Chapter 7 - The Options

Introduction

7.1 Several possible solutions to the confrontations between the courts and journalists experienced in Australia have been proposed to the Committee. These are considered in this Chapter along with what is in place in western democratic jurisdictions overseas. The Committee's preferred approach is identified.

Other jurisdictions

7.2 A number of jurisdictions have statutory protection for confidential sources in a variety of forms. These have been examined by the Law Reform Commission of Western Australia in its *Report on Professional Privilege for Confidential Relationships*. What follows here is largely drawn from the work of the Commission in that Report. The majority of provisions from other jurisdictions create a form of structured discretion to be applied in each case.

United Kingdom

7.3 Section 10 of the *Contempt of Court Act 1981* (UK) provides:

> No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime.

This is a privilege limited by the exigencies of justice. The House of Lords recently examined this section in *X Ltd v Morgan-Grampian Ltd*[1]. It held that the court was required by the section to balance competing public interests in determining whether justice in a particular case required the privilege to be overruled. The court recognised the public interest in the free flow of information and in protecting the media by including in the privilege information which might indirectly identify the source.

7.4 Lord Bridge identified two factors relevant to the balancing of the competing interests:[2]

> 1. the nature of the information obtained from the source. That is the greater the legitimate public interest in the information the greater the need for protection;
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> 2. the manner in which the information was obtained by the source. That is, even if the information was obtained illegally, if there was a public interest in its disclosure, protection from disclosure would be favoured.

There appears to be some dispute amongst commentators about whether section 10 really achieves much protection beyond that provided by the current common law. It creates a presumption in favour of privilege, placing the burden of establishing the need for disclosure on the person seeking it. Arguably, this will not be difficult to do.

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1 *[1991] 1 AC 1*

2 *ibid at p.43-44*

United States of America

7.5 Twenty-eight States of America have enacted a variety of laws giving privilege. They embrace both qualified privilege and absolute privilege. In Oklahoma, for example, the privilege "does not apply with respect to the content or source of allegedly defamatory information, in a civil action for defamation wherein the defendant asserts a defense based on the content of the source of such information."[3] In New York absolute privilege is provided against disclosure of both the information and the identity of its source.[4] A qualified privilege is also provided in relation to unpublished information. Some States recognise a non-statutory qualified privilege based on the First Amendment of the Constitution and similar State provisions.

Germany

7.6 In Germany an absolute privilege has been in place since 1975 allowing confidentiality for both the identity of the source and the information provided by the source. This privilege is specifically applied to search and seizure as well as to people giving evidence in court proceedings.[5] This does not require the source to have been confidential in the first place. It also protects information which might indirectly lead to identification of the source. The protection for the identity of the source

3 *Oklahoma Stat Ann Title 12 s 2506*

4 *(New York) Civil Rights Law S 79-H (as amended 1990)*

5 *Art 53 and 97 (respectively) of Code of Criminal Procedure (StPO), and art 383 Code of Civil Procedure (ZPO)*

of published information has apparently been uncontroversial in Germany but the protection for information has attracted debate. People have argued that it fails to take into account the interests of the parties who need the information by preventing them from having access to what might be vital material. It applies equally in all kinds of proceedings, both civil and criminal, without taking account of the danger of wrongful convictions or the unfair ruining of reputations. Other criticisms have been:

- that the class of people who can claim the privilege is very broad, as it applies to anyone who contributes to a relevant publication, and
- that it is confined only to periodicals and newspapers, excluding books, films and other vehicles of communication.

The Netherlands

7.7 No privilege of any form exists in the Netherlands, although in 1991 a Bill was proposed by a member of Parliament and published for comment. It represented a very detailed approach, covering a wide range of information. It sought to create an equal balance between the various competing interests.

Austria

7.8 In Austria absolute privilege for journalists has been available for many years. Since 1982[6] the right of journalists who are witnesses in judicial proceedings to refuse to reveal confidential information, or the

6 *(Austria) Press and Other Publications Media Act 1981*

sources thereof, has been extended to media owners, editors and other workers in media enterprises. These were added to eliminate the danger of undermining the privilege by questioning others who might know about the confidences. The protection applies to all media, including electronic media and agencies and services.

7.9 Arguably, this indicates that Austrian society values the privilege very highly, possibly more highly than the proper administration of justice. However, without a closer examination of the function this privilege serves in an inquisitorial legal system such as exists in Austria, it is not possible to fully evaluate the argument.

