

Additional comments by Liberal senators

1.1 Liberal senators acknowledge and support the stated objectives of the Evidence Amendment (Journalists' Privilege) Bill 2009 (Bill). However, the provisions of the Bill fall short of achieving those objectives.

Limitations of the object clause

1.2 The committee report endorses the object clause, despite its terminology restricting recognition of the public interest¹ and the problematic non-definition of the term 'journalist'.² Liberal senators understand the difficulties associated with defining 'journalist', but consider it necessary for the Bill to more precisely identify the persons to whom the privilege might apply (for example, bloggers).³

1.3 Liberal senators also note the Media Entertainment & Arts Alliance's call for greater protection of journalist-source confidentiality,⁴ and agree that the substantive provisions of the Bill should do more in this regard.

Extension of the privilege to journalists

1.4 While Part 3.10 Division 1A of the *Evidence Act 1995* (Act) and the Bill concern the journalist-source relationship, submitters and witnesses questioned why other professional relationships involving confidential communications are not granted protection, as is the case in NSW (section 126A of the *Evidence Act 1995* (NSW)) and as was recommended by both the WA Law Reform Commission and later, the Australian Law Reform Commission:

15.1 The uniform Evidence Acts should be amended to provide for a professional confidential relationship privilege. Such a privilege should be qualified and allow the court to balance the likely harm to the confider if the evidence is adduced and the desirability of the evidence being given. The confidential relationship privilege available under Part 3.10, Division

1 Public Interest Advocacy Centre, *Submission 5*, pp 2-3.

2 The Hon. C. Christian Porter MLA, WA Attorney-General, *Submission 2*, pp 4-5. Also, see the Hon. John Hatzistergos MLC, NSW Attorney-General, *Submission 9*, pp 1-2; and the Hon. Lara Giddings MP, Tasmanian Attorney-General, *Submission 13*, p. 1.

3 Liberal senators note that a proposed US federal shield law excludes bloggers by defining its 'covered person': see Australian Associated Press, Answers to Questions on Notice, 1 May 2009, p. 2. (received 1 May 2009).

4 Media Entertainment & Arts Alliance, *Submission 7*, p. 3 & pp 5-6.

1A of the *Evidence Act 1995* (NSW) should therefore be adopted under Part 3.10 of the *Evidence Act 1995* (Cth).⁵

1.5 Liberal senators agree that the law ought to recognise the public interest in professional confidential relationships generally. There is no reason why journalist-source relationships should be granted a higher level of protection than that granted to interests protected by other privileges (for example, medical, legal and religious practitioners).

Risk of prejudice to national security

1.6 Liberal senators note in passing that new paragraph 126B(4)(j), which replaces part section 126B(4), requires the court to take into account any risk of prejudice to national security (as opposed to giving that risk the greatest weight). Liberal senators question the wisdom of downgrading this provision as:

It is hard to foresee how the reputation of one journalist could ever be more significant than the genuine security interests of a nation.⁶

Protection provided in the Act

1.7 As noted in the committee report, submitters and witnesses expressed considerable concern with subsection 126B, a great deal of which related to the guided judicial discretion.

Guided judicial discretion

1.8 A former Commonwealth Solicitor-General, Mr David Bennett QC has publicly noted that the guided judicial discretion provides no certainty about which journalists' sources will receive protection under the Act. He then remarked, 'the one thing one needs is certainty in advance'.⁷

1.9 Without certainty, potential sources will refrain from approaching journalists with information that might legitimately be in the public interest. Alternately, journalists will face a moral dilemma: either not publish a story in the public interest; or be forced to choose to abide by professional ethical obligations and possibly be fined, convicted or jailed for contempt of court for not disclosing confidential sources.

5 Australian Law Reform Commission, *Review of the Uniform Evidence Acts* (2005), Report 102, Recommendation 15-1. Also, see the Law Reform Commission of Western Australia, 'Professional Privilege for Confidential Communications - Project No. 90, May 1993; the Hon. Simon Corbell MLA, ACT Attorney-General, *Submission 10*, p. 2; the Hon. C. Christian Porter MLA, WA Attorney-General, *Submission 2*, p. 4; Public Interest Advocacy Centre, *Submission 5*, pp 3-4; and Australian Associated Press, Answers to Questions on Notice, 1 May 2009 (received 1 May 2009).

