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Senate Legal and Constitutional Standing Committee
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Dear Sir

INQUIRY IN THE *EVIDENCE AMENDMENT (JOURNALISTS' PRIVILEGE) BILL 2009*

Thank you for the opportunity to make a submission regarding the *Evidence Amendment (Journalists' Privilege) Bill 2009* ('the Bill').

The main purpose of the proposed amendment to the *Evidence Act 1995* (Cth) is to extend the current protection beyond confiders to confidants of information, subject to various factors.

It is noted that the proposed amendment was foreshadowed by the Commonwealth Government in its Government Information – Restoring Trust and Integrity Policy:

> *"Journalist shield laws –*
>
> *Federal Labor will support reasonable suggested changes to current laws, as adopted by Standing Committee of Attorney-Generals, as model national law.*
>
> *Working with the Australian Government Solicitor and the Director of Public Prosecutions, a Rudd Labor Government will also ensure a protocol is in place so that a responsible journalist presenting news in the public interest is not prosecuted by Federal agencies where the information presented is merely embarrassing to the government. This will not cover reportage that jeopardises law enforcement, national intelligence or security, military operations or intelligence or diplomatic relations."*

As I have not seen the protocol I am unable to comment on it in the context of any legislation.

Also of relevance to this discussion is the Commonwealth Government's proposed public interest disclosure policy to:

- establish a legislatively based proper reporting and investigation system to deal with allegations of corruption and misconduct to encourage and protect thereby public interest disclosures within government to an integrity agency; and

- provide limited protection by a court, where a person having exhausted all legitimate mechanisms and avenues of complaint, discloses to third parties such as journalists, depending on the circumstances and weighing up all relevant factors, balancing the public interest in disclosure against any breach of confidentiality. (It is proposed that two key tests will be used to determine when public interest disclosure will attract legal protection: where the whistleblower has gone through the available official channels, but has not had success within a reasonable time frame and where the whistleblower is clearly vindicated by the disclosure).

Given that the Government intends to introduce public interest legislation, the more practical, even safer approach would be to introduce such legislation simultaneously, so both pieces of legislation could be considered together. It is problematic to comment on the above Bill in a vacuum.

The Importance of the Administration of Justice to Maintaining the Rule of the Law

Maintaining the rule of law is paramount in our democratic society. To achieve this, it is critical to ensure that the proper administration of justice occurs and is supported.

In 1940 His Honour Justice Dixon observed in a case before the High Court:

> *"No-one doubts that editors and journalists are at times made the repositories of special confidences which, from motives of interest as well of honour, they would preserve from public disclosure, if it were possible. But the law was faced at a comparatively early stage of the growth of the rules of evidence with the question how to resolve the inevitable conflict between the necessity of discovering the truth in the interests of justice on the one hand and on the other the obligation of secrecy or confidence which an individual called upon to testify may in good faith have undertaken to a party or other person. Except in a few relations where paramount considerations of general policy appeared to require that there should be a special privilege ... an inflexible rule was established that no obligation of honour, no duties of non-disclosure arising from the nature of*

> *a pursuit or calling, could stand in the way of the imperative necessity of revealing the truth in the witness box.*[1]*"*

Any laws that undermine or erode the capacity of the judiciary to administer justice would be untenable. For this reason, the proposed object clause that juxtaposes the justice system with the role of the media could be interpreted as diminishing the pre-eminence of the administration of justice. This has potential and concerning ramifications for the rule of law.

The statement in clause 3 (and Note 5) of the Explanatory Memorandum, with respect to the author, confuses the administration of justice with the functioning of the executive. The *"proper functioning of government"* and *"whistleblower regimes"* are not judicial functions (though, if called on by the lodging of applications, the judiciary can oversight them). Perhaps the intention of the amendment was to require the courts to balance the proper functioning of government and the role of the media in conveying information to the public. This view is reinforced by the aim of clause 4 of the Explanatory Memorandum:

> *"This clause will give recognition to the important function the media plays in enhancing the transparency and accountability of government. Its role in informing the community on government matters of public interest is a vital component of a democratic system."*

I suggest that the factors set out in Section 126B of the Act may provide sufficient protection for the confider and the confidant, without the object clause. Indeed, if there were to be any object clause perhaps it should reflect the position that the proper administration of justice is paramount.