Sweden

7.10 In Sweden[7] there is a statutory prohibition on journalists and others in the print media against revealing the identity of a confidential source of information. Evidence which identifies a confidential source is inadmissible. The privilege is subject to an exception relating to State security or to violation of professional secrets by officials. It is unavailable in criminal cases which do not affect freedom of the press. In such cases the court may find disclosure is made necessary by an overriding public or private interest. Anonymity will not be protected in cases where the disclosure of the information amounts to high treason or to espionage or to a related crime of a serious nature.

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7 Sweden has had a Freedom of the Press Act since 1776

Denmark

7.11 Media law in Denmark provides a limited privilege for journalists. It is subject to an exception in criminal cases where the relevant witness is essential to the case. Nor does the privilege apply where the publication is considered to have served no useful social purpose and it concerns a breach of professional secrecy or other related offence and significant public or private interest requires the case to be determined on the basis of all the relevant evidence.

New Zealand

7.12 Of all the overseas examples, the relevant provisions in New Zealand have received the most attention in Australia. Section 35 of the *Evidence Amendment Act (No 2) 1980* (New Zealand) has attracted a considerable amount of support amongst the media and others as a model for protection of sources in this country. The Commonwealth Attorney-General's Department advised the Committee, however, that they were unable to identify a reported New Zealand case in which a journalist has actually claimed the privilege.[8]

7.13 Section 35 provides as follows:

> (1) In any proceeding before any Court, the Court may, in its discretion, excuse any witness (including a party) from answering any question or producing any document that he would otherwise be compellable to answer or produce, on the ground

8 *Attorney-General's Department Submission 115, p. 1334, footnote 62*

that to supply the information or produce the document would be a breach by the witness of a confidence that, having regard to the special relationship existing between him and the person from whom he obtained the information or document and to the matters specified in subsection (2) of this section, the witness should not be compelled to breach.

(2) In deciding any application for the exercise of its discretion under subsection (1) of this section, the Court shall consider whether or not the public interest in having the evidence disclosed to the Court is outweighed, in the particular case, by the public interest in the preservation of confidences between persons in the relative positions of the confidant and the witness and the encouragement of free communications between such persons, having regard to the following matters;

(a) The likely significance of the evidence to the resolution of the issues to be decided in the proceeding;

(b) The nature of the confidence and of the special relationship between the confidant and the witness;

(c) The likely effect of the disclosure on the confidant or any other person.

(3) An application to the Court for the exercise of its discretion under subsection (1) of this section may be made by any party to the proceeding, or by the witness concerned, at any time before the commencement of the hearing of the proceeding or at the hearing.

(4) Nothing in subsection (1) of this section shall derogate from any other privilege or from any discretion vested in the Court by any other provision of this Act or of any other enactment or rule of law.

(5) In this section "Court" includes -

(a) Any tribunal or authority constituted by or under any Act and having power to compel the attendance of witnesses; and

(b) Any other person acting judicially.

7.14 The effect of this provision is that, having regard to the confidential nature of a communication made in the context of a special

relationship, courts have a general discretion to excuse a witness from answering a question or producing a document in relation to it.

7.15 A number of the features of this provision were critically discussed in the Attorney-General's Department's submission.[9] First, the 'special relationship' from which the confidence springs appears to be without limit. It certainly goes further than the common law.

7.16 Secondly, the privilege may be accorded on the basis that disclosure would be a breach of confidence, having regard to a special relationship. Yet the balancing test is too broad in that the court has to balance the public interest in having the evidence admitted in the particular case against the public interest in preserving confidences between persons in the position of both the witness and the source. The Department says the test of the likely effect of disclosure on the source is irrelevant.

7.17 Thirdly, the Department is critical of allowing a party to apply for a witness to be excused from answering. This criticism is made on the basis that a party could be motivated by a desire to exclude harmful evidence. This is likely in an adversarial legal system such as ours. A related criticism is that the privilege cannot be claimed by the source of the confidential information, for whom protection is, in the Department's view, most justifiable.

7.18 In *R v Secord* [1992] 3 NZLR 570, the Court of Appeal made the following comments about the occasions when the section is likely to

9 *Submission 115, p 59 - 60*

operate:

> Section 35 is concerned with Court proceedings. If the evidence is important to the determination of the issue, then it is likely that the public interest will favour disclosure; the more serious or important the issue, the more likely that is. ... [F]actors the Court will wish to take into account will include the manner and circumstances in which the information was given, the purpose for which it was given, the seriousness of the reasons for seeking disclosure, and whether there are other means of obtaining the evidence.[10]

7.19 The case itself related to a claim for privilege by a probation officer. The Law Reform Commission of Western Australia referred to comments from New Zealand that the section had not given rise to any particular problems. There does not, however, appear to be any case where it has been tested in relation to journalists.

