



LLM PhD

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

I am a journalism educator, researcher and freelance journalist and co-author (with Mark Polden) of *The Journalist's Guide to Media Law* – 4th edition (Allen & Unwin, Sydney, 2011). I am also Australian correspondent for *Reporters Sans Frontières*, a member and past president of the Journalism Education Association Australia and a member of the Australian Council of Journalism Professors. This submission presents my personal view and is not meant to represent the position of my institution. Neither does it represent the official position of any of the above organisations, although I have canvassed the views of colleagues at each of the above organisations in preparing it.

Firstly, I endorse the comments of the Australian Press Council in its submission supporting shield laws for Australian journalists. Three reporters have been jailed in recent decades for refusing to answer questions in court on ethical grounds; others have been fined, given suspended sentences, or have been threatened with such measures; and countless others have been impeded in their work because of the perceived risk of using information provided by a whistleblower.

Internationally, there have been numerous legislative approaches to the notion of the 'shield law', from the very general protection of professional confidences through to the very specific protection like that proposed here.

My submission begins by supporting the proposed legislation as the default position for the same reasons articulated in the Australian Press Council's submission, then proceeds to suggest a further measure to broaden the protection for those practising journalism but who many not be working in the mainstream news media.

1. **Default position: Pass the legislation as drafted rather than risk losing the shield law for Australian journalists working in the news media.** This is an historic proposal in media law in Australia and will hopefully set a legislative precedent for other jurisdictions. The rebuttable presumption in favour of a journalist's privilege is a welcome development and involves a reasonable balancing process weighing the respective public interests at stake.
2. **In the event that minor amendments are being introduced, that the definition of 'journalist' be broadened to encompass journalism academics, retired journalists, freelance journalists and journalism students.** This could be achieved by the deletion of the words 'who in the normal course of that person's work' from the definition of 'journalist' under the legislation. The current phrasing seems to rule out the above groups, combined with clause 8 of the Explanatory Memorandum which states 'This means that the journalist should be employed as such for the privilege to operate, and private individuals who make their postings on the internet or produce non-professional news publications, where this is not their job, will not be covered by section 126H'. Many journalism educators produce high quality investigative journalism, either in book, feature or news form, although this may be occasional and not 'in the normal course of their work'. Further, journalism students at scores of tertiary programs throughout the country produce high quality media products, often featuring investigative stories which might rely on confidential sources, and often on an unpaid basis. The above groups invariably ascribe to the same ethical codes as working journalists. In fact, in many cases their work is even more driven by ethical and social justice principles and their journalism has more of an investigative quality than that of many mainstream reporters because of the time they are able to devote to it. If the committee is concerned that this casts too wide a net, supplementary wording along these lines would be an alternative: *"Where such individuals are not in paid employment in the news media they would need to prove to the court that, on the balance of probabilities, they identify as journalists and ascribe to a journalist's ethical obligation of confidence to their sources."*

There may be other devices proposed that achieve this end, and I am sure my colleagues would be equally supportive, but we would not want the spirit and momentum of the current proposal to be lost in the process.

Yours sincerely,

Professor Mark Pearson