THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA

Project No 53

Privilege For Journalists

REPORT

FEBRUARY 1980

The Law Reform Commission of Western Australia was established by the *Law Reform Commission Act 1972*.

The Commissioners are -

Mr. D.K. Malcolm, Chairman
Mr. E.G. Freeman
Mr. H.H. Jackson
Mr. C.W. Ogilvie
Mr. L.L. Proksch.

The Acting Executive Officer of the Commission is Mr. T.J. Bickley, and the Commission's offices are on the 16th floor, City Centre Tower, 44 St. George's Terrace, Perth, Western Australia, 6000. Telephone: 325 6022.

To: THE HON. I.G. MEDCALF, Q.C., M.L.C.
ATTORNEY GENERAL

In accordance with the provisions of section 11(3)(b) of the *Law Reform Commission Act 1972*, I am pleased to present the Commission's report on journalists' privilege.

(Signed) David K. Malcolm
Chairman

7 February 1980

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CHAPTER 1
TERMS OF REFERENCE

1.1 The Commission was asked to consider the proposal that a journalist called to give evidence in judicial proceedings should be given the right to refuse to disclose the identity of his source of information.[1]

1.2 The subject matter of the reference is also relevant to the Commission's project on privacy, the terms of reference of which include the question whether any changes in the law are required to provide protection against the disclosure of confidential information.[2] With one exception,[3] the Commission's terms of reference on privacy parallel those given to the Australian Law Reform Commission by the Federal Attorney General and both references require the respective Commissions to have regard to the development of a uniform law on privacy throughout Australia. The two Commissions agreed that the question of a journalists' privilege would be considered in the course of the study on privacy.

1.3 This Commission issued a working paper on the question of a journalists' privilege in June 1977.[4] After studying the Working Paper, the Australian Law Reform Commission indicated to this Commission that as it did not have a separate reference on journalists' privilege, it wished to deal with that topic as part of its study of confidential relationships generally. It said that it was accordingly unable to provide this Commission with a considered view on the question of a journalists' privilege until that study was complete.[5]

1.4 This Commission, however, considers that the question whether a journalists' privilege should be enacted is sufficiently discrete to enable it to be the subject of a separate report. The

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1 The Commission regards the reference as relating not only to journalists in the narrow sense, but to all those directly engaged in the procurement of news for publication, or in the publication of news, by the press, radio and television.

2 In the case of a journalist, this would include the identity of his informant where he had undertaken not to reveal it. The terms of reference of the Commission's project on privacy are reproduced as Appendix II of this report.

3 Namely, that concerning the expunging of old criminal records: see Appendix II.

4 The paper is referred to in this report as the "Working Paper". It is reproduced as Appendix III of this report.

5 It did, however, kindly convey to this Commission a number of helpful observations made by members of its Privacy Division in the course of discussing the Working Paper. These have been taken into account by this Commission in the preparation of this report. The Australian Commission's study of confidential relationships is not yet complete.

Commission will in due course submit a report on other aspects of confidential relationships under its privacy reference.

CHAPTER 2
WORKING PAPER

2.1 The Commission's Working Paper was circulated to all those persons or bodies who the Commission considered might be interested in the subject, including the publishers of all the major Australian metropolitan newspapers, radio and television companies, the Australian Broadcasting Commission and other organisations connected with the dissemination of news. Ten comments were received. A list of the commentators is contained in Appendix I. Their views are outlined in Chapter 4 below and have been carefully considered by the Commission in preparing this report.

2.2 The Working Paper sets out the present law on journalists' privilege in Australia (the law is the same throughout Australia) and a discussion of the issues involved. The paper also contains an outline of the law in a number of overseas jurisdictions which provide for some form of journalists' privilege.[1] Apart from drawing attention to a recent judicial decision in the State of New Jersey which is of significance.[2] the Commission has not considered it necessary to traverse the comparative law again in this report.

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1 See paragraphs 3.1 to 3.24 of the Working Paper, which is reproduced as Appendix III below.

2 See paragraph 5.10 below.

CHAPTER 3 - THE ISSUE
THE GENERAL RULE OF COMPELLABILITY

3.1 The issue raised by the terms of reference is of fundamental importance, since it concerns the power of a court or other judicial body[1] to require a witness to answer questions put to him in the course of the proceedings so as to enable that body correctly to dispose of the matters before it.

3.2 The general rule is that a witness must answer all questions put to him, the answers to which would provide relevant and admissible evidence in those proceedings. There are a number of exceptions to this general rule,[2] but none which would entitle a journalist called as a witness to refuse to disclose the identity of his informant if that information were relevant and otherwise admissible.

3.3 Judges have certain statutory and common law discretions governing the admissibility of evidence and the questions which a witness can be required to answer.[3] There are dicta in two English cases decided in the early 1960's to the effect that although a journalist has no *right* to refuse to answer a question designed to reveal a confidence obtained in the course of his work, the common law gives to a judge a limited *discretion* to authorise him not to answer.[4] According to Lord Denning,[5] the discretion can be exercised in a journalist's favour when the question, though relevant, is not "a necessary question in the course of justice to be put and answered". According to Donovan L.J. in the same case, the discretion may go beyond this to include situations "impossible to define in advance, but arising out of the infinite variety of fact and circumstance… which may lead a judge to conclude that more harm than good would result from compelling a disclosure or punishing a refusal to answer".

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1 There are many other bodies besides courts which have power to compel the attendance of witnesses and to require them to answer questions on matters within their jurisdiction. Royal Commissions have such a power, as do Parliamentary Committees (see the *Royal Commissions Act 1968* (WA), ss.9 and 14 and the *Parliamentary Privileges Act 1891* (WA), ss.4 and 8). Other examples are the Real Estate and Business Agents Supervisory Board (see the *Real Estate and Business Agents Act 1978* (WA), s.20) and Land Valuation Tribunals (see the *Land Valuation Tribunals Act 1978* (WA), s.29).

2 For the exceptions which presently exist, see paragraph 3.11 below.

3 See *Cross on Evidence* (2nd Aus. ed. 1979) Ch. 1, Section 6; *Evidence Act 1906* (WA), ss.25 and 26.

4 See *Attorney General v Mulholland and Foster* [1963] 1 All ER 767; *Attorney General v Clough* [1963] 1 All ER 420. Relevant extracts from the judgments of Lord Denning M.R. and Donovan L.J. in the former case are set out in paragraph 2.6 of the Working Paper. The cases arose out of the refusal of certain journalists to reveal their sources to the Vassall Tribunal: see paragraphs 3.6 to 3.8 below.

5 In *Attorney General v Mulholand and Foster*.

3.4 Although as far as the Commission is aware the discretion has never been expressly invoked in court proceedings in respect of a journalist, subsequent dicta have mostly been in favour of its existence, but without unanimity as to its true extent.[6] The English Law Reform Committee in its 16th Report[7] assumed the existence of a "wide discretion" in the judge to "permit a witness... to refuse to disclose information where disclosure would be a breach of some ethical or social value and non-disclosure would be unlikely to result in serious injustice in the particular case...". However, although two members of the House of Lords in *D. v National Society for the Prevention of Cruelty to Children*[8] approved the Committee's statement as an accurate statement of the law, two others doubted whether the discretion was as wide as the Committee had indicated.[9] In the Commission's view, while there is some merit in the Law Reform Committee's statement, the precise scope of the discretion is yet to be determined.

