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THIN SHIELDS PIERCE EASILY: A CASE FOR FORTIFYING THE JOURNALISTS' PRIVILEGE IN NEW ZEALAND

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Abstract: In late 2006, New Zealand's Parliament inserted Section 68 into the nation's Evidence Act 2006, providing for the first time a testimonial privilege specifically protecting journalists from compelled disclosure of their confidential sources. The privilege, commonly referred to as a shield law, has been met with approval from politicians, media commentators, and journalists, both in New Zealand and beyond.

While New Zealand's reporter shield law goes a long way toward extending press freedoms, it ultimately falls short of the country's historically robust commitment to the free flow of information. Section 68's most glaring shortcoming is the ease with which a judge can tear down its protections. A judicial determination that the public interest in the disclosure of the source outweighs the public interest in maintaining confidentiality will pierce the shield. Unfortunately, balancing tests such as the one codified in Section 68 have a track record of exploitation, often with fair trial concerns overriding free expression.

In that light, Section 68 should be strengthened for three purposes: 1) to reflect the nation's longstanding commitment to a free and vibrant media, 2) to satisfy the requirements of the New Zealand Bill of Rights Act 1990, and 3) to accord with effective models from other democratic governments. Two relevant sources the country could mine for guidance include United States federal law and the newly enacted shield law in Washington State. New Zealand would be well served by observing not only the protective innovations of the two models, but also their shortcomings. The federal status quo in the U.S., should serve as a cautionary tale, both from policy and legal standpoints. Washington State's statute on the other hand, strikes an appropriate balance between the public interest in disclosure and the public interest in protecting journalists' sources.

I. INTRODUCTION

On December 5, 1999, the front page of New Zealand's *Sunday Star-Times* served readers a juicy political scandal.[1] In part delicious, in part tragic, the scandal involved New Zealand Police Commissioner Peter Doone's conduct during a routine traffic stop. After playing in the press for more than a month, the incident gained momentum on January 16, 2000, when a confidential government source implicated Doone in obstructing a

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[1] *Police Boss Was in Car Stopped by Constables*, THE SUNDAY STAR-TIMES (Auckland), Dec. 5, 1999, at 1.

breathalyzer test intended for the driver, Doone's then-girlfriend.[2] Despite staunchly denying wrongdoing, Doone resigned shortly thereafter.[3]

The imbroglio started on election night, November 27, 1999. Just after nine o'clock, a rookie constable pulled over a 1999 Nissan Maxima driven by Robyn Johnstone[4] for operating without activated headlights.[5] The police commissioner sat in the front passenger seat.[6] Quoting an unidentified source, the *Sunday Star-Times* alleged that Doone exited the car and engaged rookie constable Brett Main as the constable approached the Maxima.[7] Main had been on the job three days.[8] The article quoted Doone as uttering four fateful words: "That won't be necessary," when the rookie indicated he should perform a breathalyzer test on Johnstone.[9] Although the rookie cop had the "alcohol sniffer" in hand, he never administered the test.[10]

On January 14, 2000, *Sunday Star-Times* reporter Oskar Alley telephoned New Zealand Prime Minister Helen Clark to inquire about the incident (he had initially learned of it from police sources).[11] The Prime Minister confirmed, under a presumption of confidentiality,[12] that Doone used the infamous four words.[13] The high-level, yet anonymous,[14] confirmation assured the scoop a prominent front-page splash on January 16, 2000.[15]

As a result of the ensuing public outcry, Doone was forced to resign later that month.[16] Police reports criticized Doone for approaching the

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[2] Oskar Alley, *Doone Case Cop Was Ready to Breath Test*, THE SUNDAY STAR-TIMES (Auckland), Jan. 16, 2000, at 1.

[3] Vernon Small, *Unrepentant Doone Forced to Step Down*, THE N.Z. HERALD, Jan. 26, 2000, *available at* http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=114200.

[4] Johntone, who was Doone's girlfriend at the time, is now his wife. *See* Leah Haines, *Doones: Why We're Taking on Helen Clark*, THE N.Z. HERALD, May 1, 2005, *available at* http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10123168.

[5] Helen Tunnah, *PM to Fight Defamation Claim*, THE N.Z. HERALD, Apr. 28, 2005, *available at* http://www.nzherald.co.nz/litigation/news/article.cfm?c_id=249&objectid=10122718.

[6] Alley, *supra* note 2.

[7] *Id*.

[8] Tunnah, *supra* note 5.

[9] Alley, *supra* note 2.

[10] Haines, *supra* note 4.

[11] Press Release, ACT political party, Did Prime Minister Helen Clark Treat Police Commissioner Peter Doone with Honesty and Integrity? (May 10, 2005), *available at* http://www.act.org.nz/node/26929#.

[12] Editorial, *Doone Affair Puts All in a Poor Light*, THE N.Z. HERALD, May 4, 2005, *available at* http://www.nzherald.co.nz/topic/story.cfm?c_id=240&objectid=10123643.

[13] *Id*.

[14] The article referred to Prime Minister Clark as a "source" and a "source close to the inquiry." Alley, *supra* note 2.

[15] *Id*.

[16] Small, *supra* note 3.

officer, but also found that Doone never used the phrase "that won't be necessary."[17]

Five years passed before Doone sued the *Sunday Star-Times* for defamation, claiming $850,000 (NZD) in damages.[18] During the legal battle between Doone and the newspaper, court documents filed by Clark[19] revealed that the Prime Minister had served as the confidential source of the newspaper's information.[20] On April 27, 2005, Doone dropped his suit against the *Sunday Star-Times* and set his legal energies against the Prime Minister.[21]

While New Zealand legislators had been contemplating a journalists' privilege for more than a decade,[22] few could have guessed a routine traffic stop would become the catalyst for codifying one. The outing of the Prime Minister as the source of the *Sunday Star-Times'* story humiliated Prime Minister Clark and her government.[23] The ensuing uproar, fueled by the Prime Minister's comments that government officials would curtail conversations with reporters if their identities could not be protected,[24] gave momentum to a reporter shield law.[25] Accordingly, Parliament inserted Section 68 (hereinafter "§ 68") into the New Zealand Evidence Act 2006, providing a qualified privilege for journalists to maintain the confidentiality of their sources.[26]

This comment examines the scope of protection provided by New Zealand's journalists' privilege. Part II explores New Zealand's historical

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[17] An internal report conducted by then Deputy Police Commissioner Rob Robinson, Doone's right-hand man, called Doone's actions "inappropriate." Tunnah, *supra* note 5. *The Sunday Star-Times* printed a correction on June 4, 2000: "The Sunday Star-Times, having recently received further information, now acknowledges that Peter Doone did not make that statement. We regret our error and apologise to former commissioner Doone." Alley, *supra* note 2.

[18] Kevin List, *Fairfax Makes PM an Offer She Can't Refuse: How the Prime Minister and APN Employees Came to be Defending Fairfax*, SCOOP INDEPENDENT NEWS, May 10, 2005, http://www.scoop.co.nz/stories/HL0505/S00117.htm (last visited Sept. 10, 2008).

[19] Clark did not admit her involvement voluntarily. The *Sunday Star-Times's* publisher, Fairfax New Zealand, subpoeanaed Clark to provide a brief of evidence to help defend against Doone's lawsuit. *Id*. *See also* Tunnah, *supra* note 5. Fairfax was roundly criticized for breaching its journalistic and ethical duties to protect confidential sources. *Doone Affair Puts All in a Poor Light*, *supra* note 12.

[20] Tunnah, *supra* note 5.

[21] *Id*.

[22] New Zealand Law Commission, *Preliminary Paper No. 23: Evidence Law: Privilege*, May 1994, ¶ 348.

[23] *Doone Affair Puts All in a Poor Light*, *supra* note 12. The opposition party even called on her to resign. *See* 625 PARL. DEB., H.R. (May 10, 2005) 20360.

[24] *Doone Affair Puts All in a Poor Light*, *supra* note 12.

[25] *See* Media Law Update, *Bell Gully, Journalists' Sources—Protection in the Spotlight?* (Aug. 2005) (on file with Bell Gully), *available at* http://www.bellgully.co.nz/newsletters/01Media/journalistic_protection.asp.

[26] Helen Tunnah, *Journalists Get Protection*, THE N.Z. HERALD, May 28, 2005. *See* Media Law Update, *supra* note 25.

commitment to the free flow of information to provide context for the passage of § 68. Part III features an in-depth look at the strengths and weaknesses of § 68, including a comparison of § 68 to New Zealand common law confidential-source protections, Section 14 of the New Zealand Bill of Rights Act 1990, and general free-press ideals. Part IV contrasts § 68 with shield laws in other jurisdictions, including United States federal law and the new journalists' privilege in Washington State. Finally, Part V recommends specific changes to § 68 that would make it a robust, suitable, and effective shield law.

