Ethical dilemmas and legal consequences

Ross Duncan considers the confidentiality of journalists' sources

The recent jailing for four months of Adelaide reporter, Chris Nicholls, for contempt has intensified community debate about whether the ethical duty of journalists not to reveal confidential sources should be given legal recognition and protection.

The Nicholls case

Last year, Nicholls, an ABC Radio news reporter at the time, was charged with false pretences, false impersonation and forgery. The charges followed an investigation and series of reports by Nicholls about the business relationship between the South Australian Tourism Minister, Barbara Weise, and her de facto partner, Jim Stitt. The reports revealed that consultancy fees paid by the Australian Hotels Association to Stitt had been paid into the account of a company owned by Weise and Stitt. The Association, with the assistance of Stitt, had been lobbying for control of poker machines which the government was proposing to introduce into South Australia. A subsequent government inquiry found that while Weise was not guilty of any impropriety, she did have a conflict of interest.

The charges against Nicholls alleged that in the course of his investigations he falsely pretended that he was Stitt in order to obtain certain confidential banking records. During the four week trial in March and April this year the prosecution led evidence of telephone calls made to the banks from a mobile telephone in Nicholls' possession at the relevant time. A bank accountant also identified Nicholls as the person who collected Stitt's company banking documents by pretending to be Stitt.

Crucial to Nicholls' defence was his claim that he did not obtain the bank documents directly but through a source. The inference was that if anyone had pretended to be Stitt it was the source, not Nicholls. However, when asked who the source was, Nicholls said that he had given an undertaking of confidentiality and was ethically bound not to reveal the source's identity. He refused to answer all questions put to him during cross-examination which he considered might lead to such identification. The prosecution argued that the story of the source was an elaborate fabrication invented to explain the criminal conduct of Nicholls himself. On Friday 16 April, the jury acquitted Nicholls of all five charges.

However, his relief was shortlived. He was directed to reappear the following Monday to face a charge of contempt for having refused to answer necessary and relevant questions during the trial: namely who was his source. His guilty plea rendered him liable under the District Court Rules, to either a fine or a prison sentence for a fixed term or until he purged his contempt. He was sentenced to four months imprisonment. At the time of writing he was in Yatala prison awaiting the hearing of an appeal against the severity of the sentence.

Protection of Criminals?

In sentencing Nicholls, Judge Taylor, who had also presided at the trial, (an aspect of procedure which South Australian Attorney-General, Chris Sumner has conceded needs to be reviewed) took the view that in refusing to identify his source, Nicholls was effectively protecting a criminal. He said:

"The independent informer, that is, the source, had clearly committed or been party to serious offences. This puts him in a different class to most informers. I accept that at the time the undertaking (of confidentiality) was given, MrNicholls may well not have known of the illegalities involved. At the time of the trial, he did.

"I make it clear that this court will not accept an undertaking as sufficient reason in these circumstances not to disclose criminal behaviour, as in this case, and so diminish the responsibility of the journalist, whoever he be; I believe this consistent with all of the various freedoms the press is entitled to ...".

Other case

While the sentence imposed on Nicholls has sent shock waves through the world of investigative journalism, he is not the first in recent times to spend time behind bars for refusing to disclose to a court the identity of a source. In 1989, Perth journalist, Tony Barrass, declined to reveal the source of confidential tax information during the preliminary hearing of charges of official corruption against a Taxation Office clerk, Harland Luders. The magistrate sentenced him to seven days imprisonment (the maximum penalty available) and, when Barrass again refused to disclose the source at the trial of Luders, the judge fined him $10,000. Joe Budd, formerly of the Brisbane Courier Mail, also was imprisoned in Boggo Road jail for several days in March last year for not revealing a source.

At the time of writing Deborah Cornwall of the Sydney Morning Herald is being prosecuted for her decision not to tell the Independent Commission Against Corruption the name of an informant and faces a potentially similar fate if convicted. The Adelaide Advertiser's David Hellaby also faces a possible prison term after losing a High Court appeal against a court order to reveal the confidential source of his report about the State Bank of South Australia. The bank claims that it needs to know the identity of the source to determine whether it has a claim for injurious falsehood arising from publication of the story.

