Source protection closer in NSW

***Jenny Mullaly** reports on long-awaited draft state legislation designed to protect journalists' sources*

June marks the 25th anniversary of the Watergate break-in. *Washington Post* journalists Woodward and Bernstein, and their source, to this day known only as 'Deep Throat', occupy a celebrated place in the pantheon of journalism, a shining example of the power of journalistic disclosure and the critical importance of sources. Meanwhile, in Western Australia, two journalists who refused to disclose the identity of their sources to the Easton Royal Commission have been found in contempt and fined, highlighting once again the need for law reform to avoid such outcomes. NSW has moved one step closer to protection of source confidentiality, with the introduction into Parliament of the Evidence Amendment (Confidential Communications) Bill 1997 (the Bill).

The Bill

Division 1A of the Bill establishes a professional confidential relations privilege. A 'protected confidence' is defined as 'a communication made in confidence to another person ... : (a) in the course of a relationship in which the confidant was acting in a professional capacity, and (b) when the confidant was under an express or implied obligation not to disclose its contents ...' (cl 126A). The journalist/source relationship is one such confidence, as journalists have an ethical obligation to preserve the confidentiality of their sources.

Clause 126B(1) provides that a court may direct that evidence not be adduced if to do so would disclose:

- a protected confidence, or
- the contents of a document recording a protected confidence, or
- protected identity information ('information about, or enabling a person to ascertain, the identity of the person who made a protected confidence': cl 126A). This would include the identity of a journalist's source.

Such a direction must be given if the harm that would result to the confider from evidence being given outweighs the desirability of the evidence being given (cl 126B(3)). The factors to be taken into account by the court in deciding whether to make an order focus on evidentiary issues in the particular proceeding, and include:

- the probative value of the evidence;
- the importance of the evidence;
- the nature and gravity of the relevant offence, cause of action or defence and the nature of the subject matter of the proceeding;
- the availability of any other evidence;
- the likely effect of adducing the evidence, including the likelihood of harm t the protected confider;
- the means available to the court to limit the harm that is likely to be caused if the evidence is disclosed;
- in criminal proceedings, whether the defendant or prosecutor is seeking to adduce the evidence; and
- whether the substance of the evidence has already been disclosed by the protected confider or any other person (cl 126B(4)).

The privilege is lost 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).

In the course of the *Cojuangco* litigation, Justice Kirby said: 'For my own part I have no doubt that legislative reform of the law is required to attend to this problem'. This Bill, if enacted, will provide a basis for judicial recognition of journalists' claims to protect their sources.

Scope too narrow?

One criticism is that the Bill may not provide sufficient scope for consideration of the broader implications of compulsory disclosure of journalists' source. The criteria for making an order include harm to the protected confider, which is defined as including 'bodily harm, financial loss, stress or shock, damage to reputation or emotional or psychological harm'. While the immediate concern of the ethical obligation is with the welfare of sources, there is an overriding concern that compulsory disclosure of sources will deter other sources from providing information, thereby harming the broader public interest in the free flow of information. As the definition of 'harm' and the criteria are inclusive, consideration of the wider dimension is not necessarily precluded, but it would require an expansive interpretation of the intent and wording of the legislation.

But the important thing is that here is a real prospect of law reform, whereas the recommendations of the Western Australian Law Reform Commission (1993) and the Senate Standing Committee on Legal and Constitutional Affairs (1994), have, despite their promise, so far proved barren.❑