

Second Reading Speech

Evidence Amendment (Journalists' Privilege) Bill 2009

This Bill implements an important reform to the Commonwealth *Evidence Act 1995* by amending the existing privilege provisions which are available to protect confidential communications between journalists and their sources, in appropriate circumstances. It forms part of the Rudd Government's commitment to enhancing open and accountable government. It also delivers on the Rudd Government's election commitment to strengthen protection for journalists' sources.

This Bill recognises the important role that journalists play in informing the public on matters of public interest and, in my view, appropriately balances that against the public interest in the administration of justice. It does this by inserting an objects clause into the Division to ensure that the court keeps both of these factors firmly in mind when exercising its discretion in the particular case.

In doing so, the Bill improves on the version of the privilege introduced by the former Coalition Government in 2007. That was a version I described at the time as a "quick fix to a somewhat complex issue".

While this Bill just deals with journalist shield, the Government is also committed to enhancing our mechanisms to allow public interest disclosures and Freedom of Information

laws. The Government is currently considering the report of the House of Representatives Legal and Constitutional Affairs Committee on whistleblowers and is committed to introducing legislation this term. My colleague the Special Minister of State is looking to release an exposure draft Freedom of Information legislation as soon as practicable. Together with the measures in this Bill, those measures will improve the openness, transparency and accountability of government and the public service.

The value of a well informed community was highlighted by the Commonwealth Ombudsman in its 1994-95 Annual Report, where it stated:

‘Information is the currency that we all require to participate in the life and governance of our society. The greater the access we have to information, the greater will be the responsiveness of our governments to community needs, wants, ideas and creativity....’

Protection of journalists’ sources is one of the basic conditions of press freedom. As recognised by the European Court of Human Rights in 1996, without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest.

The Bill strengthens protections for journalists’ sources by changing the way in which a court is able to address communications which have been made to a journalist. The Bill will

require the court to consider whether a communication was made contrary to law in determining whether to direct that the evidence not be given. The current law has operated too severely in mandating the loss of privilege in these circumstances. Clearly, the Court will weigh the competing objects. The greater the gravity of the relevant misconduct, the greater the weight the court will be expected to give that factor.

The Bill will also require the Court to consider not only any potential harm to the source but also to the journalist if the evidence is given. This gives specific recognition to the fact that journalists can also suffer harm, such as harm to their reputation and their ability to obtain information, if they are required to disclose a source. Where a likelihood of harm has been established to the journalist or the source or both, and the court is satisfied that the nature and extent of this harm outweighs the desirability of the evidence being given, the court must uphold the privilege.

I want to make it very clear that these amendments are not designed to prevent or frustrate legal action being taken against a person who makes an illegal disclosure. Nor are the amendments intended to encourage such disclosures. And I don't anticipate they will do so. What these amendments do is to clarify the circumstances in which a journalist should be required to provide evidence to a court about the confidential communication or its source.

As I said earlier, the Rudd Government is also currently developing whistleblower protections which have the capacity to complement journalist shield laws by providing avenues other than the media for public interest disclosures. The court has the ability under the existing Evidence Act provisions to consider whether the source could have utilised,

where available, laws protecting public interest disclosures. Failure by a source to access the protections provided by these laws would be a relevant consideration in the court's determination of whether the confidential communication between a journalist and source should be privileged.

The Bill specifies that the Court in exercising its discretion must consider potential prejudice to national security. But the factors that are listed are not weighted one above the other. The amendment will provide greater flexibility for the court by allowing it to determine the weight to be given to a particular risk of prejudice to national security based on the evidence before it. Clearly, again, the greater the risk of prejudice to national security and the greater the gravity of that prejudice, the greater the weight the court would give to this factor.

The Bill will extend the application of the new journalists' privilege beyond proceedings in federal and Australian Capital Territory courts, to all proceedings in any other Australian court for an offence against a law of the Commonwealth. This provision will ensure that the Rudd Government's commitment to enhancing transparency and accountability in the Australian Government is effectively implemented by these reforms. In practice, the prosecution of an Australian Government official charged with disclosing confidential government information is usually conducted in a State or Territory court rather than a federal court. It is in these proceedings that journalists are often called upon to reveal their sources. This amendment will enable the new journalists' privilege to apply to all prosecutions for Commonwealth offences.

There will be some that will say this Bill does not go far enough. They will point to laws in New Zealand and the United Kingdom which contain a presumption in favour of protecting journalist.

But let me say in answer to those critics – this legislation enables an appropriate balance to be struck between the public interest in free press and the public interest in the administration of justice. It provides a guided discretion but leaves the balancing of competing interests and particular facts in each case to the court. As I said in 2007 when the Opposition introduced its flawed legislation, judicial discretion in these matters is not something to be afraid of. Indeed, no other profession – not even lawyers – has the benefit of an absolute privilege to protect confidential information.

A broader judicial discretion to maintain confidentiality between a journalist and their source in court proceedings is not just about protecting journalists. The Bill aims to benefit the wider community by facilitating the free flow of public interest information in cases where courts find journalists' privilege should be upheld.

I believe that this Bill finds the appropriate balance between the desirability of protecting confidential communications between journalists and their sources and the public interest in ensuring that all relevant evidence is before our courts.

I started this speech by saying that the media has an important role to play in our democracy. Let me finish by saying, Mr Speaker, that this role comes with significant responsibilities; responsibilities of fairness and, most importantly, accuracy. It is not a mere platitude to say

that a well informed, well functioning and responsible media is a vital cog in the democratic wheel.