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SENATE

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Reference: Evidence Amendment (Journalists' Privilege) Bill 2009; Law and Justice (Cross Border and Other Amendments) Bill 2009

TUESDAY, 28 APRIL 2009

MELBOURNE

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SENATE STANDING COMMITTEE ON

LEGAL AND CONSTITUTIONAL AFFAIRS

Tuesday, 28 April 2009

Members: Senator Crossin (*Chair*), Senator Barnett (*Deputy Chair*), Senators Farrell, Feeney, Fisher, Hanson-Young, Marshall and Trood

Substitute members: Senator Ludlam to replace Senator Hanson-Young

Participating members: Senators Abetz, Adams, Back, Bernardi, Bilyk, Birmingham, Bishop, Boswell, Boyce, Brandis, Bob Brown, Carol Brown, Bushby, Cameron, Cash, Colbeck, Collins, Coonan, Cormann, Eggleston, Fielding, Fierravanti-Wells, Fifield, Forshaw, Furner, Hanson-Young, Heffernan, Humphries, Hurley, Hutchins, Johnston, Joyce, Kroger, Ludlam, Lundy, Ian Macdonald, McEwen, McGauran, McLucas, Mason, Milne, Minchin, Moore, Nash, O'Brien, Parry, Payne, Polley, Pratt, Ronaldson, Ryan, Scullion, Siewert, Stephens, Sterle, Troeth, Williams, Wortley and Xenophon

Senators in attendance: Senators Barnett, Crossin, Fisher, Ludlam

Terms of reference for the inquiry:

To inquire into and report on:

Evidence Amendment (Journalists' Privilege) Bill 2009; Law and Justice (Cross Border and Other Amendments) Bill 2009

WITNESSES

Committee met at 10.09 am

CHAIR (Senator Crossin)—I declare open this public hearing of the inquiry by the Senate Standing Committee on Legal and Constitutional Affairs into the Evidence Amendment (Journalists' Privilege) Bill 2009. The inquiry was referred to the committee by the Senate on 19 March 2009 for report by 7 May 2009. This bill amends part 3.10, division 1A of the Commonwealth Evidence Act 1995, which provides mechanisms for communications made in confidence to a journalist to be privileged at the pre-trial and trial stages of both civil and criminal proceedings. The committee has received 10 submissions for this inquiry, and all of those submissions have been authorised for publication and are available on the committee's website.

I remind all witnesses that in giving evidence to the committee they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee, and such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to the committee. We prefer all evidence to be given in public but, under the Senate's resolutions, witnesses have the right to request to be heard in private session. It is important that witnesses give the committee notice if they intend to ask to give evidence in camera.

If a witness objects to answering a question, the witness should state the ground upon which the objection is taken and the committee will determine whether it will insist on an answer, having regard to the ground which is claimed. If the committee determines to insist on an answer, a witness may request that the answer be given in camera, and such a request, of course, may also be made at any other time.

FERNANDEZ, Dr Joseph, Private capacity

CHAIR—Welcome, Dr Fernandez. We have your submission, which we have labelled No. 1. Do you have any changes or amendments you want to make to that submission?

Dr Fernandez—Thank you, Senator. Yes, I do have two corrections to make. On page 6, I wish to add the word 'said' after the words '16 years ago', which appear in the top one-third of the page. It should read:

> The Western Australia Law Reform Commission, in a report prepared 16 years ago, said—

Secondly, on page 7, under heading 5, on the third line from the bottom, I wish to change the word 'those' to 'the'. So it should read:

> The Commonwealth Attorney-General has now—

CHAIR—Thank you. Those are the only two corrections?

Dr Fernandez—Those are the only two, Senator, but, if the opportunity presents itself, I would like to also make some updates to this submission on the basis of newer developments. In particular, a day or two after I had made the submission the WA select committee into the police raid on the *Sunday Times* handed down its report, and there may be one or two details from that report that might be useful to add to my submission.

CHAIR—Thank you. That would be useful. Dr Fernandez, would you like to start by making a brief opening statement?

Dr Fernandez—Thank you, Senator. My submission has a number of thrusts and I have set it out under various headings. What I thought I would do this morning is set out some of the key thrusts of my submission. First of all, I am seeking to build on what the honourable Attorney-General has professed to want to do through these amendments. I draw to this committee's attention, in particular, the stated objectives that: these amendments are being made in furtherance of an election commitment to strengthen journalist shield laws; this recognises the important role that the media plays in informing the public on matters of public interest; this is an important part of the Rudd government's commitment to enhance transparency and accountability in government; this will give recognition to the important function that the media plays in informing the community on matters of public interest; and it is intended to give the judiciary guided judicial discretion in this area. So my submission really tries to build upon all these avowals that the Attorney-General has indicated.

The second thing that I hope I have succeeded in doing in this submission is to identify the latitude that may be available when considering protection for journalists' confidential sources. I would like for the committee to keep in mind that really, at the very top end—the Rolls Royce version, if you like—of protection is absolute protection. I make this point because it might be misconstrued. It might be read that the media here—myself included—are only seeking to aspire to the benchmark set in the New Zealand provisions, for instance, or the UK Contempt of Court Act.

The third thing that I would like to draw this committee's attention to is that this consideration of journalist shield laws really have been a longstanding matter. This has dragged on for a decade and a half, and I bring to this committee's attention—if it is not already aware—that the Senate committee itself, back in 1994, considered this matter and issued a rather detailed report entitled *Off the record: shield laws for journalists' confidential sources*. One very interesting observation made in that report is in paragraph 7.68:

> In this proposal the special role of the media is acknowledged by making the starting point—

and I stress 'the starting point'—

> from which judicial discretion is to be applied the presumption that the confidence will be respected. The need to take into account other matters in the public interest is accommodated by the items listed above.

I will not go through those items, but the point I wanted to make from this extract is that it has long been recognised, even by a predecessor Senate committee, that the starting point in the consideration of protection for journalist shield laws should be a presumption that favours protection.

The fourth thrust I am hoping that my submission contains is a practical way forward by proposing a form of words—a clause—that might be incorporated into the proposed amendments, and that clause appears on page 11 of my submission. I intend to amend this clause slightly to make it more consistent with what I said earlier in this submission, and that is, in addition to the criteria that I have stated there, to add also the criterion of freedom of speech. That is all I have in terms of my opening remarks. Thank you.

CHAIR—Thank you, Dr Fernandez. We will go to questions. Senator Barnett, would you like to start?

Senator BARNETT—Yes; thank you, Chair, and thank you, doctor, for your submission and your time and input into this inquiry. Firstly, could you put on record whether you are speaking in your personal capacity or representing the university.

Dr Fernandez—I am speaking in my personal capacity.

Senator BARNETT—Thank you. I go to your last point first. You made a recommendation regarding adding 'freedom of speech' at page 11. Do you want to clarify that recommendation so that we are fully aware of it?

Dr Fernandez—Of course, Senator. I have, on the bottom of page 11, provided a draft of a proposed clause that I suggest might be considered in these amendments. My present clause reads:

In exercising its discretion as to whether to compel disclosure from a journalist to reveal his or her confidential source, the court should give particular attention to the importance of facilitating greater transparency, openness and accountability in government.

That is how it reads at present. I propose to add, after the words 'attention to', the words 'the interests of freedom of speech and in particular to' et cetera.

Senator BARNETT—I thought we had better get that on the record. If that is your recommendation, we need to make it clear. I have a few questions firstly about SCAG and the SCAG process and if you had a view about that. There has been some media speculation. There was a report in the *Australian* newspaper last Friday, 24 April headed 'Federal shield law under attack but McClelland pushes ahead'. It notes that SCAG had come to an arrangement or an agreement, but it also notes the Western Australian Attorney-General, Christian Porter, who said that the Commonwealth scheme was flawed and would not be enacted as state law. I am wondering whether you had a view, because you are based in Perth, are you not?

Dr Fernandez—Yes, I am, Senator.

Senator BARNETT—Do you have a view about the Western Australian Attorney-General's views? You may have seen his submission, which is a public submission, as is the submission of the Western Australian Director of Public Prosecution. They have been quite critical of the federal proposal and aspects that have flowed from the SCAG meeting. I was wondering if you would like to respond to those criticisms that have been made by the Western Australian government?

Dr Fernandez—I have not seen the submission on the Western Australian site, even though it might be available. I intend to look at it as soon as I get back. I have been trying to focus my attention on my submission and how to present it strongly to this committee.

As for the general drift that I get from Chris Merritt's report in, I believe, the Legal Affairs section of the *Australian* newspaper, the general thrust, may I say upfront, is that I am a little disenchanted. I am disappointed that that is the position being taken in Western Australia. I would have liked to think that the vibe that was being conveyed at the time that Mr Christian Porter and the Liberal Party were seeking to form government, during the last state elections, was one of sympathy with the journalists' quest for shield law protection. But since then, since forming government, I detect a sort of reticence, a reluctance to proceed down that path.

Senator BARNETT—Can I put one of their main concerns to you and perhaps you could respond to that. It is set out in points 6, 7 and 8 of the Attorney-General's submission. It is along the lines that there is an automatic loss of privilege where the communication is fraudulent or involves criminal activity or a criminal offence. In that instance, privilege is denied. They discuss that in those points in the submission.

They say that as a result of this amendment—that is, the government's amendment that before us and that you are commenting on—the privilege may apply over communications that constitute a criminal offence: fraud or other forms of misconduct. They say the change is inconsistent with the law of privilege in other contexts and will have serious and unfortunate consequences. These are pretty strong statements. They are statements which along the lines that we support the status quo rather than moving in the direction that perhaps you would like to go in and indeed that many others would like to go down. Would you like to respond to those concerns?

Dr Fernandez—It is not my position, and I doubt very much that it is the position of my colleagues in the media, that what we should introduce is an absolute shield law—one that would, in fact, work against the

public interest in cases where there is inequity, a criminal act or fraud. That is not my position at all and I am quite happy with an exception that recognises those particular exigencies.

Senator BARNETT—Let us go down another route in terms of your preference for the New Zealand model set out in your submission. Can you outline for the committee your understanding of the New Zealand model and the key characteristics of it?

Dr Fernandez—Thank you, Senator. I believe that I have provided in the submission an extract of the New Zealand provision, which contains a clear presumption in favour of protection of journalists' confidential sources. Having said that, the New Zealand legislation in this area also recognises that there may be other factors that militate against protection, but all I am saying is that that legislation evinces an intention that the starting point—I stress 'starting point'—is that there is a presumption in favour of protection.

Senator BARNETT—What are the main differences between, as far as you see it, the New Zealand model and the bill before us?

Dr Fernandez—The bill before us, as I understand it, does not contain that presumption. It merely sets out a whole range of discretions that are given to the courts to take into account. It does not, for instance, identify as one of the objects of this particular legislation that priority should be given to openness, transparency and accountability in government. Neither does it place any priority on the interests of freedom of speech. That is what I am suggesting that this bill more clearly identify as priorities, in line with what I read to be the Attorney-General's statements in the explanatory memorandum and in the media release of 19 March.

Senator BARNETT—Just going a little further, the UK legislation: do you have an understanding of it, and what are the main differences between it and our law?

Dr Fernandez—It is roughly the same as the New Zealand approach as well, Senator.

Senator BARNETT—Okay. I think I will leave it there. I will pass to Senator Ludlam, if that is convenient with the chair and with you.

CHAIR—Thank you, Senator Barnett.

Senator LUDLAM—Thank you very much for your submission and for coming out to see us this morning. Just picking up where Senator Barnett left off, you amended three lines in the paragraph that you introduced us to right at the beginning. Is that a way, in your view, of defining what the public interest means in this case?

Dr Fernandez—I would not venture to go that far because, as I also observed in my submission, the notion of the public interest is an amorphous one, a very difficult one, and that is why they are acknowledged by the courts and, I think, according to the authority that I have cited in my submission, by the Australian Law Reform Commission. What I am suggesting though is that, in line with what the Commonwealth Attorney-General appeared to be wanting to do, which is to be giving the courts a guided judicial discretion, it would be consistent within the scope of that guided judicial discretion to give the court some idea as to what ideal we are trying to attain here. I thought that clause would serve that purpose quite well.

Senator LUDLAM—That would go into the objects section—

Dr Fernandez—The objects section would be my preferable location of that clause. Although some suggestion has been made somewhere in the material that I have read that it could be merely listed as one of the factors that is taken into account, I would prefer to it see it set out in the objects section because that is a very influential place in which to convey this ideal.

Senator LUDLAM—I do not know whether you have had time to look over the submission made by the PIAC. They spoke at some length about—

Dr Fernandez—Sorry, Senator; who was that?

Senator LUDLAM—The Public Interest Advocacy Centre.

Dr Fernandez—No, I have not.

Senator LUDLAM—They talk a little about the definition of a journalist and who is a journalist, in this case, if you are not working for an accredited media organisation or if you are a blogger. Do you have any concerns along those lines?

Dr Fernandez—I have concerns but I cannot say that I have any solutions because this is a very contentious area. I faintly recall having heard or read somewhere recently that there are something like 75 million blogs, and academics commentators and other experts have also agonised over the definition of

'journalist' and 'journalism' for many years. I have in front of me a compilation of some academic analysis of this area. Academics have identified six ways to define journalism. That covers journalism as practices, journalism as a profession, journalism as technical mastery, journalism as an institution, journalism as text and journalism as people. I think as time goes on it is becoming more difficult rather than easier to define the whole concept of journalism and I would suggest that we not be detained by our failure to arrive at a proper definition of journalism or journalists.

Senator LUDLAM—Do you have any sense of why SCAG has stalled on a uniform approach towards shield laws and do you think that perhaps what the Commonwealth is up to should wait until we can bring things into harmony with the states?

Dr Fernandez—The approach that I took with my submission is that the Commonwealth effort in this area can prove to be quite influential. I may be wrong on that but I think if we wait for unanimity in this area we might end up the way we did with uniform defamation laws, where it took some two decades before people got together and agreed on a way forward. I think there would be nothing to stop us making progress if the Commonwealth took the initiative, went ahead, but then set a benchmark that was worthy of emulation. I think that would be a very influential course of action, one that might lead the states to come to an agreement. As I read from Chris Merritt's report: it is not that all the states are reluctant to move forward; it is just one or two, perhaps.

Senator LUDLAM—The AAP submission talks at some length about extending the protection of harm to journalists to include harm to other people associated with a journalist, whether that be colleagues or family members. That routine part of a journalist's business might be fact checking. Do you have a view as to whether those protections should be extended?

Dr Fernandez—Once again, that is contingent on how we define journalists and journalism. I would suggest a broad definition. Anyone involved in the transmission of information that has a news and current affairs characteristic to it should be considered journalists for the present purpose.

Senator LUDLAM—I will leave it there. Thank you very much for your submission.

CHAIR—Dr Fernandez, I have just got a couple of questions I want to ask you. My understanding is that although, perhaps, you prefer the New Zealand model, is it not correct that, at the end of the day, in the New Zealand model the ultimate judgment is left to the courts to decide whether or not a journalist must reveal their source?

Dr Fernandez—It is not my position that this question of the authority of the courts should be removed completely. I am quite happy for some level of discretionary authority to be vested in the courts. What I am rather suggesting, I hope, is that other factors I mentioned earlier such as the priority that we should accord to openness, transparency and accountability in government and in the interests of freedom of speech should be more explicitly recognised in the objects section. I believe that such recognition in the objects section of the legislation would prove very useful in the way that the discretion of the courts is applied.

CHAIR—You are basically putting to us that if the objects of the amendments were strengthened or improved to make it quite clear about some sort of guidance for the judiciary—

Dr Fernandez—Yes, that would be right.

CHAIR—So you believe making those amendments—that is, strengthening the objects of the act and outlining quite clearly some direction for the judiciary—is the way to proceed?

Dr Fernandez—That is exactly it.

Senator BARNETT—I have one further question I would like to ask. Dr Fernandez, there has been some discussion about how this fits in the overall scheme of things with whistleblowers legislation and anti-corruption measures and initiatives around the country. I was wondering if you had a view as to whether we should be looking at some sort of consistent approach across the board rather than having a one-off approach at a federal level?

Dr Fernandez—I thought it would be too much to try and address those concerns as well and so in my submission there is very brief statement towards the end where I said a more effective way forward would be for shield laws to be accompanied by other instruments capable of lubricating the flow of information, such as through the whistleblower legislation and freedom of information law. I also mentioned in my submission that because I think efforts are underway in this direction I say no more about it in my submission. Yes, indeed, I

agree with you that, ideally, we would have an entire package that covers not just journalists but also the providers of information to journalists, particularly whistleblowers.