The Status of Journalists' Code of Ethics

The Explanatory Memorandum (clauses 10-11) refers to the importance of providing the courts with greater flexibility to *"...maintain confidentiality between a journalist and their source..."* and thereby enabling journalists

> *"...to uphold an ethical obligation to maintain the confidentiality of a source without fear of being held in contempt of court."*

It should be noted that the journalist's code of ethics referred to is not legislatively enshrined, and that journalists, unlike most other professions, are self regulated.

Though amenable to consideration of some codification of the law at an appropriate time, in 1980 the Law Reform Commission of Western Australian ('LRCWA') made observations about the status of the journalists *"Code of Ethics"* that policy makers need to be mindful of:

> *"...it may be argued that journalists should be legally entitled to*

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[1] *McGuiness v Attorney General of Victoria (1940)* 63 CLR 73 at 86.

> *refuse to disclose the identity of their informants on the ground that refusal is required by the ethics of their profession. However, a group's imposition upon itself of a 'code of ethics' is not of itself a sufficient justification for the enactment of the substance of that code in legislation. It may, of course, be embarrassing to a journalist to be faced with the dilemma of having to elect between breaking the law by refusing to answer a relevant question and breaking a code, but this would not justify the granting of a journalists' privilege.[2]"*

As well, the Committee is no doubt aware that, unlike with legal professional privilege where the privilege is not the lawyer's but the client's, the proposed exception put forward by the Bill also seeks to protect the confidant.

The Test

I have strong reservations about aspects of the proposed test, as follows:

a. Item 3 of the Bill would have the effect of unnecessarily circumscribing the discretionary power of the judiciary, by mandatorily requiring the judiciary to go through a check list of factors, many of which may be irrelevant to the matter before the court. The Explanatory Memorandum also states that this check list is not exhaustive. This amendment increases the possibility of appeals, thereby introducing uncertainty and delay, with the concomitant potential to affect adversely the proper functioning of the justice system, if, as can be assumed, a number of these matters will arise regarding criminal cases and other investigatory inquiries. The current discretion should be retained.

b. The removal of the pre-eminence of national security considerations [compared with the current requirement being taking in to account and giving the greatest weight to, any risk of prejudice to national security (s126B(4)(h))] is concerning (See Notes 15, 16 and 17). It is hard to foresee how the reputation of one journalist could ever be more significant than the genuine security interests of a nation.

c. The watering down of s126D (Notes 18 and 19), whereby a fraud does not result in the loss of the privilege and nor does commission of an offence (clauses 6 and 7 of the Explanatory Memorandum and Note 14). This has ramifications for the foreshadowed whistleblower legislation, for example, including the power of governments to regulate public interest disclosure (albeit the Government's policy, as summarised above, foreshadowed exceptions if disclosure is made to a third party). Legal professional privilege does not apply to a communication made by or to a lawyer for the purpose of carrying out a fraud or other crime. It is not clear why greater *"protection"* from law enforcers is afforded journalists and their confiders than the role of lawyers on behalf of their clients, which role is, in part, to

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[2] Privilege for Journalists Report, Project No. 53 – February 1980, 10.

support the administration of justice by upholding the rule of law. The better approach would be to allow the seriousness of any fraud or other offence to be balanced against the public interest and to be reflected in sentence, if charges are laid and there is a conviction.

d. Clause 6 (and Note 6 and 12) of the Explanatory Memorandum provides as examples of harm to journalists their *"reputation"* and *"ability to access sources"*. Whilst the legislation does not make this clear, is the public interest in the administration of justice ever overridden by the public interest in maintaining a journalist's reputation and access to sources? Surely this should be confined to physical or emotional harm?

Public Interest Disclosure Legislation

As discussed above, the Government has foreshadowed public interest disclosure legislation and, in fact, a Bill has previously been introduced to the Senate.[3]

It is crucial to ensure that the work and credibility of any integrity agency is supported and not compromised in favour of a good story by an individual journalist. Any such agency should be allowed to manage effectively such a function, without fear of being undermined regularly by private disclosures.

