

**Submission by**  
**AUSTRALIA'S RIGHT TO KNOW**

Evidence Amendment (Journalists' Privilege) Bill 2010 (No. 2) and  
Evidence Amendment (Journalists' Privilege) Bill 2010

**November 2010**

Introduction

Australia's Right to Know welcomes the opportunity to make a submission to the Senate Legal and Constitutional Affairs Committee regarding the *Evidence Amendment (Journalists' Privilege) 2010* & *Evidence Amendment (Journalists' Privilege) Bill 2010 (No.2)*.

Australia's Right to Know is a coalition of media organisations formed in 2007 to examine the effectiveness of legislation relevant to the media's capacity to keep the public informed of matters of public interest.

The members of Australia's Right to Know are:

News Limited, Fairfax Media, Australian Broadcasting Corporation, Free TV Australia (representing free to air commercial TV networks), Special Broadcasting Service, Commercial Radio Australia (representing commercial radio stations), Australian Associated Press, APN News and Media, Australian Subscription Television and Radio Association (representing pay TV), Sky News and the Media Entertainment and Arts Alliance.

Support for new model

Both Bills propose a new model for protection of journalists' sources. Section 126H of the *Evidence Amendment (Journalists' Privilege) 2010* (Wilkie/Xenophon Bill) and section 126D of the *Evidence Amendment (Journalists' Privilege) Bill 2010 (No.2)* (Brandis Bill) insert a presumption in favour of journalists not disclosing their confidential source.

ARTK is strongly in favour of a rebuttable presumption, where a journalist is not compelled to answer questions or produce documents that would disclose a protected confidence or protected identity unless the party seeking disclosure rebuts the presumption by establishing that any harm likely to be suffered by the journalist, the confider or any other individual, as well as any harm to the public interest in freedom of the press and media access to sources is outweighed by the necessity for the information to be disclosed in the interests of justice.

The onus of proving that disclosure is necessary should properly rest with the party seeking disclosure, as is consistent with equivalent legislation in New Zealand, the United Kingdom and many states in the United States. Therefore, it will achieve the stated legislative intention of strengthening the protection afforded to journalists.

The scrutiny brought to bear on corporate and government operations by accurate and responsible investigative journalism plays a key role in exposing and curbing corruption and abuse of power as well as promoting open and accountable government. The amendment is therefore necessary to protect anonymous sources, who play a crucial role in holding public institutions and the private sector accountable.

The presumption in favour of non-disclosure will also strengthen public confidence in the profession, and this reflects an increasing appreciation that the ability to keep confidentiality is essential for a journalist to be able to maintain trust with their source and encourage other sources to come forward and assist the profession in exposing corruption and maladministration.

Without this protection in a court, there is risk of information about corruption and maladministration not coming to the attention of the public through the media.

ARTK strongly supports the introduction of section 131B (as per both the Wilkie/Xenophon Bill and Brandis Bill , respectively) which will extend the application of the journalists' privilege provisions to all proceedings for Commonwealth offences, such as bail or interlocutory proceedings.

#### Extending the protection beyond journalists to other protected confidences

The only substantial difference between the two Bills is the protected confidences the Bills seek to cover. The Wilkie/Xenophon Bill seeks to protect a protected confidence held by a journalist. Whereas the Brandis Bill while seeking to protect a protected confidence held by a journalist, also seeks to introduce a general professional privilege for a wider range of professional relationships (section 126B of the *Evidence Act 1995*) for other protected confidences. We note that a general professional confidential relationship privilege is currently provided for under the *Evidence Act 1995* (NSW).

As ARTK is a coalition of organisations which are in the business of media we do not feel we are qualified to express a view on the merits or otherwise of whether protection should be available in relation to any relationships other than that between a journalist and an informant.

#### Definition of "journalist"

There has been some debate surrounding the definition of journalist. In both Bills it is defined as

*"journalist means a person who in the normal course of that person's work may be given information by an informant in the expectation that the information may be published in a news medium."*

ARTK supports this definition of journalist on the basis that it does not seek to introduce a restrictive statutory term leaving it largely to its ordinary meaning. This is, in our view, an effective mechanism for excluding those who are not acting in good faith.

The concept of a journalist and journalism has and continues to change over time and it will continue to do so. It is important it applies in a technologically neutral way and that a journalist would be included in the definition regardless of who they are or in what medium they publish. This definition achieves that. We consider the reference to “news medium” is wide enough to include all mediums and technologies and all forms of content that involve journalism; from news and current affairs programs, newspapers reports, documentaries, opinion pieces, panels discussions, documentaries, blogs, and tweets and any other creation that may arrive in the future.

Most importantly, this definition will allow a court to take a case by case approach in determining whether or not something is journalism having regard to the facts and circumstances surrounding a particular case. The court will be able to assess public interest and the likely adverse effect of any disclosure. We consider that any attempt to more precisely define a journalist will not necessarily stand the test of time as the media world evolves over time.

#### Conclusion

ARTK supports the speedy passage of the new model for more robust protection of journalists’ sources.