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SENATE

LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE

Reference: Evidence Amendment (Journalists' Privilege) Bill 2010; Evidence Amendment (Journalists' Privilege) Bill 2010 (No. 2)

THURSDAY, 18 NOVEMBER 2010

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SENATE LEGAL AND CONSTITUTIONAL AFFAIRS

LEGISLATION COMMITTEE

Thursday, 18 November 2010

Members: Senator Crossin (Chair), Senator Barnett (Deputy Chair) and Senators Furner, Ludlam, Parry and Pratt

Participating members: Senators Abetz, Adams, Back, Bernardi, Bilyk, Birmingham, Bishop, Boswell, Boyce, Brandis, Bob Brown, Carol Brown, Bushby, Cameron, Cash, Colbeck, Coonan, Cormann, Eggleston, Faulkner, Ferguson, Fierravanti-Wells, Fielding, Fifield, Fisher, Forshaw, Hanson-Young, Heffernan, Humphries, Hurley, Hutchins, Johnston, Joyce, Kroger, Ian Macdonald, McEwen, McGauran, Marshall, Mason, Milne, Minchin, Moore, Nash, O'Brien, Payne, Polley, Ronaldson, Ryan, Scullion, Siewert, Stephens, Sterle, Troeth, Trood, Williams, Wortley and Xenophon

Senators in attendance: Senators Barnett, Brandis, Crossin, Furner, Ludlam, Pratt and Xenophon

Terms of reference for the inquiry:

To inquire into and report on:

Evidence Amendment (Journalists' Privilege) Bill 2010; Evidence Amendment (Journalists' Privilege) Bill 2010 (No. 2)

WITNESSES

Committee met at 3.49 pm

HERMAN, Mr Jack Richard, Executive Secretary, Australian Press Council

Evidence was taken via teleconference—

CHAIR (Senator Crossin)—I declare open this public hearing of the Senate Legal and Constitutional Affairs Legislation Committee's inquiry into the provisions of the Evidence Amendment (Journalists' Privilege) Bill 2010 and the Evidence Amendment (Journalists' Privilege) Bill 2010 (No. 2). This inquiry was referred by the Senate to the committee on Monday of this week, 15 November, for inquiry and report by 23 November 2010. We have received six submissions for this inquiry and all of those submissions have been authorised for publication and are available on the committee's website.

I do want to remind all witnesses that in giving evidence to the committee they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee, and any such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to the committee. If a witness objects to answering a question the witness should state the ground upon which the objection is taken and the committee will determine whether it will insist on an answer having regard to the ground claimed.

We have your submission. I place on record my appreciation of that having been lodged with us today with such the council having had such a short time to produce that. We do appreciate something in writing. Would you like to make an opening statement and then we will go to questions.

Mr Herman—The council has for a little over five years been pressing through various forums, attorneys-general, parliamentary inquiries and law reform commissions its belief that the current Australian systems for protecting journalists who do not wish to reveal a confidential source are inadequate.

In 2005 we took up with the Australian Law Reform Commission the possibility that the then draft New Zealand Evidence Bill, which has subsequently been passed as the New Zealand Evidence Act, contained provisions that made the default position a rebuttable presumption that journalists could protect their sources unless there were dire circumstances which, in the public interest, would cause the court to seek that those sources be revealed.

We believe that is the proper position both in the public interest and to protect journalists who, on ethical grounds, wish to protect their sources and also to protect the right of the public to receive information. We believe that without a protection for the confidentiality of sources those sources willing to tell journalists information in the public interest on matters of public concern might be less willing so to do.

For that reason, the council welcomes both of the bills that are currently before the Senate, which by and large achieve the same end as the New Zealand Evidence Act of creating a rebuttable presumption that journalists will be able to protect their sources but have with them a public interest provision for those cases, which we hope will be very rare, where the court would say that that presumption should not be followed.

Senator BRANDIS—You are probably aware that there are two substantially similar bills before the committee, one introduced by me on 29 September into the Senate and the other introduced by Senator Xenophon, which has already passed the House of Representatives, having been introduced there by Mr Wilkie. The scope of my bill would appear to be, and is intended to be, broader than what I might call the Wilkie/Xenophon bill, because it captures a broader range of confidential relationships. If you have had a chance to compare the two bills, I would welcome your comments on the difference between the two of them.

Mr Herman—In the council's view, given that which the council would like to see achieved by the bills, it believes that by and large either bill would be suitable for the purposes of better protecting the confidential sources that journalists wish to protect. I understand that there are some specific additional provisions in what I will call the Wilkie draft and the Wilkie bill. In our submission the council states that by and large its preference is for the Wilkie bill, and it does that on two grounds. One is that that bill has already passed through the House and therefore passage through the parliament will be quicker—

Senator BRANDIS—I would not worry too much about that.

Mr Herman—I am not worried too much about that, but that was the first thought. The second was that the additional amendments that are in the Wilkie bill would seem to make specific some things. From reading the paper produced by the Parliamentary Library, what it seems to suggest is that those things that are in the Wilkie bill additional to that in the Brandis bill make clear things that are implied or thought maybe unnecessary in the Brandis bill; it dots a few more i's and crosses a few more t's. For that reason the council is

favouring the Wilkie bill but would equally welcome the bill introduced by Senator Brandis as achieving the same end for journalists.

Senator XENOPHON—I think Senator Brandis has covered it. I think that they both achieve substantially the same thing, except I think Senator Brandis's bill is one that covers other professions and with a slightly different test. I do not think I am being unfair to Senator Brandis in saying that. From your point of view in terms of protecting journalists, both bills will do substantially the same thing; is that what you are saying?

Mr Herman—The press council has a fairly narrow brief, as outlined at the end of our submission, in terms of where it makes submissions to parliament. It is largely in terms of protecting the traditional freedoms of the Australian press. For that reason its submission does concentrate on the impact that a bill like this or any other similar bill would have in terms of preserving those traditional freedoms of the Australian press. That other professions may also be protected is something that may be a good thing for the parliament to do, but it is not directly in our brief to make comments on those other professions, which is why we say that in terms of journalists both bills would by and large achieve the same result.

Senator BARNETT—Thank you for clarifying that. I have read your submission and your conclusion, and it makes it clear that you support both bills. I just want to take you back to your evidence to the Senate inquiry last year in May, 2009. You have seen the report by the Legal and Constitutional Affairs Committee and the additional comments by the Liberal senators, who supported, I think, what these bills achieve. I am just wondering whether you agree with that. The Liberal senators recommended the privilege for professional and confidential relationships other than the journalist-source relationship and the rebuttable presumption in favour of a journalist-source confidentiality.

Mr Herman—The council has made contact with the Attorney-General, both before and subsequent to that inquiry, pressing again its belief that the New South Wales model, which was then the preferred model, did not achieve a strong enough protection for journalist sources in our view, and pressing the view that a fourth position should be protection of sources except in exceptional circumstances. That was the recommendation of the minority in that earlier report. It was noted that the council, in its submissions to both the federal, state and territory attorneys-general, maintained its position that a default position that journalists should protect their sources be maintained. During the election campaign, we sought from the then ALP government an undertaking—and the coalition had already put in their platform support for that position in terms of law reform—that they would do the same thing. Even though these bills are not government bills, we are glad to see that the parliament is following that line.

Senator BARNETT—That is excellent. Thank you for that. I have an observation and then a question. The observation—in the Liberal senators' report we referred to, with a very positive response, the Australian Law Reform Commission's view, which supported your view and provided for professional confidential relationship privilege, and also the Western Australian Law Reform Commission. The reason I mention the ALRC is that there is some debate about its future, basically, and the adequacy of its resourcing and staffing. I make the point that it is very supportive of what I would see as the objects of the bills before us. I just wanted to get your views on your definition of a 'journalist'. We had quite a debate about that last year and I just wanted to clarify your understanding of the definition of a 'journalist'.

