CHAPTER 3

Key Issues

3.1 This chapter discusses the key issues raised in submissions and later in evidence, including:

- limitations of the object clause;
- extension of the professional confidential relationship privilege (privilege) to journalists;
- offences, frauds and misconduct;
- protection provided in the *Evidence Act 1995* (Act); and
- application of the privilege.

Limitations of the object clause

3.2 The Evidence Amendment (Journalists' Privilege) Bill 2009 (Bill) proposes to insert an object clause into the Act to modify the way in which courts exercise their discretion to exclude evidence of a protected confidence or protected identity information in civil or criminal proceedings.

3.3 The NSW Attorney-General, the Hon. John Hatzistergos MLC (NSW Attorney-General) questioned whether the object clause can achieve its stated purpose. Following a NSW Court of Appeal decision, an object clause neither controls clear statutory language nor commands a particular outcome.[1]

3.4 The NSW Attorney-General therefore suggested that the Bill specifically require the courts to take into account a public interest factor:

> While I support the inclusion of a public interest factor in maintaining the confidentiality of the information and the confidentiality of the protected identity information (which would also cover the public interest in the media communicating facts and opinion to the public and for that purpose having access to sources of fact), I think that the consideration of the public interest factors should be mandatory for the court to consider whenever it is deciding whether to grant a privilege.[2]

3.5 From a different perspective, the WA Director of Public Prosecutions (WA DPP) questioned whether the object clause supports the proper administration of justice, an essential component of the rule of law. The WA DPP argued that the object

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1 The Hon. John Hatzistergos MLC, NSW Attorney-General, *Submission 9*, p. 2. Also see, *Minister for Urban Affairs and Planning v Rosemount Estates Pty Ltd* (unreported, 90640127, 14 August 1996).

2 The Hon. John Hatzistergos MLC, NSW Attorney-General, *Submission 9*, p. 2.

clause juxtaposes the justice system with the role of the media, and could be interpreted as diminishing the pre-eminence of the administration of justice. In his view, there is no need for the object clause, and if it were to remain within the Bill, then it should reflect the position that the proper administration of justice is paramount.[3]

3.6 Not all submissions agreed with these two views of the object clause with other submissions supporting its inclusion within the Act.

Journalist-source confidentiality

3.7 The Media Entertainment & Arts Alliance (MEAA) submitted that the object clause contrasts with an important professional ethical obligation:

> 3. 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.
>
> Guidance Clause: Only substantial advancement of the public interest or risk of substantial harm to people allows any standard to be overridden.[4]

3.8 It argued that the Bill should place greater emphasis on protection for journalist-source confidentiality. For example, by incorporating an 'overarching statement of the spirit of the law that favours journalist-source confidentiality protection', or by requiring courts to prioritise the protection of confidential sources.[5]

3.9 Some submissions disagreed with the suggestion that the MEAA Code of Ethics be codified by the Bill. Several noted that journalists, unlike most other professions, are self-regulated,[6] and the WA DPP quoted the Law Reform Commission of Western Australia (LRC WA), which previously examined the issue:

> …it may be argued that journalists should be legally entitled to refuse to disclose the identity of their informants on the ground that refusal is required by the ethics of their profession. However, a group's imposition upon itself of a "code of ethics" is not of itself a sufficient justification for the enactment of the substance of that code in legislation.[7]

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3 WA Director of Public Prosecutions, *Submission 11*, pp 2-3.

4 Media Arts Entertainment Alliance, Code of Ethics, Guideline 3 and Guidance Clause.

5 Media Entertainment & Arts Alliance, *Submission 7*, p. 3 & pp 5-6.

6 For example, the Hon. Simon Corbell MLA, ACT Attorney-General, *Submission 10*, p. 3.

7 Law Reform Commission of Western Australia, *Privilege for Journalists*, Project No. 53, February 1980, p. 10. Also, see WA Director of Public Prosecutions, *Submission 11*, pp 3-4.

