

## REVIEW

### The Legal Implications of Disclosure in the Public Interest: An Analysis of Prohibitions and Protections with Particular Reference to Employers and Employees, by Yvonne Cripps, 1986. United Kingdom: ESC Publishing Ltd, Oxford.

Recent discussions in academic and law reform literature of the legal position of so-called 'whistleblowers' together with the world-wide litigation concerning the book *Spycatcher* make this work a timely one.

The book is the product of the research of Dr Yvonne Cripps, a New Zealand lawyer, conducted at Cambridge University, England. In her Introduction, she suggests that she was encouraged to choose this topic by several notorious cases in England where employees, generally of the Crown or Crown agencies, revealed secrets in pursuit of their perception of a public interest. Their names are well known to the students of this genre. They include Sarah Tisdall, Clive Ponting, Stanley Adams and the British Steel 'mole'. To these cases can now be added Mr Peter Wright whose book *Spycatcher* has been described by the Chief Justice of New Zealand as 'the most litigated book of all time'.

There is a special irony in Mr Wright's case. He had spent a large part of his life, whilst working for the United Kingdom security service (M15), trying to track down and expose those who were responsible for unauthorised communications of secrets. But then, in his memoirs, he purports to expose many more. He does so with the expressed object of calling to attention the suggested inattention to the remaining 'moles' in the service. One has only to mention Burgess, McLean, Philby and Blunt, to show how defective were the mechanisms of law, convention and honour which secured the 'secrecy' of the British 'Secret Service'.

Dr Cripps' book is not about traitors. It concerns the legal, ethical and practical dilemmas facing employees, bound to secrecy, who come to the view that their duties as citizens and moral human beings, require them to disclose something to the public, or to a section of the public. The book is an exploration of the way that the law, until now, has handled this dilemma. Obviously, people in positions of trust should normally keep the secrets of that trust. Equally clearly, it cannot be left to individual employees to be the final arbiters of the public interest that would excuse disclosure. Likewise, it cannot be left exclusively to the holders of the secrets. They may be blinded by self-interest, tradition or the covering up of wrongdoing — so that they do not see where the true public interest lies. That is why, in the end, the responsibility of judging whether the 'whistleblower' was justified, lies with the courts. But the courts must perform their functions, realising that sometimes (as in national security matters) they may not know or understand the full context against which the disclosure must be evaluated.

After a few interesting illustrations of employee disclosures, both in the public and private sectors, Dr Cripps embarks on a detailed examination of the categories developed by the law to prevent disclosure of confidential material and to defend that disclosure, where an appeal is made to the justification of a higher public interest. She traces the development of the action

for breach of confidence. It is, essentially, an equitable remedy.

Dr Cripps points out that the first recorded instance of a public interest defence to an action for breach of confidence appeared in the first half of the eighteenth century. In *Annesley v Angelsea* (Earl) (1743) How State Trials 1229, an English court approved the argument that, although an attorney could not normally be questioned as to a matter which came to his knowledge as such, there was an exception.:

If he is employed as an attorney in any unlawful or wicked act, his duty to the public obliges him to disclose it.

I will not weary the reader of this review with the cases since 1743. Some of them are analysed in the judgments in the *Spycatcher Case*. See *Attorney General for the United Kingdom v Heinemann Publishers Australia Pty Ltd and Wright* (1987) 10 NSWLR 86, NSWCA. Any important cases that were missed are reviewed by Dr Cripps.

Factors which have influenced courts in their assessment of the asserted appeal to public interest have included the subject-matter of the disclosure; the defendant's motives and beliefs; the timing of the disclosure; and the persons to whom the material was disclosed. All of these are well categorised by Dr Cripps' book.

She then turns to the special predicament of public sector employees. In the United Kingdom, there is a panoply of legal restraints. They include the Civil Service Code, specific undertakings secured on entry to and exit from Crown employment and legislation such as the *Official Secrets Act* 1911.

After laying the basis of the duties of confidence and secrecy by employees — both in the public and private sectors — Dr Cripps turns to an analysis of the use of the defence of public interest to actions brought for breaches of secrecy and confidentiality. First, she examines cases of disclosure of matters protected by copyright and patents. Then she turns to a number of economic torts and offences against property. She examines the public interest as a defence to defamation actions which arise out of disclosures of information. There follows an analysis of certain celebrated cases of disclosure, held to be contempt of court, which the media justified by an appeal to the public interest. Probably the most celebrated of these was the *Sunday Times Case*, concerning the thalidomide disaster which ultimately led to amendments to the English law of contempt.

Finally, Dr Cripps examines the public interest as a defence to proceedings initiated in the attempt to discover the identity of employees who have disclosed information. Where there is a 'mole', the possessors of information of high secrecy or high confidentiality are usually most determined in their pursuit of the source. Unless they can identify it, the flow may continue. But the search may bring them into conflict with the claim of the media to protect its sources of information. See

*John Fairfax & Sons Ltd v Cojuangco* (1987) 8 NSWLR 145, on appeal to the High Court at the date of writing.