3.5 Even without purporting to exercise a discretion, a judge can exercise considerable influence over the course of a trial. For example, if a witness makes known that he does not wish to answer, on the grounds of conscience, a particular question put to him by counsel, the judge may, if he thinks it appropriate, exercise "moral pressure" in his favour by intervening and asking counsel whether he wishes to press the question. Counsel may then withdraw it unless he considered that the answer would have a significant bearing on the case.[10]

3.6 In the case of a Royal Commission or other inquisitorial proceeding, the presiding officer may decide not to press a witness to answer a question if the witness objects on the grounds of conscience and the answer would appear to have little importance for the purposes of the inquiry. This attitude is exemplified by the approach taken by the Vassall Tribunal in England in 1963[11] to the refusal of certain journalists to disclose the identity of the sources of the information on which they based their newspaper articles. The Commission considers that

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6 See, for example, *Senior v Holdsworth* [1975] 2 All ER 1009; *Science Research Council v Nasse* [1979] 3 All ER 673 at 681 per Lord Wilberforce. But see *Re Buchanan* [1964-5] NSWR 1379.

7 1967, Cmnd. 3472, paragraph 1. The Committee cited *Attorney General v Mulholland and Foster* and *Attorney General v Clough* as authority for its view.

8 [1977] 1 All ER 589

9 Lord Hailsham and Kilbrandon were of the view that the Committee's statement was accurate, but Lords Simon and Edmund-Davies were doubtful.

10 This practice was described by Lord Simon in his judgment in *D. v NSPCC* ibid. at 613.

11 See the *Report of the Tribunal Appointed to Inquire into the Vassall Case and Related Matters* (1963) Cmnd. 2009. The Tribunal had been set up to inquire into the activities of Vassall (an Admiralty clerk who had been convicted of offences under the *Official Secrets Act*) and into alleged acts or defaults of other officials in relation to him.

the Vassall Tribunal's attitude would be the same as that of similar bodies in Australia,[12] and for that reason is worth outlining.

3.7 After mentioning in its Report that Vassall's conviction for offences under the *Official Secrets Act* was the occasion of a large number of Press articles,[13] the Tribunal said that most of the published statements were either derived from official sources which the Tribunal itself could draw on, or comprised pure comment expressed as fact or inferences put together from other readily accessible sources. None of these statements required investigation by the Tribunal. However, it said that there remained certain statements of fact that had appeared in the Press which were proved on inquiry to have been based on material supplied to journalists from their own independent sources, and that as a general rule the journalists concerned had objected to identifying them.

3.8 In these cases, the Tribunal had pressed for disclosure of the sources only when "it appeared... necessary for the purpose of [its] inquiry that an answer should be given". It said that in some instances information already obtained from other reliable sources was such as to make further inquiry of no value; in others careful scrutiny of the statement showed that the source had contributed nothing that could be described as information of any substance, and that in still others the subject dealt with appeared to be beyond the fringe of what was relevant to the scope of the inquiry. In the result there were only three journalists from whom the Tribunal decided it was necessary to require answers in order properly to fulfil its function.[14]

Rationale of the rule compelling testimony

3.9 There would be few who would dispute that, in general, the public interest requires that courts should have coercive powers to require witnesses to answer all relevant questions, no matter how unpalatable the witness finds the experience. If witnesses could decline to answer as they thought fit, courts would seldom be able to arrive at the truth and effective administration of justice would be impossible.[15]

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12 Paragraph 2.12 of the Working Paper outlines an incident during the proceedings of the Laverton Royal Commission in Western Australia in 1975 which tends to confirm this assumption.

13 Vassall Tribunal Report, paragraph 13.

14 These were Messrs. Mulholland, Foster and Clough. They persisted in their refusal to identify their sources and were subsequently convicted of contempt: see the Working Paper, paragraphs 2.5 to 2.7.

15 If aggrieved persons could not rely on the courts for justice, they might be tempted to resort to violence to achieve it.

3.10 A similar justification applies in the case of Royal Commissions, Parliamentary Committees and other investigatory bodies. Governments and Parliaments sometimes consider it desirable to institute formal inquiries into allegations of social or political abuses, or into other areas of particular public concern. If the investigating body had no coercive power to get at the truth, material facts would remain uncovered, public anxiety would be unallayed and any abuses would remain unremedied.

Exceptions to the general rule of compellability

3.11 Nevertheless, the rule of compellability of testimony is not absolute. The exceptions under existing Western Australian law are set out in paragraph 4.14 of the Working Paper. Briefly, they are as follows -[16]

(a) Subject to certain exceptions,[17] a witness may refuse to answer a question if to do so would expose him to the risk of punishment or forfeiture.

(b) Communications between a client and his legal adviser and, in some cases, communications passing between those persons and third parties, cannot be disclosed unless the client consents. This exception does not apply to communications to facilitate crime or fraud.

(c) Neither party to judicial proceedings can, without the consent of the other, disclose statements made "without prejudice" in the course of negotiations with a view to compromise.

(d) A married witness can refuse to disclose a communication made to him or her by the other spouse.[18]

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16 Although these exceptions apply in court proceedings it is not clear whether they also apply in Western Australian Royal Commission or Parliamentary Committee proceedings. The privilege described in (c) would in any case be inapplicable, since it can only be invoked by a party, and in such proceedings there are no parties. (a) also may not apply in Royal Commission proceedings, since s.20 of the *Royal Commissions Act 1968* (WA) provides that no incriminating answer is admissible in criminal or civil proceedings, which suggests that the witness must answer. See also s.4 of the *Evidence Act 1906* (WA).

17 See, for example, ss.11 and 12 of the *Evidence Act 1906* (WA).

18 Except where the witness is compellable to give evidence against his or her spouse for a specified offence: see the *Evidence Act 1906* (WA), ss.9 and 18. This Commission has recommended that the privilege should also cover communications made *by* the witness *to* the other spouse: *Report on Competence and Compellability of Spouses to give Evidence in Criminal Proceedings* (1977). The Report

(e) A witness cannot disclose matters the subject of so-called "Crown privilege" or "public interest immunity" (for example, matters dealing with national security or certain confidential communications between public servants).[19]

(f) A witness cannot be required to disclose the identity of a police informer[20] unless, in the case of criminal proceedings, the judge considers disclosure is necessary to show the innocence of the accused.[21]

3.12 These privileges entered the law at different times. Some are based on statute and some on the common law. Those listed in (a), (b) and (c) are directly bound up with the effective administration of justice. The privilege in (a) could be justified on the ground that otherwise witnesses may be reluctant to come forward if their evidence could be used against them at a later stage (though no doubt the privilege is also based on the general reluctance of requiring a person to give answers exposing himself to punishment). The privilege described in (b) could be justified on the ground that legal proceedings of the adversary type would be undermined if legal advisers were compelled to reveal any weaknesses in their clients' cases from what their clients had told them. As far as (c) is concerned, apart from the general desirability of facilitating agreement between disputants, the judicial system would be

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also recommended that a spouse be compellable as a witness in respect of all serious sexual offences and offences involving violence.

19 The High Court recently laid down the conditions under which a claim of Crown privilege can be successfully invoked: see *Sankey v Whitlam and Others* (1978) 53 ALJR 11. See also the House of Lords decision, *Science Research Council v Nasse* [1979] 3 All ER 673, as to the limits of "public interest immunity".
Under this head can also be grouped those statutory provisions which provide that specified Government employees called as witnesses cannot be required to disclose in court proceedings information obtained in the course of their work: see, for example, s.16 of the *Income Tax Assessment Act 1936* (Cwth).

