Minority Report by Senator Nick Xenophon

Background

1.1 The *Evidence Amendment (Journalists' Privilege) Bill 2009* ('the Bill') contains a number of key amendments to Part 3.10, Division 1A of the *Evidence Act 1995 (Cth)* ('the Act'), which provides for professional confidential relationship privilege.

1.2 Section 126B of the Act currently provides that a court may direct that evidence not be adduced in a proceeding if adducing that evidence would disclose a protected confidence, the contents of a document recording a protected confidence or, protected identity information. The court is required to give such a direction where it is likely that harm would or might be caused (whether directly or indirectly) to a protected confider if the evidence is adduced and the nature and extent of the harm outweighs the desirability of the evidence being adduced.[1] The Act also provides a list of factors the court must take into account when exercising discretion.[2] The privilege does not apply in cases of misconduct; that is, where the confidential communication is made in the furtherance of the commission of an offence or an act that renders a person liable to a civil penalty.[3]

1.3 It can be strongly argued the current laws are woefully inadequate and do not provide the protection journalists need in order to fulfil their role in a functioning democracy.

1.4 The new Bill is intended to strengthen Australian shield laws. The key amendments proposed under the Bill are summarised as follows:

- The Bill introduces a new objects clause that provides that the court is to achieve a balance between the public interest in the administration of justice on the one hand and the public interest in the media having access to sources of facts for the purpose communicating facts and opinion to the public on the other.[4]
- The Bill extends the list of factors the court must take into account when exercising is discretion by requiring the court to consider any likely harm to journalists if the evidence were to be given.[5]
- The Bill removes the automatic loss of privilege in cases of misconduct. Instead the issue of whether a communication between a journalist and their

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[1] *Evidence Act 1995 (Cth)* – Section 126B(3)

[2] *Ibid*, Section 126B(4)

[3] *Ibid*, Section 126D

[4] *Evidence Amendment (Journalists' Privilege) Bill 2009*, Explanatory Memorandum, p 1.

[5] *Ibid.*

source was made for an improper purpose is one of factors the court must take into account when exercising its discretion.[6]

- The Bill removes the current requirement that the risk of prejudice to 'national security' be given greatest weight and instead makes it one of the factors that the court must consider when exercising its discretion.[7]
- Lastly, the Bill extends the application of the Act to all proceedings in all Australian courts for offences against the law of the Commonwealth, rather than to proceedings in a federal court or an ACT court as is presently the case.[8]

A Journalist's Dilemma

1.5 As highlighted in the submission by *Australia's Right to Know*, generally, there is an expectation that journalists will typically disclose the source of their information.[9] This expectation is in keeping with Australia's Code of Ethics for Journalists, produced by the Media Entertainment and Arts Alliance, which although not legally enforceable, provides that journalists should 'aim to attribute information to its source'.[10] It also ensures a level of transparency and accountability in reporting to the public. However in practice this is not always possible. There are legitimate circumstances where a journalist is only able to obtain information on the basis that the identity of the source is kept confidential and guarantees of anonymity become necessary.[11] Guarantees of anonymity are not given lightly and without serious consideration. The Code of Ethics states that where a source seeks anonymity, a journalist should 'not agree without first considering the source's motives and any alternative attributable source.'[12] Importantly, the Code goes on to say 'where confidences are accepted, respect them in all circumstances'.[13] The Code of Ethics also contains a guidance clause which states, among other things, that 'only substantial advancement of the public interest or risk of substantial harm to people allows any standard to be overridden'.[14]

1.6 In instances where confidences have been accepted, journalists may find themselves faced with the dilemma of identifying their source and breaching the conditions under which they were able to obtain the information in the first place or,

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[6] *Ibid,* p 2.

[7] Neilsen, MA., Magarey, K, *Evidence Amendment (Journalists' Privilege) Bill 2009, Bills Digest,* No. 130, 2008–09, p 6. Available at: http://www.aph.gov.au/library/pubs/bd/2008-09/09bd130.pdf. See also, Explanatory Memorandum, p 2.

