CHAPTER 6 A SHIELD LAW FOR JOURNALISTS IN AUSTRALIA

THE NEVER ENDING STORY?

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I INTRODUCTION[1]

This chapter examines the aspiration of journalists in Australia to have in place strengthened statutory recognition of a professional privilege that specifically permits them to refuse to divulge in interlocutory or court proceedings the name of a source. The privilege, which should operate seamlessly across all jurisdictions in Australia, 'enables witnesses in judicial proceedings to withhold certain confidential information despite the relevancy of the information to issues to be determined by the proceedings'.[2] The term professional privilege is also known as 'professional confidential relationship privilege', and 'shield law'. These terms are used interchangeably through this work.

Having such a professional privilege in place is important to journalists because a source may give them information only on the basis that the identity of the source is not revealed. This is because the source would suffer adverse consequences if it became known that he or she had made the information public via the journalist. The information that is shared with the journalist, and then the public at large, is generally confidential and of the sort that would not otherwise be known outside the sphere in which the source operates. This information may

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1 Some parts of this chapter draw substantially from Joseph M Fernandez, *Submission to the Senate Standing Committee on Legal and Constitutional Affairs into the Evidence Amendment (Journalists' Privilege) Bill 2009 Inquiry*, conducted in April 2009.

2 Law Reform Commission of Western Australia, *Report on Professional Privilege for Confidential Communications*, Project No 90 (1993) [3.1].

have serious implications for third parties, for example by demonstrating incompetence, mismanagement or fraud at high levels in the public or private sectors. Journalists argue that if they are forced to reveal the identity of their sources this avenue of information would no longer be available.

Part 1 of this chapter looks at the meaning of a shield law for journalists, and the consequences for journalists and their confidential sources in the absence of a shield law. There is an analysis of the current situation in Australia, and of details of various reports that have identified the need for the introduction of a meaningful shield law. This is followed by details of recent events that have highlighted the need for a shield law, and then there is discussion of the Commonwealth Government initiatives in 2009 to strengthen the present law in favour of journalists, and its stated objectives for so doing. Part 2 analyses the different types of shield law, then comments upon some misconceptions and considers whether the proposed provisions can be improved. The final part of Part 2 investigates the key submissions to a recent Senate Committee inquiry on the matter. Part 3 compares other forms of legal professional privilege and outlines the competing interests where a shield law for journalists is concerned. The chapter ends with the conclusion that the proposed laws would be improved by providing a clear recognition for the principle that journalists' confidential sources *prima facie* need to be protected in the interests of the free flow of information in a democratic society.

II Part One

A *What is meant by a shield law for journalists?*

A shield law is a legal professional privilege that permits a journalist to refuse to answer questions either in interlocutory proceedings or during a court case. The questions relate to the identity of a source who has provided information to a journalist, and the information is of a type that is unlikely to be otherwise made known to the public. It may only be known or available in the sphere in which the source operates. The kind of privilege desired by journalists is 'essentially a right to resist disclosing information that would otherwise be required to be disclosed'.[3]

3 Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2007) [3.1], citing Jeremy Gans and Andrew Palmer, *Australian Principles of Evidence* (2004) 91.

B *Consequences for confidential sources and journalists in the absence of a shield law*

Why a source may not wish to be identified depends on the nature of the information, and the consequences for the source when third parties discover who divulged it. The source could be sacked by his or her employer, ostracised by workmates, prosecuted for a criminal offence, or sued if the information is defamatory of a third party. Even more seriously, the source may fear being injured or killed if the information concerns a third party who is likely to resort to violence.

There are different reasons as to why a third party may seek by legal means to find out who gave the information to the journalist. For example, if the information is defamatory of the third party, the third party might sue the journalist, and the media employer, for defamation. It is possible that the journalist and media employer would have an arguable defence to a defamation action, such as the defence of 'political communication' established by the High Court in the 1990s.[4] For such a defence to operate the 'defendant must establish that its conduct in making the publication was reasonable in all the circumstances of the case' and will fail if the plaintiff can prove that the publication was actuated by common law malice.[5] For the plaintiff to have any success in showing 'reasonableness' or 'malice' in order to overcome the defence, it may be necessary to determine who was the source of the information.

Another example where the identity of a source is relevant in a legal action is where there has been a leak of information to a journalist by a source employed in a government department, the leak itself being an offence on the part of that source. The information is then published by the journalist. Should the source then be tried for the offence, the prosecution may call the journalist as a witness in order to establish the guilt of the defendant source. The Barrass case discussed later illustrates this.

The consequences for journalists in being forced to reveal their sources are also serious. In Australia, and other jurisdictions such as the UK and the USA, disclosing confidential information such as the name of a source is a breach of the journalists' Code of Ethics. In Australia the Media Alliance Code of Ethics says:

> Alliance members engaged in journalism commit themselves to: ...

4 The defence to defamation variously referred to as 'political communication', 'political discourse' or 'political discussion', was established by the High Court in a series of cases, culminating in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

5 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520. In *Lange* this defence expanded qualified privilege to include such political communication, providing the defendant's conduct is reasonable and not actuated by malice, 572-574.

3. Aim to attribute information to its source. Where a source seeks anonymity, do not agree without first considering the source's motives and any alternative attributable source. Where confidences are accepted, respect them in all circumstances.[6]

Physical danger for the source if his or her identity is revealed has been mentioned, but the revelation may also put the journalist in harms way. This is the situation in which Suzanne Breen, Northern Editor of the *Sunday Tribune*, a newspaper based in Dublin in the Republic of Ireland, was placed in 2009. The Police Service of Northern Ireland (PSNI) sought a Production Order under sch 5 para 5 of the *Terrorism Act 2000* (UK) obliging Breen to disclose information about the involvement of the Real IRA in the murder of two British soldiers at the Masserene army base in Antrim in March 2009. Breen had been the recipient of a call from a Real IRA spokesman claiming responsibility for the deaths. In the Belfast Recorder's Court Burgess J, in refusing to grant the order, made reference to the 'strong public interest in bringing to justice those who have carried out such attacks or have been in any way involved in their planning and carrying out',[7] but then later said:

> That there is objective evidence that we are dealing with a ruthless and murderous group of people who would regard any handing over of any information in the possession of Ms Breen over and above the claim for responsibility, as exposing her to be treated as a legitimate target with the murderous consequences that could and may well follow from that.[8]

Burgess J more than once commented on the 'enormous difficulty posed by the conflicting interests in this case by reason of the enormity of the crime committed and the enormity of the risk as I have determined it to Ms Breen', but found the latter to outweigh the former in this particular situation.[9]

6 Media, Entertainment & Arts Alliance, *Media Alliance Code of Ethics* <www.alliance.org.au> at 22 June 2009. The *Code of Ethics of the Society of Professional Journalists* in the USA states, 'Journalists should: ... - Identify sources whenever feasible. The public is entitled to as much information as possible on sources' reliability. - Always question sources' motives before promising anonymity. Clarify conditions attached to any promise made in exchange for information. Keep promises' <www.spj.org> at 22 June 2009. In the UK the *Code of Conduct for the National Union of Journalists* states: 'A journalist: ... 7. Protects the identity of sources who supply information in confidence and material gathered in the course of her/his work' <www.nuj.org.uk> at 22 June 2009.

7 *In the matter of an application by D/Inspector Justyn Galloway, PSNI, under Paragraph 5, Schedule 5 of the Terrorism Act 2000* [2009] NICty 4, [16] <www.courtsni.gov.uk> at 22 June 2009.

8 Ibid [33].

9 Ibid [42].

When a journalist is a witness in a case, which could be a civil or a criminal case, and refuses to disclose information there are also potentially serious consequences. The refusal may take place during the pre trial discovery and interrogatory phase, or it may be during the trial if the journalist is asked a direct question. Refusal to comply is contempt of court, the form known as disobedience contempt; this is a criminal contempt, with the penalties on conviction being fines, and even possibly imprisonment.[10] There are career implications for a journalist who has a criminal conviction, for example a US visa may be refused because of it, as was the case with Gerard McManus.[11]

There have been Australian cases where journalists have gone to prison for disobedience contempt. Tony Barrass, then working for Perth newspaper *The Sunday Times*, was convicted in 1990 for contempt for refusing to reveal whom in the Australian Taxation Office (ATO) had leaked information to him. This occurred as a result of questions asked of Barrass during the trial of an ATO employee on a charge of official corruption for the unauthorised publication of Commonwealth documents under s 70(1) of the *Crimes Act 1914* (Cth).[12] Barrass was committed to prison for seven days and released after five without answering the questions, and he was also fined A$10 000 which was paid by *The Sunday Times*.[13]

Another journalist who was imprisoned for contempt was Gerard Budd (seemingly also referred to as Joe Budd), who was at the time working for the Brisbane *Courier Mail*. The parent company of the *Courier Mail* was sued for defamation because of an article written by Budd.[14] During the defamation proceedings Budd refused to name a source of information referred to in his article. Budd was

10 Paul Mallam, Sophie Dawson and Jaclyn Moriarty, *Media and Internet Law & Practice* (2005) [4.750]-[4.790], [4.835].

11 Australian Press Council, *Australian Press Council submission to the Senate Standing Committee on Legal and Constitutional Affairs' Inquiry into the Evidence Amendment (Journalists' Privilege) Bill 2009* (2009) <www.presscouncil.org.au> at 18 May 2009. McManus, a journalist with the Melbourne *Herald Sun*, and fellow journalist Michael Harvey were convicted of contempt of court and each fined A$7 000 in June 2007, *Harvey & Another v County Court of Victoria & Ors* [2006] VSC 293; *R v McManus & Harvey* [2007] VCC 619.