20 Sometimes this is classified as an aspect of (e). It has been held that this privilege extends to the identity of those who allege to the Society for the Prevention of Cruelty to Children that a child is being mistreated. The Society has statutory power in England to take court proceedings for the protection of children: see *D. v NSPCC* [1977] 1 All ER 589.

21 There is a further privilege which has survived to modern times, namely that a witness who is not a party cannot be required to produce the documents of title to his property. This privilege seems anachronistic and in any case to be of little importance nowadays: see *Cross on Evidence* (2nd Aus. ed. 1979) at 284.
Two further privileges exist in Victoria, Tasmania and the Northern Territory. In those jurisdictions, a clergyman cannot divulge in civil or criminal proceedings the contents of any confession made to him in his professional capacity without the consent of the penitent. Also, a physician or surgeon cannot, without the consent of the patient, divulge in civil proceedings information acquired in attending a patient and which was necessary to enable him to prescribe or act for the patient, unless the sanity of the patient is in dispute. The Tasmanian and Northern Territory provisions do not apply to communications made for a criminal purpose. See *Evidence Act 1958* (Vic), s.28; *Evidence Act 1910* (Tas), s.96; *Evidence Ordinance 1939* (NT), s.12.

overburdened if parties did not attempt to settle out of court because of fear that their concessions could be used against them if the negotiations broke down.

3.13 The privileges in (d), (e) and (f), however, have a different basis, since they are not aimed directly or indirectly at maintaining an effective judicial system. In discussing their rationale, Lord Simon said:[22]

> "…[I]t is clear that the administration of justice is a fundamental public interest. But it is also clear that it is not an exclusive public interest. It is an aspect (a crucially important one) of a broader public interest in the maintenance of social peace and order".

3.14 Thus, the privilege in (d) is no doubt prompted by the desirability of protecting the institution of marriage, while (e) has its rationale in the need for public bodies to discharge their legal responsibilities effectively. The privilege in (f) is based on the need for effective policing, since it would be difficult for the police to function effectively unless they received a flow of intelligence about criminal activity and which would not be forthcoming if informants thought that their identity would be disclosed.

A JOURNALISTS' PRIVILEGE

3. 15 The question raised by the terms of reference is whether a journalists' privilege should be added to the list in paragraph 3.11 above. It could not of course be justified as contributing to the effective administration of justice, but it has been argued that its enactment is justified on more general grounds.

3.16 Two possible arguments (one against and one for the proposed privilege) should be disposed of at once, since both are unconvincing. First, it may be suggested that the claim for a journalists' privilege should be rejected on the ground that it would be different in kind from those which presently exist. It is true that, unlike the proposed journalists' privilege, existing privileges are largely concerned with non-disclosure of the content of information rather than its source. However this is not so of all. The privilege outlined in (f) above relates to the identity of the source, although it would differ from a journalists' privilege in that the

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22 In *D. v NSPCC* [1977] 1 All ER 589 at 605.

information given by a police informer is usually not publicly disclosed[23] whereas the information given to a journalist is normally intended for publication. Whether that be so or not, a claim for a privilege should not be dismissed merely because it would differ in kind from those presently existing.

3.17 Secondly, it may be argued that journalists should be legally entitled to refuse to disclose the identity of their informants on the ground that refusal is required by the ethics of their profession.[24] However, a group' s imposition upon itself of a "code of ethics" is not of itself a sufficient justification for the enactment of the substance of that code in legislation. It may, of course, be embarrassing to a journalist to be faced with the dilemma of having to elect between breaking the law by refusing to answer a relevant question and breaking a code, but this would not justify the granting of a journalists' privilege.

3.18 Ever since the eighteenth century it has been a rule of the common law that a witness is not entitled to refuse to answer a question merely because to do so would involve a breach of confidence.[25] The Commission agrees with the policy lying behind this rule. Much information of a commercial, social or personal nature is given and received in confidence and the administration of justice would be stultified if witnesses could lawfully decline to disclose that information on that ground alone.[26] In any case, journalists could avoid the dilemma described in paragraph 3.17 above simply by not entering into undertakings of confidentiality which extend to non-disclosure in judicial proceedings, and potential informants could avoid the disclosure of their identity by not divulging information likely to be the subject of litigation or formal inquiry. Accordingly, it is not sufficient to show that journalists do in fact enter into undertakings of confidentiality with their sources. The overriding public importance of their doing so must also be demonstrated.

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23 It would normally not be disclosed in criminal proceedings brought about as a result of the information because it would be inadmissible as hearsay.

24 The rules of the Australian Journalists' Association provide that:

> "[A journalist] shall in all circumstances respect all confidences received by him in the course of his calling".

(See the Working Paper, paragraph 4.2).

25 See *The Duchess of Kingston's Case* (1776) 20 State Tr. 355; [1775-1802] All ER Rep. 623. In the trial of the Duchess for bigamy, the court ruled that her surgeon was obliged to give evidence in breach of confidence. The rule was recently reaffirmed by the House of Lords in *D. v NSPCC* [1977] 1 All ER 589.

26 If it is not sufficient to entitle a witness to refuse to give evidence that to do so would breach a confidence, it would make no difference that he had subscribed to a code of ethics not to reveal confidences.

3.19 The principal argument in favour of the desirability of journalists entering into undertakings of confidentiality centres round the public's "right to know". It is argued that unless such undertakings were given to informants when they require it, the flow of news would be inhibited, much information of importance would not be brought to public notice and many political and social abuses would consequently remain undisclosed. Since the public interest is promoted by journalists entering into undertakings of confidentiality, it is unjust (so the argument would go) that they should be liable to punishment when they refuse to breach those undertakings in judicial proceedings. It is further argued that the risk of punishment under the existing law has a "chilling effect" on the flow of news in that it discourages journalists from seeking information from confidential sources and discourages such sources from disclosing information to them. Some journalists may be reluctant to suffer punishment for refusing to reveal the identity of their sources should the issue become relevant in judicial proceedings, and some potential informants may fear that their journalistic contacts would be unable to withstand the threat of punishment.

3.20 However, even if the flow of news depends on journalists adhering to their undertakings of confidentiality in judicial proceedings, that still would not be sufficient to justify the granting of a journalists' privilege. It is also necessary to show that the benefits to be gained from the grant of the privilege would outweigh the disadvantages that would follow from the grant.

The critical tests

3.21 The Commission considers that journalists should not have the right to withhold the identity of their confidential sources in judicial proceedings unless it could be shown that -

(a) the relationship between journalists and their informants cannot be satisfactorily maintained unless journalists give assurances of confidentiality when required;

(b) the satisfactory maintenance of the relationship between journalists and their informants results in information of public importance being published which would not otherwise have come to public notice; and

(c) the harm done to the relationship between journalists and informants by disclosure of the latter's identity in judicial proceedings is greater than the benefit thereby gained for the correct disposal of those proceedings.

3.22 One further aspect should be mentioned. The practical question also arises whether legislation providing for a journalists' privilege could be so drawn as to minimise the possibility of abuse by journalists or informants who might attempt to use the legislation for their own ends.[27] If the risk of abuse could not be reduced to acceptable limits, it could be argued that legislation was not warranted, notwithstanding that some information of public importance would not be published.

3.23 A number of those who commented on the Working Paper adverted to one or more of the matters set out in the previous two paragraphs. The Commission considers that it would be helpful to outline their views before setting out the Commission's own recommendations. Accordingly, the commentators' submissions are set out in the following chapter and the Commission's recommendations in Chapter 5.

