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SUBMISSION TO THE SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS' INQUIRY INTO THE EVIDENCE AMENDMENT (JOURNALISTS' PRIVILEGE) BILL 2009

April 2009

1 Preliminary comments

1.1 Australian Associated Press ("**AAP**") welcomes the opportunity to make a submission to the Senate Standing Committee on Legal and Constitutional Affairs in connection with its inquiry into the *Evidence Amendment (Journalists' Privilege) Bill 2009* (the "**Bill**").

1.2 AAP, the national news agency, provides all Australian media with balanced, accurate, fair and independent news coverage of all events that shape, enthral and inform Australia. Established by competing news organisations 75 years ago, AAP sits as a pillar of independence, free of political agenda or commercial bias. Beholden to no-one it provides the Australian media and private and public sectors with an unbiased, reliable, comprehensive news and information resource.

1.3 We strongly believe a free press is core to a democratic civil society. By maintaining the free flow of information within the public arena, press freedom prompts and nurtures public opinion and facilitates vigorous and informed debate on society's key issues. Accurate and responsible investigative journalism opens the window on corporate and government operations and plays a key role in exposing and curbing corruption and abuse of power. This scrutiny promotes open and accountable government.

1.4 Journalists' shield laws provide journalists with effective and practical protection from the compulsion to disclose the identity of sources who wish to remain anonymous. Critically, the laws enable would-be sources to trust journalists with information on matters of public interest. Journalists' shield laws are the bedrock of democracy not for their own sake, but due to the broader public interests they serve.

1.5 AAP endorses any efforts by the Government to strengthen the protection of journalists against compulsion to reveal confidential sources. It commends the following improvements to the *Evidence Act 1995 (Cth)* (the "**Evidence Act**") introduced by the Bill:

(a) *inclusion of the likely harm to be suffered by journalists, as well as their sources, as a result of disclosure as a relevant consideration for the Court in ordering disclosure*. AAP believes this recognises the significant damage that disclosure of sources does to a journalist's professional reputation and how it curbs his or her ability to obtain information from anonymous sources in the future. This amendment also recognises the potential harm to be suffered by journalists who risk prosecution and conviction for contempt should they maintain the confidentiality of their sources in breach of a Court order to disclose.

(b) *amendment of the current provisions to the effect that the risk of prejudice to national security will become one of a number of factors to be considered and weighed up by the Court* rather than one that automatically "trumps" all other considerations.

(c) *removal of the mandatory loss of journalists' privilege for communications made in contravention of the law*. AAP considers that section 126D of the *Evidence Act* is an unduly harsh and unjust provision that is a practical barrier in most instances where a claim for journalists' privilege might arise. We strongly support its removal.

(d) *extension of the journalists' privilege provisions in Division 1A and section 131A of the Evidence Act to all court proceedings governed by Commonwealth*

legislation. AAP considers this to be an important step in maintaining consistency and certainty in the application of the journalists' shield provisions.

1.6 Despite these positive elements, AAP considers the Bill in its current form does not go far enough in protecting journalists. It does not fully meet the Government's stated policy objectives of *strengthening* the legislative protection offered to journalists against compulsion to reveal confidential sources and striking an appropriate balance between competing public interests in press freedom and the administration of justice.[1] AAP submits that the Bill simply maintains the status quo of inadequate protection[2] rather than strengthening it.

1.7 AAP acknowledges the tension between press freedom and the interests of justice is a complex issue and draws the Committee's attention to what it sees to be the practical limitations of the Bill and aspects of it that could be further improved. These are detailed below in paragraphs [2] to [7]

2 Introduction of a rebuttable presumption in favour of maintenance of journalists' privilege

2.1 AAP urges a Committee recommendation to amend the Bill to enshrine a rebuttable presumption that a journalist is not compelled to answer questions or produce documents that would disclose a protected confidence or protected identity information unless the party seeking disclosure rebuts the presumption by establishing that any harm likely to be suffered by the journalist, the confider or any other individual, as well as any harm to the public interest in freedom of the press and media access to sources[3] is outweighed by the necessity for the information to be disclosed in the interests of justice.

2.2 The onus of proving that disclosure is necessary should properly rest with the party seeking disclosure. The practical effect of maintaining the current position, whereby the onus is on the journalist to prove that his or her source should be protected, is that, unlike equivalent legislation in New Zealand, the United Kingdom and the United States, the *Evidence Act* will not confer any true right to resist disclosure and will not offer any additional protection than that already offered at common law under the Newspaper Rule.[4] Therefore, it will not achieve the Government's stated legislative intention of strengthening the protection afforded to journalists.[5]

2.3 Journalists do not take their professional obligation to maintain the confidentiality of sources (even at the risk of being found guilty of contempt of court and incarcerated) lightly and do not put themselves under such an obligation without due consideration. The Media, Arts and Entertainment Alliance Code of Ethics requires journalists to:

"[a]im to attribute information to its source. Where a source seeks anonymity, do not agree without first considering the sources' motives and any alternative attributable source. Where confidences are accepted, respect them in all circumstances."

