



Evidence Amendment (Journalists' Privilege) Bill 2007

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Evidence Amendment (Journalists' Privilege) Bill 2007

Date introduced: 24 May 2007

House: House of Representatives

Portfolio: Attorney-General

Commencement: The substantive provisions will commence 28 days after Royal Assent.

Purpose

To amend the *Evidence Act 1995* (Cth) and various other Acts so that journalists' sources are given some protection from discovery in federal legal proceedings, either in court or in out of court matters.

Background

Basis of policy commitment

The issue of protecting journalist's sources has been an active question in Australia for some time. As a Parliamentary Library Paper from 1992 shows (Anne Twomey, 'Law and Policy of Protecting Journalists' Sources'¹) the suggestions for reform have been contemplated over a lengthy period, and, from the paper's comparison of the laws in New Zealand, the US, the UK and Canada, it can be seen that Australia's reform processes have moved slowly.

While these Bill's amendments have a 'history,' they also go to the heart of many thoroughly contemporary issues facing the body politic. These issues include civil liberties, freedom of the press, the position of whistleblowers in the Commonwealth administration and the treatment of national security. Other related issues include the Government's apparent 'crack down' on 'leaked information',² the question of the prosecution or even the 'persecution' of those who have released information (seemingly in the public interest), and those who have withheld information (also, seemingly, in the public interest).

The broader questions of protections for whistleblowers and questions of protections for all professionals with a confidential relationship to their clients remain to be addressed. Finally, there is also the matter of an imminent federal election and an outstanding commitment that the Attorney-General made in 2005 to pass 'shield laws' to protect journalists.³

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The Attorney-General made a commitment in 2005 to respond to the case of *Herald Sun* journalists, Gerard McManus and Michael Harvey. The Attorney-General has made it clear the Bill, and its timing are a response to the issues raised in that case. This case also elicited reactions from Mr Petro Georgiou MP⁴ and Senator George Brandis⁵ who aligned themselves with the principle that laws protecting journalists' sources should be enacted.

The cases of McManus, Harvey and Kelly

Chris Merritt (*The Australian's* Legal Affairs Editor) summarised the facts in this case in the following manner: McManus and Harvey 'refused to divulge the source of their report that former veterans affairs minister Danna Vale had ignored a recommendation to increase war veterans' benefits by \$650 million, and had instead presented cabinet with a plan to spend only \$150 million.'⁶ Their lawyer, Will Houghton QC, subsequently said to the court that stories like their article 'Cabinet's \$500 million rebuff revealed' published on 20 February 2004 were 'vital to our democracy.'⁷ Certainly, they had a significant political impact.

McManus and Harvey are now awaiting sentencing for contempt of court after they refused to reveal who told them about this 'Government plan to short-change veterans of \$500 million worth of entitlements'.⁸ In October 2006 Federal Government lawyers appeared in the contempt case against the journalists to ask the court to abandon the matter.⁹ This was after an earlier attempt to intervene on the basis that the Federal Government was planning to legislate for greater protection of journalists' sources was rejected by the Victorian County Court.¹⁰

Meanwhile a senior federal public servant, Desmond Patrick Kelly, accused of leaking the information to McManus and Harvey, was found guilty by the Victorian County Court of leaking confidential information to a journalist. Mr Kelly appealed to the Victorian Supreme Court, which subsequently overturned his conviction on the basis there was insufficient evidence to support the conviction.¹¹

The cases of Chulov, Porter and Kessing

In May 2005, two journalists with *The Australian*, Martin Chulov and Jonathan Porter, published a series of stories starting with 'Airport staff 'smuggling drugs' – Secret Customs report exposes criminal links.'¹² The confidential Customs reports had apparently been 'buried' for two years.¹³ A week after these newspaper stories the Federal Government appointed British aviation security expert, Sir John Wheeler, to examine Australia's airport security. According to Kenneth Nguyen in *The Age* ('Gagging Democracy'), Wheeler confirmed in September 2005 that the warnings contained in the reports were accurate.¹⁴ Subsequently, the Howard Government accepted Wheeler's recommendations and committed more than \$200 million to improving aviation security.¹⁵

In March this year, Allan Kessing, a retired Customs official was found guilty in the NSW District Court of leaking the two highly classified reports to *The Australian* in May 2005.

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During sentencing hearings on Friday 25 May 2007, the prosecution argued it was necessary to impose a full-time custodial sentence on Kessing.¹⁶

Prosecutor Lincoln Crowley said [Kessing's] actions represented a serious security breach related to highly confidential documents and could have jeopardised police operations being carried out [at] Sydney Airport at the time.¹⁷

Kessing's lawyer, Peter Lowe, said that the publication of the revelations in the reports had caused 'public outrage' and that this, in turn, had 'had a tremendously beneficial effect.'¹⁸ Kessing is due to be sentenced on June 14.¹⁹

Freedom of the Press

In May 2007, a media coalition was formed, involving an unusually broad cross section of the media (it includes the AAP, the ABC, News Ltd, SBS, Sky News and Fairfax, as well as commercial TV and radio organisations). It called itself the 'Australia's Right to Know Coalition.'²⁰ The Coalition announced that court suppression orders, the rejection of Freedom of Information applications, anti-terrorism laws and increased government and police intervention had severely eroded press freedom in recent years. They quoted the international journalism watchdog, Reporters Without Borders, which ranks Australia at No. 35 on its worldwide press freedom index (a ranking which puts Australia below countries such as the Estonia, Bosnia, Bolivia and Ghana in the press freedom index). They also listed more than 500 laws they claim deny Australians their right to free speech.²¹ The Coalition asked Irene Moss, the former commissioner of NSW's Independent Commission Against Corruption (inter alia), to conduct an 'audit of media freedom.'²²

Media, Entertainment and Arts Alliance (MEAA) federal secretary, Christopher Warren, was reported as saying:

I think there has been a very serious deterioration in the state of freedom of speech in Australia over the past five years. Australia's media continues to be muzzled by the authoritarian actions of government and an anti-disclosure culture determined to manage and control information.²³