12 The trial (during which the finding of contempt was made against Barrass) was *DPP v Luders* [1989] Court of Petty Sessions (WA), No 27602 of 1989, (unreported, 27 November 1989) (committal proceedings); *DPP* v *Luders* [1990] District Court of WA, No 177 of 1990 (unreported, 7-8 August 1990) (trial). Luders was convicted notwithstanding the refusal of Barrass to disclose his source in the ATO. Luders was fined A$6 000, A$4 000 less than Barrass.

13 Law Reform Commission of Western Australia, *Report on Professional Privilege for Confidential Communications*, Project No 90 (1993) [4.15]-[4.26].

14 *Copley v Queensland Newspapers Pty Ltd* (unreported, Queensland Supreme Court, 20 March 1992).

sentenced to fourteen days imprisonment and released after six days. The judge, Dowsett J, considered a fine inappropriate because 'it leaves open the inference that you can buy your way out of this if you want to'.[15]

Some other cases are: David Hellaby (*Adelaide Advertiser*), A$5 000 fine;[16] Chris Nicholls (ABC), 12 weeks imprisonment;[17] Deborah Cornwall (*The Sydney Morning Herald*), two-month suspended sentence;[18] and more recently Gerard McManus and Michael Harvey (*Herald Sun*), fined A$7 000 each.[19] In response to these instances in which journalists have been convicted for having refused to reveal their confidential sources Australian law reform agencies have consistently recommended the introduction of shield laws.[20] The most recent of these recommendations, in 2005, came in a joint report prepared by three law reform commissions, the Australian Law Reform Commission and the Law Reform Commissions of New South Wales and Victoria, to which reference is made again later on in this chapter.[21] One effect of this 2005 recommendation was the Howard Government's introduction of amendments to the *Evidence Act 1995* (Cth) providing limited protection for journalist's confidential sources. The current Commonwealth Attorney-General has described those amendments as follows: 'The Howard Government introduced flawed legislation in 2007, which was a quick fix to a complex issue.'[22]

C *The current position in Australia*

In Australia at the time of writing there is limited protection for a journalist who wishes to keep the identity of a source confidential. The current provisions at Commonwealth level are in the *Evidence Act 1995* (Cth), and this Act in its entirety 'applies to all proceedings in a federal court or an Australian Capital Territory ('ACT') court'.[23]

Section 126(A) of the *Evidence Act 1995* (Cth) says the court may direct that evidence not be adduced if it would disclose a protected confidence, the contents of a document recording a protected confidence, or protected identity information. Section 126B says in part:

> Section 126B(3)
>
> The court must give such a direction if it is satisfied that:
>
> (a) it is likely that harm would or might be caused (whether directly or indirectly) to a protected confider if the evidence is adduced;
>
> Section 126B(4)
>
> Without limiting the matters that the court may take into account for the purposes of this section, it is to take into account the following matters:
>
> ...
>
> (e) the likely effect of adducing evidence of the protected confidence or protected identity information, including the likelihood of harm, and the nature and extent of harm that would be caused to the protected confider;

Section 126B of the *Evidence Act 1995* (NSW) is identical to that of s 126B of the *Evidence Act 1995* (Cth). Section 126A(1) of the *Evidence Act 1995* (Cth) defines a 'protected confidence' as 'a communication made by a person in confidence to a journalist'.[24] The equivalent section in the NSW legislation, s 126A, does not specify journalists, but says 'a 'protected confidence' means a communication made by a person to another person'. The *Broadcasting Services Act 1992* (Cth) s 202, headed 'Non-compliance with requirement to give evidence', provides in s 202(4) that a journalist has a reasonable excuse to refuse to answer a question or produce a document where this would disclose the identity of a source who provided confidential information. Section 202(5) of the *Broadcasting Services Act 1992* (Cth) says:

> Journalist means a person engaged in the profession or practice of reporting for, photographing, editing, recording or making (a) television or radio programs; or

15 Ibid 270, cited in Law Reform Commission of Western Australia, *Report on Professional Privilege for Confidential Communications*, Report No 90 (1993) [4.31].

16 *State Bank of South Australia v Hellaby* (1992) 59 SASR 304.

17 *Nicholls v DPP (SA)* (1993) 170 LSJS 362.

18 *Independent Commission Against Corruption v Cornwall* (1995) 38 NSWLR 207.

19 *Harvey & Another v County Court of Victoria & Ors* [2006] VSC 293.

20 Law Reform Commission of Western Australia, *Discussion Paper on Professional Privilege for Confidential Communications*, Project No 90 (1991); Law Reform Commission of Western Australia, *Report on Professional Privilege for Confidential Communications*, Project No 90 (1993); Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Off the Record: Shield Laws for Journalists' Confidential Sources* (1994); Law Reform Commission of Western Australia, *Report on Review of the Law of Contempt*, Project No 93 (2003).

21 Australian Law Reform Commission Report No 102, New South Wales Law Reform Commission Report No 112, and Victorian Law Reform Commission Final Report, *Uniform Evidence Law* (2005).

22 Attorney-General for Australia, Robert McClelland, 'Government delivers on commitment on journalist shield laws' (Media Release, 19 March 2009).

23 Section 4 of the *Evidence Act 1995* (Cth).

24 Section 126A of the *Evidence Act 1995* (Cth) was incorporated by the *Evidence Amendment (Journalists' Privilege Act) 2007* (Cth).

(b) datacasting content; of a news, current affairs, information or documentary character.

At present this is the only legislative definition of 'journalist' in Australia, and it is limited to the electronic media. Other than the specific protection for journalists in the federal courts, the courts in the ACT, journalists in the electronic media and the generic protection for 'protected confidences' in NSW, there is no privilege for journalists in Australia.

D *Reports and recommendations identifying the need for a shield law*

There is a long history of Australian authorities, studies and recommendations that identify strong grounds for the protection of journalists' confidential sources. Some examples follow.

In 1994 a Senate Standing Committee stated:

> The Committee accepts that without investigative journalism, the media and its new would be generally bland and their utility to the public truncated. The Committee does not wish to see this kind of journalism diminish...The Committee accepts that sources are an important tool the media uses in fulfilling its role as a facilitator of free communication. It is recognised that there will be circumstances where information will not be provided if anonymity cannot be offered to the source. *There is a risk that the failure to recognise such circumstances will lead to some diminution in the availability of important information. If this did happen, it would be detrimental to the success of the media as the vehicle for general communication.*[25]

A detailed report commissioned by a major coalition of Australian media organisations formed in 2007 called Australia's Right to Know said:

> There is a good case for an effective shield law regime based on a presumption that sources should not be revealed and journalists could be ordered to do so by a judge *only on strictly limited grounds of compelling public interest.*[26]

The Law Reform Commission of Western Australia commented in a report released 16 years ago:

> [T]he Commission has concluded that courts should be given a general discretion to excuse a witness from answering a question or producing a document which would otherwise be a breach by the witness of a confidence. In appropriate circumstances, confidential information held by journalists, including the identity of sources, could be withheld as a result of the exercise of that discretion.[27]

In 2005 the joint report, mentioned earlier, prepared by three law reform commissions observed:

> The Commissions agree there is an ongoing tension between the codes of ethics and professional duties of many professions in Australia and the legal duty to reveal to the courts information said in confidence. In many of these relationships, there is a clear public interest that can be demonstrated in protection of a confidence, such as the encouragement of people to seek treatment or the provision of information that could expose corruption or maladministration in government. However, the exclusion of otherwise relevant evidence from the court's consideration is a very serious matter. The legal protection of professional confidential communications thus raises a 'difficult mix of fundamental private and public interests'.[28]

The observation in that extract that 'the exclusion of otherwise relevant evidence from the court's consideration is a very serious matter' must be put into context. Courts routinely exclude evidence through what is referred to as exclusionary rules. As Wootten notes, 'much of the law of evidence can be understood as a set of exclusionary rules, placing limits on a search for truth ("the facts") that is otherwise conducted in accordance with the ordinary principles of rational inquiry.'[29]

In 2007 the Standing Committee of Attorneys-General (SCAG) endorsed the model Uniform Evidence Bill developed by the officers' working group 'with the exception of the confidential communications privilege, and noted that adoption of model provisions is a matter for each jurisdiction.'[30] This would indicate that the quest at the State and Territory level for a uniform approach through SCAG to a shield law seemed to have lost momentum. Given the history of reform, or lack of it, in this area, it seems that the 2009 proposals put forward by the Commonwealth Government may well also lose momentum.

25 Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Off the Record: Shield Laws for Journalists' Confidential Sources* (1994) [4.22], [4.23] (emphasis added).

26 Irene Moss,*Report of the Independent Audit into the State of Free Speech in Australia* (31 October 2007) iv (emphasis added) (hereinafter 'Moss Report'), the report was commissioned by Australia's Right to Know coalition.

27 Law Reform Commission of Western Australia, *Report on Professional Privilege for Confidential Communications*, Project No 90 (1993) [4.97].

28 Australian Law Reform Commission Report No 102, New South Wales Law Reform Commission Report No 112, and Victorian Law Reform Commission Final Report, *Uniform Evidence Law* (2005) [15.31] (reference omitted).

29 John H Wootten, 'Conflicting Imperatives: Pursuing Truth in the Courts' in Iain McCalman and Ann McGrath (eds), *Proof and Truth: The Humanist As Expert* (2003) 22.