Difficulties with terminology

3.10 While supportive of the object clause, some submissions questioned its terminology. The Public Interest Advocacy Centre (PIAC), for example, submitted that the terminology – 'facts' and 'media' – unnecessarily restricts recognition of the public interest.[8]

3.11 The NSW Attorney-General, the Tasmanian Attorney-General, the Hon. Lara Giddings MP (Tasmanian Attorney-General) and the WA Attorney-General, the Hon. C. Christian Porter MLA (WA Attorney-General) especially 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 affiliation. The label of "journalist" is really one that depends more on self identification than any other factor.[9]

3.12 As indicated in preceding paragraphs, submissions exhibited fundamental concern with journalist-source protection however, as noted by the WA DPP,[10] a primary purpose of the Bill is to extend the protection granted by the Act to journalists.

Extension of the privilege to journalists

3.13 In general, submissions and evidence supported this amendment, but non-industry stakeholders questioned its limited application to journalist-source relationships only.

3.14 The WA Attorney-General submitted that the law ought to recognise the public interest in professional relationships generally, as is the position in NSW where its professional confidential relationship privilege does not discriminate between different vocations or professions:

> **126A Definitions**
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> (1) In this Division:
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> …
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> "protected confidence" means a communication made by a person in confidence to another person (in this Division called the "confidant"):

8 Public Interest Advocacy Centre, *Submission 5*, pp 2-3.

9 The Hon. C. Christian Porter MLA, WA Attorney-General, *Submission 2*, pp 4-5. Also, see the Hon. John Hatzistergos MLC, NSW Attorney-General, *Submission 9*, pp 1-2; and the Hon. Lara Giddings MP, Tasmanian Attorney-General, *Submission 13*, p. 1.

10 WA Director of Public Prosecutions, *Submission 11*, p. 1.

> (a) in the course of a relationship in which the confidant was acting in a professional capacity, and
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> (b) when the confidant was under an express or implied obligation not to disclose its contents, whether or not the obligation arises under law or can be inferred from the nature of the relationship between the person and the confidant.
>
> **Note:** This definition differs from the corresponding definition in section 126A (1) of the Commonwealth Act, which is limited to communications to journalists.[11]

3.15 In addition to arguments based on uniformity and equity, some submissions questioned the reasons for distinguishing journalist-source relationships from other professional confidential relationships.

3.16 The ACT Attorney-General, the Hon. Simon Corbell MLA (ACT Attorney-General), for example, submitted that there is 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 group. Medical and legal practitioners operate within heavily regulated profession and are therefore subject to stringent quality control. Journalists, on the other hand, are not required to comply with professional registration or standards in order to practice their profession.[12]

3.17 The Tasmanian Attorney-General agreed with her colleagues' overall assessment, adding that, in the case of offences, fraud or misconduct, the Bill potentially grants 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

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11 Section 126A of the *Evidence Act 1995* (NSW). The NSW provisions focus on communications made by a person in confidence to another person (protected confidences), and the professional nature of the relationship. They are otherwise identical to the Act: Australian Associated Press, Answers to Questions on Notice, 1 May 2009 (received 1 May 2009). Also, see The Hon. C. Christian Porter MLA, WA Attorney-General, *Submission 2*, p. 4; and Public Interest Advocacy Centre, *Submission 5*, pp 3-4. Both submissions noted that the NSW provisions overcome many of the definition difficulties identified in the Commonwealth legislation.

12 The Hon. Simon Corbell MLA, ACT Attorney-General, *Submission 10*, p. 3. Also, see WA DPP, *Submission 11*, pp 4-5.

> automatically lost (section 125) but the journalists [sic] privilege, which is within the discretion of the court, may remain.[13]

3.18 Submissions and evidence highlighted provisions within the Bill most likely to interact with and impact on journalists' claims for privilege: section 126D and new subparagraph 126B(4)(i).

Offences, frauds and misconduct

Loss of privilege

3.19 The Bill will repeal section 126D, which provides for the loss of privilege when a communication is made or the contents of a document are prepared in furtherance of the commission of a fraud, an offence or commission of an act that renders a person liable to a civil penalty.