Mr Rudd was reported as siding 'with the media in its tussle with the Howard Government on press freedom.'²⁴ He apparently argued that 'federal restrictions on Freedom of Information requests had gone too far, and protection for public service whistleblowers needed boosting after a series of high profile criminal cases.' He also referred to an element of regret over his past performance in this area.²⁵

National Security

The Australian concerns for press freedom fall against an international backdrop of an increasing emphasis on security. This is being played out not only in the 'war on terror'

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but also, more particularly, in the war on Iraq. The sackings, prosecutions (and in one case the suicide) of employees who have raised concerns regarding these 'wars' and the prosecutions of journalists prompted by their reporting of the issues have been significant.²⁶

The current Bill gives a list of considerations a judge must consider when deciding whether to protect confidential information supplied to a journalist. This list contains a priority item concerning the risk of prejudice to 'national security.'²⁷ This consideration is to be given 'the greatest weight.' Mr Ruddock has simply commented that this 'deviation from the model is a justified and necessary update.'²⁸ The Explanatory Memorandum provides:

[a]n example of where national security may be a relevant matter for disclosure of a confidential communication made to a journalist: ... a proceeding for obtaining a control order under Division 104 of the Criminal Code Act 1995.²⁹

Judges have traditionally been deferential to the executive's power to deal with national security issues. The ALRC recently explored the potential 'chilling effect' of new counter-terrorism laws on freedom of expression in the absence of formal rights protection in Chapter 7 of its Report No. 104, *Fighting Words: A Review of Sedition Laws in Australia*.³⁰

Uniform Evidence Law

In 1985 and 1987 the Australian Law Reform Commission (the ALRC) issued two seminal Reports on *Evidence*.³¹ These Reports formed the basis for the passage of the *Evidence Act 1995* (both Commonwealth and NSW). More recently the ALRC, the New South Wales and Victorian Law Reform Commissions issued Report No. 102, *Uniform Evidence Law*.³² It has been an on-going aim of many attorneys-general and many Law Reform Commissions to arrive at an Australian-wide, uniform system of evidence law. Another related legal area that has recently achieved greater uniformity is defamation law.³³

At the moment the Commonwealth, NSW, Tasmania, the ACT and Norfolk Islands operate under the uniform *Evidence Acts* scheme. The President of the ALRC, Professor David Weisbrot commented that with the release of Report No. 102:

This inquiry has finally produced real momentum towards a single set of evidence laws, with Victoria, WA and the NT indicating that they intend to enter the uniform scheme.³⁴

Nevertheless, the meeting of the Standing Committee of Attorneys-General (SCAG) in April 2007 ended without any agreement on the appropriate course of action regarding the Commonwealth's proposed protections for journalists and their sources.³⁵

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A summit of the nation's attorneys-general last night deferred Canberra's push for shield laws and called for a report on whether they need to be accompanied by federal whistleblower protection laws. The federal Government was criticised at the summit over the lack of protection available to federal public servants who disclose information in the public interest.

While NSW, Victoria and the ACT supported the Commonwealth's plan, other states either opposed it or said they could not support it without further consultation. This left the Commonwealth without enough support to have its plan endorsed by the meeting.³⁶

The reporting journalist, Chris Merritt, went on to comment that the Commonwealth 'also has no equivalent of state anti-corruption commissions that give public servants a way of having grievances addressed.'³⁷ The 'shield laws' were to be considered further at July's meeting of SCAG.

The ALRC's Report No. 102 recommended that the current NSW provisions be adopted as a model. The Bill does not entirely follow this recommendation, pursuing a narrower version of NSW's concept of a broad 'professional confidential relationship privilege.' More specifically the Bill only provides protections for journalists and their sources rather than protecting the confidential relationships of other professionals. The Second Reading Speech states, 'in the interests of achieving a national, uniform approach to this issue the Australian Government has accepted the recommended model.' The model adopted in the Commonwealth Bill follows the *format* of the NSW provisions closely. However, in one crucial respect the Bill contradicts the principle of uniformity; the difference in coverage between a wide range of professionals (NSW) and the single category of journalists (Commonwealth). This distinction means the outcomes of the different legislation could hardly be less uniform in terms of *content*.

The Bill does, however, follow the Commission's recommendations regarding the need for the amendments to adapt the privilege to situations where children are involved through the *Family Law Act 1975*.

Journalists and other professionals

In Report No. 102, *Uniform Evidence Law*, the three Law Reform Commissions indicated there are many relationships in society where a public interest could be established in maintaining confidentiality. A sample list as supplied by Odgers is that of:

doctor/patient, nurse/patient, psychologist/client, therapist/client, counsellor/client, social worker/client, private investigator/client and journalist/source.³⁸

The Report went on to consider two specific 'sub-categories' of the professional relationships needing protection: sexual assault counsellors and the medical profession (it also indicated there should be no on-going need for the specialised provisions for religious confessions).³⁹ It concluded the medical profession would be adequately covered by a

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'professional confidential relationship privilege,' however sexual assault counsellors were identified as needing additional protections. The Commissions concluded that the interests of individuals needing counselling regarding sexual assault were partly akin to the protections offered through legal professional privilege, and that, in so far as they were associated with the lead-up to a court case, they should be protected. Consequently the privilege attached to such evidence should be absolute at the pre-trial stage. However, in view of the need to also have regard to the rights of those accused of sexual assault, only a qualified privilege should be given to such relationships/evidence in court proceedings.⁴⁰ The NSW *Evidence Act* Division 1A contains a protection for sexual assault counsellors' confidential information but the Commonwealth has decided not to incorporate similar provisions into its Division 1A inserted by this Bill.

The Commissions' recommendation that other professional relationships should be covered could extend into a further variety of contexts. So, for instance, there could be questions as to how far researchers with the Parliamentary Library should go to avoid answering questions about confidential client queries.⁴¹ This question is not entirely an idle fancy: in the USA, librarians are taking their ethical obligations regarding confidentiality very seriously. A particular concern has developed over the USA's *Patriot Act* which is seen as threatening 'library-patron confidentiality.'

