



Evidence Amendment (Journalists' Privilege) Bill 2009

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Law and Bills Digest Section

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Evidence Amendment (Journalists' Privilege) Bill 2009

Date introduced: 19 March 2009

House: House of Representatives

Portfolio: Attorney-General

Commencement: The day after Royal Assent.

Links: The [relevant links](#) to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

Purpose

To amend the *Evidence Act 1995* (the Evidence Act) to provide certain protections for communications made to journalists.

Committee consideration

The Bill was referred to the Senate Legal and Constitutional Affairs Committee on 19 March 2009 with a report originally due 7 May 2009, but now extended until 12 May (the Senate inquiry). Details of the inquiry and its Report are at:

http://www.aph.gov.au/Senate/committee/legcon_ctte/journalists/index.htm

Background

The issue of protecting journalists' sources or 'shield laws' has been an active question in Australia for some time. As a Parliamentary Library Paper from 1992 shows (Anne Twomey, 'Law and Policy of Protecting Journalists' Sources'¹) the suggestions for reform have been contemplated over a lengthy period and have been the subject of numerous inquiries and reports. They involve a complex debate about issues that go to the heart of many contemporary issues facing the body politic. Those issues include the tensions involved in balancing the interests of justice versus the public interest in a free press; issues about professional privilege more generally; issues about the need for uniformity in evidence law across all jurisdictions; issues involving the interaction between shield laws, open and transparent government and whistleblower protection; and more recently issues regarding the tension between free speech and national security.

1. *Background Paper* No. 15, Law and Government Group, 12 August 1992.

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For further background the reader is referred to the Bills Digest for the Evidence Amendment (Journalists' Privilege) Bill 2007² at:

<http://www.aph.gov.au/library/pubs/bd/2006-07/07bd172.pdf>

Current law affecting journalists' sources

A level of protection of journalists' sources was first introduced into the Commonwealth Evidence Act in 2007 through the *Evidence Amendment (Journalists' Privilege) Act 2007* (the 2007 Act). This legislation was a Government response to the case of Herald Sun journalists, Gerard McManus and Michael Harvey. The then Attorney-General made it clear the legislation, and its timing were a response to the issues raised in that case.³

Amongst other things, the Evidence Act governs the rules regarding the taking of evidence in judicial proceedings before a Federal or ACT court. With the passing of the 2007 Act, it contains limited professional confidential relationship privilege provisions.⁴ The provisions provide a privilege at the trial and pre-trial stage of civil and criminal proceedings for communications made in confidence to journalists in certain circumstances. More specifically, the Act provides that the court *may* direct (on its own initiative or upon application) that relevant evidence not be adduced in proceedings. However, the court *must* give such a direction if a protected confider would be harmed by the adduction of the evidence, and that harm outweighs the desirability of taking that evidence.⁵ The Act provides a long list of factors that are to be considered by the court in deciding whether it is necessary to require disclosure.⁶

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2. Kirsty Magarey, Evidence Amendment (Journalists' Privilege) Bill 2007, *Bills Digest*, No. 172, 2006–07.
 3. The Hon Philip Ruddock, MP, *News Release*, 201/2005, 'Submissions Lodged in Journalist Contempt Case,' 4 November 2005.
 4. Contained in Part 3.10, Division 1A of the Act.
 5. Subsection 126B(3). The court need not give the direction if the communication involves misconduct (section 126D) – see discussion at pp. 15–15 of the Digest.
 6. These factors are set out in subsection 126B(4) and include:
 - how helpful and important the evidence would be to the proceedings
 - the 'nature and gravity' of the offence, defence or cause of action and the subject matter of the proceeding
 - the availability of other evidence covering the issue
 - the nature and extent of the harm that could be caused to the confider
 - the ways in which the court could protect either the confidence itself or the identity of the confider

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There are similar protections in New South Wales,⁷ although the protection for ‘protected confidences’ in New South Wales differs slightly from the Commonwealth Evidence Act protection in that the latter specifically identifies the *journalists’* source as a target of protections whereas the NSW provisions applies more widely— i.e. they are flexible enough to cover a range of relationships such as doctor/patient, psychologist/client, social worker/client as well as journalists/source relationships.