INTERLOCUTORY PROCEEDINGS

3.24 For the sake of simplicity, the Commission has concentrated in this report on the question whether journalists should have a privilege not to disclose the identity of their sources in answer to a question put to them as witnesses at the actual hearing. However, the question of a journalists' privilege is also relevant at other stages of the judicial process, particularly where a journalist possesses documentary material, such as the notes of an interview containing the name of the person interviewed. In no Australian jurisdiction do journalists have a special privilege in regard to orders for discovery and inspection of documents (such orders may only be made where the journalist is a party to the proceedings[28])

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27 For example, a journalist could publish a sensational article purporting to be derived from an informed source, but which was mere speculation on the journalist's part. An informant could give false information to a journalist designed to promote the former's financial advantage: see paragraph 4.7 below.

28 The Australian Law Reform Commission in its Report, *Unfair Publication* (1979), recommended that provision be made for pre-action discovery and inspection in defamation actions and in regard to its proposed action for wrongful publication of sensitive private facts: see clause 54 of its draft Bill (Appendix C). This Commission agrees with the Australian Commission's proposal as regards defamation actions but considers that the question of introducing a privacy action should be deferred: see *Report on Defamation* (1979), paragraph 11.10.

or subpoenas duces tecum.[29] They also have no special privilege as regards search warrants.[30] If a journalists' privilege were to be enacted, it would need to extend in some form to these areas also.[31]

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29 A case occurred in 1978 during the course of proceedings in the Supreme Court of New South Wales where compliance with a subpoena duces tecum was in question. Interestingly, the plaintiff in the action was seeking a declaration that documents brought into existence for the purpose of fulfilling his function as an inspector under Part VIA of the *Companies Act 1961* (NSW), and all communications connected therewith, were confidential to him. One of the defendants, John Fairfax & Sons Ltd, refused to comply with a subpoena issued on behalf of the plaintiff on the ground that to do so would disclose confidential sources of one of its journalists. However, the question of enforcing the subpoena did not arise as the plaintiff and the company finally came to an agreement on what documents should be produced. The court's judgment, *Finnane v Australian Consolidated Press & Others* (unreported, No. 3813 of 1978) contains a brief reference to this incident. For a full account of it see *The Sydney Morning Herald*, 25 and 28 November 1978. A recent American case illustrates the importance journalists attach to their written material and their reluctance to comply with a subpoena: see paragraph 5.10 below.

30 President Carter has introduced a Bill into the United States Senate designed to protect journalists from "unnecessarily intrusive" searches by federal government agencies. The Bill is entitled *The First Amendment Privacy Protection Bill of 1979*. It has not yet been enacted.

31 And also to interrogatories. Journalists have no privilege in regard to answers to interrogatories, except possibly in the case of certain defamation actions: see the Working Paper, paragraph 2.3.

CHAPTER 4
VIEWS OF THE COMMENTATORS

THOSE IN FAVOUR OF A PRIVILEGE

4.1 Five of those who commented on the Working Paper were in of granting a journalists' privilege. These were the Australian Journalists' Association (WA Branch)[1] and four private persons. The AJA and two of the private commentators favoured the granting of an absolute privilege, that is one which was applicable to all proceedings and which the court or tribunal had no power to override. They considered that the privilege should extend not only to the identity of the source of information (whether published or unpublished) but also to the content of any information supplied to a journalist on a confidential basis. [2]

4.2 In support of its claim for an absolute privilege, the AJA said:

> "Journalists are bound by their code of ethics to respect all confidences received in the course of their work.
>
> We believe that this principle is crucial to the freedom of the Press and to the public's right to know.
>
> It follows that journalists will not be satisfied with anything short of absolute privilege, guaranteeing a legal right to refuse to reveal the source of such confidences.
>
> The law at present puts a journalist in an invidious position where he is ordered in a court of law to disclose the source of some… information. He has the unacceptable choice of either betraying that confidence, breaking the AJA Code of Ethics and possibly putting his informant in danger, or of breaking the law and facing imprisonment or a fine.
>
> The AJA believes the law should be changed to protect the journalist when he insists that a source is confidential. No member of the press should be held in contempt for refusing to disclose the identity of persons who have given him information in confidence, or for refusing to disclose the content of such information. To hold reporters responsible in such matters severely undermines their right to gather and report the news; and unless informants are confident that their secrets will be respected, they are unlikely to come forward with… information".

4.3 Of the two private commentators who favoured an absolute privilege, one expressed himself in substantially similar terms. The other gave no reasons for his view.

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1 Referred to in this Report as the "AJA".

2 Information is sometimes supplied to journalists as background to enable them to follow up leads, or to assess the accuracy of other information received.

4.4 The other two commentators in favour of a privilege[3] were in favour only of a qualified form. Each suggested a procedure aimed at satisfying both the need to preserve the anonymity of the source and the need to make available to the court or tribunal all the relevant evidence (including confirmation that a source did in fact exist). One proposed that instead of the journalist being obliged to disclose the identity of his informant to the trial court, he should be entitled instead to disclose it to a designated judicial officer who would examine the informant in the presence only of the journalist and then convey the results of that examination to the court or tribunal, but without revealing the informant's identity. The other suggested that the journalist should be obliged to disclose his informant's identity to the trial judge, who would be empowered, if he thought fit, to conduct a private examination of the informant instead of requiring disclosure of his identity in open court.

THOSE AGAINST GRANTING A PRIVILEGE

4.5 Three commentators were opposed to granting a journalists' privilege. These were the Law Society of Western Australia, the Australian Press Council and Mr. G. Cohen, the Chairman of Directors of Darwin Broadcasters Pty. Ltd.[4]

4.6 The Law Society of Western Australia submitted that the claimed benefit of a journalists' privilege - that it would encourage the revealing of information of public importance - "appears to be realistically categorised more as marginal and occasional, although nevertheless within those limits to have the potential to be of considerable importance". In its view, institutions operating under the present law, such as Parliament, the police and the news media themselves are far from ineffective in revealing political abuses and other matters of public importance. The Society submitted that, although the rationale for a journalists' privilege was the disclosure of matters of public concern, there appeared to be no suitable method of limiting its scope to that area; so that although justifiable, if at all, on this narrow footing it would seem necessarily to apply across the full ambit of journalistic subject matter.

4.7 The Society considered that if a journalists' privilege were to be granted, "major and seemingly insurmountable opportunities for abuse" would be opened up "the scale of which

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[3] Both are journalists.

[4] Mr. Cohen is also a Director of Territory Television Pty. Ltd. and Alice Springs Commercial Broadcasters Pty. Ltd. He was formerly a practising solicitor.

[would be] far greater than the benefit [of according a privilege] that even optimistic assessments would suggest". In its view, in addition to the harm done by depriving the court or tribunal of relevant information, the granting of such a privilege would enable -

(a) An unscrupulous journalist to publish exaggerated or even imagined information or allegations. By purporting to invoke the privilege, he would be protected from the unmasking of his deception.

(b) An unscrupulous informant, by revealing information to a journalist on a confidential basis, to have published exaggerated or false information or allegations to his personal advantage. He would remain protected from identification and thus from any disadvantages that would follow if his identity were known.[5]

4.8 The Society said that its deliberations had not revealed any effective method of controlling these opportunities for abuse. It submitted that without effective controls, a journalists' privilege would appear to offer serious and far-reaching disadvantages, both to the community and to the individuals adversely affected. In its view, the disadvantages far outweighed the advantages sought. The Society had accordingly concluded that the enactment of a journalists' privilege would not be justified.

