Chapter 5 - Confidential Relationships Compared

What is the nature of the relationship between journalist and source?

5.1 When a journalist receives information in confidence there is usually some kind of undertaking by the journalist to the person who provides the information that his or her identity will not be revealed. This undertaking would usually be given whether or not the information is subsequently published. As already stated, the Code of Ethics of the MEAA expresses this undertaking in absolute terms. Pursuant to this Code, journalists claim the confidential nature of this relationship entitles them to a right of refusal in any legal proceedings to answer questions which may reveal the identity of a person who has provided such information. The journalist claims the privilege for her or himself on the basis of adherence to the Code of Ethics. The characteristics of this claim which are crucial to the present debate are:

- it relates to the identity of the supplier of the information, not to the information supplied;
- the journalist claims the privilege rather than the source - the Code makes no provision for waiver by the source; and
- it purports to be subject to no other overriding interest.

5.2 It needs to be recognised in this debate that journalists are not the only group of people who are faced with this dilemma of revealing or not revealing information when confronted with an order to do so by a

court. This chapter examines other confidential relationships and compares them with that of the journalist and his or her source. Much of the material has been extracted from the Law Reform Commission of Western Australia's Report on Professional Privilege for Confidential Relationships (LRC of WA Project No. 90) of May 1993.

Legal Professional Privilege

5.3 The first, and possibly the one most frequently compared to the relationship between a journalist and a source, is that between a lawyer and his or her client. This privilege enables clients of lawyers who are witnesses in judicial proceedings to withhold certain confidential information, even when it is relevant to the issues in the proceedings. The privilege exists for the benefit of the client but the lawyer has the duty in the course of the relevant proceedings to make the claim. Only the client has the power to waive the privilege and to consent to disclosure of the information which is otherwise protected. The privilege can be claimed at the interlocutory stages of civil proceedings, during the course of a civil or criminal trial and in non-judicial proceedings such as those before investigatory bodies.

5.4 Unlike the 'newspaper rule' (discussed in Chapter 3), legal professional privilege is more than a rule of practice. It is a fundamental legal principle which can be relied on generally, including in situations outside judicial or quasi-judicial proceedings, such as during the exercise of search and seizure powers. It covers communications between:

(1) lawyers and:-

(a) their client;

(b) an agent of a client, if made for the purpose of obtaining legal advice for actual or contemplated litigation;

(c) third parties, if for the purposes of litigation; and

(2) client and third parties for the purpose of litigation.[1]

5.5 The commonly stated rationale for this privilege is that public interest in maintaining the confidentiality of certain communications between lawyer and client overrides the public interest in the court being able to access all relevant information. The two conflicting public interests are both integral to the effective administration of justice, based as it is on the adversarial system. It is the nature of this system which makes it important for the client to be able to freely communicate with her or his lawyer and to be selective about the information which he or she places before the court.

5.6 The privilege is essential to the relationship between lawyer and client. Without it the client could not place full confidence in the lawyer. The High Court has made the following statement about this aspect of the privilege[2]:

> This it does by keeping secret their communications, thereby inducing the client to retain the solicitor and seek his advice, and encouraging the client to make a full and frank disclosure of the relevant circumstance to the solicitor.

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1 *S.B. McNicol, Law of Privilege (1992)*

2 *Grant v Downs (1976) 135 CLR 674 at 685 per Stephen, Mason and Murphy JJ.*

The Law Reform Commission of Western Australia refers to the lawyer as the client's "alter ego".[3]

5.7 Despite the discussion above, legal professional privilege is not absolute. There are a number of exceptions. These are:

- where the communication was made to facilitate the commission of a crime or fraud;
- where the innocence of the accused depends on the admission of the evidence;
- where the evidence is needed to establish the whereabouts of certain children; and
- where the information did not form part of the confidential communication between the lawyer and client.

5.8 These show that in certain cases the public interest in the administration of justice is more important than the public interest in the protection of the confidential relationship.