Both the Commonwealth and New South Wales provisions were modelled on the recommendations of the 2006 report of the three Law Reform Commissions on Uniform Evidence Law⁸ that concluded that a professional confidential relationship 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. Although, as noted above, the Commonwealth law adopted in 2007 did depart from this recommendation of providing a *general* ‘confidential relationship privilege’.

There are no shield laws in other state jurisdictions, although the issue has been the subject of debate at meetings of the Standing Committee of Attorneys-General (SCAG). In 2007 the SCAG meeting ended without any agreement on the appropriate course of action regarding the Commonwealth’s proposed protections for journalists and their sources.⁹ More recently it has been reported, that the Commonwealth had received endorsement by the States for their scheme, despite on-going ‘issues’ developing, including criticisms by the West Australian Attorney-General and criticisms from a number of lobby groups.¹⁰

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- whether the party wanting to bring in the evidence is a defendant or prosecutor in a criminal case, and
 - whether the evidence has already been disclosed, either by the protected confider or someone else.

A final item in the list of matters the court must have regard to is, according to the terms of the subsection, to be given the ‘greatest weight.’ This is the risk of prejudice to ‘national security’, (as defined in section 8 of the *National Security Information (Criminal and Civil Proceedings) Act 2004*. Section 8 of this Act provides ‘In this Act, national security means Australia’s defence, security, international relations or law enforcement interests.’ Security, in its turn, is defined by reference to the *Australian Security Intelligence Organisation Act 1979*.

7. Section 126B, *Evidence Act 1995* (NSW).
8. Australian Law Reform Commission, New South Wales Law Reform Commission, Victorian Law Reform Commission, Report No. 102, *Uniform Evidence Law*, 2006, <http://www.austlii.edu.au/au/other/alrc/publications/reports/102/>
9. Chris Merritt ‘States reject journos’ sources law,’ *The Australian*, 13 April 2007, p. 23.
10. Chris Merritt, ‘Federal shield law under attack but McClelland pushes ahead’, *Australian*, 24 April 2009, p. 27, <http://www.theaustralian.news.com.au/business/story/0,28124,25376443-36418,00.html> accessed 7 May 2009.

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Outline of the Bill

The Bill would amend the professional confidential relationship privilege provisions in Part 3.10, Division 1A of the *Evidence Act 1995*. This Division provides that the court may give a direction on its own or upon application if a protected confider would be harmed by the adduction of the evidence, and that harm outweighs the desirability of taking that evidence.¹¹ There is a long list of factors that are to be considered by the court in deciding whether it is necessary to require disclosure.¹²

The Bill proposes the following amendments:

- It inserts an objects clause stating that the object of Division 1A is to achieve a balance between the public interest in the administration of justice, and the public interest in the media communicating facts and opinion to the public and, for that purpose, having access to sources of facts.
- It makes several amendments to the lists of factors the court must consider when exercising its discretion to grant privilege namely:
 - It would require the court to consider not only the potential harm to the source but also the harm to the *journalist* if the evidence is given
 - It would require the court to consider whether a communication was made contrary to law in determining whether to direct that evidence not be given¹³
 - In exercising its discretion, *one factor amongst others* that the court must consider is potential prejudice to national security. This factor is no longer to be given the ‘greatest weight’.
- It extends the application of the journalists’ privilege to all proceedings in any Australian court for an offence against a law of the Commonwealth.

These amendments are considered in more detail in the Main Provisions section of the Digest.

Other models—New Zealand

Much of the debate about this Bill suggests that overseas jurisdictions, particularly the New Zealand model, have something to offer Australian reform.¹⁴

11. Subsection 126B(3).

12. These factors are set out in subsection 126B(4) and are listed above at footnote 6.

13. Currently the court need not give the privilege if the communication involves fraud, an offence, or an act that renders a person liable to a civil penalty. See further discussion at pp. 15–16 of the Digest.