The American Library Association have 'formally denounced' aspects of the Patriot Act and passed a resolution urging Congress to repeal it.⁴² In a related area, legal proceedings are continuing after a librarian, 'reluctant to comply because of professional ethics aimed at keeping library records confidential'⁴³ took issue over a national security letter which 'forbade him and others at his place of work to ever discuss the letter or even to acknowledge its receipt.'⁴⁴ While there are no immediately comparable developments in Australia the decision to provide the protections of a professional privilege to journalists alone leaves other professions with the on-going possibility of ethical and legal dilemmas regarding the confidentiality they owe their client, patient or patron. The national security issues do have parallels in Australia.

Journalists and Lawyers

The model for all other forms of privilege could be said to be legal professional privilege, a well-established, well-honoured legal principle.⁴⁵ The question as to why lawyers and not journalists have access to this privilege has sometimes arisen. The Law Reform Commissions commented that:

The rationale for the creation of the privilege was to enhance the administration of justice and the proper conduct of litigation by promoting free disclosure between clients and lawyers, to enable lawyers to give proper advice and representation to their clients.⁴⁶

The fact that legal professional privilege supports the very fabric of the legal process has served to give it a uniquely privileged position.⁴⁷ It should be noted that, similar to the

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current Bill's provisions, the protection only applies where it is intended for a proper purpose—communications made in furtherance of an offence or an action that would render a person liable for a civil penalty are not protected.⁴⁸

The other feature of the legal profession's access to legal professional privilege is that they operate within a relatively heavily regulated profession. The lawyer's 'code of ethics' is monitored by statutory bodies and many of the legal principles governing the behaviour of lawyers are established in legally binding precedents.⁴⁹ This contrasts with journalists, whose code of ethics is not legally binding. As Price points out, the most severe punishment open to the Australian Journalist's Association is to expel a member, and since membership is not a pre-requisite to the practice of journalism, this may not be an effective penalty. The inadequacies of the Press Council's enforcement mechanisms are also well documented, and Price comments generally that:

it is pertinent to observe that the level of regulation appears disproportionate to the level of power wielded daily by the media.⁵⁰

After the most recent SCAG meeting the West Australian Attorney-General, Jim McGinty was reported as being

concerned that shield laws might need to be accompanied by a better way of holding unethical journalists accountable.⁵¹

The complex issue of government leaks, security issues and the role of journalists was played out in the US in the recent Scooter Libby affair. Lewis 'Scooter' Libby was a senior Whitehouse official who allegedly 'leaked' the identity of Valerie Plame Wilson, a CIA operative whose identity was classified, to newspaper journalist, Judith Miller in 2003. Plame is married to former ambassador Joseph Wilson who had been vocal in criticising the reasons for the US going to war in Iraq. Miller was jailed for 85 days in July 2005 for not revealing her source. Libby was convicted of perjury in March 2007 and awaits sentencing in June.⁵²

It should be noted that Price records that there is a general belief amongst journalists that the code of ethics is effective (for a convincing range of reasons). Nevertheless, she concludes that legal oversight of the privilege protecting confidential communications would be a useful measure.

A final issue regarding the journalist's code of ethics is the question of the emphasis given to the need to advise their sources on the wisdom or otherwise of communicating confidential information. If the journalists owe a duty of care to their sources, over that of confidentiality, it does not seem to be documented in the Code. In the Code the focus is on their duty to preserve the anonymity of their source, not to advise the source on the possible consequences of disclosing information illegally (though obviously they may choose to approach the matter in this way out of their own ethical code). Clause 3 of the Code requires journalists to:

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Aim to attribute information to its source. Where a source seeks anonymity, do not agree without first considering the source's motives and any alternative attributable source. Where confidences are accepted, respect them in all circumstances.⁵³

There is a stark contrast between the situation of Kessing, facing calls from the Commonwealth for a custodial sentence, and the journalists who published his material and have not been prosecuted for it. (It should be noted that the journalists in question did not give evidence regarding their source, and that their paper, the *Australian*, has been vocal in their calls for effective Commonwealth whistleblower legislation and in their defence of Mr Kessing.) The structure of the protections in the Bill reflect elements of this dilemma. In deciding whether to extend the privilege, the judge's focus is directed to the confider and their need for protection.

Journalists and Judges

There has been a tradition of tensions between the legal profession and journalists, both groups regarding their area of professional expertise as having primary importance for a well-functioning community.

Journalists are convinced of their social utility in upholding the public interest in the free flow of information, and judges regard themselves as vehicles for ensuring the proper administration of justice. Both public policies are equally basic ingredients of free and democratic societies.⁵⁴

The common law's reluctance to recognise anything but a limited right of confidentiality for journalists has, predictably, aggravated journalists and a common response has been a point-blank refusal to comply with court demands. In a useful paper, 'Pack your toothbrush!': journalists, confidential sources and contempt of court,' Georgia Price has explored these issues and concludes that '[t]he law has consistently refused to accord such ethical considerations any standing, and has also done little to deter journalistic defiance.'⁵⁵

Victoria's County Court chief judge, Judge Rozenes could be said to have typified the judicial approach when commenting recently on the McManus and Harvey case. He is reported as saying Journalists consider their own code of ethics more important than the law.

This is almost a badge of honour, upholding the best traditions of journalistic ethics. ...What journalists are really saying (is): 'Well we are not happy with the law, so we will make our own.' ... how can any court tolerate that?"⁵⁶

Another comment, that might be thought to represent some journalists' attitudes, comes from a prominent member of the profession in Canberra, Margo Kingston, who has said that the courts 'have nothing but contempt for [the journalist's role] ... so ... I have nothing but contempt for their stance on [the issue of protection of sources]'.⁵⁷

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There have been criticisms from journalists of the option taken in the current Bill of giving judges what Mr Ruddock has called a 'guided discretion',⁵⁸ when deciding whether to protect journalist's confidential evidence. The Media, Entertainment and Arts Alliance (MEAA), for instance, have objected to the use of judicial discretion,⁵⁹ while the Press Council has suggested that there should be a presumption in favour of protection, which the courts should only depart from in certain more serious circumstances.⁶⁰