The competing arguments

The ethical obligation of journalists not to disclose confidential sources has never been recognised as a legal right in Australia. Journalists argue, rightly, that a large well of information about matters of public interest would dry up if they did not give and honour undertakings of confidentiality. They argue that the public interest in the free flow of information should outweigh competing administration of justice considerations. Opponents — often politicians like Chris Sumner, who launched a stinging attack on Nicholls in Parliament shortly after his contempt conviction — contend that journalists should have no special legal privilege. It is said that this would open the way for anonymous individuals to spread untrue and damaging information without being able to be called to account. It is also

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feared that some members of the fourth estate may simply invent sources either to lend credibility to a story or, as the prosecution in the Nicholls case tried to persuade the jury, in order to avoid liability for criminal conduct or to fulfil some other self-interested motive.

In my view, this image of the media running riot is exaggerated. Conferring on journalists a public interest immunity from disclosure of confidential sources poses no great danger. For a start, ethical and professional considerations place great pressure on reporters and their publishers to make sure they get a story right. Most would be well aware of the dangers inherent in accepting, without independent verification, information from a source who is not prepared to be identified.

Other remedies

It is a fact, nevertheless, that unprovable or, at worst, simply wrong and damaging material will slip through. However, when it does, the subject of the publication has a remedy in defamation. It is not necessary for a plaintiff to succeed in a defamation action against a journalist or a media defendant to identify the source. Indeed, it is very much to the defendant's disadvantage not to be able to rely on the evidence of its source.

Secondly, it is unlikely that a journalist would feel ethically bound to honour an undertaking to a source whose information is proved to have been knowingly wrong. Nevertheless, it should be noted, as the Cornwall case demonstrates, that it may be difficult to determine whether the source deliberately lied or was under a misapprehension.

As to reporters fabricating sources to lend an air of credibility to a story, if the information were untrue and damaging there would again be a remedy against the reporter and publisher in defamation. If malice could be established, the remedy of injurious falsehood is available. No doubt the fact of the fictitious source would be significant evidence of malice in both actions.

A thornier issue is the right of the subject of a publication to compel disclosure of a source in order to take action against the source for defamation, injurious falsehood or, in some circumstances, breach of confidence. However, generally nondisclosure of the source does not deny the subject an effective remedy against the reporter and publisher for defamation. Indeed, in terms of the publisher's capacity to pay substantial damages, that remedy may be more effective.

Very recently, Chris Sumner seems to have changed his tune slightly, announcing that the South Australian government may be prepared to consider legislation giving journalists some limited protection from disclosure of confidential sources. Clearly, laws giving such a public interest immunity are long overdue in this country. A recent report commissioned by the United Nations found that Australia is one of only two of the world's major western democracies which does not constitutionally guarantee freedom of expression. The report by the London-based International Centre Against Censorship also commented that the standard of press protection in Australia was comparatively low and noted the poor protection for confidentiality of journalists' sources. One can only wonder how the jailing of an Australian journalist for four months for doing his job will enhance that reputation.

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A unique identity

Australia should be developing its own unique identity, not seeking to impose an impoverished model from a society in decline. We should all hope that by the turn of the century Australia will be a country with its own distinctive character drawing richly on the culture of its people, having renounced its unquestioning allegiance to America, the way it already has to Britain.

The move towards digital is the biggest technological revolution in broadcasting since the advent of television. I am well aware that technology is changing so fast and that if you wait for the end point you will never make a decision. I am not a Luddite, trying to halt the inexorable development of new technology. Quite the reverse, I want Australian television to continue to be as good as it is and develop strongly and confidently into the twenty-first century and beyond.

The reality is that the future is ours. We should be drafting the blueprint for the future from our own rich creative talents.

I am not opposing the introduction of pay TV. I merely am saying, let us proceed in a measured way where we consider all the cultural, programming and cost implications. We came to television late, when all is said and done. I was only 27 when I said "Good evening and welcome to television".

But we got it right! The best sporting coverage in the world and the only truly broad ranging selection of programming in the world, which makes a really multi-cultural nation.

This is the edited version of a paper delivered by Bruce Gyngell to the CAMLA Annual Dinner on 28 April 1993

Copyright Essayists!

The trustees of the G. C. O'Donnell Biennial Prize Trust recently announced the competition for the 1993 G. C. O'Donnell Prize. The prize of $3,000 will be awarded to the author of an unpublished essay displaying original thinking on a topic regarding copyright and the interests of authors.

Entries should be in the range of 5,000-15,000 words, although there is no minimum or maximum word limit.

Entries should be received by the G. C. O'Donnell Prize Trust, Law Faculty, Australian National University, Canberra ACT 0200 by 24 September 1993.

Further details and a copy of the competition rules may be obtained from the A.N.U. Law Faculty.