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In New Zealand the *Evidence Act 2006* provides that where a journalist has promised an informant not to disclose the informant's identity, neither the journalist nor his or her employer is compellable in a civil or criminal proceeding to answer any question or produce any document that would disclose the identity of the informant or enable that identity to be discovered.¹⁵

However a Judge of the High Court may order that the identity be revealed if satisfied that the public interest in doing this outweighs any likely adverse effect on the source or others as well as the public interest in the communication of facts and opinion to the public by the news media and, accordingly also, in the ability of the news media to access sources of facts.¹⁶

In other words, the onus in the New Zealand legislation lies with the party seeking disclosure to rebut the initial presumption in favour of non-disclosure, by proving the balancing test in their favour. This is in contrast to the Bill before the Australian Parliament which does not adopt a presumption in favour of the journalist. Rather this Bill offers a discretionary privilege, meaning the privilege is available at the court's discretion after consideration of a balancing test.¹⁷

Harvey and McManus and others

Dr Joseph Fernandez, Senior Lecturer in journalism at the Curtin University of Technology, notes that the annals of Australian case law contain many examples involving attempts by the courts to discover journalists' confidential sources.¹⁸ One of the most publicised cases and the one that provided the impetus for the 2007 reforms was the case of Harvey and McManus.

Gerard McManus and Michael Harvey 'refused to divulge the source of their report that former veterans affairs minister Danna Vale had ignored a recommendation to increase war veterans' benefits by \$650 million, and had instead presented cabinet with a plan to spend only \$150 million.'¹⁹ Their lawyer, Will Houghton QC, subsequently said to the

14. See for instance the Submission to the Senate Inquiry into the Bill from an alliance of media outlets, known as 'Australia's Right to Know', http://www.aph.gov.au/Senate/committee/legcon_ctte/journalists/submissions/sub08.pdf, accessed 5 May 2009.

15. Subsection 68(1).

16. Subsection 68(2).

17. See Main Provisions section below.

18. Senate inquiry, Submission No. 1. The submission at p. 7 lists some of these cases. See also Kirsty Magarey, 'Evidence Amendment (Journalists' Privilege) Bill 2007', *Bills Digest*, No. 172, 2006–07, p. 2.

19. Chris Merritt, 'States reject journos' sources law' *The Australian*, p. 23, 13 April 2007.

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court that stories like their article 'Cabinet's \$500 million rebuff revealed' published on 20 February 2004 were 'vital to our democracy.'²⁰

Contempt of court charges were subsequently laid by the Chief Judge of the Victorian County Court. In October 2006 Federal Government lawyers appeared in the contempt case against the journalists to ask the court to abandon the matter.²¹ This was after an earlier attempt to intervene on the basis that the Federal Government was planning to legislate for greater protection of journalists' sources was rejected by the Victorian County Court.²²

Meanwhile a senior federal public servant, Desmond Patrick Kelly, accused of leaking the information to McManus and Harvey, was found guilty by the Victorian County Court of leaking confidential information to a journalist. Mr Kelly appealed to the Victorian Supreme Court, which subsequently overturned his conviction on the basis there was insufficient evidence to support the conviction.²³

In June 2007 Harvey and McManus were each fined \$7000 for contempt of court.²⁴

The Australian Press Council comment was:

The Harvey and McManus case doesn't relate to a serious crime or a threat to national security. Their only real 'crime is holding the government accountable to those who elected it, and pay for it.'²⁵

20. Jamie Berry, 'Reporters acted above law: judge,' *Sydney Morning Herald*, 13 February 2007.

21. AAP, 'Journalists seek court's discretion in contempt case,' October 18 2006.

22. AAP, 'Court Rejects Ruddock Request on Scribes' *The Age*, 15 November 2005, cited in ALRC Report No. 102, *Uniform Evidence Law*, 2006.

23. AAP 'Public Servant guilty of document leak,' 31 January 2006
<http://news.ninemsn.com.au/article.aspx?id=84590> accessed 30 May 2007; and Supreme Court appeal: *R v Kelly* [2006] VSCA 221 (17 October 2006)
<http://www.austlii.edu.au/au/cases/vic/VSCA/2006/221.html>

Mariza O'Keefe, 'Public servant wins appeal over leaked document,' AAP, Melbourne, 17 October 2006.

See also: *Harvey & Anor v County Court of Victoria & Ors* [2006] VSC 293 (23 August 2006) <http://www.austlii.edu.au/au/cases/vic/VSC/2006/293.html>

24. *R v Gerard Thomas McManus and Michael Harvey* [2007] VCC 619.