II. NEW ZEALAND'S HISTORICAL COMMITMENT TO THE FREE FLOW OF INFORMATION IS ENERGETIC AND ESTABLISHED

A. Protecting Reporter-Source Confidentiality Is Essential to a Vibrant and Effective Media and, by Extension, a Functional Democracy in New Zealand

Confidential sources are key ingredients to an effective free press. Journalists cannot fulfill one of their primary purposes—the role of government watchdog—without cultivating and maintaining confidences. In *Goodwin v. United Kingdom*,[27] a case heard before the European Court of Human Rights in 1996, the court elucidated the need for confidential sources in free society:

> [F]reedom of expression constitutes one of the essential foundations of a democratic society and . . . the safeguards to be afforded to the press are of particular importance. Protection of journalistic sources is one of the basic conditions for press freedom . . . . Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest.[28]

The deterrence described in *Goodwin* is of particular concern to journalists. Forced disclosure of confidential sources has a so-called chilling effect on the free flow of information.[29] Specifically, compelled disclosure severs the media's ability to acquire information, which, in turn, strangles a modern, informed, and democratic citizenry. Many chilling-effect analyses proffer

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[27] Goodwin v. United Kingdom, 22 Eur. Ct. H.R. 123 (1996).

[28] *Id.* at 143.

[29] *See* Janice Brabyn, *Protection against Judicially Compelled Disclosure of the Identity of News Gatherers' Confidential Sources in Common Law Jurisdictions*, 69(6) MO. L. REV. 895, 922 (Nov. 2006); *see* Goodwin, 22 Eur. Ct. H.R. at 143; *see also* B.D. Gray, *Journalists Compelled to be Witnesses—Time for a Re-Evaluation*, 2006 N.Z. L. REV. 443, 444 (2006).

three concerns: 1) current or potential sources will dry up as a result of routine compelled disclosure; 2) journalists themselves will face increased personal harm through violence and intimidation if sources realize journalists can be compelled to testify as to events they observe.[30] Said another way, if sources come to believe they have to cover up conversations they have had with reporters, they may resort to desperate measures; and 3) compelled disclosure infringes upon the autonomy of media outlets to dictate their own news coverage.[31]

Of the three prongs, the "drying up" of sources due to routine compelled disclosure has particularly troubling consequences to the free flow of information. One commentator described the phenomenon as follows: "[g]eneral or specific knowledge amongst potential sources that news gatherers can be compelled to disclose their identities in court . . . will have a strong chilling effect upon some people who might otherwise be willing or persuaded to be confidential sources in the future."[32]

As a case in point, after her involvement in the Doone affair, Prime Minister Clark expressed a disinclination to speak with journalists. "There was a time when I used to pick up journalists' phone calls; that time is largely now gone. One does learn from those experiences," Clark said.[33] It would be hard to argue that the citizens of New Zealand are not adversely affected by their Prime Minister's reluctance to speak to them via the press.

In light of these considerations, many media commentators and media organizations argue the professional and ethical obligation to protect source confidentiality is sacrosanct. The American Society of Newspaper Editors guidelines note that "[p]ledges of confidentiality to news sources must be honored *at all costs* . . . ."[34] New Zealand press commentators have noted: "Journalists . . . have an obligation to protect [sources] when necessary. The generally accepted practice is to refuse to identify the identity of a source,"[35] even if it leads to contempt of court. The 1999 New Zealand Press Council's Statement of Principles suggests that editors and journalists "have a strong obligation to protect against disclosure of the identity of confidential sources."[36] Perhaps due to the position taken by journalists, in 1994 the

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[30] Gray, *supra* note 29, at 444.

[31] *Id*.

[32] Brabyn, *supra* note 29, at 922.

[33] 625 PARL. DEB., H.R. (May 10, 2005), 20361.

[34] American Society of Newspaper Editors, ASNE Statement of Principles, Article VI, Nov. 29, 2006, http://www.asne.org//index.cfm?ID=888 (last visited Sept. 10, 2008) (emphasis added).

[35] John Tidey, *Well-informed Sources*, *in* WHAT'S NEWS: RECLAIMING JOURNALISM IN NEW ZEALAND 72, 78 (Judy McGregor & Margie Comrie eds., Dunmore Press 2002).

[36] Jim Tully & Nadia Elsaka, *Ethical Codes and Credibility: The Challenge to Industry*, *in* WHAT'S NEWS: RECLAIMING JOURNALISM IN NEW ZEALAND 142, 154 (Judy McGregor & Margie Comrie eds.,

New Zealand Law Commission concluded that a journalists' privilege would serve "the wider interest of society better than if no privilege were accorded."[37]

From United States lore, the most celebrated confidential source is Deep Throat. Now exposed to be former Federal Bureau of Investigation Associate Director W. Mark Felt,[38] Deep Throat helped undo the presidency of Richard Nixon following a 1972 burglary at the Watergate complex.[39] "This is a case history and a case lesson of why it is so important that we have confidential sources," said Carl Bernstein who, along with fellow *Washington Post* reporter Bob Woodward, broke the Watergate story. "If you were to look back at the original stories, I think hardly any of them had named sources. There's no way this reporting could have been done, nor is there any way that good reporting at a lot of places can be done, without anonymous sources."[40] Felt was willing to collaborate with Woodward because he felt confident the reporter would go to jail before revealing Felt as the source of information.[41] In fact, Felt's identity remained the best-kept secret in American journalism for more than three decades, until he divulged his own involvement in 2005.[42]

In the Doone affair, it remains unclear whether Prime Minister Clark made an honest mistake, received bad information, or intentionally lied when she told the newspaper Doone intervened in the breath test. Of those possibilities, the third would most complicate the argument in favor of a shield law. Namely, some journalists suggest that when a confidential source knowingly provides false information to the media—often for character assassination or other self-serving purpose—the source's lie destroys the pledge of nondisclosure.

However, this comment operates under the principle that even in the case of intentional falsehood, the journalist and the courts should not divulge the source's identity. If New Zealand courts do not protect sources deemed to be liars, sources with legitimate, accurate, and important information might not step forward—this is the chilling effect. Failure to protect

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Dunmore Press 2002) (quoting the New Zealand Press Council, *Statement of Principles*, 1999. The 2008 principles are *available at* http://www.presscouncil.org.nz/principles_2.html).

[37] New Zealand Law Commission, *supra* note 22, ¶ 334.

[38] Todd S. Purdum, *"Deep Throat" Unmasks Himself as Ex-No. 2 at F.B.I.*, THE N.Y. TIMES, Jun. 1, 2005, *available at* http://www.nytimes.com/2005/06/01/politics/01throat.html?_r=sq.

[39] *Id.*

[40] *Id.*

[41] *See generally* BOB WOODWARD & CARL BERNSTEIN, ALL THE PRESIDENT'S MEN (Simon & Schuster 1974); KATHARINE GRAHAM, PERSONAL HISTORY 472, 483 (Alfred A. Knopf 1997); BEN BRADLEE, A GOOD LIFE: NEWSPAPERING AND OTHER ADVENTURES 365 (Simon & Schuster 1995).

[42] Purdum, *supra* note 38.

apparent liars would force sources to develop ironclad evidence to support their information, particularly in the case where an opposing side could be expected to voice vehement opposition, denials, or outright lies. Often, sources cannot garner this type of evidence without risking personal or professional injury. If courts put honest sources at the risk of being treated like unprotected liars, the honest sources will be less willing to contact journalists.

One of America's preeminent First Amendment lawyers, Floyd Abrams, recently said,

> [T]he law can't and shouldn't distinguish, and I would say journalists can't and shouldn't distinguish between good sources and bad, virtuous sources and unvirtuous ones. If a journalist grants confidentiality, I think the journalist has to keep her word . . . . [I]t seems to me very important for the credibility of all journalists and for the general free flow of information to come to the public for journalists who, having once promised confidentiality, keep their word about it.[43]

Because journalists rarely witness important events firsthand, they must rely on sources for information. Even the best journalistic instincts cannot always differentiate truth from falsity. When a damning bit of confidential info comes across a journalist's desk, corroboration by a second, trusted (hopefully on-the-record) source often provides a layer of trustworthiness. Unfortunately, "true" stories and "accurate" reports are not always the same. Sources often misspeak, exaggerate, or lie. Journalists should strive for truth, but when truth proves elusive, the best journalists can do is accurately report the source's information. In this light, how can the law expect journalists to know who is lying and who is not? Permitting disclosure for lying confidential sources puts journalists in the position of making that unknowable call.

Instead, the only feasible solution is a shield law that includes protection even for potentially untruthful sources. When a source's story checks out, it should be printed. When it turns out later that a source lied, printing a correction and then aggressively reporting on the lie itself corrects the initial error. This method preserves confidentiality, avoids the chilling effect, and fully informs the public.

Prime Minister Clark might have lied. Even if she did, the follow-up stories and intense media scrutiny uncovered her role in the affair more

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[43] *Frontline: Interview Floyd Abrams*, (PBS television broadcast July 10, 2006), *available at* http://www.pbs.org/wgbh/pages/frontline/newswar/interviews/abrams.html.

effectively, thoroughly, and responsibly than compelled disclosure would have—all while maintaining the free flow of information.[44]

B. New Zealand's Press Has an Established and Colorful History of Protecting Confidential Sources

New Zealand has long enjoyed a healthy commitment to press freedoms, particularly the protection of confidential sources. Media historians point to protection of anonymous authors and the difficulties faced by reporters in maintaining those confidences[45] since the inception of New Zealand's press in 1840.[46]

In 1894, the *Evening Post* obtained leaked documents regarding the resignation of New Zealand's military commander. The paper ran the story prior to the government's official announcement.[47] Incensed, government officials established a royal commission to ferret out the leak's source. In response, the *Evening Post*'s editor, E.T. Gillon, called the commission a "gargantuan farce," an "impudent travesty of justice," and a "political fraud."[48] He refused to appear after being subpoenaed, calling the duty to maintain confidential sources "absolutely sacred."[49]

More than a century later, the instinct to protect confidential sources has largely endured. These days, New Zealand consistently ranks among the most free and open societies in the world. In 2007, the nonprofit media advocacy and support organization Reporters sans Frontières (a.k.a. Reporters Without Borders) ranked New Zealand 15th out of 169 nations.[50] This placement was higher than the United States (ranked 48th),[51] Australia

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[44] The *Sunday Star-Times* divulged Prime Minister Clark's role in the affair, *see* List, *supra* note 18.

