



THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA

Project No 53

Privilege For Journalists

WORKING PAPER

JUNE 1977

PREFACE

Reform of the law in Western Australia

The Law Reform Commission has been asked to consider and report on the proposal that journalists should be given the right to refuse to disclose in court and other judicial proceedings the source of their information.

Uniform law

The subject matter of the reference also raises questions of privacy, in that it concerns the enforced disclosure of information given in confidence. The Australian Law Reform Commission and this Commission have parallel references on the subject of privacy. Both Commissions have been asked by their respective Attorneys General to have regard to the possibility of enacting a uniform law on privacy throughout Australia. It has been agreed between the two Commissions that the question of privilege for journalists should be considered in the course of the study on privacy.

Accordingly, comments received in respect to this working paper will be examined not only with a view to reforming the law in Western Australia but also will be examined by the Western Australian Law Reform Commission and the Australian Law Reform Commission in connection with their study of the possibility of the development of a uniform law to apply throughout Australia.

This paper does not necessarily represent the final views of the Commission. Comments and criticisms (with reasons where possible) on individual issues raised in the working paper, on the paper as a whole or on any other aspect coming within the terms of reference, and on the question of uniformity, are invited. The Commission requests that they be submitted by 22 August 1977.

Copies of the paper are being sent to the -

Australian Broadcasting Commission
Australian Journalists' Association
Australian Newspapers Council
Australian Provincial Press Association
Australian Press Council

Chief Justice and Judges of the Supreme Court
Citizens Advice Bureau
Civil Liberties Association of Western Australia
Crown Solicitor
Institute of Legal Executives
Judges of the District Court
Judges of the Family Court
Law School of the University of Western Australia
Law Society of Western Australia
Magistrates' Institute
Regional Dailies of Australia Limited
Solicitor General
Under Secretary for Law
Other Law Reform Commissions and Committees with which this Commission is in correspondence.

Copies are also being sent to all the major Australian newspaper publishers and the radio and television companies.

A notice has been placed in *The West Australian* inviting anyone interested to obtain a copy of the paper and submit comments.

The research material on which the paper is based is at the offices of the Commission and will be made available there on request.

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TERMS OF REFERENCE

1.1 The Commission has been asked to consider and report on the proposal that journalists¹ should be given the right to refuse to disclose in court and other judicial proceedings the source of their information.

1.2 The project was referred to the Commission as a result of representations by the Western Australian Branch of the Australian Journalists' Association to the Attorney General.

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

THE PRESENT LAW IN WESTERN AUSTRALIA

Court proceedings

2.1 In Western Australia, journalists have no common law or statutory right to refuse to disclose in court proceedings the source of their information. The general common law position was stated by Starke J. in *McGuinness v Attorney General of Victoria*² as follows:

"Next it was submitted that the source of the appellant's information upon which the newspaper articles were based was privileged and that he could not be compelled to disclose it. No such privilege exists according to law. Apart from statutory provisions, the press, in courts of law, has no greater and no less privilege than every subject of the King".

2.2 McGuinness' case is interesting in that it concerned one of the most common occasions in which the question of a journalists' privilege has been raised, namely in proceedings before a Royal Commission of Inquiry set up to determine the truth of allegations made publicly by the journalist himself. The question was whether McGuinness (who was the editor of the Melbourne newspaper *Truth*) was entitled to refuse to disclose to the Commission the source of information for articles he had written to the effect that unspecified members of the Victorian Parliament had accepted bribes in connection with two bills introduced into that

¹ The ambit of this term is explained in paragraph 1.3. The difficulties of defining the term for legal purposes are mentioned in paragraphs 4.31 to 4.33 below.

² (1940) 63 CLR 73 at 91.

Parliament. The Victorian Government had set up the Royal Commission to enquire into McGuinness' allegations. Section 17 of the *Evidence Act 1928* (Vic) provided that a Royal Commission could summon persons to attend to give evidence, but that no person could be compelled to answer any question before it that he would not be compellable to answer at the trial of an action in the Supreme Court. Thus, the question whether a journalist had a privilege not to answer questions concerning the source of his information in court proceedings was directly relevant. McGuinness declined to answer a question put to him by the Commission as to the source of his information. He was convicted of an offence under the *Evidence Act* and fined fifteen pounds. He appealed to the High Court which held that he was rightfully convicted.

2.3 McGuinness' case is also relevant in that the High Court adverted to a rule of practice which had grown up in the English High Court in defamation actions of refusing to compel a defendant who was a newspaper publisher, editor or proprietor, to disclose, in answer to interrogatories, the name of the author of the article or of the sources of the information he had relied on. This practice is now reflected in a formal rule.³ The Court in McGuinness' case pointed out that the rule was founded on the desirability of protecting those who contribute to newspaper columns from unnecessary disclosure of their identity at the pre-trial discovery stage, and had no relevance to proceedings at the trial itself.⁴ There is no similar provision in the Rules of the Supreme Court of Western Australia, but it is possible that the Court would act in accordance with the informal rule of practice which existed in England before the formal rule was promulgated. However, as far as the Commission is aware, the matter has not come up for decision in Western Australia.

2.4 A more recent Australian case in which the question of a journalists' privilege arose is that of *Re Buchanan*,⁵ decided in 1964 by the New South Wales Full Court. The case concerned an action for defamation, which is another common class of proceeding where the question of such a privilege has assumed significance. During the hearing of a defamation action brought against a newspaper, the journalist who had written the article was asked a

³ RSC O.82 R.6, which reads:

"In an action for libel or slander where the defendant pleads that the words or matters complained of are fair comment on a matter of public interest or were published on a privileged occasion, no interrogatories as to the defendant's sources of information or grounds of belief shall be allowed".

The practice was confined to newspaper publishers, but the formal rule applies generally: see P.B. Carter, *The Journalist, his Informant and Testimonial Privilege* (1960) 35 *New York University Law Review* 1111 for an account of the origin and rationale of the rule.

⁴ (1940) 63 CLR 73 at 104.

⁵ [1964-5] NSW 1379.

question during cross-examination by counsel for the plaintiff as to the identity of the person who had supplied him with the information upon which the article had been based. He refused to answer and was directed to appear before the Full Court to show cause why he should not be dealt with for contempt. The Full Court held that the question was one which the journalist was obliged to answer, and that having not done so was guilty of contempt. The Court fined him three hundred pounds.

2.5 In coming to its decision, in addition to McGuinness' case the Court considered three English cases, *Attorney General v Mulholland*; *Attorney General v Foster*⁶ and *Attorney General v Clough*,⁷ which were decided in 1963. Each of these cases involved the refusal of a journalist to name the source of his information for a published article concerning possible breaches of security in the British Admiralty. The United Kingdom Government set up a tribunal⁸ to investigate the allegations in the articles. The tribunal asked the journalists to name the sources of their information. They refused, and were convicted of contempt by the High Court and sentenced to terms of imprisonment (two were sentenced to six months imprisonment and one to three months). Two of the journalists appealed.

2.6 The Court of Appeal upheld the sentences, but in so doing appeared to acknowledge the existence of a limited discretion as to whether a journalist should be required to answer a question as to confidential information. Denning M.R. linked the journalist with the clergyman, the banker and the doctor, and said: ⁹

"Take the clergyman, the banker or the medical man. None of these is entitled to refuse to answer when directed to by a judge. Let me not be mistaken. The judge will respect the confidences which each member of these honourable professions receives in the course of it, and will not direct him to answer unless not only it is relevant but also it is a proper and, indeed, necessary question in the course of justice to be put and answered. A judge is the person entrusted, on behalf of the community, to weigh these conflicting interests - to weigh on the one hand the respect due to confidence in the profession and on the other hand the ultimate interest of the community in justice being done or, in the case of a tribunal such as this, in a proper investigation being made into these serious allegations. If the judge determines that the journalist must answer, then no privilege will avail him to refuse."