25. Australian Press Council News, August 2007, v. 19 No 3 at p. 5. Quoted in Joseph Fernandez, Senate inquiry, Submission no. 1, p. 8.

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Basis of policy commitment

The Attorney-General, the Hon Robert McClelland MP in his second reading speech to this Bill states that the Bill forms part of the Rudd government's commitment to enhancing open and accountable government and that it also delivers on the government's election commitment to strengthen protection for journalists' sources.²⁶

The purpose of this legislation is to enable an appropriate balance to be struck between the public interest in free press and the public interest, which clearly exists also, in the administration of justice. It provides a guided discretion but leaves the balancing of competing interests and particular facts to the common sense of the court considering the matter.²⁷

Position of significant interest groups and political parties

Media groups

Submissions to the Senate inquiry from media groups generally argue the Bill does not go far enough in providing protection for journalists' sources.

Australia's Right to Know

Australia's Right to Know²⁸ believes that a qualified privilege which relies on a balancing test and the discretion of the court provides some but not sufficient protection for journalists. Their submission to the Senate inquiry states:

Although the 2009 Bill would improve the regime currently available under the Evidence Act, it is difficult to contemplate the court would actually exercise the discretion and permit a journalist to maintain the confidentiality of a source.

While recognising the amendments provide an improvement to the current qualified privilege and accordingly improve the protection currently available, Australia's Right to Know submits that the Senate should recommend:

There should be recognition at law that there is a legitimate public interest in allowing journalists to protect the identity of confidential sources when disclosure by the source is demonstrably in the public interest;

26. The Hon. Robert McClelland MP, Attorney General, Second Reading Speech: Evidence Amendment (Journalists' Privilege) Bill 2009, House of Representatives, *Debates*, 19 March 2009, p. 3244.

27. *ibid.*

28. 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. Its members include News Limited, Fairfax Media, ABC, SBS the Media Entertainment and Arts Alliance.

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Australia should adopt the British and New Zealand models that legally recognise the primary interest that allows journalists to protect identity of confidential sources when the disclosure by the source is demonstrably in the public interest.²⁹

Media, Entertainment and the Arts Alliance (MEAA)

The MEAA, the journalists' union, have criticised the Bill stating that it does not introduce significant new provisions to protect journalists' confidential sources. The MEAA recommends that in order to maintain the Government's stated commitments with regards to the protection of journalists' sources, the Bill needs to be strengthened by incorporating an overarching statement of the spirit of the law that favours journalist-source confidentiality protection.³⁰

State Attorneys-General

Submissions by the various State and Territory Attorneys-General to the Senate inquiry express different concerns with the Bill, with Western Australia being particularly critical.

Western Australia Attorney-General

Western Australia's Attorney-General has specific criticisms relating to:

- the removal of the prohibition on claims for privilege over communications constituting criminal acts³¹
- the failure to provide a *general* privilege for communications made in the course of confidential and professional relationships (as opposed to a specific privilege for journalists)
- the amendments pre-empt the orderly consideration of options for reform by state Ministers at SCAG meetings.³² The application of both Commonwealth and State laws in some cases therefore having a greater risk of confusion or error.

The submission concludes that it would be preferable for consideration of the Bill be deferred or withdrawn – pending discussions among jurisdictions through the SCAG process.³³

29. Senate inquiry, Submission No. 8.

30. Senate inquiry, Submission No. 7.

31. For a description see the Main Provisions section of the Digest.

32. The communiqué from the April 2009 SCAG meeting states: 'Ministers considered options for journalist shield laws that could be included in the model Uniform Evidence Bill based upon advice from the National Evidence Working Group.'

33. Senate inquiry, Submission No. 2, p. 6.

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ACT Attorney-General

The ACT Attorney-General, Simon Corbell MLA, also has concerns, specifically about the removal of the provision that provides an automatic loss of privilege on the grounds of misconduct. He asks why the Commonwealth Government has not formulated a strong argument to explain why the interests which are protected by journalist shield laws are to be afforded a higher level of protection than the interests protected by other privileges.

