



NEW SOUTH WALES

ATTORNEY GENERAL

Mr Peter Hallahan
Committee Secretary
Senate Legal and Constitutional Affairs Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Mr Hallahan,

I am writing in relation to the *Evidence Amendment (Journalists' Privilege) Bill 2009 (the Bill)*.

Please note that Journalist Shield Laws is on the agenda for the meeting of the Standing Committee of Attorneys General on 16-17 April 2009 and my comments are subject to any decisions made at that meeting. The professional confidential relationship privilege is currently contained in the model Uniform Evidence Bill and NSW has adopted this privilege. It is important to maintain uniformity in this area as much as possible.

I have some comments on the detail of the Bill, which are as follows:

Extent of the privilege

Division 1A of Part 3.10 of the NSW *Evidence Act 1995* contains a professional confidential relationship privilege. This privilege mirrors the privilege contained in the model Uniform Evidence Act. This privilege applies to any communication made by a person in confidence, in the course of a relationship in which the confidant was acting in a professional capacity, and when the confidant was under an express or implied obligation not to disclose its contents.

The Commonwealth privilege applies to journalists only, whereas the NSW privilege also applies to those who confide in doctors, counsellors and other professionals. A specific privilege for journalists and their sources is difficult to justify to other professions, who would not be covered by the Commonwealth privilege.

I am not aware of any other provision of the Commonwealth *Evidence Act 1995* that has such a selective application.

In addition, the Bill does not provide a definition of a journalist. Journalism is different from many other professions. As for most professions it is very clear as to whether a person is a member of that profession, as to be a member a person would need to be a member of a professional body or have specific qualification, i.e. doctors and lawyers. Whereas journalism has none of the above

requirements and is often a self-declared profession. For example, it is not clear if 'bloggers' or self-published authors would be protected by the privilege.

Consideration of public interest in media communicating facts and opinions to the public

I note that the Bill contains an objects clause that states that the object of the Division is to create a balance between:

- the public interest in the administration of justice; and
- the public interest in the media communicating facts and opinion to the public and for that purpose having access to sources of facts.

The NSW Court of Appeal has said, "*whilst regard may be had to an objects clause to resolve uncertainty or ambiguity, the objects clause does not control clear statutory language, or command a particular outcome.*"¹

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

Effect of misconduct

The journalist privilege contained in the Bill is not automatically lost when the disclosure of confidential information amounts to an offence, rather it is one of a number of matters for the court to take into account. This is inconsistent with other privileges that are contained in the Evidence Act, for example legal professional privilege.

The loss of privilege on grounds of misconduct is more appropriately determined by an act of Parliament than by judicial discretion. The discretionary loss of privilege may incidentally impede the deterrent effect of criminal laws, particularly those prohibiting disclosures of private or government information.

The NSW professional confidential relationship privilege is lost if misconduct was committed. This works in conjunction with whistleblower laws, which the Commonwealth have not enacted.

Scope of application of privilege in court proceedings

Clause 131B of the Bill extends the application of the Commonwealth journalist privilege to all proceedings in a federal or ACT court and to all proceedings in any other Australian court for an offence against a law of the Commonwealth.

The NSW professional confidential relationship privilege applies to all proceedings in NSW courts. However, the Commonwealth journalist privilege

¹ *Minister for Urban Affairs and Planning v Rosemount Estates Pty Ltd* (unreported, 90640127, 14 August 1996) in DC Pearce and RS Geddes *Statutory Interpretation in Australia* Lexis Nexis Butterworths Australia, 6th Edition, 2006, p.154. .

would also apply in NSW' Courts when the matter was a Commonwealth matter dealing with a journalist. This will cause significant confusion.

For example, if there is a joint indictment of Commonwealth and State offences being heard in a state court, that court would have to apply both the Commonwealth journalist privilege and the NSW' professional confidential relationship privilege.

Another concern is that it will create discrepancies between Commonwealth matters heard in state courts and those heard in federal courts. It is arguable as to whether the Commonwealth journalist privilege covers the field of professional confidential relationships privilege and hence it is possible that the professional confidential relationships privilege will apply in addition to the journalist shield law when a Commonwealth offence is being heard in a state court. However, if a Commonwealth offence were being heard in a federal court, for example a cartel offence in the federal court, the professional confidential relationships privilege would not apply. Alternatively the Commonwealth privilege may displace the state privilege in a variety of circumstances not otherwise covered by Commonwealth provisions.

I hope that this submission has been of some assistance.

Yours faithfully



(John Hatzistergos)