The Options for Australia

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

1. do nothing;
2. legislate for absolute privilege; or
3. legislate for privilege qualified by a structured discretion.

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10 at p. 575

The following discussion sets out some of the arguments made before the Committee supporting or criticising each of these options.

7.21 The Committee recognises that the Commonwealth does not have the Constitutional power to enact laws which would govern the issue of confidential sources at all times in all jurisdictions. For the purpose of the following discussion that matter is left in abeyance. The debate is about what is the ideal solution. It will then be a matter for the relevant Government to decide whether or not it wishes to adopt the recommendations the Committee makes. The Commonwealth could, of course, lead the way by enacting appropriate legislation for application in federal proceedings and encourage States and Territories to follow. The issue is already on the agenda of the Ministerial Council of Attorneys-General.

The Do Nothing Option

7.22 The first option is to do nothing on the basis that the current state of the law in Australia is appropriate, namely that there is no special privilege accorded to journalists who seek to keep secret the name of their source. If ordered to disclose such information by a court, a journalist who refuses commits a contempt of court and is dealt with accordingly. The courts apply the principles discussed in Chapter 3 and enunciated by the High Court in *Cojuangco*.

7.23 Those who urged the Committee to support the current law drew attention to the danger of the fabrication of sources and stories

increasing if journalists are not kept strictly accountable through the justice system[11]. They argue that journalists should not be treated either as a special group or as being 'above the law'. The interests of the administration of justice are properly and fully protected by the law as it now stands. Any kind of privilege, whether discretionary or absolute, would hinder the operation of the justice system:

> Our position is that before there can be any interference with the administration of justice and the concept that that entails, before it can be impinged on in any way, there must be a very cogent reason for doing so and there must be full disclosure of all the evidence that is relevant to the case - and not only a disclosure of the evidence itself but also the ability to weigh its veracity and test its credibility. In our view, none of the arguments that we have heard in favour of journalists' privilege have that cogency.[12]

7.24 It is said that any protection accorded should be accorded to the source, not the journalist.[13] The argument is that the only possible reason for wanting to keep the identity of a source secret is to protect that source from possible consequences for having provided the information. Privilege should be for the source, not the journalist, to claim, in much the same way as legal professional privilege is for the client to claim. The decision whether or not there should be disclosure should be made by the source, rather than the journalist.

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11 See Evidence at pp 355 & ff and Submission No 13, Mr S Cockburn. Mr Cockburn points out that fabrication is already an issue which, in his view, will be exacerbated by shield laws.

12 Evidence (Mrs Jackson), p.197

13 Attorney-General's Submission 115

7.25 Further arguments against change are:-

- Devising a protective provision will inevitably entail such a number of uncertainties or variables, (in particular the concept of public interest) that legislative formulation is likely to take the position no further than the current common law;[14]

- Shield laws may encourage (or at least fail to discourage) incompetence;

- Journalists have yet to establish their credibility.[15]

- Shield laws are more likely to help incompetent journalists deal with their mistakes, rather than protect their sources. [16]

7.26 On the other hand, the disadvantages of the current legal position have been highlighted by a number of witnesses and submitters. The MEAA described the current situation as follows:

> At this stage we have a right which members of the Alliance rely upon; it just is not recognised by the judicial system. We have a judicial system which is relying upon fines and gaols and suspended sentences to get hold of sources. It just does not work. All you get is journalists going to gaol. The judicial system does not get the name of the source. So, if we stay where we are, at the rate of growth, almost geometric

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14 Evidence (Mr Sarre), p.352

15 Evidence (Mr Sarre), p.351

16 Evidence (Mr Sarre), p.361

> progression as far as journalists being gaoled goes, we will have more and more journalists in gaol and still there will not be any source revealed.[17]

7.27 The MEAA argued that there is 'an absolute lack of recognition by the judicial system that these people are bound by their own code of conduct'.[18] The other point it makes is that the current judicial attitude achieves nothing for the administration of justice because punishment for contempt in the notorious cases (discussed in chapter 3) has not lead to disclosure of the identity of the source. The MEAA says that a law which is consistently ignored is bad law.

