PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

INQUIRY INTO
THE RIGHTS AND OBLIGATIONS OF THE MEDIA

FIRST REPORT

OFF THE RECORD

Shield Laws for Journalists' Confidential Sources

REPORT BY THE
SENATE STANDING COMMITTEE ON LEGAL
AND CONSTITUTIONAL AFFAIRS

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Introduction

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

Chapter 2

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

Conflict between the Code and the Administration of Justice

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

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

Clause 3 of the Code says:

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

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

Fabrication

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

Defining a journalist

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

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

When is disclosure required?

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

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

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

Chapter 3

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

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

Investigatory bodies

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

Recommendation 1

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

Chapter 4

The Fourth Estate

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

1 *[1992] 66 ALJR 658*

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

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

Investigative journalism

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

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

Chapter 5

Other confidential relationships

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

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2 *[1992] 66 ALJR 695*

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

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

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

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

Chapter 6

Balancing public interests

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

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

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

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

Defamation

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

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

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

Chapter 7

The Options

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

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

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

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

1. do nothing;

2. legislate for absolute privilege; or

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

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

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

Do nothing

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

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

Absolute privilege

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

Privilege qualified by a structured discretion

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

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

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

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

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

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

Recommendation 2A

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

Recommendation 2B

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

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

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

- Whether maintaining the confidence is concealing criminal activity;

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

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

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

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

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

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

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

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

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

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

Chapter 8

Contempt

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

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

Recommendation 3

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

Penalties

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

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

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

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

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

Recommendation 4

The Committee recommends:

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

Chapter 9

Accountability

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

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

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

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

Recommendation 5

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

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

Recommendation 6

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

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

Recommendation 7

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

External regulation

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

Education and training

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

Other jurisdictions

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

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

Conclusions

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

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

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

Recommendation 8

The Committee recommends:

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

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

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

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

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

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

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

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

Chapter 1 - The Reference

Terms of Reference

1.1 On 25 May 1993 the Senate resolved to refer to the Senate Standing Committee on Legal and Constitutional Affairs for report, on or before 31 March 1994, the following matters:

The rights and obligations of the media, with particular reference to:

(a) the right to privacy and the right to know;
(b) the need for journalists to protect the identity of their sources of information;
(c) the right of access to the media by members of the public;
(d) courts and tribunals and the media;
(e) journalistic ethics;
(f) disciplinary processes for journalists; and
(g) any other matters relevant to the question of journalistic ethics and standards and the quality of reportage.

[*Journals of the Senate* No 12, 25 May 1993, pp. 244]

1.2 On 23 March 1994 the Senate agreed to extend the time for report to 9 June 1994.

[*Journals of the Senate* No 74, 23 March 1994, p. 1459]

1.3 The Committee's reporting date was extended again on 8 June 1994 until 31 August 1994 (*Journals of the Senate* No 89 p. 1778) and on 29 August 1994 until 13 October 1994 (*Journals of the Senate* No 102 p. 2096).

1.4 The Committee called for submissions from interested persons by placement of advertisements in the major national newspapers and by letters to particular persons and organisations known to have an interest in the relevant issues.

Priority for Shield Laws

1.5 Before commencing to take evidence in the inquiry, the Committee decided to divide it into parts, due to the wide ranging nature of the terms of reference. In the last few years there have been a number of journalists who have found themselves being dealt with by the courts for contempt when they have appeared in legal proceedings and refused to reveal the identity of their confidential sources of information. This confrontation between journalists and the legal system appeared to be receiving increasing public attention and needed resolution. The Committee accordingly decided to commence its public hearings by focussing on term of reference (b), the need for journalists to protect the identity of their sources of information. The laws proposed to provide legal recognition of that need are often referred to as 'shield laws'.

1.6 During the course of the first round of hearings it became evident to the Committee the issue of shield laws for journalists could not

be adequately dealt with without some consideration of term of reference (e), journalistic ethics.

1.7 After the tabling of this report the Committee will proceed to consider the balance of the terms of reference. Interested persons are invited to make further submissions addressing the remaining terms of reference if they wish. Further public hearings will be held.

Conduct of the First Stage of the Inquiry

1.8 The Committee received 134 written submissions most of which addressed all of the terms of reference. The list of individuals, organisations and agencies making submissions to the Committee is included in this Report as Appendix 1.

1.9 The Committee held public hearings in Sydney, Melbourne and Adelaide in November 1993 and in Brisbane in January 1994. The list of witnesses who appeared at those hearings is included in this Report as Appendix 2.

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

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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

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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 journalists'[5].

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 submission[6] 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?'[7]

2.16 There was scepticism expressed by other witnesses, however, about how widespread such careful practices might be amongst other media organisations[8]. 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 work[14]. 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 Autralia, 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.

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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

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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.

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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

Chapter 3 - Journalist v the Court

The Cases

3.1 A line of recent cases has brought attention to, and public debate upon, the issue of shield laws for journalists. It starts with the one involving Tony Barrass in Perth in 1989. In this chapter is an account of the issues raised in each case. In its submission to the Committee, the Communications Law Centre states that these cases "disclose a trend of hostility on the part of the judiciary towards journalists' claims to confidentiality".[1]

3.2 Until these cases there had been little occasion for the court to deal with journalists who refused to reveal the identity of confidential sources. It is not possible to explain the reason why the issue has now come to the fore after a lengthy period of relative obscurity but one witness made the following comment on how things were before these cases:

> Before these six cases came up a lot of journalists were already suffering a penalty because of the fact that they could not go to court and claim confidentiality, but it was sort of a hidden process because cases were settled. In some cases, perhaps, stories were even not run on legal advice to do a defamation, but I think more likely because when you went to see the lawyers after the defamation suit was there, at a certain stage it would become clear that there could be a difficulty in the evidence.[2]

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1 *Submission 113, p.1191*

2 *Evidence (Ms Bacon) p. 138*

The Barrass Case

3.3 An employee of the Australian Taxation Office in Perth was charged with official corruption under subsection 70(1) of the *Crimes Act 1914* (Commonwealth) for unauthorised publication of Commonwealth documents. [*DPP v Luders*, unreported] During the committal Tony Barrass, a journalist with *The Sunday Times*, was asked to reveal the source of the leaked Tax Office information which was the basis of his series of stories. The answer to this question would appear to have been directly relevant to the defendant's guilt. Tony Barrass refused to answer, claiming an ethical obligation to maintain confidentiality. The magistrate treated this as a very serious matter because of its connection to the issue of guilt of the defendant. The question requiring Mr Barrass to identify his source could neither be rephrased nor ignored to avoid the ethical dilemma.

3.4 The magistrate committed Barrass to gaol for 7 days under section 77 of the *Justices Act 1902* or until the answer was given. Barrass stayed in prison for 5 days without providing the information.

3.5 When Mr Luders was tried before the District Court, Barrass was called again and again refused to answer, referring to his profession's ethical obligation to protect the confidentiality of sources. However, Judge Kennedy rejected his argument, placing greater weight upon the administration of justice and the rule of law. She convicted him of contempt and fined him $10,000.

3.6 Notable aspects of this case were that Luders was convicted of official corruption anyway, without the requested evidence from Barrass and Luders was fined $6,000. This reasonably leads to the conclusion that whilst

the information was central to the issue before the court, it was ascertainable from another source. (Of course, at the point in the trial that Mr Barrass was being pressed to give his evidence, the fact that that evidence would not ultimately be central to the issue was not known to the court.) The media later argued the absurdity of this situation. The person who did nothing more than abide by his ethical code was punished more severely than the person convicted of a relatively serious corruption offence.[3] They also argued it was a serious blow to the freedom of the press. Barrass' fine was in fact paid by his newspaper.[4]

The Budd Case

3.7 Gerard Budd was employed by the Brisbane *Courier-Mail.* He was a witness in a defamation action before the Supreme Court of Queensland and sentenced to imprisonment for 14 days (released after 6) when he refused to answer questions about the identity of a source of information referred to in an article in the *Courier-Mail* written by him, even when invited to do so only to the Bar Table. He was also given an opportunity to contact the source to seek a release from the undertaking. The judge considered the questions to be particularly relevant to the issue of testing the credibility of Mr. Budd as a witness. The following extract from Dowsett J's judgment is particularly pertinent to the issues in this inquiry:

> Thus it seems to me to be more than a reasonable way of testing credibility to insist upon identification of source. I think too that the identity of the source of that information goes to the question of good faith in the allegation which the plaintiff

3 *The West Australian, 9 August 1990, p.10*

4 *This case led to the reference to the Law Reform Commission of Western Australia cited previously.*

> asserts is made in the article that there has been a cover-up, involving the plaintiff in that cover-up ... I think therefore that in both respects the question of the identity of the source of information is a relevant matter and a matter of sufficient importance in the conduct of the case to justify me in directing the witness to answer the questions designed so to identify the source.[5]

3.8 Argument in the case revolved around issues of relevance and the appropriate penalty for contempt, without reference to whether or not the court should recognise a privilege for journalists in general. The judge did express a very strong view against it when convicting Mr. Budd. He rejected any comparison with the clergy in relation to confession. In particular he said:

> ... I find it impossible to understand why any journalist should think that he is entitled to make statements about another person which may, on their face, be correct or otherwise, and when proceedings are brought to establish that they are not true and that they are defamatory, seek to conceal the source, contrary to law, asserting some high-handed view that this is in the public interest and that he, or his profession, is entitled to decide what is in the public interest.[6]

The Hellaby Case

3.9 David Hellaby was a journalist with the Adelaide *Advertiser.* [Mr Hellaby gave evidence before the Committee at its public hearing in Brisbane.] During proceedings taken against Mr Hellaby by the State Bank

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5 *Copley v Queensland Newspapers Pty Ltd (unreported), Queensland Supreme Court, 20 March 1992, Transcript p.267.*

6 *Transcript p.271*

of South Australia for pre-trial discovery, the Supreme Court of South Australia ordered him to hand over documents he used in preparing two reports in *The Advertiser* on the South Australian Auditor-General's inquiry into the State Bank of South Australia. The Bank alleged it needed access to the journalist's documents in order to decide whether it would sue Mr. Hellaby for injurious falsehood. His appeal to the Full Court was rejected, as was his application for leave to appeal to the High Court.

3.10 The court had given Mr Hellaby 14 days to reveal his source on pain of imprisonment for contempt should he fail to comply. Some of the documents called for were subsequently filed but none which revealed the identity of the source. He was found guilty of contempt but the court allowed him a week to contact his source to seek a release from the undertaking. Eventually the case was settled confidentially and not proceeded with, but the judge fined Hellaby $5,000 for the period he had been in contempt.

3.11 Unlike Mr. Barrass and Mr. Budd, Mr Hellaby was not giving evidence in court as a witness but rather as the respondent to an application for pre-trial discovery. During evidence before the Committee Mr Hellaby stated that this was a "misuse of the judicial process to gag the media"[7]. He said:

> To me the entire case was totally vexatious. It was also purely a form of legal bullying to force me into a situation where they knew that I would be forced into an ethical conundrum. It, to me, appeared to be totally unjust. I had no opportunity whatsoever to present any evidence that actually pointed to the crux of the matter. And had I been able to I am convinced, and

7 *Evidence (Mr Hellaby), p.377.*

> my lawyers were convinced, that we would have been able to show that the stories I had written that were being complained of were true, fair and accurate, and we could have done it without having to reveal the source.[8]

The Nicholls Case

3.12 In this collection of cases that of Mr Nicholls is unique. He was a journalist and the defendant in a criminal action for impersonation, false pretences and forgery resulting from his investigation into allegations that a Cabinet minister in South Australia had assisted her partner to obtain commercially valuable information. The prosecution alleged that Mr Nicholls had made telephone calls to the bank of the minister's partner, pretending to be him and seeking confidential information. In his defence Mr. Nicholls alleged that the calls were not made by him but by a confidential source. He refused to reveal the identity of that source during the course of his evidence. He was acquitted of the criminal charge but subsequently convicted of contempt of court and sent to prison for 4 months. On appeal, the Full Court reduced the sentence to 12 weeks' imprisonment.

The Cornwall Case

3.13 Deborah Cornwall's case also differs from the others in that the contempt with which the court was dealing arose not out of her evidence before a court, but before the New South Wales Independent Commission Against Corruption. This is an investigatory body with very wide terms of reference, making the question of relevance of the information to the

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8 Evidence (Mr Hellaby), p. 389

inquiry extremely difficult to dispute.

3.14 At the relevant time Ms Cornwall was a journalist with the *Sydney Morning Herald.* She wrote a story about a murder case in which she said unnamed police officers had told her that Neddy Smith had been a police informer. When she was summoned before the ICAC she refused to reveal the name of the officers. Commissioner Temby told Ms Cornwall that she had been misled by her informants and that she should therefore be no longer obligated to keep their identity confidential. She did not agree and maintained the secrecy. She was directed not to approach her source. Section 37 of the *Independent Commission Against Corruption Act 1988* obliges witnesses before the Commission to answer questions or produce documents when required, so Commissioner Temby cited Ms Cornwall for contempt. This was dealt with by Abadee J of the New South Wales Supreme Court.

3.15 Abadee J examined clause 3 of the Code of Ethics, noting that whilst it was apparently absolute in its terms, the defendant Ms Cornwall seemed willing to disclose the required information if the source consented (she had been directed not to approach the source) or if she was satisfied that she had been deliberately misled. The Judge concluded that clause 3 was intended to operate beyond the law. This conclusion has been disputed by some commentators.[9] The court held that Ms. Cornwall's refusal was not based upon the Code in any event, but on a 'subjective personal ethical consideration unrecognised by the Code itself.'[10]

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9 *Flint, Prof D, 'Protection of Journalists Confidential Sources', p.8*

10 *Independent Commission Against Corruption v Cornwall (1993) 116 ALR 97*

3.16 It was argued before the Supreme Court in this case that a law which limits the ability of journalists to maintain the confidentiality of their sources is a restriction on the implied constitutional guarantee of freedom of political communication found to operate in Australia by the High Court in *Nationwide News Pty Ltd v Wills*[11] and *Australian Capital Television Pty Ltd (No.2) v The Commonwealth*[12]. Abadee J rejected these arguments. He said that although in *Cojuangco* the High Court confirmed that the media had a role in collecting and disseminating information and that the free flow of information is vital to investigative journalism, it had held that there was no public interest immunity, let alone constitutional protection, which exempted a journalist from disclosing his or her sources of information when it was in the interests of justice to do so.[13] He said that the newspaper rule had nothing to do with Commissions of Inquiry.

