



Simon Corbell MLA

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MINISTER FOR THE ENVIRONMENT, CLIMATE CHANGE AND WATER
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MEMBER FOR MOLONGLO

Mr Peter Hallahan
Committee Secretary
Standing Committee on Legal and Constitutional Affairs
PO Box 6100
CANBERRA ACT 2600

Dear Mr Hallahan

Thank you for your letter of 25 March 2009 inviting the ACT Government to provide a submission to the parliamentary inquiry into the Evidence Amendment (Journalists' Privilege) Bill 2009 (the Bill).

I welcome the opportunity presented by the Standing Committee on Legal and Constitutional Affairs to consider changes proposed to Commonwealth law and the opportunity to provide input to the inquiry process.

I understand that the Bill amends the existing professional confidential relationship privilege provisions in Part 3.10, Division 1A of the Commonwealth *Evidence Act 1995* with the aim of providing for a privilege at the trial and pre-trial stage of civil and criminal proceedings for communications made in confidence to journalists in certain circumstances. As you would be aware the proposed amendments would apply in all ACT court proceedings.

The basis for all privileges is the protection from disclosure of some interest which is at least as significant as the public interest of disclosure of relevant material for the proper administration of justice.¹ 'Journalist shield law' is a term commonly used to describe a privilege which means that evidence revealing the identity of a journalist's confidential source of information need not be disclosed in court. Journalist shield laws involve the balancing of a number of important public interests, but primarily involve the balancing of the public interest in encouraging the disclosure and distribution of information by allowing journalists to maintain the confidentiality of their sources in court proceedings, and the public interest in the proper administration of justice by maximising the relevant evidence brought before the court.

¹ *AT & T Istel Ltd v Tully* [1993] AC 45; [1992] 3 All ER 523 at 530 per Lord Templeman, at 534 per Lord Griffiths; [1992] 3 WLR 344, HL.

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Australian Law Reform Commissions have long recognised the important role the media plays in maintaining a democratic system of government through recommendations to legislate for a qualified judicial discretion to protect the confidence of the journalist-source relationship. The freedom of the press is necessary for an open and accountable government by encouraging political debate and scrutiny of the public process.

The amendments in the Bill maintain the discretionary nature of the existing privilege. This recognises that where there are competing public interests, the most appropriate response is for the courts to engage in a balancing exercise to appropriately determine which competing interest prevails over the others in the given circumstances. The right to a fair trial, which is enshrined in the ACT *Human Rights Act 2004*, is based on the premise that all relevant evidence is brought before the courts in a trial. An absolute privilege would not allow for a proper balancing exercise to take place and ultimately would impact on the fundamental right to a fair trial.

I do not wish to comment further on the appropriateness of the Commonwealth's response to strengthening protection for journalists who shield the identity of their sources, except to raise two concerns about the model proposed in the Bill. The concerns regard the narrow focus of the privilege and the consequences for the uniformity of evidence laws, and the removal of the automatic loss of privilege on the grounds of misconduct.

- *Uniformity of evidence laws and narrow focus*

Harmonising evidence laws across jurisdictions increases efficiencies for the courts, legal practitioners and business. One of the main objectives of the joint Commonwealth, New South Wales and Victorian Law Reform Commissions inquiry into the operation of the uniform Evidence Acts was to maintain and further the harmonisation of the laws of evidence throughout Australia. The scope of the inquiry required the Commissions to focus on, amongst other things, privileges. The Commissions recommended that the uniform Evidence Acts be amended to provide for a professional confidential relationship privilege modelled on the existing privilege in the New South Wales *Evidence Act 1995* which includes communications made to doctors and other health professionals, journalists, social workers and in other relationships where confidentiality is an integral element. This recommendation was endorsed by the Standing Committee of Attorneys-General (SCAG) Ministers in July 2007.

Following the Commissions recommendation, the Commonwealth adopted a variant of the model provision in its Evidence Act through the *Evidence Amendment (Journalists Privilege) Act 2007* but applied it exclusively to communications made by a person in confidence to a journalist only. The Bill, like its predecessor, again fails to extend coverage of a privilege to more general relationships in society which involve communications made to a person acting in a professional capacity and under an obligation of confidence, as recommended by the Commissions. Introduction of legislation, which departs from the recommended model agreed to previously by SCAG Ministers, prior to reconsideration of the issue at the April SCAG meeting, impedes the delivery of uniformity in evidence law.

- *Automatic loss of privilege on grounds of misconduct*

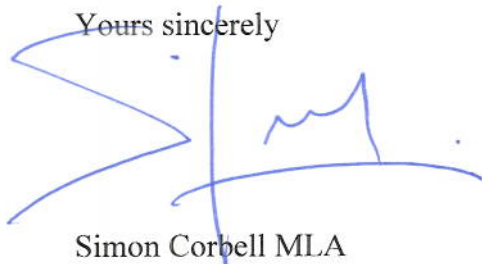
The *Evidence Amendment (Journalists Privilege) Act 2007* inserted a provision to provide that the privilege does not prevent the adducing of evidence of a communication made, or the contents of a document prepared, in the furtherance of the commission of a fraud, or an offence, or the commission of an act that renders a person liable to a civil penalty. The Bill would remove this automatic loss of privilege on the grounds of misconduct. This amendment would enable the possible application of journalists' privilege to cases where the communication between a journalist and their source is itself an offence.

All other statutory privileges, including client legal privilege (formally known as legal professional privilege) and sexual assault communications privilege, contain an automatic loss of privilege on the grounds of misconduct. These privileges involve the protection of important public interests: client legal privilege – enhancing the administration of justice and the proper conduct of litigation by promoting free disclosure between clients and lawyers; and sexual assault communications privilege – protecting the public interest in supporting and treating victims of sexual assault, and the public interest in encouraging reporting of sexual assault. Even where such important interests are at stake, the privilege is lost where there has been misconduct.

I am concerned that the Commonwealth has not formulated a strong argument to explain why the interests, which are protected by journalist shield laws, are afforded a higher level of protection than the interests protected by other privileges, given the differences which exist between journalists and other professional groups. Medical and legal practitioners operate within heavily regulated professions and are therefore subject to stringent quality control. Journalists, on the other hand, are not required to comply with professional registration or standards in order to practice their profession. Where medical or legal practitioners engage in professional misconduct they can face serious repercussions including suspension and de-registration. Where journalists fail to observe the Australian Journalist's Association's code of ethics, they too can face expulsion. However, membership to the Association is not a pre-requisite to the practice of journalism and therefore expulsion would not prevent the journalist from continuing to practice as a journalist.

I would like to thank the Committee again for providing the ACT Government with the opportunity to provide a submission to the parliamentary inquiry into the Evidence Amendment (Journalists' Privilege) Bill 2009.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Simon Corbell', with a large, stylized flourish extending to the left.

Simon Corbell MLA
Attorney General