⁶ [1963] 1 All ER 767.

⁷ [1963] 1 All ER 420.

⁸ Under the *Tribunals of Inquiry (Evidence) Act* 1921. The tribunal became known as "The Vassall Tribunal".

⁹ [1963] 1 All ER 767 at 771.

Donovan L.J. said:¹⁰

"While the journalist has no privilege entitling him as of right to refuse to disclose the source, so, I think, the interrogator has no absolute right to require such disclosure. In the first place the question has to be relevant to be admissible at all; in the second place it ought to be one the answer to which will serve a useful purpose in relation to the proceedings in hand - I prefer the expression to the term 'necessary'. Both these matters are for the consideration and, if need be, the decision of the judge. And, over and above these two requirements, there may be other considerations, impossible to define in advance, but arising out of the infinite variety of fact and circumstance which a court encounters, which may lead a judge to conclude that more harm than good would result from compelling a disclosure or punishing a refusal to answer".

2.7 Broadly similar views were expressed by Parker C.J. in *Attorney General v Clough*.¹¹

2.8 The New South Wales Full Court in *Re Buchanan* sought to sum up the views expressed in the English cases by indicating that, in its view, a judge had a discretion to decline to order that a journalist answer a question as to his source only to the extent that the question was irrelevant or improper. The Court said:¹²

"It has never been suggested that, if the question is relevant and proper, any further discretion remains in the trial judge as to whether or not the witness should be compelled to answer, and if it did it is difficult to see upon what material it could be exercised".

2.9 It seems clear, therefore, that whatever discretion exists under the common law is of a very limited kind, and applicable only in very special circumstances.¹³ The discretion cannot in any real sense be considered as a form of "journalists' privilege" as that phrase is ordinarily understood.

2.10 The most recent Australian case in which a journalist refused to answer a question as to his source is that of *Hewitt v West Australian Newspapers Ltd.*, which was decided by the

¹⁰ Ibid., at 772.

¹¹ [1963] 1 All ER 420 at 428.

¹² [1964-5] NSWLR 1379 at 1381. It will be noted that Denning M.R. held that the question must not only be relevant and "proper" but also "necessary". On the other hand, Donovan L.J. assumed that the discretion extended beyond the requirement that the question must be "necessary", which in any case was a word he preferred not to use. Perhaps no distinction in fact was intended by the difference in the words used. The views of Denning M.R. and Donovan L.J., as expressed in these cases, were discussed by the House of Lords in *D. v National Society for the Prevention of Cruelty to Children* [1977] 1 All ER 589, though not in relation to journalists.

¹³ That the discretion is a very limited one was confirmed by the English Court of Appeal in *Senior and Others v Holdsworth* [1975] 2 All ER 1009, a case which concerned a summons requiring Independent Television News Ltd. to produce unpublished film of a civil disturbance: see paragraph 4.11 below.

Supreme Court of the Australian Capital Territory in 1976.¹⁴ The case arose out of defamation proceedings, the plaintiff claiming that he had been defamed in an article published by the defendant in its newspaper *The West Australian*. The journalist who wrote the article was asked during cross-examination the names of the informants who had supplied the allegedly defamatory information. The journalist refused to answer the question, saying that he was bound by his honour not to do so. The judge held that the journalist enjoyed no relevant privilege, and in so holding referred to *Re Buchanan*,¹⁵ which he said set out the law applicable in the Australian Capital Territory. The judge said that he appreciated the difficulty in which the journalist found himself, and had endeavoured to see whether, consistently with not impeding the rights of either party, a solution could be found to the problem. However, no solution had emerged and accordingly he found the journalist to be in contempt of court. The judge said that no useful purpose could be served by imprisonment, since the question the journalist had refused to answer had not been pressed by the plaintiff's counsel. He imposed a fine of \$500.

Commissions of Inquiry and Parliamentary Committees

2.11 The Commission is not aware of any case in Western Australia of a journalist refusing to disclose in court proceedings the source of his information, and being consequently charged with contempt. In 1967, however, a complaint was laid against a journalist in the Perth Court of Petty Sessions for having refused to disclose the source of his information to a Royal Commission. The Commission had been set up to investigate allegations contained in a series of articles in the *Daily News* criticizing the conduct of the Totalisator Agency Board and certain of its employees. The magistrate dismissed the complaint because the journalist had appeared before the Commission without a summons to attend having been served upon him, and under s.3 of the *Royal Commissioners' Powers Act 1902* (WA) a witness committed the offence of refusing to answer a question only if he had been served with a summons requiring him to attend the hearing. There seems little doubt, however, in view of the High Court decision in *McGuinness v Attorney General of Victoria*,¹⁶ that had the journalist been served with a summons he would have been found guilty of an offence.¹⁷ Section 3 of the

¹⁴ Unreported, S.C. No.1290 of 1975; judgment (as to contempt) delivered on 17 November 1976.

¹⁵ See paragraph 2.4 above.

¹⁶ See paragraph 2.1 above.

¹⁷ The requirement that a witness must have been served with a summons before he can properly be called to account for failing to answer a question does not apply to court proceedings: *Evidence Act 1906* (WA), s.15.

Royal Commissioners' Powers Act (since replaced by the *Royal Commissions Act 1968* (W.A.)) provided that if a person having been summoned "shall refuse to....make answer to such questions as shall be put to him by any member of the Commission, touching the subject matter of the inquiry" he shall forfeit a sum not exceeding \$1,000.

2.12 A recent case of a journalist refusing to disclose the source of her information before a Western Australian Royal Commission occurred in July 1975. The Laverton Royal Commission asked her for the source of her information regarding police reinforcements sent to Laverton. She declined to name the source. However, the Commission did not press the matter so that the question whether a journalist has any privilege under the *Royal Commissions Act 1968* (W A) did not arise.¹⁸

2.13 It is not unusual in Western Australia for Parliament to set up a Select Committee to inquire into a matter of public interest and for the members subsequently to be appointed an Honorary Royal Commission if they have not completed their investigations before the Parliamentary Session ends.¹⁹ Insofar as the members act as a Select Committee, the position is that a witness who refuses to answer "any lawful and relevant question" may be punished "in a summary manner as for contempt by fine" according to the Standing Orders of the House concerned, unless excused by the House on the ground that the question "is of a private nature and does not affect the subject of the inquiry".²⁰ There is no express reference to a journalists' privilege, and it seems reasonable to suppose that Parliament would regard itself as being able to insist on a journalist revealing his sources of information, should it wish to do so.²¹

2.14 The Commission is aware of only one case where the Western Australian Parliament has taken punitive action against a disobedient witness. In 1904, a Mr. J. Drayton, the editor of a Kalgoorlie newspaper, the *Sun*, refused to be sworn or to answer any questions before a Select Committee of the Legislative Assembly inquiring into possible malpractices

¹⁸ On its face, the Act does not appear to provide any such privilege.

¹⁹ Two recent cases where this was done was the Honorary Royal Commission appointed to inquire into hire purchase and other agreements in 1972 and the Honorary Royal Commission appointed to inquire into the treatment of alcohol and drug dependents in 1973.