[45] GUY SCHOLEFIELD, NEWSPAPERS IN NEW ZEALAND 4 (A. H. & A. W. Reed 1958).

[46] PATRICK DAY, THE MAKING OF THE NEW ZEALAND PRESS 12 (Victoria University Press 1990). In one case, the government sought disclosure of the identity of a scathing editorial's author by ordering the registrar of the Supreme Court to obtain the original manuscript from the printer of the *New Zealand Herald and Auckland Gazette*. *See* KARL DU FRESNE, THE RIGHT TO KNOW: NEWS MEDIA FREEDOM IN NEW ZEALAND 9 (Newspapers Publishers Association 2006). When the printer handed over the manuscript, the editor of the paper challenged the registrar to a duel—an offer that was graciously rebuffed. *Id*.

[47] DU FRESNE, *supra* note 46, at 11.

[48] *Id.*

[49] *Id*.

[50] REPORTERS WITHOUT BORDERS, WORLDWIDE PRESS FREEDOM INDEX, 2007. http://www.rsf.org/article.php3?id_article=24025 (last visited Sept. 10, 2008).

[51] *Id*. A year earlier, Reporters Without Borders commented on the Bush Administration: "The United States (53rd) has fallen nine places [in freedom-of-the-press rank] since last year, after being in 17th position in the first year of the Index, in 2002. Relations between the media and the Bush administration sharply deteriorated after the president used the pretext of 'national security' to regard as suspicious any journalist who questioned his 'war on terrorism.' The zeal of federal courts which, unlike those in 33 US states, refuse to recognize the media's right not to reveal its sources, even threatens journalists whose

(ranked 28th), and other democratic nations with long traditions of vibrant media.[52] Moreover, in 2007, the nonprofit organization Freedom House ranked New Zealand's press as "free," its highest mark.[53] Insiders agree with these assessments. Karl du Fresne, author of *The Right to Know: News Media Freedom in New Zealand*, states, "In New Zealand, the news media enjoy a degree of freedom shared by few other countries."[54]

Some prescient observers, however, have recognized the need for vigilance. Historically, press protections have been fragile rights easily slapped down by government or the courts. As Du Fresne notes, press freedoms "can be eroded by inches and degrees" and "[f]reedoms that are taken for granted are freedoms at risk."[55] In 2006, Freedom House, in discussing New Zealand, cautioned that "although democratic traditions have been strengthened in recent years by reforms such as the Official Information Act and Bill of Rights Act, there are still concerns that these rights remain relatively fragile."[56]

In the realm of confidential sources, it is becoming "reasonably common" in New Zealand for litigants to seek disclosure from journalists to bolster evidentiary offerings.[57] More troubling than parties seeking information, however, has been the response of some courts. "Numerous courts and tribunals have the power to compel production of documents and to issue subpoenae. Many of them are exercising these powers in respect of journalists, and are doing so reasonably regularly."[58]

The increased willingness of courts to order the disclosure of confidential sources may help explain the passage of § 68, but it remains to be seen whether the new law will provide any additional protection.

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investigations have no connection at all with terrorism." *See* REPORTERS WITHOUT BORDERS, WORLDWIDE PRESS FREEDOM INDEX, 2006, http://www.rsf.org/article.php3?id_article=19388 (last visited Nov. 21, 2008). The United States ticked back up to 48th in 2007 due to the release of Josh Wolf, a freelance journalist and blogger who had been imprisoned for 224 days for refusing to turn over his outtakes. However, Sudanese cameraman Sami al-Haj, who works for the pan-Arab broadcaster Al-Jazeera, has been held without trial since June 2002 at the US military base in Guantanamo Bay, Cuba. *See* REPORTERS WITHOUT BORDERS, *supra* note 50. The drastic drop in press freedoms during the Bush Administration's "national security" fetish sends a clear message regarding the fragility of press freedoms.

[52] REPORTERS WITHOUT BORDERS, *supra* note 50.

[53] FREEDOM HOUSE, FREEDOM OF THE PRESS, 2007, http://www.freedomhouse.org/template.cfm?page=251&year=2007 (select New Zealand from the pull-down menu) (last visited Sept. 10, 2008).

[54] DU FRESNE, *supra* note 46, at 3.

[55] *Id.* at 1.

[56] FREEDOM HOUSE, FREEDOM OF THE PRESS, 2006, http://www.freedomhouse.org/template.cfm?page=251&year=2006 (select New Zealand from the pull-down menu) (last visited Sept. 10, 2008).

[57] Gray, *supra* note 29, at 444.

[58] *Id.*

III. ALTHOUGH § 68 CODIFIES NEW PROTECTIONS FOR JOURNALISTS AND THEIR SOURCES, IT CONTAINS SEVERAL SHORTCOMINGS

The New Zealand Evidence Act 2006 ("Act") draws common law and statutory authority into a single cohesive unit.[59] Before passage of the Act, evidence law was largely the product of common law, "comprising decisions made by judges in response to the particular set of facts before the court."[60] Parliament enacted only a few "piecemeal" statutory reforms as needed.[61] "The resulting complexity and inconsistency of the law of evidence result[ed] in undue legal argument, expense, and delays . . . "[62]

Section 68 is best understood as part of the Act's "comprehensive scheme" of evidentiary rules.[63] Until passage of the Act, New Zealand courts had not established a coherent policy for handling protection of journalists' sources.[64] One commentator described New Zealand's protections for confidential sources as follows: "[t]here are a number of overlapping rules that might apply depending on the circumstances, but ultimately the discretion is with the court to compel disclosure or not."[65] The Act, including § 68, sought to correct these ambiguities in the application of the law.

Section 68 replaces common law principles with statutory rules, but reserves significant discretion for the judiciary. So, while § 68 codifies a privilege for journalists and their sources, it also permits the same brand of judicial inconsistency the Act sought to correct.

A. Section 68 Has Strengths That Aid the Free Flow of Information in New Zealand

At first glance, § 68 seems a boon to reporters by presuming reporter-source confidentiality. This presumption makes nondisclosure the default position, from which the court can move only if the public interest so demands. The statute's opening salvo reads:

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[59] Evidence Bill, 2005, H.R. Bill [256-1], Explanatory Note, General Policy Statement, at 1.

[60] *Goff Introduces Evidence Bill*, SCOOP INDEPENDENT NEWS, May 3, 2005, http://www.scoop.co.nz/stories/PA0505/S00038.htm (last visited Sept. 10, 2008) (quoting New Zealand Government Press Release).

[61] *Id.*

[62] Evidence Bill, 2005, H.R. Bill [256-1], Explanatory Note, Current Law and the Bill, at 2.

[63] *Id.* at General Policy Statement.

[64] New Zealand Law Commission, *supra* note 22, ¶ 342.

[65] Kelly Buchanan, *Freedom of Expression and International Criminal Law: An Analysis of the Decision to Create a Testimonial Privilege for Journalists*, 35 VICTORIA UNIV. OF WELLINGTON L. REV. 609, at 631 (Oct. 2004).

> 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.[66]

This codification shifts the burden of proof from the reporters who, before, had to convince the court of the need for confidentiality, to the party seeking disclosure.[67] On the surface, this burden-of-proof transfer has the potential to create sweeping reform in the area of reporter-source confidentiality. The practical value of this shift, however, remains to be seen. Courts often seem more amenable to arguments in favor of disclosure than arguments in favor of confidentiality.

Section 68 also casts a fairly wide net. Namely, the privilege applies not only to testimony, but also to production of documents that explicitly disclose the confidant or would "enable that identity to be discovered."[68] It would make little sense if the party seeking disclosure could simply use the reporter's notes as a back-door method of acquiring the identity.[69]

However, the wide net needs some minor repairs. The operative terms in § 68(1), as excerpted above, are "would disclose" or "enable [the informant's] identity to be discovered."[70] A court could find this language to be as narrow as, say, the informant's name, date of birth, or other readily identifiable characteristic; on the other hand, the language could be broad enough to swallow any substantive information imparted to the journalist that a diligent person could use to ferret out the source's identity. Section 68 sheds little light on whether the actual information imparted to the journalist is protected along with the identity. The narrow construction seems particularly susceptible to abuse in whistleblower scenarios where only a handful of people have access to the disclosed information. If that type of substantive information is admitted into evidence, the privilege will not operate effectively.

Accordingly, § 68(1)'s terminology should be more precisely defined, preferably enumerating all types of journalistic work product (*e.g.* notes, outtakes, recordings, and so on) that could be used to identify a source.

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[66] Evidence Act 2006, 2006 Pub. Act No. 69, § 68(1) (N.Z.).

[67] Buchanan, *supra* note 65, at 632.

[68] Evidence Act 2006, 2006 Pub. Act No. 69, § 68(1) (N.Z.).

