



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

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Evidence Amendment (Journalists' Privilege) Bill 2010 (No. 2) & Evidence Amendment (Journalists' Privilege) Bill 2010¹

Date introduced: 29 September 2010 (Senator Brandis' Bill)

Date introduced: 18 October 2010 (Mr Wilkie's Bill)

House: Senate (Senator Brandis)

House: House of Representatives (Mr Wilkie)

Private Member's Bills introduced by: Senator Brandis and Mr A Wilkie.

In the unusual circumstance of two Bills introduced almost simultaneously, dealing with the same subject matter with identical provisions on the substantive issues, and in the interests of preserving the resources of the Bills Digest service, this Digest covers both in the one Digest.

Commencement: The day after Royal Assent.

Links: The links to Senator Brandis' [Bill, its Explanatory Memorandum and second reading speech](#) can be found on [the Bills home page](#), or through <http://www.aph.gov.au/bills/>.

The links to Mr Wilkie's [Bill, its Explanatory Memorandum and second reading speech](#) can be found on [the Bills home page](#), or through <http://www.aph.gov.au/bills/>.

When bills have been passed they can be found at the ComLaw website, which is at <http://www.comlaw.gov.au/>.

Purpose

[Senator Brandis' Bill] To amend the *Evidence Act 1995* so that the journalists' privilege not to give evidence is afforded stronger protections, thereby ensuring that journalists' informants are given a higher likelihood of confidentiality.

The Bill would also leave the courts with a capacity to protect a range of professional confidential relationships.

[Mr Wilkie's Bill] To amend the *Evidence Act 1995* so that the journalists' privilege not to give evidence is afforded stronger protections, thereby ensuring that journalists' informants are given a higher likelihood of confidentiality.

The Bill would remove the current Division 1A, 'Professional confidential relationship privilege.'

1. As the Digest shows, Senator Brandis' Bill was first introduced into the Parliament, however the numbering arrangements have resulted in his Bill being Evidence Amendment (Journalists' Privilege) Bill 2010 (No. 2).

Background

Evidence Law

Shield laws protect against the compulsory giving of evidence. Lawyers have extensive privileges against giving evidence – with legal professional privilege a well established legal principle (Part 3.10, Division 1 of the *Evidence Act 1995* (the Evidence Act or the Act)). There is also a privilege for religious confessions and a privilege against self-incrimination (Part 3.10, Division 2 of the Evidence Act).² It should be noted that such laws are only applied to evidence that would be otherwise admissible. There are also cases where evidence may be protected because there are more fundamental preliminary questions to answer, for instance whether someone is competent to give evidence at all. Thus, for instance, partners and family members, whether married or not, may be protected from giving evidence against each other. This exception is not regarded as falling within the definition of 'shield laws' because such family members are not 'compellable' in the first place – that is they do not have to give evidence at all. Shield laws are available to people who would otherwise be both competent and compellable (that is, required by law to answer the questions put to them).

Shield laws for journalists have been the subject of lengthy consideration by both the courts and the Parliament. These Bills represent the third and fourth legislative effort to deal with the subject of journalists' shield laws in as many years.³ Just over two weeks before Mr Wilkie introduced his Bill in the House of Representatives, Senator Brandis introduced an identically named Bill into the Senate. For ease of reference these Bills may be referred to as 'the Brandis Bill' and 'the Wilkie Bill'. Both Bills use 'the New Zealand' model as an approach to journalists' privilege and they are very close to being identical in their effects, although the Brandis Bill is more comprehensive in its coverage.

The New Zealand Model

The model on which both Bills are based is provided in New Zealand's *Evidence Act 2006* (NZ), subsection 68.⁴ Under Australia's current Evidence Act, a journalist is required to provide evidence unless they can establish that they fall within one of the grounds which justify an exemption. Under New Zealand's Evidence Act the presumption is that the evidence from journalists will not be required to be given unless the party requesting the evidence can convince the judge that certain criteria have been satisfied. The two Bills before the Parliament would effectively reverse the

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2. It can be noted here that there are other ways in which evidence can be excluded, for instance section 10 of the Evidence Act recognises that that Act 'does not affect the law relating to the privileges of any Australian Parliament or any House of any Australian Parliament.'
 3. For further background it is possible to consult the Bills Digest on the 2007 Bill (K Magarey, *Evidence Amendment (Journalists' Privilege) Bill 2007*, [Bills digest](#), no. 172, 2006–07, and the Digest on the 2009 Bill (M A Neilsen and K Magarey, *Evidence Amendment (Journalists' Privilege) Bill 2009*, [Bills digest](#), no. 130, 2008–2009).

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burden of proof (making them in line with the New Zealand model). Rather than a journalist having to prove that they should be given the privilege, the onus shifts to the person seeking the evidence, who would have to prove why the journalist should not be given the otherwise automatic exemption.

For ease of reference this Digest refers to the current legislative scheme as being the 'judicial discretion' model and the NZ model as the 'rebuttable presumption' model.

History and the 'General Professionals' Privilege'

In 2006 the ALRC, together with the New South Wales and Victorian Law Reform Commissions issued Report No. 102, *Uniform Evidence Law*, which recommended the introduction of shield laws for a wide range of professional relationships (to be applied at the discretion of the courts). This recommendation followed up on an earlier seminal ALRC Report on Evidence in 1985.

