

Chapter 2 - The Issue

Why is this Committee examining shield laws?

2.1 Investigative journalism, it is said, could not survive without confidential sources. The Law Reform Commission of Western Australia identified five reasons why journalists want to protect their sources:¹

1. in order to preserve a contractual arrangement between the journalist and his or her source;
2. in order to obtain further information from the same source in the future;
3. in order to adhere to the journalistic Code of Ethics;
4. in order to ensure continued employment which may depend on adherence to rules of conduct which include maintenance of confidentiality; and
5. in order to act in accordance with a conscience-based belief in the freedom of the press and the pivotal role it plays in maintenance of a democratic society.

This last one has been emphasised in recent cases involving contempt.

2.2 In recent times a number of journalists have been sent to gaol, threatened with such punishment (that is a suspended sentence) or fined for refusing during legal proceedings to reveal the source of published

¹ *'Discussion Paper on Professional Privilege for Confidential Communications' 1991, pp. 94, 95.*

information provided to them in confidence. There is no Australian jurisdiction which recognises any legal right of a journalist to refuse to provide information required during the course of court proceedings. The following passage of the High Court in *John Fairfax & Sons v Cojuangco* is generally regarded as a statement of the current Australian legal position:

It is a fundamental principle of our law, repeatedly affirmed by Australian and English courts, that the media and journalists have no public interest immunity from being required to disclose their sources of information when such disclosure is necessary in the interests of justice.²

2.3 A person must obey a lawful direction to answer questions put to him or her during court proceedings. So a journalist must obey a lawful direction to answer a question in court about the identity of a source of information. The legal argument is that unless the courts can compel answers they will not be properly informed. They will thus be hindered in the proper administration of justice in a particular case. This may contribute to an undermining of public confidence in the legal system. More importantly it may well lead to an injustice.

2.4 The media have been pressing for legislative action to protect journalists from the law of contempt in cases where they invoke an ethical obligation to keep secret the identity of a confidential source. It bases its claim on the argument that the ability to keep a source confidential is essential to the maintenance of the free flow of information in a democratic society and that sources of information will dry up if journalists are forced

² (1988) 165 CLR 346 at p.354

to disclose them. Unless they can guarantee anonymity they will not be trusted with information which needs to be disclosed in the public interest.

2.5 The Law Reform Commission of Western Australia received a reference on professional privilege as a direct result of the gaoling and fining of Tony Barrass, a journalist then employed by the *Sunday Times* in Perth.³ It published a report of which this Committee has made much use.

Journalistic ethics and the administration of justice

2.6 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.

2.7 The Media Entertainment and Arts Alliance (MEAA) is the union to which many journalists belong. The Australian Journalists Association (AJA) now forms a part of the MEAA. The AJA first established its code of ethics in 1944 and it has completed one major review to date (in 1984).⁴ Journalist members of the MEAA are morally and ethically bound by the Code of Ethics. Its preamble requires members to stand by their fellow members in observing the Code's ethical and professional standards. It emphasises that 'respect for truth and the public's

³ *DPP v Luders (unreported), November 1989*

⁴ *The MEAA is conducting a further review of the code and its enforcement mechanisms at the time of drafting this report. This is examined in more detail in Chapter 9 of this report.*

right to information are overriding principles for all journalists⁵.

2.8 Clause 3 of the Code is the directly relevant clause, on which journalists rely when protecting the anonymity of their sources. It says:

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

2.9 The obligation is expressed in absolute terms. Some journalists maintain that where they have been provided with information on an undertaking that the identity of its source will remain confidential, this clause of the Code of Ethics creates a conscience based inability for journalists to disclose the name. They believe they do not have the option of departing from its terms even when ordered to by a court and seek a legal privilege to maintain confidentiality. This conflicts directly with the needs of the administration of justice, particularly when the information is crucial to the resolution of the matter before the court, whether it be in criminal or civil proceedings. Courts regard a refusal to disclose a journalist's source as a contempt of court because the privilege claimed is not recognised in law.

2.10 Clause 1 of the Code is also material to the issue. It raises a question about the internal consistency of the Code. It requires journalists to:

report and interpret the news with scrupulous honesty by striving to disclose all essential facts and by not suppressing

⁵ *Code of Ethics, published by the Australian Journalists Association Section of the Media, Entertainment and Arts Alliance.*

relevant, available facts or by distorting by wrong or improper emphasis.