Priest and penitent

5.9 The recognition of a privilege for confidences between priests and penitents varies from jurisdiction to jurisdiction. In Western Australia, for example, priests have no right either at common law or pursuant to statute to refuse to divulge confidential information. In Tasmania, on the other hand, section 96 of the *Evidence Act 1910* provides:

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3 *LRC of WA, Project No 90, pp.32 - 33.*

> (1) No clergyman of any church or religious denomination shall divulge in any proceeding any confession made to him in his professional character, except with the consent of the person who made such confession.
> (3) Nothing in this section shall protect any communication made for any criminal purposes.

5.10 The Northern Territory[4] and Victorian[5] provisions are similarly subject to the consent of the penitent. The Victorian provision does not include an exception in relation to criminal purposes. The New South Wales[6] provision makes no reference to consent but is subject to the criminal purpose exception. In New Zealand[7] the position is the same as Tasmania. The Commonwealth's *Evidence Bill 1993*, clause 127, is of the same effect as the New South Wales provision.

5.11 In discussion of this issue by both the Australian Law Reform Commission[8] and the Law Reform Commission of Western Australia[9] it was said by representatives of various churches that a law requiring a priest to disclose either the fact of a confessional statement or its content would never be complied with. Priests regard themselves as bound by confessional confidentiality under the law of God and for them this will always take priority over civil law.

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4 *section 12, Evidence Act 1939 (Northern Territory)*

5 *section 28, Evidence Act 1958 (Victoria)*

6 *section 10, Evidence Act 1898 (New South Wales)*

7 *section 31, Evidence Amendment Act (No 2) 1980 (New Zealand)*

8 *The Law Reform Commission, Reports No. 26, 1985 and 38, 1987 on Evidence*

9 *LRC of WA, Project No 90, p78.*

5.12 It is worth noting that in its interim report on Evidence[10] the Law Reform Commission recommended enactment of a discretionary provision to cover confidential relationships generally. This approach was retained in the final report[11]. However, in the Commonwealth *Evidence Bill 1993*, resulting from these reports, the only confidential relationship to be given any kind of protection (apart from legal professional privilege) is that arising from religious confessions. This may reflect general community respect for clerics and the confidences they hold. The reluctance of prosecutors and parties in civil proceedings to require clerics to reveal confidential information was noted by the Law Reform Commission of Western Australia.[12]

5.13 If the arguments for a privilege for priests are based on overriding public interest, such interests might be:

- the promotion of restitution and repentance;
- the meeting of general community expectations;
- the provision of psychological and spiritual solace:
- the maintenance of freedom of religion; and
- the accommodation of ethics and conscience-based beliefs.

5.14 There are a number of other interests involved when the issue of the privilege arises which are arguably more important than, or as important as, those listed above. For example, there will clearly be instances

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10 *LRC, Report No 26, 1985*

11 *LRC, Report No 38, 1987*

12 *LRC of WA Project No. 90, p.77*

where the information held by the priest, although hearsay, will be vitally relevant to the question of guilt or innocence of an accused person. Withholding the information may lead to the wrongful conviction of an innocent person. Secondly, protection which is accorded only to formalised confessional procedures has the potential to be discriminatory. On the other hand, if it extends beyond formal confessional statements, the protection faces enormous definitional difficulties.

Doctor and Patient

5.15 As in the case of those between priest and penitent, protection of confidential communications between doctor and patient varies from jurisdiction to jurisdiction. Again there is no protection in Western Australia. Section 96 of the Tasmanian *Evidence Act 1910* deals with the relationship comprehensively as follows:

> (2) No physician or surgeon shall, without the consent of his patient, divulge in any civil proceeding any communication made to him in his professional character by such patient, and necessary to enable him to prescribe or act for such patient unless the sanity of the patient is the matter in dispute.
> (2a) No person who has possession, custody, or control of any communication referred to in subsection (2) or of any record of such a communication made to a physician or surgeon by a patient shall, without the consent of the patient, divulge that communication or record in any civil proceedings unless the sanity of the patient is a matter in dispute.
> (3) Nothing in this section shall protect any communication made for any criminal purpose, or prejudice the right to give in evidence any statement or representation at any time made to or by a physician or surgeon in or about the effecting by any person of an insurance on the life of himself or any other person.