The 2006 Report pointed out there are many relationships in society where a public interest could be established in maintaining confidentiality. A sample list was supplied by Odgers and included:

doctor/patient, nurse/patient, psychologist/client, therapist/client, counsellor/client, social worker/client, private investigator/client and journalist/source.⁵

It should be noted that, despite a common misapprehension, the medical profession has no access to a legally recognised right to keep evidence of their communications with patients confidential. As one authoritative source says 'Despite these obligations and statutory provisions [regarding privacy], doctors are bound to divulge information about their patients if a case goes to court and they are called to give evidence.'⁶ The various Law Reform Commission's summary of this matter is provided in their Report which observes:

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4. An authoritative reprint of the *Evidence Act 2006* (NZ) can be viewed at: <http://www.legislation.govt.nz/act/public/2006/0069/13.0/DLM393463.html>
 5. S Odgers, *Uniform evidence law*, 6th edition, Lawbook Co, 2004, [1.3.11900], as quoted in ALRC Report no. 102, *Uniform evidence law*, 2006. The Report by the three Law Reform Commissions went on to make some distinctions between the relevant privileges, concluding that, when enacted, doctors would be adequately covered by the 'professional confidential relationship privilege', while sexual assault counsellors needed additional protections akin to the legal professional privilege at a pre-trial stage (once the matter was in court they considered that only a qualified privilege would be suitable). The Commission's commentary followed on from a Commonwealth commitment to revisit the professionals' privilege after a NSW sexual assault counsellor was jailed in 1995 for refusing to provide notes of her interview with a rape victim when subpoenaed by the victim's alleged rapist. The law in NSW was amended to recognise a privilege after this incident. (See generally M Kingston, 'Rape Case Notes Will Be Safe, Says Shaw,' Sydney Morning Herald, 16 December 1995 and NSW Parliamentary Library paper 'Victims of Crime: Plea Bargains, Compensation, Victim Impact Statements and Support Services' (2002) at [http://www.parliament.nsw.gov.au/prod/parliament/publications.nsf/0/578c6f10c6d98565ca256ecf00083b4d/\\$FILE/10-02.pdf](http://www.parliament.nsw.gov.au/prod/parliament/publications.nsf/0/578c6f10c6d98565ca256ecf00083b4d/$FILE/10-02.pdf)).
 6. P W Bates, *Australian Health and Medical Law Reporter*, CCH, Sydney, para. 48-900, available online at CCH Intelliconnect, viewed 10 November 2010, <http://intelliconnect.wkasiapacific.com> This principle was graphically

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Given the controversial nature of some of these categories, and the aim of the uniform Evidence Acts to allow as much evidence as possible to be made available in court proceedings, the ALRC proposed that such a privilege be granted at the discretion of the court, stating:

The public interest in the efficient and informed disposal of litigation in each case will be balanced against the public interest in the retention of confidentiality within the relationship and the needs of particular and similar relationships.⁷

The recommendations of the various Law Reform Commissions were endorsed by the Opposition in the most recent Senate Report considering the matter:

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).⁸

This concern for allowing the privilege to other professionals is reflected in the drafting of Senator Brandis' bill, which preserves a judicial discretion privilege for the confidential relationships of other professionals. That preserved privilege gives a lower level of protection than that proposed for the journalists' privilege, which would be given the 'rebuttable presumption' form of the privilege. As explained above, this would mean that the generic professionals' privilege could only be claimed when the relevant professional can demonstrate to the Court that the privilege should be given, whereas the journalists' privilege is presumed to apply unless the Court can be shown otherwise.

During the recent Senate Inquiry regarding the journalists' privilege the ACT Attorney-General, Simon Corbell, summarised the views of several submissions when he argued in favour of a broad based privilege. Indeed he said there was no reason why the journalist-source relationship should be granted a higher level of protection:

...the Commonwealth has not formulated a strong argument to explain why the interests, which are protected by journalist shield laws, are afforded a higher level of protection than the interests protected by other privileges, given the differences which exist between journalists and other professional groups. Medical and legal practitioners operate within heavily regulated professions and are therefore subject to stringent quality control. Journalists, on the other

illustrated in the recent case of the prosecution of a Queensland couple for procuring an illegal abortion. The ABC's account of the medical evidence illustrates the issue: ABC Radio, Background Briefing, 'Abortion on trial in Queensland', 7 November 2010, transcript viewed 8 November,

<http://www.abc.net.au/rn/backgroundbriefing/stories/2010/3053944.htm>

7. Australian Law Reform Commission, *Uniform evidence law*, Report no. 102, quoting *Evidence*, ALRC 26 (Interim) Vol 1 (1985), [955] and Australian Law Reform Commission, *Evidence*, ALRC 38 (1987), xxi, viewed 24 October 2010, <http://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC102.pdf>
8. Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Evidence Amendment (Journalists' Privilege) Bill 2009*, viewed 14 October 2010, http://www.aph.gov.au/Senate/committee/legcon_ctte/journalists/report/d01.pdf

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hand, are not required to comply with professional registration or standards in order to practice their profession.⁹

Earlier Amendments

The 2007 Amendments

There have been a variety of legislative efforts to protect journalists. The Evidence Amendment (Journalists' Privilege) Bill 2007 was introduced by the Howard Coalition Government (largely in response to the Harvey and McManus case¹⁰) and was passed through the Parliament, successfully introducing some level of protection for information held by a journalist regarding their sources (the 2007 Amendments, or, as relevant the 2007 Bill).