Mr Herman—This is one of those vexed questions that the council has been wrestling with for many years and it is particularly apposite in regard to another ALRC report, the report on privacy, which suggests changing the current media exemption to a journalism exemption. The definition has always been difficult, which is why a definition was left out of the private sector amendment bill in around 2000. We do not define a 'journalist' so much as 'journalism', which we see as engaged in inquiry on behalf of, or leading to publication of material by, a media organisation or a news organisation—of news, current affairs or a documentary nature. The definition is very wide. It needs to necessarily be wide nowadays, because journalism has become a much wider field and includes things such as photojournalism, video journalism, audio journalism, online journalism and a whole lot of other areas. It is making it probably more difficult rather than easier to define. I am reminded that in another field they say that science fiction is that which I am pointing at when I say the words 'science fiction', and 'journalist' is almost like that; it is the person I am pointing to when I use the word 'journalist'. But we would say it is a person in the business of gathering news for publication or broadcast by a media organisation in the form of news, current affairs and documentary and so on.

Senator BARNETT—Thank you.

Senator BRANDIS—Just developing that issue, it seems to me the way both Mr Wilkie's bill and my bill deal with this is that we have defined 'journalist' by reference to the publication of news or observations about

the news in a news medium. However, there is no definition of 'news'. In order to be 'news', by your understanding of that word, is it necessary for there to be some value adding—if I can use that phrase—of raw information by a journalist? For example, let us take a ministerial speech in parliament. If a ministerial speech were posted on the minister's website without any comment and without being altered or treated in any way by another person, that of itself would not be news, would it?

Mr Herman—I am not sure of the extent to which you would call that news.

Senator BRANDIS—Yes, that is my point.

Mr Herman—I do note that both bills define the term 'news medium'.

Senator BRANDIS—What I am getting to is the question of whether original material in an unaltered form is of itself news. I chose the innocuous example of the publication of a ministerial statement on a minister's website without the interposition of any other human agency, and it seems to me that that of itself would not be news, whereas a report in the newspaper of the same speech and which involved the application of a journalist's mind to choosing bits of the speech to report and reporting some in direct speech and some in indirect speech, I think, would be news. If unamended original material without the interposition of another human agency is not news, what about documents posted on the WikiLeaks website, such as the documents famously obtained by Mr Assange in relation to the Iraq war? If unamended original material posted on a website is not of itself news, would it not follow that documents of that kind published on a website like that are not of themselves news, although a report written about them would be news, and therefore Mr Assange's activities, for example, would not be covered by these bills?

Mr Herman—That is an interesting question. Let me turn it around and say that if a news organisation broadcasting two members of parliament holding a press conference at which they give their decision as to which side of politics they are going to support in the lower house is presented live on a number of news media, there is no intervention between the parliamentarians giving the speech and the listeners. They are in the same position of just giving a speech. It is not being reported, but it would be regarded I believe by most people as being news. I think it is good that the bill defines 'news medium' rather than 'news'. What is important here is the medium on which it is broadcast or published. I think most people would regard WikiLeaks or some sort of aggregation of raw material like that as not being a news medium but something of an intermediary between the information and the public.

There are news reports of information published on a site like WikiLeaks which then make it news. I could make an analogy again with the Privacy Act. The Privacy Act talks about acts of journalism. It relates it to acts of journalism carried out by a news organisation. Lots of people may perform acts of journalism. Schools can publish newsletters, hospitals can publish information, churches can publish and telephone companies can publish books, but most people would not regard them as news organisations. The publications that they carry out are ancillary to their other activities as a school, a church or a telecommunications company. Under the Privacy Act they are probably not covered under 'news organisations', and I think you would find that very quickly it would be worked out what is a news medium and what is not a news medium in terms of what is covered by this act.

Senator BRANDIS—So for it to be news, apart from anything else, it is a necessary condition that the event which is the subject of the news be mediated in the sense of being conveyed through a medium?

Mr Herman—The definition of 'journalist' and 'informant' in both acts makes that necessary, because it is about information in the expectation that information may be published in a news medium and a journalist is working in the normal person's work in the expectation that the information may be published in a news medium. I think it is a concomitant of that that the bill is protecting information that is given to someone in the expectation that it will be published as news in a news medium.

Senator BRANDIS—To take my example, you would not regard—nor, I might say, would I—Mr Assange's informant, who merely placed into his hands, literally or metaphorically, a body of raw material which was then posted on a website, as a relationship protected by this bill?

Mr Herman—If you got Mr Assange into the witness box and asked him to reveal the name of his informant, it would then be up to a court to determine whether the act that he is carrying out is journalism or if he is a journalist within the meaning of the act. I think you would probably find that, if there were situations where the material impinged very heavily on national security and national defence, you are getting close to those sorts of dire circumstances.

Senator BRANDIS—I do not mean to talk across you. I understand that, but that is a completely different point. What I am interested in knowing is whether you get past the definitional threshold in a case like that, in your opinion?

Mr Herman—I think there is an argument to suggest that the creator of WikiLeaks is acting as a journalist, because he is mediating material that has come from an informant and is then published. I think there is a far greater argument that he is. I think you would be very hard pressed to argue that the public relations officer in a minister's office who publishes a speech on a minister's website is doing the same thing.

Senator XENOPHON—I am conscious of time. Mr Herman, because my colleague Senator Furner has questions to ask you. You may wish to take this on notice, if you could, but if you could respond to us by tomorrow—Chair, would that be appropriate?

CHAIR—Ask the question and we will see.

Senator XENOPHON—According to Wikipedia, in relation to WikiLeaks, it says that WikiLeaks gives as its mission statement giving assistance to people of all regions who wish to reveal unethical behaviour in their governments and corporations. If that is the parameter by which WikiLeaks accepts documents, does that change your views in terms of the characterisation of the relationship between the source and those publishing the source or the characterisation of Mr Assange as a journalist, further to Senator Brandis's question?

Mr Herman—I would have thought that there was a clear public interest in the exposure in any medium of corrupt behaviour, if that were the aim. In most news organisations I think there would be more of the filtering process to get at those items which most clearly demonstrate it, rather than publishing vast numbers, some of which may and some of which may not be relevant to the question of government corruption, malfeasance or whatever.

Senator BRANDIS—I have a follow-up question.

CHAIR—I will come back to you, Senator Brandis. I am going to go to Senator Furner for some questions first.

Senator BRANDIS—It will not make sense unless we follow in a sequential way.

CHAIR—You have asked questions. Senator Xenophon has had a follow-up. You have questioned this witness for 20 minutes, and it is only fair for Senator Furner to ask his questions now.

Senator FURNER—I would like your opinion based on some evidence that has been provided by the Victorian DPP. Firstly, they indicate in their submissions that the Wilkie bill is less likely to lead to the exclusion of otherwise admissible evidence. What is your opinion on that submission?

Mr Herman—I do not think that I am in a position to contradict one way or the other what the Victorian DPP have said. They would have a far closer knowledge of the impact of that in the court. I must say I am at a slight disadvantage because theirs is the last of the submissions that have gone up and I have not had an opportunity to read it in detail yet. If you could give me that question on notice, I could have a look at that and perhaps give you a response, but I think it would be unfair to them and unfair to the council if I tried to answer the question without knowing the exact parameters of their opinion.

Senator FURNER—That is fair enough. Additionally, they also make the point that the opposition's bill repeals the existing provision dealing with the loss of privilege in circumstances where the communication or document was made in furtherance of the commission of a fraud, an offence or an act that renders a person liable to civil penalty. Do you see any issue with that belief?

Mr Herman—Again, I would have to look more closely at what the DPP has said. He is also acting in the circumstance where his Attorney-General has foreshadowed changes to the Evidence Act in similar terms to those before the federal parliament, and he may have some knowledge of what is proposed in the Victorian bill that may be different from what is in the federal bill. If I could have a look at what he said I could send something in writing to the committee secretary early tomorrow.

Senator FURNER—You indicated in your introductory comments that courts very rarely follow the public interest test in terms of challenging the rebuttable presumption. In your experience, considering that you have followed this matter since 2005 when the New Zealand Evidence Bill came into place, would you be aware of any circumstances where that has applied?

Mr Herman—No. We have made inquiries in New Zealand on this very question. We are not aware of a case yet where the test has been applied, since the new Evidence Act came in, where a journalist has been

called before a court and the court has been asked to rule one way or the other on whether or not they can be compelled to give evidence. We are not aware of a case. We are still making inquiries with the New Zealand Press Council to see whether it is aware of any cases. We have not been able to find any, at least published in New Zealand, as yet on that question.

Senator FURNER—Thank you.

CHAIR—I have a question.

Senator BRANDIS—On a point of order—

CHAIR—I said I would come back to you.

Senator BRANDIS—I want to clarify an answer the witness gave to Senator Furner. It would be a more orderly fashion to enable that to be done now.