²⁰ See the *Parliamentary Privileges Act 1891* (WA), ss.7 and 8. It is also a misdemeanour under s.59 of the *Criminal Code* for a person to refuse to answer "any lawful and relevant question" before either House of Parliament or a Select Committee thereof.

²¹ See Enid Campbell, *Parliamentary Privilege in Australia* (1966), Ch.10. For the House of Commons practice as to witnesses see Erskine May, *Parliamentary Practice* (19th ed. 1976) 691 to 693. For the practice in the Australian Senate, see J.R. Odgers, *Australian Senate Practice* (4th ed. 1972) 482 to 505.

concerning a mining lease. The Assembly fined him one hundred pounds,²² which was later reduced to fifty pounds. This sum he refused to pay, and the Assembly ordered that he be imprisoned for contempt of that House until the fine was paid or the end of the current session, whichever first occurred. He did not raise any question of privilege, merely refusing to give evidence on the ground that whatever came to him as editor was hearsay and therefore not evidence. One member of the House said that if Drayton had claimed privilege in respect of specific questions, he would not have voted for Drayton's punishment.²³

THE LAW ELSEWHERE

AUSTRALIA, ENGLAND, NEW ZEALAND AND CANADA

3.1 The common law position also prevails elsewhere in Australia, and in England, Canada and New Zealand.

THE UNITED STATES OF AMERICA

General

3.2 By contrast, in the United States, the common law position in this area has been affected by a remarkable series of statutory developments. Twenty-six States²⁴ of the United States have enacted statutes providing journalists with some form of privilege in relation to information gathered in the course of their work. These statutes are known as "shield laws". The twenty-six States are listed in Appendix I in the order in which the privilege was first enacted.

3.3 The Commission understands that the main impetus towards the enactment of shield laws in the United States has been the activities of grand juries. In many jurisdictions of the United States grand juries have the function of enquiring into possible criminal activity, with a view to indicting those who appear to have committed offences. Their role is investigatory or inquisitorial, and they have power to summon persons before them who may have

²² For an account of these proceedings, see *WA Parl. Deb.*, Vol. XXV (1904) 944 to 953, 1059 to 1063, 1167 to 1170; Vol XXVI (1904) 1714 to 1725.

²³ *WA Parl. Deb.* Vol. XXVI (1904) at 1723. Drayton was eventually pardoned by the House as an act of clemency after having been imprisoned for twenty-seven days.

²⁴ As at 31 December 1975.

information relevant to their task. The American grand jury is an institution which has no equivalent in Australia.

3.4 The first State to enact legislation creating a "newsmen's privilege" was Maryland which did so in 1896, the legislation being precipitated by the jailing of a journalist who refused to disclose to a grand jury the source of published information about its proceedings, which were held in secret.²⁵ Prior to 1935 only New Jersey had followed suit. However, about that time, another case involving a grand jury arose when a New York reporter was jailed for contempt after refusing to disclose to it the source of information on which he had based a series of articles on gambling.²⁶ The resulting nationwide publicity contributed to the enactment of a journalists' privilege in a number of States, although not in New York where the proceedings had arisen.

3.5 The next major development in this area of the law came in the late 1960's and early 1970's, which was a period of widespread social and political turmoil in the United States. A number of grand juries summoned journalists who had been reporting on these social and political events to appear before them with a view to revealing their confidential sources and other information.²⁷ The journalists resisted.

3.6 Although it was generally agreed that the common law afforded no privilege to journalists, the question arose whether the Constitution of the United States did so. The First Amendment provides that "Congress shall make no law... abridging the freedom... of the press". In 1972 the United States Supreme Court reviewed three cases in which grand juries, investigating the activities and ideas of certain political and social groups, had attempted to compel journalists to disclose confidential information and the identities of their informants. The cases, which were heard together, were *Branzburg v Hayes*; *In Re Pappas*; *U.S. v Caldwell* (the cases being collectively known as the Branzburg case).²⁸ The Court held, by a majority, that the First Amendment afforded journalists no protection in these circumstances.

²⁵ See California Law Revision Commission, *Tentative Recommendation and a Study relating to the Uniform Rules of Evidence; Article V: Privileges* (1964) at 485.

²⁶ *Ibid.*, at 486.

²⁷ A large number of articles have been written about the legislative and judicial activity in the United States in connection with these events. References to some of these articles are contained in Appendix II.

²⁸ 33 L Ed 2d (1972) 626.

3.7 As a consequence of this decision, a large number of bills were introduced into Congress in 1972 and 1973. They were the subject of Congressional hearings, but none were passed. This may have been due to the difficulty of attaining a consensus on the precise form of legislation, or because Federal prosecutors had begun to exercise restraint in calling journalists before grand juries.²⁹ Also, subsequent decisions of Federal courts had shown that the *ratio* of the Branzburg case appeared to be narrower than at first supposed.³⁰ The First Amendment apparently permits a journalist to refuse to disclose the source of his information in civil trials in certain circumstances.

State legislation

3.8 However, the activities of grand juries prompted a number of State legislatures (among them New York), which had previously not thought fit to do so, to enact legislation provided for a journalists' privilege.³¹

3.9 The statutes of the State legislatures are not uniform, either as to the classes of persons given privilege, the classes of publication covered or the classes of proceedings in which the privilege can be claimed. The following outlines some of the major differences.

Classes of publications covered

3.10 Some statutes confine their protection to newspapers and radio and television stations.³² The statute of Indiana provides that, for a newspaper to attract privilege, it must have been published for five consecutive years in the same city and have a circulation of two percent of the population of the county in which it is published. A number of States cover not only newspapers and radio and television stations but also magazines, news-agencies, press associations and wire services.³³ The statutes of Oregon and New Mexico cover any "medium of communication to the public".

²⁹ See the article by Sam J. Irvin Jr. referred to in Appendix II.

³⁰ See *Baker v F.&F. Investment* 470 F 2d 778 (2d Cir 1972).

³¹ See Appendix I.

³² For example Alabama.

³³ For example New York.

Classes of person given privilege

3.11 New York's statute covers only professional reporters or newscasters, while others include editors, writers and publishers.³⁴ Others go further still and include anyone connected with or employed upon the relevant publication in an information gathering or processing capacity.³⁵

Matter protected

3.12 Some statutes cover only sources of information,³⁶ others also cover unpublished information.³⁷

No confidentiality requirement

3.13 The general pattern of the statutes is that there is no express requirement that the source should have given the information on the understanding that his identity would remain secret. See, for example, the statutes of New York, Minnesota and Alabama reproduced in paragraphs 3.16, 3.17 and 3.18 below.

Divestment provisions

3.14 Some statutes provide an absolute privilege.³⁸ Others provide only a qualified privilege. An example of this latter category is that of Minnesota whose statute provides that the privilege does not apply "in any defamation action where the person seeking disclosure can demonstrate that the identity of the source will lead to relevant evidence on the issue of actual malice", or when the information is relevant to a serious offence and "there is a compelling and overriding interest requiring the disclosure of the information where the disclosure is necessary to prevent injustice" provided that the information cannot be obtained by other means. The statute of New Mexico requires disclosure when it is "essential to prevent injustice".

³⁴ For example that of Arkansas.

³⁵ For example those of Minnesota and Nebraska.

³⁶ For example those of Ohio and Kentucky.

³⁷ For example those of Nebraska and Oregon.

³⁸ For example those of New York and Alabama.

Some examples of statutory provisions

3.15 The following sets out the relevant parts of the statutes of New York, Minnesota and Alabama as examples of the different approaches adopted in the United States to the enactment of statute providing for a journalists' privilege.

