COMMONWEALTH PRESS UNION

FOURTEENTH COMMONWEALTH PRESS CONFERENCE

MELBOURNE, 6 OCTOBER 1981

JOURNALISTS IN THE LEGAL MINEFIELD

The Hon. Mr. Justice M. D. Kirby
Chairman of the Australian Law Reform Commission

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THE COMMONWEALTH, THE PRESS AND THE JUDICIARY

We in the Commonwealth of Nations are linked together by historical accidents, use, in its splendid variety of the English tongue, a fairly universal appreciation of the game of cricket and innumerable conferences which do homage, at the meal break, to a cuisine which can only be explained by its origins in the English public school system. In the diversity of the Commonwealth of Nations, we share no single philosophy about government, the law or the content of freedom. The meaning that will be ascribed to an ideal of 'freedom of the press' will vary from one country to another. One of the principal irritants which contributed to the American War of Independence was the unwillingness of English colonial administrators to extend to the Empire the freedoms which were regarded as essential in the mother country. It is no accident that the guarantee of free speech and of a free press were contained in the first paragraph of the American Bill of Rights. Some countries of the Commonwealth have similar declarations of general principle. Some, like Australia, have no such touchstone, against which to measure the proliferation of laws which, in their variety, confusion and detail, may impede or inhibit a free press.

One of the relics of Empire, which is still substantially intact, and is, perhaps the happiest remnant of British rule, is the independent, uncorrupted judiciary. Generally speaking, throughout the Commonwealth of Nations, the judges continue to uphold the traditions developed over 800 years at Westminster and later down the Strand. Another feature that is virtually universal throughout the Commonwealth of Nations has been the recognition in recent years of the tendency of the common law to atrophy because of the disinclination of the judges to be too creative in the face of the elected parliament. It is for this reason that law reform bodies have been created in almost every jurisdiction.

S has been in Australia, both at a Federal and State level. I stand before you because the Australian [Federal] Law Reform Commission was assigned the task of reporting on the reform of the law of defamation and associated topics.

Nowadays, of course, we no longer share a single imperial court. But in 1936 the Privy Council in London, in the context of a case on the Australian Constitution, adverted to the meaning of free speech. In the zenith of Empire, Their Lordships proffered this advice to the Sovereign:

> 'Free' in itself is vague and indeterminate. It must take its colour from the context. Compare, for instance, its use in free speech, free love, free dinner and free trade. Free speech does not mean free speech; it means speech hedged in by all the laws against defamation, blasphemy, sedition and so forth. It means freedom governed by law. ... Free dinner generally means free of expense, and sometimes a meal open to anyone who comes, subject however to his condition or behaviour not being objectionable.[1]

Their Lordships had obviously never entered the conference circuit. They had not heard that there is no such thing as a free meal. Out of a sense of delicacy, I will not refer to their animadversions upon 'free love'. Note, however, the assuredness with which they asserted:

> Free speech does not mean free speech.[2]

The Australian Press Council, in its fifth Annual Report for 1981, records that the International Press Institute, which monitors the press around the world, listed the Australian Press as 'an endangered species'. The Press Council claimed that its research supported that view.[3] First amongst the offenders listed by the Press Council were judicial officers:

> Evidence gathered by the council showed the greatest number of examples of on-the-spot censorship were about members of the judiciary. Judges, magistrates and coroners apparently had ordered suppression of names or evidence on points of law, rather than in the public interest and often against the strongest protests by the police.[4]

The International Press Institute's lists of threats to press freedom in Australia asserted that more than 40% of the threats 'emanated from the judiciary'.[5] The matter has become one of comment and expressed concern.

