Attorney General; Minister for Corrective Services

Our ref: 35-03292

The Secretary
Senate Standing Committee on Legal and Constitutional Affairs
Parliament House
CANBERRA ACT 2600

E-Mailed: legcon.sen@aph.gov.au

Dear Secretary

Evidence Amendment (Journalists' Privilege) Bill 2009

Thank you for notifying the Western Australian government of the Senate Inquiry into the above Bill and seeking submissions.

In my capacity as Attorney General of Western Australia, I offer the Standing Committee the following comments by way of submission to the Committee's Inquiry.

Summary

1. The Bill achieves three principal changes to the existing privilege provided for under ss.126A-126F of the *Evidence Act 1995* (Cth) (the **Existing Privilege**). The changes concern:

    a. the circumstances in which privilege is lost;
    b. consideration of the harm that a journalist could suffer, as distinct from the harm that the confidential source could suffer, if the evidence is given; and
    c. the proceedings in which the privilege may be claimed.

2. These changes are effected to a privilege that, in its current form, applies over confidential communications made to journalists only.

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3. Each of these three changes, and the existing narrow scope of the privilege (applying to journalists only, a feature of the Existing Privilege which the Bill does not change), is problematic and requires comment.

Claims for privilege over communications constituting criminal acts

4. The Existing Privilege in s.126D provides for the automatic loss of privilege where the communication in question is made in the furtherance of a fraud or an offence or an act attracting a civil penalty.

5. The Bill would delete s.126D.

6. The result of this amendment is that the privilege may apply over communications that constitute a criminal offence, fraud, or other forms of misconduct.

7. This change is inconsistent with the law of privilege in other contexts, will have serious and unfortunate consequences, and cannot plausibly be justified by recourse to arguments that the journalist-source relationship requires special protection from the law.

8. Automatic loss of privilege where the communication is fraudulent or constitutes a criminal offence is a standard component of common law and statutory privileges that apply in Australia. For example, privilege (framed as an 'immunity' in some jurisdictions) in communications between the alleged victim of a sexual assault and a medical professional is automatically lost where the communication is criminal or fraudulent.

9. The Explanatory Memorandum justifies this amendment on the basis that the relationship between journalists and their confidential sources is unique, in that the very act of communicating with a journalist can constitute an offence.

10. It is incorrect to state that this is a "unique" feature of the relationship between journalists and their sources. For example, a communication made by a person to a legal adviser could constitute or further a criminal offence if it was intended by that communication to interfere with evidence concerning court proceedings. It is for this reason that the common law has provided for the loss of privilege in such cases, which is no doubt one reason for such criminal and improper communications being very rare.

11. However, it is correct to state (as is implied in the Explanatory Memorandum) that there are a range of offences or misconduct, that would prohibit confidential communications likely to be made to journalists. Those offences include serious crimes such as the theft of documents containing information, breaches of privacy, and breaches of confidentiality, including the unauthorised disclosure of official information.

12. A privilege prevents the courts and the parties to litigation and criminal matters from gaining access to relevant evidence in pursuit of a truthful

account of the facts. It is simply not appropriate to create a privilege that effectively provides a cover to criminal activity. The abolition of automatic loss of privilege is effectively an invitation to engage in, or an endorsement of the existing practice of, criminal acts, fraud and misconduct.

13. If, as the Explanatory Memorandum states, the rationale is to safeguard the free flow of information, then the appropriate and logical response would be to consider whether or not some exception should be created to the offences that are most likely to interfere with that flow of information. It is simply illogical to maintain that a privilege should apply to conceal conduct that is said to have public value, while still maintaining that the conduct is unlawful. This Bill does not attempt any such revision of the substantive criminal law. The offences will remain as part of the law, expressing the will and policy of the Australian Parliament. Until such a revision occurs, the law of evidence should not be developed to provide special protection or endorsement of criminal conduct, thereby embodying a double standard.

14. The Bill provides (in addition to deleting s.126D) that if the communication in question did constitute an offence, fraud or an act attracting a civil penalty, that fact is a matter to be taken into account by the court in deciding whether or not the privilege ought to apply. The inclusion of this new factor is not an adequate or satisfactory substitute for the automatic loss of the privilege currently enacted in s.126D.

15. It is, incidentally, unclear as to whether this new factor is to be a factor favouring the application of the privilege, or whether this factor weighs against the application of the privilege. Common sense and the legal framework applying over other privileges give reason to hope that the factor would weigh against the privilege. However, the policy that evidently underpins the Explanatory Memorandum is that such criminal conduct is in fact the conduct that the privilege ought to protect, for the purpose of protecting the free flow of information. Notably, that purpose is now to be enshrined in proposed s.126AA(b). A plausible argument of statutory interpretation could later be made in court proceedings that the Bill intends to remove any restriction on the application of the privilege over criminal or wrongful communications. The Bill is therefore unclear on a critical matter.

16. Even if the common sense interpretation is taken (or enshrined through amendments to the Bill) the law is best expressed definitively, rather than in the legal mechanism of a judicial balancing exercise between a list of factors. The Bill proposes that the status of a communication as criminal, fraudulent or wrongful is but one of many matters to be weighed. It could be said that communications constituting more serious criminal offences would be unlikely to attract the protection of the privilege. Even if the application of the privilege is unlikely, however, the loss of the privilege should not be left in doubt. To do so would only encourage those who are contemplating unlawful disclosures to test the limits of the law. The inclusion of criminal activity, fraud or misconduct as only one of a multitude of factors instils this doubt and uncertainty and undermines the clarity and deterrence that the criminal law should reflect.