Senator BARNETT—Sure. Thank you for that. I think there is a strong view that such an approach should be taken and that it is the ideal approach. The other thing that needs to be raised is that if we proceed at a federal level we are then creating an approach for the consideration of certain evidence in the Federal Court or the High Court, for example, and, of course, federal matters are dealt with in state courts, like the Supreme Court, for example. If the states did not move consistently with us at the federal level then you would have different laws of evidence applying in different courts. Is that your understanding? Would you agree with that?

Dr Fernandez—I agree with that, up to a point. But when it comes to the creation of absurd situations where the same court, or perhaps even the same member of the judiciary, finds themselves wearing a different hat, so to speak, having to rule inconsistently, if there was the kind of ideal legislation at Commonwealth level, and if that was given the kind of interpretation we are hoping it would, then I am hoping as well that judges faced with this conundrum might, under the umbrella of the discretionary powers that are available to them in the construing of the protection, advance a reasoning that follows the spirit of the Commonwealth legislation. I am just hoping.

Senator BARNETT—Yes. There is no problem with hoping for these things, but if you legislate, for example, in accordance with the New Zealand model, where you have got a rebuttable presumption, on the one hand, and let us say in Western Australia, the Western Australian Attorney-General, who does not support, as far as I can tell based on his submission, that approach—he is a strong opponent of it—then you would clearly have a judge sitting in the same court, deciding on very similar matters, using different laws of evidence, and required to do so. Is that your understanding?

Dr Fernandez—Yes, it is.

Senator BARNETT—So we really do have a conundrum here.

Dr Fernandez—We do.

Senator BARNETT—And this is something that, no doubt, we will flesh out and work through as we work through the inquiry.

Dr Fernandez—I believe so.

Senator BARNETT—Yes, indeed. Thank you again.

CHAIR—Dr Fernandez, thank you again for your time this morning and for your submission. It is most appreciated.

Dr Fernandez—Thank you for the opportunity.

Proceedings suspended from 10.42 am to 10.45 am

CHAPMAN, Ms Creina, Manager, Corporate Affairs, News Limited, representing Australia's Right to Know

COWDROY, Ms Emma, General Counsel, Australian Associated Press

KEEGAN, Mr Richard, External Counsel, Australian Associated Press

CHAIR—I welcome representatives from the Australian Associated Press, and also from Australia's Right to Know. Thank you to the three of you. We have received your submissions. AAP, your submission has been lodged with us and for our purposes it is numbered No. 4, and Australia's Right to Know has lodged a submission, which we have numbered No. 8 for our purposes. So can I just ask if either of the groups want to actually make any amendments or alterations to your submission?

Ms Chapman—No.

Ms Cowdroy—And no from AAP.

CHAIR—All right. Thank you. I will invite both groups to make a short opening statement. If we could start with AAP, that would be appreciated.

Ms Cowdroy—Thank you for the opportunity to make some brief opening remarks. AAP strongly believes that adequate protection of journalists' confidential sources is a fundamental feature of press freedom. Although Australia is a young country, it prides itself on being one of the world's oldest liberal democracies. In that context, the stream of journalists convicted or jailed by Australian courts over the past several decades for refusing to reveal their sources is disturbing. The most notorious recent example is, of course, the Victorian case of Gerard McManus and Michael Harvey, but AAP would particularly like to draw the committee's attention to the experience of its own journalist Belinda Tasker who faced the prospect of a prison sentence for refusing to reveal the source of information about the board of the NRMA from 2001 to 2002.

As noted in our submission, AAP supports the government's stated aims of strengthening the protection of journalists against court ordered disclosure of confidential sources. In particular, AAP endorses the government's recognition of the significant professional, reputational and financial harm that may be suffered by journalists that are forced to breach their ethical obligations by disclosing the identity of sources that have requested anonymity. However, in our view, the main priority of the bill must be to establish a rebuttable presumption that journalists' sources will be protected. This would provide an appropriate balance between the competing factors of the public interest in the administration of justice and that of freedom of the press.

The current provisions will, in their practical effect, maintain the status quo, whereby the onus will remain on a journalist called to give evidence to convince the court to exercise its discretion to recognise the confidentiality of his or her source rather than that being the default position. This, as observed in several other submissions to the committee, is no true privilege at all and does not meet the Attorney-General's stated aims. Placing the onus on the media rather than on the parties seeking disclosure will serve to increase uncertainty and expense relating to the protection of sources and will maintain a chilling effect on both journalists and their sources. AAP also notes that all other submissions received by the committee, save that of the Western Australian Attorney-General, support the introduction of a presumption in favour of source confidentiality.

In AAP's view, other improvements must be made to the bill to ensure that it advances its stated aims. The public interest in media freedom must be given weight by being included explicitly as a mandatory consideration by the courts, rather than just as an object. The bill must also recognise that the identity of a source, or information provided, may be disclosed within a media organisation on a limited basis without losing its necessary quality of confidence. In addition, the bill should expressly provide courts with the flexibility to order partial or conditional disclosure so that in those circumstances where disclosure is clearly in the public interest the resultant harm to journalists' in confidence can be appropriately minimised. I thank you for the opportunity to present these opening remarks and look forward to assisting today's inquiry.

CHAIR—Thank you very much. Ms Chapman, did you want to say a few words?

Ms Chapman—Yes, thank you, Senator. I am here today representing Australia's Right to Know, which is a coalition of Australia's major media organisations. The other members of the organisation, in addition to News Limited, are Fairfax, ABC, SBS, Free TV, ASTRA, Commercial Radio, Sky News, Western Australian Newspapers, APN, the MEAA and AAP. I note that MEAA and AAP are members and signatories to the Right to Know submission that has been made and have also made their own reinforcing submissions, and they are also appearing today.

As you would see from their submissions, the view of the coalition is, first, that the bill is an improvement on the current law, but does not go far enough. The Right to Know coalition was formed in 2007 to address the effectiveness of legislation relevant to the media's ability to keep the public informed of matters of public interest. The protection of the identity of journalist sources is central to the principles and ethics of journalists and media organisations, and protection lies at the heart of democratic accountability. It ensures information of legitimate public interest can be made freely available to the public, even if the source of that information breached a confidence in making it available to a journalist.

Traditional Australian laws fails to recognise the public interest in the protection of journalists' confidential source and, while the government's bill being considered by this committee makes welcome improvements to the regime currently in place, it does not provide true protection for journalists. The Right to Know believes that a qualified privilege which relies on a starting point in favour of disclosure, a balancing test and the discretion of the court provides some but not sufficient protection for journalists.

We recognise there may be instances when it is in the public interest that confidential information be disclosed, for example where there are issues at stake of national security or physical safety or prevention of a serious crime, but the onus should not be on the party seeking to adduce the confidential information to establish that the evidence is necessary. We are of the view that Australia should adopt a model similar to the New Zealand or British models that legally recognise the primary interest that allows journalists to protect the identity of their confidential sources, when the disclosure by the source is demonstrably in the public interest. Thank you for the opportunity of appearing.

CHAIR—Thank you, Ms Chapman. Thank you very much to both of you. I have got a couple of questions, but before I start, I understand, Senator Xenophon, you have joined us online?

Senator XENOPHON—Yes, I have, Chair.

CHAIR—Welcome to our hearing. Can I start, Ms Chapman, with a question to you. Do you believe that there are instances where all sources of information provided to journalists should be protected in each and every instance?

Ms Chapman—No, we are very much of the position that it is a matter to be decided by the court. The issue here today is what the starting point is. We are not asking for a blanket shield, which is in existence in a number of countries around the world and a couple of the states in the US. No, the starting point should be that the journalist's source is to be protected, but then it should be a matter for the court to then consider that and the prosecution to rebut that opening presumption.

CHAIR—So my understanding is that in this piece of legislation that discretion is left to the court. Do you believe that the bill is not clear enough in providing courts direction about how they should measure that?

Ms Chapman—I think the problem is that the Evidence Act starts from the premise that evidence can be adduced from the witness and, failing that, they would be in contempt of court, and then it is up to the journalist to come into the court and reverse that presumption and provide the evidence which enables the discretion then to be exercised. We are not saying that the discretion should not exist, but the starting point of the discretion is not correct.

CHAIR—How would we improve the legislation to satisfy your concerns?

Ms Chapman—I think the New Zealand model and the United Kingdom model and the United States model, which has not been adopted but has been sitting in the legislature for a while, are a very good point. The starting point is that a journalist who has a confidential source cannot be required to reveal that source in a court of law unless the court is convinced to the contrary, that it is in the public interest that that source should be revealed. So they will still have a discretion; it is just where they start from.

CHAIR—I see. My understanding is the New Zealand model does actually, at the end of the day, provide that discretion with the judiciary. So you are saying, 'Well, that is okay. That is the end point,' but it is the presumption at the beginning that you think needs to be changed in this legislation. Is that it?

Ms Chapman—That is exactly right. There are very few jurisdictions that have a blanket shield without the court having any discretion; I think Germany, Austria, Richard tells me Alabama apparently, New York State. There are very few. There needs to be a situation where a judge can say, 'This is of such serious issue.' If we are talking about an imminent threat to public safety if that source is not revealed or an imminent threat to national security if that source is not revealed, of course the judge should have the ability to be able to exercise their discretion. I would hope, in that situation, that it would be extremely unlikely that a journalist would not

be revealing their source under those circumstances, somehow. I would hope that they would be able to convince their source that they are able to go ahead. I should add to that that it is also difficult to see that actually revealing the source going to be something that is going to protect national security. It is more of the event that needs to be revealed probably, rather than the source.

CHAIR—Unless the source, I suppose, is a public servant, but then you come into other issues, don't you, namely, breaching the Public Service code of conduct?

Ms Chapman—Yes, and hopefully you may come into whistleblower issues, although that is unlikely, because whistleblower protection at the moment does not protect any revealing of information to a journalist. It is completely excluded and, even under the new proposals that have been proposed by the House of Representatives committee, the situation where a public servant talking to a journalist would be protected is extremely limited. That is if they are adopted, and they are not even adopted.

CHAIR—So what are repercussions for journalists who might breach, say, a code of ethics?

Ms Chapman—The main consequence is their professional integrity. If a journalist cannot keep a source confidential, remembering that they do not take that decision lightly, it is not to their advantage or to the media's advantage to be publishing information that is unsourced. You only do it when you need to. So their professional integrity is severely damaged, in the sense that their ability to obtain information in the future becomes extremely limited, as does their colleagues'.

CHAIR—I see. Thank you. I do not have any other questions. Senator Ludlam, do you want to go next with questions?

Senator LUDLAM—I can kick off with a couple. Thank you, Chair. I might just go to the AAP submission first, because you have proposed quite a number of amendments, some of them fairly specific. I just wanted to go to the ones where you talk about the journalist's associates being protected and some of those protections expanding. Firstly, would this not make the privilege very broad indeed potentially, and are there any cases in particular that cause you to bring these proposed amendments forward?

Mr Keegan—It certainly would make it much broader. I think what it does reflect is the changing nature of news organisations. On the one hand, there is a chain of command, if you like, to make sure you do have stories accurate and, by very definition of that, information does need be to disclosed to various other people within the organisation. Also, which is probably more in my practice as a lawyer dealing with media clients; it is becoming more and more of a situation where it is rare that you have one journalist that holds the source confidential within themselves. I think that is demonstrated in Harvey and McManus, that there were often two people working different angles, but still sharing the source confidentiality.

Senator LUDLAM—So what you are trying to do here is allow the journalist to share the information with one or two other people in the newsroom, but it would still retain the definition of confidential?

Mr Keegan—That is right.

Senator LUDLAM—What is your sense of the loose way in which journalism is increasingly defined, and some of the comments that have been made that the profession itself is really diffusing? How broad should we go with protections for bloggers, say?

Mr Keegan—I think it is difficult. The new media is exposing all sorts of challenges. Endorsing what Creina said from Right to Know, the benefit of traditional journalists, if we can call them that, having this privilege, as opposed to bloggers, is that they are more often than not members of an association. They have internal reporting mechanisms.

Ms Cowdroy—At AAP there is a code of conduct that needs to be complied with that deals with all sorts of potential conflicts that could arise in a journalist's role. So there are checks and balances, I think, that an unregulated blogger is not going to have.

Senator BARNETT—But that is self-regulation, albeit.

Ms Cowdroy—By the organisation itself, as opposed to potentially by the journalist, although I would have to say that most journalists take these obligations very seriously because obviously they have their own integrity, as Creina has said before, to protect—to ensure that they are practising their craft appropriately and in a way with integrity.

Senator BARNETT—But it is not legislated itself.

Ms Cowdroy—No.

Senator BARNETT—It is all free go.

Mr Keegan—I think the highest we could put it would be that they hold professional ethical obligations whereas perhaps bloggers do not, and probably more to the point as well is that, despite the rise and rise of new media, still the majority of people do get their news and analysis from the traditional forms of media at this stage.

Senator BARNETT—But there is no definition of journalist in the bill, and if you cannot define journalist, then who can? This is a bit of an issue for us, frankly, and we would appreciate your views on what is a journalist.

Ms Chapman—There is not a definition now in the act, and there is not one in the New South Wales corresponding legislation, and to my knowledge that has not been an issue to date. That is a matter that the judge deals with when it comes before them. As part of their decision about whether the relevant division applies, one of the first things they need to do is work out whether the actual witness in front of them comes within the division. And that is a decision that they are making about the professional relationship of a journalist, which is not particularly tricky. This issue of trying to define a journalist is impossible. Trying to define journalism and news is virtually impossible. We have been in front of a committee of your colleagues last week discussing exactly the same thing in a different context. And the problem is if you try and make a definition today, it will be out of date tomorrow. But the court is quite able to do that. There is case law which exists on what is journalism, what is news? And to my knowledge, it has not been a problem so far.

Senator BARNETT—So are bloggers journalists? I think Senator Ludlam asked the question, and it is a good question.

Senator FISHER—And whilst you are thinking about that, the supplementary question is, who is speaking for the bloggers, because in your answers to the questions thus far, surely you are speaking from vested interests in talking about the self-regulation of your industry. You represent people who belong and particularly the Right to Know group benefits from that belonging. So who speaks for the bloggers in this environment?

Mr Keegan—Without being cute, perhaps the bloggers should talk for themselves. They have an opportunity to come to this forum. But I think that the greater point is—inasmuch as we do represent the traditional media—that there is a strong argument, I think, that at the developmental stage that this protection is at, opening it to every blogger that has access to a computer portal will do nothing more than erode the privilege. But it might be something that just moves incrementally rather than opening it at this stage to bloggers.

Senator FISHER—That may be so, but if you cannot define the group that you are trying to protect, the protection does not work either. The protection is in itself eroded before you even start unless you can define the group that you are trying to protect.

Mr Keegan—Likewise, it might be exclusionary, and I think if you do try to define a journalist, you are, by its very nature, going to block some people out that are perhaps your established web page.

Senator FISHER—Such is the nature of any definition.

Mr Keegan—That is right.

Senator FISHER—It draws a line in the sand.

Mr Keegan—I think this is particularly difficult given the information age, to be completely honest with you. I do not think there is an answer apart from that so far the courts have got it right.

Ms Chapman—And in part, the definition already goes slightly further, because it talks about how it must be in the course of a relationship in which the confidant was acting in a professional capacity. So the court does already have some direction in relation to where it is going, and that is the basis on which the judge would then look at the circumstances and say, 'Is this person fitting within that definition?' And there is no proposal in this bill to change that definition, that is, the existing one.

Senator XENOPHON—Chair, can I just ask a question further to this? Would a better solution be to adopt the more flexible term 'professional confidential relationship' found in the New South Wales law? What do the witnesses say about that, so that there is that approach in terms of adopting section 126A of the Evidence Act of New South Wales?

Mr Keegan—I think that is right. It does not help with the issue of defining a journalist, but it certainly does capture what we believe are traditional journalists, but it would also capture people who are established bloggers, for example. So I agree with that, Senator.

CHAIR—Senator Ludlam, do you have any other questions?

Senator LUDLAM—I was only just getting started, Chair, but that was a very interesting discussion.

CHAIR—I realise, Senator Xenophon, you have questions as well, so if we could just deal with Senator Ludlam for a few minutes and then we will move around.

Senator LUDLAM—Just to finish up on this thread, PIAC, for example, submitted to kind of sidestep the question of who was a journalist and just talk about, in their words, 'the dissemination of information and ideas', and actually to broaden the scope of it that way. I do not know whether you have had time to view that submission, and I realise you are here representing traditional journalists, not bloggers, but would you support that kind of broadening just to provide those protections?