New York

3.16 "Notwithstanding the provisions of any general or specific law to the contrary, no professional journalist or newscaster employed or otherwise associated with any newspaper, magazine, news agency, press association, wire service, radio or television transmission station or network, shall be adjudged in contempt by any court, the legislature or other body having contempt powers, for refusing or failing to disclose any news or the source of any such news coming into his possession in the course of gathering or obtaining news for publication or to be published, in a newspaper, magazine, or for broadcast by a radio or television transmission station or network, by which he is professionally employed or otherwise associated in a news gathering capacity..."

Minnesota

3.17 "3. No person who is or has been directly engaged in the gathering, procuring, compiling, editing, or publishing of information for the purpose of transmission, dissemination or publication to the public shall be required by any court, grand jury, agency, department or branch of the State, or any of its political subdivisions or other public body, or by either house of the legislature or any committee, officer, member, or employee thereof to disclose in any proceeding the person or persons or means from or through which information was obtained, or to disclose any unpublished information procured by him in the course of his work or any of his notes, memoranda, recording tapes, film or other reportorial data which would tend to identify the person or means through which the information was obtained.

4. (1) A person seeking disclosure may apply to the district court of the county where the person employed by or associated with a news media resides, has his principal place of business or where the proceeding in which the information sought is pending.

(2) The application shall be granted only if the court determines after hearing the parties that the person making application, by clear and convincing evidence, has met all three of the following conditions -

- (a) that there is probable cause to believe that the source has information clearly relevant to a specific violation of the law other than a misdemeanor.
- (b) that the information cannot be obtained by any alternative means or remedy less destructive of First Amendment rights, and
- (c) that there is a compelling and overriding interest requiring the disclosure of the information where the disclosure is necessary to prevent injustice.

5. (1) The prohibition of disclosure provided in s.3 shall not apply in any defamation action where the person seeking disclosure can demonstrate that the identity of the source will lead to relevant evidence on the issue of actual malice.

(2) Notwithstanding the provisions of (1) of this section, the identity of the source of information shall not be ordered disclosed unless the following conditions are met -

- (a) that there is probable cause to believe that the source has information clearly relevant to the issue of defamation;
- (b) that the information cannot be obtained by any alternative means or remedy less destructive of First Amendment rights."

Alabama

3.18 "No person engaged in, connected with, or employed on any newspaper (or radio broadcasting station or television station) while engaged in a news gathering capacity shall be compelled to disclose, in any legal proceeding or trial, before any court or before a grand jury of any court, or before the presiding officer of any tribunal or his agent or agents, or before any committee or the legislature, or elsewhere, the sources of any information procured or obtained by him and published in the newspaper (or broadcast by any broadcasting station or televised by any television station) on which he is engaged , connected with, or employed".

EUROPE

3.19 Certain countries in Europe have legislation which specifically provides for some form of journalists' privilege.³⁹ Those known to the Commission to have provided such a protection are Austria, Germany (Federal Republic), Norway and Sweden. In some other countries, for example Belgium and France, the courts apparently have a limited discretion under the general law to refuse to require the disclosure of a journalist's confidential information.

Austria

3.20 Austria has had legislation since 1922 exempting professional journalists from the obligation to give evidence in criminal proceedings arising out of the contents of a newspaper. A professional journalist can also refuse to answer questions in civil or administrative proceedings, if to do so would reveal a professional secret.

³⁹ For an account of the position in countries in Europe see generally *International Press Institute Surveys*, 1-6 (Arno Press, 1972) Survey No.6.

Germany

3.21 A right to refuse to disclose sources existed prior to 1975, but it was very limited. Cases had occurred where journalists were punished for refusing to give evidence in proceedings aimed at discovering those responsible for unauthorised disclosure of government information. A revised law was enacted in 1975⁴⁰ which enlarged considerably the rights of journalists to withhold information. The legislation gives professional newspaper and broadcasting personnel the right to refuse to give testimony in both Federal and State matters. The protected class includes those who take part in the preparation, production or determination of periodical printed work or broadcasts. The right to refuse to give evidence extends not only to the name of the author, contributor or informant of articles or supporting documents, but also in respect of the documents and articles themselves. It is immaterial whether the information was published or not, but the protection is restricted to news, not to advertising material.

3.22 The statute prevents the investigating authorities from circumventing the journalist's right to refuse to give evidence by seizing his information material. Documents, sound recordings, pictures and similar material to which the right of refusal to give evidence extends cannot be seized, either when in the custody of the journalist or when kept in the editorial office. The statute also regulates the seizure of printed works in cases where the dissemination of any such work is punishable. Seizure may only be ordered if there are good reasons for assuming that the work will be confiscated and if the detrimental effects of seizure are not out of proportion to the importance of the case.

Norway

3.23 The Norwegian Parliament amended the *Criminal and Civil Procedure Acts* in 1951 to give journalists a right to refuse to disclose in both civil and criminal proceedings the source of their information. The right of exemption is not absolute. The court may decide that evidence shall be given when, after weighing the conflicting interests, it finds such evidence to be necessary. The legislation contains an interesting provision which empowers the court to require the evidence to be given only to the judge and the parties in camera and under an

⁴⁰ Bundesgesetzblatt I, 29 July 1975.

order of secrecy. The privilege does not apply to cases where the information has been supplied through a punishable breach of secrecy, or when the witness refuses to give such information about the matter as he is able to procure from the source without identifying him.

Sweden

3.24 In Sweden, the right of journalists to withhold confidential information is contained in the *Freedom of the Press Act*, which is part of the Constitution. It is a violation of that Act for a publisher or newspaper staff to reveal the identity of an author or contributor to a newspaper who wishes to remain anonymous. An exception to the protection of anonymity exists in a case which does not involve the freedom of the press and where the identity of a source is of vital importance in determining the outcome of the proceedings. The Commission understands that further protection for contributors and sources is under consideration by the Swedish Parliament.

DISCUSSION

General

4.1 In considering whether there should be a non-disclosure privilege it is necessary to weigh the public interest in ensuring that the flow of news is not inhibited by the disclosure of the source of information given in confidence to the journalist, against the public interest involved in the effective administration of justice, based on all the relevant facts.⁴¹ The problem also has relevance to the general question of privacy, since it involves the enforced public disclosure of information gained in confidence.

4.2 The importance, from the journalists' point of view, of the need to maintain confidences has found expression in the "code of ethics" of journalists' associations in various

⁴¹ Another possible argument for granting journalists a privilege is one a journalist put forward in 1911 to a court in Georgia. He submitted that to reveal the source of his information would cause him to lose his livelihood: see the case referred to in an article by R.E. Anderson in 61 *Kentucky Law Journal* (1973) 551 at 552, note 7. Undoubtedly this factor should not be overlooked, but it seems no more than a subordinate one. The Commission is not aware of any modern plea for the enactment of a privilege which relies on such an argument.

countries. The Rules of the Australian Journalists' Association⁴² contain the following provision:

"Each member of the Australian Journalists' Association shall observe the following Code of Ethics in his employment:

....

(3) He shall in all circumstances respect all confidences received by him in the course of his calling.

...."

