

AUSTRALIA'S RIGHT TO KNOW

Submission to the Inquiry into the Evidence Amendment (Journalists; Privilege) Bill 2009

April 2009

Introduction

Australia's Right to Know welcomes the opportunity to make a submission to the Senate Legal and Constitutional Affairs Committee regarding the *Evidence Amendment (Journalists' Privilege) Bill 2009* (the 2009 Bill).

Australia's Right to Know is a coalition of media organisations formed in 2007 to examine the effectiveness of legislation relevant to the media's capacity to keep the public informed of matters of public interest.

The members of Australia's Right to Know are:

News Limited, Fairfax Media, Australian Broadcasting Corporation, Free TV Australia (representing free to air commercial TV networks), Special Broadcasting Service, Commercial Radio Australia (representing commercial radio stations), Australian Associated Press, APN News and Media, Australian Subscription Television and Radio Association (representing pay TV), Sky News and the Media Entertainment and Arts Alliance.

Summary

- The protection of the identity of journalists' sources is central to the principles and ethics of journalists and the media organisations that employ them;
- This protection lies at the heart of democratic accountability by ensuring that information of legitimate public interest can be made freely available to the public even if the source of that information breached a confidence in making it available to a journalist
- Traditionally, Australian law has failed to recognise the public interest in the protection of journalists' confidential sources.
- The existing qualified privilege for journalists in the Commonwealth and NSW Evidence Acts provides inadequate protection for journalists.
- The 2009 Bill makes significant and welcome improvements to the qualified privilege currently in place in the Commonwealth *Evidence Act 1995*.



- However, Australia's Right to Know submits that the Senate should recommend:
 - There should be recognition at law that there is a legitimate public interest in allowing journalists to protect the identity of confidential sources when disclosure by the source is demonstrably in the public interest;
 - Australia should adopt the British and New Zealand models that legally recognise the primary interest that allows journalists to protect identity of confidential sources when the disclosure by the source is demonstrably in the public interest.

The role of journalists and their sources

The role of the media is to report on matters of public interest and to 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 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.

The Australian journalists' Code of Ethics states:

“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.”¹

The Code does not have legal standing and is not recognised at law.

A journalist who refuses when requested by a court to give evidence which would reveal the identity of their source is open to a contempt charge for disobedience to the court.

Therefore, a journalist confronted with a court demanding they reveal their source is faced with an ethical dilemma of choosing between breaking their confidence or breaking the law and facing possible consequences of penalties including jail.

¹ Media, Entertainment & Arts Alliance, *Media Alliance Code of Ethics*
www.alliance.org.au/resources/media

In recent years, a number of journalists in Australia have been convicted or jailed for contempt of court for refusing to reveal their sources including:

- Gerard McManus and Michael Harvey (2005) from the *Herald Sun* were convicted and fined for not revealing their confidential source;
- Belinda Tasker, Anne Lampe and Kate Askew (2002) from *AAP* and *The Sydney Morning Herald*, refused to reveal their sources for a story about the NRMA board and avoided prison after NRMA dropped the case;
- Chris Nicholls (1993) in investigative journalist from the *ABC* received a prison sentence for his story relating to a conflict of interest of a South Australian Government Minister;
- Deborah Cornwall (1993) from the *Sydney Morning Herald* was given a suspended jail sentence for refusing to disclose a confidential source;
- Gerard Budd (1992) from *The Courier Mail* was imprisoned; and
- Tony Barass (1989) from *The Sunday Times* in Perth, was imprisoned, for refusing to disclose a confidential source.

Protection in Australia

Traditionally, Australian law has failed to recognise the value of the public interest in the protection of confidential journalists' sources.

The first jurisdiction to attempt to introduce protection for confidential professional sources, including journalists' sources, was NSW in 1997.

In the wake of the McManus and Harvey case, the Commonwealth followed in 2007 amending its *Evidence Act* to incorporate almost identical provisions to those in place in NSW.

Although the prospect of introduction of a uniform model across the Commonwealth and States and Territories has been discussed by the Australian Attorneys-General at their SCAG meetings, to date no other jurisdiction has passed legislation.

The provisions in the NSW and the Commonwealth Acts create a qualified privilege which is available at the discretion of a court. The provisions enable the court to give a direction that evidence may not be called if it would disclose the identity of a confidential source.

The legislation states that the court must rule that the evidence cannot be called if it is likely that harm would or might be caused to a confidential source if the evidence is called and that any such harm outweighs the desirability of the evidence being called.