With the passage of the 2007 Amendments, the Evidence Act now contains limited professional confidential relationship privilege provisions (contained in Part 3.10, Division 1A of the Act). 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 (subsection 126B(3)). The court need not give the direction if the communication involves misconduct (section 126D).¹¹

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 (subsection 126B(4)):

- 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

9. Simon Corbell, MLA, Attorney-General (ACT), Submission no. 10, Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Evidence Amendment (Journalists' Privilege) Bill 2009*, p. 3, viewed 14 October 2010, http://www.aph.gov.au/senate/Committee/legcon_ctte/journalists/submissions/sub10.pdf

10. A case in which two journalists were held in contempt of court for refusing to give evidence regarding their sources for a story regarding contentious government budgetary arrangements. There is further documentation regarding this case in the two earlier Digests dealing with the journalists' privilege: K Magarey, *Evidence Amendment (Journalists' Privilege) Bill 2007*, [Bills digest](#), no. 172, 2006–07, and M A Neilsen and K Magarey, *Evidence Amendment (Journalists' Privilege) Bill 2009*, [Bills digest](#), no. 130, 2008–2009.

11. The provisions gives a definition of misconduct which encompasses 'the commission of a fraud or an offence or the commission of an act that renders a person liable to a civil penalty' and allows the Court to find the existence of this misconduct on 'reasonable grounds' (126D(2)).

- the ways in which the court could protect either the confidence itself or the identity of the confider
- 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 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*.

These changes were criticised on the basis that they:

- did not comply with the pre-existing NSW laws on this topic and thereby undermined the push for a uniform evidence law – a goal which is recognised as desirable by most commentators
- only dealt with journalists, not with the broader professions as recommended by the various law reform commissions (and did not define journalists clearly enough)
- left the burden of demonstrating that the privilege should be applied to the applicants with no presumption that they should be applied
- provided inadequate coverage of the various courts and tribunals in which the matters may be considered and
- provided no statutory requirement for a decision maker to have regard to the impact of their decision on the journalist concerned and the journalists' profession generally.

Another general concern was that there were insufficient protections for public servants who may leak to journalists as a whistleblowing exercise. This was particularly so since the (unfortunately convoluted) provisions of section 126D precluded the use of the privilege in the case of illegal behaviour, and since any leaking by a public servant is currently likely to involve illegal behaviour it could limit the effectiveness of those concessions dramatically. Under current law there is no statutory public interest defence for 'whistleblowing' or 'leaking'.

The 2009 Bill

In 2009 the Rudd ALP Government introduced the Evidence Amendment (Journalists' Privilege) Bill. This Bill was not passed by the Senate and lapsed on the proroguing of the 42nd Parliament in July 2010.

That Bill provided for

- 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.

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- 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 given (which was a more journalist-friendly provision than the legislative status quo)
- 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'.
- An extension of the application of the journalists' privilege to all proceedings in any Australian court for an offence against a law of the Commonwealth.

Once again this Bill was criticised for failing to extend the privilege beyond journalists. It was also criticised for not providing a more secure basis for the application of the privilege. Essentially there was a call for a reversal of the onus of proof to establish whether the privilege should be applied, away from the journalists requesting the privilege and on to the party seeking the evidence (who would then need to prove the privilege should not be applied).

The 2009 Bill was an incremental step in these directions – the introduction of an objects clause would have made it more apparent to judges/fact-finders that they should, in effect, have a presumption that the privilege would apply; and the additional criteria that the judge/fact-finder should apply would have supported the journalist's claims to the privilege (including the Bill's proposed removal of the priority to be given to national security). The 2009 Bill would have extended the applicability of the privilege to cover Commonwealth criminal matters in all Australian courts (although it is to be noted some state/territory Attorneys-General were not happy with the uncertainty that could result, since it may be that it would cover areas where state/territory laws on this topic could also apply).

The Wilkie and Brandis Initiatives

The second reading speech for Mr Wilkie's Bill focused on the need to afford whistleblowers greater protection and the dilemma journalists may be faced with if they are put in the invidious position of having to comply with court sanctioned questions or breach the Journalists' Code of Ethics – it did not explore the previous legislative activity on this topic, nor the current legislative status quo. Mr Wilkie's speech focussed particularly on the situation McManus and Harvey were faced with in 2007, however the Evidence Act has since been amended (albeit with uncertain success with respect to such cases).¹² Senator Xenophon has also thrown his support behind Mr Wilkie's Bill, as has the

12. It should be noted that during the recent Senate Inquiry into the 2009 Bill attempting to amend the Evidence Act, some witnesses argued that McManus and Harvey may nevertheless have been convicted in spite of the recently introduced legislative protections.