Sometimes judges have no choice. For example, under present law in Australia the sittings of the Family Court and most Childrens Courts must be closed to the public because the legislation says so. In the past legislation also provided for the closure of courts in the case of female first offenders. However, the Family Law Act is about to be changed to permit an open court except in proceedings concerning children and there will be a relaxation on restrictions on publication of cases, provided the names of the parties will not be disclosed. There will be no going back to the 'bad old days' in which the personal tragedies of divorced litigants became the titillating gossip of afternoon or weekend journals. Likewise, there are moves for the opening of Childrens Courts and legislation to close the courts in the case of female first offenders has now been repealed.[6]

Nonetheless, judicial orders for the suppression of news coverage range from cases of rape, incest and blackmail victims through certain committal proceedings, cases where identity is in issue, cases involving secret processes or commercial agreements and certain cases in which national security is said to be at stake.[7] The need for journalists to pay a special care in reporting the precise observations of judicial officers in Australia was recently brought home in Victoria when a coroner successfully sued a Melbourne newspaper for what was held to be a 'gross libel'. A reporter telephoned through a story of the coroner's statement concerning the procuring of documents needed from a hospital in an inquest. Unfortunately, the report came out that the magistrate 'did not care how the documents were obtained either by searching the hospital and thieving them'. What he had said, and what was dictated, was 'seizing' not 'thieving'. The coroner recovered a verdict of $6,000 together with $500 interest, the judge holding that the attempted apology three days later was inadequate. This is a classic case of mistake, of accident if you like. A number of other cases have been reported where magistrates have brought defamation proceedings. So far as I know, no judge in recent times has brought an action. But there is always a first time.

The judiciary and the administration of justice tend, in our tradition, to be 'media shy'. This is not a peculiar Australian thing. It is something probably true of the judiciary throughout the Commonwealth of Nations. Cameras and tape recorders are not generally permitted within our courts. But in the United States, where new things tend to happen first, the Supreme Court earlier this year unanimously held that a State may provide for radio, television and still photographic coverage of a criminal trial for public broadcasts, even over the objection of an accused person. It was held that the accused had no constitutional right to keep the media outside the courtroom.

1 United States Supreme Court referred to the technical sophistication of modern equipment which can ensure that there is no physical disruption of business by noise or light or machinery or personnel. The suggestion that lawyers, judges, jurors and witnesses would play to the camera was rejected as unsupported by any evidence.[8]

In Australia, we have seen in recent weeks a few tentative steps to open the courts to the electronic media. A coroner in Alice Springs read a finding in a sensational case allegedly involving a dingo. He did so live on national television, to the scandal of some commentators but with the general approbation of the media. The latest issue of the Australian Law Journal to reach lawyers' offices carries as its lead current topic the broadcast by the Australian Broadcasting Commission of proceedings in certain courts of petty sessions, especially in Sydney. The editor of the Law Journal commends the programme:

> Few people not familiar with the proceedings in the Central Court of Petty Sessions in Sydney had any idea of the extent to which stipendiary magistrates and police are overworked in disposing of long lists of cases, and of the inherent delays which are endemic in the existing system. The televised view of that court showed that ... one of the main problems ... is that of representation. Many defendants, appearing there for the first time, are completely at a loss to know how to meet the charges laid against them and naturally possess only the haziest conception of the nature of the relevant court procedure in relation to their case. ... What the camera did not reveal about a busy metropolitan court of summary jurisdiction is the depressing atmosphere which appears to be a necessary concomitant of such a court. This is the same in Bow Street, London, as it is in Liverpool Street, Sydney. ...

I have no doubt that one could add a similar reflection upon courthouses and their environs in every part of the Commonwealth.

Lately, commentators overseas have begun to question the 'media shyness' of the third and reputedly 'least dangerous' arm of government. Let there be no doubt that the judicial arm of government is the least known. It is least scrutinised in the public arena. The Lord Chancellor in England recently refused a request for access to appellate court tape recordings for the purpose of broadcasting material on a radio programme of an educational nature, which the BBC was intending to make. Writing in the Listener the disappointed suppliant said:

> Why should the camera be excluded when the House of Lords Appellate Committee heard argument last summer on whether a journalist has a right to disclose the source of information given in confidence, or when the Judicial Committee of the Privy Council heard argument also last summer on whether capital punishment breaches fundamental rights guaranteed under the Singapore Constitution? There are no jurors and no witnesses to be influenced; no-one will complain of unfair publicity.[10]