7.28 The lack of direction to judges as to what principles to apply to the making of a decision about a refusal to answer will inevitably lead to inconsistent results. Witnesses were of the view that the do nothing option would leave journalists facing gaol sentences[19]. Investigative journalists seeking information confidentially would need be prepared to go to gaol so that they could assure their sources that secrecy would be preserved. Many may take the safer course and apply their skills to writing the social pages. Professor Chesterman of the New South Wales Law Reform Commission had this to add:

> I think that would be regrettable because, while there are statements in some of the cases, including *Cojuangco*, that say judges should only make this insistence when it is necessary, the current way in which that is being used too often involves that

17 *Evidence (Mr Ryan), p. 98*

18 *Evidence (Mr Ryan), p.112*

19 *Evidence (Ms Bacon), p.147*

> requirement not being taken seriously enough. ...
> The way the law is currently structured is, there is some emphasis that the evidence must be necessary or relevant to the proceeding, but there is no instruction to a judge or a magistrate or commissioner to say, even assuming that this evidence is necessary, is the proceeding so important that we must override the public interest in maintaining confidentiality for sources? While that is not there it is so easy for a judicial officer to say that the importance of the proceedings is paramount, the administration of justice must always prevail.[20]

7.29 The Communications Law Centre Submission put forward a similar view when criticising the current judicial approach. The Centre says the Courts fail to take account of the broader interests of the community. Its view is:

> Reading the judgments, one gets the impression that few judges look beyond the particular news organisation or journalist at hand to the broader issue of the role of the media in society. The needs of individual litigants are more often than not accorded paramountcy in the balancing process and in a manner that does not suggest that orders for disclosure will be exceptional rather than routine.[21]

7.30 The Committee is concerned that under the current law in Australia a number of conscientious, experienced and ethical journalists have been imprisoned or fined for standing by what they consider to be their ethical and moral obligations. This situation calls for a remedy. It is an unhappy situation where journalists come into conflict with the law as a consequence of merely doing their jobs conscientiously.

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20 Evidence (Prof Chesterman), p.147 - 148

21 Submission 113, p.1198

7.31 The place of confidential sources in the practice of investigative journalism and the role played by the media in facilitating the exercise of the freedom of communication needs to be codified to ensure that the media can fulfil its purpose by having access to as much information as possible. This would enable the community, journalists and potential sources, to know the limitations placed upon undertakings to maintain secrecy. At present potential sources can rely on nothing more than their own assessment of whether or not the journalist to whom they provide information is prepared to go to gaol to preserve confidentiality.

7.32 In the Committee's view, the gaoling or fining of journalists acting according to their conscience has demonstrated that the current law has not yet reached the proper balance between the public interest in having a fearless press serving the community's right to freedom of information and the public interest in the proper administration of justice.

Absolute Privilege

7.33 The second option considered is the enactment of legislation for absolute immunity for journalists from being required to answer questions about the identity of sources of confidential information. Absolute privilege would allow a journalist to refuse to disclose the identity of a confidential source in all circumstances. This would include journalists as litigants' witnesses and as the occupiers of premises subjected to search warrants. For the immunity to be absolute, such a provision would need to protect the journalist and any other relevant person from questioning which would help identify the source. As has been noted above very few jurisdictions provide

for absolute privilege and some which claim to do so in fact make it subject to limited exceptions.

7.34 Absolute privilege was proposed by the Australian Democrats in South Australia in a Bill introduced into the Legislative Council by Mr Gilfillan in August 1993. By amendment to the *Evidence Act 1929* (SA), the Bill proposed to remove any requirement on a journalist to breach a confidence pursuant to which she or he received information or documents. It achieved this by removing any application of the law of contempt. Before the Committee, Mr Gilfillan argued that a journalist who is determined to keep a source secret will not be coerced into revealing it by the threat of gaol or any other punishment for contempt.[22] He said that for an undertaking as to confidentiality to be really effective it is important that a journalist has confidence in being able to maintain it without being imprisoned.[23] His view was that absolute privilege is the only way to cherish the right to confidentiality.[24]

7.35 One major criticism of providing for absolute privilege is that it fails to take account of 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 Law Society of New South Wales was opposed to absolute privilege because, the Society said, the court must be able to perform the balancing function.[25]

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22 *Evidence (Mr Gilfillan), p.288*

23 *Evidence (Mr Gilfillan), p. 296*

24 *Evidence (Mr Gilfillan), p. 305*

25 *Evidence (Mr Morgan), p. 20-21*

Other witnesses described absolute privilege as 'unrealistic'[26], 'untenable'[27] and 'difficult to make a case for'[28].