Mr Keegan—If that was the definition, I do not see the journalists I represent having a problem with that, because it would still capture their interests.

Senator LUDLAM—Yes. But without eroding—

Mr Keegan—Yes, absolutely.

Senator LUDLAM—I might come back a little later, if there is time.

CHAIR—Senator Xenophon, we will go back to you.

Senator XENOPHON—Ms Chapman, Right to Know is essentially saying that the UK and the New Zealand model is preferable.

Ms Chapman—Yes, Senator.

Senator XENOPHON—If you look at the McManus and Harvey cases, and also the Tasker—the NRMA case, would the UK and New Zealand model have provided protection to the journalists in those cases?

Ms Chapman—Clearly we cannot try and guess what a judge or a magistrate would have done in a different situation if they had had a different piece of law in front of them. I cannot talk to the Tasker case, but I can talk to the Harvey-McManus case. There was no protection whatsoever, so the magistrate's starting point was: 'I am administering a court. I have a conviction in front of me. That is my primary concern. I will adduce the evidence from the witnesses. Journalists, you must prove to me the contrary.' And that is not a point which would happen if we were under the New Zealand or the United Kingdom model. If as a starting point at least the magistrate had said, 'My opening position is that you do not have to,' and that the prosecution was in the position to prove to the contrary, I think it is very likely that we could have seen an extremely different outcome. I should say that in the Harvey-McManus case there are a number of issues that came up with that, and the current bill does address a couple of those, but there is a very good chance that it would not have gone far enough unless we had seen that opening presumption in front of the magistrate.

Senator XENOPHON—And also because the privilege is knocked out by the misconduct provision; is that right?

Ms Chapman—That is exactly right. The magistrate referred to it in his judgement. He said, 'If I had had the benefit of the New South Wales law, I could not have even got to first base. This whole issue is knocked out straight away. There is an issue of misconduct so I cannot consider the privilege at all.'

Senator XENOPHON—Further to that, do you see any changes to journalist privilege laws? It ought to be in sync with improved whistleblower protection because the two go hand in hand to an extent, don't they?

Ms Chapman—They do go hand in hand and it is extremely encouraging that it looks like we will get better whistleblower protection, but I think there is a real danger to link them. Even if the Commonwealth brings in vastly improved whistleblower protection, in many instances, or in fact in most instances, it will not really make any difference to journalists' privilege. The proposal before the Commonwealth at the moment, as I think I said earlier, would provide very limited protection for a whistleblower going to the media, so we would really be where we are now, it would not make any difference. So it is a bit of a danger to say that if we solve the whistleblower legislation then we would not need this. Hopefully it would mean that there would be less people who would be hauled in front of the courts and less journalists who would be asked to reveal their source, because the whistleblower protection is working. And, more to the point, it has got to the point where public servants are not even whistleblowing. They are just resolving the issues within the bureaucracy. That is

how it should be done. But for the cases where a public servant does go to a journalist, it is very unlikely that they are going to be protected by the whistleblower law.

Ms Cowdroy—Just on that, the whistleblower legislation obviously would only protect if someone was disclosing in their capacity as a public servant. It is not going to protect a breach of confidence type action that our journalists faced some years ago, because the whistleblowing legislation was not going to apply in that scenario. It needs to be, as Creina has said, separated out.

Mr Keegan—Could I just add something on Tasker. Tasker has the benefit of the New South Wales provision as it then was, and that case is probably more illustrative given that the current bill is a hybrid of the New South Wales bill. But in Tasker, even with the benefit of the New South Wales act, the judge found that the interests of the NRMA in having a remedy outweighed the protection of a journalist's source. That, to me, is pretty marked. On the one hand you have a cause of action, the interests of justice, in the NRMA pursuing a source; and you have journalists and their right to keep their source. The judge found for the NRMA. There is not a lot of difference between the New South Wales act and this proposal, and that is what we say is the major problem.

Senator XENOPHON—You are saying that the primary focus ought to be on improving the protection of sources, journalist privilege, and that would have a greater public benefit than in terms of whistleblower protection law?

Mr Keegan—Yes. Walking into the courtroom as a journalist and having the presumption on your side—I think that is, in essence, how we are approaching this.

Ms Chapman—And if there is better whistleblower protection sitting side by side then that is better as well, but one will not solve the other.

Senator XENOPHON—Thank you.

CHAIR—I do need to welcome Senator Marshall to our hearings today.

Senator MARSHALL—Thank you.

CHAIR—Senator Barnett, do you have questions?

Senator BARNETT—Thank you for your submissions today. Ms Chapman, firstly, following on from the comments you were just making there—and, Ms Cowdroy, respond if you would like to as well—if the bill was passed in its current form, would we have seen a different outcome in the Harvey and McManus case?

Ms Chapman—Doubtful. The judge would have at least been able to consider a discretion. He would have been able to put his mind to it, whereas under the current act he is completely barred because of section 126D. So at least he could have considered the issue and considered the discretion. But he also commented in his judgement that the evidence that was going to be given by Harvey and McManus was of such great importance that he saw it as unlikely that he would have exercised his discretion anyway. And that was because he was starting from the point of, 'My primary concern here is to convict Desmond Kelly.' That was his main aim as a court. It is his job.

Senator BARNETT—Do you want to add anything to that?

Ms Cowdroy—Not on that case, no.

Senator BARNETT—In page 6 of your submission, Ms Chapman, at the second paragraph in the conclusion section you have said:

> It is difficult to contemplate the court would actually exercise the discretion and permit a journalist to maintain the confidentiality of the source.

Are there any other examples that you can give us? You have mentioned the Harvey-McManus case. You have mentioned the Tasker case. Are there other examples that you can bring to our attention where you saw that occurring?

Ms Chapman—They are the two most recent cases that have occurred, but certainly over the last 10 years there have been a number of cases where courts, and in some cases corruption commissions, have considered the issue and have come to the conclusion that the administration of justice, as far as they were concerned, was the issue that needed to be followed, given that they had no direction from the legislation to the contrary. I think Deborah Cornwall was a case. There was a couple of Western Australian cases which are quite old now, Gerard Budd and Tony Barrass. I think all three of them were actually imprisoned. Budd and Barrass certainly were and I think Deborah Cornwall had a serious sentence.

Senator BARNETT—They were Western Australian cases, did you say?

Ms Chapman—The Budd case was a Queensland case. Barrass was *Sunday Times* in Perth. That was a tax office case.

Senator BARNETT—If you are happy to take it on notice and if you had further examples that you could possibly provide to us, that would be of assistance to us. This is for any of the witnesses: can I just draw your attention to the Western Australian Attorney's submissions. I am not sure if you have read it or reviewed it. And there is the Western Australian DPP's submission, likewise. They are very strong in opposing the bill before us, and one of their key arguments is that claims for privilege over communications constituting criminal acts are a no-no. So what do you say about that, and do you want to put on record your views with respect to where there is a loss of privilege where the communication question is made in the furtherance of fraud or an offence or an act attracting a civil penalty? This is page 2 of the Western Australian Attorney's submission. You have got points 4, 5, 6, 7 and 8, where the communications constitute a criminal offence, fraud or other forms of misconduct. Do you want to express a view contrary to the Western Australia Attorney's position?

Ms Chapman—I preface this answer by saying I am not an expert in evidence law to get to the issues of the full extent of privileges, but I think what we have to remember here is that removing 126D merely removes the bar. It is not saying that the court cannot take it into account, the fact that a potentially criminal or civil crime or breach has occurred, it is still a consideration.

Senator BARNETT—Let us go one step further. You have probably read the *Australian* last Friday, 24 April, where the Western Australian Attorney has said that the Commonwealth scheme was flawed and it would not be enacted in state law. So we have then got a position—and this is an issue for us as a federal legislature—do we proceed with legislation where we know that the states are not going to follow through with some sort of consistent approach, so we have got that on the record. This is a bit of a dilemma. I am wondering, (1) do you agree with that, and (2) the scenario where you can have rules for evidence applying in the same court with the same judge and that judge, in that court, must apply different rules of evidence in one case on one day and then, the following day, he would probably have to apply an entirely different rule for evidence again. Do you concur that that scenario is possible?

Ms Chapman—I think the first point to make is that we already have inconsistent law. We have inconsistent law between the states and the Commonwealth now. That is not within a state, but we do have inconsistent laws. I think the second point to make is that, whereas uniform law is ideal if it is good law, it may not be realistic at this point in time. Dr Fernandez referred to the defamation law process, which we are all very familiar with, 20 years in the making. We would hope that, with time, the best law in place in a jurisdiction is then applied across all jurisdictions. On the issue of inconsistencies within states, no, it is not ideal, but if I was Harvey and McManus and I was sitting in a Magistrates Court in Victoria—and that was a federal crime that was against the Crimes Act, it was a Commonwealth public servant who had allegedly leaked the information—and I had the choice between a magistrate considering law that would protect me and the prospect of getting a criminal conviction, I think as many journalists as we can protect the better. I think that the courts have got the maturity and the intelligence to be able to deal with different laws in different cases. It is not ideal, though.

Senator BARNETT—No, indeed. In the case where I asked Dr Fernandez, and I will ask you the same question, where you apply the New Zealand model and there is a rebuttable presumption and that judge has to rule using those rules of evidence on one day and then, on the following day, uses the status quo rules of evidence, you could have an entirely different outcome.

Ms Chapman—You might. Richard. I do not know if you have any comment?

Mr Keegan—I think the answer is, yes, that is correct, sadly.

Senator BARNETT—This is a dilemma that we are facing with the bill before us. We have to work out how far we go ahead.

Mr Keegan—It is certainly not ideal, but I think journalists would take their privilege anywhere they could get it, to be completely frank.

Senator BARNETT—That is a good, frank response.

Senator FISHER—Isn't that a form or forum or jurisdiction shopping?

Mr Keegan—No, I think you are stuck with the jurisdiction.

Senator FISHER—Is it clear which jurisdiction applies, be it state by state, particularly in this new world of journalism and communication? Is it clear, Mr Keegan?

Mr Keegan—I do not think it is altogether clear.

Ms Chapman—But it is not the journalist who is seeking the forum, because the journalist is being hauled to a court that is taking an action against. If you take the Harvey and McManus case, Desmond Kelly was a public servant. He was tried in a Magistrates Court in Victoria. That was a decision of the prosecution and it is just the journalist has to then turn up to the jurisdiction at which they are demanded they turn up to.

Senator FISHER—That is, of course, true; however, it is hardly in the public interest in the broad, and when you are a government setting a policy approach, it is hardly appropriate to set up a system that, one way or the other, allows forum shopping by some party to an action, firstly, and, secondly, results in lots of legal argument about who is where and are they in the right place, when the only profession that benefits, arguably, is Mr Keegan's, all respect intended, of course, Mr Keegan.

Ms Chapman—That is right, but of course we do have a situation now where, given that there is New South Wales legislation and there is none in Victoria, you have a totally different situation depending on which state you are in now. And then if you are in a Federal Court you are in a totally different situation again. So we have already got different jurisdictional issues now.

Senator FISHER—What are some of those, Mr Keegan? Are you able to summarise them for the committee?

Mr Keegan—I can probably take that on notice and prepare a little document.

Senator FISHER—That would be of assistance.

Mr Keegan—I am happy to do that. A great illustration is that, in the local courts in Sydney, you have courts side by side that are applying the state Evidence Act and the Commonwealth's Evidence Act, and magistrates drifting in between. It is not satisfactory, but sadly, that is what we are left to deal with.

Senator BARNETT—I just wanted to move on to the issue of the whistleblowers legislation, and this is an issue I am concerned about, in the sense that the government has foreshadowed legislative change in this arena, in terms of reform. There has been a joint House of Representatives Legal and Con Committee report, which was unanimous. Do you think it not preferable that this bill proceed perhaps simultaneously with whistleblower legislative reform initiatives? Would you prefer that?

Ms Chapman—The Right to Know coalition is very much of the view that stronger whistleblower protection is very important. I do not necessarily think that they are linked in this case. I think they both should proceed as quickly as they both possibly can to have better law in each case. While there are some very positive initiatives in the House of Representatives report in relation to whistleblowers, certainly in relation to whistleblow into media it is extremely lacking and it has some serious limitations, which we will be taking up further with the government. They do not necessarily need to go together. They both need to happen; I think that is the point. Better protection is needed in both cases.

Ms Cowdroy—I would concur with that, and I would say that AAP would not support lagging the journalist shield laws to mirror in with a timetable for the whistleblowers legislation. Obviously if that happens to be being pushed through quickly, fantastic for the journalist shield laws, and we would like them pushed through equally quickly, but I do not think that we would see a connection that is so fundamental that they have to be considered together.

Senator BARNETT—But they do sit neatly side by side.

Ms Cowdroy—There is some interplay between them, there is no doubt about that, but I do not think they need to be put on a parallel path. Also, just on that, as I said before, the whistleblower legislation would have been of no relevance in the Belinda Tasker case. So on that issue, where we had a journalist facing criminal sanctions, it would have had no application in that setting; in that arrangement.

Ms Chapman—Senator, if I might add, I think that if you look at the airport Kessing case, if the proposed legislation from the House of Representatives committee was in place when the Kessing occasion occurred, there is a strong argument that Kessing would have been protected. It is debatable. The new provision provides that he must have gone through adequate internal resources first and have nothing happen. Yes, I think he did that, and then he went to the media on an issue that was of immediate public danger. Yes, it probably met the test. So in that situation he would have been protected and then a journalist shield issue never comes up, because the journalist is never asked to come and give evidence against him. In that case, they did not need the

journalist's evidence against Kessing. But if you had another situation where you had severe corruption, let us say, within the tax department, then the whistleblower legislation is never going to apply and that person will never be protected by the whistleblowers legislation if they go to the media. Therefore, we are into a journalist shield position, potentially, and that is why you cannot marry them together. You have got to do them separately, but both of them.

Senator BARNETT—Have you actually drafted specific amendments to the bill? We have had Dr Fernandez this morning make some specific recommendations to amending the objects of the bill, as far as he could see. Do you have some specific recommendations that you would want to put to the committee?

Ms Chapman—The coalition has not actually done any drafting of a presumption, but it is something that, on behalf of the coalition, I could say that we could do, yes.

Senator BARNETT—But apart from the presumption, that is your key point? You are saying it should be based on the New Zealand model, but I think there are some other aspects of the New Zealand legislation, apart from the rebuttable presumption. Are there other parts that you would want to draw to our attention apart from that?

Ms Chapman—No, it really is the issue of the presumption. The presumption deals with the main problem that we have.

Senator BARNETT—Dr Fernandez had recommendations to changing the objects of the bill, to broadening it somewhat. Anyway, that is fine. I appreciate that and, well, that is a matter for you. I will leave that for you and thank you for considering that.

CHAIR—Senator Barnett, have you finished?

Senator BARNETT—Senator Ludlam had a final question and I have one final question as well. Maybe I will ask that first. Regarding SCAG, in terms of your preferred approach, how do you see the SCAG deliberations playing out in the ideal world? You have the federal bill before us, and the federal Attorney has expressed his view. The Western Australian Attorney-General has expressed his view, and then you have the SCAG process. How do you see that playing out? This is quite important, in terms of consistency, if we can obtain it.

Ms Chapman—The ideal position would be that this bill would be improved. An improved bill would then be adopted by SCAG. But, to be honest, I could not sit here and say to you that I have great confidence that SCAG would adopt it. I know I have said this before, but as in the defamation law, if it takes some time, we are better off with really good law in at least one jurisdiction and covering the federal cases in the state jurisdictions. We are better off with one good law than having consistent bad law.

Senator BARNETT—There is no way that we can cover the field. Legislatively and constitutionally, the states will have to enact their own laws. That is correct?

Ms Chapman—Yes.

Senator LUDLAM—I just wanted to come back to the rebuttable presumption. Do you have a form of words or a proposed amendment where you see that sitting, and do you think that the proposal that Dr Fernandez put—I do not know if you were in the room when he was describing it before—goes far enough? Do you have a particular amendment in mind?

Ms Chapman—I think we would need to take that on notice and have a look at the doctor's proposal.

Senator LUDLAM—I would appreciate that. Whether or not you have a specific amendment, do you think that that introduction of rebuttable presumption could be introduced into this bill? Does it turn it upside down, or is it a one-line amendment?

Mr Keegan—I think it is certainly possible to put it into this bill.

Senator LUDLAM—Yes. If you have some advice on how you think you would do that most elegantly, I think that would be useful.

Ms Chapman—We can take that on notice, certainly.

