A Shield Law To Better Protect Journalists' Confidential Sources

Submission to the
Inquiry Into the Evidence Amendment (Journalists' Privilege) Bill 2009
Senate Standing Committee on Legal and Constitutional Affairs
Parliament House Canberra
Australian Capital Territory

through
Mr Peter Hallahan
Committee Secretary

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2 May 2009

Signed:…… Date:……

(Hardcopy of this submission sent by mail to the address above;
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1. Introduction

This is a submission in response to the move to amend the *Evidence Act* 1995 (Commonwealth) through the *Evidence Amendment (Journalists' Privilege) Bill* 2009 (Commonwealth). For convenience, this Bill and related law will be referred to as *shield law*. Briefly stated, the author submits that the proposed amendments do not adequately meet the objectives declared by the Commonwealth Attorney-General, the Hon Mr Robert McLleland MP. The amendments also do not amount to substantial improvement over existing legislation in this area. The following submission sets out the bases for these views and proposes ways in which the proposed *shield law* may be made to more effectively serve the purpose intended by the Commonwealth A-G. While the Commonwealth's concern is to enact a shield law for application at Commonwealth level, it is submitted that the Commonwealth initiative in this area will have great significance for the way the States and Territories approach law-making in this area. It is therefore of vital importance that the Commonwealth initiative should attain a worthwhile outcome.

2. The Government's stated objective of openness, transparency etc

The Commonwealth Government has spoken, not entirely unequivocally, about its avowed quest for greater openness, transparency, accountability and related virtues in governance. A sample of these avowals follows. The Government has "delivered on the Rudd Government's election commitment to strengthen journalist shield laws by introducing into Parliament the *Evidence Amendment (Journalists' Privilege*) *Bill* 2009."[1] This Bill "recognises the important role that the media plays in informing the public on matters of public interest, and appropriately balances this against the public interest in the administration of justice."[2] This Bill forms "an important part of the Rudd Government's commitment to enhance transparency and accountability in Government."[3] The Bill "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."[4] It is also said that the amendments "will provide the court with greater scope to maintain confidentiality between a journalist and their source, in appropriate circumstances."[5]

> This important reform has potential benefits for the community in informing Australians on public interest matters generally. In particular, where government matters are concerned, the amendments may encourage more informed political debate and more thorough scrutiny of the political process – which are necessary for an open and accountable government.[6]

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[1] Attorney-General Robert McClelland (2009), "Government delivers on commitment on journalist shield laws", Media Release, 19 March.

[2] Attorney-General Robert McClelland (2009), Media Release, 19th March, above.

[3] Attorney-General Robert McClelland (2009), Media Release, 19th March, above.

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

[5] *Evidence Amendment (Journalists' Privilege) Bill* 2009, Explanatory Memorandum, Para 11.

[6] *Evidence Amendment (Journalists' Privilege) Bill* 2009, Explanatory Memorandum, Para 13.

3. Range of possibilities in regards to shield law

In considering available options for the introduction of shield law a range of approaches is possible. Put simply there is a choice between sweeping or qualified protection. The paragraphs under this heading illustrate the different possibilities.

3.1 Blanket protection:

US shield laws vary widely but the most media-friendly approach is probably the one taken in Alabama and about one dozen US states. The Alabama shield law, "which is considered to be 'absolute' because it does not qualify the reporters' privilege"[7] provides:

> No person engaged in, connected with or employed on any newspaper, radio broadcasting station or television station, while engaged in a news-gathering capacity, shall be compelled to disclose in any legal proceeding or trial, before any court or before a grand jury of any court, before the presiding officer of any tribunal or his agent or agents or before any committee of the legislature or elsewhere the sources of any information procured or obtained by him and published in the newspaper, broadcast by any broadcasting station, or televised by any television station on which he is engaged, connected with or employed.[8]

The most outstanding feature of this provision is its unqualified protection against the disclosure of *any* source of information provided to a journalist.[9] This provision places no qualifications as to the occasion on which this protection may be invoked, nor does it require that the information for which protection is sought must be confidential. The Alabama approach removes the uncertainty that can arise where, for instance, discretion is vested in a court to decide whether to call for disclosure of a confidential source.