7.36 The Committee noted in particular that the Nine Network does not advocate absolute privilege. "We think that the other public interests against which freedom of expression is to be balanced need to be identified and clearly articulated."[29] Mr McLachlan from the Nine Network admitted that most journalists, both within and outside his organisation, would support the notion of absolute privilege but the view of his organisation differed:[30]

> Absolute privilege is something that journalists hold of the utmost importance. I suppose in that respect the Nine Network's organisational view departs from the view of the journalists. I guess we accept that, if there is to be statutory form of protection, there will be a demand that the confidentiality of a source gives way in certain circumstances. Accepting that this is the case, we think it desirable that those circumstances be strictly limited and that they be by way of derogation from an assumption of confidentiality. We think anything short of that does not do justice to freedom of expression.

7.37 This assessment of the view of journalists was supported by the evidence given to the Committee on behalf of the MEAA that their

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26 Evidence (Mr Hurst), p.202

27 Evidence (Mrs Jackson), p. 197

28 Evidence (Mr O'Connor), p. 233

29 Evidence (Mr McLachlan), p.5

30 Evidence (Mr McLachlan), p. 23-24

preferred option would be absolute privilege although, 'in the absence of any political commitment for absolute privilege'[31], the organisation does not presently advocate it. Mr Ryan, who appeared on behalf of the federal office of the MEAA, said:[32]

> Our preferred position obviously is absolute privilege, but we think we are realistic enough - the argument that needs to be debated in this country is the right of free speech versus the right to a fair trial.

7.38 This acceptance of the reality that absolute privilege is not supportable in the present climate was echoed by a number of other witnesses.[33] The Communications Law Centre says that 'it is not the right principle'[34]. The reasons for this view were:[35]

> ... there is no ground for any kind of automatic non-disclosure or absolute privilege against disclosure, since it is quite clear there are different gradations in legal contexts.

Interestingly, the South Australian branch of the MEAA was of a different view about absolute privilege to that of the federal office. It put its view in the following terms[36]:

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31 *Submission 111, p. 1095*

32 *Evidence (Mr Ryan). p. 98*

33 *Evidence (Ms Bacon), p. 135*

34 *Evidence (Mr Chadwick), p. 171*

35 *Evidence (Mr Chadwick), p. 193*

36 *Submission No 117, p.1403*

> First, an absolute privilege is wrong in principle. Two genuine public interests are involved in this issue and neither should be made to override the other in all circumstances by inflexible legislative measures. The courts should conduct the balancing process according to the circumstances of each case.
> Second, we journalists do not want Parliament to single us out as a group for special treatment under the law. Once journalists accept special privileges they may be required to submit to special statutory regulation, perhaps even licensing.

7.39 The Committee has concluded from the evidence and submissions received that there is limited support for the introduction of an absolute privilege for journalists' sources. There are a number of 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 such a position may lead to injustice in specific cases and should therefore be avoided.

Privilege qualified by structured discretion

7.40 The third option which the Committee has examined is to legislate for a qualified privilege which identifies the appropriate balance between the competing public interests which have been discussed. There are a number of forms of this option which have been in the public arena for some time. Examples exist in section 35 of the New Zealand Evidence Act and section 10 of the UK Contempt of Court Act (both discussed above). The proposal of the Law Reform Commission of WA includes many of the characteristics of these provisions.

7.41 Most of these provisions provide a legislative guide for judges in coming to a decision whether or not to excuse a journalist from answering a question about the source of confidential information. They do this by listing a number of factors to be taken into account in resolving the issue. Generally the lists seek to give proper weight to the need to preserve confidentiality of sources whilst ensuring the conduct of a fair trial. In many cases the proposals differ only in the listed factors to be taken into account. Some examples of proposals made to the Committee during this inquiry are discussed below.

Law Reform Commission of Western Australia

7.42 There has been a considerable amount of support for the proposals made by the Law Reform Commission of WA in its Report on Professional Privilege for Confidential Relationships. The Law Council of Australia, for instance, whilst asserting that the present law works well, states that if there is to be a reform, it should reflect this approach, with some additions.