30 Standing Committee of Attorneys-General, *Summary of Decisions* (26-27 July 2007) heading 4(a).

E *Recent events highlighting the need for a shield law*

Two groups of recent events have brought into sharp relief the urgency required in enacting a strengthened shield law. The first involves a single event – the Harvey/McManus case referred to earlier. That case concerned the conviction of two Melbourne *Herald Sun* journalists, Gerard McManus and Michael Harvey, for contempt of court after they refused to disclose the key source of an article they wrote in the newspaper on 20 February 2004. That article was about government plans to reject a A$500 million boost to war veterans' pensions.[31] The Australian Press Council said of that case:

> [The article was] embarrassing to the then Veterans Affairs Minister. At the time the Minister was trying to 'spin' a cut in a promised program as some sort of windfall for veterans. Leaked material, made available to the journalists, demonstrated that the Minister was in fact reneging on an earlier undertaking.[32]

That case did not relate to a serious crime or a threat to national security – the journalists' only real 'crime' was to hold the government accountable to those who elected it, and pay for it.[33] That case precipitated the moves in 2007 which brought about the Howard Government's version of shield law protection currently embodied in the *Evidence Act 1995* (Cth) and which the current Commonwealth Attorney-General described as 'flawed'.

The second group of events unfolded in Western Australia. The first concerned the summoning of four journalists[34] in 2007 before the Western Australian Corruption and Crime Commission (CCC) and the Parliamentary Inspector of the Corruption and Crime Commission (WA), in exercises primarily aimed at discovering the sources for stories they had written or broadcast.[35] The journalists concerned were summoned to appear before the CCC and the Parliamentary Inspector against a backdrop of provisions in the *Corruption and Crime Commission Act 2003* (WA) which the media finds oppressive. These provisions include those prescribing the power to summon witnesses to attend and give evidence and produce 'any record or other thing' in the witness' custody;[36] the denial of any excuse to the person summoned to refuse to produce a document or other thing on the grounds that it would breach an obligation not to disclose;[37] and the occurrence of an offence of the offence of contempt for failure to comply with a notice to produce a record or other thing.[38]

The second event in Western Australia concerned what has popularly been referred to as the Police 'raid' on the weekend newspaper *The Sunday Times* in 2008. A parliamentary inquiry into the police raid subsequently stated:

> The Committee finds that there was an inappropriate and disproportionate allocation of resources by the Western Australia Police for a relatively standard search of an office building.[39]

This finding was hardly surprising and it had allies in unlikely quarters even before it was handed down. Especially noteworthy is the fact that the objections to the raid came from government *and* police themselves. The Premier Alan Carpenter was quoted as follows:

> I think the situation is absolutely ridiculous … It was a complete overreaction I thought the police raid and now what we're seeing the Upper House potentially punishing the journalist in a way which is completely and utterly, I think, over the top … for God's sake you don't send a person to prison for writing a story about a Cabinet leak.[40]

More remarkable was the view expressed by the WA Police Commissioner Karl O'Callaghan that the raid 'should never have occurred because, in my mind,

31 *R v Gerard Thomas McManus & Michael Harvey* [2007] VCC 619.

32 'Time to come clean' (August 2007) 19(3) *Australian Press Council News* 5-6.

33 Ibid 6, quoting the Council's Executive Secretary Jack Herman.

34 These journalists were Robert Taylor (*The West Australian*); Gary Adshead (then Channel Seven); David Cooper (Channel Seven); and Sue Short (ABC).

35 These events are catalogued in a submission by Michael Sinclair-Jones, Branch Secretary, Media, Entertainment and Arts Alliance, to the Attorney-General of Western Australia on 'Shield Laws for Journalists' (dated 7 March 2008). In a separate 'source discovery' exercise, Paul Lampathakis, the journalist at the centre of the police raid on *The Sunday Times* discussed below, was summoned before a parliamentary committee and was asked to reveal the source of leaked Cabinet information. Mr Lampathakis refused and was subsequently excused from having to reveal his source, see Select Committee into the Police Raid on The Sunday Times, Western Australia Legislative Council, Parliament House, Perth, *Report 1* (April 2009) Chapter 14.

36 Section 96 of the *Corruption and Crime Commission Act 2003* (WA).

37 Section 157 of the *Corruption and Crime Commission Act 2003* (WA).

38 Section 159 of the *Corruption and Crime Commission Act 2003* (WA).

39 Select Committee into the Police Raid on the Sunday Times, Western Australia Legislative Council, Parliament House, Perth, *Report 1* (April 2009) Finding 11, at iii. In the same report the Committee stated in Recommendation 5, at iii: 'The Committee recommends that the Attorney-General continue to pursue the introduction of shield laws for journalists'.

40 Jessica Strutt and Amanda Banks, 'Don't jail journalist: Carpenter', *The West Australian* (Perth), 9 July 2008, 15. See also similar comments reported in Amanda O'Brien, 'Threat to jail journo ridiculous: Premier', *The Australian* (Sydney), 9 July 2008, 1. The Premier's Acting Chief of Staff Kieran Murphy is also reported to have said he was 'shocked at the size and scale of the operation' and that he considered the raid to be an over-the-top response and that the leaked information was an 'embarrassment' for the government (ibid).

police have got better things to do than go after public servants who have leaked cabinet documents'.[41] The Commissioner reportedly also said:

> Who's the victim? Who the hell is the victim in that particular crime…Is the government the victim? Is Treasury the victim, and if they are, I don't care, anyway.[42]

In a twist to this position, however, the Police Commissioner, speaking after the release of the WA Legislative Council select committee inquiry report into the raid, 'rejected the committee's finding that the police response was excessive'.[43] The Commissioner also said reportedly, that 'a tactical decision was made to send in reinforcements – a decision which I support'.[44] The equivocation evident from these statements accentuates the need for greater certainty in respect of the status of journalists' confidential sources. Furthermore, the leaked information at the heart of the police raid could not be said to bear any intrinsic quality of confidentiality. On the contrary the information concerned – 'the publication of an exclusive story by reporter Paul Lampathakis about WA Treasurer Eric Ripper's request for A$16 million to spend on a pre-election advertising blitz'[45] – was clearly a matter of legitimate public interest.

The events identified above occurred against a backdrop of government and public service secrecy, as an influential and comprehensive 'audit' of freedom of speech in Australia has noted:

> Over the past 15 years government management and secrecy has increased markedly. Governments, ministers, their minders and their departments want to keep a very rigid control over the dissemination of information. Increasingly, the media has to rely on 'leaks' to get details behind major decisions.[46]

Official resistance to the release of information the public should be entitled to know is a frequent complaint among journalists. A prominent journalist observes:

> Under existing law and protocol, anybody employed by the government – that can mean a nurse, a police officer or a bus driver – is threatened with disciplinary action if they speak to the media. It's not possible for journalists to call state schools and ask principals what they think about a state government plan to tackle bullying. It's not possible to call social workers in indigenous communities to ask them whether new rules on the supply of petrol have helped or harmed the young. All must go through the central press office: in other words, through government.[47]

The media is operating in a climate of an increasing tendency towards obfuscation and official 'spin' (the latter, a pejorative term to describe wilful bias in the way information is conveyed). The Australian Press Council's chair Professor Ken McKinnon notes that there has been 'formidable growth over the last few years of media management teams'[48] or what is increasingly referred to as 'spin doctors'. The Moss report notes further:

> Journalists contributing submissions to the audit say that government PR staff all too often try to block or frustrate, rather than facilitate, their inquiries. Directing all inquiries through ministers' offices, restricting the government employees with authority to speak to the media, demanding that all questions be submitted in writing, taking a long time to respond to questions, offering answers of little value, and completely ignoring some questions, are the common features in a long list of grievances submitted to this audit.[49]

It is worth noting at this point that it is not often that a journalist will be compelled to reveal his or her sources. This is because, as Walker explains:

> … to ensure public confidence in the authenticity of information, journalists generally identify its source; the issue of compulsory disclosure usually 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 is not identified.[50]

However, rare as it may be, the occasions on which a journalist is required to disclose are usually well publicised in the media, for obvious issues of self interest. This is particularly so if the journalist is found guilty of contempt of court and

41 Nicole Cox, 'Raid a waste of time: top cop', *The Sunday Times* (Perth), 2 November 2008, 12. See also Kate Campbell, 'Police should not have raided Times: O'Callaghan', *The West Australian* (Perth), 2 July 2008, 4.

42 Nicole Cox, 'Raid a waste of time: top cop', *The Sunday Times* (Perth), 2 November 2008, 12.

43 Editorial, 'Shield laws essential to guard right to know', *The Sunday Times* (Perth), 12 April 2009, 71.

44 Peter Kennedy, ABC Television Perth, *7pm News*, 9 April 2009, citing a statement from the Commissioner.

45 Editorial, 'Shield laws a crucial part of our democracy', *The Sunday Times* (Perth), 13 July 2008, 71.

46 Moss Report, above n 26, 23.

47 Caroline Overington, 'State of Secrecy', *The Australian* (The Australian), 24 March 2009, 9.

48 'The state of the news print media' (November 2008) 20(4) *Australian Press Council News* 2. See also 'Time to come clean' (August 2007) 19(3) *Australian Press Council News* 6, on this point.

49 Moss Report, above n 26, *ii*.

50 Sally Walker, 'Compelling Journalists to Identify Their Sources: 'The Newspaper Rule' and 'Necessity'' (1991) 14(2) *University of New South Wales Law Journal* 302, 305

sent to prison or fined for refusing to comply. During and immediately following the contempt proceedings against Perth *Sunday Times* reporter Tony Barrass, rival newspaper *The West Australian* ran the banner headline 'Barrass awaits his fate' and '$10,000 fine paid: Press liberty "vital"'.[51] On 9 August 1990 the *The West Australian* editorial, strongly critical of the contempt finding against Barrass, was headed 'No justice in double penalty'.[52]

F *The Commonwealth Government initiatives of 2009*

In March 2009 the Commonwealth Attorney-General, the Hon Robert McClelland MP, caused a stir when he introduced a Bill into Parliament ostensibly aimed at addressing this longstanding vexation among Australian journalists with respect to the absence of adequate legislative protection for confidential sources.