5.16 The Northern Territory has a similar provision[13] as does Victoria, with some added details.[14]

5.17 Where there is no such legal protection, doctors are not generally considered to be bound by any ethical, moral or religious obligation to maintain confidentiality if faced with a legal requirement to reveal the information. The Australian Medical Association's Code of Ethics, paragraph 6.2.4, does not preclude a member from revealing confidential information when required by law. It refers to confidence 'in the usual course' but adds that, if a presiding judge overrules the claim, the doctor has no option but to comply.

Other professional relationships

5.18 There are a number of other professional relationships which entail the issue of confidential communications. These are discussed in the report of the Law Reform Commission of Western Australia. The Committee lists them here for completeness without further discussion. They include clients and accountants, researchers, Family Court counsellors, nurses, social workers and private investigators.

Police informants

5.19 During the Committee's inquiry witnesses representing the

13 Section 12, *Evidence Act 1939*

14 Section 28, *Evidence Act 1958*

Australian Federal Police and Victoria Police[15] described the arrangements they have in place for dealing with police informants. At first glance, this relationship seems much more comparable to that of a journalist and her or his source than any of the relationships discussed in the preceding paragraphs. For both police and journalists' informants disclosure of identity is the sensitive issue. In both cases there may be serious personal consequences for the informer resulting from that disclosure.

> We are both in professions that depend on people giving us information. We are both in professions where those people need to be protected, but at the same time the credibility of the administration of justice is a very important aspect to be considered. If police have informers, lives can be at risk if their safety and security is divulged.[16]

5.20 Both relationships could be ongoing in nature. Police argue that the accountability measures they have in place for the handling of sources, should be equally applicable to journalists.

5.21 The Committee was advised in particular of the procedures followed by the Australian Federal Police[17] whereby all informants are entered on a register, whether or not they are paid for their information. The register is kept highly confidential and accessed only by senior members of the force. The informants are subsequently identified by number. All contact with registered informants is documented. This kind of mechanism,

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15 *Evidence (Cmdr Hadgkiss and Ms Munday), p.149 & ff.*

16 *Evidence (Ms Munday), p.151*

17 *Evidence (Cmdr Hadgkiss), p.149. Victoria Police have a similar system - Evidence (Ms Munday), p.157*

it was argued, militates against the risk of fabrication of sources by keeping the officers relying on them closely accountable. It was suggested that media organisations might establish their own formal mechanisms for monitoring and supervising the use of sources. This might enhance their credibility to a greater degree than the current informal arrangements discussed in Chapter 2.

5.22 In the police context, disclosure of the identity of informants occurs only when ordered by a court, and then sometimes in confidence by handing it to the judge on paper. Police are 'extremely loath to divulge the name of that person'[18] but will do so if ordered by a judge. They accept that ultimately it is a question of 'the interests of the accused versus the public interest immunity.'

5.23 One witness, Mr Chadwick, urged the Committee to consider carefully crucial differences between these two relationships, the most important being the consequences flowing from the use to which the information is put.

> In the case of police acting on behalf of the state, there is the consequences of prosecution. The purpose of the journalist is to disclose only and, from that disclosure, police or state action may (emphasis added) result.[19]

This witness went on to say that for a disclosure to a journalist to have any further consequence would create a significant risk of journalists becoming

18 *Evidence (Cmdr Hadgkiss), p.152*

19 *Evidence (Mr Chadwick), p. 164*

an annexure to the power of the state. This would undermine the media's role as an independent watchdog.

5.24 Another distinguishing feature is the benefit which may become available to some police informants. These include the possibility of immunity from prosecution or a reduced sentence for their own criminal conduct. Arguably, this kind of incentive would reduce the risk of sources drying up which is said to be present when journalists are forced to reveal their sources. Informants, whether to law enforcement authorities or to the media, may be paid. The AFP have indicated, however, that the majority of informants come forward for neither money nor mercy, but are respectable and ordinary citizens who pass on, often in social intercourse, their suspicions of another person's activity, such as tax evasion.