Government, particularly from the Attorney-General, Mr McLelland, who offered drafting assistance.¹³

Wilkie speaks with some feeling about the importance of the Bill for protecting whistleblowers, documenting a range of whistleblowing efforts which have been met with negative consequences for the whistleblowers concerned. He shows a clear understanding of this matter when he comments:

Whistleblowers face a hard time in Australia. They are often seen as troublemakers or misfits, people letting the team down, crazies or just do-gooders ignorant of the fact that the government knows best. Most never enjoy any sustained media interest. Instead, they have their say and struggle with the subsequent professional, personal and financial consequences.¹⁴

Brandis and the Coalition also have a background in this field of shield laws for journalists. Senator Brandis spoke out in defence of McManus and Harvey back in 2005, calling for reform to the laws protecting journalists.¹⁵ The Coalition Minority Report in the Senate Legal and Constitutional Affairs review of the 2009 Bill contained a clear call for the New Zealand model to be implemented, whereas the majority report with the government members supported the 2009 Bill (i.e. a judicial discretion mode) with a few suggested amendments.

Timing?

Mr Wilkie has made it clear that he is introducing his Bill in the context of future plans for whistleblower legislation. The Government has promised to support this legislative move and there

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13. R McLelland (Attorney-General), A Wilkie, N Xenophon, *Strengthening journalist shield laws*, media release, 28 September 2010, viewed 12 October 2010, http://www.ag.gov.au/www/ministers/mccllelland.nsf/Page/MediaReleases_2010_ThirdQuarter_28September2010-Strengtheningjournalistshieldlaws.
See also D Guest and C Merrit, 'West Australia's Attorney-General rejects federal moves to protect sources', *The Australian*, 1 October 2010, viewed 20 October 2010, <http://www.perthnow.com.au/news/western-australia/west-australias-attorney-general-rejects-federal-moves-to-protect-sources/story-e6frg13u-1225932657187>
 14. A Wilkie, 'Second reading speech: Evidence Amendment (Journalists' Privilege) Bill 2010', House of Representatives, *Debates*, 18 October 2010, p. 8, viewed 9 November 2010, <http://www.aph.gov.au/hansard/reps/dailys/dr181010.pdf>. It is to be noted that Mr Wilkie has had personal experience of these matters, in particular his revelations regarding intelligence in the lead up to the Iraqi war were the subject of considerable press interest, and a summary of this history was provided by the SBS in their series on whistleblowers 'Law and Disorder - Andrew Wilkie - the perfect whistleblower', 18 November 2009, viewed 23 October 2010, <http://emms/ProgramItem.aspx?ProgramItemID=155232&SearchKeywords=%7cLaw+and+Disorder>. An ABC One piece quotes Dr Peter Bowden from Whistleblowers Australia who says Mr Wilkie is a hero: 'Andrew Wilkie is a person I admire tremendously...He undertook to release to the Australian people the information that he had acquired through his work with the Office of National Assessments, that there were no weapons of mass destruction in Iraq, so our reasons for going to war there were close to zilch,' quoted in Conor Duffy, 'Who is Andrew Wilkie?', viewed 23 October 2010, <http://abc.gov.au/news/stories/2010/08/26/2994143.htm?site=qanda>
 15. AAP, 'Lib Senator backs privilege for journalists,' 14 September 2005.

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has in fact been widespread support for whistleblower legislation.¹⁶ While it may be on the government's legislative agenda to pass whistleblower legislation, the government does not seem to have immediate legislative plans to implement provisions covering the more general confidential professional relationships. Clearly the priority item is to improve the current journalists' privilege, however, as the Brandis Bill shows, the two issues could be addressed in the same legislative package.

Senator Xenophon seems to have come the closest of any proponent of these Bills to offering an argument for the primacy of the journalists' protection over other professionals, although he does not go so far as to argue that this primacy should preclude a focus on getting both forms of the privilege appropriately implemented. In 2009 he argued 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'.¹⁷

The primacy advocated by Xenophon would be satisfied by the stronger protections proposed for journalists in both Bills. The Brandis amendments would comply with this logic by giving the general professional privilege a lesser protection (the judicial discretion model) – whereas the stronger 'rebuttable presumption' model is given to journalists.

The Wilkie Bill continues successive governments' failures to attend to the needs of professionals other than journalists. There would seem to have been no justification given as to why doctors/counsellors/social workers et cetera are not having their need for a protected confidential relationship recognised. There have now been four Bills attending to journalist's privilege but only one, the Brandis Bill, has given the general professionals' need for confidentiality any attention.

In the case of journalists there has been a widely documented case (McManus and Harvey) highlighting the need for a stronger privilege. It may be that other professionals have not been faced with this dilemma in such an acute fashion – certainly it does not seem to have occurred in such a way that it has received comparable media coverage. However it is predictable that there will be occasions where the courts should be free to extend the privilege to the confidential communications between other professionals and their clients/patients et cetera. In such a case it is surely preferable for legislators to have acted before the need for protection becomes acute. The Law Reform Commission reports are designed to assist legislators in identifying these needs and take a proactive stance by intervening before a high profile case arises which would highlight any lack of legislative foresight.

16. M A Neilsen, Public sector accountability and transparency, p. 68, Parliamentary Library, *Parliamentary Library briefing book; key issues for the 43rd Parliament*, Commonwealth of Australia, 2010, <http://www.aph.gov.au/library/pubs/BriefingBook43p/BriefingBook43rd.pdf>

17. C Merritt, 'Xenophon's push to improve shield laws', *The Australian*, 3 April 2009.

The Bill as introduced by Mr Wilkie does not comply with the 'uniformity principle' that has been held out as desirable in evidence law. The amendments do not comply with the agreed upon national uniform law model. It has for some time been regarded as desirable for Australia's various jurisdictions to standardise the rules on evidence and it is a standing item on the Standing Committee of Attorneys-General. It should be noted on this point that the proponents of the Wilkie Bill are working in conjunction with the Commonwealth Attorney-General to ensure that the states agree to the change in direction.¹⁸ According to media reports both the NSW and Victorian governments are supportive of the change in the burden of proof so that the journalists have a stronger but rebuttable presumption. Once again it may be desirable for the states/territories to move to the Commonwealth's model of journalists' privilege, but at the same time it may be desirable for the Commonwealth to move to the States/Territories model of the generic professional privilege (as the Brandis Bill does).