The current provisions in the *Evidence Act 1995* (Cth) have been outlined earlier, and, as noted earlier, this Act applies to the federal courts and the courts in the ACT. The amending legislation, *Evidence Amendment (Journalists' Privilege) Bill 2009* (Cth) proposes a new provision. This is s 126AA, Object of Division, which says:

> The object of this Division is to achieve a balance between:
>
> (a) the public interest in the administration of justice; and
>
> (b) the public interest in the media communicating facts and opinion to the public and, for that purpose, having access to sources of facts.

Section 126(A) is unchanged. Section 126B is then amended by the inclusion of the few words which are indicated by italics or strike-though in the following extracts:

> Section 126B(3)
>
> The court must give such a direction if it is satisfied that:
>
> (a) it is likely that harm would or might be caused (whether directly or indirectly) to a protected confider *or confidant* if the evidence is adduced;
>
> Section 126B(4)
>
> Without limiting the matters that the court may take into account for the purposes of this section, it ~~is to~~ *must* take into account the following matters:
>
> ...
>
> (e) the likely effect of adducing evidence of the protected confidence or protected identity information, including the likelihood of harm, and the nature and extent of harm that would be caused to the protected confider *or confidant*;

The competing interests in the journalist-source confidentiality arena, primarily constituted by the media on one side and, on the other, those uneasy about the nature of the changes, for example some of the States, immediately sought to influence the legislative reforms. A resultant inquiry by a nine-member Senate Standing Committee on Legal and Constitutional Affairs handed down its findings in May 2009. Its recommendation, by a five to four majority, was that the Bill's provisions should be strengthened in favour of protection for journalists' confidential sources.[53]

G *The government's stated objective of openness, transparency etc*

In announcing the March 2009 shield law initiative, the Commonwealth Government spoke, not entirely unequivocally, about its quest for greater openness, transparency, accountability and related virtues in governance. In a media release announcing the amendments, the Attorney-General claimed that by introducing the Bill into Parliament the government had 'delivered on the Rudd Government's election commitment to strengthen journalist shield laws.'[54] Mr McClelland added that the Bill 'recognises the important role that the media plays in informing the public on matters of public interest, and appropriately balances this against the public interest in the administration of justice' and that the Bill forms 'an important part of the Rudd Government's commitment to enhance transparency and accountability in Government.'[55] Indeed a resolution that emerged from the *2020 Summit* in 2007, one of the Rudd Government's first initiatives in office, was that 'there should be more effective shield laws to protect journalists from being required to reveal confidential sources'.[56] The Bill's Explanatory Memorandum

51 Sue Yeap, 'Barrass awaits his fate', *The West Australian* (Perth), 8 August 1990, 3; Sue Yeap, '$10,000 fine paid: Press liberty 'vital'', *The West Australian* (Perth), 9 August 1990, 3.

52 Editorial, 'No justice in double penalty', *The West Australian* (Perth), 9 August 1990, 10.

53 Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Evidence Amendment (Journalists' Privilege) Bill 2009 [Provisions] Inquiry Report* (May 2009) *iii*.

54 Attorney-General for Australia Robert McClelland, 'Government delivers on commitment on journalist shield laws' (Media Release, 19 March 2009). The Rudd Labor government took office on 3 December 2007.

55 Ibid.

56 *Australia 2020 Summit – Final Report* (May 2008) 325.

stated that the Bill recognizes the role of the media in 'enhancing the transparency and accountability of government. Its role in informing the community on government matters of public interest is a vital component of a democratic system.'[57] The Explanatory Memorandum added:

> This important reform has potential benefits for the community in informing Australians on public interest matters generally. In particular, where government matters are concerned, the amendments may encourage more informed political debate and more thorough scrutiny of the political process – which are necessary for an open and accountable government.[58]

While these avowals set the stage for strong journalist-source confidentiality protection, the Bill also appeared to contain a qualification underscoring the status quo. According to the Explanatory Memorandum:

> These amendments will ensure that a court has relevant public interest factors in mind when exercising its discretion to direct that evidence of a protected confidence or protected identity information not be given in a proceeding...the court is to achieve *a balance* between the public interest in the administration of justice and the public interest in the media communicating factors opinion to the public and, for that purpose, having access to sources of facts.[59]

It would appear that proposed amendments do not adequately meet the lofty objectives declared by the Government and do not amount to a substantial improvement over existing journalist-source protection.

A side issue is that the matter of a shield law for journalists has for a while been on the agenda of the Standing Committee of Attorneys General, a matter which has been referred to earlier in this chapter. As mentioned, in 2007 progress seemed to have slowed, but there are members of SCAG who wish to see a uniform and co-ordinated approach across Australia to the provision of a shield law for journalists, the rationale being to provide certainty for journalists and the public and 'to prevent forum shopping'.[60] In November 2008 'Ministers agreed to seek advice on the options for reform of this part of the law from an intergovernmental expert working group'.[61] At least one member of SCAG was of the view that the introduction of the Evidence Amendment (Journalists' Privilege) Bill 2009 (Cth) would 'pre-empt the orderly consideration of options for reform'.[62]

57 Explanatory Memorandum, Evidence Amendment (Journalists' Privilege) Bill 2009 (Cth) [4].

58 Ibid [13].

59 Ibid [2] (emphasis added).

60 Letter from Christian Porter, Attorney General Western Australia, to the Secretary, Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, 8 April 2009, 6.

61 Ibid 5.

III Part Two

A *Range of possibilities with respect to a shield law*

One mode of considering the range of possibilities for shield law regulation is to envisage a classification that countenances the two extremes of absolute and non-existent protection, with an intermediate position providing for qualified protection.[63] Another classification, envisages three differently constituted groups, as found in the United States:

> Generally, shield laws fall into three groups: (1) absolute privilege laws which seemingly excuse a reporter from ever revealing a news source or other confidential information in a governmental inquiry; (2) laws that only apply the privilege if information derived from the source is actually published or broadcast; and (3) qualified or limited privilege laws, which may have one or many exceptions, often allowing the courts to disregard them under certain circumstances.[64]

The paragraphs under this heading illustrate the different possibilities in respect of absolute and qualified protection.

1 Blanket protection

US shield laws vary widely but the most media-friendly approach is probably the one taken in Alabama and about one dozen US states. The Alabama shield law, 'which is considered to be "absolute" because it does not qualify the reporters' privilege'[65] provides:

> No person engaged in, connected with or employed on any newspaper, 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, before the presiding officer of any tribunal or his agent or agents or before any committee of the legislature or elsewhere the sources of any information procured or obtained by him and

62 Ibid 6.

63 For an argument against an absolute source protection privilege, see Damian Carney. 'Theoretical Underpinnings of the Protection of Journalists' Confidential Sources: Why an Absolute Privilege Cannot be Justified' (2009) 1(1) *The Journal of Media Law* 97.

64 Wayne Overbeck, *Major Principles of Media Law* (2008) 344.

65 Kent R Middleton and William E Lee, *The Law of Public Communication* (2009) 529.

published in the newspaper, broadcast by any broadcasting station, or televised by any television station on which he is engaged, connected with or employed.[66]

The most outstanding feature of this provision is its unqualified protection against the disclosure of *any* source of information provided to a journalist.[67] This provision places no qualifications as to the occasion on which this protection may be invoked, nor does it require that the information for which protection is sought must be confidential. The Alabama approach removes the uncertainty that can arise where, for instance, discretion is vested in a court to decide whether to call for disclosure of a confidential source.

2 Qualified protection

In the United Kingdom the *Contempt of Court Act 1981* (UK) provides:

> No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose the source of information contained in a publication for which he is responsible, *unless* it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime.[68]

Importantly the starting point of the exercise is that there should *not* be disclosure. As with the Alabama provision, there is no requirement that the information for which protection is sought must have been obtained in confidence. In the UK, the protection is available unless the party seeking the disclosure can satisfy the court that disclosure is necessary. Even so, the circumstances of disclosure are limited to the criteria stated there.

In New Zealand, the relevant provision is also favourably disposed towards source protection. As with the UK provision, the New Zealand provision makes source protection the default position. That is, the starting point is 'no disclosure' is required and if there is to be disclosure there must be a very good reason for it.[69]

The starting point in the above two jurisdictions – the UK and New Zealand – is one that was proposed for Australia by a Senate Standing Committee 15 years ago:

> In this proposal the special role of the media is acknowledged by making the *starting point* from which judicial discretion is to be applied the presumption that the confidence will be respected.[70]

B *Some misconceptions concerning shield laws*

It is worthwhile considering some common misconceptions associated with shield laws. First, it has been suggested that those pursuing shield protection may be

66 Ibid 529, citing Alabama Code, ss 12–21–142.

67 Ibid 529.

68 *Contempt of Court Act 1981* (UK) s 10 (emphasis added).

69 Section 68 of the *Evidence Act 2006* (NZ) provides:

> (1) If a journalist has promised an informant not to disclose the informant's identity, neither the journalist nor his or her employer is compellable in a civil or criminal proceeding to answer any question or produce any document that would disclose the identity of the informant or enable that identity to be discovered.
> (2) A Judge of the High Court may order that subsection (1) is not to apply if satisfied by a party to a civil or criminal proceeding that, having regard to the issues to be determined in that proceeding, the public interest in the disclosure of evidence of the identity of the informant outweighs —
>
> (a) any likely adverse effect of the disclosure on the informant or any other person; and
> (b) the public interest in the communication of facts and opinion to the public by the news media and, accordingly also, in the ability of the news media to access sources of facts.
>
> (3) The Judge may make the order subject to any terms and conditions that the Judge thinks appropriate.
> (4) This section does not affect the power or authority of the House of Representatives.
> (5) In this section,—
>
> ...
> *journalist* means a person who in the normal course of that person's work may be given information by an informant in the expectation that the information may be published in a news medium
> ...
> *public interest in the disclosure of evidence* includes, in a criminal proceeding, the defendant's right to present an effective defence. <http://www.legislation.govt.nz> at 18 July 2008.

