SHIELD LAWS FOR JOURNALISTS

When journalists refuse to name confidential sources in court, judges have the discretion to jail them. Journalists claim that they are bound by their professional code of ethics and increasing numbers of them are going to jail to uphold that code. The courts are certain that there is no such thing as journalists' privilege but then, when was the last time a lawyer went to jail in defence of a principle? **Evelyn McWilliams** ***reports.***

The law of contempt of court arises from the public interest in the proper administration of justice. Because there is no statutory definition in Australia of what constitutes contempt the common law relies on broad statements of principle. But cases of contempt can arise when the public interest in fair and impartial trials competes with the public interest in the freedom of the media to report and comment on matters of interest to the public. This conflict has surfaced in a spate of recent cases involving journalists who are bound by the Australian Journalists' Association's Code of Ethics to protect confidential sources.

Journalists argue that if they reveal sources then potential 'whistleblowers' will be less likely to come forward with information of interest to the public. They are seeking a privilege for the journalist-source relationship along the lines of the lawyer-client, doctor-patient and priest-penitent one. Because Australian courts do not recognise this evidentiary privilege journalists are not entitled to refuse to disclose confidential information when a court requires it. In such cases, the law of contempt applies. In the absence both of evidentiary privilege and a statutory definition of contempt the competing principles of public interest in the administration of justice and public interest in free speech are not satisfactorily kept in balance, leading to what many journalists and commentators consider unfair and unnecessary prosecutions for contempt.

Sanctions for contempt range from ordering a person who has disturbed court proceedings to leave the courtroom to imposing fines. But if the offender is an individual, she or he could be sent to prison. Until recently, the sanction of imprisonment for a journalist who refuses to reveal sources has been comparatively rare. There are various possible explanations for this. In her book, *The Law of Journalism in Australia* Melbourne law lecturer Sally Walker offers her suggestions.

> *Journalists' sources are not often relevant to litigation or investigations; the parties may not press the matter; if a government is involved it may not wish to appear to attack the media. . . . [T]o ensure public confidence in the authenticity of information, journalists generally identify their sources; the problem arises only in the comparatively rare case where, not only does the informant not want to be identified, but also the information is published notwithstanding that the source cannot identified.* (p 88, 89)

But those cases where the informant does not want to be identified are increasing and journalists refusing to divulge sources because of their Code of Ethics are facing the sanction of imprisonment. They include Tony Barrass in the 1989 Western Australian case of *DPP v Luders;* Gerard Budd in the 1992 Queensland case of *Copley v Queensland Newspapers Pty Ltd* and Chris Nicholls in a case in South Australia in which he had been charged with imperson-

ation, false pretences and forgery but was sentenced to four months imprisonment for contempt of court. Two other cases involving journalists as witnesses point to a disturbing trend in the use of contempt laws. The 1992 defamation case against the *Adelaide Advertiser* for reporter David Hellaby's series of articles on the State Bank of South Australia ended in a type of stalemate; Deborah Cornwall of the *Sydney Morning Herald* has been found guilty of contempt by Justice Abadee of the New South Wales Supreme Court after Cornwall refused to reveal her source of information to ICAC Commissioner Ian Temby. Justice Abadee will hear hear submissions on penalty in the Supreme Court on August 12 but she could face a jail sentence.

Attempts at law reform

In 1987 the ALRC tried to resolve the uncertainty surrounding contempt laws. In its report on contempt (ALRC 35) it recommended abolishing the common law of contempt and replacing it by statutory provisions. However, without concerted action on the part of all States and Territories to implement these recommendations, federal action, which would be restricted to its own courts and proceedings, would probably create more, not less, chaos and uncertainty.

In its report on evidence (ALRC 38) the ALRC looked at qualified privilege for confidential communications between various professionals and their clients, including the clergy, doctors, lawyers and journalists. The report recommended a provision similar to the New Zealand legislation, allowing a judge or a tribunal discretion in relieving a witness of the obligation to answer. Section 35 of the New Zealand *Evidence Amendment Act (No 2) 1980* is as follows

> *In any proceeding before any Court, the Court may, in its discretion, excuse any witness (including a party) from answering any question or producing any document that he would otherwise be compellable to answer or produce, on the ground that to supply the information or produce the document would be a breach by the witness of a confidence that, having regard to the special relationship existing between him and the person from whom he obtained the information or document and to the matters specified in subsection (2) of the section, the witness should not be compelled to breach.*

When the Federal Government introduced the *Evidence Bill 1991* (Cth) it implemented most of the major reforms which the Commission recommended in its report. But it restricted evidentiary privilege to the clergy. The New South Wales *Evidence Bill 1991* also borrows heavily from the ALRC's recommendations but it also restricts evidentiary privilege to priests and rabbis.