3.2 Qualified protection:

In the United Kingdom the *Contempt of Court Act* 1981 provides:

> 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.[10]

Importantly the "starting point" of the exercise is that there should *not* be disclosure. As with the Alabama provision, there is no requirement that the information for which protection is sought must have been obtained in confidence. In the UK, the protection is available unless the party seeking the disclosure can satisfy the court that disclosure is necessary. Even so, the circumstances of disclosure are limited to the criteria stated there.

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[7] Middleton KR and Lee WE (2009), 7th Edn, *The Law of Public Communication*, Pearson, New York, at 529.

[8] Middleton KR and Lee WE (2009), above, at 529, citing Alabama Code, sections 12–21–142. Shield laws in the United States of America fall into three categories: see Overbeck W (2008), *Major Principles of Media Law*, Thomson Wadsworth, Boston, at 344:

> Generally, shield laws fall into three groups: (1) absolute privilege laws which seemingly excuse a reporter from ever revealing a news source or other confidential information in a governmental inquiry; (2) laws that only apply the privilege if information derived from the source is actually published or broadcast; and (3) qualified or limited privilege laws, which may have one or many exceptions, often allowing the courts to disregard them under certain circumstances.

[9] Middleton KR and Lee WE (2009), above, at 529, note that the provision "does not qualify the reporters' privilege."

[10] Section 10 (italics added).

In New Zealand, the relevant provision is also favourably disposed towards source protection. As with the UK provision, the New Zealand provision makes source protection the default position. That is, the starting point is "no disclosure" and if there is to be disclosure there must be a very good reason for it.[11]

The "starting point" in the above two jurisdictions – the UK and New Zealand – is one that was proposed for Australia by a Senate Standing Committee 15 years ago:

> In this proposal the special role of the media is acknowledged by making the starting point from which judicial discretion is to be applied the presumption that the confidence will be respected.[12]

4. The Australian approach so far

The Commonwealth *Evidence Act* provides qualified protection for journalists' sources following recent amendments.[13] That is, the Act affords protection for "protected

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[11] For convenience, that provision, Section 68, *Evidence Act* 2006 (NZ) is set out here: Retrieved 18 July 2008, from <http://www.legislation.govt.nz/>

(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 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.

(3) The Judge may make the order subject to any terms and conditions that the Judge thinks appropriate.

(4) This section does not affect the power or authority of the House of Representatives.

(5) In this section,—

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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

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

[12] Report by the Senate Standing Committee on Legal and Constitutional Affairs (October 1994), "Off the Record: Shield Laws for Journalists' Confidential Sources", Para 7.68 (underlining added).

[13] Section 126B *Evidence Act* 1995 (Commonwealth) provides:

(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.

…

(4) Without limiting the matters that the court may take into account for the purposes of this section, it is to take into account the following matters:

(a) the probative value of the evidence in the proceeding;

(b) the importance of the evidence in the proceeding;

(c) the nature and gravity of the relevant offence, cause of action or defence and the nature of the subject matter of the proceeding;

(d) the availability of any other evidence concerning the matters to which the protected confidence or protected identity information relates;

(e) 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;

(f) the means (including any ancillary orders that may be made under section 126E) available to the court to

confidences".[14] The Act further provides that the Court *must* give a direction on its own or upon application if a protected confider would be harmed by the adduction of the evidence and that harm outweighs the desirability of taking that evidence.[15] The Act provides a long list of factors that may be considered in deciding whether it is necessary to require disclosure.[16]

There is similar protection in New South Wales.[17] There is also longstanding protection for journalists' confidential sources in the *Broadcasting Services Act* 1992 (Commonwealth).[18]

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limit the harm or extent of the harm that is likely to be caused if evidence of the protected confidence or the protected identity information is disclosed;

(g) if the proceeding is a criminal proceeding--whether the party seeking to adduce evidence of the protected confidence or protected identity information is a defendant or the prosecutor;

(h) whether the substance of the protected confidence or the protected identity information has already been disclosed by the protected confider or any other person.

The court must also 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*).

(5) The court must state its reasons for giving or refusing to give a direction under this section.

[14] See section 126A(1)

[15] Section 126B(3) *Evidence Act* 1995 (Commonwealth) provides that 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.

