

2010

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

EVIDENCE AMENDMENT (JOURNALISTS' PRIVILEGE) BILL 2010

EXPLANATORY MEMORANDUM

(Circulated by authority of Mr A. Wilkie)

GENERAL OUTLINE

1. This Bill amends the *Evidence Act 1995* (Evidence Act) by strengthening the protection provided to journalists and their sources. This Bill is intended to foster freedom of the press and better access to information for the Australian public.
2. This Bill provides that if a journalist has promised an informant not to disclose his or her identity, neither the journalist nor his or her employer is compellable to answer any question or produce any document that would disclose the identity of the informant or enable their identity to be ascertained.
3. This is based on the premise that it is vital that journalists can obtain information so they can accurately inform the Australian public about matters of interest. Accordingly, strong protection must be provided to enable the full disclosure of information.
4. The Bill does recognise that there may be circumstances where the public interest in the disclosure of information is so strong that it should be provided to the court, but it is in line with existing legislation in the United Kingdom, New Zealand and many states in the United States, where it is up to those parties who want to force a journalist to reveal their source to prove that the public interest in disclosing the source outweighs the likely harm to the source and the public interest in the information being provided in the first place.
5. In 2007, journalists, Gerard McManus and Michael Harvey were convicted of contempt of court and fined \$7000 each for refusing to reveal their source behind stories they wrote in 2004 for Melbourne's Herald Sun newspaper. This was a clear example of when journalists would not have otherwise been able to report on the actions of the Government (in this case, the Federal Government's decision to reject a \$500 million increase in war veterans' entitlements) without their source, who, had he or she been revealed, would have suffered harm .
6. This Bill will replace the existing provisions in Division 1A of the Evidence Act. It will include a new provision that provides clear authority for a presumption that a journalist is not required to give evidence about the identity of the source of their information. This presumption can be rebutted in circumstances where the public interest outweighs any likely adverse effect for the person who provided the information to the journalist as well as the public interest in communication of information to the public by the media. These amendments are based on similar provisions of the New Zealand *Evidence Act 2006*, modified to ensure appropriate application in the context of Australian evidence law.

NOTES ON CLAUSES

Clause 1 – Short title

This clause provides for the Bill to be cited as the *Evidence Amendment (Journalists' Privilege) Act 2010*.

Clause 2 – Commencement

2. This clause provides that the Act will commence the day after it receives Royal Assent.

Clause 3 – Schedule(s)

3. This clause provides that the Schedules to the Bill will amend the Acts set out in those Schedules in accordance with the provisions set out in each Schedule.

SCHEDULE 1 – AMENDMENTS

Evidence Act 1995

Item 1 – Division 1A of Part 3.10 of Chapter 3

4. Item 1 removes the existing professional confidential relationship privilege which is set out in sections 126A – 126F, contained in Division 1A of Part 3.10 of Chapter 3 of the *Evidence Act 1995* (Evidence Act).

5. Item 1 then inserts a new section 126G. The Commonwealth Evidence Act is part of the Uniform Evidence scheme (along with New South Wales, Victoria, Tasmania and Norfolk Island). The numbering of sections within Acts in uniform evidence jurisdictions is consistent, so it is important that the new provision does not impact upon the uniform numbering scheme. By inserting the new provision at section 126G, this problem is avoided and sections 126A – 126F remain free for future use.

6. Section 126G sets out some definitions that assist with the interpretation of new section 126G. The terms 'journalist', 'news medium' and 'informant' are all defined and the content of these definitions has been taken from subsection 68(5) of the New Zealand Act.

7. It is important that this protection operates alongside the Australian Journalists Association Code of Ethics¹ and this element of the definitions ensures this is the case. In addition to the principle of protecting sources, journalists are also expected to let their source know that they are a journalist. The principle is as follows:

Use fair, responsible and honest means to obtain material. Identify yourself and your employer before obtaining any interview for publication

¹ Although the limited application of the Code is recognised. The Code only binds members of the Media, Entertainment and Arts Alliance and does not bind media proprietors, editors and producers.

or broadcast. Never exploit a person's vulnerability or ignorance of media practice.

8. It is also significant to note that the journalist should be operating in the course of their work. This means that the journalist should be employed as such for the privilege to operate, and private individuals who make postings on the internet or produce non-professional news publications, where this is not their job, will not be covered by section 126H.

Protection of journalists' sources

9. Item 1 also inserts section 126H, titled 'Protection of journalists' sources' and is modelled on section 68 of the New Zealand *Evidence Act 2006* (New Zealand Act).

10. Section 126H is not exactly the same as section 68 of the New Zealand Act. Some changes have been necessary due to differences between Australian and New Zealand evidence law, court and political structures. These differences are explained as each subsection is considered below.