6 WA Director of Public Prosecutions, *Submission 11*, p. 4.

7 Mr David Bennett QC, former Commonwealth Solicitor-General quoted in Chris Merritt, 'Whistleblowers shun new laws', *The Australian*, 17 April 2009, p. 28.

1.10 Both of these scenarios represent the current situation, with submissions citing several recent, unfortunate and regrettable examples. The example most often cited was that of *Herald Sun* journalists Gerard McManus and Michael Harvey who were convicted and fined for refusing to reveal their source in a report regarding war widows' pensions.

1.11 Submissions and evidence doubted that the Bill sufficiently protects journalist-source confidentiality because it maintains a guided judicial discretion instead of creating a rebuttable presumption in favour of shield laws, as is the case in the United Kingdom, New Zealand and the United States.⁸

International shield law regimes

1.12 Liberal senators note that the committee report provides a brief synopsis of section 10 of the *Contempt of Court Act 1981* (UK) and subsections 68(1)-(2) of the *Evidence Act 2006* (NZ), both of which are premised on non-disclosure with a party seeking disclosure of confidential sources bearing the onus of proving that such disclosure is necessary, as per the relevant provision.

1.13 In the United States, the *Free Flow of Information Act of 2009:HR985* (HR985) has been introduced and passed in the House of Representatives. As at the time of writing, the bill is before the Senate. If passed, HR985 will exempt journalists from being compelled to produce documents or provide testimony unless a court finds that one of the following exceptions applies:

- the party seeking information has exhausted all reasonable alternative sources;
- in criminal investigations or prosecutions, there are reasonable grounds to believe a crime has occurred and the testimony or document sought is critical to the investigation, prosecution, or defence;
- in all other matters, the information sought is critical to the completion of the matter;
- in cases where a source's identity could be revealed, the document or testimony sought is necessary to prevent certain actions, including an act of terrorism, among others; and
- the public interest in compelling disclosure of the document or information involved outweighs the public interest in gathering or disseminating news information.⁹

8 For a compendium of state shield laws in the United States, see <http://www.poynterextra.org/shieldlaw/> (accessed 30 April 2009).

9 Congressional Budget Office Cost Estimate, HR985 – Free Flow of Information Act of 2009, 27 March 2009 .

1.14 A second version of the *Free Flow of Information Act of 2009: S448* (S448) has also introduced in the Senate. S448 and HR985 are to be concurrently debated by the Senate Committee on the Judiciary on 7 May 2009.¹⁰ S448 prohibits a federal entity from compelling a covered person (journalists and their employers.) to testify or produce any document relating to protected information unless a court makes specific determinations by a preponderance of the evidence:

- all reasonable alternative sources have been exhausted;
- the testimony or document sought is essential or critical to the investigation, prosecution or defence of a criminal offence; and
- non-disclosure would be contrary to the public interest, taking into account both the public interest in compelling disclosure and the public interest in gathering news and maintaining the free flow of information.¹¹

1.15 Liberal senators note that both proposed United States federal shield laws are premised on non-disclosure which is rebuttable only in certain circumstances.¹² The Act therefore stands in stark contrast to its international counterparts:

...unlike equivalent legislation in New Zealand, the United Kingdom and the United States, the Evidence Act will not confer any true right to resist disclosure and will not offer any additional protection than that already offered at common law under the Newspaper Rule. Therefore, it will not achieve the Government's stated legislative intention of strengthening the protection afforded to journalists.¹³

1.16 Liberal senators particularly note subsection 126B(2). In order for privilege to apply, this provision requires the court to make a direction on its own initiative, or for the protected confider or journalist to apply to the court for that direction.

1.17 Australia's Right to Know queried whether placing the onus on the court would result in favourable outcomes for journalists' sources:

It's difficult to contemplate the court would actually exercise the discretion and permit a journalist to maintain the confidentiality of a source.¹⁴

1.18 Nonetheless, Australia's Right to Know, other submitters and witnesses all emphasised that the Act should be substantially amended by the Bill to incorporate a

10 <http://judiciary.senate.gov/hearings/hearing.cfm?id=3817> (accessed 4 May 2009).

11 <http://casp.net/statutes/S%20448.pdf> (accessed 4 May 2009).

12 Also, see Australian Associated Press, Answers to Questions on Notice, 1 May 2009, pp 1-2 (received 1 May 2009). The AAP also notes that both bills contain 'strong safeguards for source confidentiality' (ie. limitations).