3.20 Some submissions welcomed this amendment, with the Australian Associated Press (AAP) describing the section as unduly harsh and unjust, a 'practical barrier' given that most confidential disclosures are made in contravention of the law.[14]

3.21 PIAC disagreed with this assessment of section 126D, emphasising the primarily permissive nature of the judicial discretion granted in section 126B:

> **Exclusion of evidence of protected confidences**
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> (1) The court may direct that evidence not be adduced in a proceeding if the court finds that adducing it would disclose:
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> (a) a protected confidence; or
>
> (b) the contents of a document recording a protected confidence; or
>
> (c) protected identity information.
>
> (2) The court may give such a direction:
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> (a) on its own initiative; or
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> (b) on the application of the protected confider or confidant concerned (whether or not either is a party).
>
> (3) The court must give such a direction if it is satisfied that:
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> (a) it is likely that harm would or might be caused (whether directly or indirectly) to a protected confider if the evidence is adduced; and
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> (b) the nature and extent of the harm outweighs the desirability of the evidence being given.[15]

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13 The Hon. Lara Giddings MP, Tasmanian Attorney-General, *Submission 13*, p. 1. Also, see WA Director of Public Prosecutions, *Submission 11*, pp 4-5.

14 Australian Associated Press, *Submission 4*, p. 2. Also, see Australian Press Council, *Submission 3*, p. 3; and Laurie Oakes, 'The fight for access to truth', *The Australian*, 4 May 2009, pp 31-32.

15 Subsections 126B(1)-(3) of the *Evidence Act 1995*.

3.22 PIAC argued that section 126D serves an important function: it clarifies the application of judicial discretion where evidence of an offence, fraud or misconduct is concerned. In its view, the repeal and partial replacement of this provision (with new subparagraph 126B(4)(i)) will accomplish little.[16]

3.23 The WA and NSW Attorneys-General also opposed the repeal of section 126D, albeit on grounds of legal principle. They argued that the amendment is not consistent with statutory and common laws of privilege, which automatically abrogate privilege in identical circumstances. In addition, the WA Attorney-General submitted that the range of offences and misconduct prohibiting, or discouraging, confidential communications to journalists include serious crimes, which should not be shielded:

> The abolition of automatic loss of privilege is effectively an invitation to engage in, or an endorsement of the existing practice of, criminal acts, fraud and misconduct…the law of evidence should not be developed to provide special protection or endorsement of criminal conduct, thereby embodying a double standard.[17]

Judicial consideration

3.24 Throughout the inquiry, submitters and witnesses expressed most concern with subsection 126B(4). As amended, this provision provides a non-exclusive list of matters which the court must take into account in determining whether to direct that evidence not be adduced in a proceeding (a guided discretion).[18]

3.25 Some submissions welcomed the proposed amendment as a strengthening of journalists' protection.[19] Other submissions queried whether the 'check list of factors' would have unintended and adverse practical implications,[20] particularly in relation to proposed new paragraph 126B(4)(i), which provides for the court to consider:

> (i) 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;[21]

3.26 The WA Attorney-General considered this amendment neither an adequate nor a satisfactory substitute for the automatic loss of privilege (section 126D). The WA Attorney-General commented that common sense and the legal framework

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16 Public Interest Advocacy Centre, *Submission 5*, pp 4-5.

17 The Hon. C. Christian Porter MLA, WA Attorney-General, *Submission 2*, p. 3. Also, see the Hon. John Hatzistergos MLC, NSW Attorney-General, *Submission 9*, p. 2.