The *Public Interest Disclosure Act 2003* (WA) provides a scheme whereby a concerned citizen may make a disclosure. This reduces the need for confidants to provide information of public interest to journalists. It is problematic when a citizen confides to a journalist in breach of this Act, particularly if the communication is vindicated.

When such Federal legislation is introduced, this should also have the effect of minimising the need for citizens to make disclosures to journalists. Also law makers need to make sure that the purpose of the proposed disclosure legislation is fulfilled by ensuring that the work of integrity agencies is not undermined.

Allowing for the possibility of retention of any *"privilege"*, despite a communication contrary to disclosure legislation, has the potential to affect the capacity of integrity agencies to manage properly.

Non-curial Contexts

The non-extension of the privilege to non curial contexts to assist with investigations is appropriate. That is, the proposal set out in the Explanatory Memorandum (clause 12) whereby the privilege does not apply during the investigatory stages of the justice system or in other non-curial contexts is the correct position.

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[3] *Public Interest Disclosure (Protection of Whistleblowers) Bill 2002* (Cth).

The situation in Western Australia

As you are no doubt aware, the LRCWA has considered the issue of journalist's privilege on several occasions.

The Privilege for Journalists Report recommended against absolute privilege[4] and did not recommend *"the adoption of any form of qualified privilege at this stage"*[5] because the common law was sufficiently flexible, with judges having a discretion to accommodate individual circumstances that arose in deciding whether a journalist should be compelled to reveal their sources or face contempt charges;[6] and the law was in a state of flux and the time was not ripe for crystallising the practice of the courts in statutory form.

The Commission did make several pertinent observations that:

> *"3.9 There would be few who would dispute that, in general, the public interest requires that courts should have coercive powers to require witnesses to answer all relevant questions, no matter how unpalatable the witness finds the experience. If witnesses could decline to answer as they thought fit, courts would seldom be able to arrive at the truth and effective administration of justice would be impossible.*
>
> *3.10 A similar justification applies in the case of Royal Commissions, Parliamentary Committees and other investigatory bodies. Governments and Parliaments sometimes consider it desirable to institute formal inquiries into allegations of social or political abuses, or into other areas of particular public concern. If the investigating body had no coercive power to get at the truth, material facts would remain uncovered, public anxiety would be unallayed and any abuses would remain unremedied.[7]"*

Having gone through the exceptions, the Commission asked:

> *"The question raised by the terms of reference is whether a journalists' privilege should be added to the list... It could not of course be justified as contributing to the effective administration of justice, but it has been argued that its enactment is justified on more general grounds.[8]"*

The Commission pointed out that much information is given and received in confidence:

> *"3.18 Ever since the eighteenth century it has been a rule of the*

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[4] LRC 53, n2, para 5.1, 19.
[5] LRC 53, n2, 30.
[6] LRC 53, n2, para 3.1-3.8, 4-6.
[7] LRC 53, n2, 6-7.
[8] LRC 53, n2, 9.

common law that a witness is not entitled to refuse to answer a question merely because to do so would involve a breach of confidence. The Commission agrees with the policy lying behind this rule. Much information of a commercial, social or personal nature is given and received in confidence and the administration of justice would be stultified if witnesses could lawfully decline to disclose that information on that ground alone. In any case, journalists could avoid the dilemma described in paragraph 3.17 above simply by not entering into undertakings of confidentiality which extend to non-disclosure in judicial proceedings, and potential informants could avoid the disclosure of their identity by not divulging information likely to be the subject of litigation or formal inquiry. Accordingly, it is not sufficient to show that journalists do in fact enter into undertakings of confidentiality with their sources. The overriding public importance of their doing so must also be demonstrated.[9]"

The Commission also commented that:

"3.22 One further aspect should be mentioned. The practical question also arises whether legislation providing for a journalists' privilege could be so drawn as to minimise the possibility of abuse by journalists or informants who might attempt to use the legislation for their own ends. If the risk of abuse could not be reduced to acceptable limits, it could be argued that legislation was not warranted, notwithstanding that some information of public importance would not be published.[10]

5.3 Those in favour of the privilege stress the need for journalists to enter into undertakings of confidentiality. Although it seems clear that some information of public importance would not be made available to journalists unless they undertook in general terms not to reveal the identity of their source, it is unclear whether the flow of information would be significantly reduced if journalists expressly declined to extend their undertaking of confidentiality to judicial proceedings.