13 Australian Associated Press, *Submission 4*, p. 3. Also, see *John Fairfax & Sons v Cojuangco* (1988) 165 CLR 346 for the substance of the Newspaper Rule.

14 Australia's Right to Know, *Submission 8*, p. 6.

rebuttable presumption, including an onus on the party seeking disclosure of a confidential source.¹⁵

1.19 Liberal senators agree that the Bill, and future legislation purporting to strengthen journalist-source confidentiality, should do more than maintain the status quo. Liberal senators do not consider a journalists' protection reliant upon the exercise of a judicial discretion as a 'true' form of protection as there is no right for journalists to resist a direction from the court to disclose the identity of a confidential source.

1.20 This point was raised in evidence and submissions with Australia's Right to Know, for example, agreeing that, had the Bill been enacted in 2007, it was difficult to conceive that it would have enabled Gerard McManus and Michael Harvey to protect their source:

In connection with the criminal trial against Desmond Kelly for disclosing confidential Department of Veterans Affairs [sic] documents, Harvey and McManus were convicted in a Victorian Magistrates Court for refusing to reveal their confidential source leading to publishing of the information. Had the Commonwealth's improved model of qualified privilege been in place in Victoria at the time, the Magistrate would have not been prevented from exercising his discretion, even though Kelly was allegedly involved in misconduct in obtaining and disclosing the confidential information.

...

But, given the evidence of Harvey and McManus went to the guilt or innocence of Desmond Kelly, it is difficult to conceive the Magistrate would have ruled the public interest in the conviction or acquittal of Kelly was outweighed by the public interest in the public having access to information and the media having access to sources.¹⁶

1.21 Liberal senators consider it untenable that journalists clearly acting or having acted morally in the public interest could find or have found themselves in such a position.

1.22 Liberal senators also note advice received from the Attorney-General's Department (Department) regarding the practical operation of the Bill:

Under both the model proposed in the Bill and the New Zealand model, the court would be required to determine in each case whether protection for a journalist's source should apply. A journalist may still be summonsed to attend court in New Zealand and asked to make submissions as to why they

15 For example, Dr Joseph Fernandez, *Submission 1*; Media Entertainment & Arts Alliance, *Submission 7*; Australian Press Council, *Submission 3*; Australian Associated Press, *Submission 4*; Australia's Right to Know, *Submission 8*; Public Interest Advocacy Centre, *Submission 5*, p. 6; and Rae Desmond Jones, *Submission 12*.

16 Australia's Right to Know, *Submission 8*, pp 5-6.

should have privilege. As such, in their application, there would be little practical difference in the way these two models would be applied.¹⁷

1.23 However, supporters of the New Zealand model emphasise the significance of its onus provisions:

A view that the proposed approach to shield laws in Australia is substantially equivalent to the New Zealand position is flawed. Rather than recognising the significant role of the media and the importance of confidentiality of sources, the proposed changes in Australian law start from the position which favours forced disclosure of confidential sources. Given that many disclosures to journalists may technically breach some obligation, even if of a contract with an employer engaged in wrongdoing, Australian judges will find it difficult to find that the balance should favour the media and journalists.¹⁸

1.24 Liberal senators acknowledge that the committee report endorses the guided judicial discretion provided in the Act. However, if there is no practical difference between the judicial discretion and a rebuttable presumption, as exists in international models and as alluded to in the Department's evidence, then Liberal senators cannot fathom why the judicial discretion, a lesser form of journalists' protection, is to be preferred.

Whistleblower legislation

1.25 In the Second Reading Speech, the Attorney-General stated:

...the Rudd government is also currently developing whistleblower protections which have the capacity to complement journalist shield laws by providing avenues other than the media for public interest disclosures. The court has the ability to consider whether the source could have utilised, where available, laws protecting public interest disclosures. Failure by a source to access the protections provided by these laws, that is, the whistleblower laws, when introduced would clearly be a relevant consideration in the court's determination of whether the confidential communication between the journalist and source should be privileged.¹⁹

1.26 While the Committee did not inquire into either existing or proposed whistleblower legislation, Liberal senators note comments regarding the legislative interaction between journalists' protection and whistleblowers' protection.²⁰

17 Correspondence to the committee dated 7 April 2009.

18 Mr Andrew Stewart, Baker & McKenzie quoted in Chris Merritt, 'Whistleblowers shun new laws', *The Australian*, 17 April 2009, p. 28.

