

What's in a Name? Bloggers, Journalism, and Shield Laws

The High Court of New Zealand recently handed down a decision finding that bloggers can be legally considered as journalists and claim protection for their confidential sources. Hannah Ryan provides a summary of the Court's decision and compares it with the legislative framework in Australia.

Are bloggers journalists? Since the emergence of the internet and the development of blogs began to break down the traditional models of journalism and news media, this question has been a vexed one, consuming much judicial and academic attention and producing divergent views internationally.¹ This is unsurprising, given that the question underpinning it is notoriously difficult to answer: *what is journalism?*

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In law, the question arises principally in relation to shield laws. Shield laws protect journalists from being compelled to give evidence about confidential sources and are the most significant protection afforded to journalists, as distinct from other members of the public. This special treatment is justified by the important role journalism and the free flow of information play in a liberal democracy, and by journalists' foremost ethical obligation to respect confidences in all circumstances.² It follows that only those people producing 'journalism' should enjoy the protection of shield laws.

In a decision that will have implications for the interpretation of shield laws in Australia, the New Zealand High Court has recently expanded the protection of New Zealand's shield laws to bloggers. By finding that a blog may be considered a 'news medium' and a blogger a 'journalist', the Court adopted a functionalist approach to defining journalism. Given that shield laws introduced in several Australian jurisdictions over the past few years largely follow the

New Zealand model, the decision should be noted by Australian journalists and media lawyers.

Legislative framework

New Zealand's shield law is found in section 68 of the Evidence Act 2006, which provides 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.

A judge may order that subsection (1) is not to apply if satisfied that, having regard to the issues to be determined in the proceeding, the public interest in the disclosure of an informant's identity outweighs both any likely adverse effect of the disclosure on the informant or another person, and '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'.³ 'Journalist' is defined as 'a person who in the normal course of that person's work may be given information by an informant in the expectation that the information may be published in a news medium'.⁴ 'News medium' is defined as 'a medium for the dissemination to the public or a section of the public of news and observations on news'.⁵

The Commonwealth introduced Australia's vanguard shield laws in 2011, through the *Evidence Amendment (Journalists' Privilege) Act 2011* (Cth). The legislation was directly modelled on New Zealand's section 68.⁶ Similar legislation has now been enacted in New South Wales,⁷ Victoria,⁸ the Australian Capital Territory,⁹ and Western Australia.¹⁰ In the Commonwealth and Australian Capital Territory legislation, a 'journalist' is defined similarly to the New Zealand

1 See: *Obsidian Finance Group LLC v Crystal Cox*, Nos. 12-35238 & 12-35319 (9th Cir. Jan 17, 2014); *The Mortgage Specialists Inc v Implode-Explode Heavy Industries Inc*, 160 N.H. 227 (N.H. 2010); Sara Phung, 'Function Not Form: Protecting Sources of Bloggers' (2012) 17(1) *Media and Arts Law Review* 121; Linda L. Berg, 'Shielding the Unmedia: Using the Process of Journalism to Protect the Journalist's Privilege in an Infinite Universe of Publication' (2003) 39 *Houston Law Review* 1371; Randall D. Eliason, 'Leakers, Bloggers, and Fourth Estate Inmates: The Misguided Pursuit of a Reporter's Privilege' (2006) 24 *Cardozo Arts & Entertainment* 385; Anne M. Macrander, 'Bloggers as Newsmen: Expanding the Testimonial Privilege' (2008) 88 *Boston University Law Review* 1075.

2 See: Media Entertainment & Arts Alliance, Journalists' Code of Ethics <<http://www.alliance.org.au/code-of-ethics.html>>, clause 3.

3 *Evidence Act 2006* (NZ), s 68(2).

4 *Evidence Act 2006* (NZ), s 68(5).

5 *Evidence Act 2006* (NZ), s 68(5).

6 Kirsty Magarey, *Bills Digest*, Nos 38-39 of 2010-11, 11 November 2010, 4; Explanatory Memorandum, Evidence Amendment (Journalists' Privilege) Bill 2011 (Cth), notes on clauses, [9].

7 *Evidence Act 1995* (NSW), s 126K.

8 *Evidence Act 2008* (Vic), s 126K.

9 *Evidence Act 2011* (ACT), s 126K.

10 *Evidence Act 1906* (WA), s 20I.

legislation 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'.¹¹ In contrast, Western Australia, New South Wales and Victoria require that a journalist be 'engaged in the profession or occupation of journalism'.¹²

Slater v Blomfield

Although New Zealand's shield laws have been in place for several years, the meaning of 'journalist' did not receive judicial consideration until this year's decision in *Slater v Blomfield*.¹³ The case arose from a dispute between Cameron Slater, a well-known right-wing commentator in New Zealand and operator of a blog called 'Whale Oil', and Auckland businessman Matthew Blomfield, who was associated with a charity known as 'KidsCan'. Slater published a series of posts on Whale Oil relating to Blomfield, suggesting among other things that he had conspired to steal charitable funds. Blomfield initiated defamation proceedings. Slater admitted that the articles were defamatory but relied on the defences of truth and honest opinion. Blomfield then applied for discovery of email correspondence between Slater and several people allegedly involved in the supply of material for Slater's article. This was accompanied by a notice to answer interrogatories including: 'Who supplied the defendant with the hard drive and other information referred to on the Whale Oil website?'

Slater refused to comply with the discovery request and interrogatory, on the basis that the information was privileged under section 68. In order to enjoy that privilege, Slater needed to establish that Whale Oil was a news medium and he was a journalist. He was unsuccessful at first instance. Blackie J found that, as Whale Oil was 'a blog site', it was 'not a means for the dissemination to the public or a section of the public of news and observations on news'.¹⁴ On this view, a blog, by definition, could not be a news medium.

