

# Journalist shield laws – Sydney Morning Herald and the NSW Crime Commission

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The following is background information to the article written by the President of the Institute entitled “Freedom of speech risks being silenced” published in the Sydney Morning Herald on 23 March 2011.

**1. Why does the *Evidence Amendment (Journalists’ Privilege) Act 2011* not provide meaningful protection to journalists’ sources?**

The *Evidence Amendment (Journalists’ Privilege) Act 2011* introduced a new provision, section 126H, at the Federal level on the disclosure in court proceedings of journalists’ sources.

Section 126H is an amendment to the Federal *Evidence Act 1995* and is to the following effect.

“126H Protection of journalists’ sources

- (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 to answer any question or produce any document that would disclose the identity of the informant or enable that identity to be ascertained.
- (2) The court may, on the application of a party, order that subsection (1) is not to apply if it is satisfied that, having regard to the issues to be determined in that proceeding, the public interest in the disclosure of the identity of the informant outweighs:
  - (a) any likely adverse effect of the disclosure on the informant or any other person; and
  - (b) 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) An order under subsection (2) may be made subject to such terms and conditions (if any) as the court thinks fit.”

The position at the Federal level before section 126H was introduced was set out in the former Division 1A in the Federal *Evidence Act 1995*. Section 126B of that Division provided:

“126B Exclusion of evidence of protected confidences

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- (1) The court may direct that evidence not be adduced in a proceeding if the court finds that adducing it would disclose:
  - (a) a protected confidence, or
  - (b) the contents of a document recording a protected confidence, or
  - (c) protected identity information.
- (2) The court may give such a direction:
  - (a) on its own initiative, or
  - (b) on the application of the protected confider or confidant concerned (whether or not either is a party).
- (3) The court must give such a direction if it is satisfied that:
  - (a) it is likely that harm would or might be caused (whether directly or indirectly) to a protected confider if the evidence is adduced, and
  - (b) the nature and extent of the harm outweighs the desirability of the evidence being given.
- (4) Without limiting the matters that the court may take into account for the purposes of this section, it is to take into account the following matters:
  - (a) the probative value of the evidence in the proceeding,
  - (b) the importance of the evidence in the proceeding,
  - (c) the nature and gravity of the relevant offence, cause of action or defence and the nature of the subject matter of the proceeding,
  - (d) the availability of any other evidence concerning the matters to which the protected confidence or protected identity information relates,
  - (e) the likely effect of adducing evidence of the protected confidence or protected identity information, including the likelihood of harm, and the nature and extent of harm that would be caused to the protected confider,
  - (f) the means (including any ancillary orders that may be made under section 126E) available to the court to limit the harm or extent of the harm that is likely to be caused if evidence of the protected confidence or the protected identity information is disclosed,

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- (g) if the proceeding is a criminal proceeding-whether the party seeking to adduce evidence of the protected confidence or protected identity information is a defendant or the prosecutor,
- (h) whether the substance of the protected confidence or the protected identity information has already been disclosed by the protected confider or any other person.

The Court must also take into account, and give the greatest weight to, any risk of prejudice to national security (within the meaning of section 8 of *the National Security Information (Criminal and Civil Proceedings) Act 2004*).

- (5) The court must state its reasons for giving or refusing to give a direction under this section.”

Division 1A conferred on a court a general discretion to order non-disclosure of the identity of a journalist’s source. In addition in the circumstances specified in subsection (3) of section 126B of that Division the discretion was removed and a court was required to order non-disclosure if it was satisfied that:

- 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.

Division 1A has been repealed and now a court has a discretion to order disclosure of a journalist’s source if it is satisfied on application by a party to the proceedings that having regard to the issues to be determined in the proceedings, the public interest in disclosure outweighs:

- 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 also in the ability of the news media to access sources of facts.

It is doubted whether the *Evidence Amendment (Journalists’ Privilege) Act* will provide in practice any greater protection to a journalist’s source than the provision it repealed. Even if it does it will be marginal, and even so the result will be no meaningful protection to journalists’ sources (the so called “rebuttable presumption” of non-disclosure is really a draftsman’s slight of hand).

