**SUBMISSION BY**

**MEDIA, ENTERTAINMENT & ARTS ALLIANCE**

**TO**

**SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS**

**REGARDING**

***EVIDENCE AMENDMENT (JOURNALISTS' PRIVILEGE) BILL* 2009 (COMMONWEALTH)**

**The Media, Entertainment & Arts Alliance**

The Media, Entertainment & Arts Alliance (Alliance) is the industrial and professional organisation representing the people who work in Australia's media and entertainment industries. Its membership includes journalists, artists, photographers, performers, symphony orchestra musicians and film, television and performing arts technicians.

**Executive Summary**

The Media, Entertainment & Arts Alliance ("the Alliance") believes that the role of journalists in the disclosure of important information in the public interest must be protected at law. Journalists are required by their professional Code of Ethics[1] to protect the confidentiality of their sources. However there is no recognition of this fundamental ethical obligation in the *Evidence Amendment (Journalists' Privilege) Bill 2009 (Cth)* ("*the Bill*") nor is there any protection provided to journalists who risk criminal sanctions if they refuse to divulge the sources of their information.

This lack of protection will inevitably flow through to the willingness of sources to divulge important information in the public interest and flies in the face of journalists' acknowledged role in informing the public on such matters.

The Alliance believes more weight should be given to a presumption in favour of journalists and their sources which would bring the Commonwealth in line with countries such as the United States, UK, Germany and New Zealand, where the Evidence Act, 2006 has as its starting point the protection of journalist-source confidentiality.

The Alliance believes that the proposed Commonwealth shield law should incorporate an overarching statement of the spirit of the law that favours journalist-source confidentiality protection.

[1] ALLIANCE Journalists' Code of Ethics, http://www.alliance.org.au/code-of-ethics.html

**Introduction**

The Alliance thanks the Senate Standing Committee on Legal and Constitutional Affairs for the opportunity to take part in its inquiry into the *Evidence Amendment (Journalists' Privilege) Bill 2009*.

The Alliance is an active partner in the Australia's Right to Know Coalition (ARTK Coalition), which represents 12 of this country's big media organisations. However, as the trade union and professional association representing Australia's journalists, performers, technicians and symphony orchestras, it is important that we properly register the views of our broader membership.

This submission addresses the stated aim of the Bill to strengthen journalists' shield laws and takes into account the Explanatory Memorandum accompanying the Bill and the Commonwealth Attorney-General, Hon Robert McClelland's accompanying Media Release.[2]

[2] Commonwealth Attorney-General, Hon Robert McClelland, "Government delivers commitment on journalist shield laws", *Media Release*, 19 March 2009.

**The draft bill**

The Alliance believes that the Bill does not introduce significant new provisions to protect journalists' confidential sources. The Bill misses an opportunity to introduce substantial amendments to favour the protection of journalists' confidential sources.

The objective of the Bill states:

> *"The object of this Division is to achieve a balance between:*
> *(a) the public interest in the administration of justice; and*
> *(b) the public interest in the media communicating facts and opinion to the public, and for that purpose, having access to sources of facts."*[3]

The provision stands in sharp contrast to the Media, Entertainment & Arts Alliance Code of Ethics:

> *"Where confidences are accepted, respect them in **all circumstances**".*[4]

This obligation is, however, qualified by the following Guidance Clause:

> *"Only **substantial** advancement of the public interest or risk of **substantial** harm to people allows any standard to be overridden".*[5]

The Bill, on the other hand, does not acknowledge the tilt in the balance in favour of journalist-source confidentiality protection in the way that the Code does which the reference to "substantial" in the Alliance's Code provides.

Under this Bill there is no requirement on the courts, when exercising their discretion, to give priority to journalists' confidential sources.[6] That balance could be tilted in favour of the latter if this clause, for instance, required the court to take into account *and to give priority* to those things that the Minister spoke about in his Media Release, for example, to:

> *(a) "[recognise] the important role that the media plays in informing the public on matters of public interest";*
> *(b) to demonstrate "the Rudd Government's commitment to enhance transparency and accountability in Government"; and*

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[3] The new section 126AA.

[4] ALLIANCE Journalists' Code of Ethics, http://www.alliance.org.au/code-of-ethics.html, Clause 3, emphasis added

[5] ALLIANCE Journalists' Code of Ethics, http://www.alliance.org.au/code-of-ethics.html, Clause 3, emphasis added

[6] See Quill J (2009), "Laws to shield journalists are more like a flimsy umbrella", *The Australian* (Legal Affairs), 27 March, at 27. The writer of that article represented *Herald Sun* journalists Michael Harvey and Gerard McManus who had refused to disclose their confidential sources. Quill wrote in the article: "The [proposed] legislation won't work."

*(c) "[to demonstrate that the] Attorney-General, Robert McClelland…delivered on the Rudd Government's election commitment to strengthen journalist shield laws".*[7]

A stronger presumption in favour of protection of journalist's confidential sources in the Bill would be more consistent with the Attorney-General's claims above.

Examples of mechanisms that can be harnessed to attain such a weighting in favour of journalists' confidential sources include the following approaches taken in the United States:

a. All reasonable attempts should be made to obtain the information concerned from alternative sources before considering issuing a subpoena to a member of the news media;[8]
b. Negotiations with the news media to gain the information sought shall be pursued in all cases in which a subpoena to a member of the news media is contemplated. If the negotiations fail e.g. if the reporter does not provide the material voluntarily, the Attorney-General must approve the subpoena based on the following guidelines:

- there must be sufficient evidence of a crime from a non-press source i.e. reporters should not be used as springboards for investigation;
- (the information that the reporter has must be essential to a successful investigation, and not peripheral or speculative;
- the government must have unsuccessfully attempted to get the information from an alternative, non-press source: and
- in some US jurisdictions the courts impose a further condition – the party seeking the disclosure must prove that its action is not frivolous.[9]

Similarly, progressive approaches to journalist-source confidentiality may be found in other jurisdictions, albeit to varying degrees. These jurisdictions include England, Germany and New Zealand.

