A Privileged Profession?
Shield laws and the Evidence Act

A submission to the Senate Inquiry into the Evidence Amendment (Journalists' Privilege) Bill 2009 (Cth)

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Mark Polden, Solicitor

Level 9, 299 Elizabeth Street, Sydney NSW 2000 • DX 643 Sydney
Phone: 61 2 8898 6500 • Fax: 61 2 8898 6555 • www.piac.asn.au

Introduction

The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit law and policy organisation that works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues.

PIAC identifies public interest issues and, where possible and appropriate, works co-operatively with other organisations to advocate for individuals and groups affected. PIAC seeks to:

- expose and redress unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate on issues affecting legal and democratic rights;
- promote the development of law that reflects the public interest;
- develop and assist community organisations with a public interest focus to pursue the interests of the communities they represent;
- develop models to respond to unmet legal need; and
- maintain an effective and sustainable organisation.

Established in July 1982 as an initiative of the Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from the NSW Government Department of Water and Energy for its work on utilities, and from Allens Arthur Robinson for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

The Evidence Amendment (Journalists' Privilege) Bill 2009

The Government should be congratulated on the proposed inclusion, via the Evidence Amendment (Journalists' Privilege) Bill 2009 (Cth) (the Bill), of a new objects clause at the beginning of the Division 1A of the *Evidence Act 1995* (Cth) (the Evidence Act). It is, however, unfortunate that the public interest recognised in the Bill is limited, in its terms, to the media having access to sources of *facts*, for the purpose of the *media* communicating facts and opinion to the public.[2]

A Privileged Media

The fact that the objects clause restricts the privilege to the 'media'—a term that is not defined anywhere in the Bill—gives rise to difficulties of definition, as well as to significant equity concerns. The kinds of communication protected, limited to those made by a person in confidence in the course of a relationship with a journalist, acting in a professional capacity, who is under an express or implied obligation not to disclose the contents of the communication, will not change.[3]

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2 Evidence Amendment (Journalists' Privilege) Bill 2009 (Cth) s 126AA.

3 See the definition of 'protected confidence' in the *Evidence Act 1995* (Cth) s 126A.

Journalism vs the Media

The interest recognised in the objects clause of the Bill—the interest in the *media* having access to matter for the purpose of communicating it to the public—is apt to be interpreted narrowly, as limited to what may conveniently be described as mainstream or mass media. Were the reference to 'media' to be understood, for example, as having a similar meaning to the term 'prescribed information provider' in the *Trade Practices Act 1974* (Cth)[6], much journalistic work would be excluded. PIAC is concerned that the objects clause set out in the Bill might be understood to suggest that the discretionary privilege otherwise provided for does not apply, for example, to journalists working as independent 'bloggers'.

PIAC submits that the objects clause set out in the Bill should be amended to remove any risk that the protection will be interpreted so as to give preferential treatment to established media, and by extension, to the journalists they employ.

PIAC submits that proposed section 126AA should be amended, by deleting the words 'the media communicating facts and opinions' and replacing them with the word 'the dissemination of information and ideas'. This wording would align with the wording of international human rights instruments[7], and with statutory Bills of rights that exist in Victoria[8] and the Australian Capital Territory.[9]

Confirmation and Denial

There will inevitably be cases where to divulge the mere existence of a channel of communication with a particular individual may be a step on the way to identifying a source which the journalist is under a duty to protect. The present drafting—of both the Evidence Act and the Bill—covers that circumstance only covers a circumstance in which it is a journalist is under an obligation not to disclose the *content of the communication*, as opposed to *the identity of the source*.[12]

In many circumstances, a journalist will be free to disclose the *content* of the communication itself; the obligation of confidentiality being limited to what the Evidence Act refers to as 'protected identity information'.[13] The drafting works presently works so that a source's identity is *only* protected where the content of the communication is not to be disclosed. This would appear to be an unintended lacuna in the Act.

In PIAC's view, 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 journalist is under a duty not to disclose, but to communications in relation to which the journalist's duty is limited to protecting the *source* (while being at liberty to disclose *content*), and that it extends to circumstances in which divulging the mere existence of any communication at all with a particular person may enable the identity of a protected source to be ascertained.

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6 *Trade Practices Act 1975* (Cth) s 65A.
7 *International Covenant on Civil and Political Rights*, Article 19.
8 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 16.
9 *Human Rights Act 2004* (ACT) s 16.
12 *Evidence Act 1995* (Cth) para 126A(1)(b).
13 *Evidence Act 1995* (Cth) s 126A.

This could be achieved by using the Bill to amend the definition of 'protected confidence' in section 126A of the Evidence Act by inserting the words 'its source, or its existence' after the words 'its content'.

Fact, Opinion and Information

Limiting the proposed object clause to facilitating access to sources of *facts*, for the purpose of communicating facts and opinion to the public[14], does not recognise the day-to-day reality of journalistic practice. Sources often supply items of information, the communication of which is of significant and legitimate public interest, but which cannot conveniently be characterised *as facts*.

For example, the following may not readily be characterised as *facts*: the likelihood of an inquiry being held, allegations of gross waste or misconduct, or a highly placed source's informed opinion about the independence or otherwise of views expressed by senior public servants on an issue of high public policy.