5.4 Although the media undoubtedly perform a valuable function in drawing public attention to matters of importance, it is not the only channel of communication used by informants. Information may be directly disclosed to members of Parliament so that it can be raised in Parliament. Where the information concerns possible breaches of the law, the informant may pass it to the police or other authority as the basis for investigation and prosecution. No doubt in these cases the allegations

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[9] LRC 53, n2, 11.
[10] LRC 53, n2, 12.

would not reach the general public unless they were published in a newspaper or other news medium, but that medium would not itself be doing so as the result of any confidential relationship with sources. It is accordingly doubtful that public disclosure of abuses depends mainly upon journalists maintaining the confidentiality of their sources.[11]"

After discussing arguments for such a privilege, the Commission said:

"3.20 However, even if the flow of news depends on journalists adhering to their undertakings of confidentiality in judicial proceedings, that still would not be sufficient to justify the granting of a journalists' privilege. It is also necessary to show that the benefits to be gained from the grant of the privilege would outweigh the disadvantages that would follow from the grant.[12]

...the Commission is in no doubt that the public is entitled to accurate information and fair comment, but this must be balanced against other claims, such as national security and the reputation and privacy of individuals. The public interest is not synonymous with whatever the public find interesting, nor is the question what is proper to publish a matter for the exclusive judgment of the media itself. The enactment of a journalists' privilege in absolute terms could encourage informants to 'leak' information which should not be published, as well as information which should.[8] It might be difficult for the media, or at least some sections of it, to resist the temptation to publish such information[9], particularly in the face of strong competition. The Commission would be reluctant to recommend a step which could have this result.[13]"

The Commission also raised an issue, not often discussed, being the public's right to know the identity of the source: that is, that journalists' argue the importance of the disclosure but provide no means to test it.

"As the New Zealand Torts and General Law Reform Committee stated in its report, Professional Privilege in the Law of Evidence[14] it is in a sense contradictory for journalists to assert the public interest in receiving the 'news' and at the same time deny the community the ability to make what is the appropriate response. For example, if an allegation of serious misconduct is

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[11] LRC 53, n2, 20.

[8] [FN from LRC Report: An informant would know that the journalist involved could not be required to disclose his identity should the source of the leak ever be an issue in judicial proceedings].

[9] Assuming, of course, that publication of it would not breach any civil or criminal law: see Chapter 4 above, n.5.

[12] LRC 53, n2, 11.

[13] LRC 53, n2, 21.

[14] 1977, at page 70.

made in a newspaper, but the allegation cannot be adequately investigated because the source of the information is withheld, the publisher is in effect asserting the public's 'right to know' on the one hand and denying it on the other.[15]"

The Commission's more recent Professional Privilege for Confidential Communications Report[16] also dealt with the journalist privilege. The Commission:

"*...recommended against the creation of a privilege that would allow individuals to refuse to reveal information to judicial proceedings on the basis that they were confidential communications made within a particular professional relationship. Instead, the Commission recommended:*

- *That Parliament enact a statutory judicial discretion allowing courts to excuse witnesses from disclosing information in breach of a confidential relationship in judicial proceedings.*

- *That in exercising such a discretion the court should consider whether or not the public interest in disclosure of the evidence is outweighed, in the particular case, by the public interest in the preservation of confidences between persons in the relevant positions of the confidant and witness and the encouragement of free communication between such persons.*

- *That, for reasons of clarity, the statutory discretion be based upon a similar working provision in the New Zealand Evidence Act rather than that proposed by the Australian Law Reform Commission in clause 109 of its draft Evidence Bill.*[17]"

The Standing Committee on Uniform Legislation and Intergovernmental Agreements' 1996 Evidence Law Report[18] that considered uniform evidence laws found that:

"*In respect of the creation of privileges for protection of confidential communications the Standing Committee indicated that it rejected the grant of any form of blanket privilege attaching to specific relationships.*[19] *Instead, the Committee expressed its preference for enactment of a general judicial discretion in matters of confidential communications.*[20]"

The LRCWA's Report on the Review of the Law of Contempt[21] made a number of recommendations regarding contempt in the face of the Court.