The three Law Reform Commissions who reported in *Uniform Evidence Law* all concluded that judicial oversight to resolve these dilemmas was the best option. Their reasons included having regard to the possibility of abuse which may occur with any more absolute approach – such an absolute approach might leave 'the interests of justice' unsatisfied. It was also in recognition of the need to *balance* the various interests in disclosure, as against the various interests in protecting confidentiality. This process will arguably be best resolved through a more active intervention than a more static statutory approach.⁶¹ The draft Bill clearly follows the Commissions' recommendation with respect to judicial oversight:

Recommendation 15–1 The uniform Evidence Acts should be amended to provide for a professional confidential relationship privilege. Such a privilege should be qualified and allow the court to balance the likely harm to the confider if the evidence is adduced and the desirability of the evidence being given. The confidential relationship privilege available under Part 3.10, Division 1A of the Evidence Act 1995 (NSW) should therefore be adopted under Part 3.10 of the Evidence Act 1995 (Cth).⁶²

Although note the comments above regarding the Bill's departure from the recommendation on the general 'confidential relationship privilege.'

The Commission's conclusions are reflected in Mr Ruddock's comments upon the introduction of the Bill:

"The privilege is not absolute," Mr Ruddock said. "It is important to balance the interests of justice in making the evidence available with the public interest in a free press and the public's right – or need – to know."⁶³

The Parliamentary Library's 1992 paper had come to a similar conclusion:

Clearly neither an absolute privilege, nor a complete absence of privilege, are acceptable solutions to the question [regarding a privilege for journalists]. The wide variation of circumstances in which journalists would seek to raise such a privilege, mean that a fixed rule of application is also inappropriate to meet the conflicting public interests. Some form of flexibility is necessary, and the best forum to exercise such a discretion would appear to be the courts.⁶⁴

These commentators have, admittedly, been from the legal profession. Price, however, formed her similar perspective having interviewed journalists. She observes that there are,

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among the journalists, those who believe judicial oversight would offer benefits. She concludes that, '[w]hile a modest level of legislative reform may be beneficial, the research suggests that the possibility of compulsory disclosure of sources acts as an important check on the power of the media and of journalists. Any radical reform restraining such accountability is not justified.'⁶⁵

Not all members of the legal profession reflect a bias towards a court monitored privilege. Media lawyer Robert Todd is quoted by the *Australian* as saying:

If politicians are serious about shield laws, they won't leave it to the discretion of judges...experience tells us that judges won't exercise that discretion very capably on behalf of journalists.⁶⁶

Journalists and Whistleblowers

A pertinent feature of the Bill is **proposed s. 126D** which provides that when the communication or the information communicated between the source and the journalist involve fraud or an offence, the court's protection of privilege will not apply. Under the current legal arrangements there will be very few stories that can be legally communicated between a Commonwealth public servant and a journalist. Chris Merritt comments:

Doubts have persisted about the effectiveness of the scheme because the federal Government imposes criminal sanctions on public servants who make unauthorised disclosures to the media.⁶⁷

It may be significant to note here that **proposed ss. 126F(4)** contains a provision which would allow the court to extend the privilege to situations which are not directly covered by the provisions in the relevant division. This could presumably mean that, entirely at the Court's discretion, it could cover situations where some illegality had tainted the communication.

The issue of effective protection for sources was raised in the context of the most recent SCAG meeting where the Commonwealth's proposals ran into some difficulties:

During the meeting, state attorneys-general pointed out that while the federal Government is pushing for shield laws for journalists' sources it has no equivalent of state whistleblower laws that protect public servants from retribution. The Commonwealth also has no equivalent of state anti-corruption commissions that give public servants a way of having grievances addressed.⁶⁸

Subsequent reactions to the introduction of the Bill have also focussed on the need for matching protections for unauthorised release of information in the public sector:

- Bruce Wolpe, a Fairfax Media spokesman, has commented that unless the federal 'shield law' was accompanied by whistle blower protection and state shield laws, the new scheme would be missing 'an essential part of the package';

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- The NSW Attorney-General said the federal shield law would be 'inadequate and half-baked' unless it was accompanied by protection for whistleblowers...' because the Commonwealth has no standing body that can investigate misconduct or corruption, public servants will be hamstrung in coming forward to air their concerns';
- the Media, Entertainment and Arts Alliance (MEAA) secretary (Chris Warren) is reported as saying 'Any reform which is modelled on NSW legislation must be part of a package which includes protected disclosure laws. Without that addition this law will be nothing more than election spin from a Government more determined to be seen to be doing something than actually addressing the problem.'⁶⁹

National whistleblower project

'Whistling While They Work' is a three-year national research project into the management and protection of internal witnesses, including whistleblowers, in the Australian public sector. The project is being coordinated by Dr Alexander Brown of Griffith University. Dr Brown has been quoted in the media as having reservations about the protections for journalists under the Bill:

Dr Brown, of Griffith University, said journalists would still be dragged into prosecutions unless the Government introduced whistleblower protection laws.⁷⁰

In November 2006, the Commonwealth, NSW and Qld Ombudsmen released an issues paper, *Public Interest Disclosure Legislation in Australia: Towards the Next Generation*, which was prepared by Dr Brown as part of the Whistling While They Work project.⁷¹ The paper examines the nine pieces of existing whistleblower legislation across the Commonwealth and States and Territories, and recommends a national approach. Professor John McMillan, the Commonwealth Ombudsman commented:

The call for a national and coherent approach deserves special attention. The discussion paper outlines the elements necessary for the facilitation of public interest disclosures:

- protecting whistleblowers
- ensuring disclosures are properly dealt with, and
- facilitating the making of disclosures.