[69] This protection of documents exists at common law under the so-called newspaper rule. However, the newspaper rule applies only to the pretrial discovery phase of a matter. *See* JOHN BURROWS & URSULA CHEER, MEDIA LAW IN NEW ZEALAND 567-68 (5th ed. 2005).

[70] Evidence Act 2006, 2006 Pub. Act No. 69, § 68(1) (N.Z.).

Without more, the court could narrowly define the reporter-source privilege, making it a privilege in name only.

B. Section 68 Contains Flaws That Undermine the Intent, Application, and Purpose of the Privilege

Section 68 has not yet been tested by the New Zealand courts. In that light, the court of first impression should keep in mind three broad categories in which § 68 is deficient: 1) it is inconsistent with the New Zealand Bill of Rights Act 1990; 2) § 68 circumscribes common law protections; and 3) it has not kept pace with the general environment of press protections New Zealanders enjoy. The qualified privilege created by § 68 at best improves incrementally on the status quo and, at worst, functions to impair common law and existing statutory protections. Despite the new presumption of nondisclosure, in many ways § 68 is also weaker than the prior privilege regime.

1. Section 68's Imprecision Sabotages Iron-Clad Protection, Leaving the Confidentiality of Journalists' Sources at the Court's Discretion

The overarching weakness of § 68 is its malleability. The presumption of confidentiality afforded in § 68(1) is all but gutted in the very next breath. Section 68(2) creates a balancing test that gives the presiding judge wide latitude to overcome the presumption:

> 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.[71]

By couching the balancing test in broad language without effective fail-safes placed upon the judiciary, Parliament may have made it less challenging for judges to order disclosure than at common law. This circumstance exists because the Evidence Act 2006, in which § 68 is codified, expressly

[71] *Id.* § 68(2).

supersedes the common law. "The Act reflects current developments in evidence law and takes into account fundamental changes in some areas," said Justice Minister Mark Burton.[72] "It also clarifies the existing law by removing ambiguities and inconsistencies."[73] When § 68 is eventually tested, the party seeking disclosure will undoubtedly argue that the law tosses out the old common law protections in favor of the codified and imprecise balancing test.

Parliament undoubtedly saw § 68's balancing test as an asset to the administration of justice. The courts themselves have long expressed an interest in not being "tied hand and foot" by rigid, forced adherence to press freedoms.[74]

It is a point well taken. Journalists should not have an absolute privilege in *all* circumstances. Common sense dictates the need for some limits on free press. In an example birthed by the modern terrorism environment, if a journalist is truly the only outlet that has information imperative to preventing imminent harm, a court should be able to compel disclosure of that information. Accordingly, a balancing test makes good sense. By definition, balancing tests must have some room to stretch to meet the circumstances of each case. However, they should not permit a degree of elasticity that provides room for judges to uphold subpoenas for source identifying information when free expression in free society dictates that confidentiality should stand.

Experience with Section 35 of New Zealand's Evidence Amendment Act (No. 2) 1980[75] ("§ 35") illustrates some problems that can arise from open-ended balancing tests in the context of confidential sources. The thrust and language of § 68 is strikingly similar—and indeed may have been largely inspired by—§ 35. Section 35 creates a balancing test providing judges with general discretion to excuse any witness from answering questions or producing documents that would constitute a breach of confidence.[76]

Section 35 does not mention journalists specifically, although it squarely implicates their line of work. Subsection (2) requires the court to "consider whether or not the public interest in having the evidence disclosed

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[72] *The Evidence Act Was Passed by Parliament Today*, SCOOP INDEPENDENT NEWS, Nov. 23, 2006, http://www.scoop.co.nz/stories/PA0611/S00465.htm (last visited Sept 10, 2008) (quoting New Zealand Government Press Release).

[73] *Id*.

[74] Attorney-General v. Mulholland, [1963] 2 Q.B. 477 (Court of Appeal) (Donovan L.J.).

[75] *See* Evidence Amendment Act (No. 2) 1980, 1980 Pub. Act No. 27, § 35 (N.Z.); *see also* BURROWS & CHEER, *supra* note 69, at 565.

[76] Evidence Amendment Act (No. 2) 1980, 1980 Pub. Act No. 27, § 35 (N.Z.).

to the Court is outweighed, in the particular case, by the public interest in the preservation of confidences between persons . . . ."[77] Furthermore, the court must consider specific factors when balancing the arguments, such as: "(a) The likely significance of the evidence to the resolution of the issues to be decided in the proceeding: (b) The nature of the confidence and the special relationship between the confidant and the witness: (c) The likely effect of the disclosure on the confidant or any other person."[78] As one New Zealand media law textbook notes, "[i]t is clear that the power to excuse the witness [under § 35] is *discretionary*," and that power is used only "*occasionally*" by the courts.[79]

In fact, the balancing test in § 35 was recently exploited in the New Zealand case *R v. Patel*.[80] In this case, Keith Slater, a television reporter for TV3's program *60 Minutes*, briefly interviewed an anonymous police informer concerning the murder-for-hire orchestrated by defendant Bhikubhai Patel.[81] Patel subpoenaed Slater to disclose the interview contents and the identification of the source. The court, after applying the balancing test set forth in § 35, in addition to the commitment to free flow of information inherent to Section 14 of New Zealand's Bill of Rights Act 1990 ("§ 14"),[82] dismissed Slater's motion to quash the subpoena.[83] Suddenly facing a live subpoena, Slater faced contempt of court if he did not divulge his source.

In making its decision, the *Patel* court eviscerated the simple balancing test in § 35—a test which, again, closely resembles § 68. Justice Cooper wrote, "[i]n my view, having regard to the nature of the defence, the *inevitable* conclusion is that Mr Slater's evidence is likely to be highly significant to the resolution of issues concerning [the informant's] credibility, which is plainly a matter to be addressed under s 35(2)(a) of the Act."[84] With this sentence, the court dispatched the public's interest in free expression. In fact, the "inevitability" envisioned by Justice Cooper conflicts with the rights embedded in § 14, § 35, and New Zealand's common law commitment to press protections.

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[77] *Id*. § 35(2).

[78] *Id*. § 35(2)(a)-(c).

[79] BURROWS & CHEER, *supra* note 69, at 565 (emphasis added).

[80] R v. Patel, [Oct. 27, 2005] CRI-2004-004-014009, ¶ 60 (H.C., Auckland) (Cooper J).

[81] Patel has since been sentenced to five years in jail for the crime. *See Man Jailed for Trying to Have His Wife's 'Lover' Killed*, THE N.Z. HERALD, Apr. 4, 2007, *available at* http://www.nzherald.co.nz/assault-and-homicide/news/article.cfm?c_id=124&objectid=10432523.

[82] New Zealand Bill of Rights Act 1990, 1990 Pub. Act No. 109, § 14 (N.Z.).

[83] Slater, the journalist, could not rely on § 68 as it was not yet on the books.

[84] R v. Patel, [Oct. 27, 2005] CRI-2004-004-014009, ¶ 86 (H.C., Auckland) (Cooper J) (emphasis added).

The court offered further ruminations regarding journalists' ability to maintain confidentiality when interviewing sources, including this troubling conundrum:

> In a situation where the person providing the information is a key witness in a prosecution and will of necessity have to give evidence in a public trial, it could not properly be assumed either by the witness or the reporter that the content of their discussions would be able to be kept private.[85]

This appears to establish, at least in Justice Cooper's courtroom, that when a reporter talks to a "key witness" before that witness testifies, the confidentiality of that conversation cannot be preserved. Because Justice Cooper applied the balancing test in § 35 to arrive at this decision, the precedent does not bode well for journalists who rely on the similar balancing test codified in § 68.

The *Patel* case exemplifies the need for more robust protections in New Zealand's reporter shield law. If Parliament does not reinforce § 68, it will offer few protections beyond those dismissed by the *Patel* court under § 35. Applying today's journalists' privilege, New Zealand courts could easily reach the same result as the *Patel* court, with only the added hurdle of inserting a sentence in the opinion that overcomes § 68's presumption of nondisclosure. As *Patel* demonstrates, judges applying § 68's balancing test could prioritize the "public interest" in full evidentiary disclosure at the expense of source confidentiality and freedom of the press.

Proponents of the balancing test cite another recent case, *R v. Cara & Kelman*,[86] as evidence that such tests protect rather than undermine free speech. In *Cara*, one of two defendants accused of being an Israeli spy sought information published by journalists to aid his defense.[87] The *Cara* court excused three journalists for the *New Zealand Herald* from giving evidence, sought under a subpoena, regarding confidential sources.[88]

The *Cara* opinion, however, stands as a hollow victory for confidential source protection. Although the court ultimately did not compel disclosure under § 14 and § 35, the decision turned on the fact that the evidence was deemed irrelevant to the case, not because free press trumped fair trial in a head-to-head confrontation. The court ruled that the party seeking disclosure was merely engaged in a fishing expedition, "[n]or is the

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[85] *Id.* ¶ 84.
[86] R v. Cara & Kelman, [2004] CRI-2004-004-006560 (H.C., Auckland).
[87] *Id.* ¶ 7.
[88] *Id.* ¶ 2.

evidence sought directly relevant to the central issue of whether or not the accused can receive a fair trial."[89] If the information were indeed relevant, and the court nevertheless held that free press trumped fair trial, then the ruling would help solidify the importance of journalistic privilege under § 35's balancing test. The *Cara* court merely sidestepped the conflict by holding the sought evidence irrelevant.