[8] *Op,cit., Bills Digest,* p 6.

[9] Australia's Right to Know Submission to the Inquiry into the Evidence Amendment (Journalists' Privilege Bill 2009, *submission no. 8*, p 2.

[10] Media, Entertainment & Arts Alliance, *Media Alliance Code of Ethics* www.alliance.org.au/resources/media

[11] *Op.cit.,* Submission no. 8, p 2.

[12] *Op.cit., Media Alliance Code of Ethics.*

[13] *Ibid.*

[14] *Ibid.*

being found in contempt of court and subject to significant criminal penalties including pecuniary penalties, criminal conviction or, worse still, a term of imprisonment.[15]

1.7 This is just one of the quandaries journalists may be confronted with. Another major concern is the impact that revealing sources can have on the profession's ability as a whole to rely on sources for information that is in the public interest.[16] Where journalists disclose their source rather than face the prospect of being in contempt of court, damage is caused not only to the individual journalist's professional reputation but the profession's reputation as a whole, particularly as sources become mistrusting of the media.[17] The inevitable outcome of this occurrence, often referred to as the 'chilling effect',[18] is the potential it has to impede the flow of information to the public and inhibit freedom of the press and freedom of speech, both equally important cornerstones of democracy.

Overseas Models – New Zealand and the United Kingdom

1.8 Unlike Australian legislation which only provides the court with the discretion to direct that evidence which would disclose a confidential communication made to a journalist or the identity of their source be excluded in proceedings, NZ and UK legislation provide a presumption in favour of not disclosing a source. This is a much better model. The onus lies with the person seeking disclosure to establish that the source should be revealed on public interest grounds (NZ) or in the interests of justice, national security and the prevention of disorder or crime (UK).

1.9 Section 68 of the *Evidence Act 2006 (NZ)* provides that:

> 1) If a journalist has promised an informant not to disclose the informant's identity, neither the journalist nor his or her employer is compellable in a civil or criminal proceeding to answer any question or produce any document that would disclose the identity of the informant or enable that identity to be discovered.
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> 2) A Judge of the High Court may order that subsection (1) is not to apply if satisfied by a party to a civil or criminal proceeding that, having regard to the issues to be determined in that proceeding, the public interest in the disclosure of the identity of the informant outweighs –
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> (a) any likely adverse effect of the disclosure on the informant or any other person; and

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[15] *Op.cit.,* Australia's Right to Know, *submission no. 8,* p 3.

[16] Ingham, L., *Australian Shield Laws for Journalists: A Comparison with New Zealand the United Kingdom and the United States* (2008) Australian National University, College of Law Internship Program, p 4. Available at: http://www.cla.asn.au/Article/ShieldLaws.pdf

[17] *Ibid.*

[18] *Ibid.* See also *Goodwin v the United Kingdom* [1996] ECHR 16 at 39.

> (b) the public interest in the communication of facts and opinion to the public by the news media and, accordingly also, in the ability of the news media to access sources of facts.

1.10 Section 10 of the *Contempt of Court Act 1981 (UK)* provides that:

> No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime.

1.11 UK Legislation should be read in the context of its relationship with Article 10 of the *European Convention of the Protection of Human Rights and Fundamental Freedoms*[19], which states that:

> (1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
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> (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

1.12 The relationship between UK legislation and the Article 10 of the Convention was considered in the leading case of *X Ltd v Morgan Grampian Ltd.*[20] The case involved information derived from a confidential corporate plan that was thought to be stolen being provided to a trainee journalist. The company involved sought an injunction against the publication of a story based on the confidential information received by the trainee journalist and the disclosure of notes identifying the journalist's source.[21] The court ordered the trainee journalist, Goodwin, to disclose his source. Goodwin refused and was found in contempt of court. He ultimately appealed the decision to the European Court of Human Rights (*Goodwin v the United Kingdom*)[22] which held that the order to reveal the source and the subsequent fine of

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[19] See, Ingham, L., *Australian Shield Laws for Journalists: A Comparison with New Zealand the United Kingdom and the United States* (2008) Australian National University, College of Law Internship Program, p 16. Available at: http://www.cla.asn.au/Article/ShieldLaws.pdf

[20] [1991] 1 AC 1.