19 The Hon. Robert McClelland MP, Attorney-General, *House Hansard*, 19 March 2009, p. 3245.

20 For example, the Hon. Lara Giddings MP, Tasmanian Attorney-General, *Submission 13*, p. 1.

1.27 Liberal senators also refer to the arguments of Chris Merritt in *The Australian*. Mr Merritt writes that if whistleblowers shun new whistleblowers' legislation, it will undermine the effectiveness of journalists' shield laws:

Unless the material they pass to the media concerns a threat to public health or safety – and the threat is immediate and serious – they lose their protection under the whistleblower scheme. And they also stand to lose protection from the proposed shield law for journalists' sources.²¹

1.28 Former NSW Supreme Court judge, David Levine warned that there were so many overlapping areas of law involved in protecting journalists' sources that 'unless a package that covers privacy, whistleblowers and privilege can be developed, the problem will be insoluble.'²²

1.29 Liberal senators agree with the Attorney-General that the Bill should complement whistleblowers' legislation, but express disappointment in that the two pieces of legislation were not concurrently introduced for comprehensive consideration.

Application of the proposed privilege

1.30 The Bill proposes to extend the privilege to all proceedings in any Australian court for an offence against a law of the Commonwealth. This amendment coincided with the Standing Committee of Attorneys-General (SCAG's) consideration of journalists' privilege provisions in the model Uniform Evidence Bill.

1.31 Upon conclusion of its April 2009 meeting, the Attorney-General publicly announced that the states/territories had agreed to endorse a key component of the Bill (new public interest factors) and that, 'the standing committee's agreement has been reported to the senate legal and constitutional affairs committee.'²³

1.32 Liberal senators note that there is a long-standing agreement between members of SCAG that its formal decisions cannot be made public with the agreement of SCAG ministers.²⁴ Liberal senators therefore understand why the Attorney-General's communication must remain confidential. However, Liberal senators wish to place on record that being unable to publicly consider that confidential communication makes it difficult to fully evaluate the evidence put to the committee,

21 Mr Chris Merritt, 'Whistleblowers shun new laws', *The Australian*, 17 April 2009, p. 28. Also, see Mr Drew Warne Smith, 'Whistleblowers left exposed by new shield laws', *The Australian*, 4 May 2009, p. 32.

22 Mr David Levine, former NSW Supreme Court Judge quoted in Chris Merritt, 'Whistleblowers shun new laws', *The Australian*, 17 April 2009, p. 28.

23 Chris Merritt, 'Federal shield law under attack but McClelland pushes ahead', *The Australian*, 24 April 2009, p. 27.

24 Attorney-General's Department, Answers to Questions on Notice, 1 May 2009, pp 2-3 (received 1 May 2009).

particularly that concerning the interaction between Commonwealth and state/territory evidence law regimes.

1.33 Notwithstanding SCAG's April 2009 agreement, the WA Attorney-General, for example, has reiterated concerns presented in his submission: namely, that the Bill creates two contradictory evidentiary regimes in each state/territory;²⁵ that the Bill does not satisfactorily address the issue of whistleblowers; and that the Commonwealth has pre-empted SCAG deliberations:

There was, in essence, an agreed model which was somewhat along the lines – with some modifications – of what exists in NSW. All we needed was for the Commonwealth to sign on to that model. But instead of waiting for the final development of what looked to be unanimous agreement, they simply overrode the process entirely and tabled legislation in federal parliament. The first we heard of it was literally the tabling.²⁶

1.34 Liberal senators note the WA Attorney-General's rejection of the Commonwealth shield law as a model for Western Australia.

Recommendation 1

1.35 Liberal senators recommend that the Bill be amended to create:

- **a privilege for professional confidential relationships other than the journalist-source relationship; and**
- **a rebuttable presumption in favour of journalist-source confidentiality.**

Senator Guy Barnett

Senator Russell Trood

Senator Mary Jo Fisher

Deputy Chair

25 The Hon. C. Christian Porter MLA, WA Attorney-General, *Submission 2*, p. 5.

26 The Hon. C. Christian Porter MLA, WA Attorney-General quoted in Chris Merritt, 'Federal shield law under attack but McClelland pushes ahead', *The Australian*, 24 April 2009, p. 27.