Policy position of non-government parties/independents

Mr Wilkie, the Government and Senator Xenophon have all worked on the Bill introduced by Mr Wilkie, however since Senator Brandis' Bill is identical in effect with respect to the journalists' privilege they may nevertheless be interested in his approach. Senator Brandis, with an elegant piece of drafting, manages to satisfy the long standing recommendations of a number of Law Reform Commissions regarding the need to broaden the privilege beyond journalists, while implementing the 'rebuttable presumption' scheme in an identical manner to the Wilkie Bill. Senator Brandis' broadening of the privilege in no way lessens the impact of the protections he proposes for journalists. It is thus conceivable that either sponsor of the respective Bills could endorse the other's Bill (thereby generating a metaphorical group hug in legislative form).

It is as yet unclear as to how the other independents will view the two Bills, and the Greens, having previously called for a 'rebuttable presumption model',¹⁹ do not seem to have expressed a preference regarding the two Bills, although all the different parties supported the Wilkie Bill in the House of Representatives debates, subject to amendments in the Senate.²⁰

18. See for instance N Butterly, 'Gillard shield laws get WA snub', *West Australian*, 29 September 2010, viewed 20 October 2010, and D Guest, 'Xenophon to lobby west on shield laws', *The Australian*, 15 October 2010, viewed 20 October 2010, <http://www.theaustralian.com.au/business/legal-affairs/xenophon-to-lobby-western-australia-on-shield-laws/story-e6frg97x-1225938873627>.

19. Senate Standing Committee on Legal and Constitutional Affairs, *Report on the Inquiry into the Evidence Amendment (Journalists' Privilege) Bill 2009*, pp. 31-33, viewed 14 October 2010, http://www.aph.gov.au/senate/Committee/legcon_ctte/journalists/

20. See generally the second reading debate in the House of Representatives, *Debates*, 25 October 2010, pp. 3-9, viewed 29 October 2010, <http://www.aph.gov.au/hansard/rep/dailys/dr251010.pdf>

Position of major interest groups

The Media, Entertainment and Arts Alliance, the union and professional organisation covering the media, entertainment, sports and arts industries, has for some time been calling for laws along the lines of the New Zealand model to be introduced. They criticised both the 2007 and 2009 Bills on the basis that those Bills did not go far enough to protect journalists. They have offered their support to both the Wilkie Bill and the Brandis Bill, saying

[t]he Alliance welcomes the race in parliament to introduce bills strengthening journalist shield laws... [t]he Alliance sees tougher journalist shield laws as a way to prevent the prosecution of journalists who respect article three of the Alliance Journalist Code of Ethics – which states that where confidences are accepted, they must be respected in all circumstances. Such a provision is vital if journalists and whistleblowers are to hold those in power to account.

Both bills are reportedly based on New Zealand legislation, and will introduce a rebuttable presumption in favour of journalists not disclosing information that would identify their sources in court proceedings. This means those seeking to identify a confidential source must persuade a judge that there is a public interest reason to do so that outweighs the potential harm to that source.²¹

They have also condemned the West Australian government's refusal to move towards the 'rebuttable presumption' model – posing the question 'why are they protecting themselves from genuine whistleblowers?'.²² There would seem to be an on-going tension here, with an earlier West Australian Attorney-General commenting with respect to the 2007 amendments that he was:

concerned that shield laws might need to be accompanied by a better way of holding unethical journalists accountable.²³

Financial implications

According to the Brandis Explanatory Memorandum the Bill would have no significant financial impact but claims for the privilege could result in 'some increase in the use of court resources'. The Wilkie Explanatory Memorandum does not comment on the financial implications of this Bill.

Main issues

With two Bills before the Parliament dealing with precisely the same issue, it is necessary to provide a brief comment on the differences between the two Bills.

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21. Media and Entertainment Arts Alliance, 'Alliance welcomes shield laws', MEAA web site, 29 September 2010, viewed 18 October 2010, http://www.alliance.org.au/alliance_welcomes_shield_laws/
 22. N Butterly, 'Gillard shield laws get WA snub', *West Australian*, 29 September 2010.
 23. C Merritt, 'States reject journos' sources law' *The Australian*, p. 23, 13 April 2007.

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The Bill introduced by Senator Brandis addresses several of the concerns expressed over past efforts, including the Coalition's 2007 Bill. Most significantly it broadens the privilege beyond journalists to cover a broad range of professionals who are in a position to accept and keep their clients confidences. This would be an amendment that has long been outstanding and which neither party has previously managed to legislate. It would also provide evidence that, despite the fact that Parliamentarians and journalists necessarily have a close relationship, legislators interests are broader than simply addressing the need to protect journalists.

Nevertheless the Wilkie Bill, while introducing the same protection for journalists as the Brandis Bill, has the endorsement of the Government, and in its more focussed approach there may be some additional satisfactions for sectors of the media.

