PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

INQUIRY INTO
THE RIGHTS AND OBLIGATIONS OF THE MEDIA

FIRST REPORT

OFF THE RECORD

Shield Laws for Journalists' Confidential Sources

REPORT BY THE
SENATE STANDING COMMITTEE ON LEGAL
AND CONSTITUTIONAL AFFAIRS

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Executive Summary

Introduction

0.1 In the last few years there have been a number of journalists dealt with by the courts for contempt when they have appeared in legal proceedings and refused to reveal the identity of their sources of information. This confrontation between journalists and the legal system appears to be receiving increasing public attention and needs resolution. The Committee accordingly has decided to commence its public hearings for this inquiry by focussing on term of reference (b), the need for journalists to protect the identity of their sources of information.

Chapter 2

0.2 There is no Australian jurisdiction which recognises any legal right in a journalist to refuse to provide information required during the course of legal proceedings. A person must obey a lawful direction to answer questions put to him or her during such proceedings.

Conflict between the Code and the Administration of Justice

0.3 The media have been pressing for legislative action to protect journalists from the law of contempt, based on the argument that the ability to keep a source confidential is essential to the free flow of information necessary to a democratic society and that sources of information will dry up if journalists are forced to disclose them.

0.4 Confrontation between the courts and journalists has come about because there is a direct conflict between the relevant part of the Code of Ethics to which journalists subscribe and the requirements of the proper administration of justice.

Clause 3 of the Code says:

> In all circumstances they shall respect all confidences received in the course of their calling.

0.5 On the other hand, judges regard a refusal by a journalist to disclose his or her source as a contempt of court because the privilege claimed is not recognised in law.

Fabrication

0.6 The risk of encouraging fabrication of sources has been a common argument against granting privilege. Rigorous checking procedures and committed maintenance of industry standards would diminish, if not eliminate, this argument. While there is no cogent evidence before the Committee that a change in the law will encourage fabrication where it would not have previously occurred, it is difficult to test any argument that a qualified privilege will increase the incidence of fabrication of sources. The Committee notes that all submitters and witnesses appear to agree that the majority of journalists subscribe to their Code and behave ethically.

Defining a journalist

0.7 Anyone can call himself or herself a journalist. No formal qualifications, professional recognition, registration or licensing is required before a person can create a piece of writing, or film or video or audiotape, and have it published. From time to time a politician, a sportsperson, an academic or a person who fits no particular description can do journalistic work.

0.8 A number of definitions have been put forward in legislative proposals, such as in a bill in 1993 to amend the *Evidence Act 1929* of South Australia. The Committee's view is that all of these definitions lack the precision required if a legal privilege is to be afforded by legislative provision to a specific group of people. Journalists cannot be defined by reference to membership of the AJA because there are many journalists who are not members and there are members of that union who would not normally be described as journalists. In light of the difficulty of defining a journalist it may be necessary to find a solution to the issue of confidential sources which does not require an exhaustive definition of the group to which it should attach.

When is disclosure required?

0.9 As a general principle, information sought in legal or quasi-legal proceedings must be relevant to the issues in question. In pre-trial applications the High Court has approved an approach involving the balancing of the public interest in the proper administration of justice (which requires that cases be tried on the basis of all the relevant and admissible evidence) and other competing public interests, such as national security, (which require the suppression of certain information). This approach requires the applicant to demonstrate that disclosure is 'necessary in the

interests of justice'. In interlocutory proceedings, the limited protection offered is only in defamation cases, and probably not if malice is in issue.

0.10 Failure to answer as directed is a common law contempt in the face of the court or a statutory offence, punishable by fine or imprisonment.

Chapter 3

0.11 The line of recent cases which has brought attention to and public debate upon the issue of shield laws for journalists is examined. All these cases have highlighted the dilemma created by the present state of the law in Australia as articulated by the High Court in *John Fairfax & Sons v Cojuangco* (1988) 165 CLR 346.

0.12 The chapter includes an examination of the legal principles applied in these cases and the authorities upon which those principles have developed.

Investigatory bodies

0.13 The issue of confidential sources has drawn attention to the growth in power of investigative statutory bodies and the danger of intrusion on personal and press freedom they pose.

