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Reference: 2009-301

Ms Julie Dennett  
Committee Secretary  
PO Box 6100  
Parliament House  
Canberra  
ACT 2600

18 November 2010

By Email

Dear Ms Dennett

Re: Senate Standing Committee on Legal and Constitutional Affairs inquiry with  
respect to the Evidence Amendment (Journalists' Privilege) Bill 2010 & Evidence  
Amendment (Journalists' Privilege) Bill 2010 (No 2)

I refer to your letter dated 15 November 2010 and your invitation for submissions with respect to both the Wilkie and Brandis Bills relating to journalists' privilege.

The proposed legislation extends the application of the privilege(s) to all proceedings in any Australian court involving a Commonwealth offence. We note that this will only effect prosecutions conducted by my office in so far as they relate to Commonwealth charges and in the rare instance where an issue of privilege is raised.

Victoria is yet to enact any legislation which recognises either 'professional confidential relationship privilege' or a specific 'journalists' privilege', and the common law does not recognise any such privilege.

This lack of uniformity may lead to a peculiar situation where in the running of a joint State/Commonwealth prosecution an issue of privilege is raised whereby evidence is capable of being admitted with respect of the Victorian offences but excluded with regard to the Commonwealth offences.

I do note, however, that the issue of journalists' privilege is on the agenda for reform in this State but as yet has not been reduced to Bill form.

I do not wish to make any comments on matters of Commonwealth legislation other than to indicate that:

- The Wilkie Bill is to be preferred as it has a more narrow application and less likely to lead to the exclusion of otherwise admissible evidence.
- Of particular concern, the Brandis Bill repeals the existing provision dealing with the loss of privilege in circumstances where the communication or document was made in furtherance of the commission of a fraud or an offence or the commission of an act that renders a person liable to civil penalty.
- Although the specific journalists' privilege would remain subject to the public interest test, it is our view that communications made in furtherance of a fraud or criminal offending be explicitly excluded from the operation of the privilege.
- In my view clauses 126H(2)(b) of the Wilkie Bill and 126D(2)(b) of the Brandis Bill are otiose and ought to be removed.

Yours faithfully,

Jeremy Kapke.