



**AUSTRALIAN
PRESS
COUNCIL**

SUBMISSION

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**Australian Press Council Submission to the
Senate Standing Committee on Legal and Constitutional Affairs'
Inquiry into the *Evidence Amendment (Journalists' Privilege) Bill 2009***

Executive Summary

- The Australian Press Council welcomes efforts to strengthen the protection for journalists whose ethics prevent them from disclosing the identities of their confidential sources of information.
- To be an effective measure to protect journalists who refuse to disclose their confidential sources of information, legislation should include a rebuttable presumption that journalists cannot be compelled to do so.
- The presumption should be rebuttable on presentation of evidence that the disclosure is in the public interest and that, in the circumstances, the public interest served by the disclosure outweighs the public interest in access to information that would be served by the non-disclosure of the confidential source of the information.
- The proposed objects clause is an improvement but does not go far enough.
- The Australian Press Council welcomes the strengthening of s126B(4) of the *Evidence Act*.
- The Australian Press Council welcomes the inclusion of journalists within the scope of s126B(3) of the Act.
- The Australian Press Council welcomes the removal of s126D of the *Evidence Act*.
- Journalists' shield laws are only effective when combined with adequate whistleblower protection legislation.

Submission

The Australian Press Council welcomes the opportunity to comment on the *Evidence Amendment (Journalists' Privilege) Bill 2009*. The Press Council acknowledges that the government is moving in the right direction in strengthening the protection of journalists who feel obliged by their professional ethics to protect their sources of confidential information. However, the Press Council is of the view that the government ought to go further, and introduce legislation that creates a presumption that a journalist is not required to disclose the identity of a confidential source unless there is a compelling reason warranting such disclosure.

Members of the Committee will be aware that Gerard McManus, who was convicted of contempt in 2007 for refusing to disclose a confidential source, was refused a US visa on the basis of that conviction. Committee members will also be aware that the refusal has caused disruption to Mr McManus in his professional life and also great inconvenience to his employer. Similarly, Michael Harvey and his wife, Cynthia Banham, can expect to have their career opportunities curtailed as a result of Harvey's conviction for contempt.

The case of Harvey and McManus emphasises the importance of having in place legislation which prevents journalists from having to choose between their professional ethical obligation to protect their confidential sources, on the one hand, and their personal self-interest, on the other.

The Press Council recognises that, in introducing the *Evidence Amendment (Journalists' Privilege) Bill 2009*, the government is moving in the right direction. However, the Press Council urges the government to go further, and introduce legislation that will provide a true protection for journalists and their sources.

There are several aspects of the proposed amendments that will contribute to the entrenchment of the existing protection for journalists and their sources. In particular, the proposed insertion of an Object clause into the legislation, which will ensure that courts exercise their discretion in a manner that seeks to give equal weight to both the public interest in communication to and by the media, as well as the public interest in the administration of justice, is a move in the right direction - but does not go far enough, as noted below

The proposed amendment of s126B(3), whereby the risk of harm to a journalist (if it outweighs the value of the evidence) will from now on be the basis upon which a court is obliged to make a direction that evidence not be adduced, where until now the relevant risk was confined to that of harm to the confidential source, is of especial merit, since it goes beyond merely providing the court with a discretion, and provides the court with guidance as to how that discretion ought be exercised, in a manner consistent with the ideal of free communication in the public interest.

The strengthening of s126B(4), which will obligate the court to consider a range of factors which until now the court has had a discretion as to whether or not to take into account, will also increase the level of protection provided to journalists seeking to protect their sources, as will the inclusion of journalists within the scope of ss126B(4)(e). The Press Council also welcomes the removal of s126D.

The Press Council is encouraged by the government's initiative. However, the Press Council is nonetheless of the view that in order to provide a true protection for journalists who feel compelled to protect the identities of their confidential sources of information, the government should go further. The Hon. Robert McClelland, in his second reading speech on the Bill, acknowledged the long-standing position of the Press Council (and most media

organisations) when he referred to the legislative provisions of New Zealand and the UK and their presumptions in favour of protecting journalists' privilege. The Press Council remains committed to the introduction of legislation that establishes a rebuttable presumption that a journalist cannot be compelled to identify the sources of their information, if to do so would breach a confidential relationship and thereby violate professional ethical standards. Such a presumption should only be rebutted where the party seeking to have the evidence adduced can present compellable reasons to do so, such as where the failure to disclose the identify of the source would present a serious threat to the health or safety of the public or to security. It ought not be regarded as sufficient to rebut the presumption if the only benefit from the identification of the source is to assist in the investigation, or prosecution, of an alleged source of the confidential information.

In spite of the Press Council's firm view that a rebuttable presumption is essential, the Council nevertheless welcomes the proposed amendments and encourages the government to continue with reforms designed to increase the free flow of information to the public. The Council applauds the government's endeavours with regard to whistleblower protection and Freedom of Information. For government to be truly accountable to the people, none of these measures by themselves will be adequate, but all three together offer the hope of government that is genuinely open.

The Australian Press Council

The Australian Press Council is a voluntary association of organisations and persons established on 22 July 1976. The membership of the Council is set out in the attachment.

The objects of the Australian Press Council are to promote freedom of speech through responsible and independent print media, and adherence to high journalistic and editorial standards, by:

- considering and dealing with complaints and concerns about material in newspapers, magazines and journals, published either in print or on the Internet;
- encouraging and supporting initiatives by the print media to address the causes for readers' complaints and concerns;
- keeping under review, and where appropriate, challenging political, legislative, commercial or other developments which may adversely affect the dissemination of information of public interest, and may consequently threaten the public's right to know;
- making representations to governments, public inquiries and other forums as appropriate on matters concerning freedom of speech and access to information;
- undertaking research and consultation on developments in public policy affecting freedom of speech, and promoting public awareness of such issues;
- promoting an understanding of the Objects, Principles and workings of the Council especially among editors, journalists and journalism schools, through forums and consultations; and encouraging feedback for Council's consideration.

The Australian Press Council

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Alan Kennedy

Panel of Editor Members (2 members of whom 1 attends each meeting)

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Executive Secretary (non voting)

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For details and biographies see:

<http://www.presscouncil.org.au/pcs/site/about/members.html>