Maintaining the flow of information

***Jenny Mullaly** reports on draft NSW Government legislation aimed at protecting the confidentiality of journalists' sources – and other confidential communications – in legal proceedings.*

proposal by the NSW Attorney General's Department to enact legislation protecting confidential communications from disclosure in legal proceedings will, if adopted, improve the protection of journalists' sources.

The CLC has been an active participant in the debate about the protection of journalists' sources. The arguments, briefly stated, relate to individual journalist/source relationships, the media generally and the public interest in the free flow of information. Journalists have an ethical obligation to preserve the confidentiality of their sources in order to protect them from the potential adverse consequences of disclosure. If journalists are compelled to give evidence about their sources in legal proceedings, or if there is a threat of this occurring, they may lose the confidence of existing or potential sources. More significantly, sources to the media generally may diminish (the so-called 'chilling' effect).

The media are the main source of information for most citizens. Sources are essential to the media and have facilitated important disclosures. The chilling effect resulting from inadequate source protection would harm the flow of information to the public and, by extension, the right of free speech. The European Court of Human Rights recognised these arguments in *Goodwin v United Kingdom* (March 1996), when it decided that an English court order requiring a journalist to disclose his source violated the right to freedom of expression in the European Convention on Human Rights.

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As the law currently stands, the balance lies too far in favour of the litigant, prosecutor or investigatory body seeking disclosure, whose needs are more readily apparent than the intangible and unquantifiable concept of the free flow of information. A statutory 'shield law' is required to provide greater protection for sources. A structured judicial discretion to excuse journalists from answering questions about the identity of their sources has been proposed by the West Australian Law Reform Commission (*Project No 90*, May 1993) and by the Senate Standing Committee on Legal and Constitutional Affairs (*Off the Record: Shield Laws for Journalists' Confidential Sources*, October 1994).

The proposal

The discussion paper by the NSW Attorney General's Department proposes amendments to the NSW Evidence Act 1995 to address the problem of professionals being compelled to give evidence in court proceedings in breach of obligations of confidentiality. Specific reference is made to rape counsellors and journalists. The discussion paper acknowledges that significant harm may result from compelled disclosure, even if such cases are comparatively rare. This harm extends beyond those immediately involved to the community generally - one example being if rape victims are deterred from seeking counselling.

The draft legislation

The proposed amendments would apply to communications made in confidence to a person acting in a professional capacity, who is under an obligation, express or implied, not to disclose its contents. It includes documents and information identifying the confider (cl. 126A). The identity of a journalist's source would therefore qualify as a 'protected confidence'.

A court may direct that evidence not be adduced if to do so would disclose a protected confidence (cl. 126B). Such a direction must be given if the harm resulting to the confider from disclosure outweighs the desirability of the evidence being given (cl. 126B(3)).

Factors to be taken into account by the court in deciding whether to make an order include:

- the importance of the evidence;
- the nature of the proceedings;
- the availability of other evidence;
- the likelihood of harm to the confider;
- other means available to the court to limit the harm of disclosure (for

example, in camera proceedings and suppression orders);
- whether the prosecution or defence is seeking disclosure in criminal proceedings; and
- whether the substance of the protected confidence has already been disclosed (cl. 126B(3)).

The protection does not apply if the confider consents to disclosure (cl. 126C) or if the communication was made in relation to the commission of a fraud, offence or an act that carries a civil penalty (cl. 126D).

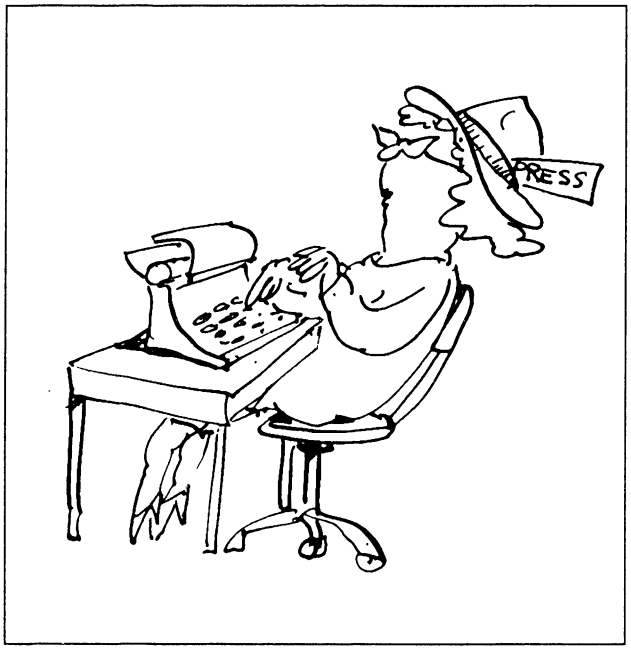
The CLC's response

The CLC welcomes the proposal as one that would provide greater scope for judicial recognition of journalists' claims to protect their sources. The discussion paper demonstrates an appreciation of the argument that the protection of sources is an aspect of the free flow of information.

The proposal's generic approach, which does not seek to confine the protection to particular professions, overcomes the problem of attempting to define who is a journalist and what information should be protected.

The draft legislation avoids the shortcomings of the Senate Committee's recommendations (see *CU* December 1994), which attempted to define in advance the situations in which the interest in disclosure should prevail. Such lists tend to include such criteria as 'necessary in the interests of justice' and 'national security' which, history suggests, are likely to be interpreted in favour of disclosure. The focus on evidentiary issues, such as the importance of the evidence being sought and the nature of the proceeding, is more likely to achieve the aim that confidences be protected unless there are significant countervailing interests. Consideration of the party seeking disclosure in criminal trials - defence or prosecution - is important. Prosecution claims about the need to know the identity of a journalist's source must be assessed critically. The independence of the press could be undermined if journalists are in effect forced to become adjuncts to prosecutions by the State.

An area of concern is terminology. References in the draft legislation and explanatory memorandum to the creation of a 'professional confidential relationship privilege' may confuse the debate and encourage unwarranted criticism based on the legal significance and sensitivity that attaches to the creation of privilege. The amendments are clearly in the nature of a judicial discretion which requires the judge to consider the circumstances of each case when deciding whether to excuse a witness from giving evidence.



The draft legislation fails to reflect the awareness, demonstrated in the discussion paper, that the protection of certain communications serves broader public interests, referring only to 'harm to the protected confider'. This is particularly relevant to the protection of journalists' sources. Confining the inquiry to harm to the individual source means that the broader public interest in the free flow of information will not be considered. The reference to harm should either be unqualified, or should refer specifically to harm to the community.

Another concern about the potential application of the proposal to journalists is that journalists could be unable to protect their sources in situations where the sources have breached the law (for example, whistleblowers and social activists). A broad interpretation of cl. 126D could result in loss of protection. The famous American case of *Branzburg v Hayes* (1972), in which journalists who had written articles about the Black Panthers movement and drug users were subpoenaed to give evidence about crimes that they had observed, comes to mind. Greater concerns arise in relation to public service whistleblowers, in light of the numerous secrecy provisions littering Commonwealth and state legislation. The loss of protection should be defined more narrowly, otherwise sources who provide information concerning matters of public interest may fail to be protected.

It is hoped that constructive public discussion of the proposal will address these concerns. Overall, the draft legislation represents a step in the right direction for the protection of journalists' sources, and is an improvement on earlier proposals. It is also encouraging to note that promises made in opposition do sometimes see the light of day in government.

NSW Attorney-General's Department, ***Protecting Confidential Communications From Disclosure in Court Proceedings,*** *June 1996*