Narrow extent of privilege and concept of harm to the journalist (confidant)

17. The Existing Privilege may apply only in respect of confidential communications made to a journalist acting in a professional capacity.

18. No attempt is made in this Bill to broaden the protection of this privilege to other professional confidential relationships, such as that between a doctor and a patient. Further, no attempt has been made in this Bill to define the term "journalist". These are lost opportunities, leaving deficiencies in legislation that was passed with undue haste in the first instance.

19. It is not appropriate for the law to single out journalists and their confidential sources for special protection, while relationships between recognised professions and their clients receive no privilege. The law ought to recognise the public interest in professional confidential relationships generally. The New South Wales professional confidential relationships privilege does not discriminate between different vocations or professions in the way that the Existing Privilege does: see *Evidence Act 1995* (NSW), s.126A-126F. The New South Wales provisions are framed to focus on the confidence in which the communication was made, and the professional nature of the relationship, rather than establishing the vocation of the confidant as the test for the application of the privilege.

20. The New South Wales model of providing a general privilege for communications made in the course of confidential and professional relationships (without distinction between different occupations) is also a useful mechanism for avoiding a difficult and unnecessary problem of definitions in the Existing Privilege.

21. The Existing Privilege does not define the term "journalist". Yet the term has a flexible and contentious meaning, and the practice of journalism is rapidly changing. It is not possible to define journalists in the way that lawyers or doctors are usually identified, such as by reference to qualifications or compulsory professional vetting or affiliation. The label of "journalist" is really one that depends more on self-identification than on any other factor. Many examples immediately arise: should a person publishing in an amateur capacity on an internet weblog be accorded the status of "journalist"? What if that person's writings are a diet of opinionated political commentary, idle and malicious gossip, and trivia, well spiced with character assassination and libel? Some courts would conceivably think that such contributions are not worthy of the epithet "journalism", whereas other courts would take a more liberal view. Would the status of persons employed to report by news media organisations then depend, also, on the quality and nature of their work.

22. Such uncertainty is unnecessary and unsatisfactory.

23. This amending Bill gives an opportunity to introduce a definition or to propose factors to guide courts applying the privilege. The Bill in its current

form avoids a difficult and controversial, but crucial, question of policy by leaving the definitional issue to the judiciary.

24. The Bill proposes also (under ss.126B(3)(a) and (4)(e)) that the possible harm to the journalist (confidant) from the evidence being given is also a factor to be considered by the Court. What this harm would entail is difficult to contemplate. In any case, the privilege (like all privileges) properly belongs to the confider, not the confidant, for the protection and benefit of the confider and the relationship of confidence. The effect of disclosure on a journalist is irrelevant and should receive no weight as a factor weighing against the evidence being given.

Application of a non-uniform privilege by State courts

25. The Bill provides for this privilege to apply in all proceedings, under proposed s.131B. Generally, the *Evidence Act 1995* of the Commonwealth applies only in proceedings in Federal courts and courts of the Australian Capital Territory: *Evidence Act 1995* (Cth), s.4.

26. The result is that State courts, which are responsible for hearing Commonwealth criminal matters, will be required to apply a substantive rule of evidence different from that which the courts would otherwise apply. Two contradictory evidentiary regimes – concerning a substantive and contentious privilege – will be applied.

27. There is, accordingly, a greater risk of confusion or error from the external application of the privilege in State courts.

28. The extended operation of the journalist's privilege in State courts in this manner is contrary to the general scheme of evidence law arrangements between the Commonwealth and the States. Those provisions of the Commonwealth *Evidence Act 1995* that presently do have extended operation in State courts are of an entirely different character and purpose from this privilege: see the Table in s.5, and s.131A, *Evidence Act 1995* (Cth).

29. The extended operation of the privilege into State courts operating under different evidentiary rules also illustrates a larger and more important problem that the Bill as a whole creates between the States and the Commonwealth.

30. The question of the privilege available to journalists and their confidential sources is a matter in which the Standing Committee of Attorneys General (**SCAG**) has recently taken a serious interest. At the last SCAG meeting in November 2008, Ministers agreed to seek advice on the options for reform of this part of the law from an intergovernmental expert working group. The reason for SCAG doing so was to facilitate, if possible, the creation of a uniform or harmonised privilege for journalists. It would obviously be preferable for law reform to be coordinated among different jurisdictions,

providing certainty and simplicity for journalists and the public, and to prevent forum shopping.

31. The introduction of the amendments in this Bill pre-empt the orderly consideration of options for reform by Ministers at the forthcoming SCAG meeting later this month.

32. The Commonwealth government's rejection of the SCAG process, and its unilateral decision to introduce its preferred option prior to proper discussion of the different options among jurisdictions makes harmonised or uniform laws less likely.

33. It is a matter of considerable regret that it is necessary for me to communicate my views on the Bill at this legislative stage, rather than directly with my counterparts in the different jurisdictions.

34. It would be preferable for consideration of this Bill to be deferred – or the Bill to be withdrawn altogether – pending discussions among jurisdictions through the SCAG process.

Yours sincerely

Hon C. Christian Porter MLA
ATTORNEY GENERAL

28 APR 2009