Slater enjoyed more success on appeal to the High Court. Significantly, Asher J found that a blog *could* be a news medium for the purposes of section 68, and indeed that Whale Oil was such a news medium. Similarly, Slater could be considered a 'journalist' and was therefore presumptively entitled to the protection in section 68(1). However, in this case the public interest in the disclosure of the identity of the informant outweighed the other considerations identified in section 68, and the presumption of non-compellability was displaced.

The judgment suggests that not all blogs will be considered news media and not all bloggers are journalists. Instead, determining

whether a publication is a news medium and whether a person is a journalist will be a multifactorial inquiry. Asher J identified several features of Whale Oil and Slater's work that meant the former was properly to be considered a news medium and the latter a journalist. First, it was necessary that Whale Oil's posts be of such a standard that they could be regarded as 'news'.¹⁵ That is, material presented on a blog should be accurate and reliable in order for the blog to be a 'news medium', otherwise it cannot be considered to be news.¹⁶ It was significant that Whale Oil frequently published articles with an element of breaking news.¹⁷ Implicitly, then, a blog that posts only commentary is very unlikely to be considered a 'news medium'.¹⁸ Further, the judge suggested that the publication of news had to be regular.¹⁹ It was also relevant that Whale Oil enjoyed a large audience and was popular with the public.²⁰ The combination of these features meant that the blog's 'particular political perspective'²¹ and 'dramatic and abusive' style were immaterial.²² What was determinative was the 'element of regularly providing new or recent information of public interest'.²³

Determining whether a publication is a news medium and whether a person is a journalist will be a multifactorial inquiry

Whether Slater could be considered to be a journalist was approached as a related, but separate, inquiry to the news medium question. The fact that Slater was not employed as a journalist was largely irrelevant.²⁴ Instead, Asher J looked to the work that he carried out. That work was defined to be the 'mental and physical effort involved in obtaining information on news topics and transforming it into readable prose which coherently disseminates the information to a reader'.²⁵ In concluding that Slater was in fact a journalist, it was significant that he regularly received and disseminated news through a news medium, that this involved significant time on a frequent basis, he derived some revenue from Whale Oil and it involved the application of journalistic skill.²⁶ The latter was the most important consideration.²⁷

Consideration

If the rationale of shield laws is to protect the free flow of information by encouraging sources to volunteer information to those who will disseminate it, the approach adopted in *Slater v Blomfield* is a sensible one. By focusing on the *function* of journalism, rather than its traditional *form*, this approach ensures that those who are find-

11 *Evidence Act 1995* (Cth), s 126G; *Evidence Act 2011* (ACT), s 126J.

12 *Evidence Act 2008* (Vic), s 126J; *Evidence Act 1906* (WA), s 20G; *Evidence Act 1995* (NSW), s 126J.

13 [2014] NZHC 2221.

14 *Blomfield v Slater* DC Manukau CIV-2012-092-001969, 26 September 2013, 15 (Blackie J).

15 *Slater v Blomfield* [2014] NZHC 2221, [61].

16 *Ibid*.

17 *Ibid* [59].

18 *Ibid* [63].

19 *Ibid* [54].

20 *Ibid* [55], [64].

21 *Ibid* [64].

22 *Ibid* [62].

23 *Ibid* [65].

24 *Ibid* [69], [73].

25 *Ibid* [66].

26 *Ibid* [74].

27 *Ibid* [82].

ing and disseminating information in the public interest, and their sources, are protected appropriately, whether or not they have the infrastructure of a large media organisation behind them. Accordingly, although a multifactorial inquiry is appropriate, the core focus should be on the kind of information disseminated by a publication, whether it is properly considered to be news, and the role of journalistic skill, methods and ethics in the work of the purported journalist. Elements such as the regularity of posts, the revenue earned by the website, and the size of the audience are secondary.

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The decision should also be commended for its realistic recognition of the democratisation of news journalism fostered by the internet. As Asher J put it, '[t]he fact that those who operate websites are often not owned by large media corporates means that fresh perspectives are presented and the public have more choice.'²⁸ For these reasons, the Commonwealth and the Australian Capital Territory, with their similar definitions, should follow the New Zealand example when the question inevitably arises.

In light of the logical interpretation adopted by the New Zealand High Court, it is disappointing that some policymakers and legislators continue to promulgate a retrograde division between those who are employed as journalists and others who claim to be journalists, such as bloggers. While the Commonwealth purposely

decided against a requirement that a person be employed as such to enjoy the benefit of shield laws,²⁹ the New South Wales, Western Australian and Victorian shield laws still require a person to be engaged in the 'profession or occupation' of journalism in order to be protected from compellability. More recently, the Commonwealth Parliamentary Joint Committee on Intelligence and Security recommended against providing an exemption for journalists from a proposed offence prohibiting the publication of details of certain intelligence operations. One reason was that:

'...the term 'journalism' is increasingly difficult to define as digital technologies have made the publication of material easier....it would be all too easy for an individual, calling themselves a 'journalist', to publish material on a social media page or website that had serious consequences for a sensitive intelligence operation. It is important for the individual who made such a disclosure to be subject to the same laws as any other individual.'³⁰

The difficulty in defining journalism is undeniable. However, adopting functionalist considerations, rather than clinging to traditional forms, is the most principled approach. It is only by this method that the law can properly ensure that works, and their corresponding authors or journalists, which merit protection deservingly receive it.

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28 Ibid [49].

29 Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Evidence Amendment (Journalists' Privilege) Bill 2010 and Evidence Amendment (Journalists' Privilege) Bill 2010 (No. 2) (additional comments by the Australian Greens).

30 Parliamentary Joint Committee on Intelligence and Security, Advisory Report on the National Security Legislation Amendment Bill (No. 1) (2014), [3.101].



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