4.3 The code of ethics directs the maintenance of an undertaking of confidentiality once that undertaking has been given. It naturally does not indicate how often, or under what circumstances, a journalist has need, from his point of view, to seek out or obtain information from a confidential source. A succinct account of these circumstances is given in the International Press Institute Survey No. 6, *Professional Secrecy and the Journalist*,⁴³ as follows:

"An essential element of the news-gathering process is the relationship between the journalist and his informant. The journalist seeks information from any and all sources likely to be able to provide him with that information. In the final analysis these 'sources' are individuals. Many of them are public officials operating at various levels

⁴² Persons eligible for membership of the Australian Journalists' Association are those professionally engaged -

- (1) as journalists, authors, licensed or official shorthand writers, Hansard reporters and publicity and public relations officers;
- (2) in any branch of writing or drawing or photographic work for the Press;
- (3) in the collection and/or preparation of news, and/or information on current events for broadcasting or radio transmission;
- (4) in any form of writing, collection and/or preparation of news, and/or information on current events, or drawing or news photography for use in television services;
- (5) in any branch of writing or drawing or photographic work for publicity, published instructions or public relations purposes;
- (6) wholly or in major part as script-writers, except those engaged solely, or in major part, in the preparation of advertising material for broadcasting or radio or television transmission ;
- (7) in the Public Service of the Commonwealth or a State -
 - (a) as journalists in writing and/or preparing matter for publication in newspapers, magazines, books or pamphlets and/or broadcasting and persons performing work of a similar nature as publicity officers or public relations officers;
 - (b) as photographers the greater part of whose duty is to take and prepare photographs for reproduction in newspapers and/or magazines: Rules of the Australian Journalists' Association, cl.2.

Persons expressly made ineligible for membership include the editor-in-chief and editor of a metropolitan daily newspaper, the chief of the general reporting staff of a daily newspaper in a capital city and a proprietor of any newspaper who does not derive most of his income from journalistic work: *ibid.* The current membership of the Association is about 8,000. The Western Australian District membership is about 700.

⁴³ Arno Press (1972). B. Woodward and C. Bernstein, two reporters of the *Washington Post* in describing in their book *All the President's Men* (1974) their investigation into the Watergate affair give many illustrations of the need, from their point of view, of assuring informants that their identity would not be revealed.

of government, and with varying degrees of authority and knowledge; others are individuals engaged in business or professional activities, or in the arts.

In seeking information from any individual, bureaucrat or not, the journalist almost always receives his answers in a straight-forward conversational exchange. In using information so obtained, he normally credits the source by name, with such further identification as may be necessary to establish the validity of the speaker's knowledge. Very few reports appear in print without some such specific attribution to source. This is regarded as essential if the reader is to be able to form a proper judgment of the weight to be given a particular statement.

But [there] are exceptions. They are infrequent, but may be important. There are times and circumstances, ...when an informant may not wish to be identified as the source of a statement. To the journalist who has established himself as a reliable reporter, accurate and responsible in his approach to his task, the 'source' may nevertheless be willing to provide certain information with the understanding that it will not be attributed to him. The informant may have good reason for wishing to remain anonymous. It may be a personal reason, but perfectly understandable and legitimate. There may even be a reason bearing some direct relation to the public welfare. The journalist might try to persuade the source to permit him to use the information with the usual attribution, or he might not. But if the source clearly wished to remain anonymous, and if the information seemed worthy of use, the journalist would use it without any such direct attribution".

4.4 That effective journalism has need on occasion of confidential sources was confirmed by evidence submitted by journalists to the United States Supreme Court in the *Branzburg* case.⁴⁴ It was also confirmed in discussions which this Commission had with representatives of the Australian Journalists' Association (W.A. District), and with senior executives of West Australian Newspapers Ltd.

4.5 However, a significant fact arose out of the Commission's discussions with journalists and management. It appears that it is the practice of West Australian Newspapers Ltd., and of some other newspaper publishers in Australia, for the editor sometimes to require a reporter to disclose to him the identity of his informant before he will authorise the printing of the story.⁴⁵ The purpose is to ensure that the story comes from a reliable source. Presumably, if the reporter had given an assurance of confidentiality to his informant which precluded him from disclosing his identity even to the editor, the story would not be published. On the other hand, the reporter may consider that disclosure to his editor was compatible with his assurance of general confidentiality. Accordingly, if journalists were to be given a statutory

⁴⁴ See paragraph 3.6 above.

⁴⁵ This practice appears to be in contrast to that in some American newspapers: see *All the President's Men* by B. Woodward and C. Bernstein (1974).

privilege it would not be sufficient to confine it to reporters as such. To be effective, it would be necessary to include editors and perhaps others to whom the identity of the source had been revealed in the course of a journalist's work.

Is the issue a real one?

4.6 One of the striking features of the question is how seldom, relatively speaking, the matter has actually come to a head in legal proceedings, either in Australia or overseas. In Australia, the reported cases have been confined to those where a newspaper has been sued for defamation, or to the proceedings of Commissions of Inquiry. Even in the United States, where the question has assumed much greater significance, there appear to be comparatively few cases where a journalist has been threatened with punishment.⁴⁶ A high proportion of those which have occurred there have related to grand jury investigations, a type of proceeding which does not exist in Australia.⁴⁷

4.7 There also appear to have been few recorded cases where the issue has arisen in Western European countries.⁴⁸

4.8 There are a number of possible reasons for the relative lack of cases where the issue has been of significance. It is probably not often in Australia that a journalist's source of information would in fact be relevant to the issue being litigated or investigated. A further possibility is that parties, knowing of the journalists' code of ethics and the likelihood that a journalist would refuse to divulge his source notwithstanding the threat of punishment, may think it pointless to press the matter. There may also be a desire, if the Government is involved, not to appear to be attacking the press. This last reason was suggested to the Commission by representatives of the Journalists' Association, and is one given by commentators in the United States,⁴⁹ and in Europe.⁵⁰

⁴⁶ See the article listed in Appendix II.

⁴⁷ See paragraph 3.3 above. Section 354 of the *Victorian Crimes Act 1958* empowers the Full Court to order the empanelling of a grand jury in certain circumstances. However, such a grand jury's powers are much more limited than those of a grand jury in the United States. No grand jury has been empanelled in Victoria since 1939.

⁴⁸ See *I.P.I. Survey* No. 6, cited in note 39 above.

⁴⁹ See the articles in Appendix II.

⁵⁰ See *I.P.I. Survey* No. 6, cited in note 39 above.

4.9 However, although there have been few instances in Australia, there are sufficient to make the issue a real one. The most recent case occurred in November 1976 (*Hewitt v West Australian Newspapers Ltd.*), when a journalist was fined for refusing to disclose the identity of his informants.⁵¹ The action was for defamation, and a possible reason for the plaintiff's counsel asking the journalist to disclose his source may have been to provide evidence of malice if the journalist's sources were such that they could not reasonably have been believed. Proof of malice would have negated a defence of qualified privilege, and may in any case have provided a ground for exemplary damages.⁵²

4.10 Defamation actions are not the only court proceedings where the issue could become a real one. In the United States, the question of a journalists' privilege has recently arisen in other sorts of civil proceedings,⁵³ and also in criminal proceedings.⁵⁴ There is also the possibility of the setting up of a commission of inquiry. Some State Governments, and the Federal Government, have expressed concern at the seeming lack of effective security in respect of confidential Government documents. If an inquiry were to be instituted in connection with such an incident, journalists could be called to give evidence and reveal sources.

4.11 Weight has been added to the view that there is a need to review the question by the remarks of Scarman L.J., a former Chairman of the English Law Commission, in the recent English Court of Appeal case, *Senior v Holdsworth*.⁵⁵ All three judges of the Court confirmed the absence of a journalists' privilege under English law beyond the limited discretion outlined in Mulholland's case.⁵⁶ Speaking in the context of an application for production under subpoena of unpublished television film, Scarman L.J. said that while the law offered the press and broadcasting authorities some protection against oppressive applications, it was

⁵¹ See paragraph 2.10 above.