3.17 In the result Ms Cornwall was found guilty of contempt and a two month suspended sentence was imposed with 90 hours of community service.

The Legal Principles

3.18 All these cases have highlighted the dilemma for journalists created by the present state of the law in Australia on the issue, as articulated by the High Court in *Cojuangco* and quoted in chapter 2.

3.19 The law on the matter of disclosure of sources in Australia was

11 *[1992] 66 ALJR 658*

12 *[1992] 66 ALJR 695*

13 *Independent Commission Against Corruption v Cornwall, Supreme Court of New South Wales, unreported, 6 July 1992, p.90.*

established in *McGuinness v Attorney-General of Victoria* (1940) 63 CLR 73. Mr. McGuinness was the editor of *Truth*. He wrote and published articles which suggested that certain persons were collecting funds to bribe members of the Victorian Parliament to vote against two Bills before the House. A Royal Commission to inquire into the allegations ensued. When called to give evidence, Mr. McGuinness refused to reveal the source of his information. He was convicted of an offence against the Evidence Act and fined fifteen pounds.

3.20 When the case went to the High Court on appeal, it was held that newspaper proprietors, editors and writers do not have a privilege which entitles them to refuse to disclose their sources at a subsequent trial. The following extract from the judgment of Rich J firmly states the High Court's position at the time[14]:

> The appellant was called upon to choose between his duty under the law to answer questions relevant to the enquiry, unless he had some lawful excuse for refusal, and what he conceived to be his duty as a pressman to his informant to maintain silence. He chose to observe the latter supposed duty and to refuse to divulge the source of his information. ... [the cause] seems to be founded on a paradox. It is said that newspapers will not be able to discover the truth and publish it unless when the courts of justice in their turn want the truth pressmen in whom it has been confided are privileged to withhold it.
>
> The paramount principle of public policy is that the truth should always be accessible to the established courts of the country.

3.21 There is some debate about whether there is any residual discretion in the courts to excuse a person from disclosing a confidential

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14 ibid.

source even when the information is both relevant and admissible. The Supreme Court of New South Wales denied it in *Re Buchanan* (1964) 65 SR NSW 9 at page 11. In the United Kingdom some courts have conceded the existence of such a discretion at trial (as well as at the interlocutory stage) if a breach of an ethical or social value or risk of serious injustice is involved and that this should override the public interest in ensuring that all relevant and admissible information is before the court.[15]

3.22 In Australia the position is uncertain but it could be argued that the qualification of the High Court in *Cojuangco* that the disclosure might not be ordered if it was not '*necessary in the interests of justice*' allows for the exercise of such a discretion.

The Newspaper Rule

3.23 In defamation actions, the newspaper rule allows a newspaper publisher, proprietor or editor to withhold information about the name of the writer of the article which is the subject of the action and about the sources of information supporting the article, but only in interlocutory proceedings and subject to special circumstances. The rule does not apply at trial. The High Court said, in *Cojuangco*, that it is a rule of practice, not evidence, and it 'guides or informs the exercise of the judicial discretion'.[16]

3.24 According to Dixon J in *McGuinness v Attorney-General of Victoria*[17] the rule is founded on:

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15 *Attorney-General v Mulholland [1963] 2 QB 477, British Steel Corporation v Granada Television [1981] AC 1096 and D v National Society for the Prevention of Cruelty to Children [1978] AC 171*

16 *(1988) CLR 346 at 356*

17 *(1940) 63 CLR 73 at 104*

> the special position of those publishing and conducting newspapers, who accept responsibility for and are liable in respect of the matter contained in their journals, and the desirability of protecting those who contribute to their columns from the consequences of unnecessary disclosure of their identity.

3.25 Because the newspaper is liable for what it publishes, it is not necessary for the plaintiff to search for other possible defendants at the interlocutory stage. At trial, however, disclosure may be necessary to show malice and so the rule does not apply.

3.26 The rule was applied by the Queensland Court of Appeal in *Hodder v Queensland Newspapers Pty Ltd*[18] which held that the interests of justice did not require the appellant to answer interrogatories about the identity of a confidential source. Fitzgerald J said the rule helped the courts balance the effective administration of justice with other public interests like freedom of speech and the public's right to be informed. The balance enabled a person alleging defamation to ascertain the necessary details when it was important, at trial, rather than at a stage when they might abandon the case after the identity of the source has been revealed.

3.27 In *Cojuangco* the High Court recognised that, at an interlocutory level, it is much less likely to be 'necessary in the interests of justice' to require disclosure of a confidential source. It also recognised that even at trial the court will not compel disclosure unless it is necessary to do justice.[19]

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18 [1993] ATR 81-207

19 (1988) 165 CLR 346 at 345-355

Pre-trial Discovery

3.28 All Australian jurisdictions have in place in their rules of procedure, in some form or other, provision for a discovery process before the commencement of an action[20]. It is usually called pre-trial discovery. This assists the parties to identify any wrongdoing. This was the procedure in issue in *Cojuangco* and in the Hellaby case.

3.29 At common law there was a recognised equitable procedure for discovery to allow for the identification of a wrongdoer[21]. The English case of *British Steel Corporation v Granada Television Ltd*[22] involved an action for disclosure of the name of the person who supplied documents to Granada which formed the basis of a television program. The majority of the House of Lords held that disclosure should not be compelled unless it was necessary in the interests of justice. Because British Steel had abandoned all claims against Granada, disclosure was needed to obtain an effective remedy. It was therefore in the interests of justice.

3.30 In *Cojuangco* the question was whether there should be preliminary discovery against a media organisation for the names of the sources of information upon which certain publications were based. Where there was an effective remedy against the media organisation an order for preliminary discovery would not be made to reveal the source. It must, however, be an *effective* remedy.

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20 eg. New South Wales Part 3, Rules of the Supreme Court 1970; Rules of Procedure in Civil Proceedings, 1986 (Vic), Rule 32.03

21 Norwich Pharmacal Co v Customs and Excise Commissioners [1974] AC 133

22 [1981] AC 1096

3.31 An effective remedy has been defined as a remedy against the media organisation which is coextensive with the one that would be available against the sources if they were known, namely the same opportunity to recover adequate monetary compensation. The media organisation would not be able to rely on a defence unavailable to the source.[23]

Investigatory bodies

3.32 As discussed in Chapter 2, conflict between journalists and the legal system has arisen in the context of investigations conducted by statutory bodies set up in a number of jurisdictions to investigate matters related to corruption and organised crime. These bodies include the National Crime Authority (NCA), the Australian Securities Commission (ASC) (both Commonwealth), the New South Wales Independent Commission Against Corruption (ICAC), the New South Wales Crime Commission and the Queensland Criminal Justice Commission (CJC). In September 1993 the Parliamentary Criminal Justice Committee of the Legislative Assembly of Queensland published a report on confrontation between a media determined to maintain confidentiality of a source and the ICAC (*ICAC v Cornwall*) and the CJC.

3.33 Each of these bodies has broad, but not coincidental, powers to require answers to questions and production of documents. The relevant provisions are listed in the following table:

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23 *The Herald and Weekly Times Ltd and Others v The Guide Dog Owners' and Friends' Association and Another [1990] VR 451 at 458 and Cojuangco v John Fairfax and Sons Ltd (No 2) (1991) ATR 81-068 at 68,541*

Act	Power to require documents	Power to require statement
Australian Securities Commission Act 1989	sections 28-34	sections 19 and 37(9)
National Crime Authority Act	section 29	-
Independent Commission Against Corruption Act 1988	section 22(1)	section 21(1)
Crime Commission Act 1985 (NSW)	section 19(2)	section 10(1)
Criminal Justice Act 1989 (Qld)	section 3.1	section 3.1

3.34 The Chairman of the Australian Press Council has made the following criticism of the powers of the ICAC:

> Given the power of ICAC to determine its own investigations and its own terms of reference, and the consequent ease with which a disclosure may thus be found to be relevant, its potential to impact on freedom of political communication vastly exceeds that of a court. Although not a court, it may compel disclosure and treat as a contempt any refusal. It may do so selectively, as indicated in *ICAC v Cornwall*, where Mr Smith himself had declined to answer questions and ICAC had been unwilling to institute proceedings for contempt. ... Reporting on corruption and crime are legitimate matters for political and public communication. Freedom of that communication requires the use of confidential sources, including "off the record" briefings by officials even by inquisitorial bodies. If statutory protection from contempt is required for inquisitorial bodies, should it not be reasonably proportionate to the need for protection and the freedom of political communication?[24]

24 *Paper delivered to Hobart Legal Convention 1993, p. 11-12*

3.35 The issue is that these statutory provisions may displace, either impliedly or expressly, the common law test of the evidence being necessary to the interests of justice when a court is considering whether to order disclosure, see for example subsection 37(1) of the ICAC Act. Some of them also are sufficiently broadly expressed to remove the ability to determine whether the information demanded is relevant.

3.36 On another occasion Professor Flint has asked:

> Did we ever intend to give powers to bodies like the ICAC, greater than those of our courts, to use against journalists and the media - the very institution that has done more in the initial exposure of defects in public life than any other?[25]

3.37 Examination of the provisions listed above shows that not all these bodies have been given the same breadth of authority. The NCA Act, for instance, restricts the power to demand documents and the like to those which have relevance to the specific investigation it is conducting. The Act does not allow for 'proposed investigations', as does the CJC legislation. The Queensland Parliamentary Criminal Justice Committee's report on the use of the power under section 3.1 of the Criminal Justice Act recommended the CJC's coercive powers not be confined by its two investigative responsibilities. The Parliamentary Criminal Justice Committee thought it might be necessary in future to effectively discharge its other functions and responsibilities.[26]

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25 *'Protecting Sources', Australian Press Council News, August 1993, p.3*

26 *Parliamentary Criminal Justice Committee, Report of a Review of the CJC's use of its power under section 3.1 of the Criminal Justice Act 1989, September 1993, p.30*

3.38 The Committee's view is that Professor Flint's question must be closely examined. The issue of confidential sources has drawn attention to the growth of power of these statutory bodies and the danger they pose of intrusion on personal and press freedom. If there is to be any privilege for journalists against disclosure, it should clearly apply to all legal and quasi-legal proceedings, including proceedings before these investigatory bodies.

Recommendation 1

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

Chapter 4 - The Fourth Estate

The Argument

4.1 From time to time during the course of the debate in this inquiry, both in written submissions and in oral evidence, there have been references to the place of the media in our constitutional democracy as the 'fourth estate'. This proposition places the media alongside the Parliament, the Executive and the Judiciary as a fundamental component of our constitutional system of government. It was described in evidence as follows:

> **Mr McLachlan**--If I can just pick up on two themes, as I see them. On the role of the media as the **fourth estate**, obviously it is our belief that the media has a very important role to play in ensuring the maintenance of our democratic society. It does act as a watchdog and provides a forum for accountability of the exercise of public and private power. The importance of the media in that regard is internationally recognised in a number of international treaties and instruments to which Australia is a signatory. So we say that freedom of expression and freedom to publish are of the utmost importance in maintaining the fourth link in the whole estate.[1]

The Constitutional Basis

4.2 The supporters of this proposition will have been encouraged by the decisions of the High Court in *Nationwide News Pty Ltd v Wills*[2] and

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1 *Evidence (Mr McLachlan), p.4*

2 *[1992] 66 ALJR 658*

Australian Capital Television Pty Ltd v The Commonwealth [No 2] [3], although judicial statements in these cases stop short of specific reference to the part the media plays in Australia's constitutional balance.

4.3 In the former case Brennan J starts from the proposition that the Constitution creates the repositories of legislative, executive and judicial power and a system of government in which the Houses of Parliament are chosen by the people. The Constitution prescribes a system of responsible government, that is one which is ultimately answerable to the Australian people and in which the executive is responsible to the legislature. To sustain this system of responsible government, freedom of public discussion, particularly of political and economic matters, is essential. The public cannot adequately influence decisions which affect their lives unless they are adequately informed. His Honour referred to *Attorney-General v Times Newspapers*[4], where Lord Simon of Glaisdale said:

> The first public interest involved is that of freedom of discussion in a democratic society. People cannot adequately influence the decisions which affect their lives unless they can be adequately informed on facts and arguments relevant to the decisions. Much of such fact-finding and argumentation necessarily has to be conducted vicariously, the public press being a principal instrument.

4.4 This statement was quoted with approval by some of the other judges in both the cases referred to, the second of which confirmed the approach taken in the first. It is as close as any of the judgments get to

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3 *[1992] 66 ALJR 695*

4 *[1974] AC 273 at 351*

asserting a specific place for the media in ensuring freedom of communication.

4.5 These two decisions have emphasised the essential character of the freedom of communication in facilitating the discussion of political and economic issues in a democracy. Such a freedom is implicit in a representative government because the people who elect it must be able to make informed decisions at the ballot box. In practice, this freedom is facilitated by the media as the instrument affording the widest dissemination of information. The media therefore plays an integral part in the maintenance of representative government in this country and claims a place alongside the other three integral parts, or "estates", the Parliament, the Executive and the Judiciary. The media provides maximum effectiveness for freedom of communication.

4.6 Brennan J said that there is no right to free discussion of government at common law but:

> Where a representative democracy is constitutionally entrenched, it carries with it those legal incidents which are essential to the effective maintenance of that form of government.[5]

Qualifications

4.7 Importantly, the court emphasised that the freedom is not absolute but is subject to legal restrictions, such as the law of defamation or

5 *[1992] 66 ALJR at 669*

the criminal law, which are legitimately in place to protect interests which might otherwise be affected. Deane and Toohey JJ said at p. 682 "It is an implication of freedom under the law of an ordered society" (emphasis added). In *Australian Capital Television Pty Ltd v The Commonwealth [No 2]*, the Chief Justice said at p. 705 "the guarantee does not postulate that the freedom must always and necessarily prevail over competing interests of the public."