To test whether section 126H provides meaningful protection to journalists’ sources, it is useful to take as an example the present attempt of the NSW Crime Commission to obtain from two Sydney Morning Herald journalists the name of the person or persons who provided to them in confidence information about whether the Commission was doing secret deals with major drug dealers on the disposal of the proceeds of crimes. For this purpose it is assumed that the person who provided the information to the journalists was a junior detective in the NSW police force who was genuinely worried about the secret deals with major drug dealers.

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In the example the NSW Crime Commission could obtain a court order under subsection (2) of section 126H requiring the journalists to disclose the name of the junior detective if the Commission satisfied the court that having regard to the issues to be determined in the proceedings between it and the Police Integrity Commission the following is the position:

The public interest in the disclosure of the name of the junior detective

### **outweighs**

Any likely adverse effect of the disclosure on the junior detective or any other person and the public interest in the communication of facts and opinion to the public by the news media (including the ability of the news media to access sources of facts).

The following are the reasons why the *Evidence Amendment (Journalists' Privilege) Act* is considered to provide in practice no meaningful protection to journalists' sources.

- (1) The junior detective in the example is not a party to the proceedings and may not know anything about the proceedings or want to be involved in them. An order for disclosure of his name can only be made on the application of a party to the proceedings and an order for disclosure could be made without the knowledge or input of the junior detective.
- (2) Court proceedings and applications to court are expensive. The junior detective may not have the resources to fund the costs of being represented in court.
- (3) If the junior detective applied to the court to be heard there is a risk that his or her identity would be found out. A court may seek to minimise the risk. For example it was stated in a NSW Attorney-General's Department 1996 Discussion Paper:

"The court should be required to consider the means available to limit the adverse consequences of a forced breach of confidence. These may include limiting publication of the evidence, ordering non-publication of part only of the evidence, suppressing the publication of names and other identifying information and conducting hearings in camera (closed court). Many concerns about giving evidence can be addressed by using techniques such as these to keep confidential information secret. Breach of such orders can be punished as a serious contempt."

In *Director-General, Dept of Community Services v D* [2006] NSWSC 827 Brereton J took into account in a case which did not involve a journalist's source that the hearing in which the confidences were sought to be adduced was required to be in camera, access to court records was limited and publication of certain matters was prohibited.

But despite the best efforts of a court, disclosure of the identity of the journalist's source may result.

- (4) There is no assurance that any party to the proceedings will have any interest or the money to properly look after the interests of the junior detective in the court proceedings. There is a real prospect that the interests of the junior detective will in practice be given only lip

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service protection (it is not the role of the court to make its own inquiries; rather it determines the matter on the evidence provided by the parties after hearing their submissions).

- (5) Thus in the example, whilst the NSW Crime Commission would have a strong interest in disclosure, it is possible that the other party to the proceedings would have no real interest in contesting non-disclosure. In these circumstances the contest before the court may not in practice be a real contest (with the person at risk being the junior detective).
- (6) If the court orders disclosure by the journalists there is a real difficulty if the junior detective wants to appeal the order but none of the parties to the proceedings want to appeal. Even if the difficulty of appealing is overcome there is a real risk of disclosing the name of the junior detective in the appeal process.
- (7) Section 126H has been “sold” as creating a “rebuttable presumption” that journalists’ sources will not be disclosed. But that is misleading spin; the section gives no meaningful protection, only a false sense of security to journalists’ sources.

This is demonstrated by taking the example being used. The NSW Crime Commission must satisfy a court that the public interest of disclosure outweighs:

- Any likely adverse effect of disclosure on the junior detective or anyone else; and
- The public interest in the communication of facts or opinion by the news media and the ability of the news media to access sources of fact.

In practice the so called “rebuttable presumption” is likely to be a misleading headline without any substance. The so called presumption is that there will be no disclosure unless a court is satisfied that having regard to the issues to be determined in the proceedings before it, the public interest in having all relevant evidence before the court outweighs two matters. The first is the likely adverse effect of disclosure on the informant or any other person. The second is the public interest in the communication of facts and opinion to the public by the news media and the ability of the news media to access sources of facts.