⁵² See Fleming, *The Law of Torts* (4th ed. 1971) at 493-511, 521.

The Australian Law Reform Commission, in its discussion paper, *Defamation - Options for Reform* (1976) p. 8 proposes that the onus of proof in the case or the media should be on the defendant to show that he believed, on reasonable grounds, in the truth of the statement. Accordingly, if he could not do so without identifying his informant and did not wish to identify him, his defence would fail. The Australian Law Reform Commission also proposes the abolition of exemplary damages in defamation proceedings: discussion paper, p.14.

⁵³ For example, *Baker v F. & F. Investment* 470 F 2d 778 (2d Cir 1972) (a civil rights case).

⁵⁴ For example, *United States v Liddy* 478 F 2d 586 (DC. 1972), a case involving one of the principals in the Watergate affair. The defendant issued a subpoena requiring a journalist to produce tapes of certain interviews upon which the journalist had based a number of stories.

⁵⁵ [1975] 2 All ER 1009.

⁵⁶ See paragraph 2.5 above.

arguable that more was needed. He was of the view that it was a problem for law reform, possibly requiring consideration in a wider context than the actual case before the Court.⁵⁷

Should there be a statutory privilege for journalists?

General obligation

4.12 There is a general legal obligation upon persons to give testimony upon all relevant facts in court proceedings. If there were no such obligation and persons could choose whether or not to give evidence, administration of justice would be impossible. Similarly, there is a general legal obligation on persons to answer relevant questions put to them by commissions of inquiry. If it were not so, the purpose of the inquiry could be frustrated.

4.13 Nevertheless, the obligation to give evidence is not absolute, and in most common law countries a number of exceptions have been created, either by the common law itself or by statute. The claim of any group to be exempted from the general liability to give evidence has, however, been carefully scrutinised, and the exceptions granted have been very few.⁵⁸

Existing privileges

4.14 The following are the cases under Western Australian law where a right to withhold information exists in court proceedings -⁵⁹

- (a) A person may refuse to answer any question tending to incriminate him. This was a rule of the common law, but has now been made statutory.⁶⁰
- (b) A spouse may refuse to disclose any communication made to her or him by the other spouse. This is a statutory privilege.⁶¹

⁵⁷ [1975] 2 All ER 1009 at 1022.

⁵⁸ See *D. v National Society for the Prevention of Cruelty to Children* [1977] 1 All ER 589 for a discussion by the House of Lords of the principles under which specific privileges are recognised at common law.

⁵⁹ See generally, *Cross on Evidence* (Aus. ed. 1970) Chs 11 & 12.

⁶⁰ *Evidence Act 1906* (WA), s.24. There are some exceptions to this privilege. For example, under s.12 of the *Evidence Act*, in proceedings relating to the public revenue, the judge may require a witness to answer an incriminating question. But if he does answer, he can obtain a certificate from the judge exonerating him from punishment.

⁶¹ *Evidence Act 1906* (WA), s.18. An exception exists where a spouse is charged with an offence and the other spouse is a compellable witness.

- (c) Communications passing between a client and his legal adviser (together, in some cases, with communications passing between these persons and third parties) may not be given in evidence without the consent of the client if they were made either -
 - (i) with reference to litigation, whether actual or contemplated, or
 - (ii) to enable the client to obtain, or the adviser to give, legal advice.

This is a rule of the common law.⁶²

- (d) Neither party to court proceedings can, without the consent of the other, give evidence as to statements made by either of them "without prejudice", as for example the offer of a settlement. This is a rule of common law.⁶³
- (e) A witness cannot be compelled to disclose matters the subject of Crown privilege (for example, matters dealing with national security, or confidential reports made by senior public servants about their subordinates). This is a rule of the common law.⁶⁴
- (f) A witness cannot be required to disclose the identity of a police informer unless, in the case of criminal proceedings, the judge considers that such disclosure is necessary to show the innocence of the accused. This is a rule of the common law.⁶⁵

4.15 Two Australian States (Victoria and Tasmania) have thought fit to enact legislation creating two additional privileges. In these States a clergyman cannot divulge, without the consent of the penitent, the contents of any confession made to him in his professional

⁶² See *Cross on Evidence* (Aus. ed. 1970) at 298, and the cases referred to therein. Privilege cannot be claimed where the communication was to facilitate crime or fraud: *R. v Cox and Railton* (1884) 14 QBD 153.

⁶³ See *Cross on Evidence* (Aus. ed. 1970) at 309, and the cases referred to therein.

⁶⁴ See *Conway v Rimmer* [1968] 1 All ER 874.

⁶⁵ See *Marks v Beyfus* 25 QBD 494 (C.A.); *D. v National Society for the Prevention of Cruelty to Children* [1977] 1 All ER 589. This is sometimes treated as falling under category (e). It is set out separately here because of its similarity to the journalist-informant situation.

capacity.⁶⁶ Also, a physician or surgeon cannot in these States divulge in civil proceedings (unless the sanity or testamentary capacity of the patient is in dispute) any information he acquired in attending the patient and which was necessary to enable him to prescribe or act for him.⁶⁷

4.16 The question is whether disclosure of a journalist's source of information should be added to the list.⁶⁸ In his treatise on evidence, Wigmore sets out four conditions which he considers must be fulfilled before a privilege against disclosure should be enacted.⁶⁹ The Commission regards these conditions as a useful starting point, and its discussion is developed in the light of them.

The critical tests

4.17 Adapting Wigmore's four conditions to the specific case of the disclosure of a source of information, the conditions are that -

- (1) the information must originate in a confidence that the identity of the informant will not be disclosed;
- (2) the element of confidentiality must be essential to the full and satisfactory maintenance of the relationship between the parties;
- (3) the relationship must be one which in the opinion of the community should be fostered;
- (4) the injury that would inure to the relationship by the disclosure of the identity of the informant must be greater than the benefit thereby gained for the correct disposal of the proceedings.

⁶⁶ *Evidence Act 1958*, s.28(1)(Vic); *Evidence Act 1910*, s.96(1) (Tas). The Tasmanian provision does not apply to a communication made for a criminal purpose.

⁶⁷ *Evidence Act 1958*, s.28(2) and (3) (Vic); *Evidence Act 1910*, s.96(2) and (3) (Tas). The Tasmanian provision does not apply to a communication made for a criminal purpose.

⁶⁸ It is unclear whether any of the privileges set out in paragraph 4.14 could be successfully claimed in proceedings before a Select Committee of Parliament of Western Australia or before a Western Australian Royal Commission: see paragraphs 2.11 to 2.14 above.

⁶⁹ *Wigmore on Evidence* (Vol.8, McNaughton Rev. 1961) para. 2285.

4.18 Although some States of the United States have provided a privilege against disclosure, whether or not the source is confidential,⁷⁰ this appears difficult to justify. It seems reasonable that the privilege, if granted at all, should not in principle extend beyond matters received in confidence. Wigmore's first condition would appear to be satisfied, assuming that the privilege was claimable only in respect of confidential matters.

