Submission to Senate Legal and Constitutional Affairs Legislation Committee enquiry into the Evidence Amendment (Journalists' Privilege) Bill 2010 and Evidence Amendment (Journalists' Privilege) Bill 2010 (No.2)

The Chairperson

Senate Legal and Constitutional Affairs Legislation Committee

Dear Senator,

I am a legal academic at Charles Darwin University and have been invited to make a submission to the Senate Legal and Constitutional Affairs Legislation Committee enquiry into the Evidence Amendment (Journalists' Privilege) Bill 2010 and Evidence Amendment (Journalists' Privilege) Bill 2010 (No.2).

The focus of my submission will be not so much on the Bills themselves but on advocating that the rebuttable presumption/qualified immunity they will create in relation to journalists (and other relationships of confidence in relation to the "Brandis Bill") giving evidence before a court should apply more broadly. In particular I submit that the presumption/qualified immunity should extend to protect access by law enforcement agencies to journalists' telephone call records and for that matter email inboxes.

The Bills in general

In general terms I strongly support both Bills. I do not propose canvassing the legislative history or current situation in detail, in that they are covered adequately in the relevant Bills Digest.[1]

Although some States and Territories now have various versions of "whistleblower" legislation, the history of such legislation tends to indicate that the protections it affords public sector whistleblowers are quite weak and limited. I regard the ability of the media to scrutinise and expose alleged government and public sector wrongdoing as an important check and balance in a democratic society. Recognition of that principle in turn requires legal recognition of the public interest in not compelling journalists to reveal their sources unless there is some specific significantly stronger public interest in forcing disclosure. In my view these Bills achieves an appropriate balance between potentially competing public interests, allowing a court to weigh the public interest in confidentiality of journalists' sources against whatever competing public interests may be involved (commonly the interests of litigation parties and the court in having all relevant evidence available to be tested).

I also note that there may be a public interest in protecting the confidentiality of journalists' sources more widely than just in relation to public sector whistleblowing. Obvious examples

[1] Bills Digest Nos 38-39, 2010-11, Evidence Amendment (Journalists' Privilege) Bill 2010 and Evidence Amendment (Journalists' Privilege) Bill 2010 (No.2).

include stories exposing organised criminal activity (although it would be very rare in such situations for the interest in protecting journalistic confidences to outweigh law enforcement interest in disclosure), corporate malfeasance and consumer "rip-offs". The Bills clearly apply the presumption/qualified immunity to those areas as well as public sector whistleblowing.

I support the "Brandis Bill" in preference to the "Wilkie Bill", in that the former extends the proposed presumption/qualified immunity to a range of relationships of confidence not just journalists and their sources. I note that the Australian Law Reform Commission and New South Wales and Victorian Law Reform Commissions have recommended just such amendments to the Uniform Evidence Law/ *Evidence Act 1995* (Cth).[2] Indeed the Commissions' Report also extended beyond just the situation of the compellability of members of various professions giving evidence before a court, and recommended that protection be extended to the pre-trial litigious process (e.g. discovery and inspection of documents) and to extra-litigious functions such as decisions about search warrants and access to telephone records.[3] That recommendation is centrally relevant to the thrust of this submission, which focuses on one such extra-litigious function (accessing telephone records) in relation to one of the confidential relationships the Commissions' recommendation covers (the journalist-source relationship).

In my view there is no persuasive reason why the protection of the proposed presumption/qualified immunity should be confined to journalists as opposed to other relevant professionals whose work may give rise to relationships or situations of confidence. Indeed as Kirsty Magarey observes in the Bills Digest,[4] other professions such as doctor/patient, nurse/patient, psychologist/client, therapist/client, counsellor/client, social worker/client may involve formal Codes of Ethics the breach of which can result in professional disciplinary proceedings whose outcome may include striking off or deregistration by the relevant professional licensing body. This is not so for journalists.

Nevertheless, in my submission the position of journalists is uniquely relevant to the public interest in facilitating "whistleblowing" in relation to public sector wrongdoing, and as such certainly merits protection notwithstanding the somewhat informal nature of journalistic ethics and codes of conduct.

Extending the presumption to bloggers and citizen journalists?