7.43 The Commission's recommendation is based on section 35 of the New Zealand Evidence Amendment Act (previously discussed: see paragraph [7.15]) with some modifications. Its main feature is the creation of a statutory discretion applying to any professional relationship which entails the provision of information confidentially. It incorporates guidelines for the exercise of that discretion. The Commission recommends enactment of a statutory judicial discretion 'to protect confidential information within

any special relationship from disclosure provided that, in any particular case, the public interest in having the evidence disclosed to the judicial proceeding is outweighed by the public interest in preservation of confidences between persons in the relative positions of confidant and witness and the encouragement of free communication between such persons'.[37]

7.44 The draft provision recommended by the Commission requires the Court to have regard to a number of factors when deciding the appropriate balance. These are:

(a) the likely significance of the evidence to the resolution of the issues to be decided in the proceeding;
(b) the nature of the confidence and of the special relationship between the confidant and the witness;
(c) the likely effect of the disclosure on the confidant, any other person or community, taking account of the ethical, moral or religious dictates of those professions or vocations which unequivocally demand non-disclosure, even in the fact of the Court's order to disclose;
(d) any means available to the Court to limit the adverse consequences of a required disclosure of confidential sources of information and any alternative means of proving relevant facts.

7.45 In its submission the Law Council[38] supported this recommendation, subject to further additions which have been proposed by Professor Michael Chesterman of the New South Wales LRC. These additional requirements are:

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37 LRC of WA, Project 90, p. 129 - 130

38 Submission 123, p. 1510

(a) the court would make a finding as to why and how the identity of the informant and/or any evidence that he or she could reasonably be expected to supply is required by a party to the proceedings and whether that information is necessary for the resolution of the specific aims raised in those proceedings;
(b) the judge must also specify what steps have been taken to secure equivalent evidence by other means, and why these steps have proved unsuccessful. The court would be directed to consider an alternative means of proving relevant facts;
(c) the judge must also state the public interests involved in compelling disclosure and preserving the informant's anonymity and make an explicit finding as to which is more compelling and why;
(d) the judge's findings should be open to appeal.

7.46 During the Committee's public hearings, Professor Chesterman confirmed his view that the starting point for these cases should be non-disclosure, to depart from which a case must be made out for overriding the protection given to the confidential information.[39] He went on to explain:

> [Grounds] must be shown for overriding it and they should relate to the necessity of the evidence for the particular proceedings and overall the importance of the proceedings themselves. It is at that second step that one draws distinctions between evidence that might be necessary for a criminal trial for a series of events, which I would say is the highest level of importance, and evidence which may be necessary to enable a more effective remedy in a civil claim, which I would say is important but clearly not as important as the criminal trial example.[40]

39 *Evidence (Prof Chesterman), p. 124*

40 *Evidence (Prof Chesterman), p. 124 - 125*

Nine Network

7.47 The Nine Network's submission supports the call for enacting a judicial discretion governing disclosure and non-disclosure.[41] It proposes that such legislation should have the following features:

- It must give primary weight to public interest in protection of confidential sources. This would require a clear statement that the prima facie position is that journalists will not be required to disclose but that in certain circumstances only the court's discretion may override that prima facie position.

- That discretion must be restricted to situations where it is essential to protect specific public interests which are under immediate and pressing threat from failure to disclose.

- The specific public interests to which this relates are limited to[42]:
  1. protection of national security;
  2. protection of territorial integrity;
  3. protection of public health or safety;
  4. protection of the authority and impartiality of the judiciary;
  5. establishing the innocence of a person charged with a crime;
  6. where the information disclosed by the source was made to facilitate the perpetration of a crime; and
  7. enabling a plaintiff in a defamation action to challenge the veracity of any defence (such as qualified privilege) which relies on the confidential source.

7.48 The Nine Network criticises the recommendation of the Law Reform Commission of Western Australia as failing to attach sufficient

41 *Submission 77, p. 479*

42 *Submission 77, p. 480*

importance to the protection of confidentiality. The Nine Network considers that the West Australian proposal, like section 10 of the UK *Contempt of Court Act 1981* and section 35 of the New Zealand *Evidence Amendment Act (No 2) 1980,* allows disclosure in circumstances where it is not essential.

Media Entertainment and the Arts Alliance

7.49 The MEAA's second option takes a more pragmatic approach than the first, and is supported by the South Australian Branch of the Alliance[43]. This supports the recommendations of the Law Reform Commission of Western Australia with some adjustment. The submission of the South Australian Branch asserts that there is a potent public interest in the free flow of information, consistent with the view of the Nine Network.

