

## Privilege for Journalists

### Terms of Reference

In 1974 the Commission was asked to consider the proposal that journalists called to give evidence in judicial proceedings should be given the right to refuse to disclose the identity of their sources of information.

### Background of Reference

The subject of the reference was relevant to the Commission's reference on privacy, the terms of which included the question whether any changes in the law were required to provide protection against the disclosure of information given in confidence.<sup>1</sup> The Commission's terms of reference on privacy paralleled those given by the Commonwealth Attorney-General to the Australian Law Reform Commission. Both references required the respective Commissions to have regard to the development of a uniform privacy law throughout Australia. The two Commissions agreed that the question of a journalist's privilege would be considered in the course of the study on privacy.

The Commission issued a working paper in June 1977 which specifically addressed the legal issues surrounding the privilege for journalists and examined proposals for reform in Australian and overseas jurisdictions.

### Nature and Extent of Consultation

The working paper was circulated to interested parties within the print and electronic media, including the publishers of all the major Australian newspapers, radio and television licence-holders, the Australian Broadcasting Commission and others. Following consideration of submissions the Commission delivered its final report on the subject in February 1980.<sup>2</sup>

### Recommendations

The Commission recommended that journalists called to give evidence in judicial proceedings should not be granted a statutory right to refuse to disclose the sources of their information. The Commission was of the opinion that the disadvantages of such an absolute statutory privilege far outweighed the benefit that might reasonably be expected by conferring it.

The Commission commented that a qualified judicial discretion was desirable, if put in statutory form, to protect the confidence of the journalist-informant relationship. However, the Commission declined to recommend the adoption of any qualified privilege at the time of handing down its report to await further judicial development in the area.

### Legislative or Other Action Undertaken

The Commission had the opportunity to reconsider the issue of a privilege for journalists in a wider context when reporting upon its reference on Professional Privilege for Confidential Communications ("Project No 90").<sup>3</sup> In its final report on that reference, the Commission restated its earlier recommendation and extended it, concluding that courts should be given a general discretion to excuse a witness from answering a question or producing a document that would otherwise be a breach of confidence. The Commission further recommended that confidential information held by journalists, including the identity

<sup>1</sup> Law Reform Commission of Western Australia, *Privacy*, Project No 65(1) (referred 1976, withdrawn 1986).

<sup>2</sup> Law Reform Commission of Western Australia, *Privilege for Journalists*, Project No 53 (1980).

<sup>3</sup> Law Reform Commission of Western Australia, *Professional Privilege for Confidential Communications*, Project No 90 (1993). Because of the great number of developments in the law since completing its report on the subject of journalists' privilege the Commission did not consider itself bound by its previous recommendations.

## ◀ Privilege for Journalists

of sources, could be withheld in appropriate circumstances as a result of the exercise of that discretion.<sup>4</sup> However, in making a decision whether to exercise the discretion, courts would have to take into account the public interests in preserving confidential information held by journalists.

In 1994 the Senate Standing Committee on Legal and Constitutional Affairs published its inquiry into the rights and obligations of the media,<sup>5</sup> specifically addressing laws for the protection of journalist's confidential sources. In its report, the Standing Committee did not accept that journalists have a claim to an absolute privilege in protecting their confidential sources, as ultimately the courts must remain the final arbiter of the fundamental rights of citizens. The Standing Committee concluded that legislation for a form of statutory judicial discretion to excuse a journalist from answering questions about the identity of a confidential source was the best way to balance competing public interests. The Standing Committee cited with approval the recommendations of the Commission in its report on *Professional Privilege for Confidential Communications*. To date no legislative action has occurred to specifically create a privilege for journalists to protect confidential communications.

### Currency of Recommendations

The Commission's recommendations, as reformulated in Project No 90, remain current. There is a need for the justice system to acknowledge the special role of the media in maintaining a democratic system of government. The investigative activities of journalists allow citizens to make informed decisions on issues that may otherwise go undetected. Decisions of the High Court have emphasised the essential character of the freedom of communication in facilitating the discussion of political and economic issues in a democracy.<sup>6</sup>

### Action Required

Implementation of the Commission's primary recommendation requires legislative enactment<sup>7</sup> of a judicial discretion to recognise a qualified privilege that identifies the appropriate balance between the competing public interests in freedom of communication in a democracy and the maintenance of public confidence in the Australian system of justice. It is possible that this could occur as part of the initiative towards uniform evidence legislation based on the model of the Commonwealth *Evidence Act 1995*.<sup>8</sup>

### Priority– Medium

Currently, journalists have no legal right to refuse to disclose relevant information in their possession, or the confidential identity of the sources of such information, in judicial proceedings. The absence of such a privilege has resulted in a number of journalists having been punished for contempt of court for refusing to reveal their sources.<sup>9</sup> A general judicial discretion to excuse a witness from providing information in certain circumstances would assist journalists in avoiding unnecessary proceedings for contempt of court.

4 Ibid paras 4.85–4.98.

5 Standing Committee on Legal and Constitutional Affairs, *Off the Record: Shield Laws for Journalist's Confidential Sources*, Parliament of the Commonwealth of Australia (1994).

6 See, eg, *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v The Commonwealth* [No 2] (1992) 177 CLR 106.

7 The Commission considered that the most appropriate location for the recommended statutory provision would be the *Evidence Act 1906* (WA).

8 See Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System in Western Australia*, Project No 92 (1999) ch 20.

9 See, eg, *Director of Public Prosecutions v Luders* (unreported) Court of Petty Sessions (WA), 27 November 1989; *Copely v Queensland Newspapers Pty Ltd* (unreported) Queensland Supreme Court, 20 March 1992.