[16] These factors are spelt out in section 126B(4) *Evidence Act* 1995 (Commonwealth):

Without limiting the matters that the court may take into account for the purposes of this section, it is to take into account the following matters:

(a) the probative value of the evidence in the proceeding;

(b) the importance of the evidence in the proceeding;

(c) the nature and gravity of the relevant offence, cause of action or defence and the nature of the subject matter of the proceeding;

(d) the availability of any other evidence concerning the matters to which the protected confidence or protected identity information relates;

(e) 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;

(f) the means (including any ancillary orders that may be made under section 126E) available to the court to limit the harm or extent of the harm that is likely to be caused if evidence of the protected confidence or the protected identity information is disclosed;

(g) if the proceeding is a criminal proceeding--whether the party seeking to adduce evidence of the protected confidence or protected identity information is a defendant or the prosecutor;

(h) whether the substance of the protected confidence or the protected identity information has already been disclosed by the protected confider or any other person.

The court must also 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)."

[17] See section 126B *Evidence Act* (1995) NSW. The NSW protection for "protected confidences", however, differs slightly from the Commonwealth *Evidence Act* protection in that the latter specifically identifies the journalist's source as a target of protection whereas the NSW provisions applies more widely.

[18] Section 202(4), *Broadcasting Services Act* 1992 (Commonwealth):

It is a reasonable excuse for a person to refuse to answer a question or to produce a document if:

(a) the person is a journalist; and

(b) the answer to the question or the production of the document would tend to disclose the identity of a person who supplied information in confidence to the journalist; and

(c) the information has been used for the purposes of:

(i) a television or radio program; or

(ii) datacasting content.

There is a long line of Australian authorities, studies and recommendations that identify strong grounds for the protection of journalists' confidential sources. Some examples follow.

A Senate Standing Committee has stated:

> The Committee accepts that without investigative journalism, the media and its new would be generally bland and their utility to the public truncated. The Committee does not wish to see this kind of journalism diminish…The Committee accepts that sources are an important tool the media uses in fulfilling its role as a facilitator of free communication. It is recognised that there will be circumstances where information will not be provided if anonymity cannot be offered to the source. There is a risk that the failure to recognise such circumstances will lead to some diminution in the availability of important information. If this did happen, it would be detrimental to the success of the media as the vehicle for general communication.[19]

A detailed report commissioned by a coalition of Australia's major media outlets has stated:

> There is a good case for an effective shield law regime based on a presumption that sources should not be revealed and journalists could be ordered to do so by a judge only on strictly limited grounds of compelling public interest.[20]

The Western Australia Law Reform Commission in a report prepared 16 years ago said:

> [T]he Commission has concluded that courts should be given a general discretion to excuse a witness from answering a question or producing a document which would otherwise be a breach by the witness of a confidence. In appropriate circumstances, confidential information held by journalists, including the identity of sources, could be withheld as a result of the exercise of that discretion.[21]

Three Law Reform Commissions, the Australian Law Reform Commission and the Law Reform Commissions of New South Wales and Victoria noted more recently:

> The Commissions agree there is an ongoing tension between the codes of ethics and professional duties of many professions in Australia and the legal duty to reveal to the courts information said in confidence. In many of these relationships, there is a clear public interest that can be demonstrated in protection of a confidence, such as the encouragement of people to seek treatment or the provision of information that could expose corruption or maladministration in government. However, the exclusion of otherwise relevant evidence from the court's consideration is a very serious matter. The legal protection of professional confidential communications thus raises a "difficult mix of fundamental private and public interests".[22]

The observation in that extract that "the exclusion of otherwise relevant evidence from the court's consideration is a very serious matter" must be put into context. Courts routinely exclude evidence through what is routinely referred to as "exclusionary rules".[23] The Standing Committee of Attorneys-General has endorsed the model Uniform Evidence Bill developed

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[19] Report by the Senate Standing Committee on Legal and Constitutional Affairs (October 1994), above, Paras 4.22 and 4.23 (underlining added).

[20] Moss Report (31 October 2007), "Report of the Independent Audit into the State of Free Speech in Australia", Report Commissioned by Australia's Right to Know coalition, at iv (underlining added).

[21] Law Reform Commission of Western Australia (May 1993), Report on Professional Privilege for Confidential Communications, Project No 90, Para 4.97.

[22] Australian Law Reform Commission Report No 102, New South Wales Law Reform Commission Report No 112, and Victoria Law Reform Commission Final Report (2005), *Uniform Evidence Law*, Para 15.31.