7.50 The submission goes on to discuss the variety of public interest considerations to be weighed and makes the following observation about the cases surrounding the issue:

> The cases show that the interests journalists seek to protect are often not minor. Nor are the claims of is 'necessary in the interests of justice' so major in every proceeding that they easily overwhelm the interests in protection of sources, either in the particular case or in the wide sense identified by Justice Kirby [in *Cojuangco*].[44]

43 *Submission 117, pp. 1394 -1402*

44 *Submission 117, p. 1395*

7.51 The submission then identifies the following as the matters which should be taken into account when balancing competing interests in exercising the discretion to order or not order disclosure:

- the type of proceeding - whether civil, criminal or investigative - for example, the interests of justice are strongest in criminal matters;
- the stage of proceedings at which the issue arises - the earlier in the life of legal proceedings the weaker the interests of justice in compulsory disclosure;
- whether the prosecution or defence wants the information - the interests of justice are stronger when it is the defendant in criminal proceedings who wants the information;
- whether the journalist is defendant or witness - the Nicholls case (discussed in Chapter 3) is the only known case where the journalist was defendant rather than witness;
- is the identity of the source vital, or should the information the source provided be the focus?
- courts need to operate from a presumption that the majority of journalists are ethical.

Australian Press Council

7.52 The Press Council has advocated absolute protection for confidential sources as its preferred position, except when there are 'overriding public interest reasons to justify naming the source'.[45] The Council proposes that confidential communications be protected unless:

45 *Submission 39, Appendix S11, p. 7*

(a) they are waived by the source;
(b) they are made to facilitate the perpetration of a crime;
(c) the journalist has reasonable cause to believe the source of information clearly misguided him or her for reasons of economic, political or personal gain;
(d) naming the source is absolutely necessary to establish the innocence of a person charged with a crime.

7.53 In evidence before the Committee Professor Flint had this to say[46]:

> Knowing that the political realities are such that there obviously has to be a compromise, our view is that the line of demarcation should be that you should require journalists to reveal their sources only where there is a specific criminal charge, not the broad-brush fishing expedition, legitimate as it is, of a body like ICAC, and not applications for pre-trial discovery, but only where there is a criminal action for a breach of a serious crime ... Only there, where the liberty of the individual in a criminal case is an issue, do we think it is of sufficient importance for the court to consider whether it ought to require the journalist to reveal his or her source.

7.54 This proposal is not far removed from absolute privilege. Professor Flint's view was that in matters of high public interest, such as exposing a relationship between a president of the US and the head of the Mafia, only the journalist involved would be able to decide whether there is sufficient basis for breaching a confidence.[47] The opportunity for the court to override the decision of the journalist in the interest of justice is therefore very limited in the Press Council's proposal. The Committee is

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46 Evidence (Prof Flint), p. 93

47 Evidence (Prof Flint), p.97

attracted, however, to the prominence given to waiver by the source, which is largely ignored in most other proposals for reform.

Communications Law Centre

7.55 The submission of the Communications Law Centre[48], like that of the Law Council, supports the recommendations of the Law Reform Commission of WA, together with the additions proposed by Professor Chesterman. The Centre proposes that the applicable law should start from the premise that journalists are protected from compulsory disclosure in all but exceptional circumstances. Attention should be paid to how necessary the disclosure is to the satisfactory resolution of the case. This involves two distinct aspects[49]:

- It must be necessary to achieve the particular purpose to which the court or investigatory agency will apply it;
- The particular purpose must be important enough to override the journalist's obligation of confidence coupled with the public interest in maintaining free flow of information.

7.56 The Centre criticises the LRC of WA's recommended solution for failing to provide sufficient structure for the judicial discretion proposed. The additions proposed by Professor Chesterman are said to diminish this criticism.

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48 Submission 113

49 Submission 113, p. 1209

New South Wales Opposition Discussion Paper

7.57 In August 1993 the New South Wales Opposition issued a discussion paper, "Journalists and their Sources". This paper drew attention to the recent cases involving journalists dealt with for contempt of court when they refused to reveal their sources and concluded that the current situation is untenable. The paper proposed a solution which would enable courts to excuse witnesses from answering questions or producing documents on application of the witness or any party. The discretion thus created should take account of several factors[50]:-

- the public interest;
- the importance of the evidence to the successful conclusion of proceedings (it must be shown to be necessary, not just desirable);
- the effect that giving evidence will have on the ability of witnesses to earn a living in their chosen profession;
- the effect of the disclosure on the confidant;
- the freedom of the press to inform the public;
- the availability of alternative means of establishing facts.

