Journalists' Privilege - Improved Protection Made Law

Leah Jessup discusses the new Evidence Amendment (Journalists' Privilege) Act 2011 (Cth) and the improved protection it offers journalists and their sources.

In April of this year the Federal government enacted the Evidence Amendment (Journalists' Privilege) Act 2011 (Cth) (the **Act**), legislation that has the potential to significantly enhance the protection of journalists and their sources by providing that, subject to an exception, journalists will not be compelled to reveal their confidential sources. The Act goes beyond the New Zealand legislation on which it was based by providing a broader definition of 'journalist' that is intended to capture citizen journalists, bloggers and those who publish news on Twitter, Facebook and YouTube. The protection, however, is not absolute and a journalist may be forced to disclose a source if a court finds that the scales tip in favour of disclosure, rather than potential harm to the informant and the public interest in a free press.

Background

In a highly publicised case in 2007, journalists Michael Harvey and Gerard McManus were convicted of contempt of court and fined for refusing to reveal the sources behind stories that exposed a Commonwealth government decision to reject a $500 million increase in war veterans' entitlements.[1]

Primarily in response to that case the Evidence Amendment (Journalist' Privilege) Act 2007 (Cth), which commenced on 26 July 2007, was enacted and amended Part 3.10 of the Evidence Act 1995 (Cth) (**Evidence Act**) by inserting a new Division 1A 'Professional confidential relationship privilege'. The amendments gave the court the discretion to direct that evidence not be adduced in a proceeding if it would disclose a journalist's confidential source, the contents of a document recording a confidential source or information enabling a person to ascertain the identity of a confidant. The amendment stated that a court must give such a direction if satisfied that it is likely that harm would or might be caused to a protected confider if the evidence was adduced and the nature and extent of the harm outweighs the desirability of the evidence being given.[2]

The most recent amendments to Division 1A, contained in the Act, were introduced into Parliament towards the end of 2010. On 18 October 2010, Andrew Wilkie introduced a private members' Bill, the Evidence Amendment (Journalists' Privilege) Bill 2010 (the **Bill**), into the House of Representatives to further strengthen the Division 1A protection by adopting similar provisions to those under the New Zealand Evidence Act 2006 (NZ).[3] After being passed unanimously in the lower house, the Bill was referred by the Senate to the Legal and Constitutional Affairs Legislation Committee (the **Committee**) after its second reading. The Committee considered both the Bill and a separate Coalition Bill of the same name that was introduced into the Senate on 29 September 2010. The Committee preferred the former Bill and released a report recommending its passing on 23 November 2010.[4] In March of 2011, the Bill passed through the Senate and was returned to the House of Representatives with two amendments which changed the definitions of 'journalist' and 'news medium'. On 21 March 2011 the lower house agreed to the Senate amendments by a two-vote margin.[5] The Act commenced on 13 April 2011.[6]

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Scope and application

The Act replaces the former Part 3.10, Division 1A professional confidential relationship privilege with a new journalists' privilege that extends protection to confidential communications between journalists' and their sources by essentially giving journalists the right to keep their sources confidential unless a court is satisfied that public interest is best served by disclosure. The amendments include a new section s126H which provides for protection of journalists' sources, subject to an exception. Under the new section, neither a journalist nor their employer is required to answer any question, or produce any document, that would disclose the identity of the informant or enable that identity to be ascertained if the journalist promised the informant that they would not disclose his or her identity.

Sub-section 126H(2) sets out the public interest exception to the protection provided in s126H(1), requiring the court to weigh up the benefit of disclosure against the potential harm to both the source and the public interest in a free press. The sub-section states that the court may order that the protection does not apply if satisfied that, having regard to the issues to be determined in that proceeding, the public interest in disclosure of the evidence revealing

1 Explanatory Memorandum, Evidence Amendment (Journalists' Privilege) Bill 2010 (Cth) 5.

2 Explanatory Memorandum, Evidence Amendment (Journalists' Privilege) Act 2007 (Cth) Schedule 1.

3 Commonwealth, Parliamentary Debates, House of Representatives, 18 October 2010, 386 (Andrew Wilkie, Member for Denison).