70 Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Off the Record: Shield Laws for Journalists' Confidential Sources* (1994) [7.68] (emphasis added).

seeking to be placed 'above the law'.[71] The journalism fraternity's primary object in pursuing shield law is to seek protection for sources that provide information of legitimate public interest value to journalists performing their professional duties. This protection may be characterised as immunity. The immunity sought is well established in democratic societies and, as seen above, has already in some measure come to be recognised in Australia.[72] Second, it has been suggested that it is unclear why there is renewed pressure on the government to introduce shield laws.[73] The recent events stated above amply justify the renewed pressure being brought to bear upon the government to strengthen shield laws – not to mention the fact that shield law constitutes a Federal Labor election commitment.[74] Third, it is suggested that it would be unwise to introduce shield law without putting other legislative provisions in place to regulate the media. The view that the media in Australia is not adequately regulated is unfounded. The Right to Know Coalition made the following finding after a comprehensive inquiry into restrictive media laws in the country:

> Australian laws now contain more than 500 separate prohibitions and restrictions on what the public is allowed to know. Some vary from state to state, creating huge barriers to accurate and full reporting.[75]

Australia's press freedom world ranking has been languishing for some years with the country ranked 35 in the 2008 world ranking compiled by the US-based advocacy group Freedom House – behind countries such as the United States, United Kingdom, the Czech Republic, Taiwan and Canada.[76]

71 See, for example, the comment attributed to Labor Member of Parliament Adele Farina in Paul Lampathakis, 'Free speech? Call the cops', *The Sunday Times* (Perth), 13 July 2008, 71.

72 Sections 126B of the *Evidence Act 1995* (Cth) and 126B of the *Evidence Act 1995* (NSW).

73 ABC Television, 'Comments of Premier Alan Carpenter' *7pm News*, 20 August 2008.

74 Attorney-General for Australia, Robert McClelland, 'Government delivers on commitment on journalist shield laws', Media Release, 19 March 2009.

75 'The State of Free Speech In Australia' (Media Statement, 10 May 2007), released at the launch of the free speech campaign by the Right to Know coalition. The Joint Statement by the coalition was released by John Hartigan (Chairman/CEO, News Limited), David Kirk (CEO, Fairfax Media), Mark Scott (MD, Australian Broadcasting Corporation), David Leckie (CEO Network Seven and Chairman Free TV Australia), Shaun Brown (MD, Special Broadcasting Service), Michael Anderson (CEO Austereo and Chairman, Commercial Radio Australia), Clive Marshall (CEO, Australian Associated Press), and Angelos Frangopoulos (CEO, Sky News). See also ABC Radio National, 'Australia's Right to Know' *The Media Report*, 31 May 2007.

76 Freedom House, *2008 Freedom of the Press World Ranking* <http://www.freedomhouse.org/template.cfm?page=442&year=2008> at 7 June 2009.

C *Can the existing and proposed shield law provisions be improved?*

The authors of this chapter suggest that without going so far as to adopt blanket shield law protection of the Alabama kind seen above there is room to design better Australian shield law protection for journalists. The cue for reform is provided in the ideals of greater openness, transparency, accountability and related virtues in governance that the government has said it espouses. Three Law Reform Commissions have noted 'there are *many relationships in society* where a *public interest* could be established in maintaining confidentiality. These relationships include, for example, doctor and patient, psychotherapist and patient, social worker and client or *journalist and source*'.[77] It is significant that the journalist-source relationship was included here in the traditional confidentiality protection group. It is also not uncommon for a 'public interest' criterion to apply in such situations. A 'public interest' balancing act is also provided for in New Zealand, a jurisdiction whose approach has something to offer us.[78] The New Zealand Law Commission based this recommendation 'on the need to promote *a free flow of information, which is a vital component of a democratic system*'.[79] More importantly, the New Zealand provision states clearly that the protection is aimed at 'journalists' sources'. This is how the joint Australian Law Reform Commission, NSW Law Reform Commission and Victorian Law Reform Commission report interpreted the New Zealand approach:

> Whilst the original proposal was to have journalists' sources *fall under* the general confidential communications privilege, the Commission decided that *a specific qualified privilege would give greater confidence to a source that his or her identity would be protected.*[80]

One great difficulty presented by any reference to a 'public interest', however, is that it is a nebulous concept. The Australian Law Reform Commission has stated that the 'public interest is an amorphous concept' and 'impossible to define'.[81]

77 Australian Law Reform Commission Report No 102, New South Wales Law Reform Commission Report No 112, and Victorian Law Reform Commission Final Report, *Uniform Evidence Law* (2005) [15.4] (emphasis added). See also Law Reform Commission of Western Australia, *Report on Professional Privilege for Confidential Communications*, Project No 90 (1993) [4.97].

78 See s 68(2)(b) of the *Evidence Act 2006* (NZ) extracted above n 69.

79 Australian Law Reform Commission Report No 102, New South Wales Law Reform Commission Report No 112 and Victorian Law Reform Commission Final Report, *Uniform Evidence Law* (2005) [15.18] (emphasis added).

80 Ibid (emphasis added).

81 Australian Law Reform Commission, *Open Government: a review of the federal Freedom of Information Act1982*, Report No 77 (1995) [8.13].

More can be done in the proposed legislation to address the very real potential for uncertainty that could emanate from judicial evaluation of where the public interest lies in the event of a contest between disclosure and non-disclosure involving a journalist's confidential source. The proposed legislation could incorporate provisions that clearly reflect the government's intended priority. In particular, the amendments should clearly reflect the ideals of openness and transparency in governance as expressed by the government. In the absence of any express commitment to freedom of speech in Commonwealth legislation, the acknowledgement of a commitment to freedom of speech in a proposed shield law would go some way to indicating where our collective priority lies. While there is evidence of moves to recognise freedom of speech as an ideal this has occurred on only a limited scale.[82] A further useful provision would be aimed at facilitating openness, transparency and accountability in government. Such provisions are to be found in the objects sections of freedom of information[83] and defamation[84] legislation and would be consistent with the objectives declared by the government for the current shield law initiative.[85] An example of how this may be reflected in the proposed amendments is to state plainly as follows:

> In exercising its discretion as to whether to compel disclosure from a journalist to reveal his or her confidential source, the court should give particular attention to the interests of freedom of speech and in particular to the importance of facilitating greater transparency, openness and accountability in government.[86]

The protection advocated above should be available regardless of whether confidentiality was promised to the source. This is so as to embrace situations where people divulging information to journalists are under an impression that confidentiality would attach to their identity or related aspects but where no such undertaking was expressly given. Protection of this kind is available, for instance, in the *Contempt of Court Act 1981* (UK) mentioned earlier. An effective shield law would more clearly indicate the weight to be given to the protection of journalists' confidential sources. In the existing situation – whether in the law as it stands or as proposed in the current amendments – no such weight is specifically accorded to journalist source protection.

82 For instance, see s 16 of the *Human Rights Act 2004* (ACT), and s 5(2) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

83 See, for example, the objects and intent provision in the *Freedom of Information Act 1992* (WA) where section 3(1)(a) and (b) provides: 'The objects of this Act are to enable the public to participate more effectively in governing the State; and make the persons and bodies that are responsible for State and local government more accountable to the public'.

84 See the *Uniform Defamation Acts* objects section, which provides, in section 3(b), that the objects of the Act are *inter alia* '[T]o ensure that the law of defamation does not place unreasonable limits on freedom of expression and, in particular, on the publication and discussion of matters of public interest and importance'.

85 The Senate Committee received both objections and support for the inclusion of an objects clause within the Act, Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Evidence Amendment (Journalists' Privilege) Bill 2009 [Provisions] (Cth)* (2009) ch 3 [3.6].

86 Joseph Fernandez, *Submission to the Senate Standing Committee*, above n 1.

D *Key submissions to the Senate Standing Committee*

The inquiry of the Senate Standing Committee on Legal and Constitutional Affairs into the Evidence Amendment (Journalists' Privilege) Bill 2009, conducted in April 2009, received thirteen submissions primarily from media organisations and from State and Territory Attorneys-General. The following key points can be distilled from the submissions from these two sides.

The Australian Press Council, a grouping representing the main publishers in the Australian print media industry, was among submitters who said the legislation should establish 'a rebuttable presumption', such as that available in New Zealand and the UK, that journalists should not be compelled to disclose their confidential sources of information.[87] The Council said the presumption should only be rebutted where the party seeking to have the evidence adduced can present compellable reasons to do so.[88] The Media, Entertainment and Arts Alliance, an industrial and professional grouping, in this instance representing Australian journalists, also expressed a preference for a rebuttable presumption favouring journalists. The Alliance proposed 'an overarching statement of the spirit of the law that favours journalist-source confidentiality protection' in line with the spirit of the amendments that the government was seeking to convey.[89] The Right to Know Coalition called for the adoption of the New Zealand and UK models for journalist-source protection.[90] The media, it is worth noting, did not go so far as to propose, as one Member of Parliament did, that '[u]nder no circumstances should journalists face a penalty for not disclosing their sources.'[91]

87 Australian Press Council (Sydney), *Submission to the inquiry of the Senate Standing Committee on Legal and Constitutional Affairs into the Evidence Amendment (Journalists' Privilege) Bill 2009* (9 April 2009) 4.