Currently, no whistleblower legislation in Australia adequately achieves all of these objectives.⁷²

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Reactions to the Bill

Press Council of Australia

The Press Council of Australia has stated that the Bill as it stands is 'too general' to adequately protect journalist sources:

It merely says that judges 'may' take into account the desirability of not calling professionals (in this case, journalists) to reveal sources. Powerful advocacy by senior barristers of the need to put journalists in the dock will in the Council's view more often than not persuade judges to allow the messengers to be put in jeopardy. This will make them subject to contempt of court charges for failure to divulge sources, simply, in most cases, because the litigants are unwilling to do the work to unmask the sources. In short, the relevant clause in NSW *Evidence Act* is no real protection at all.⁷³

The Press Council advocates a model recently passed by the New Zealand Parliament which makes protection of sources the default position from which courts can only move, in the interests of justice, in the most dire of circumstances.⁷⁴

Media, Entertainment and Arts Alliance

The MEAA, the journalists' union, has also criticised the Bill:

...it will amount to nothing more than rhetoric without accompanying protected disclosure laws to prevent whistleblowers from being hunted down and prosecuted. Leaving the decision at judicial discretion would also give the legislation little real force.⁷⁵

Australian Labor Party

The then shadow Attorney-General, Kelvin Thomson, MP had issued a press release in February of this year, calling on the Attorney-General to act on his promise to introduce laws protecting journalists and to introduce whistleblowing protections.⁷⁶ The current shadow Attorney-General welcomed the Bill's introduction, while reserving the right to examine the details of the legislation and flagging their commitment to the more general professional confidential relationship privilege as recommended by the ALRC.⁷⁷

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Main provisions

Schedule 1

Amendments to the *Evidence Act 1995*

Item 1 proposes a new Division 1A to be included in the Evidence Act. This new Division would both create and regulate a new 'professional confidential relationship privilege'.

A new definitions section is **proposed in s. 126A**. This new section confines 'protected confidences' to those made to a journalist in their professional capacity. In contrast, the NSW Evidence Act covers more than just communications to journalists. A journalist is not defined and the Explanatory Memorandum says the term will have its 'everyday meaning'.⁷⁸ This **proposed section** also defines a 'protected confider' (i.e. someone making the confidence) and 'protected identity information', which covers information about a person making a 'protected confidence'. The definition of 'harm' covered by the Division is broad and includes emotional or psychological harm as well as the more tangible forms of loss such as physical or financial loss.

Proposed ss. 126A(2) extends the protection of confidences when they are made in the presence of a third party if the 'third party's presence is necessary to facilitate communication.' This definition will presumably cover more than simply an interpreter or translator and may cover someone who would more broadly fit the definition of a support person who enables the communication. There is no detailed exploration of this question in either the Explanatory Memorandum, or the Explanatory note to the NSW Act.

Proposed s. 126B contains the primary substance of the Bill and provides that a court may avoid requesting or accepting evidence if it would expose a 'protected confidence' or 'protected identity information' (**proposed ss. (1)**). The court is free to give this protection on its own motion or on the application of the protected confider or confidant (whether or not either is a party to the proceedings). In deciding whether to protect the information the court is required (**by proposed ss. 3**) to weigh up the harm that would be caused to a confider against the desirability of the evidence being given. The Bill provides a necessary, but not comprehensive, list of matters the court must take into account. This list includes (**proposed ss. 4**):

- how helpful and important the evidence would be to the proceedings
- the 'nature and gravity' of the offence, defence or cause of action and the subject matter of the proceeding
- the availability of other evidence covering the issue
- the nature and extent of the harm that could be caused to the confider
- the ways in which the court could protect either the confidence itself or the identity of the confider

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

A final item in the list of matters the court must have regard to is, according to the terms of the subsection, to be given the 'greatest weight.' This is the risk of prejudice to 'national security', (as defined in s. 8 of the *National Security Information (Criminal and Civil Proceedings) Act 2004*.⁷⁹ There is no equivalent provision in the NSW Act.

The court is required to give its reasons for the directions it gives under the Division by **proposed ss. 5 of s. 126B**.

Proposed s. 126C spells out the logical position, which is that if the confider gives consent then the evidence can be given.

Proposed s. 126D is a little more controversial in that it provides that the protection provided for by the professional confidential relationship privilege will not apply when the information contained in the document itself contains, or its communication involved

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

The definition of fraud under the Commonwealth *Crimes Act 1914* is very broad and, without any protections for 'whistleblowers' almost any unauthorised release of information by a Commonwealth public servant may constitute an offence of some sort.

Proposed ss. 126D(2) also sets out the conditions under which the court can find that the communication was made for these nefarious purposes. When there is an active/pertinent question as to whether the documents or communication were produced for the purposes of fraud, an offence or an act that renders a person liable to a civil penalty and there are 'reasonable grounds' for making such a finding the court may 'find that the communication was so made'.

Proposed s. 126E provides that, amongst other actions it may take, the court may choose to receive evidence in camera⁸⁰ or may order the suppression of the publication of the evidence or such part of it as is necessary to protect the protected confider.

Proposed s. 126F governs the application of the Division. **Proposed ss. (1)** provides that the Division will not apply to a proceeding already underway before its commencement, although **proposed ss. (2)** provides that it can apply to a protected confidence that may have been made before the commencement of the Division. **Proposed s. 126F** contains no ss. 3 in recognition of the NSW *Evidence Act's* provision which includes a ss. 3 dealing

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with the sexual assault communications privilege – this is clarified in a drafting note in the Bill. **Proposed ss. (4)** contains an ‘at large’ provision, which allows the court to extend the protections offered by **Division 1A** beyond the situations given direct recognition by the proposed legislation.

Item 2 proposes a **new s. 131A** which would effectively extend the professional confidential relationship privilege protection to out of court developments in legal proceedings. So, for instance, a summons or subpoena to produce documents or a requirement to disclose information in a pre-trial discovery would be covered. An objection could be made to supplying such information and the court would be required to apply the provisions from **proposed Division 1A** in arriving at a decision on the application.

Amendments to the *Family Law Act 1975*

The Bill proposes a **new subsection** to be added into Division (12A) of the *Family Law Act 1975* (Family Law Act) which deals with ‘Principles for conducting child-related proceedings’. Section 69ZX is contained within the subdivision covering matters relating to evidence and deals with the ‘Court’s general duties and powers relating to evidence’.

Proposed ss. 69ZX(4) would stop the court from relying on provisions covering the professional confidential relationship privilege (both Commonwealth and State/Territory legislation as defined in regulations) to avoid taking evidence when the court considers it would be in the best interests of the child not to take this evidence. Essentially this provision would over-ride the professional confidential relationship privilege when it is in the best interests of the child to do so (the amendment only applies this principle in the context of family court proceedings concerning children).

