

**AUSTRALIAN
PRESS
COUNCIL**

SUBMISSION

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Australian Press Council submission to the Senate Legal and Constitutional Affairs Legislation Committee on its inquiry into the Evidence Amendment (Journalists' Privilege) Bill 2010 and the Evidence Amendment (Journalists' Privilege) Bill 2010 (No.2).

The Australian Press Council has, as one of its primary concerns, the protection and promotion of freedom of speech and of the press. A significant concomitant of such freedom is access to information. Without information, freedom of the press has little meaning. This fact is of particular consequence in relation to the reporting of government activity. The media have a crucial role in facilitating the accountability of government to the electorate. It is the role of the press to ensure that citizens are made aware of facts and issues that enable them to assess the performance of elected representatives.

But governments are not always cooperative in providing the press with information that gives an objective and complete picture of government activity, free from distortion. There are instances when such a complete picture can only be ascertained by relying on confidential sources. Such sources usually have unique knowledge of the internal workings of organisations, knowledge which is invaluable to journalists seeking to keep these organisations accountable. In revealing this knowledge to a journalist, sources often place their own position, or even safety, in jeopardy. In most cases sources approach journalists only after they have exhausted all official channels available to them. Their revelations usually expose corrupt, illegal or questionable behaviour. The recent history of journalism is replete with examples where confidential sources have risked their own interests in order to ensure that the public interest was served by exposing an organisation to public scrutiny. Two examples of this are the police officers who cooperated with the *Four Corners* and *The Courier-Mail* in exposing corruption in Queensland (which ultimately resulted in the Fitzgerald Inquiry) and nurses who have come forward in recent times in both New South Wales and Queensland to discuss high death rates in public hospitals. These revelations led, amongst other things, to the conviction of Dr Jayant Patel.

Due to the risks being undertaken by such sources, information is often made available to journalists only on condition that their identity is kept confidential. The commitment to maintaining confidentiality in such circumstances is a long-standing tenet of journalistic ethics. This commitment recognises the fact that sources are often reluctant to divulge information if disclosure is likely to result in damage to their career or safety. Failure by journalists to protect confidential sources would damage the professional relationship of trust between them and would discourage informed sources from coming forward to raise issues of public concern. The ability of journalists to protect the confidentiality of their sources is a crucial element in the process of democratic accountability and must be recognised in the law.

Where the law does not recognise the importance of confidentiality between journalists and their sources, situations may arise where journalists are confronted with a dilemma – whether to divulge their source and thereby betray their ethical commitment, or to protect their source and in so doing break the law and risk a penalty. This dilemma was clearly illustrated in the United States by the imprisonment of *The New York Times* journalist, Judith Miller, for

refusing to disclose the identity of her informer, in relation to a putative story that would have addressed the question of a possible breach of the law by officials in the then US administration. Two Australian journalists, Michael Harvey and Gerard McManus, faced a similar dilemma in a prosecution, brought by the federal government, but heard before the Victorian County Court. In this case the issue was one of embarrassment to a Minister of the Crown, not the divulging of matters that could be regarded as secret or confidential in nature. Because the public official at whose committal the journalists were asked to give evidence was eventually exonerated, Harvey and McManus, who were convicted of contempt, were the only people punished – and their "crime": the maintenance of the highest journalistic ethics and keeping their word to protect the confidentiality of a source or sources.

The Press Council recognises that there may be certain instances when it is in the public interest that confidential information be disclosed to a court or inquiry. However, the Council is of the view that it is important that formal recognition be given to the public interest in the protection of confidential relationships between journalists and their sources. One way of doing this is to ensure that journalists cannot be unduly compelled to disclose confidential information in court or before an inquiry.

Since 2005, the Press Council has argued that the best way of achieving this is the use of a clause based on the New Zealand *Evidence Bill* (now the *Evidence Act*), which created a rebuttable presumption that confidentiality should be protected, a position from which courts can only move, in the interests of justice, in the most dire of circumstances.

The existing Australian laws, state and federal, leave open what might happen. At best they suggest that judges 'may' take into account the desirability of not calling professionals (in this case, journalists) to reveal sources. This leaves journalists vulnerable to legal fishing expeditions that may make them subject to contempt of court charges for failure to divulge sources, simply, in most cases, because the litigants are unwilling to do the work to unmask the sources. In short, the existing legislation is no real protection at all.

It is the possibility that journalists will be jailed for doing their job in making information available to the public, and then abiding by their ethical responsibilities to protect the confidentiality of their sources, that most disturbs the Council. Such a possibility should disturb all those who believe that a free press is the best guarantee of a vibrant liberal democracy.

For that reason the Council urges the Senate swiftly to pass Andrew Wilkie's Bill, the *Evidence Amendment (Journalists' Privilege) Bill 2010*. This Bill, which has already passed through the House of Representatives, is virtually identical to the *Evidence Amendment (Journalists' Privilege) Bill 2010 No. 2*. It contains some additional provisions that clarify some issues not overtly referred to in Senator Brandis' Bill. Notwithstanding those differences, the immediate passage of either Bill through the Parliament would ameliorate the situation where journalists can be unnecessarily exposed to convictions and make the default position a respect for their ethical responsibility to protect the confidentiality of their sources.

Conclusion

The bottom line is that, while legislation that protects the messengers (journalists) from being required to reveal sources in the courts is an essential element of our democracy, it is a necessary compliment to legislation on protection of public interest disclosures (whistleblowers). Such legislation has been proposed by the federal government, and the Council urges that it be introduced into Parliament, and passed by it, as soon as practical.

With improved shield laws to protect journalists' confidential sources, and revised protections for disclosures in the public interest on matters of public concern, the media will be better able to publish material that will keep their readers informed and keep institutions accountable.

The Australian Press Council

The Australian Press Council is a voluntary association of organisations and persons established on 22 July 1976. The membership of the Council is set out in the attachment.

The objects of the Australian Press Council are to promote freedom of speech through responsible and independent print media, and adherence to high journalistic and editorial standards, by:

- considering and dealing with complaints and concerns about material in newspapers, magazines and journals, published either in print or on the Internet;
- encouraging and supporting initiatives by the print media to address the causes for readers' complaints and concerns;
- keeping under review, and where appropriate, challenging political, legislative, commercial or other developments which may adversely affect the dissemination of information of public interest, and may consequently threaten the public's right to know;
- making representations to governments, public inquiries and other forums as appropriate on matters concerning freedom of speech and access to information;
- undertaking research and consultation on developments in public policy affecting freedom of speech, and promoting public awareness of such issues;
- promoting an understanding of the Objects, Principles and workings of the Council especially among editors, journalists and journalism schools, through forums and consultations; and encouraging feedback for Council's consideration.

The Australian Press Council
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November 2010

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For details and biographies see:

<http://www.presscouncil.org.au/pcsite/about/members.html>