The legislation lists a number of factors which the judge must take into account when considering the issue.

A fundamental flaw in the legislation is that the privilege is subject to an exception. The privilege will not apply in cases concerning misconduct.

Misconduct is deemed to have occurred if there has been a fraud or an offence or an act rendering a person liable to a civil penalty involved in giving the information to the journalist or obtaining the information in the first place. Therefore, in such cases, the court is prohibited from exercising its discretion in favour of the journalist.

Furthermore, the court can compel the journalist to disclose a confidential source if it is satisfied that there are reasonable grounds that a fraud, an offence or an act likely to attract a civil penalty was committed.

Misconduct is usually involved in these cases because disclosure by a confidential source of information to a journalist often involves the committal of a crime or an act that attracts civil action.

Evidence Amendment (Journalists' Privilege) Bill 2009

The Bill before the Senate provides very significant improvements to the qualified privilege currently in place.

The Bill makes five changes to the current regime.

New object

It introduces a new object into the Act which requires the court to achieve a balance between:

- (a) the public interest in the administration of justice; and
- (b) the public interest in the media communicating facts and opinion to the public and, for that purpose, having access to sources of facts.

When a court is considering whether or not to permit a journalist to protect their source, it will now be required to address the public interest in the flow of information to the public and the need for having sources to facts.

Harm to the journalist

The court is required to consider the possible or likely harm that could be caused to the journalist if the identity of the source is revealed. Currently the court is only required to consider the possible or likely harm that could be cause to the confidential informant.

National security

It removes the requirement on the court to give "the greatest weight to any risk of prejudice to national security" when considering whether or not to exercise its discretion to direct the evidence should not be brought. This factor will now be one of the list of factors to be considered without giving it additional weight.

Remove bar in relation to misconduct

It removes the bar that would prevent the court from being able to exercise its discretion in cases involving misconduct. This would enable the court to exercise its discretion despite the fact there has been misconduct involved.

This would be relevant to a situation similar to that confronted by journalists Harvey and McManus from the Herald *Sun*.

In connection with the criminal trial against Desmond Kelly for disclosing confidential Department of Veterans Affairs 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.

Extended application

The 2009 Bill extends the qualified privilege to also apply to proceedings in State and Territory courts for an offence against a law of the Commonwealth.

Given that this Bill would introduce an improved model to that in place in NSW and given the absence of any protection at all in other States and Territories, the wider application is a positive step.

Protection in UK, New Zealand

In contrast, the United Kingdom, New Zealand and United States all provide substantially more protection for journalists and their confidential sources than Australian law.

The New Zealand protection for journalists' sources states 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 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.²

This starting presumption is in favour of the journalist and the onus is on the party seeking disclosure to rebut the presumption.

Similarly, the United Kingdom legislation provides a presumption in favour of the journalist withholding their evidence. The provision states:

“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

² *Evidence Act 2006 (NZ)* section 68

that disclosure is necessary in the interests of justice or national security or for the prevention of a disorder or a crime.”³

Additional protection is available through Article 10 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* which states that everyone has the right to freedom of expression (subject to certain restrictions).

Conclusion

Australia’s Right to Know believes that a qualified privilege which relies on a balancing test and the discretion of the court provides some but not sufficient protection for journalists.

Although the 2009 Bill would improve the regime currently available under the Evidence Act, it is difficult to contemplate the court would actually exercise the discretion and permit a journalist to maintain the confidentiality of a source.

For example, in the Harvey and McManus case, if the 2009 Bill had been law at the time, the privilege would be extended to the Victorian court and the Magistrate would have been able to exercise his discretion to permit them to keep their source confidential, even though there was misconduct involved.

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.

Right to Know recognises there may be instances when it is in the public interest that confidential information be disclosed but the onus should be on the party seeking to adduce the confidential information, to establish the evidence is necessary.

This can be achieved by adopting a framework in the form of the New Zealand or United Kingdom legislation.

While recognising the amendments provide an improvement to the current qualified privilege and accordingly improve the protection currently available, Australia’s Right to Know submits that the Senate should recommend:

- There should be recognition at law that there is a legitimate public interest in allowing journalists to protect the identity of confidential sources when disclosure by the source is demonstrably in the public interest;
- Australia should adopt the British and New Zealand models that legally recognise the primary interest that allows journalists to protect identity of confidential sources when the disclosure by the source is demonstrably in the public interest.

³ *Contempt of Court Act 1981 (UK) c 49 s 10*