

CHAPTER 2

Overview of the Bill

2.1 The Evidence Amendment (Journalists' Privilege) Bill 2009 (Bill) proposes to amend the professional confidential relationship privilege (privilege) provisions in Part 3.10 Division 1A of the *Evidence Act 1995* (Act).

Key provisions

2.2 This chapter outlines the five key provisions of the Bill:

- the object of Division 1A;
- the exclusion of evidence of protected confidences;
- the loss of the privilege;
- judicial consideration of risk of prejudice to national security; and
- the application of the Act.

Object of Division 1A – new section 126AA

2.3 Item 1 of the Bill inserts an object clause at the beginning of Part 3.10 Division 1A. Clause 126AA provides that the object of the Division is to achieve a balance between the public interest in the administration of justice, and the public interest in the media communicating facts and opinion to the public and, for that purpose, having access to sources of fact.¹

2.4 According to the Explanatory Memorandum, the amendment intends to ensure that the court has relevant public interest factors in mind when exercising its discretion to direct that evidence of a protected confidence or protected identity information, as defined in section 126A, not be given in a proceeding.

2.5 In the Second Reading Speech, the Hon. Robert McClelland MP, Attorney-General (Attorney-General) told Parliament:

This Bill recognises the important role that journalists play in informing the public on matters of public interest and, in my view, appropriately balances that against the public interest in the administration of justice.²

2.6 The Explanatory Memorandum reiterated this explanation, in particular highlighting the government's commitment to enhancing open and accountable government:

1 Clause 126AA of the Bill. Examples relevant to both forms of public interest are cited in the Explanatory Memorandum: see Explanatory Memorandum, p. 3.

2 The Hon. Robert McClelland MP, Attorney-General, *House Hansard*, 19 March 2009, p. 3244.

This clause will give recognition to the important function the media plays in enhancing the transparency and accountability of government. Its role in informing the community on government matters of public interest is a vital component of a democratic system.³

Exclusion of evidence of protected confidences – new paragraphs 126B(3)(a) & (4)(e)

2.7 The Attorney-General also emphasised the protection of journalists' sources as one of the basic conditions of press freedom, as recognised by the European Court of Human Rights.⁴

2.8 At present, section 126B requires the court to consider:

- whether it is likely that harm would or might be caused (directly or indirectly) to a protected confider;⁵
- the likely effect of adducing evidence of the protected confidence or protected identity information, including the likelihood of harm, and the nature and extent of harm that would be caused to the protected confider.⁶

2.9 Protected confider is defined in section 126A, but that definition does not include confidants (journalists), notwithstanding that journalists might also suffer harm (such as harm to their reputation and their ability to obtain information) if they are required to disclose a source.⁷

2.10 Items 2, 3 and 4 of the Bill propose to extend the relevant paragraphs of section 126B – paragraphs (3)(a) and (4)(e) – to require the court to also consider harm to journalists as a factor in determining whether evidence of a protected confidence or protected identity information should be excluded from proceedings.

Loss of the privilege – new paragraph 126B(4)(i) & new subsection 126B(4A)

2.11 Item 8 of the Bill proposes to repeal section 126D. This provision allows for the loss of the privilege when a communication is made or the contents of a document are prepared in furtherance of the commission of a fraud, an offence or commission of an act that renders a person liable to a civil penalty.

3 Explanatory Memorandum, p. 1.

4 The Hon. Robert McClelland MP, Attorney-General, *House Hansard*, 19 March 2009, p. 3245.

5 Paragraph 126B(3)(a) of the Act.

6 Paragraph 126B(4)(e) of the Act.

7 The Hon. Robert McClelland MP, Attorney-General, *House Hansard*, 19 March 2009, p. 3245.

2.12 According to the Explanatory Memorandum, section 126D has the potential to undermine the protections granted by Division 1A, as, in some instances, the very act of communicating with a journalist can constitute an offence.⁸

2.13 To address this situation, Item 5 of the Bill proposes to replace section 126D with a more flexible paragraph – paragraph 126B(4)(i) – requiring the court to take into account:

(i) whether the evidence is evidence of a communication made, or the contents of a document prepared, in the furtherance of the commission of a fraud or an offence or the commission of an act that renders a person liable to a civil penalty.

2.14 The amendment will enable the court to decide whether the privilege should be upheld after taking into account all relevant factors. For example, in situations where a Commonwealth public servant has disclosed, without authorisation, information obtained in the course of official duties in contravention of section 70 of the *Crimes Act 1914* (whistle-blowing).

