

Making allegations of corrupt conduct public

Is it in the public interest?

The basis of my submission is that making allegations of corrupt conduct public may be in the public interest but naming the people involved in the allegations would compromise the fair trial of persons who may be subsequently charged with corruption and should be prohibited unless the accused person or persons consents or until they have been formally charged with an offence.

I believe I am well qualified to make this submission because of my published Master of Laws Thesis: **‘Identification of a suspect before being charged; legitimate freedom of speech or a threat to a fair trial?’**¹ In the thesis which dealt mainly with prejudicial pre-trial publicity I determined, among other things, that the weight of judicial authority is behind measures that are clearly necessary for due process of law and they should take precedence over freedom of speech.² This is particularly true in relation to criminal trials where an individual’s liberty is at stake and the public have an interest in securing the conviction of persons guilty of serious crime. The Law Commission of New Zealand in supporting this position made the following comment:

When a conflict arises between a fair trial and freedom of speech, the former has prevailed because the compromise of a fair trial for a particular accused may cause them permanent harm (for example, because a conviction has been entered wrongly) whereas the inhibition of media freedom ends with the conclusion of legal proceedings.³

¹ Craig N Burgess, “Identification of A Suspect Before Being Charged; Legitimate Freedom of Speech or a Threat to a Fair Trial?” (LLM Thesis, Queensland University of Technology, 2005).

² Borrie and Lowe, *The Law of Contempt* (Butterworths, 3rd ed, 1996).

³ New Zealand Law Commission, *Juries in Criminal Trials: Part Two*, Preliminary Paper 37, 1999) Vol 1, para 289.

As the CCC discussion paper correctly notes, Article 19 of the International Covenant on Civil and Political Rights adopted by the United Nations in 1966 and ratified by Australia in 1991 declares everyone has the right to hold opinions without interference but it is also qualified by other rights such as the right to reputation Article (17) and Article (14) the right to a fair hearing before the courts which conflicts with the right to freedom of speech.

The problem when rights are granted in absolute terms, the legal process of determining how and in what circumstances they are to apply is carried out in a vacuum. When the 'whole' of a right is granted by a Bill of Rights the text gives no guidance about the priorities that are to be reconciled or that govern when one right conflicts with another. For example, the battle between the First Amendment⁴ (freedom of speech) and the Sixth Amendment⁵ (the right to a fair trial) of the US Bill of Rights has been waged in the courts and seemingly won by the First Amendment. According to some legal commentators that victory has enabled the media to exert a corrupting influence over trials and has had a pervasive and detrimental effect on the rights of accused persons.⁶

One need not look far to see several examples of the veracity of this assertion in the celebrity trials of people like the former Managing Director of the IMF, Dominique Strauss-Kahn, O.J. Simpson and the late Michael Jackson which were all attended with massive and manifestly prejudicial pre-trial publicity. Such cases lead to the conclusion that from a justice point of view, prevention is better than a cure. Because by exercising one's right to freedom of speech

⁴ The First Amendment relevantly provides: "Congress shall make no law abridging the freedom of speech or of the press".

⁵ The right to a fair trial arises under the Sixth and Fourth Amendments. The Sixth Amendment relevantly provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed". The Sixth Amendment is applicable to the States by virtue of the Fourteenth Amendment.

⁶ David J O'Callaghan, 'The United States Experience of Unfettered Speech and Unfair Trials: A Case Against an Australian Bill of Rights' (1998) 72 *Australian Law Journal* 958.

one can threaten another person's right to be presumed innocent until proven guilty according to law which goes to the heart of my submission.

Eric Barendt has described free speech, when it publicises or examines the workings of the legal process, as one of those complicated areas of law where the values of free speech compete with other rights and interests.⁷ This is because, on the one hand, there is public interest in fair and impartial judicial proceedings and the maintenance of the dignity and the authority of the courts and, on the other, the public interest in the freedom of the media to report and comment on matters of interest to the public and to subject the administration of justice to critical analysis.⁸

In *Hinch v Attorney General (Vic)* the High Court of Australia referred to a balancing test that must be applied by weighing the public interest in freedom of speech. The extent of the balancing exercise was explained by Wilson J:

It is important to emphasise that in undertaking a balancing exercise the court does not start with the scale evenly balanced. The law has already tilted the scales. In the interest of the due administration of justice it will curb freedom of speech, but only to the extent that is necessary to prevent a real and substantial prejudice to the administration of justice.⁹

The presumption of innocence is a fundamental principle of the common law and has been enshrined in international covenants.¹⁰ The most significant effect of the presumption is its requirement that the prosecution bear the burden of proving all elements of the charges but a logical extension of it is an accused should suffer no detriment as a result of being charged let alone merely suspected. There does not appear any reason why this principle should be disturbed for some supposed greater public interest. The public interest in this context means more than a prurient desire to know the identity of

⁷ Eric Barendt, *Freedom of Speech* (Clarendon Press, 2nd ed, 2005) 214.

⁸ Sally Walker, *Media Law: Commentary and Materials* (Lawbook Co. 2000) 526

⁹ *Hinch v Attorney-General (Vic)* (1987) 164 CLR 41-42.

¹⁰ "The golden thread" per Sankey LC in *Woolmington v DPP* [1935] AC 462 at 481; Article 14 *International Covenant on Civil and Political Rights*.

accused persons. If the media are allowed to name a suspect and the details of his or her alleged misconduct there is a risk that potential jurors will be made aware of, and be influenced by, material that may not subsequently be admitted as evidence in a trial; for example, alleged confessions, hearsay and revelations concerning prior criminal records. This conclusion is supported by Chesterman's study into prejudicial publicity which found jurors chiefly recalled reports of the commission of the alleged offence rather than reports of the arrest of the accused.¹¹ Unfortunately, for an accused the decision to publish a person's name before they are formally charged is not caught by the laws of contempt of court although there is the risk of defamation should the information be incorrect or the charges dropped as imputing the commission of a criminal offence is defamatory, unless the offence is a very minor one.¹²

Therefore it is my recommendation that making allegations of corrupt conduct public may be in the public interest but the naming of suspects before they are charged could compromise the fair trial of the person or persons if they eventually end up charged with corruption and should be prohibited unless the accused person or persons consents. This recommendation is not unprecedented as it closely follows the *Criminal Law (Sexual Offences) Act 1978* (Qld) which contains a restriction on the publication of information that may identify an adult accused.¹³ Sections 6 and 7 of the *Act* also prohibit the publication of identifying information about a complainant and a defendant however, these provisions are much narrower and apply only to reports about certain court proceedings.¹⁴ The restrictions are generally well

¹¹ M Chesterman, J Chan & S Hampton, 'Managing Prejudicial Publicity: An empirical study of criminal jury trials in New South Wales', *Justice Research Centre Law and Justice Foundation of NSW* (2001).

¹² Patrick Milmo and W V H Rogers, *Gatley on Libel and Slander* (Sweet & Maxwell, 11th ed 2008) 61.

¹³ S10 Criminal Law (Sexual Offences Act 1978(Qld) prohibits a person from making or publishing a statement or representation that reveals the name, address, school or place of employment of:

- (a) A complainant(defined as a person who is alleged to be the victim of any offence of a sexual nature) at any time; and
- (b) A defendant charged with only sexual offences before the defendant is committed for trial or sentence.

¹⁴ S6 regulates publications that identify a complainant (and a defendant where their identity could lead to the identification of the complainant, such as when they are related) only applies to a report about a criminal hearing or trial. S7 regulates publications that identify a defendant, applies only to a report about a committal hearing.

understood in the community to be necessary so as not to visit more trauma on sexual assault victims through them being publicly exposed. Interestingly, anonymity for defendants in sexual offence matters was repealed in the United Kingdom in 1988 following a recommendation by the Criminal Law Revision Committee (1984). One of the reasons was the injustice of singling out alleged sexual offenders for special protection 'while other defendants, including those accused of the more heinous crime of murder, could be identified'.¹⁵

This then leads to a question of equity. Why should a complainant enjoy protection from identification when an accused, especially when they have not been charged, be exposed to the full blast of publicity? This is especially true where, as the Commission has noted in its Discussion paper, some complainants are politically motivated or just involved in an exercise to damage a person's reputation without regard for the consequences.