In Australia, even the ceremonial sessions of the High Court in a splendid and impressive building, with speeches of an historical and entirely formal kind, could not be televised and brought to a national audience of the public which had a legitimate interest, not to say a financial stake, in such occasions. We will venture upon media examination of the judicial arm of government with caution. The searching scrutiny of the electronic media in the courtroom may be introduced slowly. Our endeavours must be always mindful of the fact that the drama is especially important to the litigants involved. But I am sure that the day cannot be far off when there is far greater coverage in the media of the judicial process. Just as judges of previous generations had to adjust themselves to the reporters' notebook, so judges of the future will have to be able to withstand the cold eye of television. Jeremy Bentham was plainly correct in thinking that 'publicity is necessary to judicature'. But in today's generation, publicity may go beyond merely leaving the door of our courtrooms open to the intrepid few who will come and watch. As the recent ABC programme showed, most people simply have no idea of even the rudimentary procedures of the courtroom. An English law teacher suggests that we will go further:

> If the Prime Minister does not consider it beneath her dignity to be questioned by Robin Day about the decisions she makes on complex issues, the judges should not be spared that ordeal. The radio and television appearances of Lord Denning ... have served only to enhance respect and admiration for the institution of the judiciary. ... It is for us to decide whether we would rather have a dazzling judiciary whose profiles are concealed by the glitter, or a more visible judiciary whose foundations we can analyse.[11]

In past centuries, the judiciary was the most open and least secretive of the arms of government. Arguments were dealt with in open court. Judgments were read in open court. The judgments were available to all to scrutinise, analyse and criticise. Appeals reviewed these findings. An important issue before us today is how far the advent of new

ıs of communication are relevant to this judicial process and to further open the administration of justice. It seems unlikely that this aspect of our government, the judiciary, will ossify in the printed word. As government, administration and lawmaking become more open and communicative to the general public, it would seem doubtful that the judiciary alone will be able to cling to communication through the printed page of a written judgment or oral observations limited to those who can cram into a small and sometimes depressing courtroom.

A MOVING MINEFIELD

I have said enough of a general kind about the 'fragile' relationship between the journalist and the judge. The quotation from Their Lordships of the Privy Council in 1936 makes it plain that living in a legal minefield is no novel experience for a journalist. A member of the Australian Senate and a former law teacher, Senator Gareth Evans, has pointed out that in Australia freedom of expression and of the press, having no constitutional basis, are simply a residual concept. They are:

> That which remains when one takes out the laws relating to defamation, blasphemy, copyright, sedition, obscenity, use of insulting words, official secrecy, contempt of court, contempt of parliament, distribution of literature without permit, incitement and so on.[12]

Almost certainly, our legal systems still being basically similar from one part of the Commonwealth of Nations to another, the same could be said of most countries represented in the Commonwealth Press Union. In Australia, as in other Federal countries, we complicate the situation still further. Each State has its own variants of the laws of obscenity, insulting words, censorship of literature and so on. The permutations and combinations of differing legal provisions are as depressing as they are dazzling. They represent for the working journalist an intellectual test (if he ever stops to think about them) at least as challenging as the Times crossword.

Nor is the minefield stable. New legal rules and institutions are established or proposed to affect the world in which the journalist lives. A few recent Australian examples spring to mind:

- It is reported that a Bill is before the State Parliament in Queensland requiring the authorship of all pamphlets, leaflets, brochures and newspapers printed and distributed in the State to be disclosed to police.[13]

Calls have been made in South Australia for laws to prohibit interviews with jurors following a criminal trial. The television programme Nationwide interviewed a juror after a recent case and the programme has raised fears of trial by television, post-mortems, destruction of civic willingness to perform jury service and confidence in the whole process. Section 8 of the new English Contempt of Court Act 1981 specifically provides that:

> It is a contempt of court to obtain, disclose or solicit any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations.[14]

The provision introduced at a late stage was opposed by the Lord Chancellor and has been roundly criticised as oppressively wide.

A parliamentary committee of the Australian Federal Parliament is considering whether an article by a journalist is in breach of the privilege of Parliament. The article referred to the work and drinking habits of Members. The procedures of the Privileges Committee have been described in Parliament by one member as a 'secret court'.[16] I had better not say more, lest its secrets be unveiled to me.