Taking up the cause of free speech and undeterred by the glacial progress of any attempts at creating uniform legislation through the Standing Committee of Attorneys-General (SCAG), the Queensland Attorney-General Dean Wells obtained Cabinet approval on 8 July 1991 to pursue reform of contempt laws at the next SCAG meeting. The July 1991 SCAG meeting widened the discussion to include the ALRC's report on contempt. Dean Wells argued that the so-called 'newspaper rule' only protects journalists from pre-trial disclosures, not direct questioning as witnesses. The meeting resulted in agreement to consider a draft Bill and to add uniform evidence legislation on the SCAG agenda. On 26 March last year Dean Wells took a proposal to SCAG 'liberalising the law in relation to any publication; and especially to any professional who was bound by a regulated ethical code to keep confidences.' The South Australian Attorney-General Chris Sumner objected to the need for such reform, arguing that journalists must be held responsible for what they do. The ACT Attorney-General expressed concerns about the extent of the protection being offered.

In July 1992 the Queensland Attorney-General presented SCAG with a second proposal: to adopt a provision similar to section 35 of the *Evidence Amendment Act 1980* (NZ). Essentially it provides that a judge or a tribunal would have the discretion to relieve a witness of the obligation to answer. That discretion would be guided by a consideration of at least three factors:

(1) the likely significance of the evidence to the case in hand
(2) the nature of the confidence and relationship between the witness and the source
(3) the likely effect of the disclosure on the source (or any other person).

The Law Reform Commission of Western Australia has now added its voice to those suggesting the enactment of a New Zealand-style discretion in its report on *Professional privilege for confidential communications* which was tabled in the West Australian Parliament on 7 July 1993. There is no doubt that, had such a proposal been in place, the outcome of most if not all the cases cited above would have been very different.

Journalists in contempt

The Tony Barrass case involved an employee of the Australian Taxation Office who was charged with official corruption under section 70(1) of the *Crimes Act 1914* for publishing Commonwealth documents without authorisation. The Commonwealth Director

of Public Prosecutions commenced proceedings. During the committal proceedings the prosecution requested a *Sunday Times* journalist, Mr Tony Barrass, to reveal the identity of the source of the ATO information which had formed the basis of a series of articles by Barrass. The information would have been relevant to the prosecution for establishing the defendant's guilt. Tony Barrass refused to reveal the identity of the leak on the grounds of his profession's Code of Ethics. The magistrate committed Barrass to imprisonment for seven days pursuant to section 77 of the *Justices Act 1902*. Barrass remained in prison for five days and did not answer the questions.

When the case went to trial in the District Court of Western Australia in August 1990 Tony Barrass was called as a prosecution witness and again refused to answer questions in court which would have revealed the source of his information. His grounds for refusal, that he would be in breach of his profession's code of ethics, cut no ice with Judge Kennedy :

> *The administration of justice is of far greater importance than the journalist's point of view. We have an adversary system which depends on those who are competent and compellable coming to court and truthfully telling what they know . . . It is for you and your conscience what you have, in fact, done to Mr Luders. You have caused him in the end great damage. I do not refer so much to the conviction and the penalty but the fact that he lost a job . . . It seems to me that that is also a consideration for journalists; whether the damage they are likely to do to individuals outweighs any supposed benefits to the entire community.*

Tony Barrass was convicted of contempt and fined $10 000. He remains sceptical about the relevance of his testimony to the case for the prosecution, let alone to the defence. He told *Reform:* 'I still question whether my evidence was as crucial to the case as the Prosecution led the Court to believe.