18 Item 3 of the Bill.

19 Australian Press Council, *Submission 3*, p. 3 and Item 3 of the Bill.

20 WA Director of Public Prosecutions, *Submission 11*, p. 4.

21 Item 5 of the Bill.

applying over other privileges 'give reason to hope that the factor would weigh against the privilege.' Nonetheless, he expressed misgivings with the guided discretion:

> …the law is best expressed definitively, rather than in the legal mechanism of a judicial balancing exercise between a list of factors...the loss of privilege should not be left in doubt. To do so would only encourage those who are contemplating unlawful disclosures to test the limits of the law. The inclusion of criminal activity, fraud or misconduct as only one of a multitude of factors instils this doubt and uncertainty and undermines the clarity and deterrence that the criminal law should reflect.[22]

3.27 Dr Joseph Fernandez, a senior lecturer in journalism at Curtin University insisted that proponents of journalists' shield laws are seeking neither to test the law nor a grant of legal immunity rather, protection for sources that provide information of legitimate public interest value to journalists performing their professional duty, a well-recognised 'immunity' in democratic societies.[23]

3.28 Also in contrast to the WA Attorney-General, the Australian Associated Press (AAP) supported the amendment with the proviso that it should be a relevant consideration only where the protected confidence or protected identity information is a fact in issue. The AAP submitted that the Bill is protective in nature rather than punitive, and there appears to be no compelling reason why an unrelated breach of the law by the confider in providing information to a journalist should be a relevant consideration.[24]

3.29 Despite some focus on matters for judicial consideration, submitters and witnesses indicated to the committee that the most troubling legislative provisions were those concerning the judicial consideration itself.

The protection provided in the Act

3.30 Australia's Right to Know (ARK), a coalition of media organisations explained that the role of the media is to report on matters of public interest and scrutinise information on behalf of the public it serves:

> In the ordinary course of their duties journalists are expected to disclose the sources of their information. It makes the source, the journalist and the media outlet accountable for their reports, makes the process of reporting more transparent and is likely to help the consumer of the information to evaluate the integrity and credibility of the information.
>
> However, in some instances, information of legitimate public interest will only be disclosed to journalists if the identity of the source is kept confidential. In these instances, an informant may require a guarantee of anonymity for a variety of reasons but usually to avert any negative

22 The Hon. C. Christian Porter MLA, WA Attorney-General, *Submission 2*, p. 3.

23 Dr Joseph Fernandez, *Submission 1*, p. 9.

24 Australian Associated Press, *Submission 4*, pp 5-6.

> consequences such as a threat to their safety, their employment, their standing in the community and so on.
>
> Keeping a source confidential is fundamental to the ability of journalists to maintain trust with their sources and to encourage other sources to trust journalists and bring forward information of public concern.[25]

3.31 Industry stakeholders submitted that, in the past, journalist-source confidentiality has not received sufficient legal recognition and support, and submitters and witnesses alike cited recent examples of journalists fined, convicted or jailed for contempt of court for not disclosing confidential sources.[26]

3.32 While welcoming the additional protections granted in the Bill, these and other submitters continued to doubt that journalist-source confidentiality is sufficiently protected in Australian law with several submitters and witnesses referring to shield laws in other jurisdictions, for example, the United Kingdom and New Zealand.

United Kingdom

3.33 In the United Kingdom, section 10 of the *Contempt of Court Act 1981* (UK) provides journalists with a qualified protection:

> No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime.[27]

3.34 This provision is premised on non-disclosure, and there is no requirement for the information for which protection is sought to have been obtained in confidence. The statutory protection is available unless the party seeking the disclosure can satisfy the court that disclosure is necessary.

New Zealand

3.35 In New Zealand, subsection 68(1) of the *Evidence Act 2006* (NZ) also provides qualified protection to journalists who do not disclose confidential sources:

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25 Australia's Right to Know, *Submission 8*, p. 2.

26 For example, Belinda Tasker, Gerard McManus and Michael Harvey. Also, see the Law Reform Commission of Western Australia, 'Professional Privilege for Confidential Communications – Project No. 90', May 1993 for a description of other cases in which journalists have been found in contempt of court for failing to disclose confidential sources; and Australia's Right to Know, Answers to Questions on Notice undated (received 1 May 2009) .

27 Section 10 of the *Contempt of Court Act 1981* (UK).

Protection of journalists' sources

(1) If 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.