4.9 The Society did, however, offer suggestions as to the nature and scope of such a privilege if, contrary to its submission, a decision were made to enact one. It submitted that it should be confined to civil proceedings and that even in such proceedings a journalist, as a condition of being entitled to decline to reveal his informant's identity in open court, should be obliged to disclose it to a "Privilege Referee". The Referee's function would be broadly similar to that suggested by one of the commentators in favour of a journalists' privilege.[6]

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5 If an informant supplied information injuring a person's reputation, that person would be unable to take defamation proceedings against the informant. If he gave the information to a journalist in order to further a company manipulation scheme, proceedings could not be taken against him by the shareholders of the company. The Society recognised that the extent to which a journalist could go in publication of allegations without himself incurring liability would be affected by the nature of the allegations and of the person or body the subject of them. For example, the journalist and his news medium would normally themselves be liable in defamation even though they purported merely to be repeating the allegations of another (unnamed) person.

6 See paragraph 4.4 above. See also paragraph 5.14 below.

4.10 The Australian Press Council's reason for not favouring a journalists' privilege was that it would be "wide open to abuse" unless confined to cases where the court or tribunal was satisfied that "the journalist reasonably and in fact [had] an insuperable conscientious objection to answering the question". This would not only face the court or tribunal with a difficult question but, more importantly in its view, would discriminate in favour of journalists in relation to a type of conscientious difficulty that might well arise for anyone. The Council submitted that there was no demonstrated need, and no justification in principle, for creating a special privilege for journalists.

4.11 Mr. Cohen also was concerned with the possibility of abuse by unscrupulous journalists. As to this, he said:

> "….I have, on occasion, encountered circumstances which have led me quite conclusively to believe that information, either put out or sought to be put out through the media and allegedly gathered from confidential sources had, in fact, no reality and did not come from anybody other than the person who wished to publish it".

4.12 He also emphasised the difficulty encountered in adequately evaluating published material which did not disclose the source of the information. He submitted that in order properly to evaluate an article a reader must not only be certain that it accurately reflected what the source had told the journalist, but must also know the identity of the source so that he can assess his reliability and knowledge of the subject. Finally, in his view, the source should not be excused from "standing up to be counted" and should allow his name to be published with the story.

OTHER COMMENTATORS

4.13 The Australian Broadcasting Tribunal did not come down in favour of or against the granting of a journalists' privilege. It said that there was no direct connection between its statutory responsibilities and the question of journalists' entitlement to withhold information in judicial proceedings. However, it said that the quality, accuracy and impartiality of radio and television news services were of particular interest to it and accordingly any move which might result in an improved environment for news gathering would have its support. If it were

concluded that the enactment of a journalists' privilege was justified, the Tribunal submitted that it should extend to those working in radio and television.[7]

4.14 A private commentator, while not expressly indicating that he was against the granting of a journalists' privilege, submitted that it should in any case not apply in legal proceedings instituted for the purpose of identifying the sources of information leaked from Government files. He also did not consider that to confine the privilege to members of the AJA would be a sufficient safeguard against abuse.

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7 The Tribunal also drew attention to ss.117 and 117A of the *Broadcasting and Television Act 1942*. Section 117 provides that, where a statement is made on current affairs, the name of the speaker or author, as the case may be, must be announced. Section 117A provides that a record of such statements must be preserved for a prescribed period which includes, where notice is given, the duration of any court proceedings where the record would be admissible in evidence. The Tribunal said that if a journalists' privilege were granted, its relationship to these sections would require clarification.

CHAPTER 5
THE COMMISSION'S RECOMMENDATIONS

ABSOLUTE PRIVILEGE

The Commission's view

5.1 The Commission does not consider that the granting of a journalists' privilege, expressed in absolute terms and applicable to all classes of judicial proceedings, would be justified. Such a privilege would give a journalist called as a witness an unqualified right to refuse to disclose the identity of the person who had supplied him with information (and, if the privilege extended as far, to refuse to disclose any information he had received in confidence) irrespective of whether the proceedings were civil or criminal or investigatory (such as a Royal Commission) and no matter how important disclosure would be for the correct resolution of the issues involved in the proceedings. In the Commission's view, the disadvantages flowing from an absolute privilege would far outweigh any benefits which could reasonably be expected from granting it.

5.2 The privilege might of course not necessarily be invoked in every case. A journalist might successfully persuade the informant to release him from his undertaking of confidentiality or he might decide that the public interest justified disclosure in violation of his undertaking. Nevertheless, if an absolute privilege were granted, his decision whether or not to take either of these steps would be unaffected by fear of punishment if he did not make disclosure and, in the Commission's view, it would not be desirable to place such power in private hands. The following sets out in detail the Commission's reasons for coming to this conclusion.

The importance of confidential sources

5.3 Those in favour of the privilege stress the need for journalists to enter into undertakings of confidentiality. Although it seems clear that some information of public importance would not be made available to journalists unless they undertook in general terms not to reveal the identity of their source, it is unclear whether the flow of information would be significantly reduced if journalists expressly declined to extend their undertaking of

confidentiality to judicial proceedings.[1] Much would depend on the circumstances of each case. A source such as "Deep Throat" of Watergate fame might insist on an explicit undertaking from the journalist that the latter would never disclose his identity in any circumstances.[2] On the other hand, a potential informant might be content with an undertaking that the journalist would not publish his name in the article or disclose it in any casual context. The informant might regard the possibility of disclosure in judicial proceedings as remote and be prepared to take the risk of that occurring.[3] Further, granted that some information would not be divulged to journalists unless their assurance of confidentiality specifically extended to judicial proceedings, it would not necessarily follow that all such information would be published. For example, where publication of the information was likely to injure a person's reputation, the law of defamation would be an inhibiting factor.[4]

5.4 Although the media undoubtedly perform a valuable function in drawing public attention to matters of importance, it is not the only channel of communication used by informants. Information may be directly disclosed to members of Parliament so that it can be raised in Parliament. Where the information concerns possible breaches of the law, the informant may pass it to the police or other authority as the basis for investigation and prosecution. No doubt in these cases the allegations would not reach the general public unless they were published in a newspaper or other news medium, but that medium would not itself be doing so as the result of any confidential relationship with sources.[5] It is accordingly

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1 Five members of the United States Supreme Court in *Branzburg v Hayes* ((1972) 33 L Ed 2d 626 at 646), after reviewing the voluminous evidence the Court had received on this question, concluded that it was doubtful whether there would be a significant restriction in the flow of news if journalists fulfilled their testimonial obligations. They said:

> " the relationship of many informants to the press is a symbiotic one which is unlikely to be greatly inhibited by the threat of subpoena: quite often, such informants are members of a minority political or cultural group that relies heavily on the media to propagate its views, publicize its aims, and magnify its exposure to the public".

On the other hand, four other members considered that there would be a significant reduction in the flow of news.

2 See *All The President's Men* by C. Bernstein and B. Woodward, Quartet Books (1974) at page 71.

3 He may consider that the information he wishes to divulge would be unlikely ever to be relevant in judicial proceedings or, if it did become relevant, that the journalist would be called as a witness or that the court would insist on disclosure.