CHAIR—If you had asked me for the opportunity to clarify that I would have recognised you. You simply just went ahead and asked your question. If you wish to clarify something, you need to get my attention; otherwise, I have questions that I would like to ask. I will go to you for that clarification and then come back to me.

Senator BRANDIS—That is what I was trying to do. Mr Herman, did you say you have a copy of Mr Rapke's submission in front of you?

Mr Herman—Yes. I downloaded it at the stage that I was starting to talk to the committee.

Senator BRANDIS—If you look at the second dot point on the second page of the submission, the misgiving that Mr Rapke seems to have in relation to the coalition's bill is that the protections are broader and therefore, as he says, 'could potentially protect a broader body of evidence'. That of course is what you would expect a prosecutor to say; prosecutors want as much evidence before a court as possible, just as people defending the liberties of the individual and protecting confidential relationships want the protections to be as wide as they reasonably can be made.

Mr Herman—Yes. It may be that Mr Rapke's concern is based on what he says earlier: that in the absence of the Victorian legislation a joint Commonwealth/state prosecution may get into the situation where the different presumptions clash. I do not know and cannot comment on his assertion that the Brandis bill is more likely to lead to problems than the Wilkie bill. I agree with you that as a matter of an assumption you would assume that a DPP would say that.

Senator BRANDIS—That is my very point; he would say that, because all prosecutors want as few limitations on the admissibility of evidence as possible.

Mr Herman—I think that is the point that we also made in our submission.

CHAIR—I would like to ask you a question that relates indirectly to this legislation. It is a matter that has occurred in the Northern Territory in the last three weeks. It is the subject of Mr Ken Parish's submission to us. As chair, I have specifically asked him to appear before this committee, and he is the next witness. The Press Council may well be aware of the circumstances. The position that he points out, which I think is worth exploring, is that the recent events in the Northern Territory indicate a significant loophole in this legislation and/or the telecommunications interception act, and that is that where the journalist would not or could not reveal their source the Northern Territory Police simply accessed without warrant and without knowledge that journalist's telephone records and email exchanges to obtain the source of the information for that news story. Is the Press Council aware of this interaction that has been occurring in the Northern Territory, and what is your view about this potential loophole in this legislation, given the actions of the Northern Territory police recently?

Mr Herman—It raises two questions. No, I was not aware of the specifics of the case, and Mr Parish's submission, if it is in writing, is not on your website, so I am not aware of the exact points that he has made. But it would not be the first time that authorities have attempted to use records of journalists to try to find the names of sources or indeed the records of public officials to see whether they have contacted journalists. The second thing is to say that what he has talked about is the issue we raised at the conclusion of our submission, and that is that the coin of sources has an obverse side, which is protection of public interest disclosures or whistleblower protection. Were there to be protection of public interest disclosures, in the sort of way recommended by Mark Dreyfus's House of Representatives committee, which the government in the last parliament said it was going to enact, those sorts of fishing expeditions through journalists' work material would not be required.

CHAIR—We have Mr Parish's submission and I am sure it will be on the website fairly soon. Do you believe that this legislation should be amended so that access to telephone records and emails cannot be accessed? What is the difference between a journalist verbally revealing who their source is and authorities seizing telephone records that would reveal who their source is?

Mr Herman—Yes, it is a concern and I am not sure that I have an immediate answer for you as to what the correct response is, except to say that the Press Council, when such matters are brought to its attention, uses the public press to denounce such actions. It is one of the reasons why most journalists who are aware of this possibility make sure that they do not keep records of their contacts with confidential sources on their work or home computers; they are aware that the telecommunications interception act exists and the possibility of the police trying to seize work product exists as well.

CHAIR—How effective is this bill at the end of the day?

Mr Herman—This bill is effective at the end of the day in cases such as Harvey and McManus, when a prosecutor is unable to completely prove his case and attempts to do so by forcing a journalist or journalists to dob in someone who is alleged to have been their source, and the end result is that the journalists are the only ones published. In that sort of situation the prosecutors and police were unable to find any information in anything belonging to Harvey and McManus that would implicate them with the public official on trial, so they pulled McManus and Harvey before the court to try to get them to provide the link that the prosecution itself could not provide. It is in a court, in that sort of discovery and that sort of committal situation, that this bill will protect journalists.

CHAIR—Thank you for your time this afternoon. We do not have any questions on notice. I think there is one matter that you will get back to us on. We appreciate the short timeframe in which you have responded.

Mr Herman—The question that was asked related to Mr Rapke's submission, and I think I covered that issue in responding to Senator Brandis's supplementary question.

CHAIR—That is right. Thank you.

[4.29 pm]

PARISH, Mr Ken, Private capacity

Evidence was taken via teleconference—

CHAIR—Thank you for responding to our request and for your submission, which we have received this afternoon. It is No. 6 for our purposes. I know you have sent in a revised submission and we have that.

Mr Parish—May I apologise for the typographicals. I was about half finished when your officer rang and said, 'We need it now.'

CHAIR—That is okay. We understand that was because of the short time frame for this inquiry. Would you like to make a brief opening statement?

Mr Parish—Firstly, I strongly support both the bills that you are looking into. My preference would be for the Brandis bill, because it deals with relationships of confidence beyond just those of journalist and source. But the particular matter that piqued my specific interest in it was recent events in the Northern Territory involving use of police powers under the telecommunications interception act to search telephone records of a *Northern Territory News* journalist to identify a leaking police officer, if you will, who leaked information about an apparent drug raid on the home of the Lord Mayor of Darwin, which gave rise to rather a lot of controversy in the media in Darwin.

I proceeded to have a look at the situation from that and discovered, somewhat to my surprise, that there are almost no protections, checks and balances or procedures on police or other law enforcement officers investigating anyone's telephone record—not just journalists—where they are investigating any breach of the criminal law no matter how trivial, at least so far as existing call records are concerned. There is no need for a search warrant and no need for any form of external scrutiny or approval. As I say, the crime can be as trivial as it might be. In particular, in relation to the events in Darwin, the only breach of the criminal law that the police commissioner alleges is the act of the police officer leaking to the journalist himself. The logic is somewhat circular and effectively means that any public servant or other public officer leaking as a whistleblower will be subject to having their telephone records searched in effect on an open slather basis with no checks and balances to seek to ascertain the identity of the informant. My position is that that fairly clearly and quite dramatically undermines the efficacy of the bill that your committee is currently examining.

Senator BRANDIS—I have no questions, but thank you very much for your endorsement of the coalition's bill.

Senator XENOPHON—I will bravely venture. I think there are compelling reasons why Senator Brandis has not asked any questions. Thank you for your submission. Is it your view, though, that in terms of protecting journalists from prosecution both bills essentially do the same thing but that you prefer Senator Brandis's bill because it expands the classes of confidential communications that are protected, or is that a general summary?

Mr Parish—Yes, precisely—for that reason and no other reason. Essentially the Brandis bill and the Wilkie bill, at least on my reading of them, effectively do almost exactly the same thing. They are both based on the New Zealand model and the only substantive difference between the Wilkie bill and the Brandis bill is that the Brandis bill potentially protects a much wider range of relationships of confidence. I see that as an important thing. But obviously the particular focus of this committee and the particular focus that led me to look at this area was in fact the journalists area. But, while one is at it, it seems to me it is appropriate to broaden it. The Australian Law Reform Commission's investigation of the Evidence Act some years ago, in 2006, recommended that a slightly different protection of relationships of confidence should apply not just to journalists but to a wide range of other relationships.

Senator XENOPHON—But both bills will do the job insofar as it relates to protecting journalists themselves?

Mr Parish—Yes, insofar as journalists are concerned there is no difference, in my view.

CHAIR—The position you have put to us is that the source of any information a journalist uses can be disclosed by the seizure of telecommunications or email use; is that correct?

Mr Parish—Yes, the only protection on called number records, as opposed to records that might disclose the content of the communication, is section 178. That effectively gives any authorised police officer the

power to authorise access. I might say section 178 is voluntary access. All it does in a technical legal sense is allow the police to authorise the telecommunications company, if it wishes, to disclose its records. But as a matter of practicality, if an authorised police officer comes along to a telco employee and says, 'I want to look at the telephone records of journalist X', they are not going to say no. If they do, the police can then seek a search warrant. In relation to that search warrant, it is also irrelevant, as the law currently stands, as to whether there is any relevant relationship of confidence, whether it is journalist and source or anybody else.

