



Australian Government
Attorney-General's Department

Access to Justice Division

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Mr Peter Hallahan
Committee Secretary
Senate Standing Committee on Legal and Constitutional Affairs
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Mr Hallahan

Senate Committee enquiries into the Evidence Amendment (Journalists' Privilege) Bill 2009 and Law and Justice (Cross Border and Other Amendments) Bill 2009

The Attorney-General's Department appreciates the opportunity to assist in the Committee's consideration of the above two Bills. This letter addresses the Questions on Notice arising from the Public Hearing held on 28 April 2009, and provides additional points of clarification in respect of the evidence given.

Evidence Amendment (Journalists' Privilege) Bill 2009

1. What is the Department's response to the view raised by the Public Interest Advocacy Centre (PIAC) that the definition of 'protected confidence' in section 126A requires amendment to ensure it covers the identity of a source as well as content?

On page 2 of its submission, under the heading 'Confirmation and Denial', PIAC suggests that the definitions of 'protected confidence' and 'protected identity information' in section 126A work so that a source's identity is only protected where the content of the communication is not to be disclosed. PIAC notes that in some cases a journalist's duty is limited to protecting the source, while being at liberty to disclose the content.

This interpretation of section 126A is not supported by case law and the Explanatory Memorandum makes clear that the privilege applies to any part of the communication which was confidential, which may be limited, for example, to the name of the person providing the information.

Comparable provisions in the New South Wales *Evidence Act 1995* have been considered by a court to apply to protect the identity of a journalists' source, even where the journalist had disclosed the content of communications with their source. In *NRMA v John Fairfax Publications Pty Ltd & 4 Others* [2002] NSWCA 563, Master Macready considered whether to uphold professional confidential relationship privilege in an application by the plaintiff for discovery of the identity of the source of a newspaper article published by the defendant journalists about decisions made in confidence during a NRMA board meeting.

2. Would the Department please provide a brief summary of cases in which section 10 of the Contempt of Court Act 1981 (UK) has been judicially considered?

*Goodwin v United Kingdom*¹ is an important case of law on journalists' privilege in the United Kingdom. This case considered the relationship between section 10 of the *Contempt of Court Act 1981* and Article 10 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*.²

Goodwin was a trainee journalist who received information from a source that a financially unstable company was trying to raise a substantial loan. The information derived from a classified draft corporate plan which may have been stolen.

The company sought an injunction against publication of the information and discovery of Goodwin's notes disclosing his source. Goodwin refused and was found in contempt of court. He appealed to the European Court of Human Rights (ECHR), which found that the order was in breach of Article 10 of the Convention.

The ECHR held that Article 10 of the Convention limited the obligation on journalists to disclose their sources under section 10 of the Act to 'exceptional circumstances where vital public or individual interests were at stake'.³ In this case, the competing interests of the company (in suing the source for damages caused by dissemination of confidential information, for example) did not sufficiently outweigh the vital public interest in protecting the source's identity.⁴

Goodwin has been endorsed in subsequent UK cases.⁵ However its principles have been refined by case law so that when the court is called upon to balance competing interests under the Convention, none should be accorded automatic priority over any other.⁶ The court no longer characterises section 10 of the *Contempt of Court Act 1981* as a 'presumption' in favour of free speech, as it once did.⁷ Rather, it is clear that the court cannot determine whether an encroachment upon the confidentiality of a source is necessary and proportionate, in any given case, until the competing interests have been balanced one against the other.⁸

3. Please explain why confidence has been requested for the Attorney-General's letter to the Committee when the communication has been referred to in the *Australian* on 23 April 2009?

The Department has requested further advice from the Attorney-General's Office in respect of the Attorney-General's letter dated 23 April 2009 to the Chair of the Committee. There is a long-standing

¹ *Goodwin v United Kingdom* [1996] ECHR 16

² *European Convention for the Protection of Human Rights and Fundamental Freedoms* 213 UNTS 221 (entered into force 3 September 1953).

Article 10 – Freedom of expression

1. Everyone has the right to freedom of expression...
2. ...subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

³ at 37

⁴ at 45

⁵ *Ashworth Hospital Authority v Mirror Group Newspapers Ltd* [2002] UKHL 29

⁶ *Mersey Care NHS Trust v Ackroyd (No 2)* [2007] HRLR 580

⁷ *In re An Inquiry Under the Company Securities (Insider Dealing) Act 1985* [1988] AC 660

⁸ *Inner West London Assistant Deputy Coroner v. Channel 4 Television Corporation* [2008] 1 W.L.R. 945 [2007] EWHC 2513 (QB) QBD at 25.

agreement between members of the Standing Committee of Attorneys-General (SCAG) that formal SCAG decisions cannot be made public without the agreement of SCAG Ministers. Therefore, the Attorney-General requests that his letter remains confidential.

Law and Justice (Cross Border and Other Amendments) Bill 2009

Can the Department confirm when amendments mirroring the proposed changes to the *Evidence and Procedure (New Zealand) Act 1994* (to reintroduce 'family proceedings' to the scope of the scheme) were made in New Zealand?

The relevant New Zealand amendments, to the Evidence Act 2006 (NZ), came into force on 1 August 2007.

Would the proposed amendments to the *Evidence and Procedure (New Zealand) Act 1994* (EPNZ Act) apply to restraining orders?

The EPNZ Act covers the service of subpoenas, not service of documents generally. Accordingly, neither the current provisions nor the proposed amendments provide for the service of restraining orders. However, subpoenas may be served in connection with protection order proceedings under the proposed amendments.

The current definition of 'family proceedings' under the Act includes 'protection of persons from domestic violence or domestic molestation'. We note that protection or restraining orders are not limited to domestic relationships.

Would the Department please confirm that consultation with State and Territory Attorneys-General was undertaken on the proposed amendments to the *Service and Execution of Process Act 1992*?

The former Attorney-General wrote to his State and Territory colleagues in April 2006 consulting them on amendments to the Service and Execution of Process Act, including the amendments contained in this Bill. All jurisdictions supported the proposal.

On 23 February 2009 the Attorney-General circulated a draft of the amendments to his State and Territory colleagues, prior to the introduction of the present Bill. No issues or concerns were raised in response to this correspondence.

We appreciate that the Committee has been asked to report on both these Bills by 7 May 2009 and are providing these responses today as requested by the Chair. However, the Department has not had an opportunity to review the record of its evidence provided on 28 April 2009. We would be happy to provide any further clarifications necessary, either before or after reviewing the record of evidence, to assist the Committee in finalising its reports.

Yours sincerely



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