11. The overall purpose of section 126H is to send a clear message that people who wish to provide information to journalists will have their identity protected if the journalist promises them they will not disclose their identity, unless it is contrary to the public interest. This will be done by introducing a presumption that the identity of the source will not be disclosed in court, unless there is a public interest reason for it to be disclosed.

12. The provision does not apply in circumstances where the journalist or their employer decides to disclose the identity of the source, which it remains open to them to do.

Subsection 126H(1)

13. Subsection 126H(1) states that for protection to apply, the journalist has promised the informant that they will not disclose to anyone the informant's identity.

14. This is consistent with the Australian Journalists Association Code of Ethics which provides that journalists should:

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.

15. If this requirement is satisfied, the journalist and their employer are entitled to refuse to disclose information that would reveal the identity of the source, or enable their identity to be discovered in a court proceeding. It does not, therefore, provide the journalist with a right to refuse to provide information where the information would not lead to the disclosure of the identity of the source.

16. The application of subsection (1) needs to be understood with reference to the definitions provided in subsection 126G above.

17. Journalists as a class of witnesses are not being provided with an exclusion from giving evidence in all circumstances. They are being provided with a privilege to refuse to disclose information where that information would lead to the identification of a source whose identity they promised not to disclose (unless this is contrary to the public interest, as set out in subsection 126H(2)).

Subsection 126H(2)

18. Subsection 126H(2) sets out the circumstances when a party may apply to the court to make an order that the presumption that the information will not be made available (provided in subsection 126H(1)) should not apply.

19. Whilst the protection of journalists' sources and the public interest in freedom of the press are very important considerations, these may clash with some equally important public interest considerations. These will be taken into account by the court under subsection 126H(2) and the court will need to weigh up the competing considerations and make a decision.

20. When weighing up the public interest in the disclosure of the information, the court needs to find that this outweighs both (a) any likely adverse effect of the disclosure on the source (or any other person) and (b) the public interest in freedom of the press that requires journalists' to be able to get information from sources who trust the journalist.

21. Paragraph (a) (which is identical to paragraph 68(2)(a) in the New Zealand Act) has been interpreted by the New Zealand High Court to also include 'an adverse effect on the journalist such as a risk of physical harm or damage to property'.²

22. Paragraph (b) recognises that if an order is made that the information be disclosed, this may make it more difficult for journalists to access sensitive information from sources in the future, as they may not trust that their identity will remain confidential and may therefore be reluctant to provide the information.

Subsection 126H(3)

23. Subsection 126H(3) allows the court to make the order on such terms and conditions as the court thinks fit.

24. An example of the type of order that might be made is an order limiting the publication of the identity of the source for their protection (eg. a suppression order under section 50 of the *Federal Court of Australia Act 1976*).

² *Police v Campbell* [2010] 1 NZLR 483 at [100].

Missing subsection from the New Zealand provision

25. Subsection 68(4) of the New Zealand Act provides that ‘this section does not affect the power or authority of the House of Representatives’. The purpose of that subsection was to maintain a New Zealand Parliamentary Select Committee’s power to ascertain a journalist’s source.

26. An equivalent subsection has not been included in section 126G because the power of a Parliamentary Select Committee is not in question in the Australian context. First, the Evidence Act does not apply beyond court proceedings so the application of section 126H will not extend to Parliamentary Committee inquiries.

27. Second, the High Court decision in *R v Richards; Ex parte Fitzpatrick & Browne* (1955) 92 CLR 157 provides authority for the broad powers of inquiry of both Houses of Parliament under section 49 of the Constitution.

Item 2 – Subsection 131A(1)

28. Item 2 repeals subsection 131A(1) and substitutes it with a new subsection. Section 131A(1) has the effect of extending the provision to pre-trial proceedings.

Item 3 – Section 131B

29. Item 3 inserts section 131B, which will extend the application of journalists’ privilege under Division 1A of Part 3.10, beyond Federal and ACT court proceedings to all proceedings in any Australian court for an offence against a law of the Commonwealth.

30. This provision will enable the new journalists’ privilege to apply to all prosecutions for Commonwealth offences, including prosecutions that are heard in State and Territory courts.

Item 4 - Subsection 69ZX(4)

31. Item 4 amends subsection 69ZX(4) of the *Family Law Act 1975* (Family Law Act) to substitute a reference to subsection 126B(1) of the Evidence Act with the new section 126H. The language of subsection 69ZX(4) of the Family Law Act has also been amended to reflect the different operation of section 126H. For example, the court would no longer ‘direct...that evidence not be adduced’ but ‘order...a person is not entitled to refuse to give information or produce a document’.

Item 5 – Subsection 100C

32. Item 5 repeals section 100C of the *Family Law Act 1975* (Family Law Act) which relates to evidence in respect of which a child is a protected confider by persons acting on a child's behalf. Under the new subsection 69ZX(4) of the Family Law Act, the court is required to regard the best interests of the child as the paramount consideration in all applications.