I note that there has been some media publicity about the possibility of extending the protection of these bills to cover amateur bloggers and "citizen journalists" rather than just professional journalists. To the extent that this may be a live issue before this Committee, I do not support such an extension. Although bloggers and "citizen journalists" might sometimes engage in journalism in the true sense which may on very odd occasions involve exposing public sector wrongdoing based on "leaks" to them from public servants, bloggers are not journalists in the relevant sense. Although professional journalists are not subject to professional disciplinary proceedings or potential deregistration for breach of their code of ethics, the profession nevertheless **has** a code of ethics which possesses strong moral or

[2] Australian Law Reform Commission, New South Wales and Victorian Law Reform Commissions Report No. 102, Uniform Evidence Law (2006)
[3] Above n 2 32-354 (Recommendation 15).
[4] Above n 1.

persuasive force. Moreover there is a clearly identifiable peer group or "community of practice" whose disapprobation may be expected to be a powerful force in ensuring or at least encouraging journalists to behave ethically in relation to their obligation of confidentiality of sources. The journalists' code also requires a journalist to conduct an ethical weighing process before agreeing to give an undertaking to keep a source's identity confidential:

> 19 Aim to attribute as precisely as possible all information to its source. When a source seeks anonymity, do not agree without first considering the source's motive and any alternative attributable sources. Keep confidences given in good faith.[5]

None of these constraints, relatively informal though they are, apply to bloggers or citizen journalists. In my view it is the reasonable expectation that journalists will act ethically in pursuit of the public interest in exposing public sector wrongdoing which properly permits Parliament to extend a legally enforceable immunity to relationships of confidence into which they may enter. No such expectation exists in relation to bloggers, nor can they be regarded in any meaningful sense as a profession or even an identifiable group let alone "community of practice" with common ethical or professional standards.

Law enforcement agencies accessing journalists' telephone records

Recent events in the Northern Territory indicate that there is a significant "loophole" in Commonwealth law which has the potential to undo or at least dramatically undermine much of the benefit of the Bills beign examined by this Committee. Northern Territory Police have recently admitted that they accessed journalists' telephone records in an endeavour to trace the source of a (seeming) police leak of the fact that a drug raid had been conducted on the home of the Lord Mayor of Darwin. The Police Commissioner has subsequently published explanatory material as follows:

> The content of the story and particular reference to comments by a police officer are *prima facie* evidence of a breach of Section 155 (1) of the *Police Administration Act* which states;
>
> **155 Communication of information**
>
> (1) A member shall not, without reasonable cause, publish or communicate any fact or document to any other person which comes to the knowledge or into the possession of the member in the course of his duties as a member and which the member has not been authorised to disclose.
>
> Penalty: $1,000 or imprisonment for 6 months or both.

[5] Media Entertainment and Arts Alliance recommended revised Code of Ethics <http://www.gwb.com.au/99a/ethics.html> at 18 November, 2010 (not immediately locatable on the MEAA website itself)

> After the article was published a lawyer made an oral complaint about the release of confidential information and this was later formalised in writing, by way of letter to the Commissioner of Police.
>
> The matter was allocated to the Ethical and Professional Standards Command and is an on-going investigation. No further comment can be made about the investigation until it is complete.
>
> The NT News article suggesting 'Police tamper with freedom of the press' (NT News 4/11) is misleading and conveniently fails to address the real issue. NT Police have not launched a 'witch hunt' as suggested. Police are conducting a legitimate investigation into a formal complaint, that a police officer illegally disclosed confidential information to an NT News journalist.
>
> Territorians whose home is searched by Police have a right to expect that anything seen or heard inside their premises will remain confidential unless it becomes evidence in a court of law. They do not expect that parts of an interview conducted by police will be illegally released to a journalist.
>
> In this article on 21 October 2010, the journalist told NT News readers that a police officer had given him information on the condition of anonymity. If that is true, the police officer acted illegally.
>
> NT Police have clear guidelines on how information is released to the public. Police officers are encouraged to interact with the media but this does not extend to the release of confidential information or material that may compromise an investigation.
>
> NT Police have the legislative authority to obtain telephone subscriber details when investigating certain categories of offence pursuant to the *Telecommunications (Interception and Access) Act* (Cth). Where subscriber details and/or call charge records may assist in the investigation of an offence, police use this as an investigative strategy.
>
> Police require a warrant issued by a Judge to 'intercept' telephone calls.
>
> Access to subscriber details and call charge records does not require a warrant. It does, however, require approval by a Superintendent or above or another prescribed officer as authorised by the Commissioner of Police.