4.8 To some extent the qualification on the freedom of speech articulated by the High Court has been acknowledged by submitters. The Nine Network made the following comments in its submission[6]:

> Nine Network believes that freedom of expression is integral to the maintenance of Australia's democratic traditions, and should be subject to legal constraints or restrictions only where such constraint or restriction is essential for the protection of established individual rights or public interests.
>
> ...
>
> The right of freedom of expression carries with it the right (and social obligation) of the media to investigate and report on all matters of public interest to the fullest extent permissible by law. Ultimately, the mass media plays a vital role in informing the general public of events affecting them, individually and collectively; and which provides scrutiny of, and accountability for the exercise of public and private power.

4.9 Importantly, the Nine Network's submission points out that even internationally, the subjection of the right of freedom of expression to individual rights and other public interests is recognised. Accepting this qualification, the issue in the Committee's inquiry then becomes one of

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6 *Submission 77, pp.472-473*

balancing the basic freedom of expression with the individual and public interests so recognised. In *Nationwide News Pty Ltd v Wills* and *Australian Capital Television Pty Ltd v The Commonwealth*, the High Court undertook this balancing exercise in deciding upon the validity of some provisions in amendments to the *Industrial Relations Act 1988* and *Political Broadcasts and Political Disclosures Act 1991.*

The Role of the Media

4.10 Many submitters and witnesses argued strongly that the media's role in the collection and dissemination of information is vital to the protection of freedom of speech, whether or not that right is guaranteed or implied by the Constitution. The Communications Law Centre put it as follows[7]:

> The activities of the media in gathering and disseminating information is vital to the proper functioning of a democratic society. Without it, citizens cannot make informed decisions. Much illegality, corruption, dishonesty and hypocrisy would go undetected were it not for the investigative activities of the media.

4.11 Another account of this role was given in evidence before the Committee by Mr Chadwick as follows:

> ...the media vessels we use in this community animate freedom of speech in a practical sense. And they attempt to seek information and disclose it so that consequences flow.[8]

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7 *Submission 113, p.1190*

8 *Evidence (Mr Chadwick), p.176*

In reality the media is by far the best means available to keep the public in general informed about the activities of government and about other issues of public concern.

Investigative Journalism

4.12 It has been said that "news is what someone somewhere does not want printed and all the rest is advertising"[9]. If there is someone who wants to suppress the information which is of consequence to the public interest journalists will need investigative skills to overcome such resistance to publication. Sometimes restrictions on publication are legitimised by legislation, usually on the grounds that the public interest is served in the particular circumstances by the maintenance of confidentiality. Information will often be known only to those intimately acquainted with the subject-matter. These people may have very good reason for wanting to facilitate the dispersal of the information to the public, for example because they consider that it relates to some so far concealed criminal activity or corruption.

4.13 Investigative journalism usually involves searching out the kind of information which is not readily available. People who disclose confidential information may have good reasons, other than possible breach of some statutory prohibition, to not want their identity revealed. Some of the consequences may be legal, for example the risk of exposing oneself to a defamation action, or personal, for example the fear of revenge by those whose activities are exposed by the release.

9 *Evidence (Mr Chadwick), p. 190*

4.14 The following discussion before the Committee is particularly relevant to this issue[10]:

> **Mr Hellaby** - Historically, there is quite a bit of evidence around that individuals who provide information of this nature are subjected to quite considerable persecution. In my specific case, we had very grave fears for the safety of the source. My own family was placed under armed guard for three months. They were subjected to a very organised terror campaign to try to force me to reveal the name of the source. This matter was put before the court at the time but the court did not seem to take it into consideration. As far as an investigative journalist goes, he or she is absolutely reliant on sources. Without them, they basically do not have information.
> **CHAIRMAN** - How valuable is it for us to have investigative journalism?
> **Mr Hellaby** - If you do not have investigative journalism, you basically have information sheets that process press releases, government statements or formalised information that has been released. The whole point of investigative journalism is to look at an issue and probe deeper, to look into areas that a lot of people do not want you to look into. The whole point of having sources is to be able to provide you with the information to assist you to carry out that probing. It may be that an investigative journalist only succeeds in getting a formal inquiry. If they have gone that far, they have succeeded for the public good.
> **Mr Hippocrates** - Without investigative journalism, everything else, if you think about it, is just public relations. It is just a matter of what other people want to get into print. It is the stuff that people do not want published that the investigative journalist deals with. It is the prime job of the investigative journalist to find out - from within the darkened corners of bureaucracies and other institutions, banks et cetera - what people do not want published.

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10 Evidence (Mr Hellaby), p.392

4.15 Mr Hellaby went on to say that people in authority think that they can sweep the things they do not want generally known under the carpet. "The whole aim of investigative journalism is to lift the carpet."[11]

Investigative journalism and confidential sources

4.16 If the media's role as the fourth estate is accepted and the importance of investigative journalism in that role is recognised, there is a strong argument that confidential sources are important. They serve to ensure the continuing free flow of information which enables the public to keep the government, and public institutions generally, accountable for their actions.

> Of vital importance to this process of public disclosure is the information provided by those who are in a position to know of the relevant conduct. Many sources will provide information only on the basis that their identity will not be disclosed. They fear the repercussions, legal or otherwise, that may flow from disclosure.
> ... The disclosure of journalists' sources may harm the free flow of information both from the particular source whose identity has been revealed and potential future sources who may refuse to provide information to the journalist who disclosed the identity of the source. Sources of information to the media in general may diminish.[12]

4.17 The Australian Press Council has advocated the importance of the media in exposing bad government and corruption and the importance of confidential sources to that exposure:

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11 *Evidence (Mr Hellaby). p.393*

12 *Communications Law Centre, Submission 113, p.1190*

> We have learned of bad administration, broken promises, unpopular proposals and corruption, not from press releases but from journalists. It has been journalists, and not lawyers or law enforcement agencies, who have triggered the great exposes that have been such landmarks in our recent history.
> Fundamental to the very concept of such reporting is the journalist's confidential source. Whistleblowers and dissidents, aware of the facts and even aware of wrongdoing, are central to this monitoring role that the press must have if it is to serve the public.[13]

The Nine Network added another layer of evidence before the Committee:

> If you accept that confidentiality of sources is integral to ensuring the free flow of information to the media ... then it is an integral part of the right of freedom of expression.[14]

4.18 The argument is not universally accepted. The Commonwealth Attorney-General's Department states that the arguments about sources drying up have not been tested.[15] In its *Interim Report on Evidence*, the Australian Law Reform Commission had this to say about the matter:[16]

> *Deterrent Effect of Lack of Privilege.* It is argued that the absence of a privilege and, particularly, the publicity that a privilege does not exist has a deterrent effect upon those wishing to give information to the press. It is further alleged that this has an adverse effect upon the free flow of information and upon the ability of the press to expose corruption, negligence and malfeasance in government and multi-national corporations. In general, it is said, that there is an inhibiting

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13 Flint, Prof. D.,"Protecting Sources", Australian Press Council News, August 1993, p.3

14 Evidence (Mr McLachlan), p.30

15 Evidence (Mrs Jackson), p.198

16 The Law Reform Commission, Report No. 26 Evidence, p.525

> effect upon the capacity of newspersons to complete the professional tasks assigned to them by the community.
> Guest and Stanzler[17] comment that they cannot measure the effect upon informants of the absence of a privilege. Perhaps more informants would reveal more matters to more newspersons if they knew that the newsperson were totally unlikely to reveal their identity. This is, however, only a matter of hypothesis. Were lack of confidentiality about the identity of the informant to be an inescapable result of the relationship between newsperson and informant, then and only then would there be a significant deterrent effect. However, this is not so. It is by no means a difficult process for the source to keep his identity from the newsperson to whom he gives information. Because of this, the deterrent effect of the absence of a privilege cannot be said to be substantial.

4.19 The Attorney-General's Department is of the view that if people become aware of illegal activity there are proper authorities to whom they can and should report and for this there are protections already in place such as whistleblowers legislation in some jurisdictions (for example Queensland) and witness protection schemes. In its written submission, the Department pointed to the fact that much information has been forthcoming and many cases of corruption have been revealed under the present law which does not accord any privilege against disclosure.[18]

4.20 In evidence, Mr Stewart Cockburn suggested that there are many who talk confidentially to journalists who would be happy to talk confidentially to others, such as a judge, so long as their name was not

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17 *JA Guest & AL Stanzler, 'The Constitutional Argument for Newsmen Concealing their Sources', (1969) 64 NWUL Rev 18, 57ff*

18 *Submission 115, p.1321*

published. Mr Cockburn was adamant that a requirement to reveal a source to a judge in chambers would not affect the supply of whistleblowers.[19]

4.21 The experience of police services with informants (to be discussed more fully in the next chapter) also seems to contradict this argument. Police informants have always risked the possibility of identification during court proceedings. There was no evidence before the Committee that this has affected supply.

Conclusions

4.22 The Committee accepts that without investigative journalism, the media and its news would be generally bland and their utility to the public truncated. The Committee does not wish to see this kind of journalism diminish. However, the Committee must address the questions of how vital the ability of a journalist to keep a source secret is to his or her capacity to obtain information. Put another way the question is whether that information will continue to be forthcoming if journalists cannot guarantee that the source will not be identified - in any circumstance.

4.23 The Committee accepts that sources are an important tool the media uses in fulfilling its role as a facilitator of free communication. It is recognised that there will be circumstances where information will not be provided if anonymity cannot be offered to the source. There is a risk that the failure to recognise such circumstances will lead to some diminution in

19 *Evidence (Mr Cockburn), p. 356. The Nine Network's response to this was that this is because journalists are prepared to go to gaol.*

the availability of important information. If this did happen, it would be detrimental to the success of the media as the vehicle for general communication. The Committee is not convinced, however, that the risk is so great that absolute and permanent anonymity is appropriate. The issue has to be considered in light of competing public interests.

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:

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

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

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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]

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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.

Chapter 6 - Balancing Competing Public Interests

What is public interest?

6.1 The public interest was much discussed during the Committee's inquiry. However there was limited debate about what public interest actually means. It has been distinguished from public curiosity. A witness from the Queensland Parliamentary Committee on the Criminal Justice Commission described it as 'something in which the public, the community at large, has some pecuniary interest or some interest by which their legal rights or liabilities are affected'.[1] It appears to be an elusive concept but one on which a number of arguments about privilege has been based. In this debate, the appellation 'public interest' has been attached to widely differing matters. For example, there is a public interest in the maintenance of free speech. There is a public interest in maintaining a legal system which strives to ensure every person has a fair trial. There is a public interest in the free flow of information. There is a public interest in keeping public authorities accountable. All of these play a part in the debate surrounding confidential sources.

6.2 On the basis of the High Court's decisions in *Nationwide News v Wills* and *Australian Capital Television v The Commonwealth*[2], there is clearly a public interest in freedom of communication in a democracy. The media's argument might go like this: the public interest necessitates freedom of the media, because of the crucial part the media plays in the

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1 *Evidence (Dr Watson), p.528*

2 *Op cit.*

communication of information and debate about issues of interest to the public. The public has an interest in the supply of information to the media in order to facilitate its role in communication. The argument might go on that without confidentiality the supply of information is threatened. This information is important to the ability of the media to perform its role. Should these sources dry up many matters of major public concern, ranging from maladministration through misconduct to criminal activities, would not be made known to the public, and this would harm the public interest.[3]

6.3 On the other hand there is public interest in the maintenance of our system of justice. In the general sense, public confidence in the administration of justice requires an assurance that all persons are subject to the law which the courts administer, and will obey a lawful direction of the court, particularly where the rights and liberties of an individual are at stake. In the context of a specific case, it must be possible for the court to have access to all relevant and admissible information in order to make a full assessment of the evidence and come to the appropriate conclusion on guilt or innocence.

Which public interest?

6.4 The public's right to be informed about matters which affect them is integrated with concepts of freedom of communication and freedom of expression. This right can come into conflict with an individual's right to have all relevant information before the court which is charged with the

3 *Flint, D. 'Complaints and Confidentiality', Australian Centre for Independent Journalism, Seminar Papers No 5, October 1992 : Journalism and the Law, p.16*

determination of his or her guilt or the resolution of his or her dispute with another person. This conflict results from the proposition that the ability to withhold information about the identity of a source, even in the face of a court order to do so, is fundamental to the preservation of the right of the public to be informed. This belief in the importance of confidentiality to the public interest is the basis for clause 3 of the AJA's Code of Ethics, namely that such confidences be respected at all times. The confidential nature of the relationship is crucial to the free flow of information.

6.5 In its submission to this inquiry, the Communications Law Centre put the proposition this way:[4]

> The disclosure of journalists' sources may harm the free flow of information, both from the particular source whose identity has been revealed and potential future sources who may refuse to provide information to the journalist who disclosed the identity of the source. Sources of information to the media in general may diminish.
> The journalists' ethical obligation to maintain the confidentiality of her or his sources in all circumstances may come into conflict with the wish of a litigant, prosecutor or investigating authority to ascertain the identity of the source for the purposes of proof, taking further action against the source or conducting further investigations. In resolving this conflict, courts are required to balance the public interest in having all relevant information available in order to facilitate the due administration of justice against the public interest in maintaining the confidentiality of the relationship between the journalist and the source and the broader public interest in maintaining the free flow of information.

4 *Submission 113, p.1190*

6.6 When there are a number of competing public interests involved in the resolution of an issue, a balancing exercise has to be undertaken in order to determine which of them ought properly take priority. In *Cojuangco* the High Court affirmed the need for a balancing approach to be taken to resolve the conflict between competing public interests. It explained the reasons for such an approach as follows[5]:

> The point is that there is a paramount interest in the administration of justice which requires that cases be tried by courts on the relevant and admissible evidence. This paramount public interest yields only to a superior public interest, such as the public interest in national security. The role of the media in collecting and disseminating information to the public does not give rise to a public interest which can be allowed to prevail over the public interest of a litigant in securing a trial of his action on the basis of the relevant and admissible evidence. No doubt the free flow of information is a vital ingredient in the investigative journalism which is such an important feature of our society. Information is more readily supplied to journalists when they undertake to preserve confidentiality in relation to their sources of information. It stands to reason that the free flow of information would be reinforced, to some extent at least, if the courts were to confer absolute protection on that confidentiality. But this would set such a high value on a free press and on freedom of information as to leave the individual without an effective remedy in respect of defamatory imputations published in the media.

6.7 Most submitters and witnesses accepted the proposition that an absolute privilege in favour of confidential sources would not allow for the proper balancing of competing interests.[6] The importance of one over the

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5 *John Fairfax & Sons v Cojuangco (1988) 165 CLR 346 at 353, 354*

6 *The Communications Law Centre, the Australian Press Council, the Media Entertainment and Arts Alliance*

other will not be the same in every case.

