

Navigating the challenges of disobedience contempt and source confidentiality

By Abby Williams

The value of journalism in democratic society is largely attributed to the type of reportage that aligns with the ‘fourth estate’ mandate by exposing wrongdoing (Lamble 2016, p. 222). Such is the product of risks taken by journalists – in particular investigative and public interest journalists – and by sources who supply them with information. Legal and ethical challenges arise when a judge asks a journalist to reveal their source in court, and they refuse on the basis of confidentiality (Pearson & Polden 2019, p. 316). By doing so, they may be charged for ‘disobedience contempt’, facing fines and even prison sentences.

This essay will further discuss the complex misalignment between the justice system and journalists’ ethical obligation to protect their sources, and how the risks of disobedience contempt may be navigated. It will consider the protection offered by ‘shield laws’ and explore alternative approaches by which the journalist might avoid endangering their sources, and themselves.

Disobedience contempt

The law of contempt exists to prevent misconduct from interfering with the administration of justice (Australian Law Reform Commission 1987, p. 3). There are several forms of contempt which impact the media; however, disobedience contempt is particularly challenging in that it conflicts with their ethical principles (Pearson & Polden 2019, p. 318). It arises when an individual fails to obey court orders, such as a journalist refusing to reveal the identity of a confidential source (Dwyer 2015, p. 422). Under clause 3 of the Media, Entertainment and Arts Alliance (MEAA) *Journalist Code of Ethics*, the journalist must respect the confidences of a source who seeks anonymity in all circumstances (Media, Entertainment and Arts Alliance 2020). Problematically, the *Journalist Code of Ethics* has no legal standing in court (Lamble 2016, p. 245), and any noncompliant journalist can be charged for disobedience contempt.

The tension between the justice system and the principles underpinning journalism was illustrated in court when reporter Tony Barrass was asked to identify a source who had leaked information regarding the Australian Taxation Office. When Barrass refused to answer the question on the grounds that he would be in breach of the code of ethics, he received a seven-day prison sentence and a \$10 000 fine (*Director of Public Prosecutions v Luders* 1989, cited in Law Reform Commission of Western Australia 1993, p. 45).

Disobedience contempt impacts journalists in each of Australia's jurisdictions, as journalists have no special rights when called to witness during trials (Law Reform Commission of Western Australia 1993, p. 40). When they refuse to comply with court orders, the consequences are significant.

Shield Laws

A valuable safeguard for journalists in this position is a range of 'shield laws', which offer protection from having to reveal a source or produce confidential information (Dwyer 2015, p. 423). Although Australian legislation did not explicitly provide for journalists' confidentiality agreements until 2011 (Pearson & Polden 2019, p. 326-327), it is becoming clear that the protection of sources is integral to media freedom in democratic society (Fernandez & Polden 2015, p. 65). However, shield laws vary between jurisdictions. Where New South Wales recognises the confidentiality of sources in section 126K of the *Evidence Act 1995*, Queensland has no shield laws at all (Fernandez & Polden 2015, p. 61).

The protective effect of shield laws was exemplified when *Age* journalist Nick McKenzie refused to identify the informant behind a story alleging that the plaintiff was a Calabrian Mafia leader (Pearson & Polden 2019, p. 317). The shield law came into effect under section 126K of Victoria's *Evidence Act 2008*, which provides that a journalist cannot be compelled to reveal a source to whom confidentiality has been promised (*Mafia case 2015*, cited in Pearson & Polden 2019, p. 317).

Although shield laws can potentially safeguard a journalist from having to identify a source, they cannot be relied upon in all circumstances. When the disclosure of their identity is

within the public interest (for example, in matters of national security), the importance of confidentiality is outweighed (Pearson & Polden 2019, p. 327).

Alternative Approaches

Given the threat of disobedience contempt and the unpredictable nature of shield laws, a journalist receiving information from a source seeking anonymity should consider alternative approaches to obtaining the information before entering into the bonds of secrecy. In the initial stages of the exchange, the journalist should negotiate the terms of confidentiality with their source, to establish a clear understanding of terminology and the boundaries within which they can work (Pearson & Polden 2019, p. 344).

At this stage, the source could refer the journalist to another informant who might be identifiable or offer leads that could be used to lodge a Freedom of Information (FOI) request. Also known as the 'right to information', FOI is designed to maintain transparency and accountability in democratic governments (Pearson & Polden 2019, p. 116). Under the *Commonwealth Freedom of Information Act 1982*, citizens (including journalists) have the right to access documents and data held by the Australian Government (Office of the Australian Information Commissioner, n.d.).