…

(5) In this section,—

informant means a person who gives information to a journalist in the normal course of the journalist's work in the expectation that the information may be published in a news medium

journalist means a person who in the normal course of that person's work may be given information by an informant in the expectation that the information may be published in a news medium

news medium means a medium for the dissemination to the public or a section of the public of news and observations on news[28]

3.36 Subsection 68(2) details the qualification: a judicial discretion to override the statutory protection if satisfied by either party to the proceeding that, having regard to the issues in the proceeding:

(2) …the public interest in the disclosure of evidence of the identity of the informant outweighs—

(a) any likely adverse effect of the disclosure on the informant or any other person; and

(b) 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.

…

(5) In this section,—

…

public interest in the disclosure of evidence includes, in a criminal proceeding, the defendant's right to present an effective defence.[29]

3.37 Like the United Kingdom legislation, the New Zealand provisions are premised on non-disclosure, and a party seeking disclosure must convince the court that disclosure is necessary if the protection is to be withheld. However, the New Zealand legislation also requires information to have been obtained by a journalist in confidence, and the court to conduct a balancing exercise in reaching any determination to withhold privilege.

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28 Subsections 68(1) & (5) of the *Evidence Act 2006* (NZ)

29 Subsections 68(2), (3) & (5) of the *Evidence Act 2006* (NZ)

Commonwealth law

3.38 The Act is not premised on a presumption of non-disclosure, meaning that the privilege applies only if the court makes the necessary direction on its own initiative, or the protected confider or journalist applies to the court for that direction.

3.39 While ARK expressed doubts as to whether the former would occur,[30] the point argued in stakeholders' submissions and evidence was that the Act should fundamentally be premised on a rebuttable presumption rather than a guided discretion to significantly enhance protection for journalists.[31] A sampling of those views follows.

3.40 The Australian Press Council unequivocally stated that the Bill does not go far enough, and the government ought to go further by introducing legislation that:

> …creates a presumption that a journalist is not required to disclose the identity of a confidential source unless there is a compelling reason warranting such disclosure…Such a presumption should only be rebutted where the party seeking to have the evidence adduced can present compellable reasons to do so, such as where the failure to disclose the identify of the source would present a serious threat to the health or safety of the public or to security.[32]

3.41 The AAP concurred, submitting that by not introducing legislation equivalent to that of the United Kingdom, New Zealand and the United States, 'the Bill simply maintains the status quo of inadequate protection rather than strengthening it':

> …unlike equivalent legislation in New Zealand, the United Kingdom and the United States, the Evidence Act will not confer any true right to resist disclosure and will not offer any additional protection than that already offered at common law under the Newspaper Rule. Therefore, it will not achieve the Government's stated legislative intention of strengthening the protection afforded to journalists.[33]

3.42 Dr Fernandez suggested that the Bill incorporate a clear statement of intent to guide judicial discretion and better achieve its stated objectives:

> This submission advocates the placing of the shield law in a context that recognises transparency, accountability and openness in government and the freedom of speech of citizens as important ideals. It is submitted that

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30 Australia's Right to Know, *Submission 8*, p. 6.

31 For example, Dr Joseph Fernandez, *Submission 1*; Media Entertainment & Arts Alliance, *Submission 7*; Australian Press Council, *Submission 3*; Australian Associated Press, *Submission 4*; Australia's Right to Know, *Submission 8*; Public Interest Advocacy Centre, *Submission 5*; and Rae Desmond Jones, *Submission 12*.

32 Australian Press Council, *Submission 3*, pp 3-4.

33 Australian Associated Press, *Submission 4*, p. 3. Also, see *John Fairfax & Sons v Cojuangco* (1988) 165 CLR 346 for the substance of the Newspaper Rule.