Recommendation 1

The Committee recommends that, if there is to be any privilege for journalists against disclosure, it should apply in all legal and quasi-legal proceedings, including proceedings before investigative bodies. (Para 3.38)

Chapter 4

The Fourth Estate

0.14 This chapter examines the place of the media in our constitutional democracy as the 'fourth estate'. It deals with the proposition that the media should be placed alongside the Parliament, the Executive and the Judiciary as the fundamental components of our constitutional system of government. The decisions of the High Court in *Nationwide News Pty Ltd v Wills*[1] and *Australian Capital Television Pty Ltd v The*

1 *[1992] 66 ALJR 658*

Commonwealth [No 2] [2], would have encouraged supporters of this proposition although judicial statements in these cases stop short of specific reference to the part the media plays in Australia's Constitutional balance.

0.15 The Committee considers that the media does play an integral part in the maintenance of good government in this country. It provides a major instrument for the collection and dissemination of information. This is vital to the protection of freedom of speech.

Investigative journalism

0.16 Investigative journalism usually involves searching out the kind of information which is not readily available. People who disclose confidential information may have good reasons, other than possible breach of some statutory prohibition, to want their identity kept secret. If the media's role as the fourth estate is accepted and the importance of investigative journalism in that role is recognised, confidential sources should have at least some protection. They serve to ensure the continuing flow of information which enables the public to keep the government and other institutions accountable for their actions.

0.17 The Committee accepts that sources are an important tool used by the media in fulfilling its role as a facilitator of free communications. There is high risk that important information will not be provided if anonymity cannot be offered to the source. If this did happen, it would be detrimental to the success of the media as the vehicle for the carriage of vital information to the public. The Committee is not convinced, however, that the risk is so great that ensuring absolute and permanent anonymity is appropriate. The issue has to be considered in light of similar considerations affecting other professions and, more importantly, competing public interests.

Chapter 5

Other confidential relationships

0.18 Journalists are not the only group of people who are faced with problems arising from a perceived need to keep information confidential. The Committee has taken note of the Law Reform Commission of Western Australia's examination of a number of others including lawyers, priests and

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2 *[1992] 66 ALJR 695*

doctors. In this context there are significant differences between the privilege journalists lay claim to and those which apply to other occupations.

0.19 For example, one obvious distinction between doctors, lawyers and priests on the one hand and journalists on the other is the greater hurdles that need to be cleared in order to enter the occupations pursued by the first three groups. It appears to the Committee that there is more stringent quality control in relation to the practice of professions, like the priesthood, medicine and the law. Doctors and lawyers who engage in unethical conduct can be prevented from continuing to practise their profession. There is no corresponding sanction for journalists. Exclusion from the union does not prevent a journalist continuing to work. The consequences of straying from proper standards in other occupations are much greater than is possible in relation to journalists. In any event, legislative protection for doctors and priests is available in few jurisdictions and in most cases subject to the discretion of the court. (For example, in Victoria, section 28 of the *Evidence Act 1958* provides that a cleric may not divulge, in any civil or criminal proceedings, any confession made to the cleric in his professional character. It also provides that a physician or surgeon may not divulge any information acquired from a patient in any civil suit. In each case, the prohibition is subject to the patient or penitent consenting to the information being disclosed.)

0.20 The report of the Law Reform Commission of Western Australia on Professional Privilege for Confidential Relationships includes journalists amongst that category of people who might properly attract the legal privilege to maintain confidentiality about their sources of information, even when giving evidence to a court. The report recommends a solution capable of applying to a number of relationships including priest and penitent, doctor and patient and lawyer and client. The Committee agrees that this is a proper approach to the general issue of how the law should deal with information obtained on the basis that it would be kept confidential, but in the context of this inquiry into the Rights and Obligations of the Media the Committee will confine its consideration to matters to do with the relationship between a journalist and his or her source.

0.21 In this context, the Committee does not accept that journalists have a claim to such a special position that they should be accorded a privilege which takes priority in all circumstances. Ultimately, the courts must remain the final arbiter of the fundamental rights of citizens as laid down by the law.