The law at the moment does not on any level recognise the legitimacy or appropriateness for legal protection of the relationship between journalist and source. The bill that you are looking at only proposes to protect one aspect of that—namely, the giving of evidence before a court. My position is that many of these other potential areas of vulnerability of a journalist and source are equally important to protect and, if they are not protected, the result is that the protection of the bill you are looking at will be largely negated.

CHAIR—Are you suggesting that we either amend this bill or amend the Telecommunications (Interception and Access) Act?

Mr Parish—If I had my druthers, my preference would be both the Evidence Act and the Telecommunications (Interception and Access) Act. I have not done a drafting exercise, obviously. But my proposal would be that at least for access of telephone records of a journalist a search warrant should be required, whereas at the moment no external approval or scrutiny is required, and that in relation to the justice considering the issue of a warrant an effectively identical presumption to either the Brandis or the Wilkie bill ought to apply—namely, the balancing exercise between the public interest in journalistic confidence and other public interests, most notably obviously the interest in effective law enforcement.

CHAIR—You do put on the last page of your submission, though, where you think further investigations or negotiations could go to close that loophole. I am surprised that perhaps the authors of the legislation before us had not thought of that, although that probably was not the case until the incident in the Northern Territory recently.

Mr Parish—They seem to have looked at it. The addition of section 180, which is the prospective information provision, is relatively recent—I think 2007. It is not apparent from the second reading speech, but presumably they gave some consideration then to whether a similar protection ought to be included, because for prospective information it does quite specifically apply only where they are investigating a serious crime. They presumably made a policy decision that no such additional protection was needed in relation to historical information.

I have not been able to find anything in extrinsic materials that tells me why they reached that conclusion, but they must have given it thought, because it is only two sections before. They are drawing a clear distinction between historical information and future information. As I state in the submission, it appears the reason why they have decided to protect future information more rigorously was that, at least for mobile phones such as iPhones with satellite navigation capability, if you do not have that sort of provision then it potentially allows police to use the access to track and locate people, which obviously for lots of situations has much greater privacy implications than just being able to peruse a list of phone numbers that have been called.

Senator FURNER—I understand the bill provides for an opportunity for journalists or others to advise their informant of the risks they are involved in, but it does not appear to go beyond that. Focusing on the example you provided, it certainly expands the possibility of someone to have that evidence in terms of the phone tapping identified. Do you really think there needs to be an enhancement of this particular part where the journalist or others inform the informant—or whistleblowers, for want of a better term—that that is the case—that, although they have an opportunity to explain to them that they need to do that, it needs to be further enhanced to ensure that there is a possibility, based on the example you provided, that the evidence may at some stage through other pieces of legislation be exposed?

Mr Parish—Yes, I think that would be desirable in terms of informants making an informed decision about whether to leak to a journalist. If I understand what you are saying correctly, I would think that any caution that the journalist is required to give ought to be fairly clear in terms of the informant understanding the risk that they are taking. I think that is a matter of ethics, just as protecting a confidence is.

The other point I should make arising from your question is that I think you used the word 'tapped' or a word along those lines. We are not talking here about telephonic interception and accessing the content of a communication. I am talking only about ordinary telephone records consisting of a list of numbers that have been called. There is no protection on that at all. There are protections on wiretap records in the sense of

records that tell you what was actually said during the conversation. In relation to that, there is already a three-year serious crime requirement on it, just as there is on all prospective information.

What the legislation seems to have done is to make a policy decision that where the material includes the content of a communication there should be higher hurdles to leap before police can access them. Where it consists of access not to the content of the communication but to future non-content information, that should also be protected by a serious crime hurdle, because it may enable the person to be tracked, whereas something that is just a list of numbers and does not say anything about what was actually said has no protection at all. Those are ordinary records, of course, that every telecommunications company keeps irrespective of whether there is wiretap warrant or an active investigation going on. They are standard records that police under section 178 can access without any checks or balances or permissions whatsoever.

CHAIR—Thank you again for your submission and for making yourself available for us this afternoon.

[4.45 pm]

CHAPMAN, Ms Creina, Australia's Right to Know

COWDROY, Ms Emma, General Counsel, Australian Associated Press Limited for Australia's Right to Know

ESTE, Mr Jonathan, Director of Communications, Media, Entertainment and Arts Alliance

CHAIR—We have a submission from Australia's Right to Know, which we have numbered No. 2. I do not think we have a submission from the Media, Entertainment and Arts Alliance as yet. I will ask each of the groups to provide us with a brief opening statement and then we will go to questions. Mr Este, would you like to start first?

Mr Este—Before I start I should add that the media alliance is also part of the Australia's Right to Know coalition and they have made a submission that we are part of.

CHAIR—It might make sense if Australia's Right to Know goes first. Ms Chapman.

Ms Chapman—Thank you for asking us to appear today. The Australia's Right to Know coalition represents all major media companies in Australia. For a considerable period of time, as a coalition, we have argued that Australia's evidence law should provide a rebuttal presumption in favour of protection of the confidentiality of journalists' sources, arguing that the starting point should be that a journalist cannot be required to disclose their source in a court, but that that may be overturned by a court if it is the view of the court that the public interest in disclosure outweighs the public interest in freedom of speech, or any possible harm to the journalists, the confider or any other individual. We strongly believe that the onus of proving the presumption should stand firmly in the hands of the parties seeking the disclosure. We outlined this model and discussed it in detail with this committee in its inquiry into the Evidence Amendment (Journalists' Privilege) Bill 2009. We did that in written form and also in person where both Ms Cowdroy and myself appeared. I think, from memory, that the MEAA appeared as well.

We are very pleased that this model has been incorporated into both bills and, as such, we definitely support both bills. We note that the main difference between Senator Brandis's bill and Senator Xenophon's and Mr Wilkie's bill is this issue of extending it to a broader range of confidential relationships.

We represent media companies and we feel that we are not actually capable or in the position to comment on whether it should be wider. We note that it has been discussed at length in the ALRC. It is in the New South Wales legislation. It has been discussed at length, but frankly we feel that it would be inappropriate for us to comment. We are not qualified to comment on confidential relationships, such as doctors and their patients and psychiatrists and their patients, which is the other one that is often referred to, so we feel that is a matter for other people to comment on.

We welcome both bills. We do not have a view as to which one is the preferable bill. We think it is extremely positive that the parliament, as a whole, appears to be embracing what is commonly known as the New Zealand model and we hope that the model in one of the two bills is passed as soon as possible.

CHAIR—Mr Este, would you like to add anything or will we go to questions?

Mr Este—I merely observe that the members of the media alliance who are journalists across all the different platforms and different companies work to the journalists' code of ethics, clause 8 of which expressly states that any confidence if sought and given by the journalist to his or her source and also the responses must be honoured under all circumstances. We have seen a number of cases where journalists have been pressured and in fact have emerged from legal proceedings with criminal records as a result of honouring what is seen as their professional code. I think I am right in saying that obviously for alliance members this is in the very centre of the way they do their work, but across members or non-members most journalists would work to this assumption. In asking a journalist to name the source of their story, when they have given a promise of confidentiality, you are asking them to go against one of the most deeply held principles of the profession.

CHAIR—Ms Cowdroy, do you want to add anything?

Ms Cowdroy—No.

CHAIR—Senator Ludlam, do you have any questions?

Senator LUDLAM—I will address my questions specifically to Senator Xenophon's proposal, which relates to journalists. The inquiry into the government's bill a year or so ago was quite a bit broader than this.

It had a lot more going on in it. This is quite narrow. This is specifically about establishing that rebuttable presumption in the eyes of a court. Was there anything in the original government bill that you liked that you think the parliament needs to deal with by way of loose ends or is this, effectively, what you are seeking to have passed?

Ms Chapman—This bill is quite complete. With the complexity of the last bill the presumption was that it was working the other way, so it had a large number of factors that it was directing the court to take into account. Part of the beauty of this model is its simplicity where it is largely leaving it to the court, rather than directing the court to take into account a range of factors.