In the case of the media, a 'suspect' or one who has been accused of corruption is one usually identified as such by some judicial authority as it is dangerous for the media, because of defamation laws, to identify someone as a 'suspect' without a credible source to rely on. Therefore making it illegal to name a person accused of crime or corruption until they are formally charged in court does not entirely prevent freedom of speech or open justice as the media would still be able to report the bare facts of the allegations raised thereby maintaining an appropriate balance between freedom of speech and a fair trial.

An anticipated criticism of this recommendation is that the media may argue that if they are prevented from naming a suspect then a whole class of people could be placed under suspicion until the accused appears in court. For example, if the media were prevented from naming a member of parliament or prominent Queensland businessperson accused of

¹⁵ United Kingdom Home Office, *Protecting the public: Strengthening protection against sex offenders and reforming the law on sexual offences*, Cm 5668(2002)19.

misconduct then all MP's or all prominent business people would be regarded as under suspicion by the public. This is fair comment but on the other hand one could just as persuasively argue that the comparatively minor discomfort of a few for a short period of time is a smaller price to pay than the prospect that an accused, by being named before being charged, would not only suffer a gross invasion of their privacy but be at greater risk of being denied a fair trial should they subsequently be charged and therefore suffer far worse consequences.¹⁶ This situation was acknowledged by Queensland's Channel Nine Television Ltd in its submission to the then Queensland Crime & Misconduct Commission's 'Inquiry for Sexual Offences' in 2002 when it deposed that disclosing the identity of an accused as soon as a person is suspected of committing an offence could be unfair to an accused and arguably would constitute an unacceptable invasion of their privacy.¹⁷

It is worth noting that the *Criminal Law (Sexual Offenders) Act 1978* (Qld) has operated without controversy since its existence and is seemingly proof that statutory prohibitions concerning the naming of offenders and complainants can be successfully enforced if there is sound reasoning for their existence.¹⁸ The question of the appropriateness of revealing suspect's name has arisen elsewhere in the past. More than 50 years ago a legislative proposal was introduced into the South Australian Parliament that prohibited the publication of any material that revealed the identity of a person accused of a crime in the absence of a conviction. Although the Bill lapsed it is evidence that the matter has troubled the judiciary and others for years but has seemingly yet to be satisfactorily resolved to the satisfaction of all parties.

¹⁶ See *Jago v The District Court of New South Wales* (1989) CLR 168,23 where Deane J said a person accused of a crime has a right to a fair trial, or rather a right not to be tried unfairly.

¹⁷ QTQ-9 submission to 'The Inquiry for Sexual Offence Matters', *Crime and Misconduct Commission* (2002) 6.

¹⁸ *Criminal Law (Sexual Offenders) Act 1978* (Qld) S 6 Publication at large of complainant's identity prohibited.

Furthermore there is no evidence that the judicial process will become less accountable or that any abuses of power or process would be more likely to occur if the media was prohibited from publishing the identity of accused persons until they have been formally charged. It is important to note that the principle of open justice is not an absolute one as there have always been common law and statutory exceptions to this principle in most Australian jurisdictions where courts are invested with the power to prohibit or restrict the publication of court proceedings.¹⁹

There is little doubt that reporting a person is suspected of an offence by an authoritative person or body, such as the CCC, would seriously damage a suspect's reputation because readers would be entitled to surmise that the suspicion is based on reasonable grounds. The publication under those circumstances has the capacity to diminish trust or confidence in the person and cause others to avoid business or social contact, at least until the suspicion is eliminated.²⁰

Therefore it is my submission making allegations of corrupt conduct public should be prohibited unless the accused person or persons consents, or until they have been formally charged with an offence. That is, because protecting the privacy or reputation of an accused is really about protecting our own rights and holding the community and the media to a standard before we punish a person for an alleged wrong. While the media may dismiss our privacy rights by reminding us that rights are not absolute it is equally valid that one right should not cancel another out when they intersect, rather they should be carefully balanced, and curbed as little as possible to make room for one another. I believe my submission meets that criteria.

¹⁹ See, for example, *Justices Act 1886* (Qld) s 71; *Federal Court of Australia Act 1986* (Cth) s 17 (4); *Crimes Act 1900* (NSW) s 578; *Supreme Court Act 1986* (Vic) s 18.

²⁰ See *Lewis v Daily Telegraph Ltd* [1964] AC 234 (HL) 284-5.

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