[23] Wootten H (2003), "Conflicting Imperatives: Pursuing Truth in the Courts" (Chapter), in McCalman, I and McGrath A, *Proof and Truth: The Humanist As Expert*, Australian Academy of the Humanities, Canberra, at 22 notes:

> …much of the law of evidence can be understood as a set of exclusionary rules, placing limits on a search for truth ("the facts") that is otherwise conducted in accordance with the ordinary principles of rational inquiry.

by the officers' working group "with the exception of the confidential communications privilege, and noted that adoption of model provisions is a matter for each jurisdiction."[24] The quest at State and Territory level for a uniform approach toward shield law appears to have stalled. The justification for the introduction of shield law that applies in all Australian jurisdictions has reached critical proportions in light of old and recent developments that have threatened journalists' confidential sources. This is discussed next.

5. Old events that illustrate the need for a *shield law*

The annals of Australian case law involving attempts by the courts to discover journalists' confidential sources are littered with many examples.[25] In response to these various instances in which journalists have been convicted for having refused to reveal their confidential sources Australian law reform agencies have consistently recommended the introduction of shield laws.[26] The most recent of these recommendations came from three law reform commissions who issued a joint report.[27] One effect of this recommendation was the introduction of amendments to the Commonwealth *Evidence Act* providing limited protection for journalist's confidential sources. The Commonwealth Attorney-General has now described those amendments as follows: "The Howard Government introduced flawed legislation in 2007, which was a quick fix to a complex issue."[28]

6. Recent events accentuating the need for shield law

While it is conceded that the current initiative to introduce shield law extends only in so far as the Commonwealth jurisdiction, events occurring at local level are instructive and potentially stand to benefit (in particular, from the influence it may have on local legislative moves) from a properly enacted Commonwealth shield law. In Western Australia, two groups of events

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[24] Summary of Decisions, Standing Committee of Attorneys-General, 26-27 July 2007, Hobart, heading 4(a).

[25] Some of the relevant cases are:
(a) Tony Barrass (*The Sunday Times*, Perth), 7 days imprisonment and $10,000 fine (*R v Barrass* (Unreported) Court of Petty Sessions of WA, No 27602 of 1989; *R v Barrass* (Unreported) WA District Court, Kennedy J, 7 August 1990);
(b) David Hellaby (*Adelaide Advertiser*), $5000 fine (*State Bank of South Australia v Hellaby* (1992) 59 SASR 304);
(c) Joe Budd (*Courier-Mail*), four days imprisonment, (*R v Budd* (Unreported) Qld SC, Dowsett J, 20 March 1993);
(d) Chris Nicholls (ABC), 12 weeks imprisonment (*Nicholls v DPP (SA)* (1993) 170 LSJS 362);
(e) Deborah Cornwall (*The Sydney Morning Herald*), 2-month suspended sentence (*Independent Commission Against Corruption v Cornwall* (1995) 38 NSWLR 207);
(f) Gerard McManus and Michael Harvey (*Herald Sun*), fined $7000 each (*Harvey & Another v County Court of Victoria & Ors* [2006] VSC 293).

[26] Western Australia Law Reform Commission (December 1991), *Professional Privilege for Confidential Communications*, Discussion Paper, Project No 90; Law Reform Commission of Western Australia (May 1993), Report on Professional Privilege for Confidential Communications, Project No 90; Senate Standing Committee on Legal and Constitutional Affairs (October 1994), *First Report of the Inquiry into the Rights and Obligations of the Media Off the Record (Shield Laws for Journalist' Confidential Sources*"; Law Reform Commission of Western Australia (June 2003), *Report on Review of the Law of Contempt*, Project No 93.

[27] Australian Law Reform Commission Report No 102, New South Wales Law Reform Commission Report No 112, and Victoria Law Reform Commission Final Report (2005), *Uniform Evidence Law*.

[28] Attorney-General Robert McClelland (2009), Media Release, 19th March, above.

coming on the heels of the well-known Harvey/McManus saga[29] have brought into sharp relief the urgency in enacting shield law.