6.8 The Law Reform Commission of Western Australia concluded in its Report that the public interest in the protection of confidential information in the hands of journalists, including the identity of the sources, does not by its very nature outweigh the public interest in courts' having all relevant evidence available to them so as to justify the creation of a privilege. The Commission favoured a structured discretion so that in appropriate circumstances the information could be withheld subject to the order of the court.[7] The Commission recognised the importance of the role played by the media in the provision of accurate information to the public but said that creating an absolute right to keep sources secret would be to the detriment of judicial proceedings to which such information would always be denied. It went on to point out that even without such a privilege matters of major public interest have been exposed[8], although possibly as a result of an express or implied undertaking as to confidentiality.

6.9 Justice for each and every individual in our society is essential.

> It is a fundamental obligation of the state to provide a system that enables its citizens to get justice according to law, in both criminal and civil matters. It is in the public interest that the innocent are not convicted, but that the guilty are convicted.[9]

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7 *LRC of WA, Project No 90, pp. 57-58*

8 *Ibid, p.60*

9 *Attorney-Generals Department, Submission 115, p. 1341*

6.10 It goes without saying that the public interest lies in ensuring that everybody receives a fair trial. It is in the interests of a fair trial that all relevant evidence be available at that trial. To create a situation which makes it impossible in some cases to access relevant evidence potentially defeats a fair trial. To protect that public interest in the face of the competing public interest that information be freely available courts recognise that neither can be absolute.

Who determines the balance?

6.11 The important thing to remember here is that the direct conflict arises during legal proceedings. Who, in those circumstances, should decide which public interest should prevail? Should it be the journalist to whom the confidence was given and who would be the only person (apart from the source him or herself) equipped with the full knowledge of the circumstances in which the communication was made? Should it be the responsible officer or senior employee of the media organisation by which the journalist is employed, such as the editor of the newspaper? After all it is the media organisation which ultimately carries the responsibility for what it publishes. Or should it be the judge who has ultimate control over the proceedings before her or him, who is responsible to see that the trial in issue is fair and who must decide the questions of relevance and admissibility of all the evidence?

6.12 The Committee acknowledges that, in determining the balance, it must be possible in the interests of justice in a particular case to defeat the claim for privilege. As the issue arises predominantly before courts

(refusal to answer a question before a statutory or investigative body can only by punished by a court) it is the court which has to be the ultimate decision maker. Logically therefore the judge must have the power to determine the appropriate balance between competing interests.

Significance of information

6.13 One crucial aspect of the balancing exercise which has been discussed is: how important is it to the determination of the legal proceedings that the court be informed of the identity of the source of the information provided by a journalist? The resolution of this issue is affected by the importance the evidence has to the matter before the court, and by the nature of the proceedings in question. That is, whether they are criminal or civil, or whether the issue arises in interlocutory or pre-trial applications or during trial. It seems accepted that the earlier the stage in the proceedings, the less likely it is that disclosure will be of vital importance. This is the basis upon which the newspaper rule is held not to apply during trial, but only to interlocutory proceedings.

6.14 On one approach, the identity in question should only be revealed if that information is necessary to the determination of the issue before the court. This approach has been adopted in section 10 of the *Contempt of Court Act 1981* (UK), which creates a statutory privilege for journalists. It provides that no court may require a person to disclose the source of information contained in a publication unless it is established that the disclosure is necessary in the interests of justice [as well as national security or the prevention of disorder or crime]. What this recognises is that journalists will often have information which must be made available as

evidence in judicial proceedings in order for justice to be done. It is argued that it would be detrimental to the public interest in the proper administration of justice to interfere with this by giving journalists a privilege to withhold information without very good reason.[10]

6.15 There are a variety of positions taken as to when it is necessary to have the identity of a source revealed. The Nine Network, for instance, accepts that it would be appropriate for disclosure to be ordered if evidence is critical to establishing the innocence of a person[11]. They say that the evidence must be 'absolutely necessary'[12] to the case for the public interest in confidentiality to be overruled.

6.16 The High Court's view of necessity was expressed in *Cojuangco* when it approved the balancing approach in pre-trial applications. The Court held that this required the applicant to demonstrate more than relevance to the proceedings. The applicant had to show that disclosure is "necessary in the interests of justice."[13]

6.17 Another proposition is that the court should have access to all relevant admissible evidence. If the information provided in confidence is relevant to the proceedings, the court should be able to call the source to test the veracity of that evidence. Usually, if such evidence is given by the journalist to whom it was provided, it is hearsay and therefore, at best, of

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10 LRC of WA, Project 90, p.62

11 Evidence (Mr McLachlan), p.11

12 Evidence (Mr McLachlan), p.12

13 Op cit at p.351

limited weight. In fairness to the parties in any legal proceedings the opportunity to adduce evidence of significant weight should not be denied. Therefore, if it is possible for the evidence of the journalist to be tested fully, or, if it can be given in circumstances which do not amount to hearsay, the opportunity to call the source should not be denied.

6.18 Whether or not evidence about the identity of the source of certain information is necessary or relevant will always be determined on a case by case basis. For example, in *DPP v Luders*, Luders was convicted without the identity of Barrass's source being ascertained. In the Nicholls case, on the other hand, the defendant was accused of criminal behaviour. His response to the accusation was that it was not him who had engaged in the criminal behaviour but his confidential source, whom he refused to identify. This is a clear case where the information about identity was central to the question of guilt or innocence.

6.19 Various commentators have alleged that the fact Mr. Nicholls was acquitted without disclosure was relevant to the question of the significance of the identity of the source to the case. On the other hand, it is possible that the lack of sufficient evidence to prove the case against Mr. Nicholls beyond reasonable doubt was to a degree exacerbated by his refusal to answer the question about the identity of the source. (He was not claiming privilege against self-incrimination as a reason for not disclosing.) In that case the court considered the question whether the source existed at all, rather than whether it was able to test the veracity of the information provided by the source by having the unnamed person called and cross-examined.

Defamation

6.20 The law of defamation highlights the conflict between vindicating the freedom of the press and seeing to the proper administration of justice in civil proceedings.

6.21 It was put to the Committee by a number of witnesses and submitters that the laws of defamation act as a grave fetter on the practice of journalism by seriously impinging upon the freedom of expression. The Law Reform Commission of Western Australia suggested that the law of defamation may be a greater restriction on the freedom of the press than the lack of a privilege for journalists.[14] It can inhibit public investigation and media discussion of events which are important to the public interest. This contention is particularly significant in the light of the High Court's conclusions about the implied right to freedom of communication in *Nationwide News v Wills* and *Australian Capital Television v The Commonwealth,* discussed in Chapter 4.

6.22 The Nine Network stated that the lack of uniformity in the law of defamation makes it a particularly difficult restriction for mass media to grapple with.[15] Defamation laws differ from State to State and, so far, all efforts to attain uniformity have failed.

6.23 Whatever the state of the law of defamation, to allow a journalist to keep secret the source of allegedly defamatory material denies

14 *Project 90, p.61*

15 *Submission 77, p.477*

the person defamed the fullest opportunity to obtain redress for the wrong done to her or him by the publication. The newspaper rule recognises at least a prima facie need to respect confidences. However, it applies only at the interlocutory stage. At a defamation trial, the question of malice is commonly in issue and it becomes important to identify the source in order to assess the motive behind the disclosure of the allegedly defamatory material. For the media this operates as a fetter on free speech. For the victim of the publication the denial of access to the source frustrates the legal process on which he or she relies for redress.

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

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;
>
> 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.

Chapter 8 - Contempt

Introduction

8.1 When a journalist refuses to comply with the order of a judicial or quasi-judicial body to answer questions for fear of disclosing the identity of a confidential source, is proceeding against him or her for contempt of court the appropriate response? Would the answer to this question be different if the recommendations of chapter 7 of this report were in operation? If the solution to the conflict engendered by journalists' determination to keep their sources secret and the justice system's insistence that they be revealed allows for the justice system to prevail in certain circumstances, then unless the authority of the court is acknowledged and respected by journalists, the risk of confrontation between them remains.

8.2 To successfully eliminate conflict, this solution will need recognition in the Code of Ethics of the AJA. There would then be no legitimate argument, whether legal or moral, for a journalist to defy an order to disclose. Such defiance would clearly be contempt in the face of the court.

Disobedience Contempt

8.3 In 1987 the Law Reform Commission of Australia (LRC) published its Report No 35 on Contempt. That report described non-compliance with court orders as "disobedience contempt". 'It involves the imposition of sanctions for the purpose of enforcing orders made by, and undertakings given to, courts, and for the punishment of disobedience of

those orders."[1] The LRC recommended the abolition of the common law of contempt in those circumstances, and its replacement by a statutory procedure for the imposition of sanctions upon witnesses who refuse to answer a question lawfully put to them.[2] The recommendations go on to provide that sanctions for the purpose of enforcement should only be imposed where compliance is within the capacity of the person concerned and only to the extent that they are likely to be effective.

8.4 The LRC's recommendation 66[3] favours punitive sanctions only to the extent that they are necessary to uphold the effectiveness of court orders. Courts are still the ultimate arbiters of disputes in our society. Penalties are therefore relevant in the context of enforcement. If enforcement is not an issue, penalties can only serve as vindication for the injured party, or as a specific or general deterrent.[4] This means that one particular journalist would be punished to encourage other journalists in a similar situation to reveal their confidential source.

A Separate Court

8.5 The LRC Report contemplates that proceedings for disobedience contempt be conducted by the presiding judge or by a separate

1 *Law Reform Commission, Report No. 35, p. lv*

2 *LRC, Report No 35. p.lxxxv*

3 *LRC, Report No 35, p.lxxxiv*

4 *LRC, Report No 35, p. 307*

tribunal constituted from the same court but excluding the presiding judge[5]. The decision about which mode should be followed is left to the presiding judge. Professor Chesterman, during evidence to the Committee, urged that, if a journalist is to be dealt with for contempt for failing to comply with a court order, that subsequent proceeding should take place before a different judge. His view was that the basic issue in a trial for contempt is that it be fair. He said:

> Even as the law stands, it is not inevitable that it be dealt with by the same judge because you can prosecute these witness refusals as separate criminal offences, in which case they will go under a statutory offence provision to usually summary trial before a magistrate. Where the refusal occurs, as with Deborah Cornwall, in front of a commission investigatory body, that body will never be the one that imposes liability and punishment; it will have to be referred across to a court, just as Deborah Cornwall was referred across to the Supreme Court and dealt with there.
> But I would like you to consider making the procedure whereby, at least if the journalist requires it, the issue of his or her ultimate liability and sentence be referred to a separate court; that that be common form for all of these sorts of cases and not just depend on the way it happens to develop.[6]

8.6 At another point in the public hearings, Professor Chesterman argued that if a court has reached a decision that the journalist should reveal her or his source and the journalist refuses, there is a conflict between the relevant judge and journalist, before the issue of what is an appropriate remedy is ever considered. The judge her or himself is a party to the conflict and may well be seen to view the matter from a partisan

5 *LRC, Report No 35, p. 79*

6 *Evidence (Prof Chesterman), p. 143*

position. The issue of the journalist's ultimate liability and punishment should therefore, in Professor Chesterman's view, be referred to a separate court where the issues will be determined by a disinterested adjudicator.[7]

8.7 This position was supported by the Communications Law Centre which drew attention to the possibility that such separate consideration of punishment for contempt could operate as a 'review', presumably of the exercise of the judge's discretion pursuant to the guidelines. The following extract from the Centre's submission articulates the relevant issues:[8]

> Separate trial in a separate court ensures a fair trial for the journalist and provides all of the safeguards which are usually available to an accused person. The judge or magistrate whose demands for disclosure have been openly defied can too easily feel that her or his authority is in issue and therefore may be unable to approach the issues of "necessity" and "importance of purpose" with total impartiality. ... If a separate court is used there is, in effect, a review stage for the journalist - for a conviction to occur, two fora must agree that "necessity" and "importance of purpose" have been established.

8.8 The Committee understands this proposal. However, the Committee does not consider it appropriate to depart from the conclusions reached by the Australian Law Reform Commission in its exhaustive review of the law of contempt. The LRC recommended that there should be two possible modes of trial for the offence of contempt in the face of the court, namely trial by the presiding judge or trial by a separate bench from within

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7 *See Evidence (Prof Chesterman), p. 125*

8 *Submission 113, p. 1213*

the same court, but excluding the presiding judge. The Committee has concluded that it is appropriate to leave the option in the hands of the presiding judge who has the duty to make her or his court operate effectively.

Recommendation 3

The committee recommends that any contempt proceedings be dealt with in the manner recommended by the Australian Law Reform Commission in its report on Contempt, namely that the presiding judge have the option either of dealing with the matter himself or herself or of referring the matter to a separate court. (Para 8.9)

Penalties

8.9 Assuming that contempt proceedings for disobedience are to be retained, there appear to be a number of ways of addressing the issue of punishment for it.

Statutory offence

8.10 In addition to making recommendations about proceedings in respect of disobedience contempt the LRC Report recommended the creation of a new indictable offence of wilful failure to comply with a court order in such a way as to constitute a flagrant challenge to the authority of

the court.[9] Indictable offences usually attract a penalties which include a term of imprisonment.[10]

8.11 Where the behaviour of a journalist is found by a court to be so serious as to constitute such an offence, should the recommendation of the LRC be implemented. The Committee sees no reason why he or she should not be subjected to the relevant punishment, appropriately decided by the court. Ideally, the situation should not arise if the structured discretion discussed in Chapter 7 is enacted, and the AJA Code of Ethics amended to recognise the law which would then apply. In all those circumstances, a journalist who continues to defy the court should not have the protection of the law. The LRC found in their inquiry that imprisonment would continue as a sentencing option.

8.12 The Committee's attention was drawn to the situation where a journalist refuses to reveal a confidential source and is by such refusal knowingly aiding a crime which carries a penalty of 5 years.[11] The Committee considers that such a situation would result in the journalist being prosecuted for participating in the relevant crime. It would not be a proper case to bring proceedings for disobedience contempt.

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9 LRC, Report No 35 p.lxxxvi, para 561.