PIAC suggests that the word 'facts' wherever appearing the Bill[16] should be replaced with the word 'information'.

A Purposive Test

The proposal in the Bill to limit the objects clause[17] by reference to the *purpose* for which the facts in question were acquired is unnecessarily narrow.[18] Not every fact is acquired by a journalist, nor communicated by a confidential source, for the sole or even the dominant purpose of communicating fact or opinion to the public.

Confidential sources frequently provide information to journalists by way of background or 'deep' background, to assist a journalist who is acting ethically, reasonably and prudently in cross-checking and validating other material, or who is attempting to confirm the veracity, neutrality or reliability of other sources. In some cases, confidential sources communicate information in confidence to a journalist for their own or the journalist's protection. PIAC submits that communications made, in whole or in part, for these kinds of purposes should also be protected.

PIAC therefore submits that the words 'for that purpose' should be deleted from section 126AA of the Bill.

A General Privilege?

PIAC has a more general equity concern, about limiting the privilege to journalists acting in a professional capacity. The Evidence Act presently includes a note[19] to the effect that the definition of a 'protected confidence' for the purposes of Commonwealth evidence law differs from the corresponding definition in the *Evidence Act 1995* (NSW)[20], which is not limited to communications to journalists.

In PIAC's view, many of the definitional difficulties outlined above would be resolved if the Commonwealth were to adopt the NSW model, which would ensure a fair and equitable application by the Courts of the

14 Evidence Amendment (Journalists' Privilege) Bill 2009 (Cth) s 126AA.
16 See Evidence Amendment (Journalists' Privilege) Bill 2009 (Cth) s 126AA.
17 Evidence Amendment (Journalists' Privilege) Bill 2009 (Cth) Division 1A.
18 Evidence Amendment (Journalists' Privilege) Bill 2009 (Cth) s 126AA.
19 *Evidence Act 1995* (Cth) s 126A.
20 *Evidence Act 1995* (NSW) s 126A(1).

principles the privilege seeks to embody, guided always by the discretionary factors that Parliament has set out[21], rather than creating in journalists a privileged class of confidant.

National Security

PIAC congratulates the Government on the proposed change to the emphasis given to national security[22] so as to re-align it as no more than a consideration to be weighed among others, as opposed to an interest to be given the greatest weight: a caveat introduced to the Evidence Act by the former Attorney-General, the Hon Philip Ruddock MP, in 2007. PIAC notes, however, that the definition of 'national security' for the purpose of the Bill remains unacceptably broad, taking in—as it does—any risk of prejudice to, among other things, Australia's *political* or *economic* relations with foreign governments.[23]

PIAC believes that a preferable definition of 'security' is set out in the *Australian Security Intelligence Organisation Act 1979* (Cth) (the ASIO Act).[24] While in PIAC's view that definition is still overly broad—in that it extends to Australia's obligations to foreign governments in relation to threats of unlawful harm aimed at achieving a political objective—potentially touching issues such as China's role in Tibet, the opportunity should be taken to insert in the Bill a reference to the ASIO Act definition, in place of the existing reference to the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth).[25]

Loss of Privilege - Misconduct

The Explanatory Memorandum observes that under the existing Evidence Act, where a confidential communication is made in the furtherance of the commission of an offence, the privilege provided by Division 1A is presently unavailable.[26] PIAC does not believe that this is an accurate reading of the existing Evidence Act, which provides no more than that Division 1A does not prevent the adducing of 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.[27]

The Evidence Act presently includes a power for the Court to make an appropriate direction.[28] It requires the Court to make a direction only if 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 given. The present provision in the Evidence Act relating to loss of privilege for misconduct merely makes clear that the Court retains a discretion to admit matter into evidence—which otherwise satisfies those conditions—where it is evidence of an offence.[29]

PIAC's understaning of the section reflects that set out in Australian Law Reform Commission (ALRC) *Discussion Paper 69*, in which it was suggested that that the comparable Division 1A of the *Evidence Act 1995* (NSW), upon which the federal legislation is based, does not create a true privilege[30], but allows the Court a

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21 *Evidence Act 1995* (Cth), sub-ss 126B(3), (4)

22 Evidence Amendment (Journalists' Privilege) Bill 2009 (Cth) sub-s 126B(4).

23 By reason of having incorporated the definition of 'national security' and 'international relations' in sections 8 and 10 of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth).

24 *Australian Security Intelligence Organisation Act 1979* (Cth) s 4.

25 *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth); see sub-s 126B(4) of the *Evidence Act 1995* (Cth), and the proposed new paragraph 126B(4)(j) introduced under Schedule 5 of the Evidence Amendment (Journalists' Privilege) Bill 2009 (Cth).