The first of the recent events in Western Australia concerns the summoning of four journalists[30] in 2007 before the Corruption and Crime Commission (CCC) in an exercise primarily aimed at discovering the sources or confidential sources for stories they had written or broadcast.[31] The journalists concerned were summoned to appear before the CCC against a backdrop of provisions in the CCC Act that deprived the journalists concerned of rights that would otherwise be considered fundamental in liberal democratic society.[32] The second concerns the "raid" in 2008 by police on *The Sunday Times* newspaper in Western Australia. That raid has been widely acknowledged as being unjustified and especially noteworthy is the fact that the objections have come from Government[33] *and* Police[34] ranks. In fact, WA's Police Commissioner is on record as saying the raid "should never have occurred because, in my mind, police have got better things to do than go after public servants who have leaked cabinet documents".[35] The Commissioner reportedly also said: "Who's the victim? Who the hell is the victim in that particular crime…Is the government the victim? Is Treasury the victim, and if they are, I don't care, anyway."[36] This is an unusually strong stand for someone

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[29] The event concerns the conviction of two *Herald Sun* journalists, Gerard McManus and Michael Harvey, for contempt of court after they refused to disclose the key source of an article they wrote. That article was about plans to reject a $500 million boost to war veterans' pensions: *R v Gerard Thomas McManus & Michael Harvey* [2007] VCC 619. The Australian Press Council said (see *Australian Press Council News*, August 2007, Vol 19 No 3, at 5):

> The Harvey and McManus case doesn't relate to a serious crime or a threat to national security. Their only real 'crime' is holding the government accountable to those who elected it, and pay for it.

[30] These journalists were Mr Robert Taylor (*The West Australian*); Mr Gary Adshead (then *Channel Seven*); Mr David Cooper (Channel Seven); and Ms Sue Short (ABC).

[31] These events are well catalogued in a submission by Michael Sinclair-Jones, Branch Secretary, Media, Entertainment and Arts Alliance, to the Attorney-General of Western Australia on "Shield Laws for Journalists" (dated 7 March 2008).

[32] See, for example, section 96 (power to summon witnesses to attend and produce things); 157 (no excuse to refuse to produce a document or other thing on the grounds that it would breach an obligation not to disclose); and 159 (the occurrence of an offence of contempt for failure to comply with a notice to produce a record or other thing).

[33] See the strong comments attributed to Premier Alan Carpenter in Strutt J and Banks A (2008), "Don't jail journalist: Carpenter", *The West Australian*, 9 July, at 15:

> I think the situation is absolutely ridiculous…It was a complete overreaction I thought the police raid and now what we're seeing the Upper House potentially punishing the journalist in a way which is completely and utterly, I think, over the top…for God's sake you don't send a person to prison for writing a story about a Cabinet leak.

See also similar comments reported in O'Brien A (2008), "Threat to jail journo ridiculous: Premier", *The Australian*, 9 July, at 1. The Premier's Acting Chief of Staff Kieran Murphy is also reported to have said he was "shocked at the size and scale of the operation" and that he considered the raid to be an over-the-top response and that the leaked information was an "embarrassment" for the Government (ibid).

[34] See Campbell K (2008), "Police should not have raided Times: O'Callaghan", *The West Australian*, 2 July, at 4. The operations director of the Corruption and Crime Commission Mr Nick Anticich is reported to have expressed surprise at the scale and timing of the raid "and the decision to undertake it at that point in the investigation": see Gosch E (2008), "Watchdog pans newspaper raid", *The Australian*, 1 July, at 9.

[35] Cox N (2008), "Raid a waste of time: top cop", *The Sunday Times*, 2 November 2008, at 12.

[36] Cox N (2008), "Raid a waste of time: top cop", *The Sunday Times*, 2 November 2008, at 12.

in that position to have taken but it is hardly surprising given that the information that was the subject of the "leak" could hardly be said to bear any intrinsic quality of confidentiality. To the contrary the information concerned – "the publication of an exclusive story by reporter Paul Lampathakis about WA Treasurer Eric Ripper's request for $16 million to spend on a pre-election advertising blitz"[37] – was in every sense a matter of legitimate public interest. A parliamentary inquiry into the police raid subsequently stated:

> The Committee finds that there was an inappropriate and disproportionate allocation of resources by the Western Australia Police for a relatively standard search of an office building.[38]

The events identified above have occurred against a backdrop of government and public service secrecy,[39] resistance to release of information the public should be entitled to know,[40] and a tendency for official spin and obfuscation.[41]

7. Some misconceptions concerning shield laws

It is worthwhile to consider some common misconceptions associated with shield laws. First, it has been suggested that those pursuing shield laws are seeking immunity from the law.[42]

In a twist to this position, however, the Police Commissioner, speaking after the release of the WA Legislative Council select committee inquiry report into the raid "rejected the committee's finding that the police response was excessive": see "Shield laws essential to guard right to know" (2009, Editorial), *The Sunday Times*, 12 April, at 71. The Commissioner also reportedly said "a tactical decision was made to send in reinforcements – a decision which I support": see Kennedy P (2009), ABC Television Perth, News, 7pm 9 April, citing a statement from the Commissioner.