CHAIR—Just before we finish, Mr Keegan, I understand you volunteered to provide the committee with a document. You just need to realise we would need that by Friday, because of our reporting timeline and our need to actually have it. It would be useful to have it in preparation for the report.

Mr Keegan—Friday it will be, Senator.

CHAIR—Thank you. I appreciate that.

Senator XENOPHON—I will ask one question on notice. I say to the witnesses that the UK laws have been in force for some time now. The New Zealand laws are modelled on the UK laws. Can the witnesses provide, preferably on notice, an analysis of how those UK laws have worked in terms of relevant case law and how that evolved in the UK into the protection and support of journalists and the impact on the public interest?

Ms Chapman—Yes, we can certainly do that.

Senator XENOPHON—Thank you.

Ms Chapman—I should just point out in relation to that that, of course, the UK has the benefit also of the European Convention on Human Rights.

Senator XENOPHON—I understand.

Ms Chapman—The two link in together, so they have a journalists shield provision and they also have the human rights protection. But we will provide that.

Senator XENOPHON—Thank you.

CHAIR—I now thank the representatives from the AAP and Australia's Right to Know. Thank you for your submissions. I think your evidence before the committee today has been very helpful and useful, so thank you very much.

Ms Chapman—Thank you.

Ms Cowdroy—Thank you.

Proceedings suspended from 11.33 am to 11.51 am

POLDEN, Mr Mark Alexander, Solicitor, Public Interest Advocacy Centre

CHAIR—Let us reconvene this meeting of the Senate Standing Committee on Legal and Constitutional Affairs. I now welcome representatives from the Public Interest Advocacy Centre. We have your submission, which we have numbered 5, for our purposes. Can I ask if you want to make any amendments or alterations to that, initially?

Mr Polden—No, I do not.

CHAIR—Then I invite you to make a short opening statement and, of course, at the conclusion of that we will go to questions.

Mr Polden—First of all, PIAC would obviously like to thank the committee for the opportunity to make these submissions and to speak to what we have written. Our general position is this: we do ask ourselves what these amendments really set out to achieve and then how effective they are in achieving those ends. PIAC does not wish to be overly critical. We think it is very good that this issue is being looked at, but, on one view of it, the amendments will not move the position very far, if at all, past the common law position. The common law position, the locus classicus, is Fairfax v Kowanko. I can give the committee a citation for that, if need be. And essentially, what that case says is that it will be extraordinarily rare for the public interest in the administration of justice to give way to other public interests, particularly the public interest in protecting journalists' sources so as to facilitate the free flow of information.

It has been argued quite recently by another lawyer. I read a paper yesterday in which he asserted that the bill will not change that situation, and I have to say that, rather sadly, we are inclined to agree with him. If the government is about openness and transparency and, indeed, changing attitudes, my own experience—20 years advising newspapers—suggests to me that that kind of change will not occur unless there is a change to the onus which exists in order to make, under the present Evidence Act, this kind of privilege out.

I read what the minister says, that really that comes down to a question of a guided discretion, but at the moment the starting point for the exercise of the discretion is that one needs to displace a presumption that the administration of justice should not give way in view of the damage that could be caused to a source or to the journalist. And really, having been around courts for about 20 years, that is a very entrenched judicial attitude, and you would need to signal a pretty profound change by moving the onus provision if the protection were to be made more effective.

I think, really, that that is the key point. One can then work down through the detail of the proposals and have a look at what does and does not work about the act. One concern we do have—and we think it is really a

drafting concern, but it is pretty central—is with the definition of 'protected confidence' and the definition of 'protected identity information', which hangs off the back of that. Our reading of it suggests that the section as it is presently worded, and as it will remain worded in the bill, is not very well crafted to protect a situation where it is not the content of the communication which is to be kept private, but the identity of the source, and that is really what we are talking about. I can take you later through the detail if there are any questions on that, but it is really a drafting issue.

The other main point, apart from onus and that drafting issue, comes down to scope of the legislation. And while PIAC is very happy to see the Commonwealth coming in and making things hopefully a little easier for journalists who get caught up in prosecutions of Commonwealth offences, there is a very wide range of matters which arise under state law which this legislation will not be able to assist with, and that is obviously a concern. What PIAC would like to see would be certainly a Commonwealth act, but, perhaps underneath that, a cooperative approach based on some model provisions which can go into uniform evidence acts around the country, so that journalists will not be dealing with two different kinds of situations, depending upon which jurisdiction they happen to find themselves in at any particular time. So those are the key points. I would be happy to answer any questions on the submission or assist in any way that I can.

CHAIR—Thank you, Mr Polden. Senator Xenophon, do you have any questions? We do not have Senator Xenophon on the telephone anymore, then, I take it? All right. Senator Ludlam, do you have questions?

Senator LUDLAM—Yes, thank you, Chair. I have got a couple. Thank you very much for your submission. One of the things that you raise, about which we had a little bit of discussion with the Right to Know Coalition and the AAP, who presented just earlier, was the definition of 'media' and 'journalist'. I think you are proposing here that you would like to see the sorts of protections that we are discussing extended to independent bloggers or independent journalists, for example. Can you maybe just make the case for us as to why you believe that should occur?

Mr Polden—It is an extraordinarily difficult situation for a journalist writing for an independent publication—perhaps an online publication, even writing on their own behalf—to be sure as to whether they would fall within the protections afforded by this act. I suppose there is a question, first of all, as to intent, whether the reference to the media is, indeed, intended to have some meaning, and if so, what that meaning might be. I am certainly not clear about what it might be.

One potential way of understanding it might be in similar terms to the carve-outs under the Trade Practices Act, which refer to prescribed information providers. That would take in, obviously, the big publishers and the big broadcasters. One would then have to ask the question: why should those entities, which are already pretty well funded and have, presumably, access to legal advice, be able to confer on those who work for them, through the operation of this legislation, some protection which is not available to journalists who do not align themselves with those kinds of organisations? PIAC's view is it is just a basic equity concern.

Our position would be that, rather than PIAC or anyone needing to make a case as to why such a protection should extend to journalists generally, it would really be up to the commercial broadcasters and the large publishers to say why it should be restricted to media and the so-called big operators. We do not have access to the servers here to hear what was going on in the committee just before the adjournment but their argument might be that it needs to be restricted to journalists working for entities who have got something financial to lose, some skin in the game and who can feel the pain if some orders are made against them. I do not know if they have advanced reasons why they say this should only apply to the media narrowly defined. I would have thought that the Press Council probably would be for a broader interpretation of protection. I do not know if the AMEA has spoken about it, but I would have thought they would be pushing for it to apply to journalists generally.

Senator LUDLAM—Yes. They were not necessarily wedded to excluding others. They just wanted to make sure they were not eroding the protections afforded to accredited journalists. On the bottom of the second page of your submission you talk about the distinction between content and source protection. That would seem to be fairly fundamental. Do you want to just flesh those ideas out a little bit for us?

Mr Polden—Sure. It may be necessary for senators to refer to the present act. If one goes to section 126A on definitions and looks under the heading 'protected confidence', the first limb of it says:

… a communication made by a person in confidence to another person—

a journalist—

(a) in the course of a relationship in which the confidant was acting in a professional capacity—

that is all understood—

(b) when the confidant was under an express or implied obligation not to disclose its contents—

That is the contents of a communication made by a person in confidence. So the obligation there which triggers the protection is the obligation not to disclose the contents of the communication. If one looks then at the definition of 'protected confider', it is a person who had made a protected confidence. That is a communication made in confidence to a journalist where the journalist is under an obligation not to disclose the content of the communication. Similarly, protected identity information hangs off the back of it as well—information enabling a person to ascertain the identity of a person who, again, made a communication to a journalist acting in a professional capacity where the journalist was under an obligation not to disclose the content of the communication. It just seems to me, having worked in newspapers for a very long time, that that is just wrong and in most cases there will be no obligation not to disclose the contents of the communication. The obligation will be not to disclose the source.

Senator LUDLAM—So you have got a proposed form of words inserting the words 'its source or its existence', which is basically just to make sure that that is all covered.

Mr Polden—Yes. It is just a drafting matter, and it looks to me like it has just slipped through and has sat there in the act and nobody has ever picked it up but, potentially, it is a problem if you are trying to take advantage of the protection such as it is.

Senator LUDLAM—I just want to go to the very next point that you make. You have taken issue with the word 'facts' and suggest that that should be replaced with the word 'information'. You have given some examples of where certain kinds of information might not be characterisable as facts but I suppose I would also have a concern that you are then spreading a pretty broad blanket over all kinds of rumour and innuendo and, potentially, malicious information that has been reported too. Is that a concern?

Mr Polden—Obviously, it is a concern, but 'information' is the wording under the International Covenant on Civil and Political Rights, article 19, the Victorian Charter of Human Rights and Responsibilities, the ACT Human Rights Act and, indeed, section 30 of the uniform defamation act. That may be a useful point of comparison. Those acts talk about circumstances in which members of the public have an interest or apparent interest in having information on some subject.

There may be a way of dealing with the concern which was raised. I was going to come to it later. Section 126B(4) is the—if I can put it this way—checklist of matters the court may take into account. It is a non-exhaustive list. One way of addressing the concern which has been expressed is to insert some other factors into there. I was going to come that a little later, but some of the kinds of factors which may be useful in assisting a court in determining whether the protection should be extended or not are the kinds of factors which, again, are set out in section 30 of the uniform defamation acts. To give you the flavour of them, section 30, subsection (3) says:

(a) the extent to which the matter published is of public interest; and

(b) the extent to which the matter published relates to the performance of the public functions or activities of the person; and …

(d) the extent to which the matter published distinguishes between suspicions, allegations and proven facts

That seems to me to go to the matter we are discussing now. So our position would be that one can deal with any concerns about that by building in some further matters for the court to take into consideration under 126B(4).

Senator LUDLAM—Thank you for that. We are a bit short of time, so I will just put one last question to you, if I may. Dr Fernandez, in his submission, provides some words which he suggests should go in the objects clause of these amendments that we are considering to give the court some guidance as to the importance of, in his words 'facilitating greater transparency, openness and accountability in government'. I do not know whether you have had time to have a look at those proposals.

Mr Polden—I have not seen them but I will just say something very briefly about that, and it goes to this issue of onus. The crucial words are really the words in 126B(3)(b), the satisfaction has to be:

The nature and extent of the harm—

which would be caused to sources—

outweighs the desirability of the evidence being given.

One could change that wording and quickly deal with the onus but the other thing one could do—and I am coming here to the point you have just raised—is, again under subsection (4), build in some positive matters for consideration by the court which relate to, for example, the desirability in general, not just in the particular case, of encouraging sources to come forward. The risk, if any, is that as a consequence of the failure to make an order, that is an order protecting sources in a particular case, that other sources in other matters may be deterred from coming forward in the public interest. So those kinds of matters, I would suggest, will be more powerful if they go into the consideration factors than if they go into the objects clause.

Senator LUDLAM—I do not know whether you would have time to just review the proposal that has been put forward there—that, in the absence of any definition of what the public interest means, there is just some guidance there for the courts.

Mr Polden—Yes.

Senator LUDLAM—I will leave it there.

Senator BARNETT—Thank you, Mr Polden, for your submission. I note from your submission that you support the adoption of the New South Wales model, which extends protection to all kinds of professional confidential relationships. I just wanted to flesh that out with you. I have actually got a copy of section 126A of the New South Wales Evidence Act in front of me, and you probably are familiar with it. Do you see simply that being replicated into federal law and, secondly, can you tell us why all professional confidential relationships should be protected and not just journalists' confidential communications?

Mr Polden—Do I see it being incorporated into Commonwealth law? Yes, but it would need some modification to deal with some of the issues we have just been discussing and, in particular, the onus issue. So that it is going to be—and I do not mean to say this in an overly critical way—equally ineffective as the draft of the present act or the amendments if the onus is not changed. That is the first thing.

Secondly, it may well benefit from the inclusion of some of the factors I have just referred to, as matters which may help guide the court's discretion, so that it may be possible to have, not a true privilege, but a discretion like this, which, while it may operate in relation to professions, generally, can have some factors built in for consideration, in cases where they are appropriate, may enable the court to weigh the balance more nicely, if I can put it that way, where the disclosures involve the free flow of information, disclosure to a journalist and so on. So there might be some factors that you would build in under the subsections as matters for consideration which might be redundant in cases of communications to other professionals. I suppose I am saying I do not think the two are mutually exclusive. You can tailor it a little bit, but PIAC's default position is: why privilege journalists over other professionals?

I am a lawyer myself, as many of us are. The law is a self-regulating profession to a far greater extent than journalism is. You can be struck off as a lawyer. You cannot be struck off, so far as I am aware, as a journalist. The medical profession is the same. I do not know whether you can be struck off as a priest. You can certainly be excommunicated, so the argument might well run that, compared to at least some other professions, the profession of journalism is not held to such strict account and, therefore, it should be open to the court to, in an appropriate case, exercise a discretion not to require the disclosure of a confidential source in any professional confidant and confider relationship, giving the court a very broad discretion.

Certainly, in New South Wales, as well as the general discretion, there is a much more specific one to do with sexual assault communications privilege, which you may be aware of. So I suppose that what I am saying is PIAC would like to see a general provision but does not necessarily take the position that a more specific one, tailored to the particular circumstances of journalists, perhaps just by reference to the factors a court might look at, would necessarily be inappropriate. It is just an equity concern, wanting it to extend more broadly. It is as simple as that.

Senator BARNETT—I think you have made some very good points, frankly, and I am interested in this view that it should apply to all professional confidential relationships, but obviously the judge has that discretion—it must be a very broad discretion—to determine where and when that privilege should be maintained. We have not had that view put as strongly as that this morning or in the submissions. It is simply that the views that we have had have obviously been primarily from the journalists' point of view to say, 'Protect our communication.' So your argument is that it should cover all professional confidential communications but that it is up to the discretion of the judge. Do you think there are some more guidelines that we should put around that so that there is some sort of guidance given to the judiciary when they are determining those matters?

Mr Polden—Yes, I do, and I think that they are there in the present act. But I do think it is important that we recognise that there is often a legitimate interest in journalists, just as much as others, protecting their sources. Let us say the decision was made to go with the more general privilege, unless some factors were built in there, and I have been calling it the checklist under 126B(4), that made specific reference to the kinds of matters which are going to arise in relation to communications to journalists, I think it unlikely that a court is going to be too eager to apply it to confidences to journalists. It is a general confidential relationships privilege, but unless you have a separate and distinct section, as we do in New South Wales for sexual assault communication privilege, applying in addition to journalists, then one would need to indicate, under the range of matters that courts take into account, that considerations like the free flow of information and encouraging sources to come forward, are matters which the court must have regard to in an appropriate case. In a case where those matters are not important, those factors for consideration would fall away.

I do feel, and I stress, that unless the organisation of 126B(3)(b) is changed, the section will not make very much difference at all to the current status quo. The direction has got to be made that is protecting the source if it is likely that harm might be caused, and the court needs to make that direction, unless it is satisfied that the desirability of the evidence being given outweighs the harm, instead of the other way around. Unless you do that, you will not change judicial attitudes. Judges are good people. They follow the law as written by parliament. Some people say they do not, but invariably they do and, unless they see a strong indication like that, that the elected arm of government, as opposed to the non-elected chapter 3 arm of government, has made a decision that we have got to change the balance, they will not change their attitude to this and they will not extend the protection. That is a very important point.

Senator BARNETT—We are a little tight on time, so I will just finish with this final question. Are you aware of the reforms in the USA that are currently before the federal congress, the House of Representatives and the Senate? I was only just made aware of this in the break this morning. I am hoping to obtain more information about the reforms that are before congress, which I understand and I have been advised are initiatives to proceed along the lines of a rebuttable presumption that journalists' confidential sources should remain. I am wondering if you are aware of that and, if so, are you able to enlighten us further?

Mr Polden—No, I am not aware of it. I will do my best to enlighten you further but, whether anything I say will serve to enlighten or simply confuse, I cannot say. The rebuttable presumption would certainly reflect the New Zealand position. In PIAC's view, it would really line up pretty well with what the minister has said, which is, ultimately, it is setting up a guided discretion. Setting up a rebuttable presumption does not do anything more than give an indication to the judiciary of the way in which it is to approach the exercise of that discretion. I have not seen it. I would be very interested to see the drafting. Is it available?

Senator BARNETT—Apparently some legislative form of it has been introduced in the US House of Representatives and Senate according to the advice I have received this morning, and apparently it is before one or other of their judiciary committees. Having worked in Washington DC as a lawyer, I know that those committees are very particular, and no doubt they will give it due consideration and that may take some time. If you learn any more about it, we would be happy for you to take it on notice and let us know. In the meantime, we will try and find out a little more about it, because it is relevant to our bill.