It could be said that the mere promise of anonymity to a source might conflict with this obligation to strive to disclose all essential facts or not to suppress relevant facts. In some cases the identity of the informant may be news in itself or at least very important to the cogency of the report.

2.11 Without knowing the identity of the source questions about motive in making the disclosure or assessments of veracity may be impossible for the media consumer to properly consider. This internal conflict in the Code weakens to some degree the arguments about the imperative for a journalist to abide by the Code as a whole and in particular to be bound by the absolute nature of clause 3.

2.12 In the current debate it is important to remember that the Code is not a legal instrument creating binding obligations but rather a statement of moral aspirations and ethical standards - criteria for the professional conscience.

Do journalists fabricate sources?

2.13 Many times during the course of the Committee's inquiry caution was sounded about the dangers in granting journalists a privilege against disclosure. If journalists know they will never be brought before a court to account for their stories they may be encouraged to fabricate sources. Both

in his written submission⁶ and in oral evidence Mr Stewart Cockburn, a retired journalist, related a series of instances, over a number of years, of fabrication of sources by journalists for a good story. On the other hand a number of witnesses, including Mr Cockburn, asserted that by far the majority of journalists are ethical and have never fabricated a source.

2.14 The risks of fabrication can be minimised by rigorous checking processes within the media industry addressing both the integrity of the journalist claiming a confidential source and the integrity of the source.

Verification procedures

2.15 Several witnesses described the procedures undertaken within particular media organisations to verify sources before stories are published. For example, the following exchange during evidence describes the practice within the Fairfax Group of newspapers:

Senator SPINDLER - When journalists in a paper ... obtain information from a confidential source, are they asked to try and corroborate that information in other ways so that they could be ready to prove veracity and authenticity without divulging the source? Is that part and parcel of instructions to, or education of, journalists in your organisation, to your knowledge, or in other organisations? Or is it assumed to be simply good practice, and people do not worry too much about whether they actually do it or not?

Ms HAMBLY - It is assumed good practice, and it is also part and parcel of the normal training in the kinds of things that journalists at Fairfax would be told. There are other factors, though. One of the general rules of practice is that, if

⁶ Submission 14, pp 113 & ff.

somebody says something about me to a journalist, then the journalist should ring me and say, 'X said this about you. Have you got a comment?' Journalists are instructed that it is good and proper practice to do that.

...

If you are running a story that is particularly significant, and you are having it legalled at prepublication legalling, the lawyer will inevitably - even if he or she does not ask, 'What is your source?' - will ask, 'How confident are you of your source? Have you checked with anybody else? Is there anybody else you can ask? Is there any other way we can get some kind of comfort that this is okay?'

2.16 There was scepticism expressed by other witnesses, however, about how widespread such careful practices might be amongst other media organisations⁸. On the other hand, Mr Meakin from Channel 9 assured the Committee that there is a 'quite rigorous checking process when it comes to the major allegations'.⁹ The ABC stressed the importance it placed on corroboration of sources.¹⁰ The Herald and Weekly Times' Professional Practice Policy, published in November 1993, requires its journalists, amongst other things, to:

1.1 Take care not to publish inaccurate, misleading or distorted material and make every endeavour to get all sides of the story and present same fairly.

1.2 Always verify facts and quotations and corroborate any critical information.

4.4 Make every effort to verify independently any material gained

7 Evidence, (Ms Hambly) p.518-519

8 Evidence (Mr Turner), p.519

9 Evidence (Mr Meakin), p.51

10 Evidence (Ms Walker), p.52

from confidential sources.

4.5 Tell your editorial supervisor/s whenever you have made a promise of confidentiality.

2.17 Many experienced journalists have sources with whom they have developed a relationship of trust over a number of years.¹¹ Editorial staff recognise the experience of these journalists and have confidence in them properly checking the veracity of the source, without checking for themselves. The industry standards for the practice of journalism and need for individual journalists to attract the respect of other journalists, that is, peer pressure, also militate against fabrication. Reputation plays an important part in a career in journalism; but there is a perception in the community that in some sectors of the media industry a reputation built on doubtful practices may be seen as an advantage.