Similarly, in AAP's experience, sources do not seek anonymity without good reason. Therefore, given the appropriately broad definition of "harm" in section 126A of the

[1] See Second Reading Speech of Hon. Robert McClelland MP - Attorney General

[2] *R v Gerard Thomas McManus and Michael Harvey* [2007] VCC 619

[3] See Part 3 of this submission, below

[4] *John Fairfax & Sons v Conjuangco* (1988) 165 CLR 346

[5] See Second Reading Speech of Hon. Robert McClelland MP - Attorney General

Evidence Act, a court will almost certainly find that some harm would occur if a source is disclosed. By the same token, parties in legal proceedings do not seek disclosure of protected confidences or identifying information without good reason. Therefore a court is also almost certain to find that there would be some prejudice to the interests of justice in allowing non-disclosure. A presumption that disclosure is not necessary will ensure that confidences are respected unless there is a compelling overriding public interest imperative not to do so and will as a result tangibly strengthen the journalists' privilege.

3 Explicit consideration of harm to other individuals and to the public interest at large

3.1 As noted above, AAP strongly supports the insertion of harm to be suffered by a journalist as a relevant consideration in the exercise of the Court's discretion. However, AAP considers that the Bill should be amended so that harm to *"any other person"*, as well as harm to *"the public interest in the media communicating facts and opinion to the public and, for that purpose, having access to sources of facts"*[6] is also included in section 126B(3)(a) and 4(e) of the *Evidence Act*.

3.2 A requirement to take into account harm to "*any other person*" would direct the Court to consider (where relevant) harm to the families of the confidant and of the journalist, to colleagues of the journalist or confidant, to a third party that put the journalist in contact with the confidant or to any other third party that may be adversely affected by the disclosure. Such an amendment would reflect a recognition that the harm suffered as a result of disclosure of a confidential source may go beyond the journalist and his or her source and that in practice, journalists often have complex networks of relationships with sources and colleagues.

3.3 AAP supports the recognition of the public interest in journalists having access to sources in the objects of Division 1A of the *Evidence Act* but believes that to have any real effect, this consideration should be given explicit recognition as a factor to be weighed by the court in section 126B(4) of the *Evidence Act* . This reflects the approach taken by New Zealand's *Evidence Act 2006*[7] and the US *Free Flow of Information Act 2007*.[8]

3.4 Inclusion of harm to the public interest as a factor in section 126B(4) would send a clear message to Courts that broader harm to the public interest in press freedom can outweigh the interests of justice in a particular case. As Lorraine Ingram observes *"once one or two journalists gain a reputation for betraying confidences the entire profession is tainted and sources potentially dry up for everyone"*[9], this creates a chilling effect that is detrimental to both the journalistic profession and the public interest in the free flow of information. Conversely, when journalists are seen to maintain confidences, this sends a message to other potential sources that they can trust journalists.

3.5 If courts are not specifically mandated to consider this wider impact (rather than just the facts of the particular case before them) they will almost certainly find that a source should be disclosed, as demonstrated by the decision in the McManus and Harvey case.[10]

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[6] See proposed section 126AA

[7] s68(2) *Evidence Act 2006 (NZ)*

[8] *Free Flow of Information Act 2007* section 2(4)

[9] Ingram, L *"Australian Shield Laws for Journalists: A Comparison with New Zealand the United Kingdom and the United States"* at http://www.cla.asn.au/Article/ShieldLaws.pdf

[10] *R v Gerard Thomas McManus and Michael Harvey* [2007] VCC 619

4 Consideration of whether prior disclosure is inconsistent with maintenance of confidentiality

4.1 AAP submits that the section 126B 4(h) factor which requires the court to consider whether the relevant protected confidence or identity information has been disclosed should be amended to explicitly specify that what the Court must consider is not whether the information has been disclosed at all, but whether it has been disclosed in a manner which is inconsistent with maintenance of the confidentiality of the protected confidence or identity information.