4 See the Report of the Australian Law Reform Commission, *Unfair Publication* (1979), Ch.3, and the Report of this Commission, *Defamation* (1979), Ch.2. It is doubtful whether implementation of the recommendations of the Australian Law Reform Commission, whether or not modified as recommended by this Commission, would significantly alter the position as regards publication of information from unidentified sources. In particular, the Australian Commission's proposed new defence of attributed statements would only apply in the case of the publication of a statement by a named informant. In addition, the proposed tort of publication of sensitive private facts (see Part III of the Australian Law Reform Commission's Report) would significantly restrict the present area of permissible publication.

5 The Law Society, in its comments, made a point along similar lines: see paragraph 4.6 above.

doubtful that public disclosure of abuses depends mainly upon journalists maintaining the confidentiality of their sources.

The public's "right to know"

5.5 The AJA submitted in its comments that the public's "right to know" depended on journalists respecting all confidences received in the course of their work.[6] As used in this context, the phrase "the right to know" expresses a political, not a legal, principle, and there could consequentially be wide disagreement about the proper limits of that right.[7] As the two previous paragraphs indicate, the Commission is in no doubt that the public is entitled to accurate information and fair comment, but this must be balanced against other claims, such as national security and the reputation and privacy of individuals. The public interest is not synonymous with whatever the public find interesting, nor is the question what is proper to publish a matter for the exclusive judgment of the media itself. The enactment of a journalists' privilege in absolute terms could encourage informants to "leak" information which should not be published, as well as information which should.[8] It might be difficult for the media, or at least some sections of it, to resist the temptation to publish such information,[9] particularly in the face of strong competition. The Commission would be reluctant to recommend a step which could have this result.

The public's right to know the identity of the source

5.6 Whether or not there are limits to the public's "right to know", the Commission is not convinced that the public's knowledge is necessarily advanced by the publication of material from unidentified sources. It is difficult, if not impossible, to assess properly the accuracy of purported information unless the identity of the person who supplied the information is disclosed so that his reliability and knowledge of the subject can be evaluated. As the New Zealand Torts and General Law Reform Committee stated in its Report, *Professional Privilege in the Law of Evidence*[10] it is in a sense contradictory for journalists to assert the public interest in receiving the "news" and at the same time deny the community the ability to

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6 See paragraph 4.2 above.

7 The AJA did not provide any detailed views on this question.

8 An informant would know that the journalist involved could not be required to disclose his identity should the source of the leak ever be an issue in judicial proceedings.

9 Assuming, of course, that publication of it would not breach any civil or criminal law: see Chapter 4 above, n.5.

10 1977, at page 70.

make what is the appropriate response. For example, if an allegation of serious misconduct is made in a newspaper, but the allegation cannot be adequately investigated because the source of the information is withheld, the publisher is in effect asserting the public's "right to know" on the one hand and denying it on the other.[11]

5.7 Not every person treats with caution material purportedly emanating from an unidentified source, and it is this credulity on the part of many readers which would provide opportunities for the sort of abuse which concerned the Law Society of Western Australia.[12] The granting of a journalists' privilege in absolute terms would enable an unscrupulous journalist to publish an exaggerated (or even a speculative) account of events, secure in the knowledge that no judicial inquiry could compel him to disclose the identity of his sources, if any. An unscrupulous informant could give a journalist misleading information, with the object of promoting the informant's personal advantage (for example a company manipulation). Assuming the journalist kept his promise of confidentiality, the informant would remain protected from identification and thus from any disadvantages that would follow if his identity were known.[13]

5.8 The previous paragraphs outline the difficulties that commissions of inquiry and the like would face if journalists were given an absolute right not to disclose their sources of information. Courts would face similar difficulties. As far as the Commission is aware, the cases in Australia where journalists have refused to disclose their sources have been confined to civil proceedings (defamation, breach of confidence).[14] The consequences of withholding relevant information in civil proceedings could be serious enough. For example, as was pointed out in the Working Paper,[15] refusal by a journalist to disclose his source in defamation

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11 The Royal Commission which had been set up by the Victorian Government in 1939 to investigate allegations in a Melbourne newspaper that members of the Victorian Parliament had been bribed, stated in its Report that it had been hampered in its investigation by the refusal of the editor of the newspaper to disclose the sources of his information: see the Report of the Royal Commission, 1940 (Government Printer, Melbourne). The Vassall Tribunal in England in 1963 also indicated that it was unable to investigate certain newspaper allegations about Vassall's spying activities because the journalists concerned refused to disclose the identity of their sources: see paragraphs 3.6 to 3.8 above.

12 See paragraph 4.7 above.

13 The granting of an absolute privilege would, for example, entitle the journalist to refuse to disclose his source's identity to an inspector appointed under s.17 of the Securities Industry Act 1975 (WA) or under Part VIA of the Companies Act 1961 (WA).

14 See the Working Paper, paragraphs 2.4 and 2.10. See also Chapter 3 above, n.29.

15 Paragraph 4.9.

proceedings could deny the court evidence of malice, which may be necessary to negate a defence of qualified privilege, or which would justify an award of exemplary damages.[16]

5.9 However, the impact of denying the court relevant information in criminal proceedings could be much worse, since it could result in the denial of evidence essential for the conviction of a person on a serious charge or, more importantly, for his acquittal. In the United States there have been a number of occasions where journalists have refused to reveal the identity of their sources in criminal proceedings.

5.10 A case occurred in the State of New Jersey in 1978 which provides a dramatic example of a journalist refusing to disclose confidential information in criminal proceedings. The case is significant in two respects, first as illustrating how far a journalist might be prepared to go in protecting his confidential sources, and secondly as illustrating how widely it would be necessary to draft the law to give absolute protection to such information. The defendant was on trial for allegedly murdering a number of patients in a hospital where he was a doctor. The journalist concerned had written a series of articles implicating the doctor in the deaths and it was largely as a result of his allegations that the doctor was put on trial. On the application of the defence a subpoena was issued to the journalist requiring him to produce written material recording the interviews he had made and upon which he had based his articles.[17] The journalist refused to comply with the subpoena, relying both on the United States Constitution and on a New Jersey statute which provides for a journalists' privilege covering both sources and information.[18] The trial judge, however, ruled that the statute did not preclude him ordering that the journalist deliver the material to *him* for inspection so that he could decide whether it was relevant to the proceedings and, if so, whether it was protected from disclosure to the defence. The journalist refused to comply with the judge's order and was imprisoned and fined for contempt.[19] The Commission does not consider that legislation which permitted a journalist to withhold relevant evidence in criminal proceedings (whether

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16 Under the Australian Law Reform Commission's defamation proposals in its Report, *Unfair Publication* (1979) the defence of qualified privilege (called limited privilege) would not be available to the media, and exemplary damages would be abolished: ibid., paragraphs 148 and 263.

17 The defence said it intended to use the material as a basis for the cross-examination of a prosecution witness.

18 Rev. Stat. ss.2A:84A-21; 2A:84A-29 (Supp. 1972-1973). Under the statute the privilege is deemed to be waived in respect of material, any part of which has already been disclosed by the journalist. It may also be unavailable if it would prejudice a defendant's right under the Constitution to a fair trial.

19 For an account of the incident, see *The New York Times*, 15, 25-30 July 1978. The case was also reported in Australia, see, for example, *The West Australian*, 17, 26, 31 July 1978, 26 October 1978. The doctor was acquitted.

or not it went further than the New Jersey statute by entitling a journalist to withhold material from the judge himself) would be generally acceptable in Australia, nor would it be desirable.