New s. 100C is proposed for Part XI of the Family Law Act governing ‘Procedure and evidence.’ The **proposed section** would allow one of the responsible parents or carers, or the child’s independent lawyer, to make an application covering evidence where the child is a ‘protected confider’ under the proposed professional confidential relationship privilege provisions in the Evidence Act. **Proposed ss. 100C(1)** would cover both directions not to take the evidence at all (**under proposed ss. 126B(1)**) and orders regarding taking the evidence in camera or suppressing the publication of the evidence, as the court sees fit (**under proposed s. 126E**).

Amendments to the *James Hardie (Investigations and Proceedings) Act 2004*

Items 5-7 incorporate the definition of ‘professional confidential relationship privilege’ from the new provisions in the Evidence Act into the *James Hardie (Investigations and Proceedings) Act 2004* (JHIPA). The **proposed section 4A**, to be inserted into the JHIPA, excludes the application of the professional confidential relationship privilege from a James Hardie proceeding, although this exclusion does not apply to ‘authorised persons’ (i.e. people overseeing the conduct of a James Hardie proceeding).⁸¹

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Amendments to the *Proceeds of Crime Act 2002*

Items 8 and 9 insert new provisions into the *Proceeds of Crime Act 2002* (the PCA) incorporating a 'professional confidential relationship privilege' which derives its meaning from the new provisions in the Evidence Act.

The PCA allows for examinations to take place regarding a person's financial affairs when the person is subject to an order of confiscation. Existing s. 196 of the PCA introduces 'offences relating to appearance at an examination' essentially making it an offence to refuse to answer questions or to co-operate with an examination. Section 197 initially introduces an exception to this principle, specifying that if someone would be excluded under a 'law of the Commonwealth' from being required to give evidence in a court process then they are not subject to a s. 196 offence. Subsection 197(2) goes on to remove this exclusion from certain categories of people, such as those in a lawyer/client relationship. The proposed changes would incorporate journalists into the category of those who are not protected by the 'laws of the Commonwealth' exemption to the offences under the PCA.

Concluding comments

The speed with which this Bill is being moved through Parliament and the decision to abandon a major aspect of uniformity in favour of achieving an immediate result are in stark contrast to the relatively leisurely lead-up to these reforms. The ALRC recommended an amendment along these lines in its first report on Evidence Law in 1985, some 22 years ago. The Bill does not implement the ALRC's recommendations. The departure from the NSW model means this Bill diverts from the drive towards uniformity in evidence law and fails to provide the comprehensive coverage of professional confidential relationships as recommended by many reports. Mr Ruddock has, however, indicated his intention to introduce the recommended reforms.⁸² Nevertheless, within its own terms the structure of the Bill seems appropriate and it maintains uniformity in the model of judicial oversight for the implementation of the privilege. In the same way as the NSW legislation it seeks to find that balance between the various interests in the (non) disclosure of confidential evidence. The regimes differ more in terms of *which* confidential evidence they cover rather than *how*.

With respect to the need for uniformity the Attorney-General commented in the Second Reading Speech that in order to ensure the protection of journalists he 'will be continuing to encourage [his] State and Territory counterparts to introduce similar amendments as expeditiously as possible.'⁸³ He also comments that he remains:

committed to working to achieve model uniform evidence laws as this will be a great outcome for all Australians. It is my hope that I will soon be introducing another bill that will implement more general reforms to the Evidence Act. However the

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protection of journalists is too important an issue to wait for the finalisation of that other bill.⁸⁴

In the Press Release accompanying the introduction of the Bill, Mr Ruddock says:

I have consistently urged my State and Territory counterparts to adopt a uniform approach to this issue. I will continue to encourage them to come on board.⁸⁵

Presumably the States/Territories could also argue that the Commonwealth will need to 'come on board' with respect to the full implementation of the recommended (NSW based) model with regard to the broader privilege question, which would move the direction of the Commonwealth back towards uniformity (noting the stated intention of Mr Ruddock to do this in due course).⁸⁶

In the list of items that the judge must consider when deciding whether to give confidential information a privilege there is no mention of the need to protect the principle of the confidentiality of journalistic sources. The focus is very much on what a revelation would do to the confider/source rather than the impact of a revelation on a confidant/journalist.

In the one case considering the parallel NSW legislation (*NRMA v John Fairfax Publications*⁸⁷) the judicial officer, though he was not required to consider the matter, did take into account 'policy considerations based on the desirability of the flow of information and the centrality of keeping the identity of sources confidential to achieve this end.' The judicial officer concluded that it was more important for the plaintiff to have an effective remedy than to protect the journalists' reputation for confidentiality. He also concluded it outweighed the journalists' ongoing ability to obtain information (given they were being forced to reveal sources).

The outcome in that case may not be repeated, however, the question as to whether similar considerations will be taken into account by future decision makers will remain open. It may have been preferable to have a statutory requirement that decision makers incorporate a consideration of the impact of such a decision on the journalists concerned and on the journalists' profession. However, a countervailing consideration against including such an additional criteria is the need for uniformity and the fact that current NSW provisions do not include such a requirement.

The benefit of **proposed ss. 126B(5)**, (which would require a court to state its reasons for giving or refusing to give a direction protecting the confidential evidence) is that its provisions will give greater transparency to the decision. It will enable those interested in the matter to establish what criteria are being used to make a decision, including whether the impact of the decision is being considered from the perspective of the journalists' profession.

The Bill does not promote greater disclosure of public information about national security issues, nor will it affect the protection of whistleblowers at a Commonwealth level. Both

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these issues are likely to impede the 'freedom of the press' being argued for by a variety of media sources.⁸⁸

Acknowledgements

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The author remains responsible for any errors and omissions.