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[15] LRC 53, n2, 21-22.
[16] Professional Privilege for Confidential Communications Report, Project No 90, The Law Reform Commission of Western Australia, May 1993.
[17] Law Reform Commission of Western Australia - 30th Anniversary Reform Implementation Report, Law reform Commission of Western Australia, 2002, 89-90.
[18] Western Australia, Legislative Assembly, Standing Committee on Uniform Legislation and Intergovernmental Agreements, Evidence Law (13 November 1996).
[19] Review of the Criminal and Civil Law Justice System in Western Australia, Project No 92, (1999), para 5.5.
[20] LRC 30th Anniversary, above n 15, 90.
[21] Report on the Review of the Law of Contempt, Law Reform Commission of Western Australia,

The Commission recommended some legislative reform. The relevant recommendations for the purposes of your enquiry are as follows:

> *"30. The offences to replace the existing law of contempt in the face of the court should provide the following:*
>
> *(a) A person appearing as a witness before a court shall not refuse to be sworn or make an affirmation when so ordered by the court.*
>
> *(b) A person appearing as a witness before a court shall not, subject to the laws relating to privilege, refuse to answer a question or to identify him or herself when so ordered by the court. [page 65]"*
>
> *31. Legislation should provide that:*
>
> *(a) Refusal to reveal the sources of information upon which a publication is based shall not constitute the contempt offence of refusing to answer questions, unless disclosure is necessary in the interests of justice or national security or for the prevention of crime.*
>
> *(b) The question whether disclosure is necessary in the interests of justice or national security or for the prevention of crime, is to be determined in each case by the presiding judge.*
>
> *For the purposes of this recommendation 'publication' includes any speech, writing or other communication in whatever form, including a form preparatory to such publication, which is addressed to the public at large or any section of the public. [page 67]"*

The Commission commented that:

> *"In the United Kingdom the law relating to contempt by witnesses has been reformed by the insertion of a provision which in effect creates a new form of privilege available to journalists and publishers, but subject to the overriding dictates of the public interest.[22] The reforms sought to strike a balance between the freedom of the press to disseminate information (especially at the behest of anonymous whistleblowers) and considerations which have traditionally led to the rule denying any confidentiality to such sources. The United Kingdom provision among other things appropriately confines the protection to publications that engage the public interest referred to, namely, those of the public media. The Commission recommends the adoption of a similar provision in Western Australia.[23]"*

Project No 93, June 2003.

[22] *Contempt of Court Act 1981* (UK) Section 10.

[23] LRC 93, above n 20, 67.

A further note of warning however, from the LRCWA aimed at not undermining the authority of the court or enquiry:

> *"In introducing such a provision to the Western Australian context, it is important to note that traditionally the liability of a witness, and in particular a journalist, to be committed for contempt for refusing to answer questions has been subject to a requirement that the question asked of the witness was relevant and necessary to the proceedings in question. That requirement was to be determined at the end of the case and in light of all other relevant evidence. However, in light of the recommendation in favour of protecting journalistic sources, the Commission believes that there should be no additional element of relevance or necessity before a refusal to answer a question which a witness is directed to answer constitutes a contempt offence. It is inconsistent with the maintenance of the authority of the court — and, therefore, the interests of justice — that a witness, when charged with contempt, should be in a position to 'second guess' the ruling of the trial judge as to whether a question is relevant and admissible.*[24]
>
> *In examining the above recommendation on this issue, the Commission suggests that the Government also give consideration to implementing the broader recommendations made in the Commission's report on Professional Privilege for Confidential Communications, referred to earlier.*[25]*"*

Conclusion

Thank you for the opportunity to comment on the Bill. If, following receipt of submissions, changes will be recommended to the Bill, I would welcome the opportunity to comment further.

Meanwhile, should you seek any additional information, please do not hesitate to contact me.

Yours faithfully

Robert Cock QC
DIRECTOR OF PUBLIC PROSECUTIONS

16 April 2009

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[24] LRC 93, above n 20 ,66-67.
[25] LRC 93, above n 20, 67.