The Senate

Standing Committee on Legal and Constitutional Affairs

Evidence Amendment (Journalists' Privilege) Bill 2009 [Provisions]

May 2009

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TABLE OF CONTENTS

RECOMMENDATIONS

Recommendation 1

3.62 The committee recommends that subclause 126B(4) of the Bill be amended to require the courts to take into account the public interest in the disclosure of a protected confidence and/or protected identity information.

Recommendation 2

3.63 Subject to the preceding recommendation, the committee recommends that the Senate pass the Bill.

CHAPTER 1

Introduction

1.1 On 19 March 2009, the Senate referred the Evidence Amendment (Journalists' Privilege) Bill 2009 (Bill) to the Standing Committee on Legal and Constitutional Affairs, for inquiry and report by 7 May 2009.

1.2 The Bill was introduced in the House of Representatives on 19 March 2009 by the Attorney-General, the Hon. Robert McClelland MP. It amends the professional confidential relationship privilege (privilege) provisions in Part 3.10 Division 1A of the *Evidence Act 1995* (Act).

Summary of key amendments

1.3 The key amendments contained in Schedule 1 of the Bill are as follows:

- insertion of a new clause stating the object of Division 1A;
- extension of the provisions excluding evidence of protected confidences;
- repeal and replacement of the provisions relating to loss of the privilege;
- repeal and replacement of the provision relating to weighting of any risk of prejudice to national security; and
- extension of Division 1A and section 131A of the Act.[1]

Conduct of the inquiry

1.4 The committee advertised the inquiry in *The Australian* newspaper on 25 March 2009. Details of the inquiry, the Bill and associated documents were placed on the committee's website. The committee also wrote to 50 organisations and individuals inviting submissions by 9 April 2009.

1.5 The committee received 13 submissions which are listed at Appendix 1. Submissions were placed on the committee's website for ease of access by the public.

1.6 The committee held a public hearing in Melbourne on 28 April 2009. A list of witnesses who appeared at the hearing is at Appendix 2, and copies of the Hansard transcript are available through the internet at http://www.aph.gov.au/hansard.

Acknowledgement

1.7 The committee thanks those organisations and individuals who made submissions and gave evidence at the public hearings.

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1 Item 1, items 2 & 4, items 7 & 8, items 5 & 6, item 5, and item 9 of the *Evidence Amendment (Journalists' Privilege) Bill 2009*, respectively. Also, see Explanatory Memorandum, pp 1-2.

Scope of the report

1.8 Chapter 2 provides an overview of the Bill. Chapter 3 discusses the key issues raised in submissions and evidence.

Note on references

1.9 References in this report are to individual submissions as received by the committee, not to a bound volume.

1.10 Due to delays in the production of the Hansard Transcript, this report was prepared without reference to evidence received at the public hearing.

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:

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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.

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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

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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.

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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.

CHAPTER 3

Key Issues

3.1 This chapter discusses the key issues raised in submissions and later in evidence, including:

- limitations of the object clause;
- extension of the professional confidential relationship privilege (privilege) to journalists;
- offences, frauds and misconduct;
- protection provided in the *Evidence Act 1995* (Act); and
- application of the privilege.

Limitations of the object clause

3.2 The Evidence Amendment (Journalists' Privilege) Bill 2009 (Bill) proposes to insert an object clause into the Act to modify the way in which courts exercise their discretion to exclude evidence of a protected confidence or protected identity information in civil or criminal proceedings.

3.3 The NSW Attorney-General, the Hon. John Hatzistergos MLC (NSW Attorney-General) questioned whether the object clause can achieve its stated purpose. Following a NSW Court of Appeal decision, an object clause neither controls clear statutory language nor commands a particular outcome.[1]

3.4 The NSW Attorney-General therefore suggested that the Bill specifically require the courts to take into account a public interest factor:

> While I support the inclusion of a public interest factor in maintaining the confidentiality of the information and the confidentiality of the protected identity information (which would also cover the public interest in the media communicating facts and opinion to the public and for that purpose having access to sources of fact), I think that the consideration of the public interest factors should be mandatory for the court to consider whenever it is deciding whether to grant a privilege.[2]

3.5 From a different perspective, the WA Director of Public Prosecutions (WA DPP) questioned whether the object clause supports the proper administration of justice, an essential component of the rule of law. The WA DPP argued that the object

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1 The Hon. John Hatzistergos MLC, NSW Attorney-General, *Submission 9*, p. 2. Also see, *Minister for Urban Affairs and Planning v Rosemount Estates Pty Ltd* (unreported, 90640127, 14 August 1996).

2 The Hon. John Hatzistergos MLC, NSW Attorney-General, *Submission 9*, p. 2.

clause juxtaposes the justice system with the role of the media, and could be interpreted as diminishing the pre-eminence of the administration of justice. In his view, there is no need for the object clause, and if it were to remain within the Bill, then it should reflect the position that the proper administration of justice is paramount.[3]

3.6 Not all submissions agreed with these two views of the object clause with other submissions supporting its inclusion within the Act.

Journalist-source confidentiality

3.7 The Media Entertainment & Arts Alliance (MEAA) submitted that the object clause contrasts with an important professional ethical obligation:

> 3. Aim to attribute information to its source. Where a source seeks anonymity, do not agree without first considering the source's motives and any alternative attributable source. Where confidences are accepted, respect them in all circumstances.
>
> Guidance Clause: Only substantial advancement of the public interest or risk of substantial harm to people allows any standard to be overridden.[4]

3.8 It argued that the Bill should place greater emphasis on protection for journalist-source confidentiality. For example, by incorporating an 'overarching statement of the spirit of the law that favours journalist-source confidentiality protection', or by requiring courts to prioritise the protection of confidential sources.[5]

3.9 Some submissions disagreed with the suggestion that the MEAA Code of Ethics be codified by the Bill. Several noted that journalists, unlike most other professions, are self-regulated,[6] and the WA DPP quoted the Law Reform Commission of Western Australia (LRC WA), which previously examined the issue:

> …it may be argued that journalists should be legally entitled to refuse to disclose the identity of their informants on the ground that refusal is required by the ethics of their profession. However, a group's imposition upon itself of a "code of ethics" is not of itself a sufficient justification for the enactment of the substance of that code in legislation.[7]

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3 WA Director of Public Prosecutions, *Submission 11*, pp 2-3.