Endnotes

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3. The Hon Philip Ruddock, MP, *News Release*, 201/2005, 'Submissions Lodged in Journalist Contempt Case,' 4 November 2005.
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5. AAP, 'Lib Senator backs privilege for journalists,' 14 September 2005.
6. Chris Merritt, 'States reject journos' sources law' *The Australian*, p. 23, 13 April 2007.
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15. *ibid.*
16. Nicolas Perpitch, 'Judge considers jail term for leaking reports,' *Canberra Times*, p. 9, 26 May 2007.
17. *ibid.*
18. *ibid.*
19. *ibid.*
20. Paul Mulvey, 'Media companies unite to fight for press freedom,' *AAP*, 10 May 2007.
21. *ibid.*
22. Nicolas Perpitch, 'Former corruption commissioner to audit free speech,' *AAP*, 24 May 2007.
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24. Tony Koch And George Megalogenis, 'Labor backs media in secrecy war,' *The Australian*, 17 May 2007.
25. *ibid.*
26. Examples in which media involvement have played a role are given in Charles Hanley, 'Journalists and 'leakers' feel heat around the globe,' *AP*, New York, 6 July 2006.
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 - Danish journalists facing trial for reporting their government knew there was no evidence of banned weapons in Iraq. They reported in 2004 that, before joining the Iraq invasion, the Danish government was told by military intelligence that there was no firm evidence of banned weapons in Iraq, a finding the Danes presumably based on US and British information. The newspaper's chief editor, Niels Lunde, commented that, because it involved going to war, 'the articles published were obviously in the public interest,' (as reported by Associated Press). The Danish leaker, a former intelligence officer, was convicted and jailed for four months last year. A prosecutor has commented that now 'the court must decide whether the penal code provision banning publishing secret information applies to these journalists.' The government contends the leak damaged its intelligence relations with other nations;
 - London's Central Criminal Court has on trial other accused leakers who allegedly disclosed that President George W Bush talked of bombing Al Jazeera, the Arab television station;
 - The Washington Times says the Justice Department is investigating the Times for disclosing in 2005 that the government was monitoring Americans' phone calls without court warrants and the Washington Post for reporting the CIA was operating secret prisons for suspected terrorists in eastern Europe (the CIA had

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already, in April, fired a top analyst as an alleged source for the reports on covert prisons).

27. Section 126B.
28. Second Reading Speech, House of Representatives *Debates*, 24 May 2007, p. 4.
29. Explanatory Memorandum, p. 5.
30. Australian Law Reform Commission, Report No. 104, *Fighting Words: A Review of Sedition Laws in Australia*, July 2006. <http://www.austlii.edu.au/au/other/alrc/publications/reports/104/> accessed 30 May 2007.
31. Australian Law Reform Commission, 26, *Evidence (Interim)*, 1985 <http://www.austlii.edu.au/au/other/alrc/publications/reports/26/> and Australian Law Reform Commission, 38, *Evidence*, 1987 <http://www.austlii.edu.au/au/other/alrc/publications/reports/38/ALRC38.html> both accessed 30 May 2007.
32. Australian Law Reform Commission, New South Wales Law Reform Commission, Victorian Law Reform Commission, Report No. 102, *Uniform Evidence Law*, 2006, <http://www.austlii.edu.au/au/other/alrc/publications/reports/102/>
33. In 2005 all States and Territories agreed to introduce substantially uniform defamation laws with effect from 1 January 2006. Since then all the States have passed a Defamation Act in substantially similar form. These Acts are: *Defamation Act 2005* (NSW) *Defamation Act 2005* (Vic), *Defamation Act 2005* (Queensland), *Defamation Act 2005* (Western Australia), *Defamation Act 2005* (Tasmania), *Defamation Act 2005* (South Australia), *Civil Law (Wrongs) Act 2002* (A.C.T.) as amended.
34. Australian Law Reform Commission, 'Complexity, courtroom games must go in evidence shake-up: ALRC,' *Media release*, 8 February 2006, <http://www.alrc.gov.au/media/2006/mr0802.htm>
35. Chris Merritt, 'States reject journos' sources law,' op. cit.
36. *ibid.*
37. *ibid.*
38. S Odgers, *Uniform Evidence Law* (6th ed, 2004), [1.3.11900], as quoted in ALRC Report No. 102, *Uniform Evidence Law*, 2006.
39. These categories are already protected in an Australian jurisdiction, the medical profession being covered in Tasmania in an absolute sense in civil proceedings. In every State and Territory other than Queensland there is some restriction on accessing counselling communications. Tasmania's protections are the strongest on this issue, providing an absolute protection for such communications. Religious confessions are protected by s. 127 in the uniform Evidence Acts.
40. ALRC Report No. 102, *Uniform Evidence Law*, 2006, para 15.45-15.84, Recommendation 15-4.