2. Section 68 Is Inconsistent with the Common Law Necessity Requirement, and Neglects to Codify Important Protections Under It

An understanding of New Zealand's common law as it pertains to § 68 requires a discussion of English common law, from which New Zealand's common law derives. New Zealand courts apply English precedent unless New Zealand courts have distinguished the particular legal issue. Even in the case of distinguished law, the English common law still carries persuasive authority.[90] New Zealand courts look beyond England, as well, for persuasive authority. One legal scholar has noted that "New Zealand courts will consider authorities from a variety of other common law jurisdictions, especially Canada, Australia, the United Kingdom, and the USA."[91]

English common law courts often required a showing of "necessity" before ordering disclosure of confidential sources or placing restrictions on the press. Although the "necessity" threshold has waxed and waned over time, its protection was consistently greater than that provided for by § 68, which has no such requirement. English courts seem comfortable with a flexible "degree of need"[92] to compel disclosure. One judge[93] wrote: "I doubt if it is possible to go further than to say that 'necessary' has a meaning that lies somewhere between 'indispensable' on the one hand, and 'useful' or 'expedient' on the other. . . . The nearest paraphrase I can suggest is 'really needed.'"[94]

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[89] *Id.* ¶ 42.

[90] *See* Bureau of East Asian and Pacific Affairs, Dep't of State, *Background Note: New Zealand* (May 2008), http://www.state.gov/r/pa/ei/bgn/35852.htm (last visited August 24, 2008) ("New Zealand law has three principal sources--English common law, certain statutes of the U.K. Parliament enacted before 1947, and statutes of the New Zealand parliament. In interpreting common law, the courts have been concerned with preserving uniformity with common law as interpreted in the United Kingdom.").

[91] Margaret Greville, *An Introduction to New Zealand Law & Legal Information*, Sept. 2, 2002, http://www.llrx.com/features/newzealand.htm (last visited Aug. 24, 2008).

[92] Saunders v. Punch Ltd., [1998] 1 W.L.R. 986, 993.

[93] Lord Griffiths, writing in In re An Inquiry under the Company Securities (Insider Dealing) Act 1985 [1988] A.C. 660, 704.

[94] Saunders v. Punch Ltd., [1998] 1 W.L.R. 986, 993 (quoting In re An Inquiry under the Company Securities (Insider Dealing) Act 1985 [1988] A.C. 660, 704).

Similarly, the European Court of Human Rights, in *The Sunday Times v. United Kingdom (No. 2)*, the famous *Spycatcher* case, held that necessity "implies the existence of a pressing social need."[95] The *Spycatcher* cases revolved around a tell-all book of the same title, written by a former British spy. The book chronicled MI5's attempt to discover a Soviet mole. Citing national security concerns, the British government sought to gag newspapers from running excerpts of the book, but the newspapers prevailed. Even in the national security context, the government had not met its burden of proof on a showing of necessity. These cases illustrate that while the necessity scale is flexible, it by definition remains within the boundaries of protectiveness.

In the New Zealand case *Cara*, *supra*, the court used its discretion under § 35 to implement something very similar to a necessity test.[96] The court excluded the evidence because it was "not relevant or essential"[97] to fair trial concerns. However, the court was not guided in that direction by forceful legislation; it found the evidence unnecessary at its own discretion and under the impetus of common law.

Under the English common law, a finding of "necessity" was in part a function of whether the party seeking disclosure had exhausted other means of obtaining the information before approaching journalists. Often, the failure to seek other sources of the information could be "a powerful, even a decisive, factor against the intervention of the court."[98] The necessity test required parties to exhaust other means of obtaining the desired information before disclosure was contemplated, resulting in limited and appropriate instances of compelled disclosure.

The exhaustion requirement is a sensible protection that has relatively little impact on the administration of justice, yet delivers huge windfalls for free expression. Other jurisdictions have embraced this exhaust-other-avenues approach. Guidelines established by the United States Department of Justice, for example, require prosecutors to exhaust reasonable means before issuing subpoenas to reporters.[99] English courts agree. In *Ashworth Hospital Authority v. MGN Ltd.*, the court held that "in order to demonstrate that disclosure of a source is necessary, a claimant must show that all other reasonable means have been employed unsuccessfully to identify the

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[95] The Sunday Times v. United Kingdom (No. 2), 14 Eur. Ct. H.R. 229, 234 (1992).
[96] Gray, *supra* note 29, at 449-450.
[97] R v. Cara & Kelman, [2004] CRI-2004-004-006560, ¶ 43 (H.C., Auckland).
[98] Saunders v. Punch Ltd., [1998] 1 W.L.R. 986, 997.
[99] 28 C.F.R. § 50.10(b) (2008).

source."[100] The case *Attorney-General v. Mulholland* states explicitly that "if the information can be obtained elsewhere, it is not relevant or necessary for [the journalist] to furnish it."[101]

While *Ashworth* and *Mulholland* speak in firm tones about the need to exhaust other sources, the leading case from the English judiciary on journalistic source protection, *Saunders v. Punch Ltd.*, backs off the requirement: "I do not say that the making of such attempts is a necessary precondition of the court's assistance . . . ."[102]

Section 68, in contrast, remains silent on the need to exhaust. This deficiency potentially permits parties to engage in so-called fishing expeditions without first attempting to acquire the information from non-media sources. However, a court could find an exhaustion requirement implicitly exists in the catchall language of § 68(3): "[t]he Judge may make the order subject to any terms and conditions that the Judge thinks appropriate."[103] Whether judges will insert an exhaustion requirement into § 68(3) remains to be seen.

New Zealand courts might follow the *Cara* precedent, which birthed something similar to a necessity requirement from the balancing test in § 35. The same requirement could be read into § 68's balancing test. The waters in this pool are very murky, though, and in the end, journalists seeking to quash subpoenas will find themselves at the court's discretion regarding an exhaustion requirement. At worst, a court could find that the necessity to seek information from a non-journalist source will not apply, as it is not expressly enumerated in § 68. After all, the drafters had the opportunity to include an exhaustion requirement, but chose not to.

3. Section 68 Does Not Meet the Mandate for Free Expression Found in § 14 of New Zealand's BORA

Similar to England, New Zealand does not have a formal written constitution.[104] Instead, its constitutional authority is formed through an amalgam of statutes, treaties, court decisions, and other authority.[105] The New Zealand Bill of Rights Act 1990 ("BORA"), which spells out the fundamental rights and freedoms enjoyed by New Zealanders, is one of the

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[100] Ashworth Hospital Authority v. MGN Ltd., [2001] 1 W.L.R. 515, 536 (Court of Appeal) (Laws L.J.).

[101] Attorney-General v. Mulholland, [1963] 2 Q.B. 477, 482-83 (Court of Appeal) (Donovan LJ).

[102] Saunders v. Punch Ltd., [1998] 1 W.L.R. 986, 997.

[103] Evidence Act 2006, 2006 Pub. Act No. 69, § 68(3) (N.Z.).

[104] *See* The Governor-General of New Zealand—New Zealand's Constitution, http://www.gov-gen.govt.nz/role/constofnz.htm (last visited Sept. 10, 2008).

[105] *Id.*

documents afforded constitutional stature. Section 14 of BORA addresses the free flow of information in society and freedom of the press. It states simply: "Everyone has the right to freedom of expression, including the right to seek, receive, and impart information and opinions of any kind in any form."[106]

Section 14 is a powerful legal tool for people working in the news business. According to one legal scholar and practitioner:

> Perhaps the most significant legal change in the last two and a half decades has been the enactment of the New Zealand Bill of Rights Act 1990. Section 14 of the Bill of Rights has provided a new focus for arguments based on freedom of expression, and has allowed the media to be more assertive, and more successful, in pressing claims to freedom of expression in the courts . . . . [P]rior to the 1990s the media did not tend to talk of a 'right' to freedom of speech or expression. Now the courts are required by statute to act consistently with the right to freedom of expression.[107]

As noted in section II.A, supra, the journalistic necessity of cultivating, utilizing, and maintaining confidential sources is imperative to the free flow of information. Confidential sources fit within the phrase "information and opinions of any kind in any form."[108] Accordingly, because § 68 does not offer robust protections to confidential sources, it is arguably inconsistent with New Zealand's BORA. By allowing such wide judicial discretion, § 68 could be construed as failing the guaranteed "right to freedom of expression" in BORA's § 14. The shield law should be strengthened to comply with the broadest interpretation of BORA's mandate.

From a policy standpoint, the weakness of § 68 also opens the door to a chilling effect. This reality is inconsistent with § 14's purpose. To enforce § 14's ideals, the language of § 68 should be read broadly to promote the relationships between reporters and their sources. The right to "receive" information, under BORA, should demand nothing less.

Section 25 of BORA establishes robust rights for the accused. Criminal prosecutions are an area where the confidentiality of sources is often challenged. Rights of the accused are spelled out in BORA under Section 25 ("§ 25").[109] Section 14 and § 25 butt heads, almost by definition,

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[106] New Zealand Bill of Rights Act 1990, 1990 Pub. Act No. 109, § 14 (N.Z.).

[107] Simon Mount, *The Interface Between the Media and the Law*, 2006 N.Z. L. REV. 413 (2006).