United States legislation

5.11 Although a number of States of the United States of America have statutory provisions which provide for a journalists' privilege,[20] their enactment appears to have been largely brought about by the activities of grand juries. In the United States, grand juries have the function of inquiring into possible criminal activity, with a view to indicting those against whom a prima facie case has been established.[21] They possess wide investigatory powers and can summon before them for examination any person who might have relevant information. Apparently, the State legislatures concerned considered that, prompted by prosecuting authorities, grand juries were using investigative journalists as an "investigative arm of the Government". They were being required to divulge information about possible criminal activity which they had collected during the course of their work and which the police should have obtained for themselves. The American grand jury has no counterpart in Australia and legislation designed to overcome problems associated with that institution provides no precedent for the enactment of similar legislation here. The nearest equivalent in Australia to the grand jury is the Royal Commission. However unlike American grand juries, which are part of the ordinary criminal process, their appointment is of infrequent occurrence. Royal Commissions are normally set up only when substantial pressure has arisen for a thorough investigation into some area of particular social or political concern and when there is a real need to uncover all the relevant facts. In any event, as far as the Commission is aware, there has been no suggestion that Royal Commissions in Australia have attempted to use journalists as their "investigative arm".

Recommendation as to absolute privilege

5.12 For the above reasons, the Commission recommends against the granting of a journalists' privilege expressed in absolute terms.

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20 These are popularly known as "shield laws".

21 See the Working Paper, paragraphs 3.3 and 4.6.

QUALIFIED PRIVILEGE

5.13 The arguments against the grant of an absolute privilege extending to all classes of judicial proceedings do not apply with equal force to a qualified privilege. Theoretically, a qualified privilege could take a number of forms, as follows -

(a) a journalist could be required to disclose his informant's identity to a "Privilege Referee" as a condition, of being excused from disclosing it in open court;

(b) the privilege could be claimable only in certain classes of proceedings; or

(c) the privilege could be granted or withheld at the discretion of the presiding judicial officer in accordance with prescribed guidelines.

These suggestions are considered in the following paragraphs.

Privilege Referee

5.14 The Law Society of Western Australia suggested this form if, contrary to its submission, it were decided to enact a form of journalists' privilege. In outline, the procedure would be as follows -[22]

(a) The journalist wishing to claim the privilege in judicial proceedings would be required to communicate the name of his informant to a "Privilege Referee", either personally or in a sealed envelope.

(b) The presiding judicial officer would then supply to the Referee a note setting out in general terms the nature of the information said to have been communicated by the informant to the journalist.

(c) The informant would then appear before the Referee who would satisfy himself that the informant gave information to the journalist of the general

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[22] In the Law Society's view the scheme should in any case operate only in civil proceedings. In other proceedings the existing law should continue to apply: see paragraph 4.9 above.

nature set out in the note and that he desires that his identity be not revealed in the proceedings.

(d) Only if the Referee was satisfied as to the matters set out in (c) would the journalist be excused from identifying his informant in the proceedings.

5.15 The object of the scheme would be to maintain a degree of confidentiality for a journalist's source while safeguarding against one form of abuse which could arise if an absolute privilege were granted.[23] The Commission, however, considers that such a scheme would have substantial defects in practice. It would not deal with the case where the tribunal desired to examine the informant himself for the purpose of ascertaining the truth or otherwise of the information he gave the journalist.[24] The scheme could perhaps be revised to include this additional feature,[25] but it would then become very cumbersome, cause considerable delay and expense and in any event would be unlikely to be regarded as a satisfactory compromise, either by journalists or by the judiciary.[26] The Commission does not recommend its adoption in either form.

Classes of proceedings

5.16 A qualified privilege based on different classes of proceedings could take a number of forms, depending on the view taken as to the desirability of protecting journalists' sources on the one hand and the desirability of full disclosure on the other. For example, the legislation could provide that the privilege would only be excluded in criminal proceedings (or criminal proceedings of a serious nature). Alternatively, it could provide that the privilege would only apply in civil proceedings.[27]

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23 Namely, where a journalist publishes exaggerated or imagined "information" purporting to come from a confidential source.

24 This could be particularly important in Royal Commission proceedings if the scheme were drafted so as to have general applicability: see paragraphs 3.6 to 3.8 above. See also paragraph 2.2 of the Working Paper.

25 As proposed by another commentator who favoured a broadly similar scheme: see paragraph 4.4 above

26 Under the existing law, a Royal Commission could, if it thought the circumstances warranted it, take evidence in private and to this extent the confidentiality of a journalist's source would be preserved. But this is a matter for the Commission's discretion. A journalist has no right to insist that his evidence be given in camera.

27 As was suggested by the Law Society of Western Australia in its comments on the Working Paper. The Society was against any form of journalists' privilege at all, and only offered this suggestion as a means of limiting the privilege should it be decided to enact one.

5.17 A number of those States of the United States which have enacted a journalists' privilege have adopted the approach of excluding the privilege in classes of proceedings where ascertainment of the truth was regarded as particularly important and where material facts could not otherwise be proved. In Minnesota,[28] for example, the privilege is excluded in defamation actions where the issue of malice is raised[29] and in proceedings where there is probable cause to believe that the source has information clearly relevant to a specific violation of the law other than a misdemeanour. Even in these cases, the privilege is divested only if the person seeking disclosure satisfies the court that the relevant evidence cannot be obtained by other reasonable means.

5.18 A major difficulty with such an approach is that any division between those proceedings where the privilege applied as of right and those where it did not would be bound to be arbitrary. Wherever the line was drawn there would always be the possibility of serious injustice being done in proceedings where the privilege applied. The Commission does not in any event consider that the privilege should apply in criminal proceedings.[30] Nor would it be desirable that it should apply in Royal Commission proceedings,[31] yet this is one of the areas where journalists are most likely to be called upon to reveal the identity of their sources.[32] A scheme which excluded one of the principal areas of concern to journalists would be unlikely to be regarded by them as a satisfactory compromise. For these reasons the Commission is not in favour of implementing this approach.

The case by case approach

5.19 The advantage claimed for this approach is its flexibility. It would enable the court or tribunal to weigh the conflicting interests involved - the need to arrive at the truth in the particular proceedings as against the need to protect the journalist's confidential source.

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28 Stat. Ann. ss.595:021-025 (Supp 1973). Paragraph 3.17 of the Working Paper sets out the text of the statute.

29 It has been held by the United States Supreme Court that a "public figure" cannot succeed in such an action unless he proves that the publisher acted with actual malice. If relevant evidence as to malice were excluded he would have no remedy at all. For an account of the United States law in this area see Appendix F of the Report of the Australian Law Reform Commission, *Unfair Publication* (1979).

30 See paragraph 5.10 above.

31 A Royal Commission could be set up to investigate an area where it was of the utmost public importance that the whole truth be revealed.

32 See note 11 of this Chapter.

5.20 The English Law Reform Committee assumed that such a discretion already existed at common law.[33] It said:

> "Privilege in the main is the creation of the common law whose policy, pragmatic as always, has been to limit to a minimum the categories of privileges which a person has an absolute right to claim, but to accord to the judge a wide discretion to permit a witness, whether a party to the proceedings or not, to refuse to disclose information where disclosure would be a breach of some ethical or social value and non-disclosure would be unlikely to result in serious injustice in the particular case in which it is claimed".

5.21 In its Report, *Professional Privilege in the Law of Evidence*,[34] the New Zealand Torts and General Law Reform Committee said that, whatever the status of the rule in New Zealand, such a discretion was desirable and should be put on a statutory basis. The Committee said: [35]

> "This discretion, if given the force of statute and exercised in accordance with guidelines laid down by statute, could provide a satisfactory and certainly more desirable alternative to the granting of privilege to a wider number of named groups".