88 Ibid, 4.

89 Media, Entertainment and Arts Alliance, *Submission to the inquiry of the Senate Standing Committee on Legal and Constitutional Affairs into the Evidence Amendment (Journalists' Privilege) Bill 2009*.

90 Australia's Right to Know, *Submission to the inquiry of the Senate Standing Committee on Legal and Constitutional Affairs into the Evidence Amendment (Journalists' Privilege) Bill 2009* (April 2009) Summary.

91 Bob Such, Member of Parliament for Fisher (Independent), South Australia, *Submission to the inquiry of the Senate Standing Committee on Legal and Constitutional Affairs into the Evidence Amendment (Journalists' Privilege) Bill 2009* (7 April 2009).

On the opposing side, the Western Australia Attorney-General expressed concern about the absence of a definition of 'journalist' in the Bill. He said the term has 'a flexible and contentious meaning' and that the attendant 'uncertainty is unnecessary and unsatisfactory'.[92] Expressing a similar sentiment, the New South Wales Attorney-General said it was unclear if bloggers or self-published authors would be protected by the privilege.[93] Similarly, the ACT Attorney-General expressed concern that journalists 'are not required to comply with professional registration or standards in order to practice their profession.'[94] On the question of the definition of 'journalist' it has been noted that the experts have 'agonised over the definition'.[95] The complexity in this area is accentuated, for instance, by what has been described as 'alternative journalism' – the kind that emanates from outside mainstream media.[96] The media covered by this category of journalism includes newspapers, magazines, radio, television, blogs, social networking sites and independent book publishing.[97] It is suggested that the courts should be left to determine whether the kind of journalism for which protection is being sought qualifies in the circumstances. In any event, the New Zealand approach – which defines a journalist as 'a person who in the normal course of that person's work may be given information by an informant in the expectation that the information may be published in a news medium'[98] – provides a useful starting point. Concern was also expressed that the Commonwealth's unilateral pursuit of legislative provisions in Commonwealth law without 'proper discussion of the different options among jurisdictions makes harmonised or uniform laws less likely' and would create a potential for 'forum shopping'.[99]

92 Attorney-General of Western Australia, Christian Porter, *Submission to the inquiry of the Senate Standing Committee on Legal and Constitutional Affairs into the Evidence Amendment (Journalists' Privilege) Bill 2009* (8 April 2008) paras 21-22.

93 Attorney-General of New South Wales, John Hatzistergos, *Submission to the inquiry of the Senate Standing Committee on Legal and Constitutional Affairs into the Evidence Amendment (Journalists' Privilege) Bill 2009.*

94 Attorney-General of ACT, Simon Corbell, *Submission to the inquiry of the Senate Standing Committee on Legal and Constitutional Affairs into the Evidence Amendment (Journalists' Privilege) Bill 2009.*

95 See remarks of Joseph Fernandez in Senate Committee hearing before the Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, 28 April 2009, on the *Evidence Amendment (Journalists' Privilege) Bill 2009*, Proof Committee Hansard (Senate) L&CA, 4.

96 For a convenient discussion of this subject see Chris Atton and James F Hamilton, *Alternative Journalism* (2008).

97 Ibid 1, 54.

98 See section 68(5) of the *Evidence Act* 2006 (NZ).

99 Attorney-General of Western Australia, Christian Porter, *Submission to the inquiry of the Senate Standing Committee on Legal and Constitutional Affairs into the Evidence Amendment (Journalists' Privilege) Bill 2009*, [30], [32].

E *The Senate Committee's Report*

The Senate committee inquiring into the Bill was divided in its findings with the majority comprising non-Labor members favouring stronger journalist-source protection. The four Labor members made two recommendations. The first was that the Bill 'be amended to require the courts to take into account the public interest *in the disclosure* of a protected confidence and/or protected identity information'.[100] The second was that subject to this amendment the Senate should pass the Bill.[101] The Liberal Senators recommended that the Bill be amended to create a privilege for professional confidential relationships other than the journalist-source relationship; and a rebuttable presumption in favour of journalist-source confidentiality.[102] The Australian Greens party made two recommendations, first, that the Bill be amended to introduce a rebuttable presumption in favour of maintenance of journalists' privilege and, second, that the Bill be amended to ensure that the scope of protections offered is not arbitrarily narrowed to traditional journalists working for established media.[103] The independent Member recommended that the Bill should more closely mirror the protections offered to journalists in the New Zealand and United Kingdom legislation.[104]

Two observations may be briefly made about these recommendations. The broad split between the two positions can be characterised as being divided along party lines with four Labor Senators on one side and, on the other side, three Liberal Senators, a Greens Senator and an Independent Senator.[105] The second observation is that the Labor position, in contradiction of the ostensibly media-friendly position taken by the Commonwealth Attorney-General, also Labor, appeared to tighten the scope of the provisions to the detriment of

100 See Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Evidence Amendment (Journalists' Privilege) Bill* 2009 *[Provisions] inquiry Report* (May 2009) ch 3 [3.62] (emphasis added). The Labor Senators were Patricia Crossin, Don Farrell, David Feeney and Gavin Marshall.

101 Ibid ch 3 [3.63].

102 Ibid ch 3, 'Additional Comments by Liberal Senators', [1.35]. The Liberal Senators were Guy Barnett, Russell Trood and Mary Jo Fisher.

103 Ibid ch 3, 'Additional Comments by the Australian Greens' [1.8], [1.12]. The Greens Senator on the Committee was Scott Ludlam.

104 Ibid ch 3, 'Minority Report by Senator Nick Xenophon' [1.18].

105 Ibid *iii*. See also Chris Merritt, 'Labor's journo shield rejected', *The Australian* (Sydney), 13 May 2009, 18.

journalist-source confidentiality protection.[106] This is in contrast to the position of the non-Labor Senators who leaned towards a presumption in favour of journalist-source confidentiality protection.

IV Part Three

As journalists' privilege is discussed elsewhere in this chapter, this section briefly examines the availability of professional privilege for other parties, focussing in particular on lawyers, doctors and clerics. The purpose of this is to provide some comparison by which to measure the claim made by journalists that they are entitled to professional privilege.

A *Professional privilege for lawyers*

In a 2007 report the Australian Law Reform Commission forcefully made the point 'that the 'privilege' should not be viewed as some peculiar entitlement of lawyers, but rather as an important right of clients'.[107] The privilege allows communications between lawyer and client to remain confidential, and not be disclosed in evidence (for example if the lawyer was cross examined under oath on the matter). The privilege has a long history in the common law, and also exists in many common law countries other than Australia; it is also recognised in some civil law jurisdictions including those in the European Union.[108] In Australia it is a common law right in some states, and has a statutory basis in others.[109]

The principal reasoning behind client legal privilege is the administration of justice, as stated by the High Court:

> The rationale of this head of privilege, according to traditional doctrine, is that it promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by legal advisers, the law being a complex and complicated discipline. This it does by keeping secret their communications, thereby inducing the client to retain the solicitor and seek his advice, and encouraging the client to make a full and frank disclosure of the relevant circumstances to the solicitor.[110]

The lawyer is the agent of the client, and, to be in a position to best present the client's case, the lawyer must have a full appreciation of the relevant circumstances. This enables litigants of vastly differing abilities to have some measure of equality before the courts.[111]

There is also a 'rights' argument for justification of the privilege. This may be based on the right of the client to privacy, especially from invasion by the state, or state agencies.[112] The right may also be expressed as protecting access to justice because it is 'of fundamental importance to the protection and preservation of the right, dignity and equality of the ordinary citizen under the law'.[113] While this approach is more about enforcing rights, there is also an argument that the privilege is a free standing right in itself. Support for this is to be found in the *International Covenant on Civil and Political Rights*, article 14 of which provides for basic minimum rights to an accused. Similarly article 6 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* provides for the right to a fair trial.[114] The Australian Law Reform Commission prefers the approach that '[a]ny characterisation of the doctrine as a right should be viewed more in terms of a right to access to a fair hearing or trial or access to legal advice, rather than a right that only can be ascribed to humans'.[115]

It should be noted that the privilege does not apply to all communications between lawyer and client. It applies only to those communications the dominant purpose of which is contemplated or pending litigation, or for obtaining or giving legal

106 See the 'first', recommendation of the Senate Committee, as influenced by the Labor majority: Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Evidence Amendment (Journalists' Privilege) Bill* 2009 *[Provisions] inquiry Report* (May 2009) *vii*. See also Chris Merritt, 'Shield law may be tightened', *The Australian (Legal Affairs)* (Sydney), 22 May 2009, 27.

107 Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2007) 27.

108 For a discussion of the development, history and comparative dimensions of client legal privilege see Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2007) Ch 3 'Overview of Client Legal Privilege'.

109 *Evidence Act 1995* (Cth), and by s 4 this applies also to courts in the ACT; *Evidence Act 1995* (NSW); *Evidence Act 2001* (Tas) (the uniform Evidence Acts). Note also that the *Evidence Act 2008* (Vic) with identical relevant provisions was passed and assented to in September 2008; by s 2 a few sections came into effect immediately, the remaining provisions, including those relating to the client privilege, were to come into operation on a date to be proclaimed, or on 1 January 2010.

110 *Grant v Downs* (1976) 135 CLR 674, 685 (Stephen, Murphy and Murphy JJ).

111 Law Reform Commission of Western Australia, *Discussion Paper on Professional Privilege for Confidential Communications*, Project No 90 (1991) [4.8].

112 Law Reform Commission of Western Australia, *Report on Professional Privilege for Confidential Communications*, Project No 90 (1993) [3.14]-[3.15]; Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2007) [2.35]-[2.39].