In the case involving a Brisbane *Courier-Mail* reporter Gerard Budd, the Queensland Supreme Court found Budd in contempt when, as a witness in a defamation action brought against the *Courier-Mail*, he refused to answer questions put to him concerning an unidentified source of information which Budd had used in one of his articles. The judge considered that the questions put to Gerard Budd were relevant to the case and, in particular, to testing Budd's credibility as a witness. In convicting Gerard Budd of contempt and sentencing him to 14 days imprisonment the judge expressed his views on journalists' claim to privilege:

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

In the Nicholls case, ABC radio journalist Chris Nicholls was sentenced on 19 April this year to four months' jail after pleading guilty to a contempt of court charge for refusing to reveal a source. He has just been released after serving 11 weeks. Nicholls had been charged with impersonation, false pretences and forgery as a result of his investigations into allegations that a South Australian Cabinet Minister had assisted her partner Mr Jim Stitt to obtain commercially valuable information. According to the prosecution, Nicholls had impersonated Stitt over the phone in order to gain confidential information. Chris Nicholls alleged that he did not make the calls but refused to reveal the identity of the person who did. The jury acquitted Chris Nicholls of the criminal charge but he was imprisoned for four months for contempt of court for refusing to reveal his source. On appeal that sentence was reduced to 12 weeks.

According to the Chris Warren, joint federal secretary of the Media Entertainment and Arts Alliance (MEAA) all three cases provide good examples of the way contempt laws are abused and give Dean Wells' proposal added currency. The MEAA told *Reform* that, if a judge were to take into consideration not only the relevance of the question being put to a witness but also whether, in refusing to answer that question, the witness would be the one with the most to lose, all three cases could have been resolved without the sanction of contempt. In the Gerard Budd case, it was Budd and the *Courier-Mail* who were disadvantaged by Budd's refusal to reveal his source. In Chris Nicholls' case, Nicholls handicapped his own defence by claiming confidentiality. Similarly, the MEAA argues that the prosecution did not need Tony Barrass' evidence in putting together its case against Luders.

Unlike the Barrass and Budd cases, the Hellaby case involved a pre-trial discovery order. David Hellaby, a reporter from the *Adelaide Advertiser*, was ordered on 4 September 1992 to hand over to the Supreme Court documents he used in preparing two reports on the South Australian Auditor General's inquiry into the State Bank of South Australia. Because the State Bank was considering whether to sue Hellaby for injurious falsehood it argued that it needed access to the journalist's documents. A charge of injurious falsehood depends on a plaintiff proving that a publication is untrue; that it caused the plaintiff actual pecuniary damage and that it was actuated

by malice. Accordingly, the judge asked for papers relevant to the authorship of the articles, the journalist's belief in their accuracy, his sources, attempts to verify the articles and any directions given to him regarding the writing of the articles. Hellaby's appeal to the Full Court against the order for discovery was refused and his application for special leave to appeal to the High Court was also refused.

Under the order for discovery David Hellaby had 14 days to reveal his source, otherwise he faced the possibility of imprisonment for contempt. On the 14th day his lawyers filed some of the documents but did not disclose the identity of his source. Hellaby was found guilty of contempt of court but the judge adjourned the hearing for a week to give Hellaby the opportunity to ask his source to release him from his undertaking of confidentiality. Meanwhile Hellaby's lawyers retaliated by filing their own order for discovery seeking details of the Bank's losses incurred as a result of the articles. The resulting deadlock was resolved by a confidential settlement between the Bank and David Hellaby's lawyers in which the Bank agreed not to proceed with moves to identify the source. But Hellaby was fined $5 000 for the period he had been in contempt.

On 25 March 1993 Deborah Cornwall, a reporter with the *Sydney Morning Herald*, faced contempt of court proceedings for refusing to reveal to the Independent Commission against Corruption (ICAC) the source of her information about a story on a murder case. In the story, Cornwall claimed that unnamed police officers had told her that Neddy Smith had informed on a man subsequently convicted of murder. The ICAC Commissioner Ian Temby stated that it had been established that Smith was not the informer and that therefore Cornwall's sources were discredited and should not be protected. Cornwall knew her sources to be impeccable but conceded to the Commission that there were ostensible reasons which might lead Commissioner Temby to accept that Smith was not the informer. She maintained that she was bound by her profession's Code of Ethics and refused to name her sources. But under section 37 of the *Independent Commission Against Corruption Act 1988* (NSW) a witness summoned to attend or appear before the Commission is not entitled to refuse to answer questions or produce documents. According to Chris Warren, there is a danger in legislation such as this because it allows a judicial body to embark on fishing expeditions for information. In this sense it would be acting as a quasi investigative enquiry not a judicial one.