4 Media Arts Entertainment Alliance, Code of Ethics, Guideline 3 and Guidance Clause.

5 Media Entertainment & Arts Alliance, *Submission 7*, p. 3 & pp 5-6.

6 For example, the Hon. Simon Corbell MLA, ACT Attorney-General, *Submission 10*, p. 3.

7 Law Reform Commission of Western Australia, *Privilege for Journalists*, Project No. 53, February 1980, p. 10. Also, see WA Director of Public Prosecutions, *Submission 11*, pp 3-4.

Difficulties with terminology

3.10 While supportive of the object clause, some submissions questioned its terminology. The Public Interest Advocacy Centre (PIAC), for example, submitted that the terminology – 'facts' and 'media' – unnecessarily restricts recognition of the public interest.[8]

3.11 The NSW Attorney-General, the Tasmanian Attorney-General, the Hon. Lara Giddings MP (Tasmanian Attorney-General) and the WA Attorney-General, the Hon. C. Christian Porter MLA (WA Attorney-General) especially argued that the non-definition of the term 'journalist' is problematic:

> …the term has a flexible and contentious meaning and the practice of journalism is rapidly changing. It is not possible to define journalists in the way that lawyers or doctors are usually identified, such as by reference to qualifications or compulsory professional vetting or affiliation. The label of "journalist" is really one that depends more on self identification than any other factor.[9]

3.12 As indicated in preceding paragraphs, submissions exhibited fundamental concern with journalist-source protection however, as noted by the WA DPP,[10] a primary purpose of the Bill is to extend the protection granted by the Act to journalists.

Extension of the privilege to journalists

3.13 In general, submissions and evidence supported this amendment, but non-industry stakeholders questioned its limited application to journalist-source relationships only.

3.14 The WA Attorney-General submitted that the law ought to recognise the public interest in professional relationships generally, as is the position in NSW where its professional confidential relationship privilege does not discriminate between different vocations or professions:

> **126A Definitions**
>
> (1) In this Division:
>
> …
>
> "protected confidence" means a communication made by a person in confidence to another person (in this Division called the "confidant"):

8 Public Interest Advocacy Centre, *Submission 5*, pp 2-3.

9 The Hon. C. Christian Porter MLA, WA Attorney-General, *Submission 2*, pp 4-5. Also, see the Hon. John Hatzistergos MLC, NSW Attorney-General, *Submission 9*, pp 1-2; and the Hon. Lara Giddings MP, Tasmanian Attorney-General, *Submission 13*, p. 1.

10 WA Director of Public Prosecutions, *Submission 11*, p. 1.

> (a) in the course of a relationship in which the confidant was acting in a professional capacity, and
>
> (b) when the confidant was under an express or implied obligation not to disclose its contents, whether or not the obligation arises under law or can be inferred from the nature of the relationship between the person and the confidant.
>
> **Note:** This definition differs from the corresponding definition in section 126A (1) of the Commonwealth Act, which is limited to communications to journalists.[11]

3.15 In addition to arguments based on uniformity and equity, some submissions questioned the reasons for distinguishing journalist-source relationships from other professional confidential relationships.

3.16 The ACT Attorney-General, the Hon. Simon Corbell MLA (ACT Attorney-General), for example, submitted that there is no reason why the journalist-source relationship should be granted a higher level of protection:

> …the Commonwealth has not formulated a strong argument to explain why the interests, which are protected by journalist shield laws, are afforded a higher level of protection than the interests protected by other privileges, given the differences which exist between journalists and other professional group. Medical and legal practitioners operate within heavily regulated profession and are therefore subject to stringent quality control. Journalists, on the other hand, are not required to comply with professional registration or standards in order to practice their profession.[12]

3.17 The Tasmanian Attorney-General agreed with her colleagues' overall assessment, adding that, in the case of offences, fraud or misconduct, the Bill potentially grants journalists greater privilege than that which might be claimed under legal professional privilege:

> …a public servant whistleblower may impart the same information to a journalist (for publication) and a lawyer (for the purpose of seeking legal advice), thereby committing the offence of disclosing official secrets. Under the proposed Commonwealth Bill, the legal professional privilege is

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11 Section 126A of the *Evidence Act 1995* (NSW). The NSW provisions focus on communications made by a person in confidence to another person (protected confidences), and the professional nature of the relationship. They are otherwise identical to the Act: Australian Associated Press, Answers to Questions on Notice, 1 May 2009 (received 1 May 2009). Also, see The Hon. C. Christian Porter MLA, WA Attorney-General, *Submission 2*, p. 4; and Public Interest Advocacy Centre, *Submission 5*, pp 3-4. Both submissions noted that the NSW provisions overcome many of the definition difficulties identified in the Commonwealth legislation.

12 The Hon. Simon Corbell MLA, ACT Attorney-General, *Submission 10*, p. 3. Also, see WA DPP, *Submission 11*, pp 4-5.

> automatically lost (section 125) but the journalists [sic] privilege, which is within the discretion of the court, may remain.[13]

3.18 Submissions and evidence highlighted provisions within the Bill most likely to interact with and impact on journalists' claims for privilege: section 126D and new subparagraph 126B(4)(i).

Offences, frauds and misconduct

Loss of privilege

3.19 The Bill will repeal section 126D, which provides for the loss of 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.

3.20 Some submissions welcomed this amendment, with the Australian Associated Press (AAP) describing the section as unduly harsh and unjust, a 'practical barrier' given that most confidential disclosures are made in contravention of the law.[14]

3.21 PIAC disagreed with this assessment of section 126D, emphasising the primarily permissive nature of the judicial discretion granted in section 126B:

> **Exclusion of evidence of protected confidences**
>
> (1) The court may direct that evidence not be adduced in a proceeding if the court finds that adducing it would disclose:
>
> (a) a protected confidence; or
>
> (b) the contents of a document recording a protected confidence; or
>
> (c) protected identity information.
>
> (2) The court may give such a direction:
>
> (a) on its own initiative; or
>
> (b) on the application of the protected confider or confidant concerned (whether or not either is a party).
>
> (3) The court must give such a direction if it is satisfied that:
>
> (a) it is likely that harm would or might be caused (whether directly or indirectly) to a protected confider if the evidence is adduced; and
>
> (b) the nature and extent of the harm outweighs the desirability of the evidence being given.[15]

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13 The Hon. Lara Giddings MP, Tasmanian Attorney-General, *Submission 13*, p. 1. Also, see WA Director of Public Prosecutions, *Submission 11*, pp 4-5.