[108] New Zealand Bill of Rights Act 1990, 1990 Pub. Act No. 109, § 14 (N.Z.).

[109] *Id.* § 25 (Section 25 reads, in relevant part: "[e]veryone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights: (a) The right to a fair and public

in matters where a party seeks disclosure of a confidential source. In most cases, only one principle, either free press or fair trial will survive, not both. As the New Zealand Court of Appeal recognized in *Gisborne Herald Co. Ltd. v. Solicitor-General*, "[b]oth values have been affirmed by the Bill of Rights. . . . Full recognition of both these indispensable elements can present difficult problems for the Courts to resolve."[110]

Despite the equal footing afforded these "indispensable elements," judges often use fair-trial justifications to overcome § 14 (and § 35) arguments. Courts have consistently ruled that free press issues must yield to fair trial concerns, although BORA makes no hierarchical determination and certainly does not demand this result.[111] A New Zealand scholar noted, "once it is established that there is a real risk of prejudice to a fair trial, freedom of expression must be curtailed."[112]

Section 25's dominance seems rooted in the logic of Wigmore's enduring—and apparently unshakable—adage that "the public . . . has a right to every man's evidence."[113] In free nations, those facing loss of liberty typically have the right to present an effective defense. But in New Zealand, that right is not absolute. It must be balanced against the *equally* important right of "[f]reedom of the press as a vehicle for comment on public issues . . ."[114] as *Gisborne* indicates. More recently, the *Cara* court stated that "the Court is here balancing two rights affirmed by the Bill of Rights which in the circumstances of this case are in competition, the one with the other, to which the Court must seek a response that is proportionate and justifiable."[115]

4. Section 68 Invites Conflict Between Free Press and Fair Trial Interests

In the future, § 68 will likely face the same withering attacks as § 14. This eventuality is assured by express language in the definition subsection, § 68(5): "public interest in the disclosure of evidence includes, in a criminal

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hearing by an independent and impartial court . . . (e) The right to be present at the trial and to present a defence: (f) The right to examine the witnesses for the prosecution and to obtain the attendance and examination of witnesses for the defence under the same conditions as the prosecution").

[110] Gisborne Herald Co. Ltd. v. Solicitor-General, [1995] 3 N.Z.L.R. 563, 571. *See generally* BURROWS & CHEER, *supra* note 69, at 419.

[111] Gray, *supra* note 29, at 445.

[112] BURROWS & CHEER, *supra* note 69, at 419.

[113] JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW (McNaughton rev. ed., Little Brown & Co., Boston, 1961) vol. 8, § 2285, 527.

[114] Gisborne Herald Co. Ltd. v. Solicitor-General, [1995] 3 N.Z.L.R. 563, 571.

[115] R v. Cara & Kelman, [2004] CRI-2004-004-006560, ¶ 38 (H.C., Auckland).

proceeding, the defendant's right to present an effective defence."[116] This language shoots holes in many arguments journalists could hope to muster against criminal defendants' right to a fair trial. This is one of the few issues the drafters choose to address with great specificity—and for good reason. The rights protected by § 25 should not be automatically dislocated by New Zealand's shield law. The qualified journalists' privilege must permit some room for disclosure when justice truly demands.

The bad news for free press is that almost by definition the triers of fact have more concrete experience with the court system than the media. Judges have, in a very real sense, devoted their lives to the administration of justice and an efficient, well-ordered court process. In that vein, when balancing the "indispensable elements," judges readily understand the impact of excluding testimony and evidence when excusing a journalist from testifying. However, the impact on society for disclosure of confidential sources is far less intuitive and comprehensible. The New Zealand Law Commission has recognized that freedom of expression often faces a judicial handicap:

> These potential harms to society are not easy to evaluate in themselves, let alone to balance against the potential harm which may be done to the administration of justice if significant information is not disclosed. Nor can they be readily demonstrated in a courtroom setting. *Judges who administer justice every day may perhaps be more conscious of costs for the legal system than broader social costs*.[117]

The damage done to fair trials by maintaining confidential sources is often overstated and, conversely, the importance of protecting free press interests is often underestimated. "[P]ublic costs of nondisclosure in terms of lost information, evidence, opportunities to suppress or punish wrongdoing are often relatively minimal or illusory,"[118] writes one media law scholar. "[T]he public interest in protecting [confidential] sources should nearly always prevail and giving priority to *any* other public interest should *never* be automatic."[119] A prominent New Zealand media law scholar stated recently, "[g]iven the statutory protection of freedom of expression in [§ 14] of the New Zealand Bill of Rights Act 1990, it needs to be considered

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[116] Evidence Act 2006, 2006 Pub. Act No. 69, § 68(5) (N.Z.) (bold formatting removed).
[117] New Zealand Law Commission, *supra* note 22, ¶ 219 (emphasis added).
[118] Brabyn, *supra* note 29, at 922.
[119] *Id.*

whether, on some occasions, the public interest in discussing an issue should prevail over the right to a fair trial."[120]

While courts should be sensitive to both these competing rights, they should not so readily dismiss free-press concerns. In fact, the tension at issue might be more accurately framed not as a conflict between free press and fair trial, but rather a conflict between fair trial and the public's right to know. The distinction is subtle, but revolutionary. After all, media outlets fulfill their purpose by supplying information to their audience. The press does not challenge compulsion subpoenas entirely for its own satisfaction; instead, the press fights to retain confidentiality for the interest of public access to information. If viewed through these glasses (*i.e.,* the press is an extension of the public at large) judges might be more willing to maintain confidences.

5. Section 68 Does Not Adequately Protect Freedom of Information

Almost fifteen years ago, the New Zealand Law Commission[121] authored a paper weighing the practicality of certain privileges, including a journalists' privilege.[122] The Commission ultimately found that § 35 did not, by itself, sufficiently protect journalists. "Although . . . the legislature appear[s] to have had journalists in mind when [§ 35] was adopted, the protection which § 35 offers is no longer adequate."[123] Accordingly, the Commission recommended modifying § 35 to include protections equivalent to a qualified journalists' privilege.[124] The proposals contained safeguards to ensure the untrammeled free flow of information.[125] "*With these amendments*. . . a provision equivalent to § 35 in the proposed evidence code would adequately protect journalists' sources from compulsory disclosure."[126] However, § 68's drafters seem to have ignored many of the amendments suggested by the Commission, favoring instead the naked balancing test from § 35. The inference, then, is that without the safeguards, the Law Commission considers § 68's current balancing test inadequate. The following two pitfalls are of particular concern.

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[120] BURROWS & CHEER, *supra* note 69, at 419.

[121] The Law Commission is "an independent, government-funded organisation, which reviews areas of the law that need updating, reforming or developing. It makes recommendations to Parliament, and these recommendations are published in [its] report series." New Zealand Law Commission, *About Us*, http://www.lawcom.govt.nz/AboutUs.aspx (last visited Sept. 10, 2008).

[122] *See generally* New Zealand Law Commission, *supra* note 22.

[123] *Id.* at 114, ¶ 354.

[124] *Id*. at 115.

[125] *Id.* at 114-115.

[126] *Id*. at 115, ¶ 355 (emphasis added).

First, by creating a blanket balancing test, § 68 fails to "take into account the nature of the proceeding, such as whether it is criminal or civil."[127] Lumping both civil and criminal proceedings under the same standard shows a troubling and fundamental misunderstanding of the rights at play. By failing to differentiate between criminal and civil matters, § 68 implies that the same standard applies to both proceedings. However, the qualified journalists' privilege should be bifurcated, with separate standards for civil and criminal matters.

The evidentiary standard in criminal proceedings is more rigorous than in civil matters. In most cases, New Zealand criminal defendants must be found guilty beyond a reasonable doubt, while the standard in civil cases is typically lower, often more likely than not.[128] This division recognizes that personal liberty in a criminal proceeding is of a different quality than liability in a civil proceeding.

The opposite should be true for compelled disclosure. While § 68 could be strengthened in general, compelled disclosure in civil matters where life, liberty, and the public welfare are *not* at risk should be especially difficult to obtain. The value to society of protecting the free flow of information is almost always more important than the particular issues litigated in civil matters. Criminal matters, however, are more problematic. The source's identity should still be appropriately protected, but some concessions should be made for imminent and dire threats to public or personal safety.

A single standard cannot be appropriate for both proceedings. The flexibility of § 68, of course, permits judges to apply different standards to different proceedings, but it also allows them to abuse that flexibility.

Second, the Law Commission's paper recommended requiring a less-intrusive method for acquiring the sought-after identity, stating, "alternative avenues should be exhausted before ordering a journalist to disclose."[129] Section 68 contains no such requirement. Although § 68(3) states that a judge can make the disclosure subject to "any terms and conditions that the Judge thinks appropriate," it does not mandate using a less-intrusive method where possible. The less-intrusive method guarantees that parties seeking disclosure do not use court proceedings merely as fishing expeditions or as expeditious means of acquiring informants' identities.

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[127] *Id.* ¶ 354.

[128] *See* New Zealand Ministry of Justice, *The New Zealand Legal System*, http://www.justice.govt.nz/pubs/other/pamphlets/2001/legal_system.html (last visited Sept. 10, 2008).