Chapter 6

Balancing public interests

0.22 Recommendations in this report have been considered in the context of determining what balance should be struck between competing public interests. Competing public interests have been considered in the context of determining priorities. Public interest is an elusive concept but one on which a number of arguments about privilege has been based. When there are a number of competing public interests involved in the resolution of an issue, like the present one, a balancing exercise must be undertaken in order to determine which of them ought properly take priority.

0.23 An absolute privilege in favour of allowing confidential sources to remain secret would not allow for the proper balancing of these competing interests. One important public interest lies in ensuring that everybody receives a fair trial. It is in the interests of a fair trial that all relevant evidence be available at that trial and that it be accurate. To create a situation which makes it impossible in some cases to properly access relevant evidence potentially defeats a fair trial. In order to balance competing public interests the Courts recognise that none can be absolute.

0.24 In determining the balance, it must be possible for the interests of justice in a particular case to override the claim for privilege to keep a source secret. The judge must have the power to determine the appropriate balance between competing interests.

0.25 It is necessary for the court to determine how important the information in question is to the proceedings. The level of importance will vary from *irrelevant* to *essential to the matter before the court.* This issue will always be determined on a case by case basis.

Defamation

0.26 The conflict between the freedom of the press and the proper administration of justice in civil proceedings can become acute in defamation actions. It was put to the Committee that defamation may be a greater restriction on the freedom of the press than the lack of a privilege for journalists to keep their sources confidential. It can inhibit public investigation and discussion of events which are important in the public interest.

0.27 Defamation laws differ from State to State and, so far, all efforts to attain uniformity have failed. Whatever the state of the law of defamation, to allow a journalist to keep secret the source of allegedly libellous or slanderous material is to deny the person defamed the fullest opportunity to obtain redress for the wrong done to her or him by the publication. The "newspaper rule" recognises at least a prima facie need to respect confidences. However, it only applies at the interlocutory stage. At a defamation trial, the question of malice is commonly at issue and it becomes important to identify the source in order to assess the motive behind the disclosure by the source of the allegedly defamatory material. For the media this operates as a fetter on free speech. For the victim of the publication the denial of access to the source frustrates the legal process on which he or she relies for redress.

0.28 Despite these legitimate criticisms of the substantive law relating to defamation, the cost and complexity of defamation proceedings mean that an action for it can be resorted to by only a minority of people. Accordingly, the Committee is not convinced that defamation law acts a major check upon the role of the media to inform the public. It may cause hesitation when the media proposes to publish information about a public figure of substantial means. But even for these persons defamation actions are costly and often protracted. For these reasons they are of doubtful value as a form of redress for most individuals.

Chapter 7

The Options

0.29 The Committee has looked briefly at the arrangements for the protection of sources in place in a number of other western democracies. These range from no protection to absolute privilege. Some qualified safeguards, like that given by section 10 of the UK Contempt of Court Act, are criticised for the fact they do not provide any greater protection than the common law. Absolute privilege is favoured in jurisdictions with legal systems different to ours. There are difficulties in transposing this privilege into the law as administered in Australia.

0.30 The overseas regime which has been given the closest attention in Australia is section 35 of the New Zealand *Evidence Amendment Act (No 2) 1980.* The effect of this provision is that courts have a general discretion to excuse a witness from answering a question or producing a document, having regard to the confidential nature of the communication,

the special relationship that exists, and to all the other circumstances of the case.

0.31 Each of the courses taken by other jurisdictions has attracted both criticism and support. The Committee has identified three possible courses Australia might take in dealing with a claim for a privilege to preserve the secrecy of a source's identity:

1. do nothing;

2. legislate for absolute privilege; or

3. legislate for a privilege qualified by a structured discretion in the Court to overrule it.

0.32 A number of the arguments for and against each option are set out in Chapter 7.

0.33 The Committee is concerned that under the current law in Australia a number of apparently conscientious, experienced and ethical journalists have found themselves either imprisoned or fined for standing by what they considered to be their ethical and moral obligations. The Code of Ethics is a set of internal rules developed by the union but it has no status in law.

Do nothing

0.34 To do nothing may well be to deny journalists the support they need to carry out investigative journalism in the best way possible, to facilitate communications as well as they otherwise would and to inform the public as freely as it is entitled to be informed. They need the protection of legislation complemented by an effective code of ethics to enable them to do these things.

