Secrecy, disclosure and the public interest

THE DISCLOSURE OF OFFICIAL INFORMATION IN AUSTRALIA (PART 2)

In the first part of this article I argued that the Commonwealth criminal law review committee chaired by Sir Harry Gibbs should recommend that strict tests of harm be formulated in relation to the categories of official information proposed to be protected by the criminal law. That is, a person should not be subject to criminal sanction for the disclosure of official information unless the disclosure of that information is likely to cause substantial harm to the national interest. I argued further that questions about whether or not harm would result from disclosure should be determined not by the government but by the judiciary.

In this part, I examine the national interest from a different perspective. Here I argue that it should be a defence to a charge of disclosing official information without authorisation that the disclosure was made in the public interest.

I conclude by considering whether the fact that official documents have been previously published should constitute a defence to a prosecution for their unauthorised disclosure.

Should there be a public interest defence?

Confidentiality is not an absolute value. It must be weighed in the balance against other competing values. If the net of confidentiality is cast too widely there is the danger that the free flow of important information may be unnecessarily and undesirably constrained. On the other hand, if it is cast too narrowly, the effective conduct of government may be prejudiced.

If the relative value of confidentiality is accepted then one may reasonably argue that it should be a defence to a charge of unauthorised disclosure of official information that the release of that information was in the public interest. Such an approach is simply a recognition of the fact that in any individual case different and competing interests will bear on the question of disclosure.

This is neither a novel nor radical approach. In the law relating to breach of confidence, for example, it has been held that confidential information may be disclosed where an iniquity would be exposed (*Initial Services Ltd v Putteril* [1968] 1 QB 396), where non disclosure would endanger public health and safety (*Church of Scientology v Kaufman* [1973] RPC 635), where disclosure is required for the purposes of litigation (*D v National Society for the Prevention of Cruelty to Children* [1977] 1 All ER 589) and, more generally, where the court considers that there is a strong public interest militating in favour of release (see for example, *Commonwealth v John Fairfax & Sons* [1980] 55 ALJR 45).

A similar non-exhaustive categorisation of circumstances in which unauthorised disclosure may be justified in the public interest could profitably be developed with respect to the disclosure of official information.

Thus, for example, where the disclosure of information relates to the existence of crime, fraud, abuse of authority, threats to public safety, or serious neglect in the performance of official duties, it should, in my view, be open to a court to admit a defence that disclosure was in the public interest.

What qualifications should apply to the defence?

There are, however, a number of qualifications which should apply to the taking of this defence.

1. It is axiomatic that a public servant should not be able to rely on the defence if he or she has not taken reasonable steps within the service to redress his or her concerns. Public servants should not be rewarded for disclosing information as a first rather than a last resort. Realistic avenues of redress, one of which may be to lodge a complaint with the Ombudsman, should be pursued prior to choosing to disclose official information.

However, to suggest, as the Committee's discussion paper appears to, that the Ombudsman might be the principal for redress of grievances would, in my view, be mistaken. Both the Ombudsman's charter and his or her capacity to act are limited.

Thus, for example, the Ombudsman may not inquire into any action initiated by Ministers. In the present context this may prove to be a severe limitation. In addition, it is well known that, for many years, the Ombudsman has been so under resourced that his office has not been able to pursue many of its statutory duties effectively (see for example, Commonwealth Ombudsman's Annual Report, 1988).

Looking at internal mechanisms of complaint resolution, one cannot in my view be optimistic that complaints of serious wrongdoing will meet with approval and action when directed to heads of relevant departments. Where one is speaking about disclosure of information relating to illegality, iniquity or neglect, departmental officials can be expected to act as much in their own as in the public interest. It would therefore be naive to require that every formal channel of complaint be pursued before official information is disclosed on public interest grounds.

However, as a general rule, all realistic forms of administrative redress should be tried. It follows that courts should act as a forum of last resort with respect to assertions that disclosure of official information was in the public interest.

2. The disclosure of official information should relate to serious administrative misconduct of the types previously mentioned. So, it would not be permissible for a defendant to argue, for example, that a government policy (e.g. the mining and export of uranium) was against the public interest.