[37] "Shield laws a crucial part of our democracy" (2008), *The Sunday Times*, 13 July, at 71.

[38] Select Committee into the Police Raid on the Sunday Times, Report 1 (April 2009), Western Australia Legislative Council, Parliament House, Perth, Finding 11, at iii. It may be noted further that in the same report the Committee stated in Recommendation 5, at iii:

> The Committee recommends that the Attorney-General continue to pursue the introduction of shield laws for journalists.

[39] See, for instance, the observation in Moss Report (31 October 2007), "Report of the Independent Audit into the State of Free Speech in Australia", Report Commissioned by Australia's Right to Know coalition, where it is noted at 23:

> Over the past 15 years government management and secrecy has increased markedly. Governments, ministers, their minders and their departments want to keep a very rigid control over the dissemination of information. Increasingly, the media has to rely on "leaks" to get details behind major decisions.

[40] See Overington C (2009), "State of Secrecy", *The Australian*, 24 March, at 9, where the writer states:

> Under existing law and protocol, anybody employed by the government – that can mean a nurse, a police officer or a bus driver – is threatened with disciplinary action if they speak to the media. It's not possible for journalists to call state schools and ask principals what they think about a state government plan to tackle bullying. It's not possible to call social workers in indigenous communities to ask them whether new rules on the supply of petrol have helped or harmed the young. All must go through the central press office: in other words, through government.

[41] See, for instance, Moss Report (31 October 2007), "Report of the Independent Audit into the State of Free Speech in Australia", Report Commissioned by Australia's Right to Know coalition (p. ii) where the authors note as follows:

> Journalists contributing submissions to the audit say that government PR staff all too often try to block or frustrate, rather than facilitate, their inquiries. Directing all inquiries through ministers' offices, restricting the government employees with authority to speak to the media, demanding that all questions be submitted in writing, taking a long time to respond to questions, offering answers of little value, and completely ignoring some questions, are the common features in a long list of grievances submitted to this audit.

The journalism fraternity's primary object in pursuing shield law is to seek protection for sources that provide information of legitimate public interest value to journalists performing their professional duties. This protection may be characterised as immunity. The immunity sought is well established in democratic societies and, as seen above, has already in some measure come to be recognised in Australia.[43] Second, it has been suggested that it is unclear why there is renewed pressure on the government to introduce shield laws.[44] The recent events stated above amply justify the renewed pressure being brought to bear upon the government to enact shield laws – not to mention the fact that shield law constitutes an Federal Labor election commitment.[45] Third, it is suggested that it would be unwise to introduce shield law without putting other legislative provisions in place to regulate the media. The view that the media in Australia is not adequately regulated is unfounded. A grouping of Australia's major media outlets have made the following finding after a comprehensive inquiry into restrictive media laws in the country:

> Australian laws now contain more than 500 separate prohibitions and restrictions on what the public is allowed to know. Some vary from state to state, creating huge barriers to accurate and full reporting.[46]

8. Can we improve on existing shield law provisions?

It is submitted that without going so far as to adopt blanket shield law protection of the Alabama kind seen above there is room to better design Australian shield law protection for journalists. The cue for reform is provided in the lofty ideals the government espouses.[47] Some features that should be incorporated into the proposed shield law are set out here.

8.1 Public interest criterion:

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[42] See comment attributed to Labor Member of Parliament Adele Farina, in Lampathakis P (2008), "Free speech? Call the cops", *The Sunday Times*, 13 July, at 71. The relevant paragraph from that article is reproduced here:

> Ms Farina also asked me in the committee hearings whether I felt that my sources and I were above the law, to which I replied "no".

[43] Sections 126B in the *Commonwealth Evidence Act* and 126B in the *New South Wales Evidence Act*.

[44] See comments of Premier Alan Carpenter on 20 August 2008, ABC News, 7pm.

[45] Attorney-General Robert McClelland (2009), Media Release, 19th March, above.