A report of an inquiry into press ownership in Victoria suggests that it will recommend the establishment of a statutory tribunal to scrutinise newspaper transactions.[17] Already we have in Australia in the Australian Broadcasting Tribunal procedures for such scrutiny in the electronic media which have led to an extremely long hearing before the Administrative Appeals Tribunal, in which the nooks and crannies of the Murdoch press were explored in different techniques of cross-examination.

Hot on the heels of reports of alleged corruption of a State Premier, recently dead, the journal involved, the National Times, has been the recipient of numerous letters, passionately against their reports, and some passionately for. In Parliament, Dr. Klugman has raised the need for laws of defamation to protect the dead. One Federal Minister is reported to have suggested that such press irresponsibility might invite regulation.

P PARING THE DEFAMATION REPORT

It is against this background that I want in the remaining time to say something about two projects of the Australian Law Reform Commission, in which we have the opportunity to clear at least part of the minefield for those who must daily operate within it. I refer to our projects on defamation law reform and that aspect of our exercise on the law of evidence as concerns journalists' privilege.

The project on defamation reform was not something dreamed up by the Law Reform Commission itself. As with all tasks upon which we are engaged, it was specifically referred to the Commission by the Federal Attorney-General in Australia. The reference required the Commission to report 'on desirable changes to the existing law, practice and procedure relating to defamation and actions for defamation'. It called our attention to the desirability of uniformity of laws. It required us to note the need to 'strike a balance between the right to freedom of expression and the right of a person not to be exposed to unjustifiable attacks on his honour and reputation'.

The Commission was led in the project by one of Sydney's leading barristers, Mr. Murray Wilcox Q.C. Mr. Wilcox accepted a tour of duty as a full-time Commissioner, precisely to lead the project. Amongst the commissioners who worked upon the reference in its early stages were some of the most distinguished lawyers of our country. Sir Zelman Cowen, until the announcement of his appointment as Governor-General, took a keen and active part as a part-time Commissioner. For years, he has spoken and written about the importance of the media to the quality of freedom. Mr. Justice Brennan, recently elevated to the High Court of Australia, was also actively involved in the enterprise. Another Commissioner was Professor Alex Castles, a member of the Committee of Inquiry which recently reported on the ABC. He began his career as a journalist. He has always been interested in the law and the media. So we had, working on the project, some of the best and most relevant lawyers in the country. But we did not confine our team to lawyers. As in all of our tasks, we collected about us a group of consultants who could ensure that we were armed with every viewpoint of critical relevance. Our consultants ranged from specialist lawyers and academics to representatives of the different interests of the media in this country: print and electronic; city and country; practical and academic management and operators. Discussion papers were published setting out our tentative thinking. Ultimately a draft Bill was circulated nationally for comment and criticism. Television programmes and radio talk-back discussions took the issues involved to the four corners of the nation. Never before has there been such a thorough-going debate of a reform measure before so many people both within the media industry and beyond, amongst the citizenry.

Because of the frankly poor history of Australia in the achievement in uniform laws, the Commission also secured the participation of colleagues appointed by the State attorneys-general. These State officers sat at our table and took part in the discussions leading up to the final proposals. Discussion papers, seminars, public hearings, written comments, consultants' views, public and private debate: no-one can say that this project was not thoroughly ventilated in the most open and public way.

When the report was produced, it canvassed the competing views and identified the policy issues to be addressed. In a controversial matter such as defamation law reform is bound to be, it is inevitable that differences of view will exist about specific proposals. The right to disagree is central to a free and democratic society. In the end, it is for the elected representatives to decide. But, if I can be permitted to say so, it is important that they should face the obligation of decision. Otherwise, a great deal of public and professional energy will have been squandered and hopes for reform will have been raised, needlessly.

Tabling the report in Federal Parliament on 7 June 1979, the Federal Attorney-General, Senator Durack, said:

> The Law Reform Commission should be commended for the way it went about its reference. It has sought out the views not only of those involved in the legal aspects, but through seminars and public hearings it has sought to involve as many people from the community as possible.