[21] Barnett, H., Constitutional & Administrative Law (2002) 4th edition (London: Cavendish Publishing). See also, Ingham, L., *Australian Shield Laws for Journalists: A Comparison with New Zealand the United Kingdom and the United States* , pp 15-16.

[22] [1996] ECHR 16.

5000 pounds imposed on him for refusing to do so were in violation of his right to freedom of expression under Article 10 of the Convention.[23]

1.13 The Court stated that that 'freedom of expression constitutes one of the essential foundations of a democratic society and that the safeguards to be afforded to the press are of particular importance'.[24] Further, it stated that:

> Protection of journalistic sources is one of the basic conditions for press freedom…Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 (art. 10) of the Convention unless it is justified by an overriding requirement in the public interest.[25]

1.14 In their submission, Australia's Right to Know recognised that there may be instances when it is in the public interest for confidential information to be disclosed. However, they submit that the onus should be on the party seeking to adduce the confidential information to establish that the evidence is necessary and that there should be a presumption in favour of journalists that a source not be revealed, as is the case in NZ and the UK.[26] This position is supported by other submitters and witnesses who appeared before the Committee.[27]

1.15 Current shield laws in Australia are woefully inadequate. Striking the correct balance between the administration of justice on the one hand, and more adequate shield laws that protect journalists' sources (and therefore foster and enhance good journalism) on the other, is essential. While the proposed amendments are a step in the right direction, they are a small step and don't go far enough. Further improvements must be made to ensure that information of legitimate public interest is freely available to the public. In this regard, further consideration must be given to the NZ and UK legislative framework.

1.16 Although beyond the scope of this Inquiry, further consideration should also be given to whistleblower protection legislation insofar as it interrelates with journalists' privilege legislation. The growing need for more adequate whistleblower protection legislation is evidenced by the number of reviews and inquiries that have

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[23] *Ibid*, at 46.

[24] *Ibid*, at 39.

[25] *Ibid*, at 39.

[26] Australia's Right to Know Submission to the Inquiry into the Evidence Amendment (Journalists' Privilege Bill 2009, *submission no.* 8, p 6.

[27] See for example, Dr Joseph Fernandez, *submission no 1;* Media Entertainments and Arts Alliance, *submission no 7;* Australian Press Council, *submission no 3*; Australian Associated Press, *submission no 4;* Public Interest Advocacy Centre, *submission 5*; Rae Desmond Jones, *submission no 12*, as referred to in Majority Report.

considered this issue over the years, including the most recent Inquiry of the House of Representatives Legal and Constitutional Affairs Committee, which reported in February of this year.[28]

1.17 Finally it is important to note the other concern regarding confidential sources and journalists, and that is the fact that, in regard to a number of recent Australian examples, it could be convincingly argued that investigations into journalist's sources often appear politically motivated. The problem with that is that quite often the source for many stories in the media is the government itself, or members of the political party which holds government. This can send a confusing message to the media. Effectively this is a signal that 'leaking is wrong, unless the government does it to further its own interests.' The selective way the forced disclosure of sources is sought undermines the moral authority a government has to seek that disclosure.

Recommendation 1

1.18 The Government's proposed laws don't go far enough and that the Bill should more closely mirror the protections offered to journalists in the NZ and UK legislation.

Senator Nick Xenophon

Independent

[28] See the House of Representatives Standing Committee on Legal and Constitutional Affairs (Inquiry into whistleblowing protections within the Australian Government public sector) report entitled: *Whistleblower protection: a comprehensive scheme for the Commonwealth public sector,* tabled on 25 February 2009 (at viii, the Report makes reference to previous reviews, inquiries etc;).