Whistleblowers

5.25 In most jurisdictions in Australia it is unlawful, and even criminal, for an official to ventilate allegations of impropriety and maladministration in government and public administration. South Australia is the only State to have enacted legislation to protect this activity, the *Whistleblowers Protection Act 1993*, although a number of other States and Territories have either introduced a bill or instigated an inquiry into the need for such legislation. At the Commonwealth level a private member's bill remains before the Senate[20]. The Senate Select Committee on Public Interest Whistleblowing has recommended the enacting of legislation to

20 *Whistleblowers Protection Bill 1993, introduced by Senator Valentine on 12 December 1991 and, after rewriting, represented by Senator Chamarette on 5 October 1993*

protect whistleblowers[21].

5.26 Legislation to protect whistleblowers is designed to encourage the disclosure of illegality, waste and corruption. It usually does this not by concealing the identity of the whistleblower but by making it an offence to take action against him or her for making the disclosure.

5.27 There are some very clear differences between the protection claimed by journalists and that given to whistleblowers. First, the protection is provided to the whistleblower, rather than the person to whom the information is given. Secondly, whistleblower legislation usually provides for disclosure to be made to an appropriate authority. (See for example section 5 of the *Whistleblowers Protection Act 1993* (SA)). Subsection 5(4) lists possible candidates for the role of the appropriate authority. Subsection 5(3) seems to allow for disclosure to be made to a journalist by the inclusion of the following:

> "(but this is not intended to suggest that an appropriate authority is the only person to whom a disclosure of public interest information may be reasonably and appropriately made)".

5.28 It has been said that if administrations are to discharge their obligation to act in the public interest, they should adopt institutional arrangements to facilitate the exposure and investigation of wrong-doing in government and, at the same time, protect the legitimate interests of

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21 *Senate Select Committee on Public Interest Whistleblowing In The Public Interest report tabled 31 August 1994*

complainants, the persons against whom allegations are made and the public.[22]

5.29 If such arrangements were in place would journalists need a legal entitlement to keep their sources secret? Would it be possible to achieve the media's aim to keep governments and other institutions accountable by protecting their sources against any consequences flowing from disclosure without keeping their identity a secret? Clearly whistleblower protection is not the complete answer:

> Legislative protection of whistleblowers is in no way the only method, or even the most effective method, for combating government fraud. Other practices or institutions have a demonstrated record of achievement in this respect: the list includes internal auditing, effective policing, public inquiries, parliamentary questions, investigative journalism and, probably the simplest method of all, the time-hallowed "leak".[23]

5.30 Those who support the need to protect journalists' sources state that whistleblower protection is not enough. Mr Halliday, of the MEAA, said that many sources would remain silent if confidentiality could not be guaranteed.[24] This was supported by the Fairfax Group:

> If there is a value in whistleblowers legislation, and I think there often is, then there is also a value in shield laws for journalists. Legislation which attempts to protect somebody who becomes

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22 *Finn, Paul, "Whistleblowing", Canberra Bulletin of Public Administration, No 66 Oct 1991, pp. 169-171*

23 *McMillan J., "Blowing the Whistle on Fraud in Government", Canberra Bulletin of Government Administration, No 56. Sept 1988, 118 at 122.*

24 *Evidence (Mr Halliday), p. 327*

> publicly known to have leaked a document or whatever, may be helpful. But there are a lot of people who, when contemplating whether or not they would reveal some information they think the public should know, would not take that step at all if they thought that what they were going to be embroiled in was some kind of dispute with them about whether or not they should have done it. So they are not going to be interested in making that disclosure at all if they are going to become publicly known to have done it.[25]

5.31 The Law Reform Commission of Western Australia compared the two relationships in the following terms:

> Whistleblower protection is a different concept from professional privilege although the practical effect of both may be the same. The former provides protection to the source of information against legal and other consequences of disclosure. The latter offers a mechanism whereby information relevant to judicial proceedings can be withheld without the parties to the information being in contempt of court for failing to disclose the information. Whistleblowing generally involves the disclosure of information. Privilege involves the withholding of information. However, in relation to the confidentiality of sources of journalists' information the two concepts can become entwined. Journalists are interested in keeping secret, even from judicial proceedings, the confidential identity of their sources of information. In the majority of cases, the source will want his identity to remain confidential in order to avoid embarrassment or reprisals from others, or some other detriment. A privilege for journalists may enable journalists to withhold from courts the identity of their sources of information. Whistleblower protection legislation ... would offer the source (whistleblower/informer) a significant degree of protection at law against reprisals, legal responsibilities, etc including suppression of his identity.[26]