26 Explanatory Memorandum, Evidence Amendment (Journalists' Privilege) Bill 2009 (Cth), Paragraphs 7, 8.

27 Ibid s 126D.

28 Ibid s 126B (1) is permissive in nature only.

29 See *Evidence Act 1995* (Cth) ss 126D; 126B(3).

30 Australian Law Reform Commission, *Review of the Uniform Evidence Acts* (2005) at [13.179].

discretion to direct that evidence not be adduced where it would involve the disclosure of a protected confidence.[31] It is notable that the ALRC takes this view about the *Evidence Act 1995* (NSW)[32], which contains a provision dealing with loss of privilege, on the grounds of misconduct[33], which is identical to the existing of the Commonwealth Act.[34] As the ALRC analyses it, the Court must balance a range of matters[35], including the probative value of the evidence in the proceeding and the nature of the offence, with the likelihood of harm to the protected confider in adducing the evidence, and then decide if it is appropriate to give a direction under the section.[36]

As the ALRC notes[37], Stephen Odgers SC has observed that there has been criticism of the NSW section, because it is not clear how the Court should exercise the discretion.[38] The ALRC further notes that the New South Wales Bar Association has argued that there appear to be two discretions within the section: that even if the Court is not satisfied that the harm that may be caused if the evidence is adduced outweighs the desirability of the evidence being given; there is still a discretion to direct that the evidence not be adduced.[39]

The Explanatory Memorandum suggests that the Bill will repeal a provision for automatic loss of privilege in cases of misconduct, and make the issue of whether a communication between a journalist and their source was made for an improper purpose one of the several matters that a court must take into account when exercising its discretion.[40] In PIAC's view, this is not the work that section 126D presently does, and the proposed abrogation and partial replacement[41] will do little, if anything, to change the former state of affairs in this regard.

Standard of proof

The Explanatory Memorandum notes that, by comparison with journalist-source relationships, communications made in the course of other professional confidential relationships, such as doctors or counsellors and their patients, may involve discussion of the confider's misconduct, but the communication itself is unlikely to constitute an offence.[42]

It is significant in this respect that the Explanatory Memorandum notes that the Bill 'picks up' the common law rule in *O'Rourke v Darbishire*[43] (a case involving loss of legal professional privilege; followed in Australia in *Propend Finance*[44]) on the standard of proof required for loss of privilege on the grounds of misconduct, where that misconduct is the subject of the proceedings.[45] As the Memorandum notes, where the commission of a fraud, offence or act that renders a person liable to a civil penalty is the subject of civil or

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31 Ibid, note 220.
32 *Evidence Act 1995* (NSW).
33 See *Evidence Act 1995* (NSW), s 126D.
34 *Evidence Act 1995* (Cth) s 126D.
35 Set out in s 126B(4).
36 Australian Law Reform Commission, above n30 note 221.
37 Ibid [13.180].
38 Ibid [13.180] and note 222.
39 Ibid, note 223.
40 Explanatory Memorandum, above n26.
41 Evidence Amendment (Journalists' Privilege) Bill 2009 (Cth) sub-se 126B(4A).
42 Explanatory Memorandum, above n26, paragraph 7.
43 *O'Rourke v Darbishire* (1920) AC 581.
44 *Propend Finance & Ors v Cth* (1994) FCA 1260.
45 Evidence Amendment (Journalists' Privilege) Bill 2009 (Cth) sub-s 126B(4A), which is identical to the second limb of the *Evidence Act 1995* (Cth) s 126D.

criminal proceedings it would ordinarily need to be proved on the balance of probabilities or beyond reasonable doubt, respectively.[46]

For the purposes of determining whether journalists' privilege applies, where the relevant misconduct is a fact in issue, the Bill perpetuates the position under the Evidence Act[47], by providing that the Court may find the misconduct is established on a much lower standard, namely if there are 'reasonable grounds' to make that finding.[48]

PIAC believes that it is fairly arguable, having regard to the observations in the Explanatory Memorandum on the unique nature of communications, as between journalists and sources (as opposed to other professional communications) such that the communication in and of itself will, in many cases, involve the journalist in the commission of an offence that at least renders a person liable to a civil, if not a criminal penalty[49], that the appropriate level of proof should be the normal civil or criminal standard. This is particularly so as the proposed amendments will not alter the laws prohibiting unauthorised disclosures of government information, PIAC believes that subsection126B(4A) should be excised from the Bill.

Onus

As the Attorney-General noted in his second reading speech on the Bill, there are respectable arguments that the Bill does not go far enough, in failing to set an onus in favour of protecting sources, as is the case in New Zealand and in the USA. While it is correct to say that no other profession, not even the legal profession, enjoys an absolute privilege for communications, PIAC believes that the Bill falls short of providing a suitable level of protection for journalists and their sources. Building in an onus in favour of source protection, while leaving the ultimate decision to the Courts, based on the kinds of balancing factors that the Bill sets out[50] would, in PIAC's view, represent an acceptable compromise.

Conclusion

PIAC would welcome the opportunity for further discussion in relation to the matters outlined above, and looks forward to being of any further assistance it can, in supporting this initiative.

46 Explanatory Memorandum, n26, item 7, paragraph 19.
47 *Evidence Act 1995* (Cth) s 126D.
48 Evidence Amendment (Journalists' Privilege) Bill 2009 (Cth) cl 7, sub-s 126B(4A).
49 Above, n46.
50 Evidence Amendment (Journalists' Privilege) Bill 2009 (Cth) s 126B.