After her lengthy analysis of the problem, Dr Cripps turns to the two remaining sections of the book. The first is an examination of the law in England which provides protection to employees against victimisation and wrongful or unfair dismissal. Some only of this law is relevant to Australia. Finally, there is a section on reform of the law. In part this is an examination of numerous proposals for reform of the *Official Secrets Act* and of the law of confidence, copyright and breach of contract. It is clear that Dr Cripps favours the adoption of the 1981 proposal of the English Law Commission that there should be a specific statutory defence for the disclosure and use of confidential information where the disclosure can be justified as being in the public interest. The Law Commission would have put the onus of proof on the party alleging unlawful disclosure to show that

the public interest relied on by the defendant . . . is outweighed by the public interest involved in upholding the confidentiality of the information.

This proposal has never been enacted in England, but some of the decisions in the English courts may have come fairly close to adopting a similar principle. See, especially, *Attorney General v Jonathan Cape Ltd* [1975] QB 752 at 770. By the end of the *Spycatcher* litigation it should be known whether the developments of the law in the courts have overtaken the lethargy of Parliament and the Executive to adopt the Law Commission's proposal.

In Australia and New Zealand a somewhat different regime of official secrecy applies, although much of the basic law of confidence is still the same as in England. These similarities and differences must be noted in using Dr Cripps' book.

The United Kingdom Government did not attempt to

stop the publication of *Spycatcher* in Canada or the United States of America, presumably because of constitutional guarantees of free speech and a free press there. In an indirect way, these Constitutions extend their influence beyond their immediate operation to achieve a de facto bias towards the free flow of information — at least in the English-speaking world. It is difficult, in the age of satellites and telefacsimile to keep secrets, once they are out. Dr Cripps does not attempt to put this well-developed body of law, which she analyses precisely, into a social and technological context. The social context is hinted at: better-educated employees and a growing tradition invoking a sense of duty beyond the immediate employer in service to a wider community. But the technological revolution which now spreads information instantaneously around the world is virtually ignored. Yet it was the very fact that once information has haemorrhaged, it cannot readily be retrieved that posed one of the difficulties for the courts asked to prevent the local publication of the memoirs of Mr Wright.

To sum up, this is a useful and analytical book in a fast-moving field of the law. How, in modern circumstances of social and technological change, society and the law should protect an inevitably smaller but still legitimate realm of confidence from the opinionated, premature, or self-interested whistleblower seeking quick profits — this may become the important question for the future.

M.D. Kirby

*Justice Michael Kirby, President, Court of Appeal, Supreme Court of New South Wales.*

This Review appeared in Vol 62 *Australian Law Journal* 397.

## VICTORIAN FOI DECISIONS

### Administrative Appeals Tribunal

#### STEWART & ORS and VICTORIA POLICE

Nos. 870629-870631

**Decided:** 11 December 1987 by Rowlands J (President) and J. Rosen (Member).

*Internal investigation by police following complaints by the applicants — request for documents created in the course of the investigation — claims for exemption under ss.30, 31, 33(1), 35(1)(b) and 38.*

The applicants, who had been arrested in 1986 whilst participating in a demonstration against beauty contests, were subsequently charged and committed for trial. Following their arrest they lodged complaints against the police alleging assault. This led to an investigation by the Internal Investigation Department (IID). Ultimately their complaints were rejected and the Police Complaints Authority invited the applicants to discuss the matter with it. It was the

evidence accumulated by the IID in the course of its investigation which was the subject of the application in this case.

The Tribunal was satisfied on the evidence given by witnesses for the respondent that the IID had taken a number of steps to protect the confidentiality of information received from the public, the police force and other units within the Department. Moreover, in its view, the persons who provided the information were lead to believe that, in the event of charges not being laid, their statements would remain confidential. The Tribunal therefore ruled that the statements were exempt under s.35(1)(b). It held that the statements were provided in confidence and their disclosure would be contrary to the public interest by virtue of the likelihood of witnesses being less full and frank in the provision of information to the Department in the future. The Tribunal

was also influenced in reaching its decision by the possibility of civilian witnesses being harassed if their statements were released.

A further claim for exemption under s.33 was also upheld by the Tribunal. The co-operation of witnesses with the IID was considered to be a 'personal matter' and the disclosure of the content of their statements would, in its view, have been unreasonable in the circumstances.

A claim under s.31(1)(a), the law enforcement exemption, was also successfully relied upon by the respondent. In upholding this claim the tribunal observed:

Insofar as material is sought which may be relevant to the future court hearing against the applicants we are of the view that the whole area of 'criminal discovery' should, as a matter of policy remain with the criminal courts. The concept itself is poorly developed and its relationship with the Freedom of Information Act is ill defined.