[46] "The State of Free Speech In Australia" (Media Statement), released at the launch of the free speech campaign by the Right to Know coalition. The Joint Statement by the coalition was released by John Hartigan (Chairman/CEO, News Limited), David Kirk (CEO, Fairfax Media), Mark Scott (MD, Australian Broadcasting Corporation), David Leckie (CEO Network Seven and Chairman Free TV Australia), Shaun Brown (MD, Special Broadcasting Service), Michael Anderson (CEO Austereo and Chairman, Commercial Radio Australia), Clive Marshall (CEO, Australian Associated Press), and Angelos Frangopoulos (CEO, Sky News). See also *The Media Report* (2002), radio program, ABC Radio National, "Australia's Right to Know", 31 May 2007.

Australia ranked 39 in the 2007 Freedom of the Press World Ranking compiled by Freedom House, behind countries such as the United States, United Kingdom, the Czech Republic, Taiwan and Canada. Retrieved 27 July 2008, from <http://www.freedomhouse.org/template.cfm?page=389&year=2007>

In 2008 this ranking improved only slightly, to No 35. Retrieved 7 April 2009, from <http://www.freedomhouse.org/template.cfm?page=442&year=2008>

[47] See ideals expressed under heading 2 above.

Three Law Reform Commissions have noted "there are *many relationships in society* where a *public interest* could be established in maintaining confidentiality. These relationships include, for example, doctor and patient, psychotherapist and patient, social worker and client or *journalist and source*".[48] It is significant that the journalist-source relationship was included here in the traditional confidentiality protection group. It is also not uncommon for a "public interest" criterion to apply in such situations. A "public interest" balancing act is also provided for in New Zealand, a jurisdiction whose approach has something to offer us.[49] The NZ Law Commission based this recommendation "on the need to promote *a free flow of information, which is a vital component of a democratic system*".[50] More importantly, the NZ provision states clearly that the protection is aimed at "journalists' sources". This is how our own ALRC interpreted the NZ approach:

> Whilst the original proposal was to have journalists' sources *fall under* the general confidential communications privilege, the Commission decided that *a specific qualified privilege would give greater confidence to a source that his or her identity would be protected*".[51]

One great difficulty presented by any reference to a "public interest", however, is that it is a difficult concept. The Australian Law Reform Commission has stated that the "public interest is an amorphous concept"[52] and "impossible to define".[53] More can be done in the proposed legislation to address the very real potential for uncertainty that could emanate from judicial evaluation of where the public interest lies in the event of a contest between disclosure and non-disclosure involving a journalist's confidential source. The proposed legislation could incorporate provisions that clearly reflect the government's intended priority. In particular, the amendments should contain provisions that make clear reference to the priorities identified above.[54] Such provisions would contain a commitment to freedom of speech. In the absence of any express commitment to freedom of speech in Commonwealth legislation, the acknowledgement of a commitment to freedom of speech in a proposed shield law would go some way in indicating where our collective priority lies. While there is evidence of moves to recognise freedom of speech as an ideal this has occurred on only a limited scale.[55] A further useful provision would be aimed at facilitating openness,

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[48] Australian Law Reform Commission Report No 102, New South Wales Law Reform Commission Report No 112, and Victoria Law Reform Commission Final Report (2005), *Uniform Evidence Law*, Para 15.4 (italics added). See also Law Reform Commission of Western Australia (May 1993), Report on Professional Privilege for Confidential Communications, Project No 90, Para 4.97

[49] Section 68(2)(b), Evidence *Act* (NZ) extracted in footnote 10 above.

[50] Australian Law Reform Commission Report No 102, New South Wales Law Reform Commission Report No 112, and Victoria Law Reform Commission Final Report (2005), *Uniform Evidence Law*, Para 15.18 (italics added).

[51] Australian Law Reform Commission Report No 102, New South Wales Law Reform Commission Report No 112, and Victoria Law Reform Commission Final Report (2005), *Uniform Evidence Law*, Para 15.18 (italics added).

[52] Australian Law Reform Commission (1995), *Open Government: A Review of the Federal Freedom of Information Act 1982*, Report No 77, Para 8.13.

[53] ALRC Report No 77, above, Para 8.13.

[54] See heading 2.

[55] For instance, see section 16 *Human Rights Act 2004* (ACT), and section 5(2) *Charter of Human Rights and Responsibilities Act* 2006 (Vic).

transparency and accountability in government.[56] An example of how this may be reflected in the amendments is to state plainly as follows:

> In exercising its discretion as to whether to compel disclosure from a journalist to reveal his or her confidential source, the court should give particular attention to the interests of freedom of speech and in particular to the importance of facilitating greater transparency, openness and accountability in government.