The Commissioner's explanation does not specify the particular provision of the *Telecommunications (Interception and Access) Act 1979* (Cth) on which they relied for authority to access the journalists' phone records. However, a Police spokesperson has subsequently clarified that the authorising provision on which they relied is s 178 which is titled "Authorisations for access to existing information or documents--enforcement of the criminal law" and reads:

> (1) Sections 276, 277 and 278 of the *Telecommunications Act 1997* do not prevent a disclosure of information or a document if the information or document is covered by an authorisation in force under subsection (2).

(2) An authorised officer of an enforcement agency may authorise the disclosure of specified information or specified documents that came into existence before the time the person from whom the disclosure is sought receives notification of the authorisation.

(3) The authorised officer must not make the authorisation unless he or she is satisfied that the disclosure is reasonably necessary for the enforcement of the criminal law.

In essence, s 178 allows an "authorised officer" of an enforcement agency (which includes the Australian Federal Police and all State and territory police forces) to authorise the disclosure by a "telco" employee of any existing information not containing the substance or content of a communication, where the authorised officer forms the view that the information is "reasonably necessary for the enforcement of the criminal law". Moreover, the authorised officer may do so irrespective of how seemingly trivial the alleged breach of the criminal law may be. Indeed in the recent Northern Territory situation the only possible breach of the criminal law alleged was the "leak" by a police officer to a journalist itself. As Magarey observes in the Bills Digest:[6]

> [A]ny leaking by a public servant is currently likely to involve illegal behaviour it could limit the effectiveness of those concessions dramatically. Under current law there is no statutory public interest defence for 'whistleblowing' or 'leaking'.

In other words, s178 as it presently stands allows any law enforcement agency to access the records of any journalist whenever it sees fit for the purpose of investigating any suspected breach of the criminal law however trivial, including an alleged breach of the criminal law consisting solely of the act of "whistleblowing" to a journalist itself. Police, public servants or teachers who "leak" to a journalist will almost always be committing some sort of offence against relevant public sector legislation by doing so. The public interest value of allowing journalists a qualified immunity from being forced to disclose sources before a court will be significantly undermined or even negated if law enforcement authorities have a largely unchecked ability to access journalists' telephone and other records to identify the "leaking" public servant by "back door" means.

Section 178 stands in contrast to s 138 which deals with access to a "stored communication" i.e. the actual **content** or a summary of the content of a telephonic communication. That section essentially provides that access is only permitted for the purpose of investigating a serious crime, which is variously defined but in simplistic terms means an offence carrying at least 3 years imprisonment.

Section 178 also stands in contrast to s 180, which is also in Part 4-1 Division 4 of the Act but deals with "prospective information or documents" i.e. records or information which do not exist at the time the authorisation is given, whereas s 178 deals with "existing information or documents". The prerequisite that authorisation can only be where they are investigating a crime carrying 3 years or more imprisonment applies to prospective information but not to existing information. The Minister's Second Reading Speech and Bills Digest on introduction of the provisions concerning prospective information essentially indicates that the reason why the serious crime prerequisite was applied to s180 (prospective information)

[6] Above n 1, 8

but not to s178 (existing information) is that, given modern technology with mobile phones especially those equipped with sat nav capabilities (e.g. iPhones), an authorisation to access/monitor future information recorded by telcos could potentially allow police to track a person's location and movements, whereas accessing only existing data recorded by the telco does not. Hence access to prospective information potentially involves a much greater intrusion on the privacy of the person whose records are accessed so that Parliament deemed that this should only be permitted where a serious crime is under investigation. For existing/historical information (e.g. called number records) the intrusion into privacy is apparently regarded as insufficient to require any form of oversight or approval requirement before police can access whatever such information they choose.

However, for journalists and their "whistleblower" sources at least, that proposition does not hold true. The identity of the whistleblower is the critical confidential information in such a situation; the content of the communication will typically already be known because it will almost by definition already have been exposed by the journalist. A "mere" list of called numbers to or from the journalist's phone may be sufficient to identify the journalist's source; the content of the communication will often be largely irrelevant to that purpose.

Substantive submission

Accordingly I am writing to ask you to consider amending both the *Evidence Act 1995* (Cth) and *Telecommunications (Interception and Access) Act 1979* (Cth) to provide that:

1. any law enforcement access to journalists' telecommunications records should require a warrant; and
2. in considering whether to issue such a warrant the decision should be subject to essentially the same rebuttable presumption of non-disclosure that will apply in court proceedings once the "shield" law amendments to the *Evidence Act* constituted by the Bill(s) are enacted.

Yours faithfully,

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