14 Australian Associated Press, *Submission 4*, p. 2. Also, see Australian Press Council, *Submission 3*, p. 3; and Laurie Oakes, 'The fight for access to truth', *The Australian*, 4 May 2009, pp 31-32.

15 Subsections 126B(1)-(3) of the *Evidence Act 1995*.

3.22 PIAC argued that section 126D serves an important function: it clarifies the application of judicial discretion where evidence of an offence, fraud or misconduct is concerned. In its view, the repeal and partial replacement of this provision (with new subparagraph 126B(4)(i)) will accomplish little.[16]

3.23 The WA and NSW Attorneys-General also opposed the repeal of section 126D, albeit on grounds of legal principle. They argued that the amendment is not consistent with statutory and common laws of privilege, which automatically abrogate privilege in identical circumstances. In addition, the WA Attorney-General submitted that the range of offences and misconduct prohibiting, or discouraging, confidential communications to journalists include serious crimes, which should not be shielded:

> The abolition of automatic loss of privilege is effectively an invitation to engage in, or an endorsement of the existing practice of, criminal acts, fraud and misconduct…the law of evidence should not be developed to provide special protection or endorsement of criminal conduct, thereby embodying a double standard.[17]

Judicial consideration

3.24 Throughout the inquiry, submitters and witnesses expressed most concern with subsection 126B(4). As amended, this provision provides a non-exclusive list of matters which the court must take into account in determining whether to direct that evidence not be adduced in a proceeding (a guided discretion).[18]

3.25 Some submissions welcomed the proposed amendment as a strengthening of journalists' protection.[19] Other submissions queried whether the 'check list of factors' would have unintended and adverse practical implications,[20] particularly in relation to proposed new paragraph 126B(4)(i), which provides for the court to consider:

> (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;[21]

3.26 The WA Attorney-General considered this amendment neither an adequate nor a satisfactory substitute for the automatic loss of privilege (section 126D). The WA Attorney-General commented that common sense and the legal framework

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16 Public Interest Advocacy Centre, *Submission 5*, pp 4-5.

17 The Hon. C. Christian Porter MLA, WA Attorney-General, *Submission 2*, p. 3. Also, see the Hon. John Hatzistergos MLC, NSW Attorney-General, *Submission 9*, p. 2.

18 Item 3 of the Bill.

19 Australian Press Council, *Submission 3*, p. 3 and Item 3 of the Bill.

20 WA Director of Public Prosecutions, *Submission 11*, p. 4.

21 Item 5 of the Bill.

applying over other privileges 'give reason to hope that the factor would weigh against the privilege.' Nonetheless, he expressed misgivings with the guided discretion:

> …the law is best expressed definitively, rather than in the legal mechanism of a judicial balancing exercise between a list of factors...the loss of privilege should not be left in doubt. To do so would only encourage those who are contemplating unlawful disclosures to test the limits of the law. The inclusion of criminal activity, fraud or misconduct as only one of a multitude of factors instils this doubt and uncertainty and undermines the clarity and deterrence that the criminal law should reflect.[22]

3.27 Dr Joseph Fernandez, a senior lecturer in journalism at Curtin University insisted that proponents of journalists' shield laws are seeking neither to test the law nor a grant of legal immunity rather, protection for sources that provide information of legitimate public interest value to journalists performing their professional duty, a well-recognised 'immunity' in democratic societies.[23]

3.28 Also in contrast to the WA Attorney-General, the Australian Associated Press (AAP) supported the amendment with the proviso that it should be a relevant consideration only where the protected confidence or protected identity information is a fact in issue. The AAP submitted that the Bill is protective in nature rather than punitive, and there appears to be no compelling reason why an unrelated breach of the law by the confider in providing information to a journalist should be a relevant consideration.[24]

3.29 Despite some focus on matters for judicial consideration, submitters and witnesses indicated to the committee that the most troubling legislative provisions were those concerning the judicial consideration itself.

The protection provided in the Act

3.30 Australia's Right to Know (ARK), a coalition of media organisations explained that the role of the media is to report on matters of public interest and scrutinise information on behalf of the public it serves:

> In the ordinary course of their duties journalists are expected to disclose the sources of their information. It makes the source, the journalist and the media outlet accountable for their reports, makes the process of reporting more transparent and is likely to help the consumer of the information to evaluate the integrity and credibility of the information.
>
> However, in some instances, information of legitimate public interest will only be disclosed to journalists if the identity of the source is kept confidential. In these instances, an informant may require a guarantee of anonymity for a variety of reasons but usually to avert any negative

22 The Hon. C. Christian Porter MLA, WA Attorney-General, *Submission 2*, p. 3.

23 Dr Joseph Fernandez, *Submission 1*, p. 9.

24 Australian Associated Press, *Submission 4*, pp 5-6.

> consequences such as a threat to their safety, their employment, their standing in the community and so on.
>
> Keeping a source confidential is fundamental to the ability of journalists to maintain trust with their sources and to encourage other sources to trust journalists and bring forward information of public concern.[25]

3.31 Industry stakeholders submitted that, in the past, journalist-source confidentiality has not received sufficient legal recognition and support, and submitters and witnesses alike cited recent examples of journalists fined, convicted or jailed for contempt of court for not disclosing confidential sources.[26]

3.32 While welcoming the additional protections granted in the Bill, these and other submitters continued to doubt that journalist-source confidentiality is sufficiently protected in Australian law with several submitters and witnesses referring to shield laws in other jurisdictions, for example, the United Kingdom and New Zealand.

United Kingdom

3.33 In the United Kingdom, section 10 of the *Contempt of Court Act 1981* (UK) provides journalists with a qualified protection:

> 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.[27]

3.34 This provision is premised on non-disclosure, and there is no requirement for the information for which protection is sought to have been obtained in confidence. The statutory protection is available unless the party seeking the disclosure can satisfy the court that disclosure is necessary.