Senator FISHER—Mr Polden, your answers to Senator Barnett and your submission referred to the New South Wales legislation and the extent to which it talks about people acting in a professional capacity. I think this morning you have also used the words 'professional relationship'. If that is to be a factor, is it defined? Are the words 'professional', 'relationship' or 'professional capacity' defined anywhere and, if not—as I suspect they are not—how would that work given modern day communication?

Mr Polden—It is a very good question, if I might say so. The answer is that they are not defined anywhere. So 'acting in a professional capacity' is—

Senator FISHER—What does that mean in today's world, particularly given the communication systems we are seeing develop?

Mr Polden—A 'profession' is a fixed body of knowledge and a group of people who come together and regulate themselves. That is essentially what a profession is. One might say there is a broader view —I would have thought a common-sense view—of profession. I think people might well interpret it as analogous to 'trade or profession'—something you practice not as a hobby but as a calling, and probably one you make money out of. I am guessing that it is a difficult definition. I would have thought that it is unlikely to take in, let us say, the casual blogger on the internet posting something on a bulletin board. It is very hard to see how a disclosure to somebody doing that could be a disclosure to someone acting in a professional capacity, so I

would have thought that, if the concern is that the protection might take in those kinds of matters, it will fall outside. Some people may argue that those matters should be inside.

Senator FISHER—Exactly, because a blogger doing blogging for no remuneration—or perhaps, in your profession's language, pro bono—might consider himself or herself to be extraordinarily professional in the process of doing that pro bono blogging and might argue differently.

Mr Polden—That might be quite right. So one would have to seriously ask the question: what is the policy determination on that? Argument has been made in relation to other bits of legislation involving journalists that, because they are subject to a code of self-regulation and so on, some special dispensations ought to be carved out from the Trade Practices Act—section 65A is an example of that, making them immune from the 'misleading and deceptive conduct' provisions of section 52. So, if you started to extend it here—although I do not want to make a 'floodgates' argument as lawyers do—the question might well be: where would it end? Is there a rational factor which one can use to discriminate? I do not know. You are the policy makers.

Senator FISHER—You are the expert, sir.

Mr Polden—I have a very tainted expertise, in that I spent 20 years advising newspapers. So, speaking from that perspective, I would argue: of course professional journalists have a code of ethics and standards and so on. But there is a powerful argument to be made for citizen journalism, I would have thought—unless one were concerned that somehow the privilege could then be used as a cover for conduct which is not really engaged in with a view of enlightening the population but for some other reason. I cannot really see that as a likely eventuality, but it may just come down to the fact that, if you do not use words like 'professional relationship' or 'profession', it is just a drafting problem. How do you draw the corners or the boundaries around this discretion?

Senator FISHER—Very good. Thank you, Mr Polden.

Senator BARNETT—Quickly, on that, what about a freelance journalist? What is the difference between a freelance journalist and a blogger?

Mr Polden—You can have a blogger who is a freelance journalist, or you can have a blogger who is not a freelance journalist. A freelance journalist ought to be, I would have thought, someone who adheres to the AJA code of ethics, at a minimum, and a blogger may or may not be that kind of person. A blogger may also be—I suppose this is the kind of difficulty you get into—completely anonymous or pseudonymous. A blogger is simply somebody who, whether journalist or not, gets onto the so-called blogosphere and writes pretty much according to the dictates of personal conscience.

CHAIR—Thank you. I do not think we have any other questions, so thank you very much for your time today and for providing the committee with a submission for this inquiry.

Mr Polden—Thank you, indeed.

Proceedings suspended from 12.26 pm to 1.19 pm

DOBBIE, Mr Michael, Director, Publications and Campaigns, Media, Entertainment and Arts Alliance

McKINNON, Professor Ken, Chairman, Australian Press Council

CHAIR—I reconvene this public hearing of the Senate Standing Committee on Legal and Constitutional Affairs inquiry, and I now welcome representatives from the Media, Entertainment and Arts Alliance and the Australian Press Council. We have the submission from the Media, Entertainment and Arts Alliance and for our purposes we have labelled that No. 7. The Australian Press Council submission is with us and has been labelled No. 3. Do either of you wish to make any amendments or alterations to your submissions before you begin?

Prof. McKinnon—No amendments.

Mr Dobbie—No amendments for the Alliance.

CHAIR—All right. Thank you both. If you would like to both make a short opening statement, that would be appreciated, and then we can go to questioning. Who is going to go first for us? Professor McKinnon, thanks.

Prof. McKinnon—I speak on behalf of the Australian Press Council, though with a limited brief—that is, we have made the submission and stand by that and, in general, we welcome attempts to provide legislative cover for shielding journalists. We note, however, that the actions of the government are really about confidential statements in general, whereas we think the narrow shield of journalism needs its own kind of statements. The principal consideration we have is that what has been proposed, while a very good attempt, does not meet the minimum requirement—that is, the onus for calling a journalist should be on the court, as it were. We accept that, in certain instances, the journalist may be required, in security cases or when the case before the court is of such importance that it would require it, but the ones that have been done so far, in particular the Harvey and McManus case, revealed that unless the onus is with the court to establish why confidential information should be revealed then it will not happen. May I also say that our view is that, in this instance, there is little likelihood of the legislature being able to craft a whistleblowers piece of legislation that will do the job. It is very much more important that the shield law for journalists be an adequate one.

CHAIR—Thanks, Professor McKinnon. Mr Dobbie, do you want to provide some comments to us?

Mr Dobbie—Yes, please, Chair. The Media, Entertainment and Arts Alliance thanks the Senate committee for this opportunity to take part in the inquiry. The Alliance is a member of the Australia's Right to Know coalition, a group which represents 12 of this country's big media organisations. The Alliance is also the trade union and professional association representing Australia's journalists, performers, technicians and symphony orchestras. About 10,000 journalists are members of the Alliance. The Alliance believes that the role of journalists in the disclosure of important information in the public interest must be protected at law. Journalists are required by their professional code of ethics to protect the confidentiality of their sources. Clause 3 of the code states:

Where confidences are accepted, respect them in all circumstances.

This obligation is qualified by a guidance clause in the code. It says:

Only substantial advancement of the public interest or risk of substantial harm to people allows any standard to be overridden.

The Alliance believes there is insufficient recognition of a journalist's fundamental ethical obligation in the Evidence Amendment (Journalists' Privilege) Bill. The bill does not acknowledge the tilt in the balance in favour of journalist source confidentiality protection in the way that the code of ethics does. The Alliance is also concerned that, under the bill, there is no requirement on the courts, when exercising their discretion, to give priority to journalists' confidential sources. In short, there is no protection provided to journalists who risk criminal sanctions if they refuse to divulge the sources of their information. Indeed, we now have the regrettable situation where *Herald Sun* journalists Gerard McManus and Michael Harvey have criminal convictions recorded against them for adhering to the professional code of ethics.

We are also concerned that this lack of protection will inevitably flow through to the willingness of sources to divulge important information in the public interest. A lack of protection is also contrary to the acknowledged role of journalists to keep the public informed. The Alliance believes that more weight should be given to a presumption in favour of journalists and their sources. This would be consistent with the Attorney-General's aims for this bill.

Our submission has detail on how this would bring Australia into line with countries such as the United States, Britain and Germany. It is also worth noting that New Zealand's Evidence Act 2006 has, as its starting point, the protection of journalist source confidentiality. With this in mind, the Alliance believes the proposed Commonwealth shield law should incorporate an overarching statement of the spirit of the law, a statement that favours journalist source confidentiality protection. Thank you.

CHAIR—Thank you very much. Senator Barnett, do you want to start with some questions?

Senator BARNETT—Yes, thanks, Chair. Mr Dobbie, to kick it off, we have had some discussion today in regard to the definition of 'journalist', so I would be interested in your feedback on that question and the definition of 'media' and 'news'. Can you help us in that regard? Is it important to have a definition and for us to know, as legislators, whether it includes freelance journalists and whether it includes bloggers, and how broad a definition do you think we are envisaging here in this legislation, knowing that, at this stage, it is a matter for the courts to determine?

Mr Dobbie—I think we have seen in the past decade or so an explosion, largely through the internet and digital means, of the method in which news and information can be delivered to an audience. We believe at the Alliance that anyone involved in news dissemination, who considers themselves to be a journalist, should be a member of the Alliance, mostly because they would then be bound by the code of ethics, which is a requirement of all journalist members of the Alliance.

So we believe that anyone involved in these new areas of blogging or citizen journalism who seriously believes that they are involved in news dissemination should, at the very least, make themselves aware of the code of ethics and behave ethically with the code of ethics in mind. We would also say that not only is that in terms of improving the quality of their output—in terms of making sure it is high quality, ethical journalism—but also it means that they are producing a product that their audience actually wants. It also means that their sources begin to trust them more because they are behaving ethically and they do adhere to a code of ethics. So we believe that this explosion in new people moving into non-traditional areas of journalism, such as blogging and citizen journalism, should be encouraged to participate in ethical journalism and adhere to the code.

Senator BARNETT—Thanks for that. This is probably a question for both you and the professor. Is there any reason why the bill should not include other professional relationships—and I draw your attention to the New South Wales Evidence Act, which covers professional confidential relationships? Could you explain why journalists or journalism is a special category, or do you think it is okay if the bill is broadened to cover professional confidential communications?

Prof. McKinnon—Perhaps I will try and answer that first. There is need for confidential protection, as it were, for more professions than journalism, but there is a special need in the case of journalists, in that they are the messengers for information that the public really has the right to know. They are not, themselves, principals in the ways that medicos and priests and so on are. So the wording that would suit for journalists is not really the wording that would be essentially the same for other professions.

Senator BARNETT—Therefore, do you support amending the bill to cover the other professions?

Prof. McKinnon—No.

Senator BARNETT—Why not?

Prof. McKinnon—It does not matter that the bill covers both, provided they are in separate sections, and that the wording relating to journalists is a wording where the onus is on the court to, as it were, establish good reason why the journalist should be called to give evidence.

Senator BARNETT—Yes, but what I would like you to answer, if you can, is whether you believe the same rules should apply to other professions—that is, you support the rebuttable presumption should that rule apply to other professional confidential communications.

Prof. McKinnon—I can see good reason why it might, but I am not in a position to give you an exhaustive statement on to whom it should be applied and under what circumstances.

Senator BARNETT—Thank you. Mr Dobbie, do you want to respond to that?

Mr Dobbie—I cannot comment for other professions except to say that journalists clearly have a role and a responsibility to inform society about itself, and that we have seen instances where journalists attempting to do that are then quizzed on the identity of confidential sources and are then placed in a difficult position where they are bound by a code of ethics not to disclose those confidential sources. Not all the information that

journalists receive is confidential. It is up to the journalist to determine whether a person who is seeking confidentiality should be granted that confidentiality, and that is clear in the alliance code of ethics. I can only really comment on the journalist's position.

Senator BARNETT—So you both support a qualified privilege for journalists rather than an absolute privilege?

Prof. McKinnon—I support a qualified privilege, and I point out that some very useful evidence worth taking into account is that, on 1 April this year, the US House of Representatives approved a new bill called the Free Flow of Information Act of 2009, House of Representatives 985, which is worth taking into account where there are exceptions to the confidence rule.

Senator BARNETT—That was my other question. I asked the previous witnesses if they were aware of the reforms in the US, and I understand the bill has either been before the Senate or been passed through the Senate—a like bill, I am not sure about that—and if you are aware of that or have any further information that would be of assistance. Can you expand on that US House of Representatives bill, because I think it is potentially quite influential? We are aware of some of the state US legislative framework which deals with this, but at a federal level this seems to be new legislation. So is there any way you can expand on your understanding of that House of Representatives bill?

Prof. McKinnon—Yes. As I said, the bill is now before the Senate. It has not been passed by the Senate. It presumes protection but allows that a journalist should be compelled to reveal confidential sources in the following circumstances: to prevent an act of terrorism against the US or its allies; to prevent significant harm to national security or to identify a perpetrator of a terrorist act; to stop an imminent death or significant bodily harm; to identify someone who disclosed a trade secret, health information on individuals or financial information that is confidential under federal law; and, in the case of a criminal investigation, to identify someone who disclosed properly classified information that caused or will cause significant harm to national security. The parties seeking the information must establish that the public interest in compelling disclosure outweighs the public interest in gathering or disseminating information.

Now, just by way of editorial comment, what is proposed in the Australian bill is a significant attempt to do that but it does not establish that the presumption is protection unless proved otherwise, and that was really the killer in the Harvey and McManus case. That is to say, the irony of that case was that while there was not enough protection it would not have mattered anyway because the person claimed to have passed the information was eventually found innocent and the two journalists—because the matter went to the court because of disobedience re the court—had criminal convictions which will affect the remainder of their careers.

Senator BARNETT—I just want to get a little bit more clarity there, Professor. My understanding of what you have just said is that in the cases of prejudice to national security the privilege does not apply.

Prof. McKinnon—That is correct.

Senator BARNETT—So is there a rebuttable presumption in favour of journalist privilege, then, or is that the exception?

Prof. McKinnon—My understanding of the bill, as it was originally written—I have not actually seen the final wording—was that it would be necessary for the accuser, so to speak, to establish that it was a case in which national security was at stake and if that were to be established then the court would be able to make a relevant order that the matter be disclosed.

Senator BARNETT—So it is up to the prosecution to establish such a fact?

Prof. McKinnon—Establish sufficient for the judge to make a decision that the national interest in terrorism is established.

Senator BARNETT—It is very interesting because my understanding of the current arrangements is that there is a high priority requested by the legislator to the courts to be given to national security and that the bill before us intends to replace that with just simply requiring the court to take it into account rather than putting the greatest weight possible on it, and the Public Interest Advocacy Centre supported that approach. But it seems the US legislation, at least from the short amount of evidence we have before us, places a considerable amount of weight on any risk to national security. Do you have a response to that observation?

Prof. McKinnon—Yes. They have added two subclauses to 126B(4) after (h)—adding (i) and (j), which attend to that national security issue. But with regard to the introductory words in 126(4) 'without limiting the

matters that the court may take into account', it is to take into account, and the word 'must' is replacing 'it is', so, in a sense, it says 'the court must take into account'. Then it adds (i) and (j) 'any risk or prejudice to national security', but it is still open to the court to determine whether there is any risk of prejudice to national security. That is how I understand the way it is drafted.

Senator BARNETT—We will probably try to get hold of that. If there is anything else in terms of taking on notice regarding that US House of Representatives bill, that would be great. You said it was HR 985?

Prof. McKinnon—Correct.

Senator BARNETT—If there are any other observations or information about the US legislation, I think the committee would be interested in that.

Prof. McKinnon—The only thing extra I would like to say about it is that it complements state legislation which is the case in all states now except Wyoming.

Senator BARNETT—When you say it is the case, what is the case?

Prof. McKinnon—Reporters have shield laws or state court rulings providing some protection in all states except Wyoming, and there are other legislatures, including the Texas legislature, which are moving to further strengthen the shield aspect of journalistic activity.

Senator BARNETT—Do they have shield laws for other professional confidential communications?

Prof. McKinnon—Most of them do, as far as I know, but it is most relevant in the present discussion that the shield laws that are being discussed are those relative to journalists.

Senator BARNETT—Thank you very much for your feedback. Mr Dobbie, did you want to make any observation there?

Mr Dobbie—No, I am happy.

Senator BARNETT—The same applies: if you want to take on notice any information or observations you can share about the US experience, that would be of interest, because we have talked a lot today about the New Zealand and UK example and recommendations to follow that. We are obviously interested in the US experience.

Prof. McKinnon—Just to give one extra piece of information about what gave momentum to the US act, since 2001, five journalists have been sentenced or jailed for refusing to reveal confidential sources in a federal court—two for 18 months, and one faced $5,000 a day in fines—and a 2006 study said that there were 67 federal subpoenas to seek confidential material from reporters. So it is a very perpetual problem, as it were, where people seek to put journalists in the dock.

Senator BARNETT—Thank you.

Senator FISHER—Professor, further to Senator Barnett's questioning and, in particular, your comment that there should be some different treatment in the legislation itself for journalists and others, or certainly different provisions to apply to others, how would you define 'others'?

Prof. McKinnon—As I said at the time, I am not specialist enough to give you an exhaustive list. I would think that the usual list would include medicos and—

Senator BARNETT—Priests.

Prof. McKinnon—Religious people. I do not know that the word 'priest' fits, but pastors and priests. I cannot go much beyond that. I am not aware of whether you, for instance, take it wide enough to cover all medical professionals.