3. The misconduct should be sufficiently serious to outweigh statutory obligations of confidence. A defendant should not be permitted to claim that minor breaches of public service rules and practices sufficed to legitimate unauthorised disclosure. Rather, the misconduct revealed in relevant documentation would have to be sufficiently grave to permit an argument to be made that non disclosure of the documents would result in greater harm to the public interest than would their release.

4. The defence should not be available to anyone acting from unsubstantiated suspicion. There should be 'reasonable cause to believe' that an abuse of authority had occurred.

5. Whether or not the defence was successful should depend on the court's broad assessment of the competing interests and values bearing on the particular case. It should not depend on whether or not the person disclosing the information had a bona fide belief that its disclosure was in the public interest. As the UK White Paper on the *Official Secrets Act* puts it:

> The Government recognises that some people who make authorised disclosures do so for what they themselves see as altruistic reasons and without desire for personal gain. But that is equally true of some people who commit other criminal offences. The general principle is that the criminality of what people do ought not to depend on their ultimate motives though these may be a factor to be taken into account in sentencing but on the nature and degree of harm which their acts may cause. [para 59]

As in the law relating to breach of confidence, the success of a public interest defence would depend not on the motive of the discloser, but on the nature of the information disclosed and a balanced assessment of the costs and benefits attached to its disclosure.

If the defence were to be formulated in this way, there would remain strong incentives for public servants to disclose information without authorisation. The public servant would fact the task of persuading a court, first, that all reasonable steps to redress his or her grievances had been taken and secondly, that disclosure was in fact in the public interest and not just believed by him or her to have been so. Failing this, severe criminal penalties would apply.

The UK Law Society in 1979 proposed that any law to replace section 2 of the *Official Secrets Act* should contain a public interest defence which:

> . . . should be available when, though it was clear that information had been disclosed in breach of the Act, this had been done in the public interest, to bring to an end illegal activities, for example, corruption; or abuse of the process of government, for example, wilful deception of the public . . . Our proposed defence is intended to operate where concealment would cause more damage to the public interest than exposure, even if this meant the disclosure of sensitive information. [Official Information, Memorandum by the Council's Law Reform Committee, July 1979]

This view should be endorsed in the Australian context.

A defence of prior disclosure

A matter on which the Review Committee did not request a specific response but which is nevertheless important is whether or not the fact that prior publication has taken place should be a defence in a prosecution for any subsequent disclosure of official information.

It seems to me, again by analogy with the law relating to breach of confidence, that where information is in the public domain, it would be inappropriate to initiate a prosecution for its subsequent publication. It is well established with regard to breach of confidence that if information is commonly known or readily ascertainable from public sources, it will not be protected (*Saltman Engineering Co. v Campbell Engineering Co. Ltd* (1948) 65, RPC 203). Further, information which is trivial or pernicious will not be protected even if its confidentiality is established (*Church of Scientology v Kaufman* [1973] RPC 635).

Clearly, there are contextual differences between these cases and those which relate to the disclosure of official information but, nevertheless, I believe that similar principles ought to apply.

Where an individual or organisation simply reports faithfully the content of information already disclosed, no offence should be regarded as having been committed. There is no reason, for example, to prosecute a

senior public official who merely confirms that a previous leak is true. This should be distinguished, however, from a case in which the original disclosure was brief and vague but the confirmation added substantial new detail amounting to a new and harmful disclosure in itself. Faithful reporting should not be penalised. Self-serving elaboration should be.

There is one very important consideration underpinning this view. Without a defence of prior publication, significant restraint would be imposed on the freedom of the press to report on matters of public importance having currency in governmental circles. The press plays a crucial role in drawing government to account for its actions. It is able to play this role in large part because of its proximity to and special relationships with ministers, their advisers, lobbyists and public servants. It often reports matters on the basis of unattributable leaks, unsourced lines of information, and established but unconfirmed speculation. It should continue to be permitted to do so.

If, however, the press is always to be required to examine its position with respect to the reporting of matters already having limited currency or documents having had limited distribution, its effectiveness in informing the community about matters of public importance would be seriously and adversely affected. This is not a consequence that should readily be contemplated.

The 1979 Bill brought forward to reform the United Kingdom *Official Secrets Act* admitted a defence of prior publication where information had been made available, or had become available on request to the public or a sector of the public. In my view this defence and a defence of disclosure in the public interest should now be adopted in Australia.

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