[129] *Id.*

In addition to § 68's omission of the Law Commission's recommended amendments, a few notable ambiguities in § 68 create considerable concern. First, it is unclear whether § 68 applies outside the scope of a "civil or criminal proceeding,"[130] including agency hearings, military courts and, most importantly, tribunals such as the Broadcasting Standards Authority ("BSA"). The BSA, an independent crown entity, operates a "quasi-judicial role of determining complaints"[131] regarding media broadcasting. Tribunals such as the BSA "hear evidence; their determinations often affect the rights of the parties before them; [and] they frequently decide something in the nature of a legal dispute between parties."[132] Accordingly, § 68's lack of specificity on this issue could, at best, create considerable uncertainty regarding the use of a journalists' privilege in certain trial-like settings and, at worst, preclude its protections.

Second, a court will have to determine who falls under the auspices of § 68. The statute declares, "neither the journalist nor his or her employer is compellable"[133] to disclose an informant's identity. Section 68(5) describes a journalist as one who "may be given information by an informant."[134] A narrow reading of this language might preclude, for example, television news producers and newspaper copy editors. Moreover, § 68 applies only to those who receive confidences in the "normal course of that person's work."[135] A court could determine that bloggers, freelance journalists, or book authors who only occasionally foray down investigative avenues should not be afforded § 68's protections. The threshold question becomes textual in nature: What is the meaning of "work?" One judge might determine that, say, unpaid bloggers are "working," while another might rule that unpaid bloggers are merely engaging in a hobby. The ambiguity in this portion of § 68(5) is especially troubling in light of the ease and speed with which technology creates new mediums for the transmission of information.

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[130] Evidence Act 2006, 2006 Pub. Act No. 69, § 68(1) (N.Z.).

[131] *See* New Zealand Broadcasting Standards Authority, *About Us*, http://www.bsa.govt.nz/aboutus-intro.php (last visited Sept. 10, 2008).

[132] BURROWS & CHEER, *supra* note 69, at 430.

[133] Evidence Act 2006, 2006 Pub. Act No. 69, § 68(1) (N.Z.).

[134] *Id.* § 68(5).

[135] *Id.*

IV. NEW ZEALAND SHOULD LOOK TO OTHER JURISDICTIONS FOR GUIDANCE, INCLUDING U.S. FEDERAL LAW AND WASHINGTON STATE'S SHIELD LAW

New Zealand does not have to start from scratch in order to reasonably strengthen § 68. Two existing sources to which Parliament should look for guidance include United States federal law and the newly enacted shield law in Washington State. New Zealand would be well served by observing not only the protective advantages of the two models, but also their shortcomings. The state of the U.S. journalists' privilege should serve as a cautionary tale for New Zealand legislators, while Washington State's law models the appropriate level of protection, codified with assertive, informative, and unambiguous fail-safes on the courts.

A. The U.S. Congress Has Not Enacted a Federal Reporter Shield Law, Leaving the Circuit Courts in Disagreement Regarding the Boundaries of the Federal Reporter-Source Privilege

The United States lacks a statutory federal journalists' privilege to protect against compelled disclosure of confidential sources. Despite numerous proposed bills, Congress has not passed a shield law.[136]

From a judicial perspective, in *Branzburg v. Hayes* a five-member majority of the U.S. Supreme Court rejected a privilege permitting journalists to conceal confidential sources in a grand jury context.[137] Justice Powell's "decisive concurrence," [138] though, "called for a case-by-case balancing that takes into account press and law enforcement interests."[139] In light of Justice Powell's concurrence, some federal circuit courts have read the majority opinion's language very narrowly, finding breathing room for a balancing test outside the grand jury context.

For example, in the 1981 case *Zerilli v. Smith*,[140] the D.C. Circuit found that "in the ordinary case the civil litigant's interest in disclosure should yield to the journalist's privilege."[141] The *Zerilli* court also held that "a qualified privilege would be available in some circumstances even where

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[136] The Free Flow of Information Act 2007, S.B. 2035, was, as of this writing, awaiting a floor vote in the Senate. The House passed a similar bill, H.R. 2102, with bipartisan support on Oct. 16, 2007.

[137] Branzburg v. Hayes, 408 U.S. 665 (1972).

[138] Adam Liptak, *The Hidden Federal Shield Law: On The Justice Department's Regulations Governing Subpoenas to The Press*, 1999 ANN. SURV. AM. L. 227, 231 (1999).

[139] *Id*. at 231-32.

[140] Zerilli v. Smith, 656 F.2d 705 (D.C. Cir. 1981).

[141] *Id*. at 712.

a reporter is called before a grand jury to testify."[142] However, in the 2003 case *McKevitt v. Pallasch*,[143] the Seventh Circuit reverted back to the narrower majority viewpoint in *Branzburg*, declaring that journalists relying on a privilege "may be skating on thin ice."[144] The chaos among the circuits is not limited to *Zerilli* and *McKevitt*. The spectrum of protection fluctuates wildly, from relatively high in the Second and Ninth Circuits to completely unprotective in the Sixth Circuit.[145]

The *Branzburg* decision has led to a degree of uncertainty and lack of uniformity among the circuit courts. New Zealand risks a similar confusion with the vague balancing test of § 68. The language of § 68, as it now stands, permits New Zealand courts in various jurisdictions to establish disparate precedents.

In an attempt to offer some coherence to the reporter-source privilege, the U.S. Department of Justice ("DOJ") established internal guidelines directing that "the prosecutorial power of the government should not be used in such a way that it impairs a reporter's responsibility to cover as broadly as possible controversial public issues."[146] One commentator has remarked that the guidelines "arguably serve as a shadow federal shield law."[147] In fact, the DOJ guidelines provide for a balancing test very similar to New Zealand's § 68. Subsection (a) reads:

> In determining whether to request issuance of a subpoena to a member of the news media, or for telephone toll records of any member of the news media, the approach in *every* case must be to strike the proper balance between the public's interest in the free dissemination of ideas and information and the public's interest in effective law enforcement and the fair administration of justice.[148]

Recently, though, these protections failed to protect reporters Judith Miller and Matt Cooper from being held in contempt of court for refusing to reveal the identity of a source.[149] As former U.S. Solicitor General Ted Olson has

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[142] *Id*. at 711.

[143] McKevitt v. Pallasch, 339 F.3d 530 (7th Cir. 2003).

[144] *Id.* at 533.

[145] *See* Jeffrey S. Nestler, *The Underprivileged Profession: The Case for Supreme Court Recognition of the Journalist's Privilege*, 154 U. PA. L. REV. 201, 224 (2005). *See generally* Reporters Committee for Freedom of the Press, *The Reporter's Privilege*, http://www.rcfp.org/privilege (last visited April 21, 2008) (providing in-depth analysis of each circuit's stance on the privilege).

[146] 28 C.F.R. § 50.10 (2008).

[147] Liptak, *supra* note 138, at 236.

[148] 28 C.F.R. § 50.10(a) (2008) (emphasis added).

[149] Editorial, *Judith Miller Goes to Jail*, THE N. Y. TIMES, Jul. 7, 2005.

noted, "the Justice Department has had internal standards providing protection to journalists and their sources for 35 years, and Special Counsel Patrick J. Fitzgerald claimed to be adhering to those standards when he subpoenaed reporters in the Plame affair."[150]

Miller, in particular, felt the pain of reporting in an environment that has no strong protections for the free flow of information. She spent 85 days behind bars for conversations she had with top Bush Administration officials, most notably I. Lewis "Scooter" Libby, regarding the identity of CIA covert operative Valerie Plame.[151] Miller was released only when Libby authorized her to disclose his identity.[152] Miller later testified before the U.S. Senate Judiciary Committee, citing an "urgent need" for a federal reporter shield law.[153]

The federal status quo should serve as a caution signal to New Zealand lawmakers. Journalists should not go to jail for informing the public of matters important to democratic governance. The Miller fiasco is relevant because the DOJ guidelines are more stringent than § 68, including requiring reasonable attempts to locate the informant before haling the journalist into court,[154] mandating attempts at negotiations before seeking a subpoena,[155] getting express authorization of the U.S. attorney general,[156] and others. Still, they still did not protect Miller from serving jail time.

B. Washington State's Shield Law Strikes an Appropriate Balance Between the Public's Competing Interests in Disclosure and Confidentiality

In the absence of a coherent federal shield law in the United States, almost every state has recognized the need for a journalists' privilege.

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[150] Theodore Olson, . . . *Or Safeguards*, THE WASH. POST, Oct. 4, 2007, at A25.

[151] Norman Pearlstine, *How Libby's Trial Hurt the Press*, TIME, May 31, 2007.

[152] Susan Schmidt & Jim VandeHei, *N.Y. Times Reporter Released from Jail*, THE WASH. POST, Sept. 30, 2005, at 1.

[153] *Reporters' Privilege Legislation: An Additional Investigation of Issues and Implications: Before the S. Comm. on the Judiciary*, 109th Cong. (Oct. 19, 2005) (statement of Judith Miller, Senior Writer, The New York Times). Miller also stated, "I'm here because I hope you will agree that an uncoerced, uncoercable press, though at times irritating, is vital to the perpetuation of the freedom and democracy we so often take for granted." *Id*.

[154] 28 C.F.R. § 50.10(b) (2008).

[155] *Id*. § 50.10(c).

[156] *Id*. § 50.10(e).