The Attorney-General's Senate inquiry submission notes that the Bill, like its predecessor, again fails to extend coverage of a privilege to more general relationships as recommended by the 2006 Law Reform Commissions report.

Like the Western Australian Attorney-General, Simon Corbell also argues that introduction of this Bill, which departs from the recommended model agreed to previously by SCAG Ministers, prior to reconsideration of the issue at the April SCAG meeting, impedes the delivery of uniformity in evidence law.³⁴

New South Wales Attorney-General

The NSW Attorney-General, John Hatzistergos, also has several concerns with the Bill. His submission to the Senate inquiry sees problems with the Bill for its selective application of privilege to journalists only and for its introduction of a discretionary loss of privilege for misconduct. Both of these, he says, would be inconsistent with NSW laws.

Further, the Attorney-General's submission argues that confusion could arise with the new application provision at section 131B of the Bill.³⁵ It argues the effect of this provision could be that cases could arise where a court would have to apply both the Commonwealth journalist privilege and the NSW professional confidential relationship privilege.

Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC), while congratulating the Government on the inclusion of a new objects clause³⁶ states that it is unfortunate that the public interest recognised in the Bill is limited to the media— therefore making them a privileged class of confidant. Furthermore PIAC notes that the term 'journalist' is not defined in the Bill which creates difficulties— difficulties could be resolved by adopting the NSW model of a more general privilege.

PIAC believes the Bill falls short of providing a suitable level of protection for journalists and their sources and suggests that building in an onus in favour of source protection,

34. Senate inquiry, Submission No. 10.

35. See Main Provisions section of the Digest.

36. See the Main Provisions section of the Digest.

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while leaving the ultimate decision to the Courts, based on kinds of balancing factors that the Bill sets out would represent an acceptable compromise.³⁷

Senator Nick Xenophon

Independent Senator Nick Xenophon is reported as being supportive of providing more certain protection for journalists who seek to protect their sources. He argues that shield laws and whistleblower protection are 'first-order issues' claiming:

If you don't protect sources and whistleblowers then the potential for maladministration, waste of public funds and abuse of power increases exponentially'.³⁸

Senator Xenophon argues that a key failing with the Bill is that it would not introduce a rebuttable presumption in favour of protecting journalists' sources and further, that the Bill fails to make reference to the right of people to the free flow of information.

Senator Xenophon is in favour of adopting a scheme more in line with the New Zealand model.³⁹

Greens

Greens Attorney-General spokesperson Senator Scott Ludlam has indicated the Greens will be seeking amendment to the Bill:

The bill falls short of what key stakeholders have identified as the minimum protections of confidentiality that journalists need if they are to pursue their work. But it also falls short of its objectives as claimed by the Attorney General. At a bare minimum we need to make it explicit that courts should assume protection of journalists sources unless there is a compelling reason to the contrary.

[...]

In other democracies there's a presumption in favour of the journalist's right to protect their source unless there are strong public interest or national security reasons for overriding this basic principle. The Government's bill falls well short of that.⁴⁰

37. Senate inquiry, Submission No. 5, p. 6.

38. Chris Merritt, 'Xenophon's push to improve shield laws', *Australian*, 3 April 2009.

39. *ibid.*

40. 'Greens will move to strengthen shield laws for journalists', *Media release*, 28 April 2009.

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Would the Bill have prevented prosecution of journalists Michael Harvey and Gerard McMannus?

A question put by the Senate inquiry to some of those giving evidence was whether the Bill in its current form would have protected Michael Harvey and Gerard McMannus from prosecution for not revealing their source. Some witnesses suggested that in their opinion the Bill would not have helped these journalists.⁴¹

Justin Quill, who acted for Harvey and McManus⁴² also doubts if the legislation had been in place it would have helped in that case. He states:

In that case, a public servant was being prosecuted because the government of the day believed he had been the source of a story that embarrassed it over a decision to take pensions from war widows.

[...]

Harvey and McManus were called to give evidence and if they revealed their source it would either demonstrate the public servant was innocent (and someone else was the source) or that he was guilty (by being the source).