New Zealand

3.35 In New Zealand, subsection 68(1) of the *Evidence Act 2006* (NZ) also provides qualified protection to journalists who do not disclose confidential sources:

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25 Australia's Right to Know, *Submission 8*, p. 2.

26 For example, Belinda Tasker, Gerard McManus and Michael Harvey. Also, see the Law Reform Commission of Western Australia, 'Professional Privilege for Confidential Communications – Project No. 90', May 1993 for a description of other cases in which journalists have been found in contempt of court for failing to disclose confidential sources; and Australia's Right to Know, Answers to Questions on Notice undated (received 1 May 2009) .

27 Section 10 of the *Contempt of Court Act 1981* (UK).

Protection of journalists' sources

(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.

…

(5) In this section,—

informant means a person who gives information to a journalist in the normal course of the journalist's work in the expectation that the information may be published in a news medium

journalist means a person who in the normal course of that person's work may be given information by an informant in the expectation that the information may be published in a news medium

news medium means a medium for the dissemination to the public or a section of the public of news and observations on news[28]

3.36 Subsection 68(2) details the qualification: a judicial discretion to override the statutory protection if satisfied by either party to the proceeding that, having regard to the issues in the proceeding:

(2) …the public interest in the disclosure of evidence of the identity of the informant outweighs—

(a) any likely adverse effect of the disclosure on the informant or any other person; and

(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.

…

(5) In this section,—

…

public interest in the disclosure of evidence includes, in a criminal proceeding, the defendant's right to present an effective defence.[29]

3.37 Like the United Kingdom legislation, the New Zealand provisions are premised on non-disclosure, and a party seeking disclosure must convince the court that disclosure is necessary if the protection is to be withheld. However, the New Zealand legislation also requires information to have been obtained by a journalist in confidence, and the court to conduct a balancing exercise in reaching any determination to withhold privilege.

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28 Subsections 68(1) & (5) of the *Evidence Act 2006* (NZ)

29 Subsections 68(2), (3) & (5) of the *Evidence Act 2006* (NZ)

Commonwealth law

3.38 The Act is not premised on a presumption of non-disclosure, meaning that the privilege applies only if the court makes the necessary direction on its own initiative, or the protected confider or journalist applies to the court for that direction.

3.39 While ARK expressed doubts as to whether the former would occur,[30] the point argued in stakeholders' submissions and evidence was that the Act should fundamentally be premised on a rebuttable presumption rather than a guided discretion to significantly enhance protection for journalists.[31] A sampling of those views follows.

3.40 The Australian Press Council unequivocally stated that the Bill does not go far enough, and the government ought to go further by introducing legislation that:

> …creates a presumption that a journalist is not required to disclose the identity of a confidential source unless there is a compelling reason warranting such disclosure…Such a presumption should only be rebutted where the party seeking to have the evidence adduced can present compellable reasons to do so, such as where the failure to disclose the identify of the source would present a serious threat to the health or safety of the public or to security.[32]

3.41 The AAP concurred, submitting that by not introducing legislation equivalent to that of the United Kingdom, New Zealand and the United States, 'the Bill simply maintains the status quo of inadequate protection rather than strengthening it':

> …unlike equivalent legislation in New Zealand, the United Kingdom and the United States, the Evidence Act will not confer any true right to resist disclosure and will not offer any additional protection than that already offered at common law under the Newspaper Rule. Therefore, it will not achieve the Government's stated legislative intention of strengthening the protection afforded to journalists.[33]

3.42 Dr Fernandez suggested that the Bill incorporate a clear statement of intent to guide judicial discretion and better achieve its stated objectives:

> This submission advocates the placing of the shield law in a context that recognises transparency, accountability and openness in government and the freedom of speech of citizens as important ideals. It is submitted that

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30 Australia's Right to Know, *Submission 8*, p. 6.

31 For example, Dr Joseph Fernandez, *Submission 1*; Media Entertainment & Arts Alliance, *Submission 7*; Australian Press Council, *Submission 3*; Australian Associated Press, *Submission 4*; Australia's Right to Know, *Submission 8*; Public Interest Advocacy Centre, *Submission 5*; and Rae Desmond Jones, *Submission 12*.

32 Australian Press Council, *Submission 3*, pp 3-4.

33 Australian Associated Press, *Submission 4*, p. 3. Also, see *John Fairfax & Sons v Cojuangco* (1988) 165 CLR 346 for the substance of the Newspaper Rule.

> clear statements of intent accompanied by substantive provisions in a shield law regime will more adequately meet the stated goal of achieving an "effective" shield law.[34]

3.43 The Attorney-General acknowledged calls for the Commonwealth to enact a shield law regime similar to that of the United Kingdom and/or New Zealand. However, the Attorney-General rejected such calls, explaining that the purpose of the Bill is to enable an appropriate balance to be struck between the public interest in free press and the public interest in the administration of justice. Accordingly, the Bill endorses a guided discretion rather than the benefit of an absolute privilege:

> [The Bill] leaves the balancing of competing interests and particular facts to the common sense of the court considering the matter…judicial discretion in these matters is not something to be afraid of. Indeed, no other profession—not even the legal profession—has the benefit of an absolute privilege to protect confidential information.[35]

3.44 The ACT Attorney-General agreed that where there are competing interests, the most appropriate response is to allow for a judicial balancing exercise to determine which competing interest prevails over the other in the circumstances. In his submission, the ACT Attorney-General contended that to do otherwise would contravene the fundamental human right to a fair trial:

> The right to a fair trial…is based on the premise that all relevant evidence is brought before the courts in a trial. An absolute privilege would not allow for a proper balancing exercise to take place and ultimately would impact on the fundamental right to a fair trial.[36]

Whistleblower legislation

3.45 Submissions and evidence noted that the government is in the process of formulating whistleblower legislation. Some submissions made no further comment in that regard. Other submissions expressed their views on the perceived shortcomings of existing whistleblower legislation and suggested means by which that legislation could be improved.[37]

3.46 The committee did not inquire into either existing or proposed whistleblower legislation, which is beyond the scope of this inquiry. However, the committee noted witnesses' comments regarding the legislative interaction between journalists' protection and whistleblowers' protection.

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34 Dr Joseph Fernandez, *Submission 1*, p. 12. Also, see Media Entertainment & Arts Alliance, *Submission 7*, p. 6.