10 Section 4G of the Crimes Act 1914 (Cth) defines an indictable offence as one with a penalty of more than 12 months imprisonment. Some statutory offences which do not carry a term of imprisonment are specifically defined as indictable by the legislation which creates the offence.

11 Submission 125, p. 1541; Evidence (Mr Hellaby), p. 382 - 383

Imprisonment

8.13 There may be cases where a journalist refuses to comply with an order in circumstances which do not constitute a 'flagrant challenge of the court's authority'[12]. The Committee needs to consider the issue of penalties in the context of the present law, where there is no statutory protection for confidential sources. The important question in that context is: should journalists go to gaol for refusing to disclose information, in circumstances where they regard themselves as bound by their professional ethics and as acting in the proper course of their employment? In its Discussion Paper of August 1993, the New South Wales Opposition said it "does not believe workers should be sent to gaol for doing their jobs".[13]

8.14 The Committee is firmly of the view that an open ended penalty, that is, a term of imprisonment until the person complies with the order, should never be an option. The arguments against open ended sentences were canvassed in the LRC's Report. They included:

- a coercive sentence may cease to be coercive,
- the potential for unnecessary publicity for 'martyrs', and
- the potential for comparatively harsh outcomes.[14]

8.15 The cases this Committee has looked at have shown that open ended imprisonment does not work. The sources have remained unknown

12 *LRC, Report No 35, para 561*

13 *New South Wales Opposition, "Journalists and their Sources", August 1993, p.13*

14 *LRC, Report No 35, paras. 541-544*

despite Mr Nicholls, Mr Hellaby and Mr Budd spending time in prison. Professor Chesterman had this to say:

> Then the other thing we took up in that report [LRC Report No 35] was the matter of the possibility of sentence until you disclose, until you give the evidence, and we said very firmly - and I think with a fair degree of unanimity from people whom we consulted - that in any type of situation where a witness refuses to give an answer in a court the penalty, ultimately, should be a limited one; under ordinary sentencing principles it should be set with an upper limit and you should never have a court saying, 'You go to gaol until you give is the information we are seeking'.[15]

8.16 This approach is supported by the Communications Law Centre in the following terms:

> In addition, it is unacceptable that the penalty for contempt takes the form of an indefinite sentence until such time as the witness caves in and obeys. In any event, such coercive punishment appears to be futile, as journalists have refused to disclose their source despite being imprisoned, as was the case with Barrass and Budd. We adopt the Australian Law Reform Commission's proposal that there should instead be a fixed maximum sentence.[16]

8.17 Other witnesses pointed out that penalties do not work, they do not correct the situation by obtaining the information sought by the court, they simply punish.[17] In that event the resolution of the case in which the issue arose is not advanced. On the other hand the administration of justice

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15 Evidence (Prof Chesterman), p. 143-144

16 Submission 113, p. 1213

17 Evidence (Mr Hurst), p. 203

may be served in the general sense as the authority of the court is vindicated. Some of these arguments are, of course, applicable in the wider debate about sentencing in criminal matters generally.

8.18 The Committee agrees with the LRC that open ended imprisonment until disclosure should not be imposed upon a journalist who refuses to comply with a court order. The Committee also concludes that penalising a refusal to answer in circumstances less than flagrant should not include imprisonment.

Proportional penalties

8.19 A number of witnesses referred the Committee to the unsatisfactory situation which arises in those cases where journalists have been ordered to answer questions about the identity of a confidential source, have refused to do so, and the punishment they have ultimately received has been more severe than that which is imposed upon the person to whom the original proceedings related. The Barrass case was the most prominent of these. As noted in Chapter 4 Mr. Luders, the accused in the prosecution, was convicted of official corruption and fined $6,000. Mr. Barrass was convicted of contempt and fined $10,000 even though his refusal to reveal the identity of his source did not prevent the successful conviction of the accused. In the case involving David Hellaby the journalist was fined $5,000 but the case was settled confidentially.

8.20 The Committee is concerned that a person who has demonstrated a commitment to his or her code of ethics, even though they

are not enshrined in law, is punished for that commitment with a heavier penalty than the person who is before the court for engaging in criminal conduct, such as official corruption. Such a result does not sit comfortably with common notions of fairness.

Other Possible Sanctions

8.21 Leaving aside the question of whether or not there ought be an indictable statutory offence of failure to comply with a court order in circumstances which involve a 'flagrant challenge to the authority of the court', it seems there is a range of responses to disobedience contempt the courts could consider. If the recommendations in Chapter 7 are enacted, this issue will arise only when the court has concluded that the information is essential to the resolution of the issue it is dealing with. As suggested by the LRC, the ideal response would be one which will obtain the information required.

8.22 If there is no consequence for the non-compliant journalist for the refusal to disclose the source of information, that journalist and others will have no incentive to comply with such an order on a subsequent occasion. The LRC favours the retention of punitive sanctions 'to the extent that they are necessary to uphold the effectiveness of court orders'.[18] So if there are to be sanctions, other than imprisonment, what are the options?

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18 LRC, Report No 35, para. 519

Fines

8.23 Monetary penalties have the potential to be an effective punishment for a journalist but, as previously discussed, it is important that the level of that fine bear some relationship to the seriousness of the offence. It should be commensurate with the subject matter of the proceedings in which the order was made.

8.24 Monetary fines are usually paid by the journalist's employer.[19] However, if the journalist has acted contrary to the employer's accepted standards, it is possible that the fine will be left to the journalist. Assuming that is not the case, it is quite likely that the employer will make the payment. Liability should also be acknowledged by the journalist. However, it would be difficult for the court to ensure that a fine imposed was actually paid by the person on whom it is imposed.

Community Service

8.25 A busy journalist may be suitably chastened by having to give up some of his or her time to provide voluntary service to the community. This should be an option for the sort of cases discussed in this report even when not an alternative to imprisonment. The Law Council's view was that both monetary penalties and imprisonment were inappropriate and suggested something along the lines of community service.[20]

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19 *Evidence (Mr Bartlett), p. 201*

20 *Evidence (Mr Bartlett), p. 201*

8.26 Deborah Cornwall was subjected to a suspended gaol sentence, with community service as an alternative. The Committee does not accept that gaol terms should be imposed when the journalist has acted in an ethical manner. It ought to be possible for a court to proceed straight to a community service order.

Suspension/ Professional discipline

8.27 If a journalist fails to comply with an order to reveal a source after enactment of the recommended structured discretion and amendment of the AJA Code of Ethics, it would be open to his or her professional body to take action to punish that journalist. (Such a journalist would have failed to abide by the new code.) Such action by the professional disciplinary body could include fines, suspension or prohibition from practice as a journalist, depending upon the conclusions about the seriousness of the offence. If the court has already imposed a punishment for contempt, care would need to be taken by the professional body to avoid impinging upon rules against double jeopardy. It might be possible for a court to merely refer the matter to the relevant professional body for consideration and appropriate action. This is sometimes done with recalcitrant lawyers.

8.28 The structure for disciplinary processes and the role and content of the journalistic code of ethics are discussed shortly in the next chapter and will be dealt with more thoroughly in a subsequent report of this inquiry.

Publicity

8.29 A further option could be the making of an order for publication of the conclusions reached by the court and the professional disciplinary body about the behaviour of the journalist concerned. Several witnesses told the Committee that journalists are jealous of their reputation because much of their work and advancement in their careers arises from the reputation they build.[21] The threat of bad publicity arising from a failure to comply with a court order and an amended code of ethics may act as an incentive to journalists to avoid giving indiscriminate undertakings as to confidentiality which a court may subsequently order them to break. The journalist will have to consider the possible view of a court about the undertaking at the time of giving it. The disadvantage of reliance upon such publicity as the main sanction is that some of the less reputable media outlets may prefer to engage journalists prepared to take risks.

Proceed on the basis there is no source

8.30 A number of witnesses drew attention to the possibility that the court might, when it was unable to ascertain the source of evidence given by a journalist because of an undertaking as to confidentiality, proceed on the basis there was no source. Such a procedure would not be in the character of punishment for contempt. It would operate quite independently of that. The device has been developed in the United States where, in a libel case in New Hampshire, it was presumed that where the defendant refused to reveal a source when so ordered there was no such

21 *Evidence (Mr Crocker), p.291, (Mr Hippocrates), p.385, (Mr Briscoe), p. 386*

source[22].

8.31 The Attorney-General's Department suggested that such a presumption might go some way to redressing the injustice resulting from a refusal to identify the source and could apply in a wider range of proceedings than defamation.[23] Professor Flint of the Australian Press Council suggested that it might be a more suitable response than seeking to punish the journalist.[24] The effect of such an assumption on the proceedings would need to be carefully considered.

8.32 There is a danger that such an approach might skew the result of the case. Professor Chesterman pointed out that the journalist may come into the case as a witness not linked with any party.[25] The assumption may in fact be false. This could lead to an injustice. Professor Chesterman put these issues succinctly:[26]

> ... if the source, for whatever reason, has not been disclosed, it is likely to weaken the evidence that is given, but it may not destroy it. ... the jury may still believe that the evidence is credible and give it due weight. I would think, though, that in the ordinary course of events the failure to reveal the source and have the source come forward and testify to his or her part in the affair is going to weaken the overall story that the journalist is telling. To move from there to a presumption that there was no source may be bringing into the evidence in the

22 *Downing v Monitor Publishing Company Inc (NH 415 A 2d 683)*

23 *Submission 115, p.1340*

24 *Evidence (Prof Flint), p. 126*

25 *Evidence (Prof Chesterman), p. 127*

26 *Evidence, p. 128-129*

> case an item of fact which is just not true. There may be some cases where there was a real source but the privilege was denied. There may be other cases where the privilege is granted to the journalist but there was not, in fact, a source. The two things are at odds with each other.

8.33 The Committee does not favour the creation of an assumption that where a journalist refuses to reveal a source then there is no source. It is an assumption which may well not be the truth. This could lead to an injustice being done. Further, such an assumption would conflict with the recommended structured discretion.

Recommendation 4

8.34 The Committee has concluded that there remains a place for contempt in dealing with the conflict between the journalist's intent to preserve confidential sources and the court's determination to see to the administration of justice. Any solution which calls for an overriding order by the court must have a sanction for the failure to comply with it. The situations where enforcement procedures will be necessary will be significantly reduced by the adoption of the solution recommended in Chapter 7.

The Committee recommends:

- After the tests set out in Chapter 7 have been satisfied, if a court orders disclosure of a confidential source and the journalist refuses to comply, that failure should be dealt with as contempt of court.

- When such failure to comply is so treated, the presiding judge should have the option either of dealing with the matter himself or herself or of referring it to a separate court. (See recommendation 3.)

- The appropriate punishment for such contempt should be a matter for the discretion of the court from a wide range of options. If the proceedings during which the alleged contempt occurred are criminal, the journalist should never be subjected to a greater penalty than the accused in the criminal proceedings.

Chapter 9 - Improving Accountability

Introduction

9.1 A number of witnesses proposed that before journalists are given a privilege to keep their sources secret they must gain the confidence of the public that such special treatment is deserved and will not be abused. The public needs to be convinced of the important role played by the media in our democratic society and have confidence that it is fulfilling that role in an accountable manner.[1] Some have suggested that accountability has to come first - that until that happens there should be no privilege.

9.2 For example, discussions of shield laws in the Ministerial Council of Attorneys-General (previously Standing Committee of Attorneys-General) have proceeded on the basis that reform of the law in this area should be linked with improvement in the ethical standards of journalists.[2] There were witnesses who said that shield laws might give unwarranted protection to some of the excesses of the media and accordingly before they are introduced the media must enhance its credibility. As one witness put it, in the present practice of journalism truth is often sacrificed for the sake of a good story.[3]

9.3 The MEAA has established a Committee, chaired by Father Frank Brennan, to review its Code of Ethics. That Committee published an

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1 *Evidence (Mr Halliday), p. 324*

2 *Evidence (Mr Sumner), p. 313*

3 *Evidence (Mr Sumner), p. 314*

issues paper in December 1993 to facilitate that review. It has not yet published a report. The issues paper does not suggest accountability as a trade-off for privilege specifically but rather in the more general context of the power of the media:

> Most importantly, any group which is seen to exercise power without accountability loses credibility. If journalists lose credibility among the public, they undercut their primary function of holding to account others who exercise power. A public without confidence in its journalists is less free.[4]

9.4 The Issues Paper dealt with accountability as follows:

> If legal limits on speech shrink, media power grows. It is imperative that media accountability be, and be seen to be, effective and fair. Without that, otherwise sound arguments for law reform, from which many would benefit, may be resisted merely because of concern that the main beneficiaries of such reforms would be media people who are perceived already to have too much power and too little responsibility.[5]

9.5 The Committee agrees with this statement and considers that greater accountability in the practice of journalism has to be visibly achieved as soon as possible. However, it is unrealistic to expect the media to be perfect before any change in the law is made. What can be expected from the media before that is done is a demonstration that it is undertaking an extensive reform of itself. One demonstration of this would be the adopting of a new code of ethics.

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4 *Ethics Review Committee, Issues Paper, December 1993, p. 2*

5 *Issues Paper, p. 3*

9.6 This Chapter briefly discusses a number of initiatives which have already been taken in Australia to monitor and improve the standard of ethics in journalism. Some general conclusions are drawn from a look at the regimes in place in a number of other jurisdictions.

Journalism and the Professions

9.7 In the present debate journalists' privilege has been compared with those of lawyers and doctors; but there are obvious contrasts in the nature of their respective practices. Lawyers and doctors are heavily regulated and it is quite difficult to qualify to enter their ranks. Years of tertiary education are required in order to do so. Substantial fees are paid annually for permission to practise and without that permission, it is illegal to engage in work. Supervisory bodies oversee the practice of these professions and have the power to apply quite severe penalties upon those who fail to meet the standards laid down by them, including disqualification from practice.

9.8 Another distinguishing feature of the legal system is that it incorporates elaborate mechanisms (including an appeal process) to protect people from unfairness. In the practice of journalism there are few effective sanctions to protect people from unfairness. There is no binding obligation to present both sides to an issue and there is no obligation to avoid bias, nor to advise readers of any such bias. By contrast, a judge operates within parameters which require him or her to ensure that justice is done and is seen to be done.