Their evidence could go to the guilt or innocence of a man. Clearly, there is a public interest in having that evidence given. But without any legislative statement that there is a greater public interest in allowing journalists to keep their sources confidential, for the greater good, how could that judge do anything other than require the pair to give their evidence?⁴³

The Press Council chairman, Ken McKinnon said the Bill was weak and ‘would give little comfort to people like McMannus and Harvey.’⁴⁴

Financial implications

The Explanatory Memorandum states that the Bill would have no significant impact.⁴⁵

41. See for example: Senate inquiry, Ms Chapman, Australia’s Right to Know, *Hansard*, 28 April 2009, L&CA 11.

42. Gerard McManus and Michael Harvey were fined \$7000 each by the Victorian County Court after pleading guilty to contempt charges. See above at p. 7 of the Digest.

43. Justin Quill, Laws to shield journalists are more like a flimsy umbrella, *Australian*, 27 March 2009.

44. Philip Dorling, ‘A-G’s bid to protect journalists ‘weak’’, *Canberra Times*, 20 March 2009.

45. Explanatory Memorandum, p. 2.

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Main provisions

The Bill would amend the professional confidential relationship privilege provisions in Part 3.10, Division 1A of the *Evidence Act 1995*. This Division provides for a privilege at the trial and pre-trial stage of civil and criminal proceedings for communications made in confidence to journalists in certain circumstances.

The amendments in the Bill are as follows.

New objects clause

Item 1 inserts an objects section into the Division that deals with professional confidential relationship privilege. **Proposed section 126AA (item 1)** states that the object of the Division is to achieve a balance between:

- the public interest in the administration of justice, and
- the public interest in the media communicating facts and opinion to the public and, for that purpose, having access to sources of facts.

According to the Minister's second reading speech this would ensure that the court keeps both of these factors firmly in mind when exercising its discretion in the particular case it is hearing.

The Explanatory Memorandum states that:

‘the public interest in the administration of justice’ may encompass, where relevant, considerations of the proper functioning of government and the use of appropriate means of making public interest disclosures, such as available whistleblower regimes. The public interest in the communication of facts and opinion to the public may draw the court's attention to the general desirability of maintaining an ongoing flow of information to the public through various forms of media and the importance of journalists keeping the identity of sources confidential to achieving this end.⁴⁶

Harm to the journalist – a reason for giving privilege

At present, the court has discretion to direct that evidence which would disclose a confidential communication made to a journalist or the identity of their source be excluded in the proceedings. Existing subsection 126B(4) provides a list of matters the court is to take into account when deciding to give the protection. One of the matters is the nature and extent of the harm that could be caused to the confider (ie the journalist's source). So where the court is satisfied that harm would or might be caused to the *source* if the evidence is given, and that harm outweighs the desirability of the evidence being given, the court must make such a direction. The Bill at **item 2** would extend this provision by

46. Explanatory Memorandum, p. 1.

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requiring the court to also consider any likely harm to the journalist (ie confidant) if the evidence were to be given. The Explanatory Memorandum states that this may include damage to the journalist's professional reputation and to that journalist's ability to access sources of fact in the future⁴⁷, although the Bill does not spell this out.

Item 3 is a further amendment to subsection 126B(4). It clarifies that the court *must* take the list of matters into account when deciding whether to give the protection.⁴⁸

Journalist privilege and misconduct

Currently section 126D provides that Division 1A does not prevent the adducing of evidence of a communication made or the contents of a document prepared in the furtherance of the commission of:

- fraud
- an offence, or
- an act that renders a person liable to a civil penalty.

This means that a journalist's source would not receive the same protections when malfeasance is involved.

Items 8 would delete this provision. In its place, **item 5** would amend subsection 126B(4) to add a **new paragraph 126B(4)(i)**. This would add to the list matters the court must take into account when deciding to give the protection:

- whether the evidence is evidence of a communication made, or the contents of a document prepared, in the furtherance of the commission of a fraud or an offence or the commission of an act that renders a person liable to a civil penalty.