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41. It must be emphasised that Library staff do already have certain protections regarding confidential information in the course of their employment and in the context of Parliamentary Privilege. Section 13 of the *Parliamentary Services Act 1999* details the Parliamentary Code of Conduct which provides, at ss. 6, that a 'Parliamentary Service employee must maintain appropriate confidentiality about dealings that the employee has with either House of the Parliament, with any committee of either House, with any joint committee of both Houses, with any Senator or Member of the House of Representatives or with the staff of any Senator or Member.' Nevertheless this provision falls against a backdrop of the broader legal system and other legislative provisions.
42. Rene Sanchez, 'Librarians Make Some Noise Over Patriot Act,' *Washington Post*, April 10 2003,
<http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&contentId=A1481-2003Apr9> accessed on 30 May 2007.
43. Alison Leigh Cowan, 'Librarian Is Still John Doe, Despite Patriot Act Revision,' *New York Times*, 21 March 2006,
<http://www.nytimes.com/2006/03/21/nyregion/21library.html?pagewanted=1&ei=5090&en=b114bbf8ca29b979&ex=1300597200&partner=rssuserland&emc=rss> accessed May 30 2007.
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<http://www.fas.org/sgp/crs/intel/RS21441.pdf> accessed 30 May 2007.
45. With Deane J commenting in *Baker v Campbell* (1983) 153 CLR 52, 116–117 that it is 'a fundamental and general principle of the common law.'
46. The ALRC, quoting *Baker v Campbell* (1983) 153 CLR 52.
47. Legal professional privilege issues were recently discussed in the context of legislative amendments made as a result of the Cole Inquiry - see further the Bills Digest no. 149 2005–06 *Royal Commissions Amendment Bill 2006*, <http://www.aph.gov.au/library/pubs/bd/2005-06/06bd149.htm>, 7 June 2006, accessed 30 May 2007.
48. The ALRC makes this comment and quotes *Attorney-General (NT) v Kearney* (1985) 158 CLR 500; *Evidence Act 1995* (Cth) s. 125 in support.
49. See, for instance, Russell Cocks, *The Ethics Handbook: Questions and Answers*, 2004; G Lewis, E Kyrou, A Dinelli *Lewis & Kyrou's Handy Hints on Legal Practice*, 3rd Edition, 1993; Ysaiah Ross, *Ethics in Law: Lawyers Responsibility and Accountability in Australia*, 3rd Edition; G E Dal Pont, *Lawyers' Professional Responsibility in Australia & New Zealand*, 2nd Edition, 2001; Ysaiah Ross & Peter MacFarlane, *Lawyers' Responsibility and Accountability: Cases, Problems and Commentary*, 3rd edition, 2002; Justin Oakley & Dean Cocking, *Virtue Ethics and Professional Roles*, 2001.
50. Georgia Price, 'Pack your toothbrush!': journalists, confidential sources and contempt of court,' *Media And Arts Law Review*, Dec. 2003, v.8(4), p.278.
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54. Georgia Price, op. cit.
55. *ibid.*
56. 'Journalists put own code above law, judge says,' Victoria, *AAP*, Monday 12 Feb 2007.
57. Interview with Margo Kingston, Columnist, *Sydney Morning Herald* (Lyneham, Canberra, 16 May 2003) quoted in Georgia Price, op. cit., p. 265.
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59. Media, Entertainment and Arts Alliance, *Press Release*, 24 May 2007, at: http://www.alliance.org.au/images/stories/070524pr_shield_laws.pdf, accessed 29 May 2007.
60. Press Council of Australia, letter to Standing Committee of Attorneys-General, May 2007, at: <http://www.presscouncil.org.au/pcsite/fop/shield.html>, accessed 29 May 2007.
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64. Anne Twomey, 'Law and Policy of Protecting Journalists' Sources,' *Background Paper No. 15*, Law and Government Group, 12 August 1992.
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66. Chris Merritt, *The Australian*, 'Judgment pass on move to protect media sources: it's doomed,' Thursday, 12 April 2007, p. 3.
67. *ibid.*
68. Chris Merritt, 'States reject journos' sources law,' op. cit.
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71. <http://www.griffith.edu.au/centre/slrc/whistleblowing/pdf/ajb-pidla1006-fullreport-final.pdf> accessed 30 May 2007.
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See further Thomas John, 'Whistleblowing in Australia: Transparency, Accountability...but above all the truth', [Research Note](#), No. 31, Department of Parliamentary Services, 2004-5, <http://www.aph.gov.au/library/pubs/rn/2004-05/05rn31.pdf> accessed 30 May 2007.

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75. Media, Entertainment and Arts Alliance, Press Release 24 May 2007, at: http://www.alliance.org.au/images/stories/070524pr_shield_laws.pdf, accessed 29 May 2007.
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79. Section 8 of the *National Security Information (Criminal and Civil Proceedings) Act 2004* provides 'In this Act, national security means Australia's defence, security, international relations or law enforcement interests.'

Security, in its turn, is defined by reference to the *Australian Security Intelligence Organisation Act 1979* which defines it to mean:

- (a) the protection of, and of the people of, the Commonwealth and the several States and Territories from:
 - (i) espionage;
 - (ii) sabotage;
 - (iii) politically motivated violence;
 - (iv) promotion of communal violence;
 - (v) attacks on Australia's defence system; or
 - (vi) acts of foreign interference;

whether directed from, or committed within, Australia or not; and
- (b) the carrying out of Australia's responsibilities to any foreign country in relation to a matter mentioned in any of the subparagraphs of paragraph (a).

While 'international relations' are defined in s. 10 of the Act as 'political, military and economic relations with foreign governments and international organisations', and

'law enforcement interests' are defined in s. 11 as including

'interests in the following:

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- (a) avoiding disruption to national and international efforts relating to law enforcement, criminal intelligence, criminal investigation, foreign intelligence and security intelligence;
 - (b) protecting the technologies and methods used to collect, analyse, secure or otherwise deal with, criminal intelligence, foreign intelligence or security intelligence;
 - (c) the protection and safety of informants and of persons associated with informants;
 - (d) ensuring that intelligence and law enforcement agencies are not discouraged from giving information to a nation's government and government agencies.
80. In camera means that the hearings are in private, i.e. the public may be barred from the court or the hearing may continue in the judge's private room in certain circumstances.
81. An authorised person is defined in ss. 3(1) as
- (a) ASIC;
 - (b) an ASIC delegate;
 - (c) a person who is exercising, or has exercised, a power under:
 - (i) a warrant issued under section 36 of the Australian Securities and Investments Commission Act 2001; or
 - (ii) section 37 of that Act;
 - (d) the DPP;
 - (e) a person who has instituted a James Hardie proceeding or caused a James Hardie proceeding to be begun or carried on.
82. The Hon Philip Ruddock, MP, 'Protecting Journalists: Labor wrong on Delay,' *News Release*, 26/2007, 13 February 2007. 'Legislating for confidential relationships privilege protection is part of a larger package of reforms which will implement Australian Law Reform Commission report on the uniform Evidence Act.'
83. The Hon Mr Phillip Ruddock, MP, Second Reading Speech, op. cit.
84. *ibid.*
85. The Hon Philip Ruddock, MP, 'Reforms to protect journalists and sources,' *News Release*, 099/2007, 24 May 2007.
86. The Hon Philip Ruddock, MP, 'Protecting Journalists: Labor wrong on Delay,' op. cit.
87. *NRMA v John Fairfax* [2002] NSWSC 563
http://www.austlii.edu.au/au/cases/nsw/supreme_ct/2002/563.html accessed on 30 May 2007.
88. For instance see the stories of Mulvey, op. cit. and Kenneth Nguyen, op. cit.

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