Senator BARNETT—What about accountants?

Prof. McKinnon—I am a sceptic about legal privilege and accountants, as I have been about cabinet-in-confidence documents—and we have already had the instance where a state government has wheeled truckloads of stuff through the cabinet room. So I would prefer to just make that a kind of a side comment, rather than a thought-out position for the Press Council.

Senator FISHER—Your distinction, Professor, is nonetheless seeming, thus far, to be based on professions—or 'perhaps' professions—in terms of a distinction between journalists and others arguably in a profession. Would that be the appropriate basis for distinction rather than distinguishing between people who communicate in one way versus people who communicate in another?

Prof. McKinnon—Again, just thinking out aloud, I would think that the distinction for journalists is that the journalists are the medium between somebody with information and a whole host of people in the public who really do have a right to know about these things, whereas the other professions—such as the two that I mentioned—deal with the personal information of patients or adherents. I stop short on the question of law and accountants because there would be many occasions in which what a legal advice was would probably be pertinent to both a commercial case and a criminal case. Certainly in the instance of accountants, I would think that any admission that a person made to an accountant might be different from the kind of material that the accountant could be asked about as the professional adviser to someone. So I am not a good informant on how far you can go in that.

Senator FISHER—Might there be other groupings of people who might consider themselves worthy of some sort of protection even though they do not fall into your list, however exhaustive it might be—and I understand you are speculating? Might there be those who consider that they should fall into your list yet the list leaves them off? Asking that another way, are there those who might fall outside what might be regarded as the more traditional professions who would consider themselves worthy of protection?

Prof. McKinnon—I am sure there are other professions who consider themselves worthy of protection. They are, in a sense, primarily professionals who serve their client, and that is where I make the distinction. They most often, where they are serving their client, feel that what is being talked about is private to the client and is not relevant in the public domain. In the case, however, of journalists, their primary role is in the public domain to make known to the public that information that the public, as reasonably informed members of the public, would have a right to know. In fact, I would go as far as to say that in a well-functioning democracy, they need to know, and the journalist needs to make that information available to them. So it is for that reason and not because we need to protect the journalists themselves. It is only in their role of middling the flow of information to the public. That is important.

Senator FISHER—So your distinction is more about the public versus private domain?

Prof. McKinnon—Most often, because I can imagine in, say, the case of a lawyer, that they would be from time to time necessarily interrogated in court in the public interest but most often would be serving clients who would have a reasonable expectation of privacy. So a decision might need to be made in each case as to whether they need to be part of any court proceedings. My view, on the other hand, about journalists would be that in their role of informing the public, the cheapest and easiest thing for a public prosecutor to do is to haul the journalist into the court, as they did with Harvey and McManus. In that case, the Press Council was very active in discussion with the federal Attorney-General about the unworthiness of this and he, in fact, made a statement saying that they should not be prosecuted, but it was weak and lame, to be frank with you, because he also claimed that he did not have any influence over the Crown Prosecutor. Since I have served seven years in Canberra as head of a federal agency, I did not find that a very persuasive statement.

Senator FISHER—I have one further question to ask you, Professor, and then Mr Dobbie may also like to express a view on it. If we pursue for one further moment your distinction between public arena versus private arena, are there those who may consider themselves to have the job of providing information in the public arena who do not fall within your definition, however defined, of journalists and, if so, who are those people and what should be done in respect of them?

Prof. McKinnon—Mr Dobbie might want to have first go while I think about that.

Mr Dobbie—I think it is a question of who sees themself as a journalist versus who sees themself as a reporter, versus who sees themself as a blogger. I think we would argue that if you are involved in disseminating news to an audience—and again, it is all a question of definitions—but if you are involved in trying to disseminate news in a professional sense, we would argue that you should be aware of your ethical responsibilities if you are going to call yourself a journalist and operate professionally, and hence that is why this legislation is encompassing journalists. The alliance has a code of ethics for its members but not all journalists are members of the alliance and, therefore, not all journalists are covered by the code.

Senator FISHER—Does awareness of the code for your members ensure observance of the code for your members?

Mr Dobbie—No, but we do have a mechanism in place for complaints to be made to a national ethics panel. There is a procedure for those complaints to be heard and for, if necessary, penalties to be meted out by the panel against an offending journalist, so there is a degree of self regulation there as well as a regime in place to ensure that ethical behaviour is upheld and that punishments are meted out if ethics are not being

upheld. There is probably also a very large requirement, if the journalist is employed by someone, for the employer to take a role in that and many employers do have their own code of conduct that applies to their employees who work in journalism.

Senator FISHER—So if there was a person who was aware of your code and considered themselves to be complying with your code, but your organisation considered that they were not complying with the industry code, what would be the difference between the treatment of that person versus a journalist who was aware of the code, considered themselves to be complying with the code, but was not considered by the industry to be complying with the code? What would be the difference in the treatment of those two individuals and would it simply be the self-regulatory enforcement?

Mr Dobbie—I think, if I understand your question correctly, they would obviously have to be a member of the alliance to be bound by the code and to be subject to the national ethics panel and a complaint would have to be brought against them.

Senator FISHER—It is a bit of a club in one way, isn't it?

Mr Dobbie—It is a professional association of people who acknowledge that by membership of that association they will be bound by its code of ethics.

Senator FISHER—Professor?

Prof. McKinnon—I would just add that the Press Council does not take into account whether a journalist is a member of the MEAA or not. If a complaint is registered about a journalist, we hold the publication to account on the basis that much that is written by journalists is then edited anyway and the journalist really does not decide what headline will be put on some account that is published. So the council holds the publication to account and requires that the publication publish the council's adjudication, and that is done without exception.

CHAIR—Senator Fisher, perhaps we might see if Senator Ludlam has got some questions then.

Senator LUDLAM—Yes, I do. Thank you, Chair. Would that cover somebody making a complaint about that kind of work—for example, on Crikey or New Matilda or one of the more obscure blogs out there? Would that necessarily come through the Press Council or do you not take that on?

Prof. McKinnon—The Crikey publisher has been before the Press Council; we have not had one from New Matilda. In fact, Crikey is considering joining the Press Council formally. Now the Press Council is moving into online publication, we do cover the online sites for all newspapers and their blogs which, by the way, under Australian rule are covered by the defamation law. So the operator of the site, the newspaper, would be held responsible for any contravention of defamation law. We have extended our remit, so to speak, to any new site that does not have a hard copy paper who wishes to be working within the Press Council principles and so far it has just been done this year to two sites that have decided they will join.

Senator LUDLAM—Thank you for that. Mr Dobbie, your submission argues that the bill does not grant any actual protection to journalists who refuse to divulge the source of their information, so this is going back to the big picture. What form of protection do you have in mind and do you think it can be provided within the way that this bill is drafted?

Mr Dobbie—Our submission is seeking that more weight should be given to the presumption in favour of journalists and their sources. I believe we are probably concerned most with the courts. When exercising their discretion, courts should give priority to journalists' confidential sources. We are concerned that there is no tipping of the balance in favour of the journalist source confidentiality and that is something that we would like to see. We welcome the bill, but we do believe that that tipping in balance in favour of confidentiality is what is needed.

Senator LUDLAM—That is concurrent with what quite a few witnesses have told us. Is that something that could be inserted, from your point of view, into, say, the objects of the sections of the act that we are amending or does it run counter to the whole thrust of the bill?

Mr Dobbie—We have sought in our submission for an overarching statement to be inserted that sets this out as, essentially, a starting point for the bill. If I am correct, and I do not want to put words in the Press Council's mouth, but I think Professor McKinnon's submission probably goes along similar lines and maybe states it just as well—is that right?

Prof. McKinnon—Yes, we believe that the bill would be immeasurably helped by a direction to the court that it shall presume that a journalist will not be called unless the matters in 126B are satisfied beyond question.

Senator BARNETT—Beyond question or beyond balance of probabilities or beyond reasonable doubt?

Prof. McKinnon—In clause 126 or 125 and all the subsets, A to I, that will be, presumably, still in the bill, the judges are required to take into account the probative value of the evidence, the importance of the evidence, the nature and gravity of relevant offences, availability of other evidence. Our stance would be that it is in the public interest to have a strong enough bill that journalists are not required to give evidence unless there is no other way of the prosecution being able to put before the court the matters that relate to the person charged. May we say also that there are two further considerations? One is that we have been aware that the New South Wales Evidence Act for many years had 'judges may do this', but it did not give any protection to journalists in practice.

In the letter back that we got from Attorney-General McClelland, he said that he had actively considered the New Zealand formulation of the protection of journalists and rejected it, in many more words, but the beauty of the New Zealand formulation was that it was very simple and straightforward. It did not prevent the judge from taking into account all these other matters but it simply, in few words, stated where the onus was. Finally, may I say, just to reiterate, that we doubt whether a working whistleblowers law will come out of all the hard work that has gone into it. We appreciate the hard work but, especially from a personal point of view, I cannot see how the head of an agency in Canberra will be able to free up enough information to satisfy what whistleblowers, even the most ethical of them, feel ought to be in the public domain. Since the Crimes Act still makes contravention of the Public Service Act a major issue, you need to change the Crimes Act and, in general terms, even if there is nothing else that comes through the whistleblower consideration that is in progress at the moment, a clear onus to protect journalists would be a very major step forward nationally.

Senator LUDLAM—I think we are well out of time. I will probably leave it there. Thank you.

CHAIR—I just have one question I want to ask Mr Dobbie. In your submission there, you actually mention that in your code of ethics you say:

Where confidences are accepted, respect them in all circumstances.

And then you go on to say:

This obligation is, however, qualified by the following Guidance Clause ...

Don't you think that that is the kind of clause or the kind of consideration that judges would give a view to if this legislation were enacted, though?

Mr Dobbie—We were talking earlier about a situation where does it need to be, perhaps, in the situation where the US legislation spells out areas of public interest where protection would not be offered. The guidance clause was written in February 1999, when the code was reviewed and revised. Although I was not with the alliance at the time, I presume that it was inserted with that in mind, that a journalist could determine that only in the instance of the advancement of public interest or the risk of substantial harm to people, that that particular aspect of the code could be overruled and overridden. Does that answer the question?

CHAIR—Here, though, it says, 'Only substantial advancement of the public interest or risk' essentially would allow that standard to be overridden—that is, divulging your source. Isn't that the sort of consideration, though, that judges would give in wanting sources to be disclosed?

Mr Dobbie—Look, I would not be able to speak for judges. Obviously, the code is there for the journalist to consider the position that they may be in, and obviously, this code was written at a time when journalists face criminal convictions, and it would obviously be up to the journalist to determine their position in terms of public interest or substantial harm and the individual circumstance they face. I am not sure how a judge would interpret that.

CHAIR—No. I understand what you are saying, but I am saying: wouldn't this be the kind of guidance judges would use to apply to themselves in a judicial matter?

Mr Dobbie—I think the difficulty is the legislation probably needs something more substantial than the wording in the guidance clause, which is why we are seeking an overarching statement in favour of journalist-source confidentiality in that the guidance clause. Because it was framed in an era of the prospect of criminal conviction, we think that the courts need to have a requirement, when exercising their discretion, to give that priority to journalist-source confidentiality. Does that answer it?

CHAIR—Yes, it does. I do not have any other questions. Do any of my other colleagues have a question?

Senator BARNETT—No, thank you, Chair.

CHAIR—All right. I thank representatives from MEAA and the Australian Press Council for your attendance today at the hearing. Professor McKinnon, thank you for talking to us by teleconference, and also for your submission.

[1.52 pm]

COLLINS, Mr Patrick, Acting Senior Legal Officer, Administrative Law and Civil Procedure Branch, Attorney-General's Department

FITCH, Ms Catherine, Acting Assistant Secretary, Administrative Law and Civil Procedure Branch, Attorney-General's Department

CHAIR—Before I officially welcome our next witnesses from the Attorney-General's Department, I want to remind senators that the Senate has resolved that an officer of a department of the Commonwealth or of a state shall not be asked to give opinions on matters of policy and shall be given reasonable opportunity to refer questions asked of the officer to superior officers or to a minister. This resolution prohibits only questions asking for opinions on matters of policy, and does not preclude questions asking for explanations or factual questions about when and how policies were adopted. I just want to remind officers that any claim that it would be contrary to the public interest to answer a question must be made by the minister and should be accompanied by a statement setting out the basis for claim.

I now formally welcome representatives from the Attorney-General's Department. We do not actually have a submission from the department, but you have a short opening statement to make?

Ms Fitch—No, we do not.

CHAIR—Perhaps we will just go straight to questions.

Senator BARNETT—Thank you, Chair and thank you to the witnesses for being here today. Do you want to respond to any of the submissions made this morning, or do you want us to just go through the concerns that have been raised?

Ms Fitch—I think we are happy if you just ask questions.

Senator BARNETT—Let's start there, in no particular order. The New South Wales legislation has provisions in the Evidence Act 1995 which cover not just journalists but other professions where professionals, in their confidential communications, are privileged. Have you reviewed that legislation and considered the merit of it?

Ms Fitch—Yes, Senator. I am not aware that the government has made a public statement that it is unwilling to, at some future point, pursue a general professional confidential relationships privilege. It is not what the current bill that is before the parliament does. I think that it is something that the government may consider doing in the future. It has, I think, by its act of introducing the bill that we presently have before us, indicated that it does not consider that the privilege existing in the New South Wales law is sufficient, in the government's view, for adequate protection of journalists and their sources in the particular confidential relationships that they have and maintain.

Senator BARNETT—But why do we have a bill before us that is related just to journalists rather than to people in other professions? Obviously, there is the legal profession, but there are also medicos and religious pastors or ministers, and, indeed, other professionals. Why are we limiting the bill to journalists?

Ms Fitch—Senator, this bill forms part of the government's election policy and election commitments to restore trust and integrity in government and to promote openness and accountability in government. It is part of a package that also includes freedom of information reforms, which I think have recently been released in draft form by the Special Minister of State, and also whistleblower laws that are being pursued through the House of Representatives standing committee and the government's consideration of that report since its release in late February, and work on suppression orders and other things.

The government, to my knowledge, is pursuing this journalist shield law quickly as part of that package of reforms to promote openness and accountability in government, which does not necessarily apply in the same way to other general professional confidential relationships.

Senator BARNETT—You mentioned whistleblowers legislation. We do not have it before us. We have not seen it. We are aware of the House of Representatives Legal and Constitutional Affairs Committee unanimous report, but we have not seen any government legislation. We had a submission earlier today saying they would prefer that the bills be dealt with simultaneously so that they sit side by side. Do you want to advise the committee as to why that is not the case?

Ms Fitch—Senator, the process for the government pursuing development of whistleblower amendments has been different from the current case for the development of the bill that we have before us presently. There certainly has been some consultation between the relevant departments involved. I need to state clearly that it is neither the Attorney-General's Department nor my area that is responsible for the development of whistleblower legislation. That is being pursued within the Department of the Prime Minister and Cabinet.

Senator BARNETT—When can we expect to see that bill?

Ms Fitch—I am not aware that the government has made a decision about that, at this stage.

Senator BARNETT—You have obviously looked at the New Zealand and UK model. We have seen the Attorney's views or criticisms of that. Are you aware of the US legislation that was introduced and passed through the House of Representatives on 1 April this year?

Ms Fitch—Yes, I am aware of that legislation in general terms.

Senator BARNETT—Can you advise us as to the merit or otherwise of that legislation?

Ms Fitch—It is my understanding that the Free Flow of Information Act to which you refer creates a qualified privilege. There are certain exceptions which are contained in that act, such as in the case of national security and, I understand, several other exceptions. It is not a model that the government has chosen to follow in the Australian legislation. I understand there have been, in the past, several bills, over a period of some years that have been before the US congress and Senate. I am not sure that I can add much more about—

Senator BARNETT—Had you considered that before you drafted this bill, because this bill has been in the public domain for many months. I have forgotten the date when it was first introduced. So presumably you had not reviewed the US bill before drafting and when this bill was introduced?

Ms Fitch—My understanding is that the SCAG working group on evidence considered it and New Zealand and several other models, including the UK et cetera, in its deliberations, yes.

Senator BARNETT—It could not have considered it because it was introduced just on 1 April.

Ms Fitch—I understand that it, or perhaps a predecessor piece of legislation, had been in the public domain for some time.

Senator BARNETT—An iteration of it, perhaps?

Ms Fitch—Yes, possibly.