In New Zealand the *Evidence Act* 2006 provides:

> *"If a journalist has promised an informant not to disclose the informant's identity, neither the journalist nor his or her employer is compellable in a civil or criminal proceeding to answer any question or produce any document that would disclose the identity of the informant or enable that identity to be discovered."*[10]

Although a Court may override this provision it is significant that the Act makes the protection of journalist-source confidentiality the starting point. The New Zealand

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[7] See above.

[8] See Pember DR (2003-2004), *Mass Media Law*, New York: McGraw-Hill, at 372.

[9] See Pember, above, at 372.

[10] Section 68(1).

Act provides that the Court has the discretion to override this provision where, having regard to the issues to be determined in that proceeding, the public interest in the disclosure of evidence of the identity of the informant outweighs — (a) any likely adverse effect of the disclosure on the informant or any other person; and (b) the public interest in the communication of facts and opinion to the public by the news media and, accordingly also, in the ability of the news media to access sources of facts.[11]

The Alliance strongly argues that it may be well and good to employ the use of the term "the public interest" in the Bill's nomenclature, past experience has shown, however, this term is fraught with ambiguity and amenable to conflicting outcomes. A recent example of a conflicting approach that led to a view favouring the withholding of information rather than the release of information can be seen in the High Court case *McKinnon v Secretary, Department of Treasury*.[12] The majority's approach in that case meant that the media was not entitled to seek the release of "bracket creep" information using *Freedom of Information* law. The majority justices took a view unfavourable to the release of information:

> *"It does follow, as the majority in the Full Court effectively held, that if one reasonable ground for the claim of contrariety to the public interest exists, even though there may be reasonable grounds the other way, the conclusiveness will be beyond review. It is important to notice that the statutory language does not give an entitlement to access if there are, as often there may very well be, reasonable grounds for the revelation of the document in the public interest."*[13]

That is, the majority took the view that if there was only one reasonable ground (cited by the Government) to support the claim that it is contrary to the public interest to release the documents, *that is enough* to withhold the release of information, even though there may be other reasonable grounds (cited on behalf of the public or journalists) suggesting that it is not contrary to the public interest to release the documents. The unreasonableness of this position is well-illustrated in the minority judgment:

> *"**How, then, could an applicant ever succeed?** If it were enough for the Minister to point to one facet of the public interest that is served by non-disclosure, then it would be enough to say that non-disclosure preserves confidentiality."*[14]

It is recommended in this submission that the proposed Commonwealth shield law should incorporate an overarching statement of the spirit of the law that favours journalist-source confidentiality protection, if indeed that is the spirit that the government is seeking to convey. Examples of such weighting may be found in the

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[11] Section 68(2).

[12] [2006] HCA 45.

[13] [2006] HCA 45, Callinan and Heydon JJ, Para 131.

[14] [2006] HCA 45, Gleeson CJ and Kirby J, Para 16, emphasis added.

following two examples. One example is, the objects section of the *Uniform Defamation Acts* provides that the Act's object is:

> *"…to ensure that the law of defamation does not place unreasonable limits on freedom of expression and, in particular, on the publication and discussion of matters of* ***public interest and importance****".*[15]

Another example is, the objects and intent section of the *Freedom of Information Act* 1992 (WA) provides:

> *"The objects of this Act are to — (a)* ***enable the public to participate more effectively in governing the State****; and (b) make the persons and bodies that are responsible for State and local government* ***more accountable to the public****."*[16]

It is suggested that such a provision in the objects section of the proposed shield law would be significant. This is because in the event of ambiguity, a court can obtain assistance from the preamble (or objects section) in ascertaining the meaning of the ambiguous provision.[17] Furthermore, the courts are required to prefer a construction of a provision that would promote the underlying purpose or object of the Act.[18]

Against the above backdrop, the Bill, if it is to represent a significant step forward, should express a weighting that favours protection for journalists' confidential sources. This can be done through an embodiment, in the objects section, of the values and aims that include the protection of freedom of speech, along with those considerations the Attorney-General ascribed to the proposed amendments at the start of this submission i.e.

- "the important role that the media plays in informing the public on matters of public interest";
- the Bill "strengthens provisions relating to information provided to journalists"; and
- that the Bill "forms an important part of the Rudd Government's commitment to enhance transparency and accountability in Government".[19]

As shown above, other progressive jurisdictions have identified approaches that more convincingly advocate the protection of journalists' confidential sources.

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[15] Section 3(b), emphasis added.

[16] Section 3, emphasis added.

[17] See *Wacando v Commonwealth* (1981) 148 CLR 1.

[18] See Cook C, Creyke R, Geddes R and Hamer D (2005), *Laying Down the Law*, 6th Edn, LexisNexis Butterworths, Chatswood, NSW, at 245 where the authors note that section 15AA, *Acts Interpretation Act* 1901 (Commonwealth) and its counterparts have such an effect. See further section 31, *Interpretation Act* 1984 (WA) which renders preambles in WA Acts even more important:

> "The preamble to a written law forms part of the written law and shall be construed as a part thereof intended to assist in explaining its purport and object."

[19] The Minister's Media Release referred to above.

The Alliance believes that in order to maintain its stated commitments with regards to the protection of journalists' sources, then the Bill needs to strengthened by a presumption in favour of protection of journalists' confidential sources.