This amendment would allow the court to decide whether privilege should apply in cases of misconduct after taking into account all of the relevant factors. In other words, it will provide that there will be a *possible* application of journalists' privilege to cases where the communication between a journalist and their source is itself an offence (such as where a public servant discloses information to a journalist in contravention of section 70 of the *Crimes Act 1914*). However, as the Explanatory Memorandum states:

where the evidence is relevant to the commission of an offence or other misconduct, this will be a matter that weighs *against* upholding the privilege.⁴⁹

The Explanatory Memorandum further explains:

47. *ibid.*

48. Currently the wording is: [the court] *is to* take into account the following matters

49. Explanatory Memorandum, p. 4.

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The proposed amendments will not alter the laws prohibiting unauthorised disclosures of government information and the court will still be required to take into account whether the communication of information was made in the furtherance of an offence. Where a disclosure is made contrary to law, the person disclosing the information may still be subject to investigation and prosecution. The proposed amendments will make it clear that courts should consider whether the misconduct in the particular case, along with all the other relevant circumstances, warrants directing a journalist to breach the confidence of their source.⁵⁰

The PIAC submission to the Senate inquiry discusses this amendment at some length and argues that in fact it will do little if anything to change the former state of affairs.⁵¹

The submission notes that the current provision (section 126D) is described in the Explanatory Memorandum as:

Where a confidential communication is made in the furtherance of the commission of an offence, the privilege provided by Division 1A is presently unavailable.

PIAC, in a persuasive argument, suggests this is an incorrect reading. PIAC's preferred reading is that the current provision merely makes clear that the Court retains a discretion to admit the matter into evidence—which otherwise satisfies those conditions—where it is evidence of an offence.⁵² Based on this interpretation it would seem that there is very little difference between the existing provision and the proposed amendment in item 5.

Item 7 makes a further amendment dealing with journalists' privilege and misconduct. It clarifies that where the relevant misconduct is a fact in issue the court may find the misconduct is established if there are 'reasonable grounds' to make that finding.

The risk of prejudice to national security

Existing subsection 126(4) requires the court to take into account and give *the greatest weight to*, any risk of prejudice to national security (within the meaning of section 8 of the *National Security Information (Criminal and Civil Proceedings) Act 2004*). The Bill at **item 6** removes this requirement for courts to give the greatest weight to any risk of prejudice to national security. Instead, **item 5** will amend **subsection 126B(4)** so that national security becomes just one of the listed factors that the court must consider when determining whether to give the privilege.

50. *ibid.*, p. 2.

51. Submission No. 5, p. 4.

52. *ibid.*

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Scope of application of privilege in court proceedings

Proposed section 131B (item 9) extends the application of the Commonwealth journalist privilege to all proceedings in a federal or ACT court and to all proceedings in any other Australian court for an offence against a law of the Commonwealth.

The Attorney-General's second reading speech provides the following explanation and rationale:

In practice, the prosecution of an Australian government official charged with disclosing confidential government information is usually conducted in a state or territory court rather than a federal court. It is in these proceedings that journalists are often called upon to reveal their sources. This amendment will enable the new journalists' privilege to apply to all prosecutions for Commonwealth offences.⁵³

However, it has also been argued, particularly by some State Attorneys-General, that this could cause confusion. For example in New South Wales that jurisdiction's confidential relationship privilege applies to all proceedings in NSW courts. The Commonwealth journalist privilege would also apply in NSW Courts when the matter was a Commonwealth matter dealing with a journalist.⁵⁴

Concluding comments

The amendment proposed is not as comprehensive as the New Zealand model nor as comprehensive as a range of interested parties would like. It is, however, an incremental step in the direction of provisions which could become comparable to New Zealand's. The change to the significance of security considerations could be significant, and it goes some way towards recognising the interests journalists have, and therefore the media generally, in having reliably secure relationships with their sources. One of the dilemmas for legislators called to vote on this Bill will be whether to accept what some may regard as inadequate changes which may nevertheless still be an improvement on the status quo in terms of protecting the journalist/source relationship.

53. The Hon. Robert McClelland MP, Attorney General, Second Reading Speech: Evidence Amendment (Journalists' Privilege) Bill 2009, House of Representatives, *Debates*, 19 March 2009, p. 3244.

54. Senate inquiry, Submission No. 9. The submission also states: For example, if there is a joint indictment of Commonwealth and State offences being heard in a state court, that court would have to apply both the Commonwealth journalist privilege and the NSW profession confidential relationship privilege.

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