> clear statements of intent accompanied by substantive provisions in a shield law regime will more adequately meet the stated goal of achieving an "effective" shield law.[34]

3.43 The Attorney-General acknowledged calls for the Commonwealth to enact a shield law regime similar to that of the United Kingdom and/or New Zealand. However, the Attorney-General rejected such calls, explaining that the purpose of the Bill is to enable an appropriate balance to be struck between the public interest in free press and the public interest in the administration of justice. Accordingly, the Bill endorses a guided discretion rather than the benefit of an absolute privilege:

> [The Bill] leaves the balancing of competing interests and particular facts to the common sense of the court considering the matter…judicial discretion in these matters is not something to be afraid of. Indeed, no other profession—not even the legal profession—has the benefit of an absolute privilege to protect confidential information.[35]

3.44 The ACT Attorney-General agreed that where there are competing interests, the most appropriate response is to allow for a judicial balancing exercise to determine which competing interest prevails over the other in the circumstances. In his submission, the ACT Attorney-General contended that to do otherwise would contravene the fundamental human right to a fair trial:

> The right to a fair trial…is based on the premise that all relevant evidence is brought before the courts in a trial. An absolute privilege would not allow for a proper balancing exercise to take place and ultimately would impact on the fundamental right to a fair trial.[36]

Whistleblower legislation

3.45 Submissions and evidence noted that the government is in the process of formulating whistleblower legislation. Some submissions made no further comment in that regard. Other submissions expressed their views on the perceived shortcomings of existing whistleblower legislation and suggested means by which that legislation could be improved.[37]

3.46 The committee did not inquire into either existing or proposed whistleblower legislation, which is beyond the scope of this inquiry. However, the committee noted witnesses' comments regarding the legislative interaction between journalists' protection and whistleblowers' protection.

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34 Dr Joseph Fernandez, *Submission 1*, p. 12. Also, see Media Entertainment & Arts Alliance, *Submission 7*, p. 6.

35 The Hon. Robert McClelland MP, Attorney-General, *House Hansard*, 19 March 2009, p. 3246.

36 The Hon. Simon Corbell MLA, ACT Attorney-General, *Submission 10*, p. 2.

37 For example, Dr Bob Such MP, Member for Fisher, *Submission 6;* and Australian Associated Press, *Submission 4*, p. 6.

3.47 The Tasmanian Attorney-General, for example, questioned whether the privilege was the best way to protect journalist-source confidentiality, submitting that the privilege does nothing to protect the source from prosecution and that that is the proper purpose of whistleblower legislation.[38]

Application of the proposed privilege

3.48 The Bill proposes to extend the privilege to all proceedings in any Australian court for an offence against a law of the Commonwealth. Submissions and evidence noted that this amendment promotes consistency and certainty in national shield laws.[39]

3.49 However, submissions also noted that the amendments create two contradictory evidentiary regimes in each state/territory, increasing the risk of confusion or error in the application of the privilege:

> 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 professional confidential relationship privilege.[40]

3.50 NSW is currently the only state to have enacted legislation protecting journalist-source confidentiality (section 126A of the *Evidence Act 1995* (NSW)).[41]

3.51 In addition, several submissions referred to SCAG's contemporaneous consideration of journalists' privilege provisions in the model Uniform Evidence Bill.[42] While the ACT and Tasmanian Attorneys-General made only a brief reference to that process, the WA and NSW Attorneys-General provided specific comments on the timing of the Bill's introduction.

3.52 The WA Attorney-General submitted that the Bill pre-empted SCAG's orderly consideration of reform options, effectively rejecting the SCAG process and jeopardising the formulation of uniform and harmonised laws. The WA Attorney-General suggested that the Bill be deferred – or withdrawn altogether –

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38 The Hon. Lara Giddings MP, Tasmanian Attorney-General, *Submission 13*, p. 1.

39 For example, Australia's Right to Know, *Submission* 8, p. 5 and the Australian Associated Press, *Submission 4*, p. 3.

40 The Hon. John Hatzistergos MLC, NSW Attorney-General, *Submission 9*, p. 3. Also, see the Hon. C. Christian Porter MLA, WA Attorney-General, *Submission 2*, p. 5.