4 Commonwealth, Evidence Amendment (Journalists' Privilege) Bill 2010 and Evidence Amendment (Journalists' Privilege) Bill 2010 (No 2), The Senate Legal and Constitutional Affairs Legislation Committee, November 2010.

5 Commonwealth, Parliamentary Debates, House of Representatives, 21 March 2011, 23 (Andrew Wilkie, Member for Denison).

6 Evidence Amendment (Journalists' Privilege) Act 2011 (Cth) s2.

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the informant's identity outweighs both any likely adverse effect of the disclosure on the informant or any other person and the public interest in the communication of facts and opinion to the public by the news media and the news media's ability to access sources.

The public interest exception gives courts significant scope to determine the extent of protection the privilege provides. Journalists are normally asked and, if necessary, ordered to give evidence about sources where the identity of the source is relevant to proceedings. A common example is the statutory defence of qualified privilege in defamation proceedings, which requires the defendant to prove their conduct was reasonable. The identity of a source can be highly relevant; the seniority and reliability of a particular individual can affect whether it was reasonable for a journalist to rely upon their word. In such circumstances, there may be a strong public interest in the administration of justice, that is, in the public having confidence that the court has all the information it requires to make a fair decision. Courts may find this consideration outweighs the public interest in freedom of communication and the protection of sources, in a variety of circumstances. Sub-section 126H(3) allows the court to make an order requiring disclosure of a source on such terms and conditions as it thinks fit. The Explanatory Memorandum to the Bill gave as an example a suppression order limiting publication of a source's identity for their protection.[7] This should give some flexibility to courts to accommodate competing public policy objectives. However, a journalist who is required to disclose a source where they have promised not to do so may quite rightly be reluctant to reveal the source's identity, even if a suppression order is in place.

Definition of 'journalist' and 'news medium'

Section 126G assists in the interpretation of s126H by providing broad definitions for the terms 'journalist', 'informant' and 'news medium' which capture not only members of the traditional media but also those who use new media to publish news.

The Act defines 'journalist' as "a person who is engaged and active in the publication of news and who may be given information by an informant in the expectation that the information may be published in a news medium".[8] When first introduced into the House of Representatives, the Bill defined 'journalist' as "a person who in the normal course of that person's work may be given…", thereby restricting the privilege to journalists employed in the traditional media of newspaper, radio, television and newswire.[9] The amendment to the definition of 'journalist', moved in the Senate and included in the Act, broadened the scope of the Bill in an attempt to recognise "the rapidly changing face of news, news mediums and the people who deliver it".[10] It was this concern that an overly prescriptive definition of journalist could lead to difficulties in the face of the widening field of contemporary journalism, which was raised by the Australian Press Council and the Media Entertainment and Arts Alliance during the Committee's public hearing in Canberra.[11] As has become all too evident in the ongoing Wikileaks saga, new media publishers will sometimes be given information by an informant on the condition of anonymity.[12]

The definition of 'news medium' was also amended in the Senate in order to broaden the scope of the Act. Under the Act, 'news medium' means "any medium for the dissemination to the public or a section of the public of news and observations on news".[13] The change from 'a medium' to 'any medium' again reinforces parliament's intention to capture not only the traditional news mediums, but also internet publication in its various forms.[14]

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Andrew Wilkie was careful, when introducing the amended definitions in the House of Representatives, to emphasise that the Act is not intended "to offer blanket protection to anybody and everybody out there making public comments".[15] The definition of 'informant' under the Act goes some way to recognise this by defining an informant as "a person who gives information to a journalist in the normal course of the journalist's work in the expectation that the information may be published in a news medium".[16] A proposed amendment by the Greens to change 'journalist's work' in this definition to 'journalist's activities' was rejected by the Senate as too broad.[17] Rather than seeking to restrict the protection to paid journalists, the inclusion of 'journalist's work' is intended to exclude those making a single passing comment on a website such as Facebook.[18] Andrew Wilkie stated in the House of Representatives on 21 March 2011 that:

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7 Explanatory Memorandum, Evidence Amendment (Journalists' Privilege) Bill 2010 (Cth) 24.