The two Bills, being identical in form with respect to the substantive amendments, both raise the same issues with respect to their drafting.

Different forms of journalism

Both the Wilkie and Brandis Bills adhere closely to the New Zealand model. The legislation would extend the journalists' privilege to all employed journalists working in all forms of 'news media', a definition which would encompass the efforts of both investigative journalists and gossip columnists. The presumption that journalists do not need to reveal their sources (where confidentiality has been promised) would apply to both categories of writers, and it would fall to aggrieved parties to convince the court, according to a strict test, that evidence as to the journalists' source should be given.

Courts would have to resolve these questions in the light of 'the issues to be determined in that proceeding' and decide whether 'the public interest in the disclosure of the identity of the informant outweighs' any likely adverse effect of the disclosure on the informant or any other person *and* whether it outweighs

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.

Clearly this will put a heavy onus on anyone seeking to have the identity of an informant revealed – and this onus will apply whether the piece is a less edifying article or whether it is an investigative piece making the weighty contributions to our democratic system which journalists can make. There is no capacity in the court to consider the worth of the individual piece, other than in those difficult to interpret phrases, which stipulates that the court is to consider these matters 'having regard to the issues to be determined in [the] proceeding' and whether the 'public interest in the disclosure' outweighs the consequent adverse effects on individuals and the public interest in the communications of facts by the media. As the Bills are drafted they offer lighter pieces the same protections regarding the role of the media in promoting free speech in a democratic system as would be offered to journalistic endeavours of greater merit. This could have interesting effects.

There are concerns that serious investigative journalism is under threat from 'many directions', including the manner in which the print media is facing new challenges under evolving forms of communication technology. In a recent article, 'An endangered species', Ian Burrell interviewed a number of journalists and academics in the field of journalism and reported their concerns that it is harder and harder to finance investigative journalism with a notable exception:

There's clearly a huge amount of money available to people doing investigations if their targets are celebrities. But whether this is moral, ethical or in the public interest is often extremely in doubt [comments Paul Lashmar, one of Britain's most experienced investigative journalists]. A lot of the best investigative journalists are working for tabloids, looking at celebrities.²⁴

Or again Mr Burrell quotes Rosie Waterhouse, another leading investigative reporter:

In the public's mind, most people will equate the current climate of investigative journalism with muck-raking, sex, celebrities and hounding people. Serious public-interest publications and broadcasters must make the distinction, and keep spelling out that we want to investigate matters in the public interest, not necessarily what interests the public.²⁵

The Bills do not seek to make any such distinction, and by conjoining the features that the court must be satisfied about before allowing the privilege to be over-ridden, the Bills would make it more difficult for the court to make that distinction too.

Different forms of journalists

Another issue that is raised by the definitions used by both Bills is how broadly or narrowly to define a 'journalist'. Mr Wilkie's Explanatory Memorandum comments that the definition in the Bill(s) will preclude many 'bloggers', although if they are paid to do their blogging on a regular basis then they will presumably still fall within the definition. The question of who is paying them and what amount is left uncertain other than by reference to it being in 'the normal course of that person's work'.

When discussing the 2009 Bill the NSW, Tasmanian and West Australian Attorneys-General argued that the non-definition of the term 'journalist' is problematic:

...the term has a flexible and contentious meaning and the practice of journalism is rapidly changing. It is not possible to define journalists in the way that lawyers or doctors are usually identified, such as by reference to qualifications or compulsory professional vetting or

24. I Burrell, 'An endangered species', *The Canberra Times*, 9 October 2010, reprinted from *The Independent*, 7 October 2010, viewed 9 October 2010, <http://www.independent.co.uk/news/media/press/secrets-of-the-story-hunters-are-investigative-journalists-so-highminded-2099790.html>. For a general account of the difficulties facing journalists in Australia today see N Abjorensen, Democratic Audit of Australia, Australian National University, *Not good news: Australia's shrinking media freedoms*, Discussion Paper 18/07, September 2007, viewed 25 October 2010, http://www.democraticaudit.anu.edu.au/papers/20070920abjorensen_media.pdf

25. Burrell, op. cit.

affiliation. The label of "journalist" is really one that depends more on self identification than any other factor.²⁶

With the Tasmanian Attorney-General going on to point out that in the case of offences, fraud or misconduct, the 2009 Bill potentially granted journalists greater privilege than that which might be claimed under legal professional privilege:

...a public servant whistleblower may impart the same information to a journalist (for publication) and a lawyer (for the purpose of seeking legal advice), thereby committing the offence of disclosing official secrets. Under the proposed Commonwealth Bill, the legal professional privilege is automatically lost (section 125) but the journalists [sic] privilege, which is within the discretion of the court, may remain.²⁷

Unlike the various principles governing lawyers' conduct, the journalists' Code of Ethics is not a legally binding document. Australia's Code of Ethics for Journalists, produced by the Media Entertainment and Arts Alliance, is not legally enforceable, although it does contain provisions which could be relevant to situations in which journalists' seek to rely on the privilege, including that they should:

Aim to attribute information to its source. Where a source seeks anonymity, do not agree without first considering the source's motives and any alternative attributable source. Where confidences are accepted, respect them in all circumstances. (Principle 3)²⁸

Furthermore they should '[n]ever exploit a person's vulnerability or ignorance of media practice' (Principle 8, inter alia). In previous discussions of the journalists' privilege it has been noted that journalists are under a duty to ensure that their potential source is aware of the ramifications of their communications, in particular if it involves illegal conduct they should be aware that they may be discovered through means outside of the control of the journalist.