Although FOI is beneficial to investigative and public interest journalism, Australia's FOI system is dysfunctional compared to that of other nations (Lidberg 2013, p. 79). The limitations of FOI were demonstrated when freelance journalist Paul Farrell requested documents from the Department of Immigration and Border Protection, to inform his investigation on Australian detention centres (*Immigration Documents case 2017*, cited in Pearson & Polden 2019, p. 124). Although Farrell was eventually able to publish material based on the documents, it proved to be extremely time consuming, complicated and politicised (Pearson & Polden 2019, p. 126).

Despite these limitations, a patient approach to FOI can be an effective alternative to sourcing information from an anonymous informant (Pearson & Polden 2019, p. 127). However, if no such option exists and the journalist must rely on off-the-record information,

they should carefully discuss the conditions of confidentiality with their source before proceeding with the exchange of information (Pearson 2013, p. 171).

Conclusion

As source confidentiality is vital to the democratic function of journalism, disobedience contempt presents a threat to journalists who must defy court orders in order to protect their informants. These relationships must be safeguarded, as investigative and public interest journalism relies on sources and whistleblowers who confide in reporters (Tanner et al. 2012, p. 152). Shield laws and other precautionary measures may be applied, but ultimately, a journalist may not reveal their source under any circumstances. Bold, robust reporting comes at a risk – and often at a price – so for journalists to continue to function as the fourth estate, they need to do so carefully.

Cases Cited

Barrass's case: Director of Public Prosecutions v Luders (unreported) [1989], located in Law Reform Commission of Western Australia 1993, *Report No. 90: Professional privilege for confidential communications*, Perth. Available from:
https://www.lrc.justice.wa.gov.au/_files/P90-R.pdf. [4 December 2020].

Immigration Documents case: Paul Farrell and Department of Immigration and Border Protection (Freedom of Information) [2017] AICmr 116, located in Pearson & Polden 2019, p. 124-126.

Mafia case: Madafferi v The Age (2015) VSC 687, located in Pearson & Polden 2019, p. 317.

Legislation cited

Commonwealth Freedom of Information Act 1982, located at:

<https://www.legislation.gov.au/Details/C2020C00246>. [6 December 2020].

Evidence Act 1995 (NSW), located at:

<https://www.legislation.nsw.gov.au/view/html/inforce/current/act-1995-025>. [5 December 2020].

Evidence Act 2008 (VIC), located at:

http://classic.austlii.edu.au/au/legis/vic/consol_act/ea200880/. [5 December 2020].

References

- Australian Law Reform Commission 1987, *Report No. 35: Contempt*, Australian Government Publishing Service, Canberra. Available from: <http://www.austlii.edu.au/au/other/lawreform/ALRC/1987/35.html>. [3 December 2020].
- Dwyer, T 2015, 'Media Practice, Industry Change and the Law' in J Bainbridge, N Goc & L Tynan, (eds), *Media and Journalism: new approaches to theory and practice*, 3rd edn, pp. 405-438. Oxford University Press, Melbourne.
- Fernandez, JM & Polden M 2015, 'Shield Laws in Australia: legal and ethical implications for journalists and their confidential sources', *Pacific Journalism Review*, vol. 21, no. 1, pp. 61-78. Available from: ResearchGate. [3 December 2020].
- Lamble, S 2016, *News as it Happens: an introduction to journalism*, 3rd edn, Oxford University Press, Melbourne.
- Law Reform Commission of Western Australia 1993, *Report No. 90: Professional privilege for confidential communications*, Perth. Available from: https://www.lrc.justice.wa.gov.au/_files/P90-R.pdf. [4 December 2020].
- Lidberg, J 2013, 'From Freedom to Right – where will Freedom of Information go in the age of Wikileaks?' *Australian Journalism Review*, vol. 35, no. 2, pp. 73-85. Available from: informit. [7 December 2020].
- Media, Entertainment and Arts Alliance 2020, *MEAA Journalist Code of Ethics*. Available from: <https://www.meaa.org/meaa-media/code-of-ethics/>. [4 December 2020].
- Office of the Australian Information Commissioner n.d., *What is Freedom of Information?*, Australian Government. Available from: <https://www.oaic.gov.au/freedom-of-information/your-foi-rights/what-is-freedom-of-information/>. [6 December 2020].
- Pearson, M 2013, 'Legal Issues' in S Tanner & N Richardson, (eds), *Journalism Research and Investigation in a Digital World*, pp. 166-177. Oxford University Press, Melbourne.

Pearson, M & Polden, M 2019, *The Journalist's Guide to Media Law*, 6th edn, Allen & Unwin, Crows Nest.

Tanner, S, Kasinger, M & Richardson, N 2012, *Feature Writing: telling the story*, 2nd edn, Oxford University Press, Melbourne.