5.22 Accordingly, it proposed that the following provision should be added to the *Evidence Act of New Zealand*:[36]

> "8B. *Discretion of court, etc. to exclude evidence* - (1) In any proceedings before any court, or before any tribunal or authority constituted by or pursuant to any Act and having power to compel the attendance of witnesses, or before any other person acting judicially, the court or tribunal or authority or other person may, in its or his discretion, excuse any witness from answering any question or producing any document that he would otherwise be compellable to answer or produce, on the ground 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 sub-section (2) of this section, the witness should not be compelled to breach.
> (2) Without limiting the matters that the court or tribunal or authority or person acting judicially may take into account, the court or tribunal or authority or person, in deciding any application for the exercise of its or his discretion under subsection (1) of this section, shall have regard to -

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33 In its 16th Report, *Privilege in Civil Proceedings*, 1967, Cmnd. 3472. The Committee cited *Attorney General v Mulholland and Foster* [1963] 1 All ER 767 and *Attorney General v Clough* [1963] 1 All ER 420 as authority for its view. See also paragraph 3.4 above.

34 1977.

35 Report, page 10.

36 Ibid., pages 76 and 77.

(a) The likely significance of the evidence to the resolution of the issues to be decided in the proceedings:

(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:

(d) Whether or not the disclosure would be in the public interest:

(e) The desirability of respecting confidences between persons in the relative positions towards each other of the confidant and the witness, including the importance of encouraging free communication between such persons.

(3) Nothing in subsection (1) of this section shall derogate from any other privilege or from any discretion vested in any court or in any tribunal or in any authority constituted by or pursuant to any Act and having power to compel the attendance of witnesses or in any other person acting judicially or by other provision of this Act or of any other Act or by any rule of the common law.

(4) Any application to the court or tribunal or authority or person acting judicially for the exercise of its or his discretion under subsection (1) of this section may be made by any party to the proceedings or by the witness concerned at any time before the commencement of the hearing of the proceedings or at the hearing".

5.23 The Commission is not concerned in this report with confidential relationships other than between journalists and their informants, whereas the New Zealand Committee was concerned to deal with confidential relationships generally (as the terms of its proposed amendment shows). However, the terms of the proposed draft clause[37] could be adapted so as to confine its operation to the journalist-informant relationship, and it is on this basis that the Commission has considered its desirability.

5.24 It is doubtful whether the draft clause proposed by the New Zealand Committee does no more than put into statutory form what the English Law Reform Committee assumed was already the law, since it appears to give a wider discretion to the court or tribunal than the statement quoted above of the English Committee would allow. According to that Committee, the discretion to authorise non-disclosure could be exercised only if serious injustice was not likely to ensue, whereas the New Zealand Committee's proposal would appear to authorise non-disclosure even if such a result would follow. In this Commission's view, such a discretion would be too wide and its exercise difficult to control by the use of the normal

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[37] An Evidence Amendment Bill was introduced in to the New Zealand Parliament in October 1979 containing a clause to give effect to the New Zealand Committee's proposal. The Bill has been referred to a Select Committee for consideration.

appeal process. As applied to the journalist-informant relationship the practical difficulties that would arise in exercising the discretion would be formidable, since the tribunal would be required to determine what the effect of disclosure would be upon that particular informant, upon other informants of that journalist and upon informants of other journalists, both present and future, all without being able to examine any of them. The result would be likely to be no more than a series of ad hoc decisions, each made largely in the light of each judge's basic philosophy. It may in any event do little to alleviate the "chilling effect" of the present law,[38] since would-be informants would never be sure when disclosure of their identity would be required.

5.25 After carefully considering the question, the Commission has concluded that any form of discretion which did not unduly hamper the court or tribunal in its quest for the truth would be unlikely to provide greater relief to journalists and their informants than the way in which judicial tribunals appear to operate at present.[39] The Commission is of the view that it would be wise not to attempt to crystallize the practice of the courts in statutory form at this stage. As pointed out in paragraph 3.4 above, the judicial discretion in this area is as yet unsettled and judicial attitudes appear to be changing fairly rapidly. It would consequently seem desirable to await further judicial development.

5.26 As part of its privacy reference, the Commission will be reviewing the question of disclosure in judicial proceedings of other kinds of confidential information (such as doctor and patient) and it will consider at that stage whether a case can be made out for the introduction of a statutory discretion, whether covering certain classes of confidential information or generally.

Recommendation as to qualified privilege

5.27 For the above reasons, the Commission does not recommend the adoption of any form of qualified privilege at this stage.

(Signed) David K. Malcolm
Chairman

Eric Freeman

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38 See paragraph 3.19 above.

39 See paragraphs 3.3 to 3.8 above.

Member

Charles Ogilvie
Member

H.H. Jackson
Member

L.L. Proksch
Member

7 February 1980

APPENDIX I

List of those who commented on the Working Paper -

Australian Broadcasting Tribunal

Australian Journalists' Association (W.A. Branch)

Australian Press Council

Chisolm, D.

Cohen, G.

Combs, F.

Doogue, J.

Law Society of Western Australia

Tennant, B.G.

Wills-Johnson, B.

APPENDIX II

Terms of reference of Project No. 65 (Privacy)

To inquire into and report upon -

(1) The extent to which undue intrusions into or interferences with privacy arise or are capable of arising under the laws of Western Australia, and the extent to which procedures adopted to give effect to those laws give rise to or permit such intrusions or interferences, with particular reference to but not confined to the following matters:

(a) the collection, recording or storage of information by State Departments, authorities or corporations, or by persons or corporations licensed under those laws for purposes related to the collection, recording, storage or communication of information;

(b) the communication of the information referred to in sub-paragraph (a) to any Government Department, or to any authority, corporation or person;

(c) powers of entry on premises or search of persons or premises by police and other officials; and

(d) powers exercisable by persons or authorities other than courts to summon the attendance of persons to answer questions or produce documents;

(2) (a) what legislative or other measures are required to provide proper protection and redress in the cases referred to in paragraph (1);

(b) what changes are required in the law in force in the State to provide protection against, or redress for, undue intrusions into or interferences with privacy arising, *inter alia*, from the obtaining, recording, storage or communication of information in relation to individuals, or from entry onto private property with particular reference to, but not confined to, the following:

(i) data storage;
(ii) the credit reference system;
(iii) debt collectors;
(iv) medical, employment, banking and like records;
(v) listening, optical, photographic and other like devices;
(vi) security guards and private investigators;
(vii) entry onto private property by persons such as collectors, canvassers and salesmen;
(viii) employment agencies;
(ix) press, radio and television;
(x) confidential relationships such as lawyer and client and doctor and patient;

(3) any other related matter; but excluding inquiries on matters falling within the Terms of Reference of the Commonwealth Royal Commission on Intelligence and Security or matters relating to national security or defence.

In making its inquiry and report - the Commission will:

(a) consider proposals for uniformity between laws of the States and laws of the Commonwealth and Territories; and

(b) note the need to strike a balance between protection of privacy and the interests of the community in the development of knowledge and information, and law enforcement.

On 1 March 1978, the terms of reference were extended by requiring the Commission to give-

consideration as to whether a person's criminal record should be expunged after a stipulated time, and if so, in what circumstances and under what conditions, and as to whether the same should revive in the event of such person sustaining a further conviction.