113 *Carter v Northmore Hale Davey & Leake* (1995) 183 CLR 121, 145 (Toohey J).

114 Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2007) [2.48]-[2.50].

115 Ibid [2.119], [3.106].

advice.[116] The limitations, or exceptions, on client legal privilege are when the privilege is abrogated by statute, or through waiver (by the client), or when a party has died, or when the communication is made to facilitate an offence or fraud.[117]

B *Professional privilege for clerics and doctors*

There is specific protection for 'religious confessions' under uniform legislation in all federal courts, and the courts of the ACT, New South Wales and Tasmania.[118]

The uniform provisions provide in s 127 'Religious confessions':

> (1) A person who is or was a member of the clergy of any church or religious denomination is entitled to refuse to divulge that a religious confession was made, or the contents of a religious confession made, to the person when a member of the clergy.
>
> (2) Subsection (1) does not apply if the communication involved in the religious confession was made for a criminal purpose.

In the federal, the ACT, and New South Wales courts, s 126B 'exclusion of evidence of protected confidence' of the respective uniform *Evidence Acts* may give some protection to the doctor patient relationship in those jurisdictions. In Tasmania s 127A of the *Evidence Act 2001* (Tas) provides a specific privilege for 'Medical communications' to medical practitioners, unless the communication is made for any criminal purpose.

The *Evidence Act 1958* (Vic) in s 28(1) 'Confessions to clergymen and medical men' provides a privilege for the clergy 'in any suit action or proceeding whether civil or criminal' unless the person making the confidence gives consent. Section 28(2) gives a privilege to doctors in 'any civil suit action'. When this Act is replaced by the *Evidence Act 2008* (Vic) on or before 1 January 2010, the provisions will be the same as those jurisdictions with uniform legislation, immediately above. The Northern Territory *Evidence Act* (as in force at 12 March 2009) gives a privilege to doctors and clergymen in s 12, unless the communication is made for any criminal purpose.

116 Ibid [3.69]-[3.71]; see also the Commonwealth (and ACT) uniform evidence legislation, and that in NSW, Tasmania and Victoria (pending), s118, s119.

117 Law Reform Commission of Western Australia, *Discussion Paper on Professional Privilege for Confidential Communications*, Project No 90 (1991) [4.6]; Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations*, Report No 107 (2007) [3.107].

118 *Evidence Act 1995* (Cth) s 127 (by s 4 this Act applies also to the ACT); *Evidence Act 1995* (NSW) s 127; *Evidence Act 2001*(Tas) s 127.

It appears there is no statutory recognition of privilege in Queensland, South Australia and Western Australia. While the common law gives effect to client legal privilege, it does not, it seems, recognise any such rights for the clergy or doctors.[119] The rationales for protection of confidential information disclosed to clerics are listed by the Law Reform Commission of Western Australia as being 'Restitution and repentance ... General community expectations ...Psychological and spiritual solace ... Freedom of religion ... Ethics and conscientious objection'.[120] All these rationales serve some public interest, but the first, restitution and repentance, has the most force. The disclosure and recognition by penitents of their wrongdoings may enable clerics to persuade them to 'give themselves up'.[121] Although a number of jurisdictions in Australia have a statutory privilege for doctors, this is not reflected in the common law. Doctors do not have the same professional or ethical requirement as clerics not to divulge confidential disclosures made by their patients.[122]

It can be seen from the above that the client legal privilege is the most comprehensive, and universal, of the privileges, but even this is restricted. The principal similarity between the client legal privilege, the privilege for the clergy and doctors and a privilege for journalists is the transfer of information in a confidential situation based on trust. The principal difference is that the journalist acts as a conduit for the information, the identity of the source being the confidential information; for the lawyer, cleric and doctor it is the information transferred that is confidential. Another difference would seem to be that whereas the first three categories concern the transfer of confidential information by a *client* of varying sorts, it might be difficult to characterise a *source* as the client of a journalist. This is so even in those situations where there is a contractual relationship between the source and the journalist, ie if the source is paid for the information.

C *A shield law for journalists - the competing interests*

The competing interests involved in providing a shield law for journalists are as follows. On the one hand there is the necessity of having all evidence being available in a court of law in order to best serve the interests of justice. On the other hand there are the interests of ensuring that the information provided by journalists' sources will not be withheld because the sources fear that their names will be divulged in interlocutory proceedings or under cross examination in a trial.

119 Law Reform Commission of Western Australia, *Discussion Paper on Professional Privilege for Confidential Communications*, Project No 90 (1991) [5.1] and [6.1].

120 Ibid [5.12].

121 Ibid [5.13].

122 Ibid [6.1]-[6.2].

The relevant interests of justice were well described by Dixon J in the High Court in *McGuiness v A-G of Victoria*:

> ... an inflexible rule was established that no obligation of honour, no duties of non-disclosure arising from the nature of a pursuit or calling, could stand in the way of the imperative necessity of revealing the truth in the witness box.[123]

The case centred on whether the appellant, editor of the newspaper *Truth*, could legally refuse in a Royal Commission hearing to answer a question inquiring after the sources of information published by McGuinness. The appeal was dismissed. In the same case Rich J pointed to a dichotomy:

> Divided duty has produced many martyrs. The appellant was called upon to choose between his duty under the law to answer questions relevant to the inquiry, unless he had some lawful excuse for refusal, and what he conceives to be his duty as a pressman to his informant to maintain silence. He chose to observe the latter supposed duty and to refuse to divulge the source of his information. The small fine imposed upon him as a result scarcely entitles him to a high place in the rank to martyrs to a cause. But it is enough to enable him to proceed by way of appeal in an attempt to uphold the cause. The cause, I think, is not worthy of even so much martyrdom. It seems to me to be itself founded on a paradox. For it is said that newspapers will not be able to discover the truth and publish it unless when the courts of justice in their turn want the truth pressmen in whom it has been confided are privileged to withhold it ...Privilege from disclosure in courts of justice is exceptional and depends upon only the strongest considerations of public policy. The paramount principle of public policy is that the truth should be always accessible to the established courts of the country.[124]

As discussed earlier, the effect of a shield law would be to allow journalists to refuse to answer questions either in interlocutory proceedings or during a court case. The questions in this context relate specifically to the identity of a source who has provided information to a journalist, and the information is of a type that is unlikely to be otherwise made known to the public. The reasons why a journalist does not want to disclose the name of a source are canvassed earlier on in this work.[125] One of the principal reasons why a shield law is perceived as mitigating against the interests of justice goes to the heart of the journalistic profession, and this reason is that there is a perception that some journalists in particular or the media as a whole are not to be trusted. When it comes to the specific issue of a shield law, the argument is that if a journalist is not compelled to name the source of certain information, that information is hearsay only. Its veracity and authenticity cannot be tested in court by cross examining the person from whom it originated. In other words the information can be a falsehood invented by a journalist who can perpetuate the lie under oath by claiming the privilege.

123 *McGuiness v A-G of Victoria* [1940] HCA 6 (Dixon J).

124 Ibid (Rich J).

125 In Part I under the heading 'Consequences for journalists in the absence of a shield law'.

The falsification of stories by journalists is a reality, as evidenced by the activities of Janet Cooke, a staff writer with the *Washington Post*, and Jack Kelley, a reporter with *USA Today*. In 1980 the *Washington Post* published a story by Cooke entitled 'Jimmy's World', about an eight year old boy in Washington who was a third-generation heroin addict. Cooke won a Pulitzer Prize for the story, which she returned when she later admitted that she had made up the story.[126] In 2004 it was reported by *USA Today* that following seven weeks of investigations into Kelley's work, written between 1993 and 2003, 'a team of journalists has found strong evidence that Kelley fabricated substantial portions of at least eight major stories ...'[127] He also 'routinely' abused the *USA Today* rules governing anonymous or confidential sources.[128] Kelley achieved this by 'layered descriptions of his sources so that they were often untraceable by his editors'.[129]

Reinforced by stories such as the ones above, this perception, that journalists and the media are not to be trusted, is felt strongly by various commentators outside the media, such as politicians, disinterested observers and academics, and also by those within the media itself. While their views may not relate to the specifics of a shield law for journalists, they add weight generally to the argument that journalists should not be given this particular form of special treatment.

One example of a politician's disdain for a particular journalist is the opinion piece by former Prime Minister Paul Keating in the *Australian Financial Review* on 31 January 2008 following the death of well known journalist P.P. ('Paddy') McGuiness. Keating said:

> McGuinness was not a contrarian or even an agent provocateur. He was none of those things. He was a fraud. But let me calibrate that. He was not just a fraud,

126 <http://www.museumofhoaxes.com/day/04_17_2001.html> at 4 November 2009.

127 <http://www.usatoday.com/news/2004-03-18-2004-03-18_kelleymain_x.htm> at 4 November 2009.

128 <http://www.usatoday.com/news/2004-04-22-report-one_x.htm> at 4 November 2009.

129 <http://www.usatoday.com/news/2004-04-22-report-five_x.htm> at 4 November 2009.

> he was a liar and a fraud ... The quality of the Australian press will rise simply because his vituperation and contumely will have been excised from it.[130]

Nick Davies, who has a freelance contract as a reporter with the *Guardian*, is also critical of his profession:

> I am not talking about the individual dishonest scumbags who bring our whole profession into disrepute. There are still good, brave, honest people working in this industry. I'm talking about the fact that almost all journalists across the whole developed world now work within a kind of professional cage which distorts their work and crushes their spirit. I'm talking about the fact that finally I was forced to admit that I work in a corrupted profession.[131]

As noted earlier,[132] there is also concern about the lack of a definition of 'journalist', and the concomitant lack of clarity about who in particular would qualify for a shield law. A statutory definition might overcome some of the anxiety that casual bystanders, such as bloggers, who are unfettered by Codes of Ethics or employment contracts, would be able to avail themselves of the privilege. However, as previously suggested, the courts should be left to make a determination whether the kind of journalism for which the protection is being sought qualifies on a case by case basis.