Subsequently it is understood that a decision was taken to commend the report to the Standing Committee of Federal and State Attorneys-General. That Committee has referred it to a group of officers: hard-pressed public servants of the Commonwealth and States, with busy local obligations of their own, finding such time as they can to fit in to already over-burdened programmes, consideration of a complex, intricate, sensitive package of reform. According to the Attorney-General for Western Australia, Mr. Ian Medcalfe QC, progress is being made. In March 1981, he said that he expected a single defamation law for Australia to be finalised 'within the next six to 12 months'.[18] In a statement issued in Canberra in April 1981, the Standing Committee of Attorneys-General affirmed its agreement to work towards a uniform defamation law. It said that whilst it might not be possible to achieve a uniformity immediately 'it should be possible to reach early agreement on a number of the issues'.

W AT DID THE REPORT SAY?

The report of the Law Reform Commission proposed the adoption of a new legal concept of 'unfair publication'. Cases of unfair publication included:

- defamatory publications;
- publications which unfairly, and without public cause, invaded personal privacy; and
- publications which appropriated a person's name, identity or likeness, without permission.

The report sought to advance five objectives which we felt to be in the interests of the media of Australia but also of the community as a whole:

- Provision of a single, uniform law applicable throughout Australia in place of the eight different and sometimes conflicting laws with which the media must currently comply in this country.

- Codification of the law, to avoid needless resort to the great bulk of earlier court decisions, so that journalists, management and citizen alike could have the code of defamation law clearly before them, expressing in a short document the basic rights and duties in this area so important to freedom.

- Simplification of current laws which between jurisdictions and even within a jurisdiction are diverse, unclear, complex and obscure: especially difficult for working journalists whose lives are controlled by copy deadlines and who must generally work under pressure and often in highly charged circumstances.

- Introduction of major reforms of procedures: particularly to provide much more speedy determination of defamation cases, both for the prompt correction of error and for the prompt removal of 'stop writs' and other unfair impediments to publication of the truth.

- Provision of new and more effective remedies, some of them borrowed from European legal systems. In place of the English law's obsession with money damages, it was proposed that new remedies should be provided, apt for the particular issue in contention, namely the reputation and dignity of the individual. For this reason, procedures were proposed for court-ordered corrections of facts found to be false and a facility for rights of reply to be afforded in certain

circumstances. In Europe corrections and rights of reply, much more than money damages, constitute the redress in defamation cases. When you think about it, they serve the public interest much better than the award, years later, of a sum of damages to a particular litigant, in a private action which may or may not be reported.

Undoubtedly, the most controversial provisions of the Law Reform Commission's report proved to be those which urged the giving of protection to a zone of 'sensitive private facts'. In the report, these were strictly defined. They were facts relating to the health, private behaviour, home life and the personal or family relationships of an individual which, if published, would, in all the circumstances, be likely to cause distress, annoyance or embarrassment. A number of defences were proposed for the publication of facts of this kind constituting the 'private zone' of the individual. Amongst the defences were consent and that the publication was on a topic of public interest. In essence, the Commission's view was that even public figures in Australia were entitled to a private life, unless publication was relevant to their public office or was on a topic of public interest. Generally, the better media in this country respect the rule already. But the fact that most people act properly has never been a reason for not providing a law for those few who act in an antisocial manner. The law's role is sensitively to reflect and enforce the minimum standards.

In my view the most novel and imaginative provisions of the Commission's report lay in the proposed reforms of defamation procedure. The Commission's report asserted that the English law of defamation, which we have inherited in Australia, has been 'distorted' by its substantial reliance on the remedy of money damages, often awarded years after the event complained of. A more inapt procedure for dealing with the wrong complained of could scarcely be designed. The Commission urged the adoption of procedures which would remove the emphasis upon money damages and lay emphasis instead upon the public's right to know. The new procedures proposed were:

- Rapid return of a case before a judge who should have a duty to explore the possibilities of conciliation, not just confrontation. Sometimes conciliation could be secured by an appropriate right of reply or correction.

- Provision of a power for the judge to order, as one of the remedies for a successful plaintiff, publication of correction of facts which have been found to be false.

. Provision of a right of reply, encouraged by a defence granted to publishers who have afforded a prompt and fair opportunity to put the other point of view.

Running through the Commission's defamation reform report was the philosophy of increasing public access to information and the need to safeguard the public's 'right to know' true facts and to be informed when facts published about a person are subsequently found to be false.