9.9 Any person can engage in journalism. No formal qualifications are required and no fees have to be paid. It is not necessary to be a member of the MEAA to be a journalist. In these circumstances it is difficult to conceive how accountability can be universally enforced. Despite the fact that members of the MEAA are required to ascribe to the Code of Ethics, when a number of journalists were interviewed by Iain Gillespie in the course of his program "Fear or Favour" broadcast on SBS-TV on 21 September 1993, many were not even aware of its existence, let alone its content. In the face of this kind of evidence, it is understandable that there is community distrust of journalists' commitment to improving standards of ethical behaviour, without the introduction of regulatory legislation.

9.10 Without a more professional approach from journalists support for any kind of privilege is weak. One witness addressed this problem directly:

> I think that the answer is to make journalism more of a profession through education, through improved accountability mechanisms, and through lifting of ethical standards until we reach a stage where the community might reasonably expect that there is an ethos within journalism, there is a culture of quality within journalism such that abuses are less likely.[6]

9.11 If journalists become more accountable through effective disciplinary mechanisms to address concerns about ethics, through a higher educational requirement and through better professional standards, credibility in the eyes of the community will follow.

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6 *Evidence (Mr Turner), p. 512*

Unethical behaviour

9.12 There is considerable risk that increasing competition amongst media outlets will put pressure on journalists to stretch the bounds of acceptable behaviour in their desire to get the big story first. Many times the Committee heard that, on the whole, journalists are ethical. But there have been some notorious instances where the pressure to get the scoop has caused matters to be taken too far, and journalists have become what is euphemistically described as "overzealous"[7].

9.13 Perhaps the most striking example of this was the television coverage of the Cangai siege in northern New South Wales in March 1993. Police services who made submissions to the Committee condemned media coverage of the incident as gross interference which unnecessarily endangered the lives of victims, police and the journalists themselves.[8] Such behaviour can result in the journalist becoming a part of the event, playing their own role in the news. The Code of Ethics does not specifically address issues surrounding such events, so it is quite likely that this sort of behaviour would not be regarded by many journalists as unethical.

9.14 In evidence before the Committee there was an amount of discussion about incidents involving Mr Chris Nicholls, a former ABC journalist from South Australia. He had shown a particular interest in the National Crime Authority (NCA) and his activities attracted the attention

7 *Evidence (Mr Hadgkiss), p. 155*

8 *Submission 91 (Victoria Police), p. 740 - 741*

of the Australian Federal Police.[9] The AFP regarded him as prepared to resort to intrusive subterfuge in order to obtain personal information, including arriving uninvited at a dinner party[10], meeting a daughter of an NCA officer at her school on the pretext of urgency, and then proceeding to question her about her father's job.[11]

9.15 This kind of behaviour is said to be exceptional amongst journalists but it is an unfortunate fact of life that the exceptions such as these tarnish the reputation of the ethical majority. It needs to be kept in check by effective mechanisms for accountability if credibility is to be ensured.

Self-regulation: Accountability through complaints mechanisms

9.16 There are a number of methods already in place for gaining accountability. None of them are based on statute and none involve coercive powers. The most important are examined below.

Australian Press Council

9.17 The Australian Press Council is a voluntary association of organisations involved in the print media. The first two of its stated objects

9 *Evidence (Mr Hadgkiss), p. 154*

10 *Evidence (Mr Hadgkiss), p. 154*

11 *Evidence (Mr Hadgkiss), p. 154 - 155*

are of relevance to this discussion:

(i) To maintain the character of the Australian press in accordance with the highest journalistic standards and to preserve its established freedom.

(ii) To consider, investigate and deal with complaints about the conduct of the press and the conduct of persons and organisations towards the press[12].

9.18 The powers of the Council are limited by a number of factors.

9.19 The Press Council deals only with the print media. It does not deal with the ethical behaviour of individual journalists, leaving this to the MEAA. The Council's Complaints Committee investigates complaints in the context of its own statement of principles which in many respects reflects the AJA Code of Ethics.

9.20 Criticisms of the Press Council have included its lack of disciplinary powers, its financial dependence on publishers, its requirement that complainants must waive the right to future legal action, that it takes several months to adjudicate a complaint and that its one sanction, a requirement to publish an adverse finding, is ineffective.[13] Some newspapers required to publish have blatantly refused to do so and critics of the Council conclude, therefore, that reliance on an honour system is pointless.

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12 Submission 39, p. 375

13 Pearson, Mark, "Press self-regulation in Australia", Tolley's Journal of Media Law and Practice (1992) 12:4 p.105 -132

9.21 The Press Council has no power to call or cross-examine witnesses or order production of documents. No privilege attaches to its proceedings. It has no resources to investigate disputed facts.

9.22 The Committee will be examining these issues in more detail in a later report and has not reached any conclusions as to whether the criticisms have been substantiated. The following issues are raised in the present context only to draw attention to the options so far identified for improving accountability. The Press Council should play a significant role in this but will be limited if its sanctions are basically ineffective. The ability to ensure publication of adverse findings would be a powerful penalty against organisations found to be in breach of the Council's principles. Unless it can do this, it is not going to be an effective instrument of self-regulation.

9.23 A number of improvements to the operations of the press council were proposed by the John Fairfax Group[14] and by Mr Holding of the Bias is Bad News Committee Inc.[15] These relate to publication of findings giving greater prominence to the role of the individual journalists in the matters complained of and granting appeal rights against decisions of the Council. The Committee will be looking more closely at such proposals later in this inquiry. It seems evident that there is a need for the Council to consider closely all the options available to support its role as an enforcer of ethical standards. Greater attention to the behaviour of journalists may be needed.

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14 Submission 114, p. 1251

15 Evidence (Mr Holding), p. 221 - 223

Recommendation

9.24 The Committee notes that the AJA was, until 1987, a participating member of the Council. In that year it withdrew following a dispute about the response of the Council to the ownership changes in the Fairfax Group. The Committee urges that steps be taken to establish a closer relationship between the Press Council and the MEAA. Cooperation between these two bodies would surely provide greater opportunity to enhance accountability in the print media.

Recommendation 5

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

AJA Judiciary Committees

9.25 The majority of working journalists are members of the AJA branch of the MEAA. As already stated, adherence to the Code of Ethics is a condition of membership.[16] AJA Judiciary Committees, composed of five financial members elected biennially in each branch, are established to adjudicate alleged breaches of the code. These committees investigate and make decisions in respect of any complaint about violation of or refusal to observe the code. Anyone, including members, can complain. If a journalist

16 *Some discussion of relevant provisions of the Code of Ethics appears in Chapter 2.*

fails to attend a meeting the committee may impose a warning, reprimand, fine of up to $1,000 or suspension from membership for up to a year. Both journalist and complainant have a right to appear and the rules of natural justice are to be observed. Procedures are set out in the MEAA rules. The complaint may be upheld or dismissed by the committee on a majority vote. Penalties which may be imposed include a warning, reprimand, fine of up to $1,000, suspension from membership for up to a year and expulsion.[17] Either party may appeal against the decision to the branch appeal committee and then to the national appeal committee.

9.26 The four most common criticisms of the AJA complaints system are published by Father Brennan's Committee as:

1. the existence of judiciary committees is not advertised to the public;
2. the complaints procedures are too slow;
3. the system is too secretive, since findings are not publicised, as a result of which members are not educated about how the code is applied, journalists escape the most relevant sanction of publication which would act as a potent deterrent and the public remains unaware of standards expected of journalists; and
4. the judiciary committees can only hear complaints against members of the AJA.[18]

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17 Australian Journalists Association, Constitution and Rules, 1989, rule 30(b)

18 Issues Paper, p.9

9.27 The Issues Paper also refers to a number of administrative deficiencies in the system as it currently operates.[19] An interesting dilemma to note in the context of confidential sources is that a judiciary committee would probably find itself in contempt of court if it were to penalise a journalist for revealing a source in breach of the code of ethics when he or she had been ordered to do so by a court.

9.28 Like the Press Council, these Committees are said to be ineffective for lack of power to enforce whatever sanctions they might impose. A journalist can go on working after expulsion from the union and can refuse to pay a fine levied.[20] Some have suggested that this ineffectiveness could be largely addressed if the Judiciary Committees were to regularly publish their findings. Ms Prue Innes, a member of an AJA Judiciary Committee, stated that one of the main reasons why these are not published is the fear those on the committees have of being sued for defamation if they did so.[21] She said:

> This is a serious problem and one which is having an inhibiting effect on the effectiveness of our disciplinary processes and findings we make about appropriate standards of professionalism for journalists. It is stopping us making detailed findings public and informing journalists of what are and what are not appropriate ethical standards.[22]

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19 *Further detailed criticisms of the AJA Judiciary Committees was made by Mr Cratis Hippocrates of the Queensland University of Technology, Submission 109*

20 *Chris Nicholls was fined by the MEAA in 1990 for what was found to be unethical behaviour. He was fined, but at the time of the Committee's hearing in Adelaide the fine remained unpaid. [See Evidence (Mr Sumner), p. 313]*

21 *Evidence (Ms Innes), p.180*

22 *Evidence (Ms Innes), p. 180 - 181*

9.29 Ms Innes distinguishes the position of these committees from that of the Press Council because they are concerned with the behaviour of individual journalists while the Press Council examines the publication itself. She urged some statutory protection against defamation be provided to enable the AJA Judiciary Committees, after all rights of appeal have been exercised, to publish its findings without fear. This proposition was supported by the Law Council.[23] The Committee accepts that publication of such findings would have an important effect upon journalists both in instructing them as to what ethical behaviour is and in showing them what the consequences of unethical behaviour might be.

9.30 Mr Cratis Hippocrates put the need for a review of the AJA procedures in this way:[24]

> The AJA's judiciary procedures need to be revised especially as the association realigns its priorities post-amalgamation. It is time for the judiciary procedures of the AJA to make journalists more accountable for their actions. Journalists need to be able to explain their ethics to the public, sources and colleagues. The sooner the AJA realises that there is a problem with the way it administers its ethics, the sooner the procedures can be streamlined and the level of accountability increased.

23 *Evidence (Mr Bartlett), p.213*

24 *Submission 109, p. 1053*

Recommendation 6

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

Australian Broadcasting Authority

9.31 The Australian Broadcasting Authority (the ABA) was established by the *Broadcasting Services Act 1992*. Part of its charter is to assist the broadcasting industry to develop codes of practice. These codes appear to be primarily directed at the content of programs without specifically addressing the methods used by journalists to put them together.[25] Codes have been registered by the Federation of Australian Radio Broadcasters and by the Commercial Television Industry. The ABC and SBS are subject to the jurisdiction of the ABA.

9.32 Primary responsibility for dealing with complaints from consumers of the electronic media rests with the broadcaster. The ABA investigates complaints only when the complainant receives no response from the broadcaster in 60 days or is not satisfied by the response. In relation to the ABC and SBS, the ABA can report failure to act on its recommendation to the Minister for Communications and the Arts. It does not appear that the ABA has any coercive power over commercial

25 *Submission 124 (Australian Broadcasting Authority)*

broadcasters who do not act upon its recommendations made subsequent to an investigation into a complaint.

9.33 Complaints about unethical behaviour of journalists employed in the electronic media remain a matter for the AJA Judiciary Committees, assuming the journalist complained about is a member of the MEAA. The ABA has no role in the matter.

Editorial adherence

9.34 It was said that one of the major problems with relying upon the Code of Ethics of the journalists' union as a mechanism for accountability was that it does not apply as such to media owners or editors. Presumably the main reason for this is that owners and editors are frequently not members of the union. Those who are or have been members claim to ascribe to its principles.[26]

9.35 Some individual media organisations have developed their own codes of practice and these are usually applicable to all staff. The electronic media are required to register these codes with the ABA by the *Broadcasting Services Act 1992.*

9.36 The ABC relies on its Editorial Policies to maintain standards of ethics. This document is very wide ranging, covering all aspects of public broadcasting going way beyond, but incorporating, ethics. It includes editorial responsibility, cultural diversity, program standards, to name but a

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26 Submission 88 (Herald & Weekly Times), p. 630

few. The ABC claims that its adherence to this document has made it more accountable than it ever was.[27]

9.37 The Herald and Weekly Times Limited promulgated its own Professional Practice Policy in November 1993. The introductory paragraphs to the policy state clearly that it ' applies to all editorial staff, whether management or staff, union or non-union members, permanent and casual staff and contributors.' It is a comprehensive list of 'does and don'ts' for the conduct of journalism. It does not, however, on the face of it, address the consequences of failing to comply with its terms or who is responsible for enforcing it. Presumably these are matters for the employer.

9.38 The Committee heard directly from only one newspaper proprietor, the John Fairfax Group. Its submission said that the main papers in the group were bound by 'charters of editorial independence, which commit the owners, management, editors and journalists to an ethical framework'[28]. There is, however, no direct mechanism for dealing with breaches of the charter, as staff committees preferred to rely upon publicity and other similarly indirect means as the methods for ensuring compliance with the charter.

9.39 In order for general satisfaction with the ethical standards of the media to be achieved it will be necessary to address who is to have jurisdiction over the decision makers in newsrooms. Clearly the AJA judiciary committees are powerless in this area. The ABA's role appears to

27 *Evidence (Ms Walker), p.84*

28 *Submission 114, p. 1250*

be quite remote from the day to day activity of broadcasting.

Sanctions for ethical breaches

9.40 If self regulation is to be more acceptable to the public, it will be necessary for any body charged with the maintenance of ethical standards to be empowered to impose effective sanctions. The discussion above illustrates that presently no such power appears to exist for either the Australian Press Council, the AJA Judiciary Committees or the Australian Broadcasting Authority. It is difficult to conceive how this can be achieved without legislative backup. Internal rules already allow the MEAA to impose fines, suspensions or expulsion. It appears that none of these is fully effective. The Press Council has the power to require a member who has offended its principles to publish the Council's findings, but the newspaper can ignore such a ruling and the Council is unable to do anything about it.

9.41 In the end, unless serious consequences for both the journalist and the publisher are seen to flow from unethical behaviour, self regulation lacks credibility. Sanctions should be enforceable against the editor and the media owner who publish information which has been obtained unethically. The Press Council ought be able to impose substantial fines upon its members and to take steps to publicise the breaches which have been committed.

9.42 In the end, unless the unethical behaviour of all those involved in the media, including the journalist and publisher, is visited with enforceable sanctions then self regulation lacks credibility.

9.43 A less complex option would be to persuade the industry to adopt a code of conduct to which publishers could subscribe. This might be done by expanding the Press Council's principles, referred to above.