8 Evidence Amendment (Journalists' Privilege) Act 2011 (Cth) Sch 1, s1.

9 Evidence Amendment (Journalists' Privilege) Bill 2010 (Cth) Sch 1, lines 13-16.

10 Above n5.

11 Commonwealth, Evidence Amendment (Journalists' Privilege) Bill 2010 and Evidence Amendment (Journalists' Privilege) Bill 2010 (No 2), The Senate Legal and Constitutional Affairs Legislation Committee, November 2010, p 11.

12 Above n5.

13 Evidence Amendment (Journalists' Privilege) Act 2011 (Cth) Sch 1, s1.

14 Above n5.

15 Above n5, 24 (Andrew Wilkie, Member for Denison).

16 Evidence Amendment (Journalists' Privilege) Act 2011 (Cth) Sch 1, s1.

17 Commonwealth, Parliamentary Debates, House of Representatives, 3 March 2011, 1096 (Ludwig, Minister for Agriculture, Fisheries and Forestry and Minister Assisting the Attorney-General on Queensland Floods Recovery) and 1097 (Nick Xenophon, South Australia).

18 Commonwealth, Parliamentary Debates, House of Representatives, 15 November 2010, 1141 (Nick Xenophon, South Australia).

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It will be interesting to see whether courts dwell on these definitions or whether the key question will instead be whether or not there is a public interest in a particular source being disclosed.

Extended application

The extended application of journalists' privilege under Division 1A to pre-trial proceedings previously provided in the Evidence Act will continue under the new protection. The previous professional confidential relationship privilege applied not only to trial proceedings, but also to summons and subpoenas, pre-trial discovery, non-party discovery, interrogatories, notices to produce and requests to produce documents and witnesses.[20] Section 131A(2), which provides for this broad definition of 'disclosure requirement', will remain in the Evidence Act. Under the new s131A(1)-(1A), if a person faced with a disclosure requirement claims that they cannot be compelled to answer any question or produce any document that would disclose an informant's identity or enable it to be ascertained, the party seeking disclosure may apply to the court for an order under s126H that the protection under s126H(1) does not apply.

The Act extends the application of the protection beyond federal and ACT proceedings to all proceedings in any Australian court for Commonwealth offences. Section 4 of the Evidence Act previously limited the application of the privilege to proceedings in a federal or ACT court. The new s131B states that Division 1A and s131A apply to all proceedings in any other Australian court for an offence against a law of the Commonwealth, including proceedings related to bail and sentencing, interlocutory proceedings and proceedings heard in chambers. The result is that the new journalists' protection will apply to all prosecutions for Commonwealth offences, including prosecutions heard in State and Territory courts.[21]

The Act also amended the Family Law Act 1975 (Cth) to reflect the operation of the new s126H.[22]

Conclusion

The Act has the potential to significantly enhance the protection of journalists and their sources in cases where a journalist has promised that the identify of a source will not be disclosed. However, the nature and extent of that protection depends significantly on how the privilege and its public interest exception are interpreted by the courts. It is to be hoped that the courts will strike the right balance between the administration of justice and freedom of communication.

Leah Jessup is a lawyer at Blake Dawson and received comments on earlier versions of this article from Sophie Dawson, a partner of Blake Dawson.

19 Above n15.

20 Evidence Act 1995 (Cth), historical version prepared 5 August 2009, s131A.

21 Explanatory Memorandum, Evidence Amendment (Journalists' Privilege) Bill 2010 (Cth) 29-30.

22 Evidence Amendment (Journalists' Privilege) Act 2011 (Cth) Sch 1, ss4-5