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

36 The Hon. Simon Corbell MLA, ACT Attorney-General, *Submission 10*, p. 2.

37 For example, Dr Bob Such MP, Member for Fisher, *Submission 6;* and Australian Associated Press, *Submission 4*, p. 6.

3.47 The Tasmanian Attorney-General, for example, questioned whether the privilege was the best way to protect journalist-source confidentiality, submitting that the privilege does nothing to protect the source from prosecution and that that is the proper purpose of whistleblower legislation.[38]

Application of the proposed privilege

3.48 The Bill proposes to extend the privilege to all proceedings in any Australian court for an offence against a law of the Commonwealth. Submissions and evidence noted that this amendment promotes consistency and certainty in national shield laws.[39]

3.49 However, submissions also noted that the amendments create two contradictory evidentiary regimes in each state/territory, increasing the risk of confusion or error in the application of the privilege:

> For example, if there is a joint indictment of Commonwealth and State offences being heard in a state court, that court would have to apply both the Commonwealth journalist privilege and the NSW professional confidential relationship privilege.[40]

3.50 NSW is currently the only state to have enacted legislation protecting journalist-source confidentiality (section 126A of the *Evidence Act 1995* (NSW)).[41]

3.51 In addition, several submissions referred to SCAG's contemporaneous consideration of journalists' privilege provisions in the model Uniform Evidence Bill.[42] While the ACT and Tasmanian Attorneys-General made only a brief reference to that process, the WA and NSW Attorneys-General provided specific comments on the timing of the Bill's introduction.

3.52 The WA Attorney-General submitted that the Bill pre-empted SCAG's orderly consideration of reform options, effectively rejecting the SCAG process and jeopardising the formulation of uniform and harmonised laws. The WA Attorney-General suggested that the Bill be deferred – or withdrawn altogether –

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38 The Hon. Lara Giddings MP, Tasmanian Attorney-General, *Submission 13*, p. 1.

39 For example, Australia's Right to Know, *Submission* 8, p. 5 and the Australian Associated Press, *Submission 4*, p. 3.

40 The Hon. John Hatzistergos MLC, NSW Attorney-General, *Submission 9*, p. 3. Also, see the Hon. C. Christian Porter MLA, WA Attorney-General, *Submission 2*, p. 5.

41 Australian Associated Press, Answers to Questions on Notice, 1 May 2009 (received 1 May 2009).

42 Standing Committee of Attorneys General, Communiqué, November 2008, p. 7; and Standing Committee of Attorneys General, Communiqué, 16-17 April 2009, p. 8: www.scag.gov.au (accessed 21 April 2009).

pending completion of the SCAG process.[43] The NSW Attorney-General similarly emphasised the importance of legislative uniformity.[44]

3.53 Upon conclusion of SCAG's April 2009 meeting, the Attorney General publicly announced that the states/territories have agreed to endorse a key component of the Bill: new public interest factors that would give judges discretion to protect a broad range of professional confidences. The Attorney-General considered this agreement to be a significant development in the harmonisation of evidence laws.[45]

Committee View

3.54 The Evidence Amendment (Journalists' Privilege) Bill 2009 amends the *Evidence Act 1995* to implement reforms to the privilege available to protect confidential communications between journalists and their sources.

3.55 Submitters and witnesses queried these reforms. However, the committee was not persuaded by the evidence received during this inquiry.

3.56 The committee accepts that the purpose of the object clause is to guide the court in the exercise of its judicial discretion. There is no evidence to suggest that exercise of the discretion cannot or will not properly serve the administration of justice. The committee does not consider that the object clause should be enhanced, either to include further statements of intent or to prioritise either of the public interests it seeks to advance. However, the committee agrees with the NSW Attorney-General that mandatory judicial consideration of public interest factors would provide journalists' with greater protection than that provided by the guidance of an object clause.

3.57 The committee commends extension of the statutory protection to journalists, as well as their sources. In so doing, the committee notes that the proposed amendments concern sections within the Act directed to establishing a privilege in favour of the journalist-source relationship only. While there might be arguments in favour of creating privilege for other professional confidential relationships, perhaps based on public interest criteria, this is not the purpose of the Bill.

3.58 The committee agrees that communications made in contravention of the law cannot be condoned. However, the committee acknowledges that, in some circumstances, the public interest is better served by the making of confidential disclosures. The committee considers that the Bill strikes an appropriate balance between the two interests by allowing the court to consider all relevant factors prior to determining whether privilege should be upheld in a particular case. Having regard to

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43 The Hon. C. Christian Porter MLA, WA Attorney-General, *Submission 2*, pp 5-6.

44 The Hon. John Hatzistergos MLC, NSW Attorney-General, *Submission 9*, p. 1.

45 Chris Merritt, 'Federal shield law under attack but McClelland pushes ahead', *The Australian*, 24 April 2009, p. 27.

the integrity of Australian courts, the committee is confident that the courts will act without prejudice in making those determinations.

3.59 The committee acknowledges the considerable sentiment and support for Commonwealth law to embody a rebuttable presumption in favour of journalist-source confidentiality. The Act does not establish a shield law regime of this nature. Instead, it provides protection for journalists in the form of a guided judicial discretion, which the Bill does not seek to change.

3.60 The committee observes 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. While much has been said regarding the onus in shield law regimes, the committee is not persuaded that this produces fundamentally different outcomes sufficient to warrant revising the qualified protection already provided by the Act.

3.61 Finally, the committee welcomes the consistency which the Bill brings to national shield laws, but notes that this is limited to Commonwealth offences. As only one state has enacted journalists' shield laws, the majority of states/territories continue to have one set of evidentiary laws in relation to journalist-source confidentiality. The committee encourages the Commonwealth, states and territories to continue to work co-operatively toward harmonisation of Australian shield laws.

Recommendation 1

3.62 The committee recommends that subclause 126B(4) of the Bill be amended to require the courts to take into account the public interest in the disclosure of a protected confidence and/or protected identity information.

Recommendation 2

3.63 Subject to the preceding recommendation, the committee recommends that the Senate pass the Bill.

Senator Trish Crossin

Chair

Additional comments by Liberal senators

1.1 Liberal senators acknowledge and support the stated objectives of the Evidence Amendment (Journalists' Privilege) Bill 2009 (Bill). However, the provisions of the Bill fall short of achieving those objectives.