Senator BARNETT—We read in the *Australian* last Friday, 24 April that the Attorney-General has said that he is pursuing the bill before us, but the Western Australian Attorney General said that the Commonwealth scheme was flawed and would not be enacted as state law. We have also got the submission from the Western Australian Attorney General before us and the WA DPP submission. They are pretty strong in their criticisms of the bill before us, perhaps in a conservative sense, saying that it goes too far.

We have then had a range of submissions before us today saying that it does not go nearly far enough, and they cite New Zealand, the UK, the US and so on. So if this bill is passed unamended—as it is—what we do know is that, in a court, the rules of evidence that are applied to one piece of litigation by a judge in the same court will, in fact, be entirely different to the rules of evidence applied in another case but by the same judge in the same court. Do you agree that that is the case?

Ms Fitch—I agree that there are different rules of evidence that apply. The Commonwealth Evidence Act applies in Commonwealth courts, generally, and different state and territory evidence acts apply in the courts in those respective jurisdictions, yes.

Senator BARNETT—Yes; however, there are federal legislative matters dealt with by State courts. So you could have a state Supreme Court judge dealing with a federal matter, and a state Supreme Court judge dealing with a state matter and having to apply entirely different rules of evidence, with respect to those two matters, in the same court by the same judge. Do you concur? Can you see the dilemma that we are faced with?

Ms Fitch—I do not disagree with what you say. The provisions in this bill and the extension that this bill contains to deal with all federal offences the same—

Senator BARNETT—It is only going to be more stark. That is fine. I am just saying we have got a dilemma and we have to work it through, but if the bill is amended to have presumptive rebuttal in it, as recommended by a range of witnesses today, then there will be an even more stark difference in the rules of evidence applying in the one court by the same judge on one case, compared to the same judge in the same

court on a different case, perhaps on another day. So I am just making that observation. I think it is clear to most of us and I am seeking your understanding if that is the case and confirmation that it is, because we need to work out if that is a dilemma for us or if we can move forward on the basis that SCAG, as it currently stands, where you have got one state opposing this law, but it seems that there is, perhaps, consensus in other state jurisdictions to proceed along similar lines. So that leads to my next question about the SCAG process. Let's say the bill is passed. What is next in terms of SCAG and ensuring consistency across the states and territories? Can you map that out for us as to how that is going to work?

Ms Fitch—I am not sure that that is clear at this point. As you will appreciate, this has been an issue that has been deliberated over with quite intense discussions over several months between the jurisdictions. In terms of taking it one step at a time, it would depend on what the parliament determined to do with the bill currently before it. I could not speculate beyond that.

Senator BARNETT—No, you cannot speculate.

Ms Fitch—I might just go back to your previous question about differences in operation between evidence laws for state and Commonwealth offences. Just to be clear, I think that, in one sense, we are talking about, if the bill were to be passed as it is—unamended—it would mean that Commonwealth offences are treated, in all courts in Australia consistently. So in a sense, it is achieving one consistency at the expense of another, but the other inconsistency arguably already exists.

Senator BARNETT—I can see your point. I know where you are coming from. Can we go to the next question that has come up pretty regularly today and you would have heard it, listening to the submissions, and I know Senator Ludlam and the rest of us have an interest in this issue and that is: what is the definition of a journalist? We are very interested in the answer.

Ms Fitch—Senator, there are a number of different definitions of 'journalist' in various acts, including the New Zealand act. As previous people appearing before the committee today have indicated, there are arguments to be made in favour and against including a definition. It is certainly something that was considered in the development of the bill. It does not include a specific definition of 'journalist'. There is already a form of confidential relationship privilege applicable to journalists in the Commonwealth Evidence Act at present, and there is not a definition of 'journalist' now. There is not one in the New South Wales act, which has been law in New South Wales for some time and has had cases brought before the courts under it. What the current bill does do is define the scope of the privilege by focusing on the circumstances in which information is provided to a journalist. I think it is 126A of the Commonwealth Evidence Act. This privilege applies to:

... a communication made by a person in confidence to a journalist ... :

(a) in the course of a relationship in which the confidant was acting in a professional capacity; and

(b) when the confidant was under an express or implied obligation not to disclose its contents ...

So it defines the scope of application for privilege in those terms.

Senator BARNETT—But that does not really answer the question. I know you are skirting around it, but you can tell us bluntly if you do not know or there are different definitions. We are sitting here and we are interested to know. If you do have a definition, we would like to know what it is.

Ms Fitch—There is not a definition that is proposed for inclusion. One thing the government had regard to in coming up with that approach was that it was actually recommended in a 1993 report that dealt with journalist shield laws that was actually published by an inquiry undertaken by this committee. You might be familiar with the *Off the record: shield laws for journalists' confidential sources* report from 1993. It recommended, for example, that no definition of 'journalist' be included.

Senator BARNETT—So is that what you are recommending?

Ms Fitch—We are recommending that no definition of journalist be included in this bill. It is not included.

Senator BARNETT—No, we know it is not included. Are freelance journalists and/or bloggers journalists under this bill?

Ms Fitch—They would be journalists where they were acting in the course of a relationship in which the confidant was acting in a professional capacity and when they were under the relevant obligations in 126A of the act, which remains unchanged from the existing provisions.

Senator BARNETT—So it is in the hands of the judiciary?

Ms Fitch—It depends on the manner in which they are acting under the legislation.

Senator BARNETT—You are leaving a very broad discretion in the hands of the judiciary.

Ms Fitch—As, I think, other people appearing before the committee have said, it is clear in many cases that will come before the courts when a journalist is obviously a journalist. There may be some cases where it is less clear—for example, in the case of bloggers—but in those cases, I reiterate, it would depend on how the person was acting at the time. Senator Ludlam, I think, was referring to cases where there may be people who are blogging but also acting as freelance journalists and acting in different capacities in different situations.

Senator BARNETT—Sure.

CHAIR—Senator Barnett, have you nearly finished?

Senator BARNETT—I had one last question, and I know others will want to ask. It is pretty much the nub of the issue, so if you do not mind, I will ask it. It seems that most of the witnesses support the objectives set out by the federal Attorney-General but have a problem with the substance of the bill, in the sense that it does not go far enough—that is, in terms of the witnesses we have heard from today and the submissions we have got, apart from the Western Australian position. So as you are the department here, could you please summarise, in your views, why you do not support a rebuttal presumption in favour of journalist privilege remaining?

Ms Fitch—Senator, there are arguably some slight mischaracterisations of this issue in the discussion so far and, I think, in some of the submissions, in our view. For purposes of evidence law, when we are talking about a rebuttable presumption, usually that would involve, for example, a presumption occurring that is set out in legislation and then, depending on whether it was a civil or criminal matter before the court at the time, evidence to be brought by either side in favour of or against overturning that presumption to the requisite standard of proof.

What the current bill does, in a similar way to what the existing provision in the Evidence Act does, is give the court a discretion as to whether the privilege should be maintained or not, and that is a discretion that is exercisable by the court on its own motion. It is not a matter of evidence being brought before the court and having to meet or not meet a requisite standard of proof, be that on the balance of probabilities or beyond reasonable doubt, depending on whether it is civil or criminal. In this case, what we are dealing with is a discretion that is guided by an objects clause and then certain other aspects in the privilege, some of which are set out in existing legislation and some of which have been augmented by the current bill.

I think, in reality, what is likely to occur when a relevant matter is brought before a court and the question of whether or not to maintain this privilege arises, is that the court will look at the facts before it, depending on all the circumstances of the case, and will be likely to, but may not, seek submissions from both sides about relevant matters that each side may want to draw its attention to and then make a decision. So I think, in those kinds of terms, it is a case of, effectively, whether or not in essence the nature and extent of any potential harm to a journalist and a confidant and a confider in any particular case outweighs the desirability of the evidence being given under the circumstances. I do not know that in operation there would be a significant difference between the way this privilege plays out and the way a presumption such as occurs in the New Zealand Evidence Act would operate.

Senator BARNETT—I will clarify. You said you do not think there would be a big difference in the way it is considered?

Ms Fitch—Not substantively, no.

Senator BARNETT—Thank you for that.

Senator LUDLAM—Then would you be in favour of just putting it beyond doubt? You have said you think you have gone most of the way there anyway, but most of the witnesses who have appeared before us, as Senator Barnett has indicated, have said, 'Just put it beyond doubt. Put that in the objects of the bill.' In fact, some submitters have even suggested: 'Borrow some language from the minister's second reading speech and put that in the objects of the bill to put it beyond doubt.' Would you support that sort of approach just to clarify that matter?

Ms Fitch—That would be one option, Senator. It is not what the government has chosen to do at the moment. I am not sure which particular language of the second reading speech you are referring to. That could be something to consider.

Senator LUDLAM—That is quite a helpful answer. If that was the minister's intention, and I think there is some indication that it is, what has really been put to us is that the bill does not do that. It does not do what the minister has said is the government's intention, and so we should put that beyond doubt, really—that the burden or the onus of proof really should be on someone who is attempting to force a disclosure rather than the journalist protecting a source.

Ms Fitch—I think what I have already said goes to the fact that I would not agree that the current bill does not do what the government has intended.

Senator LUDLAM—Of course. One witness pointed out that the drafting of the bill means:

... a source's identity is only protected where the content of the communication is not to be disclosed.

There is some confusion around whether that is intentional or whether that is an ambiguity in the drafting. It might have been AAP. I can fish it out for you.

Ms Fitch—And you are suggesting that that witness considered that may have been an oversight?

Senator LUDLAM—Yes. There is some ambiguity, I think, because in many cases it is not the content of the communication that is the concern. It is the identity of the source.

Ms Fitch—Senator, I would be happy to investigate that further on notice. I am not aware that there has been any ambiguity in the way the provision has been interpreted previously. I think there has been some consideration in the New South Wales case in which that interpretation was not problematic.

Senator LUDLAM—Before we finish up today I will point you to the specific concern that was raised, if you like.

Ms Fitch—Thank you.

Senator LUDLAM—It might make it a little bit easier. I am just wondering whether you are able to provide us with any information. As Senator Barnett has said, all we have really heard from SCAG—and not on their behalf, obviously—are some comments from the WA Attorney-General, but can you give us a better idea of whether Attorneys-General in other states and territories are likely to be willing to fall in behind this sort of approach that you are taking?

Ms Fitch—My understanding is that when the Standing Committee of Attorneys-General met in Canberra on 16 and 17 April they considered options and discussed options for inclusion in the Model Uniform Evidence Bill. That is a bill that has not been enacted exactly as a model by all of the jurisdictions. Not all jurisdictions involved have accepted that scheme so far, although that is an ongoing pursuit of ours. I understand that there has been no further public comment by state and territory A-Gs as to what their intentions are for their own jurisdictions at this stage. Certainly I am aware of the remarks by the Western Australian Attorney-General recently in the paper, but I do not know that I am able to speculate beyond that.

Senator LUDLAM—You do not have a time line for when we might see a more broad based agreement amongst the states and territories?

Ms Fitch—No. I do not think I could be sure about that at this stage.

Senator LUDLAM—Thank you very much. Just to pick up where we were before, do you think that the kinds of safeguards that you are building into this will be suitable if, for example, a citizen journalist who is not necessarily working for an accredited media organisation comes into contact with information and might find themselves in the sort of position of some of the cases that have been cited this morning? Are you comfortable that the bill would apply in that case? Will they be able to afford themselves the sorts of protections that we are seeking to give to other journalists?

Ms Fitch—Senator, I think this bill would apply where the journalist was acting in a professional capacity and where there was an express or implied obligation to keep some particular information or their identity confidential. As you can no doubt appreciate, there is an almost infinite variety of possible relationships in this day and age, some of which may be captured and others of which may not.

Senator LUDLAM—I am not sure whether you have answered the question there. I know it is probably not wise to wander off into hypotheticals, but if you have somebody who is working in an unpaid capacity for a blog—not for any mainstream news organisation—and they expose in the public interest some sort of information and then are hauled into court to expose the source of their story, will they be covered by the provisions that we are introducing here?

Ms Fitch—Firstly, there would need to be an understanding between the confidant and the citizen journalist, in your example, that any information that was transferred be kept confidential, so there may not be an understanding of that nature and that would need to be either express or implied.

Senator LUDLAM—That is the test that we would be applying to a journalist in any case, though, is it not?

Ms Fitch—Yes, that is right.

Senator LUDLAM—That is the same standard.

Ms Fitch—Yes, that is right. The New Zealand Evidence Act definition of 'journalist' is arguably difficult in that example as well. That act relevantly provides in section 68(5):

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.

That is a definition of 'journalist' that some people have referred to today, and I am not sure that that is any clearer in some senses either.

Senator LUDLAM—I do not know if some of the online publications we are referring to would qualify as 'news media' or whether that is defined anywhere that would help us.

Ms Fitch—Yes, it is difficult.

Senator LUDLAM—Just to go back, it took the help of the secretary to pin down the issue that I raised before about the distinction between a source's identity or the content of a communication. At the bottom of page 2 of PIAC's submission, they propose:

Division 1A of the amended Act should make it clear beyond argument that the privilege applies not only to communications the *content* of which the journalist is under a duty not to disclose, but to communications in relation to which the journalist's duty is limited to protecting the *source* (while being at liberty to disclose *content*) …

So the journalist in question has disclosed information, but what they really need to keep secret is the identity.

Ms Fitch—I wonder if we may consider that and take that question on notice.

Senator LUDLAM—Yes, that is fine. Chair, I have no other questions.

CHAIR—I have a couple of questions, Ms Fitch and Mr Collins. I just want to look at the position of state and territory governments in relation to this matter. Can you give us a view about whether there should be a difference between state, territory and Commonwealth journalist shield laws given that, unlike state and territory laws, it is nearly always an offence under Commonwealth law for a public servant to communicate with a journalist?

Ms Fitch—Senator, the objective of harmonisation is certainly one that the Commonwealth Attorney-General has been keen to pursue in this case. The government has also made clear statements that it wishes to strengthen journalist shield laws and so it is trying to pursue both of those objectives at the same time. At the present time it is only New South Wales and the Commonwealth that have any form of professional confidential relationship privilege applicable to journalists. New South Wales, as we have heard, has a general 'not specific to journalists but covers them' privilege, and the Commonwealth is specifically limited to journalists. It is something that the Commonwealth Attorney has said that he would like to see some kind of harmonised approach if possible, but that obviously depends on all the jurisdictions being able to come to a view that the same kind of privilege is the best model, and the parliaments of those jurisdictions supporting that in each case.

The current bill is probably the strongest—if I may put it this way—version of privilege that has been introduced in an Australian jurisdiction. As I said previously, I am not sure that I can speculate on what other jurisdictions may do. In respect of many of these offences being Commonwealth offences but heard in state courts, which I think was the other part of your question, it was one objective of this bill to, by amendment, extend application of this privilege to all Commonwealth offences, including when they are heard in state and territory courts, to give consistency to the treatment of Commonwealth offences irrespective of the court in which they are being heard.

CHAIR—Do you know of any cases in the UK or New Zealand which show that the laws in those countries provide a presumption in favour of protection of a journalist and that they are stronger than what is being proposed here?

Ms Fitch—I am aware that there are only few cases in which these provisions have been tested. Having conferred with my colleague, I can say we will be happy to give consideration to a bit of a case review. I think I do have it before me somewhere in my folder. I am just searching for it at present. I would be happy to take it on notice if we are not able to answer it in the time available.

CHAIR—That is fine, except you do realise that we would like any responses back by Friday because of the time line on the reporting date for this legislation?

Ms Fitch—Yes, I understand that.

Senator BARNETT—If the bill were passed in its current form, would Harvey and McManus have been convicted?

Ms Fitch—That is a difficult question to answer. Certainly, if the bill were passed as it is before parliament at present, the privilege as it appears in the bill would have applied in that case. What this bill does is to say, effectively, that the value of the evidence that the journalist may be able to give to the proceedings depends on any relevant factor but that the court must have regard to certain things amongst it. So it provides a non-exhaustive list. It would depend, in that case in particular, on the sources of any other evidence that were available to the court, other than that which was specifically available directly from Harvey and McManus themselves, which may have been available to the court's deliberations.

I suppose one thing that introducing a provision such as this may do is encourage, for example, prosecutors and other parties to proceedings to do some further investigation as to what other sources of evidence may be available if they think there is going to be greater protection to information obtained directly from journalists. So it is difficult to answer. I do not know that I could speculate.

Senator BARNETT—Secondly, the *Australian* of Friday, 24 April said:

Mr McClelland, who has ruled out a scheme based on the New Zealand model—which contains a rebuttable presumption that journalists' confidential sources should remain so—said he had already told a senate inquiry into his shield law plan about the deal with his state counterparts.