9.44 Logically, the enforcement of such a code should be administered by the Press Council. Administration should include the ability to impose penalties for breaches of the code and regular periodic review of the level of compliance.

9.45 The Committee will examine this issue more closely in its next report on journalistic ethics and disciplinary processes. At this stage the Committee concludes that self-regulation should be the appropriate means whereby ethical standards are maintained. However, this will only be a credible means if effective sanctions are attached to breaches of ethical standards. Such sanctions should apply to all those involved in the media including both journalist and publisher.

Recommendation 7

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

Proposals for Regulation of the media

9.46 Some have proposed the external regulation of the media as the ultimate answer to its flawed credibility in light of the perceived failure of self-regulation. Such proposals include licensing and a legislated code of ethics with a statutory body to enforce it.

Licensing

9.47 Some witnesses, notably the South Australian Police, proposed that proper regulation of the media would ensure a measure of accountability. This could be achieved by enacting legislation which would license journalists, define ethical standards and set up a disciplinary tribunal to deal with complaints.[29]

9.48 A related proposal was put by the then Attorney-General for South Australia which involved negative licensing.[30] This would allow anyone to practise journalism, as happens now, but if found to be acting contrary to the established code of ethics, a court could forbid them from continuing to do so. Alternatively, such a decision could be made by a panel consisting of the peers of the journalist concerned.

9.49 Journalists are understandably opposed to this suggestion on the basis that it has the potential to be a fetter on the freedom of speech.

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29 It was suggested that such a mechanism could also be used to provide an in camera process for establishing veracity of confidential sources. Evidence (Mr Clyne), p.283

30 Evidence (Mr Sumner), p. 333

> There is a very strong view amongst journalists that any form of licensing is anathema to the way we operate, to the basic rights of the freedom of anyone to fire up a newsletter, to start up a paper, to comment as they wish in Australia. Related closely to freedom of speech is freedom of the press.[31]

9.50 The proposal raises questions of who does the licensing and how.

9.51 Another suggestion involved voluntary application for accreditation which would bring with it a privilege given by shield laws to be enacted.

9.52 At this stage, the Committee is not persuaded that any form of licensing is called for.

External regulation

9.53 If improved self-regulation is the preferred approach, then clearly the media must be responsible for the processes needed to maintain ethical standards. Several submitters have suggested that some independent, presumably statutorily created, body should be appointed. One proposed a media commission, appointed by an all party parliamentary committee[32].

9.54 The Commonwealth Attorney-General's Department suggested that self-regulation has failed and that serious consideration should therefore be given to a statutory body involving journalists and lay persons,

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31 Evidence (Mr Halliday), p. 334

32 Submission 25 and Evidence (Mr Turner), p. 512

designed to enable individuals aggrieved by media reports to complain and have their complaints investigated and adjudicated upon.[33]

9.55 There are a number of difficult issues raised by these proposals which will be examined more fully in the next report. They include the dangers of political interference, the question of who appoints the members, the sort of powers such a body would have and the effect it might have on freedom of the press and investigative reporting.

9.56 At this stage the Committee considers that there is scope for improvement in self-regulation which should be fully explored before a more intrusive option is taken. The fullest exertion of peer pressure should be exercised to raise the standards of ethical behaviour amongst those in the media in order to gain the confidence and support of the public.

Training and qualifications

9.57 Much has been made of the fact that to be a journalist people are presently not required to obtain any special qualifications or to have any particular training. They can develop their ability on their own or, if employed by a media organisation, learn their skills on the job. However, in recent years there has been a remarkable growth in the number of tertiary courses available to those who want to be journalists. If journalistic ethics is given prominence in these courses there will over time be a diminution in the current ignorance about them and ultimately this will encourage public confidence in the media.

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33 Evidence (Mrs Jackson), p. 213

9.58 One academic in journalism put the matter before the Committee as follows:

> [J]ournalists' sense of ethical responsibility needs to be developed further as part of a general trend towards greater professionalism, and this process will best come from educators at arms length from the industry, both in initial training and in-service or refresher courses for practitioners.[34]

9.59 The benefits of continuing education have been recognised by a number of professions as an essential ingredient in maintaining standards. As presently practised journalism involves skimming the surface of most issues and moving on to the next, with little time to consider the impact of what is published.

> [P]artly because journalists spend so much time writing, they are loath to go and do a different mode of considered analysis of their practices. ... Unlike lawyers, there is no body of work or guided reading that we have all walked through so that we are all at one about what is our position and what is accepted practice and what is not accepted practice.[35]

9.60 Large media organisations ought have sufficient resources to provide on-going training for practising journalists. They should also be encouraged to allow their practising journalists the time to take up external training. At present there appears to be very little opportunity for this.[36]

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34 Submission 25 (Mr Geoffrey Turner), p. 171

35 Evidence (Ms Cornwall), p. 80

36 Evidence (Ms Cornwall), p. 89

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

Cultural development

9.62 The MEAA could do more, as the professional body common to most journalists, to inculcate a culture of professionalism. The ability to achieve this beyond the membership of the union would be limited to example as it has no power at all over non-members. Its ability to affect the standard of journalism generally is probably limited to setting a standard which is followed by those in the media because of peer pressure and the threat of unfavourable publicity. The first step along this path is now being taken by the review of the Code, previously mentioned.

What happens in other jurisdictions?

9.63 The Committee undertook some minor research into a small number of other western democratic jurisdictions to ascertain whether it could be said there is a relationship between the standard of ethical behaviour in the media, the status of the principle of freedom of the press and the degree of external regulation applied.

United Kingdom

9.64 In the United Kingdom there are many similarities with Australia. The UK has no written constitution or charter enshrining freedom of the press. The Press Council was established in 1953 under threat of legislation. It was a voluntary body staffed by media representatives. It was criticised for lack of independence. It was disbanded in 1990. After the Calcutt Report into privacy in 1990 a revised Press Complaints Commission was established to protect public interest and to oversee the Code of Practice. The Calcutt Report has recommended regulation of standards by a publicly funded statutory tribunal with power to take evidence on oath, order public corrections and apologies and award compensation. These have not been adopted as yet. In the mean time the Press Complaints Commission appears to suffer the same kind of criticisms as the Australian Press Council.

9.65 The UK National Union of Journalists, like the AJA, has a code of conduct to which its members are in theory bound. The union's ultimate sanction appears to be expulsion but up to 1990, no journalist had ever been expelled.[37] The UK also has statutory bodies established under the Broadcasting Act, the Broadcasting Complaints Commission and the Broadcasting Standards Council. Despite these mechanisms the British press on the whole is probably regarded as the most questionable when it comes to ethical standards.

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37 G Robertson and A Nicol, Media Law The Rights of Journalists and Broadcasters, Longman 1990, p. 440

United States of America

9.66 In the United States the First Amendment to the Constitution enshrines freedom of the press as a right. The existence of press councils is voluntary and the enforcement of ethical standards and rules is rare. On a national level the only significant press council is the National News Council, established in 1973.[38] Internal monitoring by newspapers is a growing trend using mechanisms like newspaper ombudsmen, more open publication of retractions and corrections, together with a number of publications dedicated to the review of news coverage.

France

9.67 In France the freedom of the press is enshrined in a number of constitutional provisions. There are no mechanisms for self-regulation by the press to prevent abuse of that freedom. Ethical standards contained in documents such as the Charter of the Professional Duties of Journalists have no legal force and do not appear to have been referred to by the courts. The conduct of journalism appears to be unregulated but affected indirectly by laws such as those of defamation, privacy and anti-discrimination. For example, there are restrictions on reporting of in camera proceedings and the protection of the presumption of innocence. The duty of professional secrecy, a breach of which is covered by the Penal Code, does not apply to journalists. Refusal to reveal a source is traditionally punishable by gaol, but it is very rarely demanded.

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38 Soifer and Lahav, eds., Press Law in Modern Democracies, Longman 1985, p. 115

9.68 It is believed that improvement in the standard of press reporting in France is due to increased competition amongst daily newspapers, higher expectations of the public, and the better training of journalists. The willingness of the courts to defend the rights of the individual against invasion of privacy and libel, together with the relative ease of access to courts, are seen as reasons why the French public has not demanded greater press regulation.[39]

Sweden

9.69 Freedom of the press in Sweden is protected by a variety of constitutional provisions including Chapter 1, Article 1 of the Freedom of the Press Act.[40] Press self-regulation has a long tradition in Sweden and in both form and substance is not dissimilar to that which exists in Australia. A Press Council established by three dominant press organisations in the 1960s strives to ensure adherence to a Code of Ethics which has as its primary goal the protection of the privacy of individuals. The Council consists of an equal number of lay and professional members, operates on a voluntary basis and is financed entirely by the press industry and the Union of Journalists.

9.70 Complaints go to a Press Ombudsman before they reach the Council. If a serious breach of the Code is found the Ombudsman files a complaint with the Council which adjudicates the matter. The Council can

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39 Errera, Roger, "Press Law in France", in Article 19, Press Law and Practice: a comparative study of press freedom in European and other democracies, 1993

40 Axberger, Hans-Gunnar, "Freedom of the Press in Sweden", in Press Law and Practice, p.150

order a paper to publish its findings and to pay a fine if imposed in the event that a breach of the code is found to have occurred. The majority of newspapers respect the system whether or not they belong to the Publishers Association. The Code of Ethics is said to be treated by Sweden's press with respect and decisions of the Ombudsman or Council are complied with. Laws applying to the press are therefore rarely used.

What conclusions can be drawn from other jurisdictions?

9.71 It is hard to ascertain which system in practice gives rise to the most effective yet equitable regulation of ethical standards in the media. A study of the means of regulation yields little on their practical success. Indeed, it may be that there is no correlation between the existence of regulations, be they legal or otherwise, and the ethical standards to which journalists adhere.

9.72 If there is a duty upon journalists to adhere to certain ethical standards, those standards exist despite the existence of codes of ethics. Thus the refusal to disclose the identity of a source does not find justification solely in the existence of Clause 3 of the AJA Code. *Sydney Morning Herald* journalist Deborah Cornwall, for example, was said by the Court to have relied on a "subjective personal ethical consideration unrecognised by the Code itself"[41], when she refused to disclose to the Court the source of her information. The codes serve as reminders of the ethical principles to which journalists should adhere.

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41 *ICAC v Cornwall unreported, Supreme Court of New South Wales, Abadee J, 6 July 1993, 11043/93 in Bennett ibid at 2*

9.73 It is perhaps not surprising that it is in those countries in which there is a perception of a want of ethical standards (for example in the United Kingdom), that the codes are not only live issues, but are considered as one of the most important means of regulating the behaviour of the media. This might in itself suggest that the codes are ineffective.

9.74 Yet, on the basis of the Swedish example self regulation is a sufficient means of maintaining acceptable standards. On the other hand, it does appear that in France, whose society is possibly the most heavily regulated of the states examined, press standards cause minimal concern.

9.75 An examination of other countries shows that journalists' unions in those places where freedom of speech is enshrined in written constitutions are less inclined than elsewhere to assert in their codes of ethics that freedom of the press is an overriding principle to which all others are subject. The consequences of such conclusions will be examined more closely later in the Committee's inquiry.

Conclusions

9.76 While there is no proper accountability for journalists there remains the danger of according them a status which might be abused. In a society where investigative journalism is seen as an important part of the freedom to communicate, a media which is prepared to go after what is important risks exceeding the bounds of the acceptable. In order to protect that freedom and to engender a vibrant media which will pursue its role as watchdog with dedication it is likely that the occasional unethical journalist

will come to notice. If the media gets out of hand, as some would say has happened in the United Kingdom, then the need for an independent and powerful review body based on statute increases. But there is a danger in developing too many constraints in order to address the lowest common denominator. It can stifle freedom of speech and of communication. At this stage the Committee does not favour an interventionist approach such as licensing to the maintenance of ethical standards in Australian journalism. It has been widely agreed by witnesses and submitters that the majority of journalists are ethical and the Committee does not consider that the agenda should be run by an over reaction to a few exceptions.

9.77 It is up to the media to establish credibility in the eyes of the community through effective self-regulation. It needs to satisfy the public at large that this can be done without external supervision or a legislatively imposed set of rules. As accountability is important across the whole range of journalistic activity, not just to the question of protection of confidential sources, it is not likely to be helpful to delay reform affecting confidential sources until full accountability is obtained. Once the media has adopted a new Code of Ethics, and an effective disciplinary mechanism for enforcing it, it would be appropriate to enact the legislative reform of the kind recommended by the Committee. The Committee is satisfied that the MEAA has accountability high on its agenda and awaits the outcome of the current review of its Code of Ethics with high expectations.

9.78 The Committee considers that journalists should strive to be more responsible and better qualified. Qualifications can come from the increasingly available tertiary courses, as well as experience. Media

organisations should be encouraged to engage journalists of merit which has been gained through both tertiary qualifications and through practical experience.

Recommendation 8

The Committee recommends:

- That clause 3 of the Code of Ethics be amended by the MEAA to remove the absolute character of the obligation it imposes on journalists to maintain confidentiality so that they can, with a clear conscience, comply with a court order made in the appropriate case to identify a source.
- That the MEAA establish a committee to improve the self regulation of journalists.
- That the Press Council be given power to impose and enforce sanctions on the print media. This should be done by legislation if necessary.
- That the MEAA and the Press Council establish closer links in an endeavour to improve the practice of journalism.
- That statutory protection against libel be provided to enable publication of the decisions of the AJA disciplinary committees;
  a. as a means of providing a more effective sanction against recalcitrant journalists,
  b. to better inform the public about the means by which journalists regulate themselves, and
  c. to improve community trust in journalists and justify in its eyes provision for the qualified privilege recommended in Chapter 7.
- That the MEAA act to increase the professionalism of journalists generally:
  (a) by setting standards for journalism;
  (b) by seeing to it that proper training is provided for them; and
  (c) by having effective disciplinary procedures in place.