The Press Council is able to hear complaints of breaches of the code of conduct, but findings under this procedure do not have any legal effect. In a 2003 paper, Georgia Price pointed out that the most severe punishment open to the Australian Journalist's Association is to expel a member, and since membership is not a pre-requisite to the practice of journalism, this may not be an effective

26. Senate Standing Committee on Legal and Constitutional Affairs, Report on Inquiry into the Evidence Amendment (Journalists' Privilege) Bill 2009, p. 11, viewed 29 October 2010, http://www.aph.gov.au/Senate/committee/legcon_ctte/journalists/report/report.pdf

27. Lara Giddings MP (Deputy Premier, Attorney-General, Minister for Justice (Tas)), Submission no. 13, Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Evidence Amendment (Journalists' Privilege) Bill 2009*, viewed 14 October 2010, http://www.aph.gov.au/senate/Committee/legcon_ctte/journalists/submissions/sub13.pdf

28. See generally, Media, Entertainment & Arts Alliance, *Media Alliance Code of Ethics*, viewed 23 October 2010, http://www.alliance.org.au/resources/download/code_of_ethics/

penalty.²⁹ The inadequacies of the Press Council's enforcement mechanisms are also well documented, and Price comments generally that:

it is pertinent to observe that the level of regulation appears disproportionate to the level of power wielded daily by the media.³⁰

Price recorded that there was a general belief amongst journalists that the Code of Ethics was effective (for a convincing range of reasons). Nevertheless, she concluded at the time (2003) that legal oversight of the privilege protecting confidential communications would be a useful measure.

Neither Bill makes any reference to the journalists' Code of Ethics or includes a rigorous definition of a journalist or any exploration of the forms of journalism that may thus attract the privilege.

Key provisions in common

The two Bills share certain elements, but insert them into the Evidence Act in different ways. Rather than repeat the provisions that they share, the Digest provides a summary of the two different models with differentiated individual comment supplied later.

Definitional Elements

Both Bills provide definitional elements which stipulate a broad definition of an informant (someone who tells a journalist something for the purposes of its publication) and a journalist (someone who works in such a way that 'in the normal course of that person's work' they may be given material by an informant who would expect them to publish the information), and also defines 'news medium' so that it would cover a range of media, including digital, by reference to the dissemination of 'news and observations' to the public or a section of the public.

Central Operative Provisions

The central operative provisions of both Bills provide an assumption in **proposed subsection (1) of [sections 126D-Brandis and 126H-Wilkie]** that journalists who have promised not to disclose the identity of an informant cannot be compelled to answer questions in such a manner that this promise of confidentiality is thwarted. The court can, however, require the evidence to be provided under **proposed subsection (2)** if a party can satisfy the court that 'the public interest in the disclosure of [that] evidence' outweighs any likely adverse effect on anyone and also outweighs the

29. Georgia Price, "Pack your toothbrush!": journalists, confidential sources and contempt of court,' *Media And Arts Law Review*, December 2003, vol. 8 no. 4, p. 278, viewed 29 October 2010, <http://www.law.unimelb.edu.au/cmcl/malr/8-4-1%20Price.pdf>

30. *Ibid*, p. 278.

public interest in the operation of the media and accordingly in the media's ability to access sources of facts [i.e. informants].

In summary the court can order evidence to be given even if it discloses the identity of an informant if, on balance, the court is persuaded the public interest in that evidence outweighs harms to the informant or anyone else and also outweighs the public interest in the communications of the news media AND 'accordingly, the news media's ability to access 'sources of facts'.

With the proposed repeal of section 126D there is no legislative suggestion that the court should have regard to whether the relevant behaviour constitutes misconduct, however the court can impose whatever terms and conditions it thinks fit on any order to disclose the relevant evidence (**proposed subsection (3)**).

Extensions of coverage

In identically worded and numbered sections the two Bills propose to extend the operation of the protections included in the Bills to all proceedings for Commonwealth offences. This follows the proposed model in the 2009 Bill, although there were concerns expressed regarding this extension at the time it was sought to be made.

The Attorney-General's second reading speech for that 2009 Bill provided 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.³¹

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.³²

Miscellaneous Provisions with minor differences

The Wilkie Bill deals with an issue of procedure which is not addressed in the Brandis Bill, however it is arguably unnecessary for the Brandis Bill to do so. In **item 3** the Wilkie Bill applies the journalists'

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

32. 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.

privilege to pre-trial proceedings. It seeks to introduce a **new subsection 131A(1)** which would allow someone who is the subject of a disclosure requirement to refuse the order and it would fall to the party seeking disclosure to apply to the court for an order that the rebuttable presumption of the privilege should apply.

On this point the Brandis Bill is silent, however the current subsection 131A(1) would give an extended application to both the journalists' privilege and the general professional privilege since it stipulates that these matters are to be dealt with by the courts in the same manner as if the objection to providing this information under a disclosure requirement is an objection to giving evidence in court.