Senator LUDLAM—I will take that as a no, that this substantially deals with the issues that you were seeking to address. There is something that I am struggling with, as are a number of other people. You do not necessarily want these protections to apply to somebody who posts something on a Facebook page or a comment on a news article, but the boundaries of your profession have expanded and diffused in recent years since the original concept of shield laws. This bill draws the line in a very definite place using existing definitions of journalism and so on. What are your views on expansion or how to grapple or cope with that diffusion, that people are doing public interest work that most of us would consider as journalism without necessarily being paid and not ever making its way into print in the formal sense? How do we handle the changes that are occurring in your profession?

Ms Chapman—We think the definition is pretty broad. It is leaving a lot of the work to a court to make a decision on a case-by-case basis, to take the facts of the situation, ask questions of the person in the witness box, and determine who they are and what they are doing. I am not sure that the paid factor would be a major problem for a court. I think 'ordinary course of work' would generally mean that is how they earn their living, but not necessarily. The purpose is to try to knock out the one-off person who happens to randomly get some information, but the reality of the matter is that I do not think that person ever will. It is probably a moot point. It is a pretty general definition which will enable the court to deal with different types of medium going through it. It is not technologically specific. I think it will probably deal with a lot of people. I am not sure all of our journalists get paid sometimes.

Senator LUDLAM—Is that a hint?

Ms Chapman—Is an academic who contributes a column to a newspaper a journalist?

Senator LUDLAM—Are they a journalist?

Ms Chapman—They may or may not be. The academic who does it regularly, but gets paid by the university, may be a journalist.

Senator LUDLAM—I would hate for that to be the threshold test as opposed to my point.

Ms Chapman—The point is that a court will look at each specific circumstance and decide, which is the way it should be.

Senator LUDLAM—The language in the bill is somewhat ambiguous. The explanatory memorandum is not and draws the line quite sharply around employed, as such, for the privilege to operate. It states:

… private individuals who make postings on the internet or produce non-professional news publications, where this is not their job, will not be covered by section 126H.

You need to draw a line somewhere. The drafters of the bill and of the EM have drawn it there. I just wonder whether you have a view. In your view, should the academic who posts a column in a newspaper be protected if they are operating in the public interest? Should that public interest test be applied to them as equally as to somebody working for the *Sydney Morning Herald*?

Ms Chapman—The courts should be able to examine the facts and look at their role in the situation, beyond just the public interest, but also their contribution of what they are doing in the ordinary course of their work. I do not think that you can purely rely on public interest.

Senator LUDLAM—What I think we are trying to do here is leave it to the court to decide whether it is in the public interest for a source to be protected or not and that it is the burden of proof to show that it should not be. We are hoping that this privilege does rest with journalists. My question is not to try to interfere with that; it is more the question of who should fall within those protections. My current reading of the bill is perhaps that your academic who occasionally, on an unpaid basis as an expert, submits a column to the paper and discloses something; they will not currently be protected by this bill. Neither would I be if I write a piece on an unpaid basis for Crikey.

Ms Chapman—I think that is right because that is not your ordinary course of work.

Senator LUDLAM—That is correct. That is not my ordinary course of work.

Ms Chapman—It may or may not be for the academic.

Senator LUDLAM—My argument is that I should be protected, as far as I am concerned, and I think our academics should be as well. I am not making it your problem. I am just trying to get your views.

Mr Este—I am wondering whether we should concentrate on the person doing the disclosure, the journalist, rather than whether the outcome or the transaction is journalism. If an academic is writing on Crikey or in the newspaper, paid or unpaid, what they are doing is deemed to be journalism so it should be protected. That is one way of looking at it.

Senator LUDLAM—Is that a question or a statement?

Mr Este—I would suggest that it might be one way of looking at it, rather than trying to define what is or is not a journalist, by saying they are paid and this is the normal course of their work, is to ask: is the outcome of what they are doing an act of journalism?

Ms Chapman—This is what Mr Herman talked about in relation to news medium, where it is linked to the news medium as well as the definition of the journalist. Where it is published will make a considerable difference.

Senator LUDLAM—So from the point of view of your organisations you are happy that the bill is drafted as platform neutral and does not prescribe where the material is published and that your preference is also for it not to be so exclusionary or to arbitrarily exclude people from the protections that we are seeking?

Ms Chapman—Correct.

Senator BRANDIS—On the question of who is a journalist, I have a somewhat different view from Senator Ludlam. If anything, I would make it narrower rather than broader. When, for example, the Prime Minister published an opinion article in the *Sydney Morning Herald* yesterday morning about the carbon tax, was she acting as a journalist? She was disseminating information—that is, the government's thinking—through a news medium. What do you think?

Ms Chapman—It is not her ordinary course of work, is it?

Senator BRANDIS—It is the course of her work to advocate opinions, yet it would seem contrary to Senator Ludlam's view. It would seem to me to be peculiar to regard a politician advocating through a news medium a policy position as a journalist. What do you think? It was not very good, by the way.

Ms Chapman—I did not read it.

Senator BRANDIS—You did not miss anything. What do you think? Should that be caught in the definition of a journalist?

Ms Chapman—I do not think a court, under any circumstances, would determine that the Prime Minister is a journalist.

Senator BRANDIS—Rather than anticipating what a court might say, a court will apply the statute.

Ms Chapman—Therefore, as general as the statute is, I would say to give the court the ability to make that decision themselves in the circumstances. A court would determine that she is not a journalist.

Senator BRANDIS—You do not think she is a journalist, do you?

Ms Chapman—No.

Senator BRANDIS—As a politician, when I write an article for the *Spectator Australia*, which is a very respectable magazine, I am not a journalist, am I?

Ms Chapman—The definition has been drafted as it is to try to avoid the situation of cutting out the one-off person who does it on one occasion. That is what the test is. It is: what are you doing on a regular basis? We could say: is Mark Latham a journalist?

Senator BRANDIS—He publishes a commentary piece every fortnight in a national newspaper, so I would have thought that he probably is.

Ms Cowdroy—So yes, he is. The sports media rights committee looked at this issue in detail earlier this year and grappled, I think, with a very similar concept in relation to access to sporting events. If everyone is allowed to turn up and say, 'Hi, I am a journalist and I want to come and get access to an event', how do we

regulate the three or four hundred applications that are going to happen. I think one of the issues that they took into account was the duty to inform the public, so if you are coming back to the ordinary version of work, then if your ordinary work is to inform the public and to enthral the public and to do, I suppose we would say, what journalists do, then clearly I do not think the Prime Minister would fall into that category.

Senator BRANDIS—Would you like to see the definition in this bill narrowed so that it is only an accredited journalist, a member of your organisation?

Ms Chapman—No, I do not think that would be appropriate at all.

Senator LUDLAM—Just while we are on this thread, I wonder whether I could put Senator Brandis's question the other way, whether you pick any of the examples we have chosen or Senator Brandis's example of the Prime Minister putting an opinion piece in the paper. Regardless of how this thing is drafted or definitions, is it the view of your organisations that such publication should be protected? It is up to us, I guess, as legislators to work out how to do it, but should that form of publication or that form of speech attract this protection in your view?

Ms Chapman—Of the Prime Minister providing a comment piece?

Senator LUDLAM—Should this protection that we are discussing in this bill be afforded to that kind of speech or that kind of publication?

Ms Chapman—No, because it is not her ordinary course of business.

Senator LUDLAM—It is not the academics' either, though, and it would not be mine either.

Ms Chapman—It is for some, I think. I think they cross into—

Senator LUDLAM—We are in a very grey area really, are we not?

Ms Chapman—We are in a very grey area, which is why I would be very, very happy for the judge to be the one making the decision.

Senator BRANDIS—Yes, but that is a bit of a cop-out, with respect. We are trying to craft a statute which will give the court as much guidance of the thinking of parliament as possible, and by defining terms we assume the primary responsibility of making that guidance reasonably clear so that a judge does not just have to rely upon his or her or general notions about what a journalist is. They should be able to look to the statute and say, 'Aha, well these are the statutory indicia of what is or is not a journalist.'

There is also the issue of novelty as it seems to me. For example, let us say that in a newspaper a historian to commemorate the Battle of Britain wrote a story about the Battle of Britain which revealed nothing that was not known half a century ago. A historical piece like that, albeit carried in the newspaper, would not be an exercise in journalism, would it; it would be an exercise in history writing?

Ms Chapman—That is correct. In that situation this bill could not arise because if there is no new information then there is no confidential source.

Senator BRANDIS—So, new information is always a necessary criterion of news?