25 *Evidence (Ms Hambly), 510*

26 *LRC of WA, Project No 90, p. 71*

A Privilege for Journalists distinguished

5.32 There are a number of significant differences between the privilege journalists lay claim to and those which apply to other confidential communications. Firstly, in nearly all the other cases the privileges belong to the person who has instigated the confidential communication, the person who has consulted the professional, whereas journalists lay claim to the privilege for themselves.

5.33 Secondly, the purpose of the privileges in the other cases is to keep the content of the confidential communication secret, rather than to publish the contents and keep the identity of the person making it secret. None, with the possible exception of the case of the whistleblower, is intended to actually facilitate the publication to the world at large of the content of the communication. The Attorney-General's Department states that the keeping of the source secret "removes any effective means litigants or courts have to check or challenge the evidence the journalist has given."[27] Publication under such a privilege facilitates the exposure to the public of information by unaccountable sources.

5.34 Legal professional privilege in particular is distinguished by the place it has in the justice system. It is said to facilitate the operation of that system by making possible the provision of advice and representation by legal professionals.[28] Privilege for journalists not to disclose a source has, according to the Attorney-General's Department, a greater potential to

27 *Submission 115, p.1336*

28 *Attorney-General's Department, Submission 115, p.1325.*

distort the result of a court proceeding and to undermine public respect for the administration of justice than any other privilege. It can, the Department said, be positively misleading.[29]

5.35 The representatives of the Law Society of South Australia made the following comparison between legal professional privilege and that claimed by journalists:

> ...legal professional privilege is quite a separate issue. Firstly, you have to analyse, we say, the nature of the result of the communication that is to take place as a result of the confidential communication from confidential source. In the case of legal professional privilege, we all know that it is a one-to-one situation of a person seeking advice from a solicitor, that person having the privilege, and for the sole purpose of obtaining that legal advice for the sole purpose, as the courts have dictated, of anticipated or actual litigation. So the nature of the communication is very important. One must characterise what is the nature of that communication and for what purpose. If we look at the other side of the coin, and look at and ask those same questions - what is the nature of the communication that is being made to a journalists and for what purpose - it is for the public dissemination, presumably for some purpose, whatever that purpose may be. Now that is quite a different category from the category that we are speaking of. It is not proper in our respectful submission to relate the two, if that has been done. One must also look at the question of a further factor in relation to the communication in relation to the solicitors, and that is that it is in the interests of the administration of justice.[30]

29 *Submission 115, p.1337*

30 *Evidence (Mr Walsh), p.269*

5.36 The Committee does not see the two privileges as comparable and does not accept the argument based on the proposition that the privilege journalists claim is similar to legal professional privilege.

5.37 There are some similarities between the factors which influence doctors and priests when faced with a legal requirement to reveal confidences and those which influence journalists. All these groups claim some adherence to moral or ethical obligations to maintain the confidence. In some jurisdictions that obligation for doctors and priests, but not for journalists, is supported by legislation.

5.38 One obvious distinction between doctors 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 former occupations. These issues will be discussed more fully in chapter 9. There is more stringent quality control in relation to the practice of professions like the priesthood, medicine and the law than in relation to the practice of journalism. The consequences of straying from proper standards in other occupations are much greater than is possible in the case of journalism.

Do journalists have a special claim?

5.39 The Law Reform Commission of Western Australia's Report includes the relationship between journalists and sources amongst a group of professional relationships which entail confidential communications. Others in the group have been discussed above. The Report recommended a discretionary solution capable of applying to all these groups. The

Committee considers this to be a sound approach to the legal issue, but, in the context of this inquiry into the Rights and Obligations of the Media does not propose to make any recommendations relating to professional groups other than journalists. 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.