Finally the Wilkie Bill amends sections of the *Family Law Act 1975* (the FLA) to adjust the relevant provisions so that the correct sections of the Evidence Act are referred to when there is a relevant case under the FLA (**item 4**). In such a relevant case a journalist may be required to give evidence regarding their confidential information when it is in the child's best interest that this occurs. The Brandis Bill would not require such an amendment since it makes no changes to the existing numbering scheme of the Evidence Act to which the FLA refers. The Wilkie Bill also seeks to tidy up the FLA (**item 5**), by repealing a section of the FLA (section 100C) which is effectively superfluous since a new arrangement in the FLA (sections 69ZX and 69ZN) ensures that it is the court's duty in all proceedings involving children to ensure that their best interests are protected.³³

Key provisions distinguishing the Brandis Bill

The Brandis Bill amends 'Division 1A – Professional confidential relationship privilege' of the Evidence Act by inserting into the current section 126A (the definition section) the 'definitional elements' outlined above. The Brandis Explanatory Memorandum points out that disclosures to a non-journalist that might be opportunistically relayed to a news medium outside of the normal course of that person's work should not be able to claim the privilege.

Item 2, with a succinct drafting effort (that is simply replacing the current reference to a journalist with 'another person' in Division 1A-Professional confidential relationship privilege), creates a more general privilege for professionals, in the form of a judicial discretion. The term 'professional' is not defined in the provision, however, because no-one could access the proposed professional privilege without the consent of the relevant Court, it would be interpreted within a rich legal history governing the term.³⁴

33. These changes were made by the *Family Law Amendment (Shared Parental Responsibility) Act 2006*. For further background see M A Neilsen and J Norberry, *Family Law Amendment (Shared Parental Responsibility) Bill 2005, Bills digest*, no. 99, 2005-2006, viewed 1 November 2010, <http://www.aph.gov.au/library/pubs/bd/2005-06/06bd099.pdf>.

34. See generally 'The Professions' in R Cocks, 'Ethical Ramifications of Corporatised Legal Practice' (2001) 6(2) *Deakin Law Review* 334. The plain English meaning would also be relevant and the Macquarie Dictionary defines a 'profession' as '1. a vocation requiring knowledge of some department of learning or science, especially one of the

The Bill (in **item 3**) is then able to delete the current note to this section (126A), which has been inserted to distinguish the Commonwealth Act's provisions from the comparable NSW provisions.³⁵

The Brandis Bill seeks to replace the provision which currently deals with the loss of the privilege in cases of misconduct (section 126D 'Loss of professional confidential relationship privilege: misconduct') with a **new 126D** containing the 'central operative provisions' outlined above. It would seem that section 126D's treatment of misconduct situations is no longer regarded as necessary since the court is able to take cognisance of these matters in the case of the general privilege, and in the case of the journalists' privilege such provisions are not deemed necessary.

Key provisions distinguishing the Wilkie Bill

The Bill repeals the entire Division 1A of Part 3 of the Evidence Act (which is currently titled 'Professional confidential relationship privilege'). A new Division 1A would be introduced titled 'Journalists' privilege'. The new title would more accurately reflect the ambit and coverage of the Division, although the removal of the current Division 1A leaves unaddressed the needs of other professional confidential relationships. The numbering of the sections proposed by the Bill is explained by the Explanatory Memorandum by reference to the uniform model law, such that sections 126A-126F are left vacant in line with a future intention to address the matters that should be canvassed there.

The new Division would have a proposed definition section introducing the definitional elements outlined above and also the 'central operative provisions' (**proposed section 126H**). With respect to the definitional elements, the Explanatory Memorandum points out that bloggers, to the extent they may be defined as operating on a casual or unpaid basis, would not come within the definition of a journalist, who must be operating within 'the normal course of [their] work'.

Concluding comments

The Bills are identical in their effect with respect to the journalists' privilege. The Brandis Bill gives recognition to the general professional privilege (albeit at a lower level of protection than the journalists' privilege), while the Wilkie Bill removes the pre-existing structure for the general

three vocations of theology, law, and medicine (formerly known specifically as the professions or the learned professions)', but that Dictionary goes on to point out that it can encompass '2. any vocation, occupation, etc.' and '3. the body of persons engaged in an occupation or calling.' The relevant Oxford English Dictionary definition is 'a vocation or calling, esp. one that involves some branch of advanced learning or science.'

35. The note currently provides 'Note: This definition differs from the corresponding definition in subsection 126A(1) of the NSW Act, which is not limited to communications to journalists.'

professional privilege entirely (leaving the numbering to be filled, and also recognising that it is currently only applicable to journalists). There are miscellaneous ways in which the Bills differ but these are mostly a matter of drafting and the differences are insignificant, once the central model of only one or two privileges is resolved.

Both Bills implement the rebuttable presumption model with respect to journalists, but neither offers a particularly rigorous definition of journalism. Furthermore the repeal of provisions recognising the significance of illegality/misconduct leaves the Courts with less guidance in exercising their reserve discretion to prevent the presumptive exercise of the privilege.

The relationship between journalists and politicians is necessarily intimate, however by keeping in mind a population of professionals who may not have that immediate capacity to interact or sway Parliamentarians, the provisions proposed by Senator Brandis would manage to avoid any possible accusation that this relationship is so close that it involves the neglect of other constituents. Under the evolving Parliamentary configurations the possibility of a Wilkie-Brandis Bill should not be dismissed.

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