Limitations of the object clause

1.2 The committee report endorses the object clause, despite its terminology restricting recognition of the public interest[1] and the problematic non-definition of the term 'journalist'.[2] Liberal senators understand the difficulties associated with defining 'journalist', but consider it necessary for the Bill to more precisely identify the persons to whom the privilege might apply (for example, bloggers).[3]

1.3 Liberal senators also note the Media Entertainment & Arts Alliance's call for greater protection of journalist-source confidentiality,[4] and agree that the substantive provisions of the Bill should do more in this regard.

Extension of the privilege to journalists

1.4 While Part 3.10 Division 1A of the *Evidence Act 1995* (Act) and the Bill concern the journalist-source relationship, submitters and witnesses questioned why other professional relationships involving confidential communications are not granted protection, as is the case in NSW (section 126A of the *Evidence Act 1995* (NSW)) and as was recommended by both the WA Law Reform Commission and later, the Australian Law Reform Commission:

> 15.1 The uniform Evidence Acts should be amended to provide for a professional confidential relationship privilege. Such a privilege should be qualified and allow the court to balance the likely harm to the confider if the evidence is adduced and the desirability of the evidence being given. The confidential relationship privilege available under Part 3.10, Division

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1 Public Interest Advocacy Centre, *Submission 5*, pp 2-3.

2 The Hon. C. Christian Porter MLA, WA Attorney-General, *Submission 2*, pp 4-5. Also, see the Hon. John Hatzistergos MLC, NSW Attorney-General, *Submission 9*, pp 1-2; and the Hon. Lara Giddings MP, Tasmanian Attorney-General, *Submission 13*, p. 1.

3 Liberal senators note that a proposed US federal shield law excludes bloggers by defining its 'covered person': see Australian Associated Press, Answers to Questions on Notice, 1 May 2009, p. 2. (received 1 May 2009).

4 Media Entertainment & Arts Alliance, *Submission 7*, p. 3 & pp 5-6.

> 1A of the *Evidence Act 1995* (NSW) should therefore be adopted under Part 3.10 of the *Evidence Act 1995* (Cth).[5]

1.5 Liberal senators agree that the law ought to recognise the public interest in professional confidential relationships generally. There is no reason why journalist-source relationships should be granted a higher level of protection than that granted to interests protected by other privileges (for example, medical, legal and religious practitioners).

Risk of prejudice to national security

1.6 Liberal senators note in passing that new paragraph 126B(4)(j), which replaces part section 126B(4), requires the court to take into account any risk of prejudice to national security (as opposed to giving that risk the greatest weight). Liberal senators question the wisdom of downgrading this provision as:

> It is hard to foresee how the reputation of one journalist could ever be more significant than the genuine security interests of a nation.[6]

Protection provided in the Act

1.7 As noted in the committee report, submitters and witnesses expressed considerable concern with subsection 126B, a great deal of which related to the guided judicial discretion.

Guided judicial discretion

1.8 A former Commonwealth Solicitor-General, Mr David Bennett QC has publicly noted that the guided judicial discretion provides no certainty about which journalists' sources will receive protection under the Act. He then remarked, 'the one thing one needs is certainty in advance'.[7]

1.9 Without certainty, potential sources will refrain from approaching journalists with information that might legitimately be in the public interest. Alternately, journalists will face a moral dilemma: either not publish a story in the public interest; or be forced to choose to abide by professional ethical obligations and possibly be fined, convicted or jailed for contempt of court for not disclosing confidential sources.

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5 Australian Law Reform Commission, *Review of the Uniform Evidence Acts* (2005), Report 102, Recommendation 15-1. Also, see the Law Reform Commission of Western Australia, 'Professional Privilege for Confidential Communications - Project No. 90, May 1993; the Hon. Simon Corbell MLA, ACT Attorney-General, *Submission 10*, p. 2; the Hon. C. Christian Porter MLA, WA Attorney-General, *Submission 2*, p. 4; Public Interest Advocacy Centre, *Submission 5*, pp 3-4; and Australian Associated Press, Answers to Questions on Notice, 1 May 2009 (received 1 May 2009).

6 WA Director of Public Prosecutions, *Submission 11*, p. 4.

7 Mr David Bennett QC, former Commonwealth Solicitor-General quoted in Chris Merritt, 'Whistleblowers shun new laws', *The Australian*, 17 April 2009, p. 28.

1.10 Both of these scenarios represent the current situation, with submissions citing several recent, unfortunate and regrettable examples. The example most often cited was that of *Herald Sun* journalists Gerard McManus and Michael Harvey who were convicted and fined for refusing to reveal their source in a report regarding war widows' pensions.

1.11 Submissions and evidence doubted that the Bill sufficiently protects journalist-source confidentiality because it maintains a guided judicial discretion instead of creating a rebuttable presumption in favour of shield laws, as is the case in the United Kingdom, New Zealand and the United States.[8]

International shield law regimes

1.12 Liberal senators note that the committee report provides a brief synopsis of section 10 of the *Contempt of Court Act 1981* (UK) and subsections 68(1)-(2) of the *Evidence Act 2006* (NZ), both of which are premised on non-disclosure with a party seeking disclosure of confidential sources bearing the onus of proving that such disclosure is necessary, as per the relevant provision.

1.13 In the United States, the *Free Flow of Information Act of 2009:HR985* (HR985) has been introduced and passed in the House of Representatives. As at the time of writing, the bill is before the Senate. If passed, HR985 will exempt journalists from being compelled to produce documents or provide testimony unless a court finds that one of the following exceptions applies:

- the party seeking information has exhausted all reasonable alternative sources;
- in criminal investigations or prosecutions, there are reasonable grounds to believe a crime has occurred and the testimony or document sought is critical to the investigation, prosecution, or defence;
- in all other matters, the information sought is critical to the completion of the matter;
- in cases where a source's identity could be revealed, the document or testimony sought is necessary to prevent certain actions, including an act of terrorism, among others; and
- the public interest in compelling disclosure of the document or information involved outweighs the public interest in gathering or disseminating news information.[9]

8 For a compendium of state shield laws in the United States, see http://www.poynterextra.org/shieldlaw/ (accessed 30 April 2009).

