

MALLESONS STEPHEN JAQUES

Ms Monika Sheppard
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Senate Standing Committee on Legal and
Constitutional Affairs
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Dear Ms Sheppard

Inquiry Into the Evidence Amendment (Journalists' Privilege) Bill 2009

I refer to the hearing before the Senate Standing Committee on Legal and Constitutional Affairs ("the Committee") held on Tuesday 28 April 2009 at which I appeared on behalf of Australian Associated Press ("AAP") together with Ms Emma Cowdroy, AAP's General Counsel. Following the hearing we had a brief discussion with Senator Barnett regarding the fact that the US Congress is currently considering similar legislative reforms with respect to the protection of journalists' sources. Senator Barnett suggested the Committee would be aided by the provision of a short note summarising the current status of the US proposals. This letter constitutes that note.

Free Flow of Information Act 2009

The United States Congress is currently considering the enactment of Federal journalists' shield laws. Two versions of the *Free Flow of Information Act 2009* are presently before the United States Congress. Copies of both are attached.

H.R 985 was passed by the House of Representatives on 31 March 2009. It was then sent for consideration by the Senate and referred to the Senate Committee on the Judiciary on 4 April 2009.

S 448 is a further version of the *Free Flow of Information Act 2009* which is a second version of the Bill that originated in the United States Senate. It was introduced in the Senate and referred to the Senate Committee on the Judiciary on 13 February 2009. The Senate Committee was due to meet to consider and take submissions on both H.R 985 and S448 on 30 April 2009 but that has since been cancelled and the Senate Committee will now meet on **7 May 2009** (see <http://judiciary.senate.gov/hearings/hearing.cfm?id=3817>)

While there are some differences between the finer points of H.R 985 and S448, the Committee will note that both versions of the *Free Flow of Information Act 2009* proceed on the basis of a rebuttable presumption that the confidentiality of journalists sources is to be maintained. The onus is on the party seeing disclosure to demonstrate that:

- (a) they have exhausted all alternative reasonable sources of the information
- (b) that the information sought is "essential" or "critical" to investigation, prosecution or defence of a criminal offence or
- (c) that that non disclosure will cause significant and "specified" or "articulable" harm to national security.

Both versions of the *Free Flow of Information Act 2009* therefore provide journalistic 'privilege' in the true sense of the word, rather than merely a guided discretion.

Further, both H.R 985 and S448 contain strong safeguards for source confidentiality, even in the event that the onus is satisfied and a court decides to compel disclosure. They require that any information that a journalist is compelled to disclose should be:

- (a) limited to the purpose of verifying published information or describing any surrounding circumstances relevant to the accuracy of such published information; and
- (b) narrowly tailored in subject matter and period of time covered so as to avoid compelling production of peripheral, nonessential or speculative information.

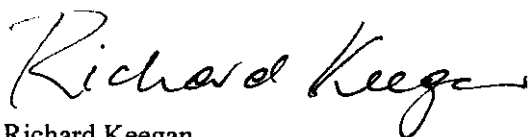
These limitations reflect the proposals put forward at point 6 of AAP's submission to the Committee to the effect that the Evidence Amendment (Journalists' Privilege) Bill 2009 should include provisions allowing Courts to order that the scope of disclosure is limited as far as possible, and that, in particular, where possible, disclosure should be limited to the substance of the information provided by the source, rather than the identity of the source.

Additionally, it is pertinent to note that the Bill passed by the United States House of Representatives (H.R 985) defines a "covered person" (that is, a person protected by the privilege) as:

" a person who regularly gathers, prepares, collects, photographs, records, writes, edits, reports or publishes news or information that concerns local, national, or international events or other matters of public interest for dissemination to the public for a substantial portion of the person's livelihood or for substantial financial gain and includes a supervisor, employer, parent, subsidiary, or affiliate of such covered person"

Due to the fact that it refers to a person who engages in journalism "for a substantial portion of the person's livelihood or for substantial financial gain", this definition is limited to professional journalists and excludes amateur bloggers. This definition also extends protection to all individuals and corporations in the chain of command of modern news media organisation including editors, producers and management rather than just reporters. This lends support to the argument made at point 4.3 of AAP's submission that in such an organisation, the operational realities involved in the preparation and dissemination of news often requires information regarding confidential sources to be shared amongst several individuals.

Yours sincerely



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