2.18 The Australian Press Council has pointed out that various ethical codes for the practice of journalism provide, with equal emphasis, for the protection of confidential sources and **against** their fabrication. The likelihood of a minority who will engage in unethical conduct is conceded. But the Council states it has no evidence to suggest that it is more widespread than in other occupations.¹² It points out that good reporters use confidential sources for assessment and verification of information they already have rather than to gain access to highly sensitive and newsworthy information. On the down side, however, is the journalist who won acclaim

11 *Evidence (Mr Moor)*, p.224-225, (*Ms Cornwall*) p.50

12 *Submission 39, Appendix S11*, p.5

from the industry by being awarded the Pulitzer Prize in 1981 on the basis of what later proved to be a fabricated story.¹³

2.19 Fabrication of a source, or the invention of information, as distinct from the careless publication of information provided by a person in confidence without properly checking the authenticity of that information, is an issue clearly covered by the Code of Ethics. All submitters and witnesses appear to agree that the majority of journalists subscribe to their Code and behave ethically. They go on to argue that to provide some legislative protection for those ethical journalists against being forced to reveal a source will not have any effect on the incidence of fabricated sources. A few unscrupulous journalists do it now or have done it in the past, without any legal protection being in place. There is certainly no cogent evidence before the Committee that a change in the law will encourage fabrication where it would not have previously occurred.

Who is a journalist?

2.20 Membership of the AJA branch of the MEAA is one relatively easy way of giving definition to the majority of journalists. The MEAA advised the Committee that not just anyone can join the union. A person has to be deriving the majority of his or her income from performing journalistic work¹⁴. However, not all journalists are members of the union. Also, not all members of the union perform journalistic work in the commonly understood meaning of that expression. For example, *Hansard*

¹³ Cited in Submission 39, Appendix S11, p.6

¹⁴ Evidence, (Mr Ryan) p.105

reporters, who are members of the AJA do not perform the sort of work dealt with in this report. Trying to identify what is a journalist beyond the membership of the journalists' union is not easy. If a shield law is to be put in place, to whom will it apply? If it is to protect the interests of all who practice the craft, trade or profession (however called) of journalism, some way of identifying practitioners may need to be devised.

2.21 As things stand anyone can call himself or herself a journalist. No formal qualifications or professional recognition or registration or licensing is required before a person can create a piece of writing, film, video or audiotape and have it published if he or she can find a willing publisher or broadcaster. A politician, a sportsperson, an academic or a person who fits no particular description can do journalist-like work.

Various definitions

2.22 During the course of the Committee's inquiry a number of possible definitions have been considered. The Law Reform Commission of Western Australia looked at some definitions in its *Report on Professional Privilege for Confidential Communications* of May 1993 (Project No. 90). One respondent to the discussion paper which preceded the report suggested:

Journalists are those engaged regularly and frequently and substantially in collecting, preparing, writing, and processing articles, words or images for the above.¹⁵

¹⁵ Law Reform Commission of Western Australia, *Project No. 90*, p.73

2.23 The Australian Press Council proposes that journalists should be defined widely:

A journalist is a person connected with or employed by a newspaper or magazine of general circulation, press association, news service, or radio or television station.

Without limiting the generality of the above, journalist includes a member of the Australian Journalists' Association section of the Media, Entertainment and Arts Alliance.¹⁶

2.24 A Bill to amend the South Australian *Evidence Act 1929* was introduced into the Legislative Council by the Australian Democrats in August 1993. It proposed an absolute privilege for a 'professional journalist', and defined the term as follows:

"professional journalist" means a person engaged in collecting information for publication in the print or electronic media.¹⁷

Under this approach, as soon as a person is engaging in media activities in a professional capacity he or she might be properly regarded as a journalist.

2.25 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. The practice of journalism can be so broad and various that it could include almost anybody who aspires to it.