Signed for the Committee:

Senator Barney Cooney
Chair

APPENDIX I

Written Submissions Released for Publication

Appendix I

Sub No.	Organisation/Citizen	Date of Submission
1	Shanahan, Mr D, The Australian, ACT	15.06.93
2	Breen, Mr P, NSW	17.06.93
3	Curry, Mr Henry A, Valley Liberals, VIC	undated
4	Brons, Mr R, VIC	17.06.93
5	Christian Leaders in Waverley, VIC	25.06.93
6	Maher, Mr P, VIC	23.06.93
7	Rivett, Mr Collinridge, NSW	25.06.93
8	SEC Credit Union Co-operative, VIC	21.06.93
9	Saunders, Mr R, NSW	undated
10	Brons, Mr R, VIC (*Supp. Submission*)	09.07.93
11	Brons, Mr R, VIC (*Supp. Submission*)	10.07.93
12	Brons, Mr R, VIC (*Supp. Submission*)	26.07.93
13	The New South Wales Council of Professions, NSW	20.07.93
14	Cockburn, Mr S, SA	29.07.93
15	Australian Civil Liberties Union, VIC	04.08.93
17	Law, Mr V H, QLD	26.06.93
18	Hellaby, Mr D W, SA	10.08.93
19	NSW Child Protection Council, NSW	12.08.93
20	Knights of the Southern Cross, VIC	11.08.93
21	Medical Consumers Association of NSW	18.08.93
22	Victims Advisory Council, NSW	undated
23	Reading, Mr G, NSW	26.08.93
24	Heenan, The Hon Judge, District Court of Western Australia, WA	20.08.93
25	Turner, Mr Geoff, The University of Queensland, QLD	25.08.93
26	Shoien, Mr N A, Acting Chief Judge, District Court, QLD	26.08.93
27	Humanist Society of Victoria Inc., VIC	30.08.93
28	GRAPPLE, VIC	30.08.93
29	Madden, Mr T C, QLD	30.08.93
30	The Federation of Australian Radio Broadcasters Ltd., NSW	02.09.93
31	Anderson, Mr T, NSW	01.09.93
32	Bias is Bad News Committee, VIC	20.08.93
33	National Council of Women of Australia Inc., QLD	23.08.93

Sub No.	Organisation/Citizen	Date of Submission
34	Office of the Commissioner of Police, ACT	31.08.93
35	Australian Broadcasting Corporation, NSW	30.08.93
37	Cancelled	
38	Lockett, Mr E J, TAS	01.08.93
39	Australian Press Council, NSW	02.09.93
40	Brons, Mr R, VIC	31.08.93
41	Miles, Chief Justice J, Supreme Court of the ACT	03.09.93
43	Gough, Mr R N, VIC	03.09.93
44	The News Journal Company, Wilmington USA	26.08.93
45	Anderson, Ms D, VIC	undated
46	Barr, Mr M, VIC	02.09.93
47	The Country Women's Association of WA Inc.,WA	31.08.93
48	Sarre, Mr R, School of Law, University of SA	02.09.93
52	Edwards, Ms D, M.SC, B.Sc (Hons), University of Technology, NSW	10.09.93
53	Hudson, Mr B, NSW	09.09.93
56	National Children's & Youth Law Centre, NSW	06.09.93
64	National Indigenous Media Association of Australia, QLD	09.09.93
66	O'Neill, Mr J, QLD	09.09.93
68	Police Department of South Australia, SA	07.09.93
69	Young, Dr Peter R, PhD, Queensland University of Technology, QLD	09.09.93
77	Nine Network Australia Limited, NSW	15.09.93
78	Department of Transport & Communications, ACT	
79	Cancelled	
84	Federation of Australian Commercial TV Stations, NSW	17.09.93
85	Baden Powell Guild of ACT	18.09.93
87	Buchhorn, Mr R, QLD	undated
88	Herald & Weekly Times, VIC	undated
89	Hartley, Prof J, Murdoch University, WA	16.09.93

Sub No.	Organisation/Citizen	Date of Submission
90	Schultz, Ms J, NSW	19.09.93
91	Media Director, Victoria Police, VIC	16.09.93
92	Meadows, Mr Michael, Queensland University of Technology, QLD	17.09.93
93	Walker, Mr G de Q, University of Qld, (TC Beirne School of Law)	21.09.93
95	Chudleigh, Mr M, NSW	06.09.93
97	NSW Attorney-General, NSW	28.09.93
98	NSW Council for Civil Liberties Inc., NSW	16.09.93
99	Holland, Mr H R C, British High Commission, ACT	28.09.93
100	White, Ms Sally & Hurst, Mr John, Royal Melbourne Institute of Technology, VIC	16.09.93
101	Committee for Balance in News, VIC	undated
102	Victoria Bar Council, VIC	29.09.93
103	The Law Reform Commission, NSW	12.10.93
105	SBS, NSW	12.10.93
106	Acting Commissioner of Police, WA Police Department, WA	30.09.93
107	Hughes, Mr R, QLD	27.09.93
108	Queensland Minister for Justice, Attorney-General & Minister for the Arts, QLD	undated
109	Cratis Hippocrates, Queensland University of Technology	18.09.93
110	Law Society of New South Wales	26.10.93
111	Media Entertainment and Arts Alliance, NSW	26.10.93
112	The Hon Chris Sumner, Attorney-General for South Australia	26.10.93
113	Communications Law Centre, VIC	16.11.93
114	John Fairfax Holdings, NSW	02.11.93
115	Attorney-General's Department, ACT	02.11.93
116	Ann Lynch, Deputy Clerk of Senate, ACT	22.07.93
117	Media Entertainment & Arts Alliance, SA	undated
118	Whitton, Mr E, NSW	11.08.93
119	NSW Privacy Committee, NSW	22.10.93
120	Commonwealth Director of Public Prosecutions, ACT	05.11.93
121	Hughes, Mr Robert, QLD	11.11.93

Sub No.	Organisation/Citizen	Date of Submission
122	Children's Court of WA	18.11.93
123	Law Council of Australia, ACT	03.12.93
124	Australian Broadcasting Authority, NSW	25.11.93
125	Hellaby, Mr David, SA	18.01.94
126	Wells, The Hon Dean, Minister for Justice & Attorney-General, QLD	18.01.94
127	Queensland Police Service, QLD	18.01.94
128	Meadows, M, Queensland University of Technology, QLD	undated
130	Queensland Newspapers, QLD	18.03.94
131	Australian Civil Liberties Union, VIC	18.04.94
133	Radio Station 6PR and Howard Sattler, WA	05.04.94
134	Australian Press Council, NSW	31.08.94

APPENDIX II

Witnesses Who Appeared at Public Hearings

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Witnesses who Appeared at Public Hearings

SYDNEY, 4 November 1993

ANDERSON, Mr Chris, Head, News and Information Services, ABC-TV, Australian Broadcasting Corporation, Gore Hill Television Centre, Gore Hill, New South Wales

BACON, Ms Wendy, Director, Australian Centre for Independent Journalism, c/- UTS, Broadway, Sydney, New South Wales

CHESTERMAN Professor Michael Rainsford, Commissioner, Law Reform Commission of New South Wales, GPO Box 5199, Sydney, New South Wales 2021

CORNWALL, Ms Deborah, 19/13-17 Stewart Street, Glebe Point, New South Wales

FLINT, Professor David Edward, Chairman, Australian Press Council, 149 Castlereagh Street, Sydney, New South Wales

McLACHLAN, Mr James Leslie, General Counsel, Nine Network Australia Ltd, 24 Artarmon Road, Willoughby, New South Wales

MEAKIN, Mr Peter, Former Director of Current Affairs/News Director, Nine Network Australia Ltd, 24 Artarmon Road, Willoughby, New South Wales

MORGAN, Mr Shaughn, Legal Officer, Law Society of New South Wales, 170 Phillip Street, Sydney, New South Wales

NELSON, Mr John, President, Law Society of New South Wales, 170 Phillip Street, Sydney, New South Wales

RICHARDSON, Mr Mark, Deputy Chief Executive Officer, Law Society of New South Wales, 170 Phillip Street, Sydney, New South Wales

SAUNDERS, Mr Ross Hallett, 15 Hordern Street, Newtown, New South Wales

WALKER, Ms Judith Kathryn, Head, Legal and Copyright, Australian Broadcasting Corporation, 700 Harris Street, Ultimo, New South Wales

MELBOURNE, 5 November 1993

BARTLETT, Mr Peter L, Chairman, Media and Communication Committee, Law Council of Australia, C/- Minter Ellison Morris Fletcher, 40 Market Street, Melbourne, Victoria

BELLAMY, Mr Geoffrey Ian, Senior Adviser (Legal Procedure), Attorney-General's Department (Commonwealth), Barton, Australian Capital Territory

CHADWICK, Mr Paul Anthony, Victorian Coordinator, Communications Law Centre, Level 1, 11-19 Bank Place, Melbourne, Victoria 3000

HADGKISS, Commander Nigel Clive, Commander, Fraud and General Division, Australian Federal Police, 383 Latrobe Street, Melbourne, Victoria 3000

HAWLEY, Mr Michael Stafford, Vice President, Victoria Branch, Australian Federal Police Association, C/- 383 Latrobe Street, Melbourne, Victoria 3000

HOLDING, Mr Peter Alan, Public Officer, Bias is Bad News Committee Inc, C/- 3/19 Robe Street, St Kilda, Victoria 3182

HURST, Mr John Thomas Charmichael, Senior Lecturer, Journalism Studies, Department of Journalism, Deakin University, Faculty of Arts, Deakin University, Waurn Ponds, Geelong, Victoria

INNES, Ms Prue, Chairman, Courts Information Officer, Supreme, County and Magistrates Courts, Australian Journalists Association Judiciary Committee, Courts Information Officer for Victoria's Courts, Supreme Court, Cnr William and Lonsdale Street, Melbourne, Victoria 3000

JACKSON, Mrs Margaret Charlotte (Maggie), Acting Deputy Government Counsel, Civil Law Division, Attorney-General's Department (Commonwealth), Robert Garran Offices, Barton, Australian Capital Territory

LUCAS, Ms Joan Elizabeth, Executive Officer, Briefing and Policy Coordination Branch, Australian Federal Police, GPO Box 401, Canberra, Australian Capital Territory 2601

MOOR, Mr Keith, News Editor, *Herald Sun,* 44 Flinders Street, Melbourne, Victoria 3001

MULLALY, Ms Jennifer Freya, Legal Researcher, Communications Law Centre, Level 1, 11-19 Bank Place, Melbourne, Victoria 3000

MUNDAY, Ms Jane Marianne, Media Director, Victorian Police, 10th Floor, 380 William Street, Melbourne, Victoria 3000

O'CONNOR, Mr Kevin Patrick, Privacy Commissioner, 24L, 388 George Street, Sydney 2000

ADELAIDE, 10 November 1993

CLYNE, Sergeant Robert, Commissioners Executive Secretariat, South Australia Police Department, 30 Flinders Street, Adelaide, South Australia

COCKBURN, Mr Alexander Stewart, Retired Journalist, 24 Day Road, Glen Osmond, South Australia 5064

CROCKER, Mr David Thomas, Private Citizen, 46 Lansdowne Terrace, Walkerville, South Australia

DOYLE, Ms Margaret, Director, Policy and Research, South Australian Government, 45 Pirie Street, Adelaide, South Australia

FITZGERALD, Dr Barry, The Law Society of South Australia, 124 Waymouth Street, Adelaide, South Australia

GILFILLAN, Honourable Ian, State Parliamentary Leader, Australian Democrats, Parliament House, Adelaide, South Australia

GRIFFIN, Honourable Kenneth Trevor, Member of the Legislative Council and Shadow Attorney-General, Parliament House, Adelaide, South Australia

HALLIDAY, Mr Stephen Graham, South Australian Branch President, Media, Entertainment and Arts Alliance, First Floor, 241 Pirie Street, Adelaide, South Australia 5000

HANDFORD, Dr Peter Robert, Law Reform Commission of Western Australia, 11th Floor, London House, 216 St George's Terrace, Perth, Western Australia

HULL, Mr Anthony Edward Munro, Journalist, Australian Broadcasting Corporation, Box 9994 GPO, Adelaide, South Australia 5000

SARRE, Mr Warwick, Head of School, University of South Australia, School of Law, 22-26 Peel Street, Adelaide, South Australia 5000

SUMNER, Honourable Christopher John, Attorney-General of South Australia, South Australian Government, Adelaide, South Australia

WALSH, Mr Stephen, President, Law Society of South Australia, 124 Waymouth Street, Adelaide, South Australia

BRISBANE, 18 January 1994

BAIN, Mrs Yvonne Jean, President, National Council of Women of Australia, PO Box 85, Stones Corner, Queensland 4120

BRISCOE, Mr Wayne Gerald, 14 Palana Street, The Gap, Queensland 4061

DAVIES, Mr Kenneth Henry, Chairman, Parliamentary Criminal Justice Committee, Parliament of Queensland, Parliament House, Brisbane, Queensland 4000

HAMBLY, Ms Gail, Legal Counsel and Company Secretary, John Fairfax Holdings Ltd, 235-243 Jones Street, Broadway, New South Wales 2007

HELLABY, Mr David William, PO Box 5133, Daisy Hill, Queensland

HIPPOCRATES Mr Cratis, Lecturer, School of Media and Journalism, Queensland University of Technology, PO Box 2434, Brisbane, Queensland 4001

KUMMEROW, Senior Sergeant Stephen Dugald, Senior Sergeant, Policing Policy and Strategy Branch, Queensland Police Service, Police Headquarters, 100 Roma Street, Brisbane, Queensland 4001

LAURIE, Mr Neil John, Senior Research Officer, Parliamentary Criminal Justice Committee, Parliament of Queensland, Parliament House, Brisbane, Queensland 4000

MEADOWS, Mr Michael Hugo, Lecturer, School of Media and Journalism, Queensland University of Technology, GPO Box 2434, Brisbane, Queensland 4001

O'CONNOR, Mr Daniel Leonard, Research Director, Parliamentary Criminal Justice Committee, Parliament of Queensland, Parliament House, Brisbane, Queensland 4000

RODGER, Acting Chief Superintendent Robert Stevenson, Officer in Charge, Policing Advancement Division, Queensland

Police Service, Police Headquarters, 100 Roma Street, Brisbane, Queensland 4001

TURNER, Mr Geoffrey Alan, Lecturer, Department of Journalism, University of Queensland, Brisbane, Queensland 4072

WATSON, Dr David John Hopetoun, Member, Parliamentary Criminal Justice Committee, Parliament of Queensland, Parliament House, Brisbane, Queensland 4000

WELLS, Mr Dean, Attorney-General, Parliament House, Brisbane, Queensland 4000