Ms Chapman—No. That is actually an issue which was discussed at length in sports rights. It does not have to be brand new; it can be a reinterpretation.

Senator BRANDIS—New or of sufficient contemporary notoriety?

Ms Chapman—That is where a factor of interest comes in. Yes, it can be an old piece, but if it is purely a rehash of something completely old then it would not be relevant.

Senator BRANDIS—That is right, yes. Can I ask you a question I put to the Press Council? Does it require the interposition of a human agency between original material and the place at which it is published, whether it be in a newspaper or on a website, for example? The example I have in mind is the WikiLeaks website; I think it is a clear example of this. If a person merely posts original documents on a website with nothing else—there is no intermediation by any human agency—is that an exercise in journalism?

Ms Chapman—Yes, because probably obtaining the documents was the act of journalism.

Ms Cowdroy—And selecting what to put up there.

Senator BRANDIS—That is a fair point, Ms Cowdroy, but let us say there was no selection; it was just a dump of an undifferentiated mass of original material onto a website. Do you say that for a person like Mr Assange to merely receive and be the functional agent for the posting on the website of original material where there is no process of selection undertaken by him, there is no value added by him in any sense and he is

merely a conduit for the publication of documents which are not of his creation; do you say that is an act of journalism?

Ms Chapman—Yes, I would say there are a large number of pieces in the newspaper every day which are merely a reproduction of information that has been obtained that has not been value added.

Senator BRANDIS—Give me an example.

Ms Cowdroy—All the sports data.

Senator BRANDIS—The sports data is journalism?

Ms Cowdroy—I think the difficulty we are getting into is on one hand you are talking about what is an act of journalism and on another hand we are talking about what is news, so I think that that is probably the difficulty. We would certainly see the sports pages of a newspaper as news.

Senator BRANDIS—That is a very good point, Ms Cowdroy, if I may say so, but I have been assuming that for something to be an act of journalism it has to be news, but you say that is not so?

Ms Chapman—I think the document is news as well. The document itself is news.

Ms Cowdroy—And the creation of the document.

Senator BRANDIS—The document generates news without being news itself. I am sorry, let me withdraw and rephrase that. The publication of the document is an event which generates news; there is no doubt about that.

Mr Este—It is something that informs the public.

Ms Chapman—So, the document itself is news.

Senator BRANDIS—So, therefore, do you say, Mr Este, the publication of anything in its original form in any medium which is interesting to a section of the public is, of itself, news, and therefore the facilitation of that being done is an act of journalism?

Ms Chapman—I think to help that we would say that it would be too hard to define, and the concept of news changes constantly.

Senator BRANDIS—That is why I am asking you these questions. I do not have a dogmatic view of my own, but I am interested in hearing your views on it.

Ms Chapman—We would say that if it is published in a news medium it is news.

Senator BRANDIS—Even if it is merely an original document?

Ms Chapman—Yes.

Senator BRANDIS—Do you agree with that, Mr Este?

Mr Este—Yes.

Senator BRANDIS—Can I turn to a completely different topic. That is the difference between the coalition's bill and Mr Wilkie's and Senator Xenophon's bill about which you offer no expression of opinion, but can I simply make a point to you and invite your comment. By locating journalist privilege among a range of other confidential relationships, the effect of the coalition's bill would be to attract a wide body of legal principles concerning the protection of confidential relationships. This is kind of a lawyer's point, I suppose, but it seems to me that that would strengthen the protection of journalists because their privilege is located in a more substantial, more significantly developed and sophisticated body of legal principle. What do you think about that?

Ms Chapman—I think we should probably take it on notice. They are quite different privileges, so potentially they may overlap, but I would suspect that they would also lead to—

Senator BRANDIS—But there are some core legal principles that apply across the range of that body of legal doctrine that deals with the protection of confidential relationships.

Ms Chapman—I think we need to take it on notice.

Senator BRANDIS—Alright, thank you.

Senator BARNETT—Thank you for acknowledging the previous inquiry and the Senate committee report—the Liberal senators' report. We have quoted you in that and we are heading in the direction for which you are very supportive. Under the definition of journalist in your submission, on the last line of that page you

say, 'This, in our view, is an effective mechanism for excluding those who are not acting in good faith.' How does that happen? The definition says you must be working, and that really is the key point you have been making, I think, in response to Senator Ludlam and Senator Brandis. How can you justify this view you have that this definition excludes those who are not acting in good faith? Surely the people can be acting not in good faith and still be covered.

Ms Chapman—The point is that we feel it is a broad enough definition for the court to be in a position to be asking the questions and finding—I appreciate Senator Brandis's point that it is a bit of a cop-out.

Senator BARNETT—They have to be acting in good faith; where does that come into it?

Ms Chapman—You do not necessarily need to be acting in good faith.

Senator BARNETT—I know. Why did you put it in your submission?

Ms Chapman—That is probably a good point.

Senator BRANDIS—It is a very good point, as a matter of fact, because a lot of people who tell secrets to journalists are actually acting in bad faith—they are acting out of malice—but that does not mean that what they are saying is not true.

Ms Chapman—That is correct; it is not necessarily relevant. The motivation of the whistleblower may or may not be relevant. The motivation of the journalist is probably more relevant. It will be relevant to some extent in a court's consideration of these issues to try and get behind the truth of the matter and why they should accept that the journalist does not have to give up their source. The journalist's motivations will be relevant in some circumstances.

Senator BARNETT—They may be, but they may be acting in bad faith or at least not in good faith. The journalist might be acting for whatever other reasons. My point is the definition. All it says is the person's work; they must be acting in the normal course of the person's work, so clearly I am just—

Ms Chapman—The definition does not achieve it, but it is an important issue for the court to examine at the time. It may be an important issue for the court to examine.

Senator BRANDIS—Can I just jump in, Senator Barnett? As long as, it seems to me, the journalist is acting in their professional capacity, the journalist's motive does not seem to me to be relevant at all. You could have a situation in which—it is not unknown in this building—a particular journalist hates a particular politician and is eager to do them harm. The journalist might have a source who also hates the same politician and is in a position to give the journalist information about that politician which would do them harm if published. The motive of both the source, in providing the disobliging information to the journalist, and the journalist in publishing it may well be in both cases malicious. That does not mean the information is not news.

Ms Chapman—Correct, but it may be relevant to the court to know the motivations of the parties involved; it may be.

Senator BRANDIS—Of course.

Senator BARNETT—The definition of news medium is very broad, it seems. Let me be specific. Does it include Facebook?

Ms Chapman—I would say, yes, it does.

Ms Cowdroy—It would have to be platform agnostic.

Senator BRANDIS—What?

Ms Cowdroy—Platform agnostic.

Senator BRANDIS—What a fantastic phrase!

Senator BARNETT—So, what you are saying—this is exactly where I am going to—is it could include any form of social marketing, Facebook or otherwise, but what is the key as to whether it is covered as a news medium or not?

Ms Cowdroy—I think the fact of the matter is with Facebook and Twitter a lot of news organisations publish to that forum as it is, so it is not just a blogger putting up a news story.

Mr Este—Perhaps a difficulty is involved in it as well because of the speed at which these tools evolve. If you are too prescriptive, that is going to lead you into difficulties up the track.

Senator BARNETT—The bottom line is this is very broad, is it not? When you say 'news medium' it means 'a medium for the dissemination to the public or a section of the public of news and observations on news'. So, you agree that is a very broad definition, is it not?

Ms Cowdroy—Yes, and rightly should be, but it is also has the caveat essentially provided by the definition of 'journalist'.

Senator BARNETT—Alright, thank you.

CHAIR—Mr Este, Ms Chapman and Ms Cowdroy, thank you for your time this afternoon and for responding so quickly to our request with this inquiry being held within three days. Thank you very much; it is much appreciated.

[5.16 pm]

ANGEL, Mr Joseph, Legal Officer, Justice Policy Branch, Access to Justice Division, Attorney-General's Department

KELLY, Ms Wendy, Director, Telecommunications and Surveillance Law Branch, Attorney-General's Department

MINOGUE, Mr Matthew, Acting First Assistant Secretary, Access to Justice Division, Attorney-General's Department

PANAGODA, Ms Ruvani, Acting Principal Legal Officer, Justice Policy Branch, Access to Justice Division, Attorney-General's Department

CHAIR—As I understand it we do not have a submission from you but I do just want to remind senators that the Senate has resolved that an officer of a department or of a state shall not be asked to give opinion on matters of policy but shall be given reasonable opportunity to refer questions asked of the officer to a superior officer or a minister. I remind you that this resolution prohibits only questions asking for opinions on matters of policy but does not preclude questions asking for explanations or factual questions about when and how policies were adopted. You are reminded that any claim that it would be contrary to the public interest to answer a question must be made by a minister and should be accompanied by a statement setting out the basis for that claim.