41 Australian Associated Press, Answers to Questions on Notice, 1 May 2009 (received 1 May 2009).

42 Standing Committee of Attorneys General, Communiqué, November 2008, p. 7; and Standing Committee of Attorneys General, Communiqué, 16-17 April 2009, p. 8: www.scag.gov.au (accessed 21 April 2009).

pending completion of the SCAG process.[43] The NSW Attorney-General similarly emphasised the importance of legislative uniformity.[44]

3.53 Upon conclusion of SCAG's April 2009 meeting, the Attorney General publicly announced that the states/territories have agreed to endorse a key component of the Bill: new public interest factors that would give judges discretion to protect a broad range of professional confidences. The Attorney-General considered this agreement to be a significant development in the harmonisation of evidence laws.[45]

Committee View

3.54 The Evidence Amendment (Journalists' Privilege) Bill 2009 amends the *Evidence Act 1995* to implement reforms to the privilege available to protect confidential communications between journalists and their sources.

3.55 Submitters and witnesses queried these reforms. However, the committee was not persuaded by the evidence received during this inquiry.

3.56 The committee accepts that the purpose of the object clause is to guide the court in the exercise of its judicial discretion. There is no evidence to suggest that exercise of the discretion cannot or will not properly serve the administration of justice. The committee does not consider that the object clause should be enhanced, either to include further statements of intent or to prioritise either of the public interests it seeks to advance. However, the committee agrees with the NSW Attorney-General that mandatory judicial consideration of public interest factors would provide journalists' with greater protection than that provided by the guidance of an object clause.

3.57 The committee commends extension of the statutory protection to journalists, as well as their sources. In so doing, the committee notes that the proposed amendments concern sections within the Act directed to establishing a privilege in favour of the journalist-source relationship only. While there might be arguments in favour of creating privilege for other professional confidential relationships, perhaps based on public interest criteria, this is not the purpose of the Bill.

3.58 The committee agrees that communications made in contravention of the law cannot be condoned. However, the committee acknowledges that, in some circumstances, the public interest is better served by the making of confidential disclosures. The committee considers that the Bill strikes an appropriate balance between the two interests by allowing the court to consider all relevant factors prior to determining whether privilege should be upheld in a particular case. Having regard to

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43 The Hon. C. Christian Porter MLA, WA Attorney-General, *Submission 2*, pp 5-6.

44 The Hon. John Hatzistergos MLC, NSW Attorney-General, *Submission 9*, p. 1.

45 Chris Merritt, 'Federal shield law under attack but McClelland pushes ahead', *The Australian*, 24 April 2009, p. 27.

the integrity of Australian courts, the committee is confident that the courts will act without prejudice in making those determinations.

3.59 The committee acknowledges the considerable sentiment and support for Commonwealth law to embody a rebuttable presumption in favour of journalist-source confidentiality. The Act does not establish a shield law regime of this nature. Instead, it provides protection for journalists in the form of a guided judicial discretion, which the Bill does not seek to change.

3.60 The committee observes that there are alternate shield law regimes in the United Kingdom, New Zealand and even the United States, none of which is identical, and on the basis of the evidence before it, the committee cannot say that any one of these models is superior to the others. While much has been said regarding the onus in shield law regimes, the committee is not persuaded that this produces fundamentally different outcomes sufficient to warrant revising the qualified protection already provided by the Act.

3.61 Finally, the committee welcomes the consistency which the Bill brings to national shield laws, but notes that this is limited to Commonwealth offences. As only one state has enacted journalists' shield laws, the majority of states/territories continue to have one set of evidentiary laws in relation to journalist-source confidentiality. The committee encourages the Commonwealth, states and territories to continue to work co-operatively toward harmonisation of Australian shield laws.

Recommendation 1

3.62 The committee recommends that subclause 126B(4) of the Bill be amended to require the courts to take into account the public interest in the disclosure of a protected confidence and/or protected identity information.

Recommendation 2

3.63 Subject to the preceding recommendation, the committee recommends that the Senate pass the Bill.

Senator Trish Crossin

Chair