

With regards to the Public Interest Disclosure Bill 2013, Senator Wright has asked that the following question be put on notice for the Joint Media Organisations:

1. In recommendation 6 (page 6) of your submission you make the argument for carving out an exemption to the criminal offence of revealing identifying information about a discloser if it is done so in the course of news gathering/preparing a story/checking sources etc.

Subclause 20(3)(e) allows you to continue to gather news stories, the only requirement on news agencies is that they would have to seek the disclosers consent before talking to senior editorial staff/colleagues with experience in a certain area. Does this not already happen and in what other ways would news gathering be altered to how its currently practiced?

Response

As outlined in our submission, the parties to the Joint Media Organisation submission oppose the presumption of criminal liability – embodied in Clause 20(1) and 20(2) – for the use and/or disclosure of identifying information during the course of responsible news gathering.

The imposition of new criminal sanctions on journalists – regardless of available defences – weakens the ability to expose wrong doing, crime and corruption within the Commonwealth public service. This occurs because it exposes journalists to potential liabilities and criminal sanctions which in turn have a chilling effect on freedom of speech – directly impacting on news gathering.

As outlined in the submission, for the media representative presumed criminally liable, it may be the case that to prove an exception at subclause 20(3) in a court – including consent – that it would likely involve disclosing the identity of a confidential source. This is of deep concern and does indeed impact on news gathering.

Whether or not the identity of a source is disclosed internally (with or without consent) is a matter that will always depend on the circumstances of the particular case. There will be a number of considerations that the relevant journalist will need to take into account, such as:

- The level of trust and security at both editorial and discloser level;
- The nature of the material disclosed;
- The position of the discloser;
- How easily accessible the discloser is to the journalist.

A journalist must also consider any risk to the source, including in relation to whether making an additional contact to seek the required consent could compromise them. A discloser's explicit consent will therefore not necessarily always be sought before a journalist discusses the relevant material with editorial or senior staff.

It is also significant to recognise that the journalist is not the “publisher”, so a decision as to whether to publish would typically need to be discussed with senior producers, an executive producer, editor or legal advisors. Such discussions may also need to occur to establish the likely reliability of the source, and issues such as bona fides or lack of malice.

The Joint Media Organisations therefore maintain that the Bill must include an exception that allows the media to use and disclose identifying information for the purpose of inquiring into and investigating matters raised by a whistle-blower in the course of responsible news gathering.

For example, a journalist must be able to disclose to his or her producer, legal advisor or editor the identity of the informant, on a strictly confidential basis, for the purpose of making a decision whether to publish. This may particularly be the case with a junior journalist. Such a process is clearly distinct from publication. It is always necessary to assess the quality of an informant and an informant's motive.

Such an exception is therefore essential to ensure that journalists are not subject to criminal action for engaging in their usual business practices. It will also protect a discloser, because journalists will not be required to prove consent in legal proceedings. The Joint Media Organisations would be happy to engage with the Committee on appropriate wording for such an exemption.

More generally, the concerns of the Joint Media Organisations about the criminal liability provisions are in the broader context of the Bill as a whole, in particular that it:

- is overly narrow and restrictive in scope;
- is focused on process rather than outcomes; and
- appears to be drafted in favour of non-disclosure.

Further, the Bill is lacking a real avenue for 'unauthorised' disclosures – including to the media. The matter raised in the question – that of the presumption of criminal liability and the effect on journalists in undertaking their jobs – is illustrative of this.