8.2 Source protection should be the default position:

This approach is seen in New Zealand as noted above. In addition, the proposed shield law should specify that the protection of journalists sources set out in the Act expressly override any contrary provisions in other statutes or regulations.[57]

8.3 Protection regardless of confidentiality obligation:

The protection advocated above should be available regardless of whether confidentiality was promised to the source. This is so as to embrace situations where people divulging information to journalists are under an impression that confidentiality would attach to their identity or related aspects but where no such undertaking was expressly given. Protection of this kind is available, for instance, in the UK *Contempt of Court Act* seen above.[58] An effective shield law would more clearly indicate the weight to be given to the protection of journalists' confidential sources. In the existing situation – whether in the law as it stands or as proposed in the current amendments – no such weight is specifically accorded to journalist source protection.

7. Conclusion:

In summary, as resolved at the 2020 Summit "there should be more effective shield laws to protect journalists from being required to reveal confidential sources."[59] While no suggestion is being made for the introduction of absolute protection of journalists' confidential sources, good progress would be made if the proposed amendments were to provide greater direction to the courts as to where to place the fulcrum in a contest between disclosure and non-disclosure. This submission recognises that there may be instances when the journalists' claim to source confidentiality may need to be overridden by a competing consideration. This

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[56] See, for example, the objects and intent provision in the *Freedom of Information Act* 1992 (WA) where section 3(1)(a) and (b) provides:

> The objects of this Act are to enable the public to participate more effectively in governing the State; and make the persons and bodies that are responsible for State and local government more accountable to the public.

See also the *Uniform Defamation Acts* objects section, which provides, in section 3(b), that the objects of the Act include:

> To ensure that the law of defamation does not place unreasonable limits on freedom of expression and, in particular, on the publication and discussion of matters of public interest and importance.

See also heading 2 above.

[57] Such as those found in the *Corruption and Crime Commission Act* 2003 (WA).

[58] See text accompanying footnote 10 above.

[59] See *Australia 2020 Summit – Final Report* (May 2008), at 325.

submission, however, advocates a clear recognition for the principle that journalists' confidential sources *prima facie* need to be protected in the interests of free flow of information. 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.[60] It is submitted that 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. As noted in a US context:

> The mere existence of shield laws might help to thwart subpoenas. For example, lawyers might be less likely to seek a subpoena for the purpose of "fishing" for information when a state statute clearly grants a reporter a shield against testifying.[61]

It is to be noted further that shield laws per se will not resolve the dilemma often faced by journalists in their relationships with confidential sources. A more effective way forward would be for shield laws to be accompanied by other instruments capable of lubricating the flow of information, such as through whistleblower and Freedom of Information law. As efforts are underway in this direction no more is said in this regard.

And finally, ironically, arguably one of the greatest contributions to the Australian media law landscape, of special significance to the media, came not from the legislature but from the High Court through the free speech cases.[62] The present move towards improved shield law protection is a golden opportunity for the legislature to stamp its mark in this area.

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[60] See the provision suggested by the author of this submission under heading 8.1 above.

For a more recent expression of commitment to such ideals see Cabinet Secretary and Special Minister of State, Senator John Faulkner's speech, 24 March 2009, "Open and transparent government – the way forward", Australia's Right to Know coalition's *Freedom of Speech Conference*, Sydney, where the Minister said:

> [O]ur democracy, drawing as it does so strongly on the heritage of Westminster, has inherited a historical tendency to weight the protective features of confidentiality more heavily than the positive aspects of disclosure…[The proposed FOI] reforms will change the law, but they will also demonstrate the government's commitment to culture change, a shift from the culture of secrecy we saw under the last Government to one of openness and transparency.

[61] Middleton KR and Lee WE (2009), above, at 536.

[62] For a discussion of Australia's constitutional implied freedom of political communication, see what Chesterman M (2000), *Freedom of Speech in Australian Law*, Ashgate, Hants, England, at 15 refers to as "the seven major 'free speech' cases in constitutional law which gave birth to the constitutional principles": *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211; *Cunliffe v Commonwealth* (1994) 124 ALR 121; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; and *Levy v The State of Victoria & Ors* (1997) 189 CLR 579.