But we have been advised that the submission by the Attorney-General to our committee, which we have in front of us, is a confidential submission. Can you advise us as to why it is a confidential submission? It appears that the minister is happy to speak about it in the public arena but we are not allowed to address this particular submission, which we have before us, because it is confidential.

Ms Fitch—I have been advised that there is a letter to the committee which the Attorney has signed. I have not seen a signed version of that letter, so I am not able to talk to you about what the contents of that may be. It is a matter that I would need to seek advice from the Attorney on.

Senator BARNETT—You might seek advice, because to read about these matters in the public arena and then be advised that the letter is confidential, frankly, I find somewhat disappointing, and I receive that advice with some dismay.

CHAIR—Senator Barnett, can you clarify for me what letter you are referring to?

Senator BARNETT—This is the letter of 23 April from the Attorney-General to our committee. It is addressed to you. It is a two-page letter and it has an attachment to it, but I cannot comment any further than that.

CHAIR—It might have been confidential at the time of that article but might not be confidential now. Perhaps we can get that clarified.

Senator BARNETT—I am advised that it is confidential.

Ms Fitch—We would be happy to clarify that.

CHAIR—Thank you very much. We do not have any other questions in relation to this legislation, so can I thank the officers from the department and also publicly thank all the witnesses who have given evidence today to our committee in relation to this piece of legislation.

FITCH, Ms Catherine, Acting Assistant Secretary, Administrative Law and Civil Procedure Branch, Attorney-General's Department

CHAIR (Senator Crossin)—I formally declare open this public hearing of the inquiry by the Senate Standing Committee on Legal and Constitutional Affairs into the Law and Justice (Cross Border and Other Amendments) Bill 2009. I welcome the officer from the Attorney-General's Department. You are a busy person today, Ms Fitch.

Ms Fitch—Yes, Senator. I am every day.

CHAIR—Do you wish to make any opening comments about this legislation?

Ms Fitch—No, I do not.

CHAIR—I understand that this legislation is fairly innovative and groundbreaking. Could you start by providing us with a background as to why this legislation is before us.

Ms Fitch—The Law and Justice (Cross Border and Other Amendments) Bill contains three main groups of measures. Essentially the main set of measures are some amendments to the Service and Execution of Process Act 1992, which are, in essence, facilitative amendments to enable the Cross Border Justice Scheme applying in the NPY Lands—the cross-border region of South Australia, Western Australia and the Northern Territory—to operate unimpeded. The substantive elements of the scheme are contained in relevant legislation that has been passed in Western Australia and is in various stages of development in the other two jurisdictions. These current amendments to the Service and Execution of Process Act at the Commonwealth level are largely to remove the possibility of any inconsistency by virtue of section 109 of the Constitution between the operation of the Commonwealth legislation and that at the state and territory levels.

CHAIR—So what does this mean, though, on the ground, basically, in practical terms if this legislation is enacted?

Ms Fitch—It would allow for the Cross Border Justice Scheme to operate unimpeded and, in fact, were there to be future cross-border schemes of a similar kind of nature in the future, these Commonwealth amendments would similarly allow those to operate without the possibility of any inconsistency and confusion. Essentially the cross border scheme has been under consideration by the three jurisdictions involved for several years, and the point of it, I think it was initially established in response to calls by women's groups in the cross-border lands—it could have been the NPY Women's Council; I am not absolutely sure of that—to stop offenders evading police and law enforcement officials within those regional lands by crossing over a border where the law enforcement officer pursuing them, effectively, has no jurisdiction and no powers to prosecute that alleged offence.

CHAIR—I am assuming this stems from the need to try and give police and investigators more power when it comes to, say, drug trafficking or petrol sniffing trafficking in the APY Lands in that sort of triangular part of the centre of Australia. Is that correct?

Ms Fitch—Yes. I think it was essentially developed in response to a concern that current state boundaries were enabling perpetrators to evade police and the justice system, in particular within that area of the NPY lands.

CHAIR—So do states have to enable legislation as well? So have we seen similar legislation or complementary legislation put through the SA, WA and NT parliaments?

Ms Fitch—Yes, absolutely. In fact, it is the legislation at the state and territory level that contains the majority of the legislative aspects of the Cross Border Justice Scheme. There are, as I think I referred to, cross border justice acts in each of the relevant jurisdictions. Western Australia, I think, passed its act on 13 March last year. The Northern Territory act was passed by the Northern Territory parliament on 12 February this year, and the South Australian bill was introduced on 4 February this year. The scheme effectively needs all of the state and territory acts to be passed before it can commence operation. It arguably could commence operation before these facilitative amendments have been put through at the Commonwealth level, although there may be some confusion in relation to how the Service and Execution of Process Act's current provisions and certain provisions of the Cross Border Justice Scheme state and territory legislation are to operate in conjunction with one another.

CHAIR—Right. So that legislation has been introduced. Has it been passed by those parliaments?

Ms Fitch—It has been passed by Western Australia and the Northern Territory, and has been introduced but not passed yet by South Australia.

CHAIR—We do not have submissions from those governments. We do not have submissions from the NPY Women's Council.

Senator BARNETT—We do have a submission from the Western Australian government, Chair.

CHAIR—We do now, do we? But I am assuming, though, that this is legislation that has been, in fact, asked for and welcomed by all concerned. Would that be your understanding?

Ms Fitch—Yes, absolutely.

Senator BARNETT—Just to confirm my understanding, we have received two submissions: one from the Western Australian Department of the Attorney-General, and one from the Aboriginal Legal Rights Movement. Is that your understanding, Ms Fitch?

Ms Fitch—Yes, that is right.

Senator BARNETT—Let us have a look at this Aboriginal Legal Rights Movement. Their concerns are all related to the APY lands; is that correct? Have you seen their submission?

Ms Fitch—Yes, I have it before me.

Senator BARNETT—All right. It expresses a whole range of concerns—I think there are 24 of them—and it is a little alarming. They are making comments and expressing concerns about the South Australian bill. Is that the bill that is currently before the South Australian parliament?

Ms Fitch—Yes, that is my understanding.

Senator BARNETT—Right. So can you just help us here procedurally, because they talk about retrospectivity. The South Australian bill will operate retrospectively, which obviously causes all of us concern. It allows the reversal of the onus—

Ms Fitch—Sorry, Senator. Would you mind just pointing me to—

Senator BARNETT—Point 2. Point 1 says the bill allows for reversal of the onus of proof in relation to the facts of connection to the cross border region, and point 20 talks about:

The Commonwealth model should be a benchmark for the States and Territories. ALRM suggests that this Senate Committee should recommend that the states and Territories enact similar provisions in relation to custody notifications …

So this just raises some issues here. We probably need to walk through them. What do you say about their concerns? They are expressing concerns about the South Australian bill. We have got a Commonwealth bill before us. But you are saying the federal bill sets up the framework in which the states and territories then can legislate underneath to benefit from the Commonwealth bill. But should we pass this bill knowing of the concerns about the various state laws? What should we do about it? Is that accurate? Is that correct? Should we be concerned?

Ms Fitch—I am not sure that I would characterise the current proposed amendments to the Service and Execution of Process Act as setting up the framework within which the state and territory scheme can operate. In fact, I will refer back to a point I made earlier. We, by not proceeding with the current bill, could not, in fact, I do not think, constitutionally prevent the states and territories from setting up the scheme that they propose. What we could do is ameliorate confusion about the interaction between an existing Commonwealth statute and the proposed scheme, which is just merely likely to lead to complex and confusing litigation. In respect of the detail of the state and territory bills that constitute the scheme, I am not able to speak in very detailed terms about their contents. It is not the case that the Commonwealth legislation that has been proposed here is intending to get involved in the setting up of that scheme. It is merely removing an impediment to its operation. So insofar as the bulk of the comments made in the submission to which you are referring are about substantive aspects of the South Australian legislation, I would suggest it is largely a matter to be raised with the South Australian parliament.

Senator BARNETT—You might be right that it is largely a matter for the South Australian parliament, but are we implicitly condoning retrospective legislation coming out of South Australia or reversing the onus of proof or creating custody notification concerns? All these issues have been raised with our committee. Are we, by supporting this bill, condoning what may or may not be legislated for in South Australia?

Ms Fitch—I would not characterise it as implicitly condoning. We could not prevent it by not supporting these current amendments.

Senator BARNETT—There are issues in this bill related to audio and audiovisual links. The Aboriginal Legal Rights Movement raised that issue and it is set out in schedule 2 of our bill. It provides for prisoners to give evidence by audio or audiovisual link in proceedings in the jurisdiction of their imprisonment. This Commonwealth bill is setting up a framework in which that can occur—is that correct?

Ms Fitch—The proposed amendments in the current bill to the audio and audiovisual link arrangements are not related directly to the operation of the cross-border scheme. They are a clarifying amendment intended to avoid doubt in circumstances where somebody is imprisoned in one jurisdiction and, rather than having arrangements applied to them to enable them to be moved to another jurisdiction to physically give evidence before proceedings in a jurisdiction other than that in which they are imprisoned, to allow them to be moved within the jurisdiction of imprisonment. If evidence is to be given by audiovisual link, it is not something that is related directly to the cross-border justice scheme; it has a broader application.

Senator BARNETT—Let's go back a step. Has this bill been before SCAG, and what has SCAG said about it?

Ms Fitch—No, it has not been before SCAG to my knowledge. I understand that, with a standing arrangement in respect of amendments to the Service and Execution of Process Act, it has regularly been circulated to all state and territory attorneys-general and, to my knowledge, they have all supported the bill.

Senator BARNETT—To your knowledge?

Ms Fitch—Yes, that is my understanding.

Senator BARNETT—Do you want to take that on notice and get back to us?

Ms Fitch—I am happy to confirm that. I am reasonably certain that that is the case.

Senator BARNETT—We have two submissions from the Western Australian Attorney General, which I have only seen today. Have you seen them?

Ms Fitch—Yes, I have one from the Department of the Attorney General of Western Australia, but not signed by the Attorney himself.

Senator BARNETT—It is from the department, indeed, and signed: 'Cheryl Gwilliam, Director General, 6 April 2009'. What is your response to their submission?

Ms Fitch—My response is that it is a supportive submission. I am unsurprised by that, because the amendments to the Service and Execution of Process Act at the Commonwealth level were developed in consultation with this department.

Senator BARNETT—There is a reference to the Evidence and Procedure (New Zealand) Act 1994 to extend the cooperative scheme for the service of subpoenas between Australia and New Zealand to certain family proceedings. Is that correct? Can you expand on that provision?

Ms Fitch—When the Evidence and Procedure (New Zealand) Act and the Evidence Amendment Act of New Zealand were first passed by the parliaments of Australia and New Zealand, they implemented a cooperative scheme to the service of subpoenas between the two jurisdictions and for the use of video and telephone links to facilitate proceedings between those two jurisdictions. Initially when they were passed, there was an agreed exclusion for family proceedings, which was primarily to address New Zealand concerns about the potential for misuse of subpoenas in the family context. However, New Zealand subsequently overcame those concerns. I think there was correspondence between the relevant New Zealand minister at that time and former Attorney-General Ruddock to agree to extend the operation of the scheme to include family proceedings but retaining two specific exclusions within the parameters of the definition of 'family proceedings', and they are those that the bill recommends be retained as exclusions.

Senator BARNETT—What specifically are those two categories of family proceedings?

Ms Fitch—They are proceedings in respect of applications made under the Hague convention on child abduction and also proceedings related to the status and/or property of incapacitated adults—effectively a person who is unable to manage his or her own affairs but is an adult who is not subject to child protection arrangements.

Senator LUDLAM—Can you tell us whether restraining orders and child protection matters generally would be caught, or are they excluded?

Ms Fitch—Within the definition of 'family proceedings'?

Senator LUDLAM—Yes.

Ms Fitch—I might have to confirm this for you, but my understanding is that subpoenas issued by a guardianship board or tribunal are excluded. They would be retained as an exclusion from the extension of the scheme.

Senator LUDLAM—That would cover restraining orders as well?

Ms Fitch—I will have to confirm that for you, but my understanding is that that is the case.

Senator BARNETT—Do you know the rationale as to why they have been excluded?

Ms Fitch—It is largely because they are excluded within Australia from the agreement that is between the Australian jurisdictions, and it was viewed as anomalous if there was a greater level of cooperation between Australia and New Zealand than between the Australian jurisdictions themselves. The New Zealand parliament has already enacted legislation to extend the scheme, the extension of which was agreed to in the 2003 correspondence between ministers. So, for the purposes of New Zealand legislation, the extension already applies and we are effectively now following up on our part of the agreement.

Senator BARNETT—Do you know when that bill passed?

Ms Fitch—My recollection is that it was late 2006 or 2007.

Senator BARNETT—Do you want to take that on notice and clarify that?

Ms Fitch—I am happy to do that.

Senator BARNETT—That is helpful to know. I assume that their definitions of excluded family proceedings will be the same as our definitions of excluded family proceedings.

Ms Fitch—Yes, their definition, as enacted, is the same as what is being proposed here.

Senator BARNETT—I wanted to flag with you the concerns set out by the Aboriginal Legal Rights Movement, and I ask that you take on notice, having further considered their submission, anything else that you might like to add. They have raised what I would consider pretty serious concerns about the South Australian legislation. Obviously that is a matter for the South Australian parliament, but it is your view that there is no implied condoning by us of that South Australian legislation or any other state legislation, because that is not the objective of the bill before us. If there is anything further you wish to add in response to their submission, obviously we would welcome that view.

Ms Fitch—I am happy to consider further whether there is anything we could add and to provide that by Friday, if that is helpful for the Senate committee.

Senator BARNETT—Thank you very much.

Senator LUDLAM—I am interested in particular in what the bill does around the giving and taking of evidence by video. Is it essentially just making these provisions consistent so that evidence can be taken interstate? Could you clarify for us exactly what you are doing there? Also, what assessment have you made as to the pluses and minuses of taking evidence by video? Is that advantaging or disadvantaging defendants or people giving evidence? Is there much work around that that you are aware of?

Ms Fitch—If I may answer the second of your questions first. It is certainly not intended that these amendments make it easier for defendants or people imprisoned to give evidence by video link for proceedings being held in another jurisdiction, to disadvantage those people in any way. It is intended to, if anything, reduce the need for them to be transported long distances sometimes, which we face within Australia, under highly securitised arrangements. It is intended to make it easier for them rather than to disadvantage them in any way. I am not able to comment in more general terms about whether giving evidence by one form or another may be seen by some people to be an advantage or a disadvantage. I do not think I can comment further about that.

In respect of your first question about what the amendments to the taking of evidence by audiovisual link provisions are intended to achieve, currently the sentence and execution of process act provides that people who are in prison in one jurisdiction are able to be produced—and that is the term that is used—to give evidence in another, and it is being effectively interpreted as if that would only be produced in person to give evidence in another.

What this is intended to do is to say, where there are situations where usually, but for that person's incarceration and the arrangements that have to be made under this legislation to physically transport them, it would be much easier for them to stay within the jurisdiction of their imprisonment, but go to a place other than the prison, which has available to it video link evidence facilities, that there should not be any exclusion in those cases. The current provisions should not just be interpreted as if to say the person had to physically move between jurisdictions.

Senator LUDLAM—Yes. One of the ARLM's key contentions was that this is really targeted at Aboriginal people. Australia is a big country. Are we specifically targeting APY Lands and Aboriginal residents thereof or is the intention here broader?

Ms Fitch—No, this amendment would apply not just in the APY Lands or the Cross-Border Justice Scheme lands, but across the board to any part of any Australian jurisdiction.

Senator LUDLAM—What do you think of the implications for legal service providers? We have got an inquiry under foot at the moment on access to justice. Is this going to advantage or disadvantage or do you think it will make any difference at all to the providers in the region?

Ms Fitch—I think my initial response to that would be it would be neutral. It would be possibly easier in some respects for legal service providers, but I think overall it would be neutral. Video link evidence is quite frequently used in Australian jurisdictions, so it works well.

Senator LUDLAM—I will probably leave it there, but with the rider that I really appreciate your responses to the matters that were raised in the submission.

CHAIR—I do not think we have any other questions. Ms Fitch, thank you very much for your appearance before us today and assisting us with our inquiry into this second piece of legislation.

Ms Fitch—Thank you, Senator.

CHAIR—I want to thank everyone for being there today and certainly for your patience in my chairing over the phone. I appreciate that, but I am pretty keen to hear what the evidence was for these two pieces of legislation. I now formally declare this meeting of the Legal and Constitutional Affairs Committee adjourned. Thank you again.

Committee adjourned at 3.01 pm