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*.

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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. Apart from drawing attention to a recent judicial decision in the State of New Jersey which is of significance, 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.  

The English Law Reform Committee in its 16th Report 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* 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. 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.

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 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) Cmdn. 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, 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, 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.

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**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.

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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 -

(a) Subject to certain exceptions, 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.

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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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^{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).

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.

^{20} 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\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.

\textsuperscript{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.

\textsuperscript{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).

\textsuperscript{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.

\textsuperscript{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.\textsuperscript{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).\textsuperscript{28}

\textsuperscript{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.

\textsuperscript{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. They also have no special privilege as regards search warrants. If a journalists' privilege were to be enacted, it would need to extend in some form to these areas also.

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 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.

4.6 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

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.  

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.  

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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.  

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.


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. 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. 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. It might be difficult for the media, or at least some sections of it, to resist the temptation to publish such information, 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* 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.\footnote{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.}

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.\footnote{See paragraph 4.7 above.} 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.\footnote{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).}

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).\footnote{See the Working Paper, paragraphs 2.4 and 2.10. See also Chapter 3 above, n.29.} The consequences of withholding relevant information in civil proceedings could be serious enough. For example, as was pointed out in the Working Paper,\footnote{Paragraph 4.9.} refusal by a journalist to disclose his source in defamation
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{18} The trial judge, however, ruled that the statute did
not preclude him ordering that the journalist deliver the material to \textit{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.\textsuperscript{19} The Commission does not consider that legislation
which permitted a journalist to withhold relevant evidence in criminal proceedings (whether

\textsuperscript{16} Under the Australian Law Reform Commission's defamation proposals in its Report, \textit{Unfair Publication}
(1979) the defence of qualified privilege (called limited privilege) would not be available to the media,
and exemplary damages would be abolished: \textit{ibid.}, paragraphs 148 and 263.
\textsuperscript{17} The defence said it intended to use the material as a basis for the cross-examination of a prosecution
witness.
\textsuperscript{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.
\textsuperscript{19} For an account of the incident, see \textit{The New York Times}, 15, 25-30 July 1978. The case was also reported
in Australia, see, for example, \textit{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, 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. 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 -

(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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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.\textsuperscript{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, \textit{Professional Privilege in the Law of Evidence},\textsuperscript{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: \textsuperscript{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 \textit{Evidence Act of New Zealand}:\textsuperscript{36}

\begin{quote}
"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 -
\end{quote}

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

\textsuperscript{34} 1977.

\textsuperscript{35} Report, page 10.

\textsuperscript{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\(^\text{37}\) 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

\(^{37}\) 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.
APPENDIX III

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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APPENDIX II  Bibliography of selected articles.
TERMS OF REFERENCE

1.1 The Commission has been asked to consider and report on the proposal that journalists\(^1\) 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. 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.

2.4 A more recent Australian case in which the question of a journalists’ privilege arose is that of Re Buchanan, 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

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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.

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 and Attorney General v Clough, 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 tribunal 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: "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."
Donovan L.J. said:  

"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*.  

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:

"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. 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

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10 Ibid., at 772.  
11 [1963] 1 All ER 420 at 428.  
12 [1964-5] NSWR 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. 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*, 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*, that had the journalist been served with a summons he would have been found guilty of an offence. Section 3 of the

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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

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\(^{18}\) 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, 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.

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 States 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

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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.


\(^{26}\) 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".

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29 See the article by Sam J. Irvin Jr. referred to in Appendix II.
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. Others go further still and include anyone connected with or employed upon the relevant publication in an information gathering or processing capacity.

Matter protected

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

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. 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".

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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. 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 1975\(^\text{40}\) 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. 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

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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' Association 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, 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 matter 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. 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. 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.\footnote{See the article listed in Appendix II.} 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.\footnote{See paragraph 3.3 above. Section 354 of the \textit{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.}

4.7 There also appear to have been few recorded cases where the issue has arisen in Western European countries.\footnote{See \textit{I.P.I. Survey} No. 6, cited in note 39 above.}

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,\footnote{See the articles in Appendix II.} and in Europe.\footnote{See \textit{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. 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 negatived a defence of qualified privilege, and may in any case have provided a ground for exemplary damages.

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 journalist's privilege has recently arisen in other sorts of civil proceedings, and also in criminal proceedings. 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*. All three judges of the Court confirmed the absence of a journalist's privilege under English law beyond the limited discretion outlined in Mulholland's case. 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

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51 See paragraph 2.10 above.
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.


\(^{60}\) *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.
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, 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, 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" unless there was a privilege. On the other hand, three dissenting judges of the Court were in no doubt that sources would be deterred. 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. 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.

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.

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70 See paragraph 3.13 above.
71 33 L Ed 2d 626.
72 Ibid., at 646.
73 Ibid., at 669.
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:

"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 expressed 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

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76 [1964-5] NSWR 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. 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, 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.

4.28 The privilege could be limited in three ways -

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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.\footnote{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.\(^\text{82}\)

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.\(^\text{83}\) 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".\(^\text{84}\)

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). 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?

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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.

<table>
<thead>
<tr>
<th>State</th>
<th>Year when statutory privilege was first enacted</th>
<th>Current reference</th>
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<tbody>
<tr>
<td>Alabama</td>
<td>1935</td>
<td>ALA. Code. Tit. 7 s.370 (1960)</td>
</tr>
<tr>
<td>Arkansas</td>
<td>1936</td>
<td>ARK. Stat. Ann. s.43-917 (1964)</td>
</tr>
<tr>
<td>Kentucky</td>
<td>1936</td>
<td>KY. Rev. Stat. s.421-100 (1972)</td>
</tr>
<tr>
<td>Indiana</td>
<td>1941</td>
<td>IND. Ann. Stat. s.2-1733 (1968)</td>
</tr>
<tr>
<td>North Dakota</td>
<td>1973</td>
<td>N.D. Cent. Code. s.31-01-06.2 (Supp. 1973)</td>
</tr>
<tr>
<td>Oregon</td>
<td>1973</td>
<td>ORE. Rev. Stat. ss.44.510-540 (1973)</td>
</tr>
</tbody>
</table>
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