Mr Minogue, do you want to start with an opening statement or some comments?

Mr Minogue—No, I am happy to move straight to questions if that would help the committee.

Senator BRANDIS—I must say I am a little surprised to see officers from the Attorney-General's Department here, given that these are two private bills, although one of them has been adopted by the government.

CHAIR—We did ask them to come.

Senator BRANDIS—I am sorry, I did not realise that. I am glad you are here. I do not want to ask you anything about the bills or the substance of the bills, but I would like to know this: on what date were officers of your department first asked by the government to examine each of these two bills?

Mr Minogue—We might have to give you the precise date on notice. All I can say today is that it was before 22 September.

Senator BRANDIS—Was it after 21 August?

Mr Minogue—We saw the bill introduced by the member for Denison after 21 August, yes.

Senator BRANDIS—It was between 21 August and 22 September that you were asked to review Mr Wilkie's bill. Were you at any time given instructions to yourselves draft a government bill in relation to this matter?

Mr Minogue—Government decisions about what legislation it may develop or propose or introduce are really decisions for government and I would be very reluctant to disclose what government might have done. It is fair to say, consistent with what the Attorney had said during the election campaign, that the government was going to re-examine its position on the bill on journalists shield from the position it took to parliament in 2009 and we assisted the government in doing that following the election.

Senator BRANDIS—Did the matter go so far as the receipt by you or a relevant officer within your department of drafting instructions?

Mr Minogue—We prepared drafting instructions for a bill the government might introduce.

Senator BRANDIS—On what date were those drafting instructions finalised?

Mr Minogue—It is difficult to say 'finalised' because the government decided not to introduce a bill—

Senator BRANDIS—I withdraw the word 'finalised'. On what date did the preparation of those drafting instructions commence?

Mr Minogue—It was the middle of September. I cannot be more precise than that at this stage.

Senator BRANDIS—That will do me. Did the preparation of those drafting instructions commence before or after you were first asked to look at Mr Wilkie's bill?

Mr Minogue—Before.

Senator BRANDIS—Where do drafting instructions go in this area, to the parliamentary counsel?

Mr Minogue—The Office of Parliamentary Counsel; that is right.

Senator BRANDIS—Were those drafting instructions ever sent to the Office of Parliamentary Counsel?

Mr Minogue—Yes, they were.

Senator BRANDIS—On what date?

Mr Minogue—Again, mid-September.

Senator BRANDIS—After or before you saw Mr Wilkie's—

Mr Minogue—I am sorry, before.

Senator BRANDIS—Could the drafting instructions be produced, please?

Mr Minogue—I will take that on notice but my position at this stage would be that is a matter for the government. Drafting instructions reflect policy decisions of government and would normally be regarded as cabinet-in-confidence.

Senator BRANDIS—Has a policy decision been made? We do not have a government bill. None has been introduced.

Mr Minogue—Indeed, and drafting instructions are matters that might relate to positions government might take. What legislation it might or might not introduce would generally be regarded as confidential to government but I am happy to take that on notice.

Senator BRANDIS—I just want to follow the sequence of events here. The drafting instructions were prepared and sent to the Office of Parliamentary Counsel before you saw Mr Wilkie's bill?

Mr Minogue—Yes.

Senator BRANDIS—We know that the government has not in fact introduced a bill. Was an instruction at any time received by you not to proceed with a government bill?

Mr Minogue—I would not characterise it as an instruction. It is up to the government to decide what it does with bills.

Senator BRANDIS—You certainly drafted the instructions to the Office of Parliamentary Counsel in mid-September. It is now mid-November. There must have been a point at which the process of drafting a government bill ceased.

Mr Minogue—That is true.

Senator BRANDIS—When did that happen?

Mr Minogue—When the Attorney announced that he would be supporting the bill by the member for Denison.

Senator BRANDIS—At the time at which that decision was made, had a draft government bill in fact been prepared?

Mr Minogue—There were draft provisions. It certainly was not a finalised bill but drafting had been commenced.

Senator BRANDIS—Would you say it was well advanced?

Mr Minogue—It was reasonably.

CHAIR—I am keen as you would know to pursue your view about the matter that Ken Parish from Charles Darwin University has raised this afternoon. I probably gave you a bit of notice about this two weeks ago in Melbourne as to whether or not you believe the issues he raises do point to a loophole in this legislation and/or whether or not there needs to be an amendment to this legislation or an amendment to the Telecommunications (Interceptions and Access) Act?

Mr Minogue—Yes, I also know that the matter was raised with colleagues who were involved in another Senate committee. I think the department's position would be that there is not a loophole certainly in relation to the proposed amendment to the Evidence Act. The reason for that is that the interception powers broadly defined do not relate to the admissibility or adducing of evidence in hearings once the litigation or actions have commenced. That is the reach of the Evidence Act. Section 4 of the Evidence Act relates to proceedings

in a federal court. Interception and other police powers do not relate to proceedings in a court; they relate to non-curial processes that might happen before that. In that sense we would not see there being a loophole in terms of what the Evidence Act can do.

CHAIR—Of this act, for example?

Mr Minogue—Of this act, that is right. In terms of the Telecommunications (Interception and Access) Act's regime more broadly I would refer to the fact that those powers do contain quite strict limitations. I think, as Mr Parish indicated in his evidence this afternoon it is only about the number, not the content, and he alluded to the fact that there is a higher regime for content, and in my submission that is perfectly appropriate. But even with the numbers there are strict protections on what that information can be used for and those circumstances include: for the enforcement of the criminal law and enforcement of a law imposing a pecuniary penalty or protection of the public revenue. So it is not a broad power to access this information and do anything you like with it. It is controlled access for controlled purposes. For that reason I would say there was also not a loophole in regard to that other legislation.

CHAIR—How do you explain the actions of the Northern Territory Police then in the case that occurred with the journalist in the last three weeks? His mobile telephone records were seized without a warrant and without his knowledge as they tried to ascertain who was the source of the leak for his story in the newspaper? What protection does he then have as a journalist?

Mr Minogue—The protection is in relation to the holder of the records. We do have another officer here who is more well-versed in the intricacies of the telecommunications regime whom I might refer you to.

Ms Kelly—In relation to the specific incident you are referring to, the Northern Territory Police were investigating a criminal offence in terms of the leaking of the information. They got access to the journalist's records under the TI Act which is available to them for that purpose.

The TI Act does not require a police force to notify the person whose records they are accessing that they have been accessed. I think the reporting in the media that I saw indicated that the person had not been notified. The provisions in the act actually require the police force to notify the carrier who holds those records to then provide those records to them. They are the circumstances, as I understand them, around the recent incident in the Northern Territory.

CHAIR—Was it because it was a criminal act in disclosing the nature of the acts that allowed the police to operate in that way?

Ms Kelly—Correct. The access arrangements are for the investigation of a criminal offence, an offence that has a pecuniary penalty attached to it or for the protection of the public revenue.

CHAIR—That criminal act was because one of their own, that is a police officer, provided that information?

Ms Kelly—That is my understanding.

CHAIR—Could the same access to mobile phone records be obtained anywhere else around this country if—

Ms Kelly—If it is a criminal offence to provide information to some other person and the police are investigating that offence, then yes, any person's phone records could be accessed.

CHAIR—If we have a matter, say, in one of the other states and an informant provides a journalist with specific information, do the provisions of this bill also become relevant if it is a criminal offence? They could still access their mobile phone records and obtain the source of the leak of that information?

Ms Kelly—If it is characterised as a criminal offence, yes.

CHAIR—So that is where the threshold difference is in that matter?

Ms Kelly—Correct.

Senator LUDLAM—I think that you were all here before and I am wondering whether you could help shed any light at all on the grey area that Senator Brandis and I were poking around in before. The drafting of the bill is pretty clear that it is platform independent and that the scope of the material covered is very broad, and where I think we are a bit hung up—or I certainly am—is on who attracts the protection. Do you want to just give us your view as your reading of what we are about to pass?