4.19 The second condition involves a difficult factual question. Although it seems certain that some communications to journalists would not be made unless the journalist undertook to maintain the confidentiality of his informant *in general*, it is difficult to assess whether the possibility (which may be remote) of disclosure in legal proceedings would have any significant effect. The United States' experience does not appear to provide conclusive evidence either way. In affidavits submitted to the United States Supreme Court in the *Branzburg* case,⁷¹ a number of journalists claimed that some informants would be unwilling to give information unless there were a journalists' privilege. They spoke of the inevitable "chilling effect" of the absence of adequate protection. However, the Court itself considered that the evidence failed "to demonstrate that there would be a significant constriction of the flow of news to the public"⁷² unless there was a privilege. On the other hand, three dissenting judges of the Court were in no doubt that sources would be deterred.⁷³ It has been suggested that there is no substantial difference as to the flow of news in those States which have shield laws and those which do not.⁷⁴ This may be because a number of these laws give only a qualified privilege and because the First Amendment provides some protection, notwithstanding the absence of relevant State legislation.⁷⁵

4.20 Allied to Wigmore's second condition, but possibly not falling directly under it, is the argument in favour of a privilege that otherwise the press may be reluctant to publish information given on condition that the source will be kept confidential, because the honouring of a promise of confidentiality may subject the journalist and the publisher to the risk of criminal sanctions and costly litigation. From discussions the Commission had with journalists and newspaper management, it would appear that this could well be an inhibiting factor both in seeking out confidential information, and in publishing it if it has been obtained.

⁷⁰ See paragraph 3.13 above.

⁷¹ 33 L Ed 2d 626.

⁷² *Ibid.*, at 646.

⁷³ *Ibid.*, at 669.

⁷⁴ See Shurn and Parker, *Reporter's Privilege - Guardian of the People's Right to Know?* (1976) 11 New England Law Review 405.

⁷⁵ *Ibid.*

4.21 The Commission would welcome expressions of views in regard to the question whether a statutory privilege would be a significant factor in maintaining or increasing the flow of information from confidential sources.

4.22 Wigmore's third and fourth conditions involve value judgments that go to the root of the concept of a democratic society. The argument in favour of a privilege has broadly been put in the form of the public's "right to know" - the uncovering of abuses by public officials and other persons in positions of power, and so on. However, the public's "right to know" could also be said to be infringed by the creation of such a privilege, since individuals (and therefore indirectly the judicial system) may be harmed by permitting a witness to refuse to disclose relevant information in court proceedings. In the case of commissions of inquiry, refusal to disclose evidence may prevent the uncovering of abuses, even to the extent of jeopardising the security of the State.

4.23 Sometimes the argument is put on the basis that the granting of a privilege is to do no more than provide statutory recognition of the journalists' code of ethics. This, however, begs the question. No-one would dispute that, apart from legal proceedings, journalists have a moral obligation to adhere to their promises of confidentiality. But the question is whether this code of ethics, appropriate for other purposes, should prevail where those proceedings are concerned. The objection to the argument was forcefully put by the New South Wales Full Court in *Re Buchanan*, as follows:⁷⁶

"Every truly democratic system of government rests upon the rule of law, and no system is truly democratic if it does not. If the law of the land is to rule, it follows, of necessity, that the courts which administer that law must not be impeded in the performance of that function by any who give their allegiance, however sincerely, to the private codes of minorities, however admirable those codes may, for other purposes, be".

4.24 One doubt that has been expressed⁷⁷ about creating a journalists' privilege is that it might be open to abuse, in that a journalist could be tempted to claim that what he wrote was given to him in confidence from reliable sources, when in fact what he had written was mere speculation on his part. The proponents of this point of view would argue that any increase in the flow of news consequent upon the creation of a journalists' privilege should be weighed

⁷⁶ [1964-5] NSWLR 1379 at 1380.

⁷⁷ By the United States Supreme Court in the *Branzburg* case: 33 L ed 2d 626.

against possible increases in unfounded rumour or speculation, brought about by journalists who could never be called to account in legal proceedings.

4.25 Since this objection relates only to the abuse of the privilege, it could possibly be met by confining the privilege to members of the Australian Journalists' Association, whose code of ethics, in addition to containing a rule as to confidentiality, contains rules obliging members to report and interpret the news with scrupulous honesty, and against suppressing essential facts or distorting the truth by omission or wrong emphasis.⁷⁸ The code is enforced by a "Judiciary Committee" in each District. If a journalist's action in attributing information to a non-existent source were to be discovered by his fellow journalists, he could be censored, fined or expelled from membership.

4.26 The role of the Australian Press Council is also relevant. The Council is a voluntary non-statutory body, which was founded in 1976 by the Australian Journalists' Association, the Australian Newspapers Council, the Australian Provincial Press Association and the Regional Dailies of Australia Limited. Nine of its thirteen members are nominees of the press and four (including the Chairman) are unconnected with the press. The Council, which approves the code of ethics of the Australian Journalists' Association,⁷⁹ has the function of investigating complaints against items appearing in newspapers. If it found that a complaint was justified, it could issue an "adjudication". However, not all newspaper publishers support the Council. In any case it has no sanction other than the issuing of a press release for publication.

Is there a compromise?

4.27 A possible way of solving the dilemma may be to provide not for an absolute, but for a qualified privilege.⁸⁰

4.28 The privilege could be limited in three ways -

⁷⁸ See *Constitution and Rules*, paragraph 49.

⁷⁹ See the Council's *Statement of Principles*.

⁸⁰ A number of States of the United States which have enacted a statutory privilege have adopted this approach, though the nature of the qualifications are not uniform: see paragraph 3.14 above.

- (a) By restricting it to certain classes of proceedings (for example, defamation actions against the publisher, Commissions of Inquiry and/or criminal proceedings could be excluded).
- (b) By restricting it to certain classes of fact (for example, facts which cannot be proved unless the source is disclosed could be excluded from the privilege).
- (c) By giving the court (or the Commission in the case of a Commission of Inquiry) a discretion to grant or withhold the privilege on a case-by-case basis, by balancing the need to protect the confidentiality of the source against the interests of justice or the purpose of the inquiry.

4.29 Each of these approaches, or indeed any combination of them, has something to commend it. However, the first alternative could result in injustice in a particular case, while the other two approaches, by introducing a factor of uncertainty, could fail to achieve the very object desired, namely the supply of information from a confidential source. Even the first approach could fail to achieve its object, since an informant may not know in what class of proceeding the item of information he supplied could become relevant. The Commission would welcome comment.

How wide should any privilege extend?

4.30 Even if it is assumed that some form of statutory privilege for journalists is desirable, there are difficult questions as to the classes of person, the classes of publication and the classes of matter over which protection should extend.

Classes of person

4.31 Some jurisdictions of the United States have granted the protection only to professional journalists, others have included part-time contributors and others again have extended it to any person connected with the publication while acting in an information gathering or processing capacity.⁸¹

⁸¹ See paragraph 3.11 above.

4.32 To confine the protection to professional journalists would in some measure safeguard against abuse of the privilege, since the Journalists' Association and the Press Council could help enforce standards. On the other hand, this would exclude the "lonely pamphleteer who uses carbon paper or a mimeograph", who would seem to have as much right to protection as a large metropolitan publisher, as the Court pointed out in the *Branzburg* case.⁸²

4.33 An associated problem under this head is the case where the reporter tells his editor the identity of the source as a condition of having the story published.⁸³ It would seem that, in order to be effective, the privilege should extend to the editor and other senior management personnel. It would also seem to be necessary to include a person who is working with the reporter and is present when the informant reveals his identity. Such a case could occur, for example, when a cameraman accompanies a television reporter on a news story.