0.35 In the Committee's view, the gaoling or fining of journalists acting according to their conscience has demonstrated that the current law has failed to adequately deal with and guide the balancing of the demands of the public interest in a fearless press serving the community's right to freedom of communication and the demands of the public interest in the proper administration of justice.

Absolute privilege

0.36 One major criticism of absolute privilege is that it fails to take account of two very important competing public interests. If there were to be an absolute privilege, when it came to the crunch, the proper administration of justice would always be overridden. This could lead to injustice. The court needs to be able to perform the balancing function. The Committee also found there is very little support for the introduction of an absolute privilege for journalists' sources. There are a number of very weighty arguments against such a proposal in the context of Australian society. In particular, absolute privilege leaves the decision about whether the confidence is relevant, essential or important to legal proceedings entirely in the hands of the journalist. The Committee is convinced that the risk that such a position would lead to injustice in specific cases is high and should therefore be avoided.

Privilege qualified by a structured discretion

0.37 Various forms of a qualified privilege have been debated to date. Some of these are examined in Chapter 7. Many of them vary only in the matters listed to be taken into account by the court when considering whether to override a claim of privilege. One particular issue which deserves close attention is whether the court is able to fully test the veracity of information which has come from a confidential source.

0.38 Despite the dangers inherent in legislation which creates lists of factors to be taken into account by a court, the Committee believes that such a list will assist judges in reaching a decision appropriate to each case. The balancing of competing interests has still to be undertaken on the basis of the relevant facts of the case. Guidance in this form will promote consistency of decision making.

0.39 The Committee is persuaded that there is a need for the justice system to acknowledge the special role played by the media in maintaining our democratic system of government. At the same time, the media must not abuse that special role and must be accountable for its actions.

0.40 The Committee has considered the various proposals for a discretionary privilege which have been put forward during the inquiry and the expressions of support and criticisms of them by witnesses and submitters. The Committee has concluded that legislation for a form of statutory judicial discretion to excuse a journalist from answering questions

about the identity of a confidential source is the best way to balance competing public interests.

0.41 The Committee wants to emphasise that any change in the existing law should not proceed unless the media establishes its credibility as a responsible, competent and fair minded institution by adopting the measures recommended elsewhere in this report, particularly in Chapter 9.

Recommendation 2A

The Committee recommends enactment of amendments to the Evidence Acts (Commonwealth and State) to provide that a journalist who has received information from a source on a confidential basis which is subsequently published will not necessarily be compelled to answer questions relating to the identity of that source. The court could, of its own motion or on the application of a party, and having considered each of the factors listed below, order the journalist to answer questions relating to the source's identity on the basis that the public interest in the administration of justice in that particular case outweighs the public interest in maintaining the confidentiality of the source. (Para 7.66)

Recommendation 2B

The Committee recommends that the factors to be considered by the court in the exercise of this discretion include:

- Whether the evidence about the source's identity is essential to the issue of the case, for example the guilt or innocence of a person accused of a crime, or the truth of statements made about the plaintiff in a defamation or other civil matter;

- Whether there is doubt about the truth of the relevant information and the veracity of that information is important to the proceedings before the court and whether it cannot be tested in any other way;

- Whether maintaining the confidence is concealing criminal activity;

- Whether the witness has been given the opportunity to contact the source in order to seek a waiver;

- Whether the communication was made in circumstances which make it reasonable that it be revealed;

- Whether the communication is of such a nature that it is reasonable that it be revealed;

- Whether the disclosure of the information will have an adverse or beneficial effect upon the community;

- Whether the interests of national security are threatened and whether the identity of the source is integral to that threat;

- Whether disclosure is necessary for the protection of life or health;

- Whether withholding the evidence about the identity of the source will cause unfair prejudice to a party to the proceedings;

- Whether the evidence is obtainable by other means which will not add significantly to the time taken by, or the costs of, the proceedings.

0.42 The Committee is not in favour of proceedings in camera to consider whether a confidential source should be revealed because that would undermine the fundamental requirement of justice being done in open court. At the same time the Committee recommends that the Court retain its present power to conduct proceedings before it as the Court thinks best in the interests of justice.