Mr Minogue—You have saved me, because I was in two minds about whether I should volunteer. Normally that would not be prudent, but you have asked me a question so I will take it on. Sorry; if I can, I should correct the record, too. I have referred to the date of the Attorney's announcement incorrectly—the Attorney's announcement with Senator Xenophon and Mr Wilkie. I think I have referred to it as 22 September; I think it was, in fact, 28 September, so I will just correct the record there. In terms of who—

Senator BARNETT—It does not change your answer to Senator Brandis and the other questions?

Mr Minogue—No, it does not change the answer. In terms of who is covered, it is a bit of a difficult area and at one level I certainly agree with some of the evidence that was given earlier that the definition is broad; it is broad and permissive. It is not unlimited and I would be cautious about suggesting an unlimited definition that someone who thinks they are a journalist is. The way the definition is phrased is very much based on the New Zealand provision, which seemed to attract a lot of support and does not seem to have caused too many problems in New Zealand.

At one level it turns on the use of the term 'in the normal course of that person's work'. What 'work' means is not an easy concept, but equally it is not a new or novel concept in terms of statutory definitions and what it means. In fact, in the context of 'journalist' there is case law touching on this. The type of approach that courts tend to take is that work is a question of fact based on the totality of all of the circumstances and the range of factors that go to leading to a conclusion that someone is, or is not, a journalist. Certainly, employment and payment are indicators of that; others can judge whether they are strong indicators or less strong indicators. They are certainly indicators, but they are not the exclusive determinant, so the fact that someone is paid does not mean they are a journalist; the fact that someone is not does not mean they are not.

There is a particular decision that I refer the committee to; it is called NRMA v John Fairfax. It is a 2002 decision of the New South Wales Supreme Court and its citation is (2002) NSWSC 563. The court there was concerned about whether a person was acting in the course of their profession as a journalist. Profession was discussed; they refer to a previous case by Justice Santow, which is contained in the reference I have given, which talked about an unpaid activity by a solicitor. The judge there analysed the previous cases and said 'profession' or 'professional activity':

… would embrace intellectual activity, or manual activity controlled by the intellectual skill of the operator whereby services are offered to the public, usually though not inevitably for reward and requiring some professional standards of competence, training and ethics, typically reinforced by some form of accreditation.

The judge in the Fairfax case, referring to that, then goes on to talk about some of the other factors. One of the ones that I particularly refer to is that there is some learning and professional development required to hold yourself out in that capacity and he says:

Their work is subject to procedures which make their employers, and thus them, accountable for their actions.

The reason I refer to that case is that I think the accountability side of it is one that has not been explored in some of the comments that were touched on. For example, in the second reading stage of the bill Senator Xenophon made the comment that the purpose of the reference to work is to draw a distinction between someone acting in a purely private capacity and someone acting in a professional capacity. I think 'professional' picks up that concept of regular, sometimes paid, perhaps usually paid, but also some accountability. There is some measure on what they are doing. That does not exclude people who do it on an informal or voluntary basis, but it does mean a private passion or exercise of a private interest probably would not be journalism.

Senator LUDLAM—What is the date of the New Zealand legislation?

Mr Minogue—2006.

Senator LUDLAM—Have you had time or is there any relevant case law you are aware of where these questions have been tested in New Zealand?

Mr Minogue—There have been one or two maybe. It certainly has not been used or come into the courts very often.

Senator LUDLAM—The reason I am pursuing this a bit is that I feel like you could quite easily envisage the key question being argued in court as to whether the protection applied or not, that somebody has been dragged into court to disclose a source and that you could find the court is tied up for a very long period of time before they get to hear the matter, arguing over whether this person is afforded the protection of the shield laws or not. I think the comments you have offered us on the definition of work are helpful. My reading of it is that you might end up determining on the question of the definition of 'normal'—in the normal course of that

person's work. What does that mean in an age of citizen journalism where the profession itself is becoming very diffused? This is not a fad; this is a long-term, very powerful trend. Just look at the last federal election; there was a huge amount of work done, arguably, very strongly in the public interest by people unpaid, publishing to their own platforms, attracting enormous interest and having a profound impact on the public debate, not working for News Corp or Fairfax and not getting paid.

I do not know how to resolve this in the context of this legislation but I hope we can provide some guidance that if these questions ever are tested in a court, and I think they will be—I guess to finish the thread—we come down on the side of whether it is in the public interest that this person get prosecuted or that source get disclosed, not who they are and whether they wrote that piece in their pyjamas or not.

Mr Minogue—In terms of citizen journalists, the trouble with adding more definitions or trying to define more concepts is that they themselves have to be defined as to what they mean. If you are too specific, someone gets in—that might be helpful—but someone gets out. If we define it in the act we will define it as we understand it today and if we had done this five years ago, or before the election—whenever citizen journalism really got going; whenever that date was—we might lose someone. I think an ambulatory definition is actually better going to serve the purposes. What the definition does not do is that it is not tied to any particular form of technology; it is not tied to any particular organisation as such; and it does depend on what a court would ultimately decide, as I said before, having regard to the totality of factors—is that person a journalist as that term is understood today, whenever that day is?

Senator LUDLAM—I think that is a shame because what we want the court to be hearing is, 'Is it in the public interest that this source be protected?' That is the question we want them to hear, not the fight about whether you got through the door in the first place.

Mr Minogue—No, I think there is a difference, because it is not just a worthiness test—and I am not trying to be provocative in saying it that way. The reason I say that is the way this bill works—as opposed to the SCAG model law, the former government's provisions or the bill introduced last year by the Attorney-General—is that this bill is different because it works on the basis of a presumption. The starting presumption is that you are not compellable. If that applies to everyone then my argument would be a presumption that evidence is not adducible and people cannot be compelled to give evidence on the basis of the public interest, which can only be determined by a court or, in some other circumstances, a government for political decisions.

The difficulty they have is that starting with the presumption that evidence is not admissible is a pretty significant step for an evidence act in our justice system to cope with—or to accommodate; that is a better way to put it. So to start with that premise but have it too broad, I think, is a little risky, I would have to say. Starting with a general public interest test about whether a person's identity should be disclosed or not without that premise, you might go further with that, but that is exactly not what stakeholders supported and that is not what is reflected in the member for Denison's bill or Senator Xenophon's bill.

Senator LUDLAM—I think we might get away with passing this bill at the moment. I do not think we have struck the balance right at all but I can guarantee we are going to need to revisit this over and over again because of the long-term direction of the journalistic profession.

Mr Minogue—Possibly. The other comment that I would make is that courts are already deciding these questions now. The case I referred to is nearly 10 years old; the factors they would have taken account of then will be different from the factors they take account of today.

Senator LUDLAM—This is coming back to the chamber whenever—sometime soon. I ask you to, if you can, provide us with any other relevant cases at all where these kind of questions—not necessarily in the context of a shield law but in the context of the kind of grey area we are trying to grapple with—have been addressed to see if there is any guidance.

Mr Minogue—Certainly. We had a quick search today, so that was what came up. I am quite comfortable in saying that that sort of line of taking account of the totality of factors is the kind of approach a court would take. We will do more work if we can; I am not quite sure of the vehicle for us to disseminate it, but if we find something that we think might be useful to the committee then we will certainly provide that to the committee.

The other point I would make in relation to accountability is that I think it comes into the concept of 'journalist' as a term in its own right but also 'work'—that is, that pattern of regularity—but also the protection applies where a journalist has promised an informant not to disclose that identity. So there is that concept of promise—the journalist having to say, 'I am going to protect you', and there being some basis on

the journalist saying: 'I am going to protect you; you know who I am, you know what I do and therefore that promise has some meaning.'

Senator LUDLAM—If the worst happens and you end up in court and they say, 'No, you are not a journalist; you had no right to offer that protection to this person; you are not protected—'

Mr Minogue—That would be a matter for the court and the implications of that would flow, but I think that still introduces that concept of distinguishing between a private action and some—

Senator LUDLAM—That is helpful.

Mr Minogue—Yes.

Senator LUDLAM—Yes. Thank you very much for your time. Thank you, Chair.

CHAIR—Thank you very much. Thank you for your attendance this afternoon; it is appreciated.

Mr Minogue—Thank you.

Committee adjourned at 5.43 pm