4.2 This will bring the legal protection of journalists' sources into line with the common law protection of confidential information, which does not automatically abrogate protection when information is disclosed, but considers whether the *"necessary quality of confidence"* has been maintained despite the disclosure[11] and the principles relating to waiver of client legal privilege[12] which dictate that disclosure does not automatically waive privilege; rather the Court must consider *"whether the particular conduct is inconsistent with the maintenance of the confidentiality which the privilege is intended to protect"*[13]

4.3 In practice, within a large media organisation, information regarding a confidential source can and often will be disclosed by journalists to Colleagues (reporters, editors and management as well as in-house and outside legal counsel) for the purpose of preparing and checking stories, without losing its confidential quality. The legislation should recognise that such disclosure is not inconsistent with the continued maintenance of the confidence. To do otherwise would dissuade journalists and media organisations from seeking advice and scrupulously checking stories based on information provided anonymously.

5 Communication in breach of the law as a factor in abrogating privilege

5.1 In practice, given the prohibitions in the *Crimes Act 1914 (Cth)* and the plethora of secrecy laws on the federal statute books, almost all cases of unauthorised release of Commonwealth information will involve the commission of an offence, particularly given the absence of any Commonwealth legislative protection against civil or criminal penalties for Commonwealth public servants that disclose information to the media.[14]

5.2 As stated above, AAP applauds the removal of 'misconduct' as an automatic bar to application of the journalists' privilege. However AAP believes that the Bill should go further in this regard. AAP submits that the Committee should recommend that the Bill be amended so that the question of whether evidence sought from a journalist concerns a communication made or document prepared in furtherance of fraud, an offence or an act subject to civil penalty (s126B(4)(i) of the *Evidence Act*) should only be considered by a Court where the relevant protected confidence or protected identity information is a fact in issue in the proceedings.

5.3 In other words, AAP believes that the issue of whether or not the confidant committed an offence or other breach of the law in communicating with the journalist should only be a relevant consideration if proceedings are brought against the confidant for the relevant

[11] Coco v A N Clark (Engineers) Ltd [1969] RPC 41

[12] ss 118 ,119, 120 and 122 *Evidence Act 1995 (Cth)*; *Mann v Carnell* (1999) 201 CLR 1

[13] *Mann v Carnell* (1999) 201 CLR 1 at 13 [29]

[14] See s 16 *Public Service Act 1999 (Cth)* for the limited protection available to Commonwealth whistleblowers

breach. Given that the Government's objective in conferring privilege on journalists is to balance the public interest in the administration of justice against the public interest in press freedom[15], and that the court is required to weigh up the harm that might be caused against the need for the evidence to be given[16], it seems clear that the intention of the Bill is to facilitate an appropriate balance between completing public interests and to *protect* confiders where possible, rather than to have a *punitive* effect on confiders. There appears to be no compelling reason why an unrelated breach of the law by the confider in providing information to a journalist should be a relevant consideration, unless the confider is being prosecuted for the relevant breach.

6 Provision for partial disclosure and for limits on access to information disclosed

6.1 AAP submits that the Bill should be amended to include a provision in section 126(E) of the *Evidence Act* to the effect that where a court declines to give a direction that the source not be revealed, it may order disclosure of only part of the protected confidence or protected identity information at issue if that would be sufficient to satisfy the interests of justice in the proceedings.

6.2 For instance, it may be sufficient in the circumstances of the particular proceedings for a journalist to divulge the substance of what was said by the source, but not details enabling identification of the source. The interests of justice may be served by the journalist identifying in broad terms the position or role of the source within a certain department or organisation without identifying the particular individual.

6.3 In addition, AAP believes that section 126(E) should also be amended to allow a Court to impose access controls on information and documents disclosing protected confidences and/ or protected identity information (such as orders that the information and documents may only be accessed by outside counsel), in the same manner as courts presently impose access controls on commercially confidential information that is discovered or produced on subpoena.

6.4 These amendments would give Courts the flexibility to further minimise and mitigate against any harm that would result from disclosure of a confidential source.

7 Whistleblower protection

7.1 AAP notes the Attorney-General's comment that the Government intends shortly to introduce legislation relating to protection of whistleblowers.[17] AAP welcomes this initiative and notes that there is a significant degree of interplay between the operation of journalists' shield laws and whistleblower protection. The fact that Commonwealth legislative protection of whistleblowers is currently extremely weak and limited means that any compulsion to divulge the identity of sources would operate all the more harshly.

8 Further consultation

8.1 AAP thanks the Committee for considering its views on the Bill and welcomes the opportunity to appear before the Committee. To arrange for AAP to do so, please contact AAP's General Counsel, Ms Emma Cowdroy, on (02) 9322 8056 or email cowdroye@aap.com.au.

[15] Proposed section 126AA

[16] Section 126B(3)

[17] See Second Reading Speech of Hon. Robert McClelland MP - Attorney General.