0.43 In the Committee's view the most appropriate solution to the issue is the passing of legislation to equip journalists with a privilege to keep the identity of their sources secret but to give the court a structured discretion to override it.

Chapter 8

Contempt

0.44 The Committee has considered the LRC position on contempt, and in particular its recommendation that there should be two possible modes of trial for the offence of contempt in the face of the court, namely at the discretion of the presiding judge, trial by either himself or herself or trial by a separate bench from within the same court. The Committee has

concluded that such an arrangement would be crucial to the successful application of the structured discretion.

Recommendation 3

The committee recommends that any contempt proceedings be dealt with in the manner recommended by the Australian Law Reform Commission in its report on Contempt, namely that the presiding judge have the option either of dealing with the matter himself or herself or of referring it to a separate court. (Para 8.8)

Penalties

0.45 The Committee is firmly of the view that an open ended penalty, that is, a term of imprisonment until the person complies with the order, should never be an option. The Committee also concludes that penalising a refusal to answer in circumstances which are less than flagrant abuse of the authority of the court should not include imprisonment.

0.46 The Committee is concerned to see that a person who has demonstrated a commitment to his or her code of ethics, even though they are not enshrined in law, is not punished for that commitment with a heavier penalty than the person who is before the court for engaging in criminal conduct, such as official corruption. Such a result does not sit comfortably with common notions of fairness.

0.47 A number of witnesses drew attention to the possibility that the court might, when it is unable to ascertain the source of evidence given by a journalist because of an undertaking as to confidentiality, proceed on the basis there is no source. There is a danger that such an approach might skew the result of the case. Something might be taken to be a fact when, in reality, it is not. Injustice might result. The Committee does not favour the creation of an assumption that there is no source when the identity thereof is not revealed. Such a result would conflict with the recommended structured discretion.

0.48 The Committee has concluded that there remains a place for the law of contempt in dealing with the conflict between the journalists' intent to preserve confidential sources and the courts' determination to see to the administration of justice. Any solution which calls for an overriding order by the court must have a sanction for the failure to comply with it. The situations where such enforcement procedures will be necessary will be

significantly reduced by the adoption of the solution recommended in Chapter 7.

Recommendation 4

The Committee recommends:

- After the tests set out in Chapter 7 have been satisfied, if a court orders disclosure of a confidential source and the journalist refuses to comply, that failure should be dealt with as contempt of court.
- When such failure to comply is so treated, the presiding judge should have the option either of dealing with the matter himself or herself or of referring it to a separate court. (See recommendation 3.)
- The appropriate punishment for such contempt should be a matter for the discretion of the court from a wide range of options. If the proceedings during which the alleged contempt occurred are criminal, the journalist should never be subjected to a greater penalty than the accused in the criminal proceedings. (para 8.34)

Chapter 9

Accountability

0.49 The Report examines the accountability mechanisms already in place and discusses some of the proposals which have been made to improve their effectiveness. Neither the Australian Press Council, the Judiciary Committees of the AJA nor the Australian Broadcasting Authority presently have sufficient power to enforce standards of ethical behaviour effectively.

0.50 The Committee considers that before journalists can be given any consideration for special treatment, they have to gain the confidence of the public that such special treatment is deserved and will not be abused. The public needs to have confidence that the media is fulfilling its important role in a responsible manner.

0.51 As accountability is important across the whole range of journalistic activity, not just to the question of protection of confidential sources, it is not likely to be helpful to delay reform affecting confidential sources until full accountability is obtained. Once the media has adopted a new Code of Ethics, and an effective disciplinary mechanism for enforcing it, it would be appropriate to enact the legislative reform of the kind recommended by the Committee. If journalists become more accountable their credibility in the eyes of the community will increase.

0.52 The Committee urges that steps be taken to establish a closer relationship between the Australian Press Council and the MEAA. Cooperation between these two bodies would provide greater opportunity to enhance accountability in the print media.

Recommendation 5

The Committee recommends that steps be taken to establish a closer relationship between the Press Council and the MEAA. Cooperation between these two bodies would surely provide greater opportunity to enhance accountability in the print media (para 9.24).