9 Congressional Budget Office Cost Estimate, HR985 – Free Flow of Information Act of 2009, 27 March 2009 .

1.14 A second version of the *Free Flow of Information Act of 2009: S448* (S448) has also introduced in the Senate. S448 and HR985 are to be concurrently debated by the Senate Committee on the Judiciary on 7 May 2009.[10] S448 prohibits a federal entity from compelling a covered person (journalists and their employers.) to testify or produce any document relating to protected information unless a court makes specific determinations by a preponderance of the evidence:

- all reasonable alternative sources have been exhausted;
- the testimony or document sought is essential or critical to the investigation, prosecution or defence of a criminal offence; and
- non-disclosure would be contrary to the public interest, taking into account both the public interest in compelling disclosure and the public interest in gathering news and maintaining the free flow of information.[11]

1.15 Liberal senators note that both proposed United States federal shield laws are premised on non-disclosure which is rebuttable only in certain circumstances.[12] The Act therefore stands in stark contrast to its international counterparts:

> …unlike equivalent legislation in New Zealand, the United Kingdom and the United States, the Evidence Act will not confer any true right to resist disclosure and will not offer any additional protection than that already offered at common law under the Newspaper Rule. Therefore, it will not achieve the Government's stated legislative intention of strengthening the protection afforded to journalists.[13]

1.16 Liberal senators particularly note subsection 126B(2). In order for privilege to apply, this provision requires the court to make a direction on its own initiative, or for the protected confider or journalist to apply to the court for that direction.

1.17 Australia's Right to Know queried whether placing the onus on the court would result in favourable outcomes for journalists' sources:

> It's difficult to contemplate the court would actually exercise the discretion and permit a journalist to maintain the confidentiality of a source.[14]

1.18 Nonetheless, Australia's Right to Know, other submitters and witnesses all emphasised that the Act should be substantially amended by the Bill to incorporate a

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10 http://judiciary.senate.gov/hearings/hearing.cfm?id=3817 (accessed 4 May 2009).

11 http://casp.net/statutes/S%20448.pdf (accessed 4 May 2009).

12 Also, see Australian Associated Press, Answers to Questions on Notice, 1 May 2009, pp 1-2 (received 1 May 2009). The AAP also notes that both bills contain 'strong safeguards for source confidentiality' (ie. limitations).

13 Australian Associated Press, *Submission 4*, p. 3. Also, see *John Fairfax & Sons v Cojuangco* (1988) 165 CLR 346 for the substance of the Newspaper Rule.

14 Australia's Right to Know, *Submission 8*, p. 6.

rebuttable presumption, including an onus on the party seeking disclosure of a confidential source.[15]

1.19 Liberal senators agree that the Bill, and future legislation purporting to strengthen journalist-source confidentiality, should do more than maintain the status quo. Liberal senators do not consider a journalists' protection reliant upon the exercise of a judicial discretion as a 'true' form of protection as there is no right for journalists to resist a direction from the court to disclose the identity of a confidential source.

1.20 This point was raised in evidence and submissions with Australia's Right to Know, for example, agreeing that, had the Bill been enacted in 2007, it was difficult to conceive that it would have enabled Gerard McManus and Michael Harvey to protect their source:

> In connection with the criminal trial against Desmond Kelly for disclosing confidential Department of Veterans Affairs [sic] documents, Harvey and McManus were convicted in a Victorian Magistrates Court for refusing to reveal their confidential source leading to publishing of the information. Had the Commonwealth's improved model of qualified privilege been in place in Victoria at the time, the Magistrate would have not been prevented from exercising his discretion, even though Kelly was allegedly involved in misconduct in obtaining and disclosing the confidential information.
>
> …
>
> But, given the evidence of Harvey and McManus went to the guilt or innocence of Desmond Kelly, it is difficult to conceive the Magistrate would have ruled the public interest in the conviction or acquittal of Kelly was outweighed by the public interest in the public having access to information and the media having access to sources.[16]

1.21 Liberal senators consider it untenable that journalists clearly acting or having acted morally in the public interest could find or have found themselves in such a position.

1.22 Liberal senators also note advice received from the Attorney-General's Department (Department) regarding the practical operation of the Bill:

> Under both the model proposed in the Bill and the New Zealand model, the court would be required to determine in each case whether protection for a journalist's source should apply. A journalist may still be summonsed to attend court in New Zealand and asked to make submissions as to why they

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15 For example, Dr Joseph Fernandez, *Submission 1*; Media Entertainment & Arts Alliance, *Submission 7*; Australian Press Council, *Submission 3*; Australian Associated Press, *Submission 4*; Australia's Right to Know, *Submission 8*; Public Interest Advocacy Centre, *Submission 5*, p. 6; and Rae Desmond Jones, *Submission 12*.

16 Australia's Right to Know, *Submission 8*, pp 5-6.

> should have privilege. As such, in their application, there would be little practical difference in the way these two models would be applied.[17]

1.23 However, supporters of the New Zealand model emphasise the significance of its onus provisions:

> A view that the proposed approach to shield laws in Australia is substantially equivalent to the New Zealand position is flawed. Rather than recognising the significant role of the media and the importance of confidentiality of sources, the proposed changes in Australian law start from the position which favours forced disclosure of confidential sources. Given that many disclosures to journalists may technically breach some obligation, even if of a contract with an employer engaged in wrongdoing, Australian judges will find it difficult to find that the balance should favour the media and journalists.[18]

1.24 Liberal senators acknowledge that the committee report endorses the guided judicial discretion provided in the Act. However, if there is no practical difference between the judicial discretion and a rebuttable presumption, as exists in international models and as alluded to in the Department's evidence, then Liberal senators cannot fathom why the judicial discretion, a lesser form of journalists' protection, is to be preferred.

Whistleblower legislation

1.25 In the Second Reading Speech, the Attorney-General stated:

> …the Rudd government is also currently developing whistleblower protections which have the capacity to complement journalist shield laws by providing avenues other than the media for public interest disclosures. The court has 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.[19]

1.26 While the Committee did not inquire into either existing or proposed whistleblower legislation, Liberal senators note comments regarding the legislative interaction between journalists' protection and whistleblowers' protection.[20]

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17 Correspondence to the committee dated 7 April 2009.

18 Mr Andrew Stewart, Baker & McKenzie quoted in Chris Merritt, 'Whistleblowers shun new laws', *The Australian*, 17 April 2009, p. 28.