Thirty-two states now have codified shield statutes;[157] another seventeen have some level of common law protections.[158]

One of the most recent state shield laws is also one of the strongest. The Washington State shield law is an example of a forceful, effective privilege that harmonizes the public's interest in confidentiality and the public's interest in disclosure. In the wake of the Judith Miller fiasco, Washington Attorney General Rob McKenna felt compelled to prevent a similar chain of events at the state level.[159]

Washington's shield law,[160] which went into effect July 22, 2007, creates an absolute privilege against compelled disclosure of the identity of confidential sources.[161] Whether the privilege is invoked in a civil or criminal proceeding, journalists are never required to turn over the "identity of a source of any news or information or any information that would tend to identify the source" in Washington State.[162] This clause helps rank the Washington law among the most protective shields in the nation.[163]

The statute also creates a qualified privilege for notes and other outtakes.[164] While not an absolute privilege, the qualified privilege recognizes that evidence and other information needs to be disclosed only in situations of compelling public interest.[165]

Washington's shield law has all the grit that New Zealand's § 68 lacks. It provides standards that guide courts down an established and well-tended path, allowing for consistent enforcement. Namely, it establishes standards that recognize the free flow of information in Washington. For example, on a micro level, the disclosure of information must be "highly material and relevant"[166] and "critical or necessary"[167] to the party's claim before compelled disclosure is even contemplated. On a macro level, a "compelling public interest"[168] must exist in the disclosure. Furthermore, the party seeking disclosure must have "exhausted all reasonable and

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[157] Bree Nordenson, *A New Shield Law in Washington State*, COLUM. JOURNALISM REV., May 4, 2007, http://www.cjr.org/behind_the_news/a_new_shield_law_in_washington.php (last visited Oct. 10, 2008).
[158] Olson, *supra* note 150.
[159] Nordenson, *supra* note 157.
[160] WASH. REV. CODE § 5.68.010 (2007).
[161] *Id.* § 5.68.010(1)(a).
[162] *Id.*
[163] Nordenson, *supra* note 157.
[164] WASH. REV. CODE § 5.68.010(2) (2007).
[165] *Id.*
[166] *Id.* § 5.68.010(2)(b)(i).
[167] *Id.* § 5.68.010(2)(b)(ii).
[168] *Id.* § 5.68.010(2)(b)(iv).

available means" before subpoenaing journalists.[169] Importantly, the law also has expansive definitions of news media[170] and does not require a formalized promise between source and reporter; a "reasonable expectation of confidentiality" is enough.[171]

The first test of Washington's shield law was an apparent victory for the protection of confidential sources. On November 28, 2007, Seattle City Attorney Tom Carr subpoenaed three *Seattle Times* reporters to turn over the identity of a source that had given the reporters information about a former Seattle police officer.[172] The officer, John Powers, sued the Seattle Police Department for wrongful termination and defamation following an alleged brutality incident. Carr, in defending the city, sought the subpoenas to discover what information the journalists could furnish.[173]

Carr, who may have been unaware of the shield, withdrew the request outright after the *Seattle Times'* attorneys filed a document explaining the steep hill Carr had to climb to get the sources.[174] In the court brief, which supported the motion for a protective order against the subpoenas, the *Seattle Times* argued that "the new shield law flatly **bars any order** compelling disclosure of information relating to the identity of a confidential source, for which there is an absolute privilege."[175] The brief went on to argue that for any "other news and information" the Seattle City Attorney failed to meet the high bar.[176] Namely, the subpoenas failed to persuade that the sought-after material was "highly material and relevant to its defense;"[177] that the reporters' testimony was "critical or necessary;"[178] that the city "exhausted all reasonable and available means to obtain testimony from alternative sources;"[179] and that no "compelling [public] interest in forcing non-party reporters to divulge their sources" existed.[180]

The shield law's author, attorney Bruce E.H. Johnson of Davis Wright Tremaine, explained as follows: In Washington, reporters "really do have

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[169] *Id.* § 5.68.010(2)(b)(iii).
[170] *Id.* § 5.68.010(5).
[171] *Id.* § 5.68.010(1)(a).
[172] Maureen O'Hagan, *Three Times Reporters Subpoenaed on Sources*, THE SEATTLE TIMES, Nov. 30, 2007.
[173] *Id.*
[174] Maureen O'Hagan, *City Drops Demand for Times Reporters' Sources*, THE SEATTLE TIMES, Dec. 6, 2007.
[175] Brief in Support of Seattle Times' Motion for Protective Order, Powers v. City of Seattle, No. C06-1727RSL, Nov. 29, 2007, at 4 (emphasis in original).
[176] *Id.* at 5.
[177] *Id.*
[178] *Id.* at 6.
[179] *Id.*
[180] *Id.*

the ability to promise confidentiality, as opposed to only promising confidentiality until they get tired of sitting in prison."[181]

V. PARLIAMENT SHOULD TOUGHEN § 68 OF THE NEW ZEALAND EVIDENCE ACT 2006 TO BETTER PROTECT CONFIDENTIAL SOURCES

New Zealand's Parliament should tighten § 68 to hem in the discretion of the nation's courts. Stronger protections would give the shield law the backbone necessary to ward off a chilling effect and comfort confidential sources. Otherwise, § 68 will all but maintain the status quo of New Zealand's no "coherent policy,"[182] allowing courts to perform very much the same nebulous analysis as before. Four suggestions follow:

First, the term "outweighs," in § 68(2), requires a mere preponderance of public interest in disclosure to justify compelling journalists to reveal their sources.[183] Said another way, if the judge feels the scales tip ever so slightly in favor of disclosure (say, fifty-one percent) then the judge should, by statute, order the disclosure. If Parliament enforced a standard of compelling public interest in the disclosure, instead of merely "outweighs," courts would have less opportunity to compel disclosure. The standard of compelling public interest would be more in line with New Zealand's historical commitment to media freedoms and the language in BORA. The term "outweighs" permits wide latitude for judges to compel disclosure.

Second, the party seeking compulsion should have to prove the interest in disclosure by clear and convincing evidence. As it stands now under § 68, the judge need only be "satisfied" in the disclosure.[184] New Zealand courts have long recognized the clear and convincing standard in the realm of prior restraints, which are also under the purview of BORA's § 14.[185] Why not create consistency by recognizing the same standard for confidential source protection? The clear and convincing standard, which has been embraced by Washington State in its shield law, would set the bar high enough to guarantee that parties would not routinely seek subpoenas without good cause.

Third, § 68 should ensure that the disclosure be highly material and relevant. This language would preclude most fishing expeditions. The *Patel* case serves a cautionary tale of the types of information that can be

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[181] Nordenson, *supra* note 157.
[182] Buchanan, *supra* note 65, at 631.
[183] Evidence Act 2006, 2006 Pub. Act No. 69, § 68(2) (N.Z.).
[184] *Id.*
[185] Auckland Area Health Board v. Television New Zealand Ltd., [1992] 3 N.Z.L.R. 406 (C.A., Wellington).

compelled under § 68's lax standard. The court ultimately compelled disclosure in that case to prove the character of a witness, arguably stretching its discretion. The character of a witness typically would not meet the standard of highly material and relevant, and it certainly should not be good enough reason to risk a chilling effect on the free flow of information.

Fourth, by forcing journalists to expressly promise confidentiality in their conversations with sources, § 68(1) sets a very high threshold.[186] In New Zealand, the shield will not apply without a formal promise. However, reporters and their sources rarely communicate in such legalistic formalities. Particularly regarding sensitive issues, the parties may communicate via innuendo, inference, and body signals that, while unmistakable in context, might not satisfy the legal criterion in § 68(1). As an illustration, it does not appear that Prime Minister Clark and the *Sunday Star-Times* established the requisite promise. Despite Prime Minister Clark's belief that she was communicating confidentially,[187] her identity and conversations with the journalist would almost certainly have to be admitted into evidence as the reporter-source confidentiality was not formally guaranteed. Additionally, New Zealand contract law already offers a remedy for breach of confidence when formal promises are in play, making the requirement of a formal promise superfluous. As one celebrated New Zealand media law scholar has noted, "[o]ne class of case gives rise to no problem: where two parties are in a contractual relationship and *expressly* agree that information supplied by the one to the other is to be treated as confidential, that contractual undertaking can be enforced by all the ordinary contractual remedies."[188] Upgrading the law to include merely a reasonable expectation of confidentiality, as recognized in Washington State, would offer a sensible level of protection. The formality of an express promise is inconsistent with strong press freedoms and encourages a chilling effect on cooperation with the press.

VI. CONCLUSION

By inserting § 68 into its Evidence Act 2006, New Zealand made a laudable first attempt at protecting reporter-source confidentiality and, by extension, the public's right to know. The presumption of nondisclosure codified in the statute takes an assertive step toward promoting the free flow of information. However, § 68 falls short in other regards. Although the

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[186] Evidence Act 2006, 2006 Pub. Act No. 69, § 68(1) (N.Z.).

[187] *Fairfax Journalists Given Assurance on Protecting Sources*, THE N.Z. HERALD, May 9, 2005, *available at* http://www.nzherald.co.nz/section/1/story.cfm?c_id=1&objectid=10124530.

[188] BURROWS & CHEER, *supra* note 69, at 205 (emphasis in original).

shield law creates a presumption of nondisclosure, it is a presumption too easily overcome. To come into line with New Zealand's statutory framework, its long-standing commitment to press freedoms, and to promote the free flow of information, § 68 should be fortified with models from other democratic jurisdictions.