0.53 The lack of protection against defamation suits for the publication of findings of the AJA Judiciary Committees is seen as a serious limitation on their ability to disseminate information about the consequences of unethical behaviour and to instruct working journalists about what is regarded as ethical behaviour.

Recommendation 6

The Committee recommends that statutory protection against defamation be provided to enable the AJA Judiciary Committees, after all rights of appeal have been exercised, to publish their findings without fear (para 9.30).

0.54 It is also important that the principles of any code of ethics for journalists be adhered to by both editorial and ownership sections of the media. A number of organisations have established their own codes of practice which largely reflect the AJA Code but usually contain considerably more detail. These are said to apply to staff at all levels.

Recommendation 7

The Committee recommends that, in addition to the adherence of practising journalists to the AJA Code of Ethics, all other key participants in the media, especially editorial staff and proprietors, should adopt a code of ethics, or a code of practice, which embodies a set of ethical principles in broad conformity with the provisions of the AJA Code of Ethics (para 9.45).

External regulation

0.55 The Report considers a number of proposals for the external regulation of journalism, including licensing, legislation, and the setting up of external statutory bodies, but the Committee is not persuaded that there is sufficient reason in Australia for taking this path. The dangers of political interference and the development of fetters on freedom of speech are seen by the Committee to be real enough to prefer the continuing encouragement of improved self-regulation. The fullest exertion of peer pressure should be exercised to raise the standards of ethical behaviour amongst journalists in order to gain the confidence and support of the public.

Education and training

0.56 The Committee has noted an increase in availability of journalism courses. Media organisations should be encouraged to engage journalists who have obtained qualifications through specialised tertiary education along with those with merit through experience. This will enhance the credibility of journalists in the public's eye.

Other jurisdictions

0.57 A short examination of the status of codes of ethics in other jurisdictions is included in this Chapter and some conclusions drawn about the relationship this has to the protection of freedom of speech and to the level of regulation.

0.58 Journalists' unions in those places where freedom of speech is enshrined in written constitutions are less inclined to assert in their codes of ethics that freedom of the press is an overriding principle to which all others are subject.

Conclusions

0.59 The Committee has concluded that, as long as there is no proper process of accountability for journalists, a danger remains in according them a privilege which might be abused. In a society where investigative journalism is regarded as an important part of the freedom to inform, a media which is prepared to go after what is important risks exceeding the bounds of the acceptable. In order to protect that freedom and to engender a vibrant media which will pursue its role as watchdog with enthusiasm it may be inevitable that the occasional unethical journalist will come to notice. If the media gets out of hand, as some would say has happened in the United Kingdom, then the need for an independent and powerful review body based on statute increases.

0.60 At this stage the Committee does not favour licensing as a regulatory approach to the maintenance of ethical standards in Australian journalism. It has been widely agreed by witnesses and submitters that the majority of journalists are ethical. The Committee does not consider that the agenda should be run by an over reaction to a few exceptions.

0.61 It is up to the media to establish credibility in the eyes of the community through effective self-regulation. It needs to satisfy the public at large that this can be done without external supervision or a legislatively imposed set of rules.

Recommendation 8

The Committee recommends:

- That clause 3 of the Code of Ethics be amended by the MEAA to remove the absolute character of the obligation it imposes on journalists to maintain confidentiality so that they can, with a clear conscience, comply with a court order made in the appropriate case to identify a source;

- That the MEAA establish a committee to improve the self regulation of journalists;

- That the Press Council be given power to impose and enforce sanctions on the print media. This should be done by legislation if necessary;

- That the MEAA and the Press Council establish closer links in an endeavour to improve the practice of journalism;

- That statutory protection against libel be provided to enable publication of the decisions of the AJA disciplinary committees;

    a. as a means of providing a more effective sanction against recalcitrant journalists;
    b. to better inform the public about the means by which journalists regulate themselves; and
    c. to improve community trust in journalists and justify in their eyes provision for the qualified privilege recommended in Chapter 7;

- That the MEAA act to increase the professionalism of journalists generally:

  (a) by setting standards for journalism;
  (b) by seeing to it that proper training is provided for them; and
  (c) by having effective disciplinary procedures in place. (Para 9.78)