Classes of publication

4.34 The next question is as to the class of publication which should be covered. This is connected with the question of the classes of person who should be granted the privilege. Some jurisdictions in the United States cover only newspapers and radio and television stations. On the other hand others extend the cover to any "medium of communication to the public".⁸⁴

4.35 Any privilege should certainly cover newspapers and radio and television stations. But should it include only daily or weekly newspapers, or should it extend to publications published at greater intervals (and so include "periodicals")? Should the extent of circulation be relevant? Should a single broadsheet circulated to a limited audience, and perhaps published only once, be covered? These are some of the questions that would fall for decision under this head.

Classes of matter

4.36 This paper has focussed primarily on the question whether a journalist should be obliged to reveal the source of his information. However, some jurisdictions in the United

⁸² 33 L Ed 2d 626 at 653.

⁸³ See paragraph 4.5 above.

⁸⁴ See paragraph 3.10 above.

States extend the protection to unpublished information (including unpublished film, photographs and tape-recordings).⁸⁵ At first sight this seems paradoxical. If the aim of granting a statutory privilege to journalists is to increase the flow of news, why should information which is **not** published be protected? However, the extension may be explained on the basis of a need to obtain background information which is not itself for publication, but which is necessary to verify the accuracy of information that is to be published.

4.37 These and other questions are listed for discussion in the following paragraph.

QUESTIONS AT ISSUE

5.1 The Commission would welcome comments (with reasons where possible) on any matter arising out of this paper, and in particular on the following -

- (1) In what circumstances, if any, should journalists be given the right to refuse to disclose in court and other judicial proceedings the source of their information?
- (2) If such a privilege is to be given –
 - (a) Who should be included in the term "journalist"? Should it include, for example, occasional contributors or those who write letters to the editor, as well as professional staff? Should it be confined to those working in a news gathering capacity?
 - (b) Should the privilege extend to an editor or publisher to whom a source of information is revealed by a journalist?
 - (c) What media should come within the scope of the privilege? What should be the position of journalists associated with, for example, newsletters, pamphlets, books, radio and television?
 - (d) Should the extent of the circulation of the publication be relevant?

⁸⁵ See paragraph 3.12 above.

- (e) Should the privilege be confined to cases where the publication was for the information or education of the public?
 - (f) Should the privilege apply to all court proceedings, civil or criminal, and if not, to which proceedings should it be confined?
 - (g) Should the privilege be available not only in relation to court proceedings, but also in relation to the proceedings of administrative tribunals, commissions, judicial investigations and Parliamentary committees, and, if so, in relation to which?
 - (h) Should the privilege, if claimed, be absolute or should the courts (or other bodies) have a discretion to uphold or reject claims of privilege? If such a discretion were to be given, what criteria should guide its exercise?
 - (i) If a privilege were to be enacted, who should be competent to waive it? Should it be the journalist, his informant or the employer of the journalist?
 - (j) Must the information be published for its source to be privileged, or should it be privileged even if the matter was never printed, broadcast or telecast?
 - (k) Should the privilege relate only to the identity of the person who supplied information or should it extend to information upon which published matter is based?
- (3) Should the proposals referred to in this paper be the subject of uniform legislation to be adopted by the Commonwealth and States?

APPENDIX I

List of States of the United States of America which have enacted some form of journalist's privilege.

State	Year when statutory privilege was first enacted	Current reference
Maryland	1896	MD. Ann. Code. art 35 s.2 (1971)
New Jersey	1933	N.J. Rev. Stat. ss.2A:84A-21,2A:84A-29 (Supp.1972-73)
Alabama	1935	ALA. Code. Tit. 7 s.370 (1960)
California	1935	CAL. Evid. Code. s.1070 (West. Supp. 1973)
Arkansas	1936	ARK. Stat. Ann. s.43-917 (1964)
Kentucky	1936	KY. Rev. Stat. s.421-100 (1972)
Pennsylvania	1937	PA. Stat. Ann. Tit. 28, s.330 (Supp. 1972-73)
Arizona	1937	ARIZ. Rev. Stat. Ann. s.12-2237 (Supp. 1972)
Ohio	1941	OHIO. Rev. Code. Ann. s.2739-12 (1954)
Indiana	1941	IND. Ann. Stat. s.2-1733 (1968)
Montana	1943	MONT. Rev. Code. Ann. s.93-601-2 (1964)
Michigan	1949	MICH. Stat. Ann. ss.28.945 (1) (1972)
Louisiana	1964	LA. Rev. Stat. Ann. ss.45:1451-54 (Supp. 1973)
Alaska	1967	ALASKA. Stat. s.09.25.150 (Supp. 1973)
Nevada	1969	NEV. Rev. Stat. s.49.275 (1971)
New York	1970	N.Y. Civil Rights Law s.79-h (McKinney Supp.1972-73)
Illinois	1971	ILL. Rev. Stat. ch 51 ss.111 et seq (1971)
Rhode Island	1971	R.I. Gen. Law. Ann. ss.9-19.1-1 to -3 (Supp. 1973)
Nebraska	1973	NEB. Rev. Stat. ss.20-144 to -146 (Supp. 1973)
New Mexico*	1973	N.M. Stat. Ann. s.20-1-12.1 (1973)
North Dakota	1973	N.D. Cent. Code. s.31-01-06.2 (Supp. 1973)
Oregon	1973	ORE. Rev. Stat. ss.44.510-540 (1973)
Tennessee	1973	TENN. Code. Ann. s.24-113-115 (Supp. 1973)
Minnesota	1973	MINN. Stat. Ann. ss .595. 021-025 (Supp. 1973)
Oklahoma	1974	OKLA. Stat. Tit. 12. ss.385.1-3 (1974)

Delaware 1974 DEL. Code Ann. Tit. 10 s.4320-26 (1974)

*The Supreme Court of New Mexico has declared New Mexico's statute to be invalid in so far as it applies to court proceedings: *Ammerman v Hubbard Broadcasting, Inc.*, 551 Pacific Reporter, 2d 1354. Under the Constitution of New Mexico, the power to prescribe rules of evidence and procedure is vested exclusively in the Supreme Court of New Mexico, and not in the legislature: *ibid.*

APPENDIX II

BIBLIOGRAPHY OF SELECTED ARTICLES

- Anderson R.E.: *Bransburg v Hayes: A Need for Statutory Protection of News Sources* (1973) 61 Kentucky Law Journal 551.
- Block S.M.: *Journalist – Informant Privilege* (1971) 49 Texas Law Review 807.
- Ervin S.J. Jr.: *In Pursuit of a Press Privilege* (1974) 11 Harvard Journal of Legislation 233.
- Kaplan J.: *Free Press/Fair Trial – Rights in Conflict : Freedom of the Press and Rights of the Individual* (1976) 29 Oklahoma Law Review 361.
- Murasky D.M.: *Journalists' Privilege* (1974) 52 Texas Law Review 829.
- Nelson H.L.: *The Newsmen's Privilege Against Disclosure of Confidential Sources and Information* (May 1971) 24 Vanderbilt Law Review 667.
- Neubauer M.: *The Newsmen's Privilege after Branzburg : The Case for a Federal Shield Law* (1976) 24 UCLA Law Review 160.
- Pradka Carter D.: *Constitution Law – Evidence – Testimonial Reprieve for Newsmen in Civil Litigation* (1973) 51 North Carolina Law Review 1550
- Sherwood M.: *The Newsmen's Privilege : Government Investigations, Criminal Prosecutions and Private Litigation* (1970) 58 California Law Review 1198.
- Shurn P.J., Parker J.Y.: *Reporter's Privilege – Guardian of the People's Right to Know?* (1976) 11 New England Law Review 405.