

## **Additional comments by the Australian Greens**

1.1 The Australian Greens believe that a strong and independent press is an essential safeguard for a democratic society.

1.2 The Greens recognise that the overwhelming balance of submissions to this committee favour greater journalist-source confidentiality protection. The committee's report acknowledges that most submissions favour a rebuttable presumption of journalists' privilege, such as exists in other like-minded democratic countries.

1.3 The committee notes in paragraph 3.60 that 'there are alternate shield law regimes in the United Kingdom, New Zealand and even the United States, none of which is identical, and on the basis of the evidence before it, the committee cannot say that any one of these models is superior to the others.'

1.4 This statement neatly misses the point made in most submissions: all of these regimes are superior to the model operating in Australia, because all of them have as their starting point the protection of journalist-source confidentiality. All of the media organizations who made submissions or gave evidence supported many of the amendments in this Bill but clearly stated that the Bill had not fulfilled the government's stated intentions in the crucial matter of protection of confidentiality.

1.5 In evidence given to the committee on 28 April 2009, Ms Catherine Fitch, the Acting Assistant Secretary, Administrative Law and Civil Procedure Branch of the Attorney-General's Department noted that:

I do not know that in operation there would be a significant difference between the way this privilege plays out and the way a presumption such as occurs in the New Zealand Evidence Act would operate.<sup>1</sup>

1.6 In other words, the government intends for the law to operate in much the same way as in jurisdictions where a rebuttable presumption of confidentiality exists. This being the case, it is the view of the Australian Greens that the Bill should express this principle clearly to put the matter beyond doubt.

1.7 Doctor Joseph Fernandez identified one means of doing this, proposing the inclusion of a statement such as the following:

In exercising its discretion as to whether to compel disclosure from a journalist to reveal his or her confidential source, the court should give

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1 Attorney-General's Department, *Committee Hansard*, Melbourne, 28 April 2009, p.33.

particular attention to the importance of facilitating greater transparency, openness and accountability in Government.<sup>2</sup>

### **Recommendation 1**

#### **1.8 That the bill be amended to introduce a rebuttable presumption in favour of maintenance of journalists' privilege.**

1.9 During the hearings a number of concerns were raised about the definitions pertaining to 'journalists' and 'media', with regard to the proliferation of blogs and independent 'citizen journalists' and the diffusion of the role traditionally played by accredited journalists in the mainstream mass media.

1.10 The Public Interest Advocacy Centre (PIAC) submission canvassed these issues well, including an amendment to proposed section 126AA to make clear that the Bill and its protections should apply to anyone engaged in journalistic work in the broadest sense. In evidence given to the committee, Ms Fitch of the AG's Department acknowledged that the Evidence Act is somewhat ambiguous in this regard:

Senator, I think this bill would apply where the journalist was acting in a professional capacity and where there was an express or implied obligation to keep some particular information or their identity confidential. As you can no doubt appreciate, there is an almost infinite variety of possible relationships in this day and age, some of which may be captured and others of which may not.<sup>3</sup>

1.11 The Greens support PIAC's recommendation that the scope of the legislation be clarified to include a broader definition of what is meant by a 'journalist'.

### **Recommendation 2**

#### **1.12 That the bill be amended to ensure that the scope of protections offered is not arbitrarily narrowed to traditional journalists working for established media.**

1.13 The Australian Associated Press submission makes a number of comments relating to apparent ambiguities in the Bill relating to the definition of 'prior disclosure', the status of communications which would be considered to be unlawful, and makes proposals to make provision for partial disclosure of information where this would be sufficient for the purpose of satisfying the interests of justice in court proceedings. The Australian Greens encourage the government to consider these proposals.

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2 Dr Joseph Fernandez, *Committee Hansard*, Melbourne, 28 April 2009, p. 3.

3 Attorney-General's Department, *Committee Hansard*, Melbourne, 28 April 2009, p. 34.

1.14 Similarly, on page 2 of the PIAC submission it is suggested:

...Division 1A of the amended Act should make it clear beyond argument that the privilege applies not only to communications the *content* of which is (sic) journalist is under a duty not to disclose, but to communications in relation to which a journalist's duty is limited to protecting the *source* (while being at liberty to disclose *content*).<sup>4</sup>

1.15 The government has stated that this Bill has been advanced with the intent of strengthening the role that media organizations can play in democratic accountability. The Greens believe that the Bill currently falls short but that with a small number of simple amendments it can make a genuine contribution in this regard.

**Senator Scott Ludlam**

**Australian Greens**

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4 Public Interest Advocacy Centre, *Submission 2*, p. 2.