The competing interest, that of ensuring that journalists' sources are not silenced, thus enabling the revelation of information that would not otherwise be known, falls within the broader interests of freedom of speech. Free speech is a very powerful public interest, recognised by Article 19(2) in the *International Covenant on Civil and Political Rights* (ICCPR), which was ratified by Australia in 1980.[133] The importance of the link between freedom of speech and freedom of the press is embedded into the first amendment to the Constitution of the United States of America 'Congress shall make no law ... abridging the freedom of speech, or of the press'. This is the only institutional protection given in the Bill of Rights.[134]

130 Cited in the online version of *The Australian* (1 February 2008) <www.theaustralian.news.com.au/story/0,25197,23140198-20261,00.html> at 4 November 2009. See also comments on the media ascribed to Paul Keating in 'Keating explodes over media' by Sean Nicholls, *The Sydney Morning Herald* (Sydney) 2 November 2009 <http://www.smh.com.au/national/keating-explodes-over-media-20091101-hrkv.html> at 4 November 2009.

131 Nick Davies, *Flat Earth News* (2009) 2-3, and all of Ch 2.

132 In Part II under the heading 'Key submissions to the Senate Committee'.

133 *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) <www.info.dfat.gov.au/Info/Treaties/treaties.nsf/AllDocIDs/8B8C6AF11AFB4971CA256B6E0075FE1E> at 22 June 2009.

134 Justice Potter Stewart, 'Or of the Press' (1975) 26 *Hastings Law Journal* 631-637, 633-634.

There are a number of philosophical arguments justifying freedom of speech, perhaps the three most significant being Mill's argument from truth, the argument from democracy and free speech as an aspect of self fulfilment.[135] The argument from truth goes back as far as Milton's *Areopagitica*,[136] but is more usually associated with John Stuart Mill who said:

> If all mankind minus one, were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind. Were an opinion a personal possession of no value except to the owner; if to be obstructed in the enjoyment of it were simply a private injury, it would make some difference whether the injury was inflicted only on a few persons or on many. But the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.[137]

One of the principal criticisms of this theory is that it assumes the truth will reveal itself during unfettered discourse.[138] Another criticism is that the theory advocates that there should be no restrictions on speech, but even the ICCPR permits derogation where there are competing interests such as the rights or reputations of others, or for the protection of national security, public order or of public health or morals.[139] Governments routinely restrict speech when there are other overriding interests, such as the interests in promoting harmony by restriction of racially offensive speech.[140]

With respect to free speech as an aspect of self fulfillment, this argument is based on the liberal concept that individuals have certain basic human rights, regardless

135 For a full analysis see, for example, Frederick Schauer, *Free speech: a philosophical enquiry* (1982); Eric Barendt, *Freedom of Speech* (1985). From the specific perspective of the media, see Andrew Nicol QC, Gavin Millar QC and Andrew Sharland, *Media Law & Human Rights* (2001).

136 John Milton, *Areopagitica* (first published November 1644, 1918 ed). Milton made reference to the search for truth being hampered by government regulation via the licencing of publications; see, for example, 33, 56.

137 John Stuart Mill, *On Liberty* (first published 1859, 1992 ed) 33. The rather curious punctuation is copied directly from the text.

138 Schauer, above n 135, 25, 27; Barendt, above n 135, 13.

139 ICCPR, Article 19(3).

140 Barendt, above n 135, 9-10.

of whether or not these rights are given to them by law.[141] Free speech is one of these rights, and should not be restricted even if it is in the interests of the majority to do so.[142] The main criticism of this theory is that, as Schauer puts it, people are not equal in their abilities, including the credibility and intellectual soundness of their ideas, but this does not exclude them from being treated equally.[143] It is difficult to see how this particular theory would be persuasive in the debate about the merits of a shield law for journalists, focused as it is on the rights or interests of the speaker rather than the rights or interests of a wider audience.

The most compelling of the philosophical justifications for freedom of speech in the context of this chapter is the argument from democracy. Schauer makes the remark about the argument from democracy that '... much of its strength derives not from its independent force, but from the extent to which it is a discrete and important subset of the argument from truth.'[144]

> For whether it be the classical argument from truth ... that posits that truth will best emerge from an unregulated marketplace of ideas, or the argument from democracy that sees unregulated public communication about values and goals as an essential component of democracy, the basic idea, common to virtually all instrumental accounts of freedom of speech, is that restrictions on the (negative) liberty to communicate will produce, in the aggregate even if not in every case, less favourable outcomes than would be produced by the unregulated communicative or deliberative domain. (footnote omitted) [145]

The argument from democracy holds that in order for citizens to effectively participate in the democratic process they must be properly informed, and so there should be no restrictions on speech.[146]

141 Ronald Dworkin, *Taking Rights Seriously* (1977) 184. Dworkin comments, 'Some philosophers, of course reject the idea that citizens have rights apart from what the law happens to give them. Bentham thought that the idea of moral rights was 'nonsense on stilts'.

142 Ibid 184; Schauer, above n 135, ch 4; Barendt, above n 135, 14-15.

143 Schauer, above n 135, 62-63. On this point see also Frederick Schauer, 'Free Speech in a World of Private Power' in Tom Campbell and Wojciech Sadurski, *Freedom of Communication* (1994) 1, 6-7.

144 Schauer, above n 135, 45. Schauer also makes reference to the 'strong link' between the two theories at the end of his chapter on the argument from truth, 34.

145 Schauer, 'Free Speech in a World of Private Power', above n 143, 1, 3.

146 The argument from democracy is described by Barendt, above n 135, 20, as 'probably the most attractive and certainly the most fashionable free speech theory in modern Western democracies'. See also Tom Campbell, 'Rationales for Freedom of Communication' in Tom Campbell and Wojciech Sadurski (eds) *Freedom of Communication* (1994) 17, 37-41.

> First, freedom of speech is crucial in providing the sovereign electorate with the information it needs to exercise its sovereign power, and to engage in the deliberative process requisite to the intelligent use of that power. Second, freedom to criticize makes possible holding government officials, as public servants, properly accountable to their masters, the population at large.[147]

One of the main objections to the argument from democracy is that the principle is self limiting. If the people are sovereign, and no restrictions may be placed on that sovereignty, then how is any limitation on speech justifiable? Indeed, how is any free speech principle justifiable because that limits the right of democratically elected representatives to act on behalf of the sovereign electorate without impediment.[148] For Barendt, the solution may lie in recognising that while the argument from democracy is pre-eminent there is more than one relevant justification for a free speech principle.[149] Thus the argument from democracy may be seen as relating primarily to freedom of political speech, and being of limited application.[150]

In a series of cases the High Court of Australia has acknowledged the importance of open communication in a democratic society by recognizing in the *Constitution* an implied guarantee of political discourse.[151] Thus where the discourse is of a political nature, the argument from democracy should in most circumstances trump any attempt at restriction. Translating this into the context of a shield law for journalists, citizens will be better informed about the workings of their democracy if journalists' sources are not silenced by the fear of exposure, which in turns enables the revelation of information that would not otherwise be known. It reflects the ideals of openness and transparency in governance which is the purported basis for the introduction of the proposed new laws.

V Conclusion

It was noted earlier in this chapter that one of the *2020 Summit* resolutions was that 'there should be more effective shield laws to protect journalists from being

147 Schauer, above n 135, 36.

148 Ibid 41; Barendt, above n 135, 21.

149 Barendt, above n 135, 22-23.

150 Schauer, above n 135, 44; Barendt, above n 135, 22.

151 See, for example: *Nationwide News* v *Wills* (1992) 177 CLR 1; *Australian Capital Television* v *Commonwealth* (1992) 177 CLR 106; *Australian Capital Television Pty Ltd* v *Cth (No. 2); NSW* v *Cth (No. 2)* (1992) 177 CLR 106; *Theophanous* v *Herald & Weekly Times and Another* (1994) 182 CLR 104; *Stephens* v *West Australian Newspapers Ltd* (1994) 182 CLR 211; *Lange* v *Australian Broadcasting Corporation* (1997) 189 CLR 520.

required to reveal confidential sources'.[152] The proposed amendments to the *Evidence Act 1995* (Cth) demonstrate a willingness on the part of the Commonwealth Government to achieve that end. It would be disappointing if the zeal for reform in this area fizzle away into nothing as has happened previously.

In addition to hoping that the momentum is not lost, the authors, however, also consider that more weight should be given to the interests of freedom of speech as a means of facilitating transparency openness and accountability in government. While no recommendation is being made for the introduction of absolute protection of journalists' confidential sources, good progress would be made if the proposed amendments were to provide greater direction to the courts as to where to place the fulcrum in a contest between disclosure and non-disclosure, and that should be in favour of confidentiality. On the issue of the lack of definition of 'journalist', the courts should be left to determine whether the kind of journalism for which protection is being sought qualifies in the circumstances. The adoption of such a shield law at the Commonwealth level would, it is hoped, be mirrored by the States and Territories so that an effective privilege for journalists would operate seamlessly across all the Australian jurisdictions.

The authors recognise that there will be instances when the journalists' claim to source confidentiality may need to be overridden by a competing consideration. This chapter, however, advocates a clear recognition for the principle that journalists' confidential sources prima facie need to be protected in the interests of the free flow of information in a democratic society.

152 See *Australia 2020 Summit – Final Report* (May 2008) 325.