The paper recommended amendment of the Evidence Act (NSW) to facilitate this.

Veracity of Information

7.58 Information from a source may include allegations which have

50 *"Journalists and Their Sources: A NSW Opposition Discussion Paper" p.13*

a serious effect on others. The question of whether the information is true may be crucial to the relevant proceedings. It is possible that this would more commonly arise in defamation or other civil proceedings than in criminal proceedings. However, there is still an argument that the interests of justice may require the availability of that source in order to test the veracity of the statements. Certainly it may be the quickest way to get to the truth of the matter. This was recognised by the Commonwealth Attorney-General's Department in evidence.[51]

7.59 Usually the reason a journalist would be required to reveal her or his source in legal proceedings would be to test the veracity of the information. If the journalist is able to prove that truth in any other way, the need to reveal the identity of the source disappears.

7.60 The focus should be on whether the identity of the source goes to the question of proving the truth of the information that formed the substance of the journalist's story. The importance of this matter was confirmed by Mr Hellaby's evidence[52]. He emphasised to the Committee that at no stage of the pre-trial discovery procedure he was subjected to was he required to establish the veracity of the allegations which had been made to him and which he published. In response to Senator Spindler's questions in regard to this matter, the Attorney-General for Queensland had this to say:[53]

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51 Evidence (Mrs Jackson), p.197

52 Evidence (Mr Hellaby), p.388

53 Evidence (Mr Wells), p.410

> ...[I]n the context of a case, counsel are likely to conduct it in such a way as to prove those things which are going to be conducive to the result that they want anyway. If, from extraneous sources, they can demonstrate the truth of what their client has said, they are probably going to do that anyway; and the issue of the source is not going to arise.

7.61 The Committee has considered the issue of requiring a journalist to prove the veracity of what they publish. If, in the ideal situation, they were able to do so there would be no need to seek disclosure of the source. If journalists were aware that they were required to prove the truth of the information, should they find themselves subsequently involved in court proceedings, they might take steps before publishing the story to enable themselves to do so without divulging the source.

Dangers of lists

7.62 The Law Society of South Australia warned that lists of factors to be taken into account when a judge is exercising a discretion to order a journalist to reveal his or her source have their drawbacks. They can exclude important issues. They can become too long and unwieldy. Individual items can become confused as the judge takes them all into account. It also claimed that lists which have been mooted to date may do no more than formalise what already happens.[54]

7.63 Despite this, the Committee believes that where a court has a list of relevant factors to take into account when exercising a discretion

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54 Evidence (Mr Walsh), pp. 271 - 272

better decisions will be reached than otherwise. 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 encourage consistency of decision making.

Conclusions

7.64 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 Committee is convinced that the media must not abuse that special role and must be accountable for its actions. The solution proposed below takes account of both these obligations.

7.65 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. The Committee has concluded that 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 the competing public interests which have been examined in the previous chapters of this report.

7.66 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 in this report. This is more fully examined in Chapter 9. The recommendation below relates only to a privilege for journalists as that is the subject of the Committee's inquiry. However, the

Committee sees merit in a legislative provision applying to a wider class of people engaged in professional relationships which entail the giving and receiving of confidential information. This broader approach appears to have been favoured in all jurisdictions which have legislated for structured discretions. The major advantage of such a solution is that it overcomes the difficulty of defining a journalist, discussed in Chapter 2.

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.

7.67 The factors to be considered by the court in the exercise of this discretion are:

- Whether the evidence about the source's identity is essential to the issue of the case, eg 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 or the costs of the proceedings.

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.**

7.68 In this proposal the special role of the media is acknowledged by making the starting point from which judicial discretion is to be applied the presumption that the confidence will be respected. The need to take into account other matters in the public interest is accommodated by the items listed above.

In Camera Proceedings

7.69 It has been suggested to the Committee that one way of ensuring that relevant information is available to the court when the interests of justice require it while at the same time protecting the anonymity of the source , is to make provision for the information to be provided in a confidential way to the presiding judge or magistrate.

7.70 The Committee is not in favour of such an approach because it undermines the fundamental feature of justice being done in open court so that it can be seen to be done. If the court concludes that disclosure is called for, the court will have considered all the consequences of that disclosure. This would include the public nature of the giving of the relevant evidence. No purpose would be served by the secretive procedure suggested. Such a procedure may act to some extent as a comfort to the journalist and the source, but if the court has decided that the information is crucial to the issue before it, then the other party needs to be apprised of it.