In the NSW Supreme Court hearing commencing on 27 April this year Cornwall's lawyers argued that she had a reasonable excuse under the ICAC Act and that the wide contempt provisions of the ICAC Act are invalid because of the implied constitutional guarantee of freedom of speech and communication about matters of public interest. On 6 July Justice Abadee found Cornwall guilty of contempt, arguing that there was no privilege protecting a journalist from disclosing sources. The *Sydney Morning Herald* reported on

WALRC recommends shield laws

Dr Peter Hanford, Executive Officer and Director of Research, WALRC

The Commission's report on *Professional privilege for confidential communications* was tabled in the WA Legislative Assembly by Attorney-General Cheryl Edwardes on 7 July 1993. The WALRC recommends the enactment of a judicial discretion allowing courts to excuse witnesses from answering questions or producing documents in judicial proceedings in exactly the same terms as the New Zealand provision, except that it would expressly provide that a 'question' includes a question as to the identity of a source of information.

The New Zealand Act lists a number of matters to be taken into account by the court in exercising this discretion. The WALRC proposal amplified these provisions. The provision, with the additions suggested by WALRC in italics, is as follows:

In deciding any application for the exercise of its discretion . . . the Court shall consider whether or not the public interest in having the evidence disclosed to the Court is outweighed, in the particular case by the public interest in the preservation of confidences between persons in the relative positions of the confidant and the witness and the encouragement of free communication between such persons, having regard to the following matters:

(a) the likely significance of the evidence to the resolution of the issues to be decided in the proceeding
(b) the nature of the confidence and of the special relationship between the confidant and the witness
(c) the likely effect of the disclosure on the confidant, *any other person or the community, taking account of the ethical, moral or religious dictates of those professions or vocations which unequivocally demand nondisclosure, even in the face of the Court's order to disclose*
(d) *any means available to the Court to limit the adverse consequences of a required disclosure of confidential information or confidential sources of information and any alternative means of proving relevant facts.*

The WALRC report looks not only at the journalist source problem but all kinds of professional relationships. In Western Australia the only privilege recognised by the law is legal professional privilege. The WALRC concluded that other privileges found in some States, such as doctor patient privilege or priest penitent privilege, should not be recognised in Western Australia.

7 July that Justice Abadee dismissed the arguments of Cornwall's defence. 'Quite simply, where there is a conflict between obeying the code and obeying the law, the law must prevail', he is reported as saying. The same report quoted Deborah Cornwall's comments outside court:

> *I believe that the law should, in the public interest, give qualified privilege to journalists to protect their sources. As it is, ICAC can cite me for contempt and the court can jail me as a deterrent and a warning to other journalists. The problem is that the law can and is being used selectively.*

Cornwall argued that Neddy Smith had refused to name an accomplice in an armed robbery but the ICAC refused to take any contempt action against him. Justice Abadee will hear submissions on penalty in August but the ICAC has called for a jail sentence.

Protecting the blower or the whistle?

Another way of balancing the freedom of speech and impartial justice equation is to offer legal protection to whistleblowers. As Paul Chadwick, the Victorian co-ordinator of the Communications Law Centre, has written: 'In the final analysis, the journalists are merely the whistle. Society's interest is in the blower.' Support for whistleblower legislation has come from a number of quarters, not least Commissioner Ian Temby. Queensland's Electoral and Administrative Review Commission and the Royal Commission into WA Inc both recommended it. Independent Green Senator Christabel Chamarette tabled a Whistleblowers Protection Bill in the Senate on 25 May 1993 and the South Australian Parliament recently passed whistleblower protection legislation.

The legislation aims to guarantee that a person who reports illegal, improper or wasteful conduct to the proper authorities will not suffer any repercussions. It is difficult to see how whistleblower legislation would have offered any certainties to the sources cited in the Deborah Cornwall case. Many commentators, including Paul Chadwick, believe that you really need both — whistleblower legislation *and* shield laws for journalists:

> *The challenge for journalists is to persuade sceptics that even the most carefully crafted whistle-blower protection schemes will fail sometimes and the last resort for sources of confiding in a journalist will still be a necessary feature of a democratic society. A corollary is that journalists as a group must boost their credibility. (The Alliance,* June quarter 1993.)

But efforts to progress talks on shield levels are floundering at the political level. When the Queensland Attorney-General Dean Wells proposed introducing uniform legislation similar to the New Zealand model at last year's SCAG meeting, the response was underwhelming. But if SCAG has shut the door on reform it has left a window open with the request on 6 May this year by the West Australian Attorney to defer discussion on the matter until the tabling of a report by the WA Law Reform Commission on professional privilege for confidential communications. That report has just been tabled.

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