About the detail of the reform package there can be legitimate difference of view. But about the general lines of reform and above all the need for reform itself, there can be little informed dispute. I repeat, this is not simply a matter for the large media groups, the great television networks and the metropolitan press. Everyone concerned in publication in Australia: printers and booksellers, libraries and citizen radio, the ordinary citizen in his conversation and the suburban press: all should be concerned to ensure a more modern defamation law with rules and procedures appropriate for our time.

REACTIONS TO THE REPORT

Generally speaking, the editorials in the Australian press have welcomed our proposals for defamation law reform though they are much less enthusiastic about a law for the protection of privacy. The Melbourne Age, however, was much more positive:

> If adopted its proposals would bring about the most comprehensive and important changes yet made in this vexed area of legal and civil rights and duties in this country. ... It would be a shame if the Commission's efforts, the result of several years' critical analysis, careful deliberation and community consultation were to remain no more than of academic interest. ... In spite of the reservations we have mentioned [about privacy] and our natural inclination towards freedom of expression and public access to information, we believe the final draft legislation to be an improvement on the present unsatisfactory confusion of the law. It deserves the prompt attention of Federal and State Attorneys-General and their Governments.

A similar call to action was contained in Mr. O'Sullivan's journal, the 'West Australian':

> By and large, the libel laws do little to stop newspapers from conducting themselves badly and providing the public with a junk diet of trivia. But they grossly inhibit newspapers from doing the job the community has a right to demand. ... The right of a press to carry out its public duty — to throw light in dark places — would be ensured by the proposals put forward in Canberra this week [by the Law Reform Commission]. ... All in all, the proposals are a long overdue assertion of the public's right to be informed.

In December 1979, the West Australian again called for action:

> All in all the Federal Commission's proposals ... would go a long way towards meeting the need of the public to be informed on matters of concern to it without in any way conferring on the news media a licence to set about wantonly destroying reputations. Whatever the final view of our legislators, it is imperative that any new laws governing defamation ... provide more public right to information than now.

The proposal for a limited protection for privacy is in part based upon the perceived greater threats to privacy in today's technological world and in part upon the need to secure a compromise solution to a peculiar Australian problem. In about half of the jurisdictions of Australia, the defence of 'justification' requires proof that the matter complained of was not only true but also published for the 'public benefit' or in 'the public interest'. Until now, that additional element of public benefit or public interest has provided a limited protection, in at least some Australian jurisdictions, for personal privacy. Unless publication was for the public benefit, it would usually not be published, even if true. Abolition of the 'public benefit' element that the justification defence, as proposed by the Law Reform Commission, was one of the reasons for suggesting, as the price, that there should be small, closely-defined zone of privacy. This could, in turn, be lost when the private interest was outweighed by a legitimate public interest.

Some commentators have expressed scepticism that reform will be achieved by the processes of consultation among the States. There is an alternative road to major reform, by the use of the Federal Constitution. But this has been rejected at this stage by the Australian Government. Reflecting on the prognosis for legislative action, Adrian Deamer, himself an experienced journalist, wrote:

> It is difficult to foretell the attitudes of the States to the proposed Bill. None of them is likely to dispute that the desirability of having uniform laws throughout the country, especially now that so many publications are national. But will New South Wales, for instance, give up its present defamation laws which only came into operation in 1974 in order to gain a general privacy law (which, I am sure, the present Attorney-General would welcome)? Will South Australia, under a Liberal Government, opt for a privacy law when its Legislative Council, controlled by the Liberal Party, has twice rejected such a privacy Bill? Will Mr. Bjelke Petersen allow Queensland to change its laws to come into line with a Labor State such as New South Wales? There will be a lot of bargaining and a number of changes before the Bill becomes law.[19]

Interestingly enough, a great deal of attention is being given to our proposals across the Tasman in New Zealand, where the Minister of Justice and his department are canvassing the introduction of the new concept of 'unfair publication' proposed by the Law Reform Commission to combine defamation and privacy protection. With just the slightest hint of self-interest, the New Zealand Herald editorial of 29 August 1981 asserted:

> Privacy is an honourable concept and an important consideration in a civilised society, but it is a difficult quality about which to construct legislative protection. That is why it remains on the frontiers of the evolving body of law which orders human affairs.[20]

I believe we will see new defamation laws with new and more appropriate procedures and remedies, and encompassed within a statute that will be available for the training of succeeding generations of journalists. I also believe that the new laws will contain limited protection for privacy. We who have inherited the English respect for the individual and cultural values such as individual privacy, should not be so timid that we retreat from the obligation to give privacy legal protection, at least in those cases where legal protection manifestly reflects current community standards and, let it be said, the usual standards of most of the media themselves.