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

20 For example, the Hon. Lara Giddings MP, Tasmanian Attorney-General, *Submission 13*, p. 1.

1.27 Liberal senators also refer to the arguments of Chris Merritt in *The Australian*. Mr Merritt writes that if whistleblowers shun new whistleblowers' legislation, it will undermine the effectiveness of journalists' shield laws:

> Unless the material they pass to the media concerns a threat to public health or safety – and the threat is immediate and serious – they lose their protection under the whistleblower scheme. And they also stand to lose protection from the proposed shield law for journalists' sources.[21]

1.28 Former NSW Supreme Court judge, David Levine warned that there were so many overlapping areas of law involved in protecting journalists' sources that 'unless a package that covers privacy, whistleblowers and privilege can be developed, the problem will be insoluble.'[22]

1.29 Liberal senators agree with the Attorney-General that the Bill should complement whistleblowers' legislation, but express disappointment in that the two pieces of legislation were not concurrently introduced for comprehensive consideration.

Application of the proposed privilege

1.30 The Bill proposes to extend the privilege to all proceedings in any Australian court for an offence against a law of the Commonwealth. This amendment coincided with the Standing Committee of Attorneys-General (SCAG's) consideration of journalists' privilege provisions in the model Uniform Evidence Bill.

1.31 Upon conclusion of its April 2009 meeting, the Attorney-General publicly announced that the states/territories had agreed to endorse a key component of the Bill (new public interest factors) and that, 'the standing committee's agreement has been reported to the senate legal and constitutional affairs committee.'[23]

1.32 Liberal senators note that there is a long-standing agreement between members of SCAG that its formal decisions cannot be made public with the agreement of SCAG ministers.[24] Liberal senators therefore understand why the Attorney-General's communication must remain confidential. However, Liberal senators wish to place on record that being unable to publicly consider that confidential communication makes it difficult to fully evaluate the evidence put to the committee,

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21 Mr Chris Merritt, 'Whistleblowers shun new laws', *The Australian*, 17 April 2009, p. 28. Also, see Mr Drew Warne Smith, 'Whistleblowers left exposed by new shield laws', *The Australian*, 4 May 2009, p. 32.

22 Mr David Levine, former NSW Supreme Court Judge quoted in Chris Merritt, 'Whistleblowers shun new laws', *The Australian*, 17 April 2009, p. 28.

23 Chris Merritt, 'Federal shield law under attack but McClelland pushes ahead', *The Australian*, 24 April 2009, p. 27.

24 Attorney-General's Department, Answers to Questions on Notice, 1 May 2009, pp 2-3 (received 1 May 2009).

particularly that concerning the interaction between Commonwealth and state/territory evidence law regimes.

1.33 Notwithstanding SCAG's April 2009 agreement, the WA Attorney-General, for example, has reiterated concerns presented in his submission: namely, that the Bill creates two contradictory evidentiary regimes in each state/territory;[25] that the Bill does not satisfactorily address the issue of whistleblowers; and that the Commonwealth has pre-empted SCAG deliberations:

> There was, in essence, an agreed model which was somewhat along the lines – with some modifications – of what exists in NSW. All we needed was for the Commonwealth to sign on to that model. But instead of waiting for the final development of what looked to be unanimous agreement, they simply overrode the process entirely and tabled legislation in federal parliament. The first we heard of it was literally the tabling.[26]

1.34 Liberal senators note the WA Attorney-General's rejection of the Commonwealth shield law as a model for Western Australia.

Recommendation 1

1.35 Liberal senators recommend that the Bill be amended to create:

- **a privilege for professional confidential relationships other than the journalist-source relationship; and**
- **a rebuttable presumption in favour of journalist-source confidentiality.**

Senator Guy Barnett **Senator Russell Trood** **Senator Mary Jo Fisher**

Deputy Chair

25 The Hon. C. Christian Porter MLA, WA Attorney-General, *Submission 2*, p. 5.

26 The Hon. C. Christian Porter MLA, WA Attorney-General quoted in Chris Merritt, 'Federal shield law under attack but McClelland pushes ahead', *The Australian*, 24 April 2009, p. 27.

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.[1]

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

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.[2]

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.[3]

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*).[4]

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

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

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.
>
> 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 –
>
> (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.
>
> (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;).

APPENDIX 1

SUBMISSIONS RECEIVED

Submission Number	Submitter
1	Dr Joseph Fernandez
2	WA Attorney-General
3	Australian Press Council
4	Australian Associated Press
5	Public Interest Advocacy Centre (PIAC)
6	The Hon Bob Such
7	Media Entertainment & Arts Alliance
8	Australia's Right To Know
9	NSW Attorney-General
10	ACT Attorney-General
11	WA Director of Public Prosecutions
12	Mr Rae Jones
13	TAS Attorney-General

ADDITIONAL INFORMATION RECEIVED

1	Australia's Right To Know - Impact on journalists when refusing to reveal their source, received 2 May 2009
2	Australia's Right To Know – Professional Privilege for Confidential Communications Report - May 1993, received 2 May 2009
3	Australia's Right To Know – Division 1A – Professional confidential relationship privilege, received 2 May 2009
4	Attorney-General's Department – Answers to Questions on Notice, received 2 May 2009
5	Australian Associated Press – Answers to Questions on Notice, received 1 May 2009
6	Australian Associated Press – Answers to Questions on Notice, received 1 May 2009

APPENDIX 2

WITNESSES WHO APPEARED BEFORE THE COMMITTEE

Melbourne, Tuesday 28 April 2009

CHAPMAN, Ms Creina, Manager, Corporate Affairs
News Limited

COLLINS, Mr Patrick, Acting Senior Legal Officer
Attorney-General's Department

COWDROY, Ms Emma, General Counsel
Australian Associated Press Pty Ltd

DOBBIE, Mr Michael, Director – Publications & Campaigns
Media, Entertainment & Arts Alliance

FERNANDEZ, Dr Joseph
Private Capacity

FITCH, Ms Catherine, Acting Assistant Secretary
Attorney-General's Department

KEEGAN, Mr Richard, External Legal Counsel
Australian Associated Press Pty Ltd

MCKINNON, Professor Ken, Chairman
Australian Press Coucil

POLDER, Mr Mark, Solicitor
Public Interest Advocacy Centre