2.15 Laws prohibiting unauthorised disclosure of government information will not be affected by the Bill, and the Attorney-General specifically rejected that the Bill will prevent or frustrate legal action against persons who make illegal disclosures. Instead, the court will continue to have:

...the ability to consider whether the source could have utilised, where available, laws protecting public interest disclosures. Failure by a source to access the protections provided by these laws, that is, the whistleblower laws, when introduced, would clearly be a relevant consideration in the court's determination of whether the confidential communication between the journalist and source should be privileged.⁹

2.16 The Attorney-General acknowledged the House of Representatives' Standing Committee on Legal and Constitutional Affairs' recent inquiry into protections for whistleblowers within the Commonwealth public sector,¹⁰ and informed Parliament that the government is currently developing 'whistleblower protections which have the capacity to complement journalist shield laws by providing avenues other than the media for public interest disclosures.'¹¹

2.17 The Explanatory Memorandum states that clause 126B(4A) picks up a common law rule regarding the requisite standard of proof for loss of privilege on

8 Explanatory Memorandum, p. 1.

9 The Hon. Robert McClelland MP, Attorney-General, *House Hansard*, 19 March 2009, p. 3245. Also, see Explanatory Memorandum, p. 2.

10 House of Representatives, Standing Committee on Legal and Constitutional Affairs, *Inquiry into Whistleblowing Protections within the Australian Government Public Sector*, February 2009.

11 The Hon. Robert McClelland MP, Attorney-General, *House Hansard*, 19 March 2009, p. 3245.

grounds of misconduct.¹² The new subsection enables the court to find, on reasonable grounds, that a fraud, offence or act was committed, or a communication was made or document prepared in furtherance of that fraud, offence or act.¹³ This amendment replicates the soon-to-be repealed section 126D(2).

Judicial consideration of risk of prejudice to national security – new paragraph 126B(4)(j)

2.18 Item 6 of the Bill proposes to omit part section 126B(4), which part requires the court to take into account, and give the greatest weight to, any risk of prejudice to national security (within the meaning of section 8 of the *National Security Information (Criminal and Civil Proceedings) Act 2004*).

2.19 The Bill intends to replace this part section with new paragraph 126B(4)(j), requiring the court to take into account any risk of prejudice to national security, as defined by the aforementioned Act.

2.20 Both the Attorney-General and the Explanatory Memorandum emphasise that the amendment allows the court to determine the weight to be given to a specific risk of prejudice to national security, in the context of other relevant factors, based on the evidence before it.

The greater the risk of prejudice to national security and the greater the gravity of that prejudice, the greater the weight the court would be expected to give to this matter under proposed paragraph 126B(4)(j) and the less protection it will likely afford to journalists and their sources.¹⁴

2.21 The Explanatory Memorandum adds that in cases where the court upholds journalists' privilege, the protection will enable a journalist to abide by ethical obligations to maintain source confidentiality without fear of being held in contempt of court.¹⁵

Application of the Act – new section 131B

2.22 At present, the Act applies to all proceedings in a federal court or an ACT court. Section 131A provides for an extended application in relation to Division 1A.

2.23 Item 9 of the Bill proposes to extend Division 1A and section 131A to all proceedings in any other Australian court for an offence against a law of the Commonwealth, including the types of proceedings stated in section 4.

12 Explanatory Memorandum, p. 5. Also, see *O'Rourke v Darbishire* [1920] AC 581.

13 Clause 126B(4) of the Bill. Also, see Explanatory Memorandum, pp 4-5.

14 Explanatory Memorandum, p. 5. Also, see the Hon. Robert McClelland MP, Attorney-General, *House Hansard*, 19 March 2009, p. 3246.

15 Explanatory Memorandum, p. 2.

2.24 The Explanatory Memorandum stated the rationale for proposed section 131B, that is, the equal treatment of offenders:

It is not appropriate that a protected confider or a confidant in the prosecution of an offence against Commonwealth law in a federal or ACT court could apply to have evidence excluded on the basis of this privilege but that a protected confider or a confidant in the prosecution of the same Commonwealth offence in a State Court could not apply for a direction that evidence not be given.¹⁶

2.25 State/territory courts usually conduct Commonwealth prosecutions, including of Commonwealth public servants charged with disclosing confidential government information. Accordingly, it is in those courts that journalists are often called upon to reveal their sources.¹⁷

2.26 Throughout the inquiry, submissions and evidence raised concerns with nearly all the key provisions of the Bill. Chapter 3 discusses these concerns.

16 Explanatory Memorandum, p. 6.

17 The Hon. Robert McClelland MP, Attorney-General, *House Hansard*, 19 March 2009, p. 3246.

