that the law of defamation acts as a major check upon the role of the media to inform the public. It may cause hesitation when the media proposes to publish information about public figures of substantial means. But even for these people defamation actions are costly and often protracted. For these reasons they are of doubtful value as a form of redress for most individuals. Allowing confidences to be maintained entails a danger of facilitating the publication of untruths which cannot be tested.