JOURNALISTS' PRIVILEGE

Let me, in conclusion, mention one matter which is under the consideration of the Australian Law Reform Commission in its inquiry into the reform of Federal evidence laws. In Australia, as in Britain and even in the United States, the law does not presently uphold a claim of absolute privilege by journalists against revealing in court the sources of confidential information upon which they have based news or other stories. The rule

ding such a privilege was lately affirmed in the House of Lords.[21] A similar conclusion was reached by the WALRC in its report on Privilege for Journalists (Project No. 53, 1980).[22] But when the contempt legislation was passing through the English Parliament, a clause was added in the committee stages designed to overturn the law established in the House of Lords. Tabled by Opposition front benches, it was carried after the Attorney-General withdrew his opposition because of support for it amongst government MPs. The amendment was designed to exclude courts from compelling journalists to reveal their sources 'except in the interests of justice, national security or the prevention of disorder and crime'.

The issue of journalists' privilege is now under the consideration of the Australian Law Reform Commission. Police informers and lawyers' clients have a privilege in respect of their confidential communications. In some States of Australia communications with a doctor or priest are privileged in civil trials. The extension of the privilege to other groups, including journalists, poses a risk that justice may become truly blindfolded. Should courts resolving the disputes of society be forced to do so on inadequate and incomplete data, where some relevant material is withdrawn out of respect for confidences which are said to be even more important than the due administration of justice upon the best available facts?

This is a matter that is still under our study. It must be seen in the context of other claims for legally enforceable privilege, whether by doctors, dentists, lawyers, physiotherapists, bankers, insurers and other groups. Are there any relevant ways in which journalists' confidences are special?

CONCLUSIONS

Inevitably, in scanning the journalists' minefield, journalists themselves tend to stress the importance to freedom of a vigorous and vigilant press and of expanding access to information. Of course, they are right to do this. Lawyers, on the other hand, tend to stress countervailing social claims to respect for privacy, honour and reputation, a fair trial, the due administration of justice etc. It is when these values collide that aggregate community freedom is at risk. It is my hope that in the work of the Australian Law Reform Commission (and otherwise) there will be more dialogue in the future between journalists and lawyers. Each profession occasionally falters. Each is indispensable to a free society.

FOOTNOTES

1. James v. The Commonwealth, (1936) 55 Commonwealth Law Reports 1, 56.

2. ibid.

3. Australian Press Council, Fifth Annual Report, 1981, 11.

4. id., 10.

5. The Australian, 22 December 1980, 6.

6. See First Offenders (Women) (Repeal) Ordinance 1980 (A.C.T.) which repealed the First Offenders (Women) Ordinance 1947 (A.C.T.). See also the First Offenders (Women) Repeal Act 1976 (N.S.W.) which repealed the First Offenders (Women) Act 1918 (N.S.W.).

7. J. Waterford, 'Treading a Path Between Conflicting Legal Policies', Canberra Times, 28 July 1981, 3.

8. Chandler v. State of Florida, 47 USLW 4141 (1981).

9. (1981) 55 Australian Law Journal 511, 512.

10. D. Pannick, 'Broadcasting Court Proceedings' in The Listener, 9 April 1981, 464.

11. D. Pannick. 'The Guardian', 3 November 1980.

12. G.J. Evans, cited in A. Deamer, 'How Free A Press?', in the Age Monthly Review, September 1981, 11.

13. National Times, 20 September 1981, 7.

14. Contempt of Court Act 1981 (Eng), s.8.

15. The Times, 26 August 1981.

16. Mr. Steele Hall MP, as reported in the Age, 25 September 1981.

17. The Age, 25 September 1981, 3.