¹⁶ Submission 39, Appendix S11, p.8

¹⁷ Clause 3

2.26 The difficulty of defining a journalist was emphasised in evidence by Mr Chadwick of the Communications Law Centre:

There are problems in actually defining a journalist. One of the reasons why in our submission on shield laws we have come down in favour of a wide-ranging test which looks at the relationship is that we do not think it is sensible to try and define journalists in the statute.¹⁸

2.27 Another witness, Mr Briscoe, had the following to say on this issue:

Under some definitions a person who simply writes a letter to the editor is a journalist in that he is dispersing information within the community, and to control legally everyone who writes a letter to the newspaper, or everyone who submits articles to the media for publication, is probably a bit unrealistic.¹⁹

2.28 The AJA is quoted in the Report of the Western Australian Law Reform Commission as making the following comment on this issue:

[J]ournalism has no formal qualifications. The range of people writing for the media includes people who may usually work in other fields. No single grouping covers all journalists in the media. The AJA's membership is the largest single group, covering more than 90 per cent of journalists. However, it does not cover editors of daily papers, contributors who earn most of their income outside journalism and those who do not wish to

¹⁸ Evidence, (Mr Chadwick) p.189

¹⁹ Evidence (Mr Briscoe), p.379

join the AJA or who have resigned from the AJA.²⁰

2.29 Certainly journalists cannot be defined solely by reference to membership of the AJA because there are many journalists who are not members and there are members of that union to whom the matters dealt with in this report would have little if any relevance. 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. In some jurisdictions, the solution has been to direct attention to the range of circumstances in which material is provided on a basis of confidentiality by one person to another and to accord a privilege to those relationships generally, rather than to focus upon the particular issues involved when a journalist receives information from a source who wishes to remain anonymous.²¹ This avoids the definitional difficulties discussed. These are examined in chapter 7.

In what circumstances do courts order disclosure?

2.30 The question of confidential sources has come up in many different legal contexts, in criminal proceedings, civil proceedings (commonly defamation), and before investigative bodies with wide powers, like the Independent Commission Against Corruption (ICAC) in New South Wales. The issue may arise in the context of journalists' giving evidence before

²⁰ *Report on Professional Privilege for Confidential Communications, Law Reform Commission of Western Australia, p.73*

²¹ *Section 10 Contempt of Court Act 1981 (UK); section 35 Evidence Amendment Act (No.2) 1980 (NZ)*

Parliament or one of its committees. As a general principle, information sought must be relevant to the proceedings in question. This should eliminate fishing expeditions except before investigative bodies where fishing is seen as a legitimate undertaking.

2.31 These circumstances were conveniently described by the Communications Law Centre in its submission as follows:²²

1. a journalist may be called as a witness before a court or tribunal or investigatory agency (such as a Royal Commission) and asked questions which go to the identity of her or his source;
2. a journalist and her or his employer may be party to a defamation or analogous action in which the plaintiff seeks, by way of discovery or interrogatories, to ascertain the identity of the journalist's source;
3. a prospective plaintiff may make an application for preliminary discovery to ascertain the identity of the source for the purpose of suing her or him.

2.32 In inquisitorial proceedings, such as those conducted by the ICAC, the force of the argument of relevance is weakened considerably by their wide terms of reference. In proceedings before a court, on the other hand, any information sought must be relevant to the case before it. If relevant and admissible, information must be disclosed at trial. In interlocutory proceedings in defamation actions and, perhaps, other analogous actions the newspaper rule applies allowing the source to remain confidential in many cases. The High Court stated in *Cojuangco* that 'disclosure of the source will not be required unless it is necessary in the

²² Submission 113, p.1192

interests of justice. So disclosure may not be compelled at an interlocutory stage of a defamation or related action and even at the trial the court may not compel disclosure unless it is necessary to see justice is done between the parties.²³ In pre-trial discovery the information must be disclosed even when the respondent is not the person who obtained the information.²⁴

2.33 In pre-trial applications the High Court has approved a balancing approach requiring the applicant to demonstrate that disclosure is 'necessary in the interests of justice'²⁵ In interlocutory proceedings, the limited protection offered is only in defamation cases and related actions, and probably not if malice is in issue.

2.34 The exercise of the court's discretion to order or not to order disclosure in pre-trial applications may be based on different considerations from those applying in interlocutory proceedings in defamation. Disclosure may be more readily ordered in pre-trial applications, designed to assist weaker plaintiffs in disputes with more powerful defendants.

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

²³ *Cojuangco* at pp 643 62 ALJR.

²⁴ *Flint, Prof D, 'Protection of Journalists' Confidential Sources - Australia and the United States', p.11. Paper delivered at Legal Convention, Hobart 1993.*

²⁵ *Cojuangco* at p. 351