But the first part of what must be “outweighed” i.e. the adverse effect of disclosure on the junior detective will in many cases be impractical to provide to the court by evidence without running the real risk of disclosure of the junior detective’s name i.e. it is difficult to prove the adverse effect on his career, family, contacts in the criminal world and his life without disclosing the junior detective’s name.

Further, a court in proceedings (civil or criminal) is not a royal commission charged with investigating a particular matter. In practice the parties to the proceedings may not provide any substantial evidence on the public interest question.

Overriding all of the above is that the court is likely in practice to start with the unstated presumption that for there to be a fair hearing all relevant evidence should be before it

(including the identity of the journalist's source). This approach is reflected in the following judicial statements:

“Spigelman CJ in *R v Young* (1999) 46 NSWLR 681 at 696-697 stated:

75. The starting point is that the search for the truth requires all oral and documentary information, which is directly or indirectly relevant or material, to be available. As Rich J has put it in *McGuinness v Attorney-General (Vic)* (1940) 63 CLR 73 at 87:

“... The paramount principle of public policy is that truth should always be accessible to the established courts of the country.”

Dixon J in the *McGuinness* case said:

“Except in a few relations where paramount considerations of general policy appeared to require that there should be a special privilege, such as husband and wife, attorney and client, communications between jurors, the counsels of the Crown and State secrets, and, by statute, physician and patient and priest and penitent, an inflexible rule was established that no obligation of honour, no duties of non-disclosure arising from the nature of a pursuit or calling, could stand in the way of the imperative necessity of revealing the truth in the witness box.”

Lord Hailsham in the House of Lords decision in *D. v National Society for the Prevention of Cruelty to Children* [1978] AC 171 said at 223:

“I start with the assumption that every court of law must begin with a determination not as a general rule to permit either party deliberately to withhold relevant and admissible evidence about the matters in dispute. Every exception to this rule must run the risk that because of the withholding of relevant facts justice between the parties may not be achieved. Any attempt to withhold relevant evidence therefore must be justified and requires to be jealously scrutinised. It is in this frame of mind that I approach the question at issue.”

Courts have rightly a real concern about excluding evidence which may prevent a fair trial. Against that real concern section 126H calls for a balancing of that immediate real concern with what may be the distant and judicially unverified public interest of the ability of the news media to access sources of fact. The result is that a court may be disposed to have the identity of the journalists' source disclosed unless good reason is shown. This reverses the rebuttable presumption said to be created by s126H.

- (8) In working out what is in the public interest each case will depend on its own facts and provide little guidance. Whatever guidance is provided will take years to be judicially determined, and in the meantime there is none.
- (9) The determination of whether to disclose may be critically adverse to the source (here the junior detective) but is for all practical purposes taken out of the source's hands and an artificial and unreal balancing act required.
- (10) In short, the *Evidence Amendment (Journalists' Privilege) Act* provides no real protection, and no certainty (let alone guidelines) to a source such as the junior detective thinking of making a confidential disclosure to a journalist. He or she is unlikely to be satisfied at the time of disclosure to the journalists that the balancing act required to be undertaken by a court will result in non-disclosure of his or her identity. If a source is not prepared or able to be a public whistleblower he or she may quickly conclude that he or she should disclose nothing to a journalist.
- (11) In the above it has been assumed that the disclosure issue is being determined by a court but disclosure in court proceedings is only the tip of the iceberg. The much proclaimed rebuttable presumption has no operation in respect of the compulsory powers which most government agencies have to require information and compulsorily require questions to be answered. Those government agencies can, for example, obtain the identity of the source i.e. under their own extensive powers or for example via the *Telecommunications (Interception and Access) Act 1979*.

## Conclusion

For the above reasons, the *Evidence Amendment (Journalists' Privilege) Act* provides no meaningful protection to journalists' sources. There is an urgent need for proper protection of a journalist's source from disclosure in court proceedings and to any government agency.

**2. Why is the Federal Evidence Amendment (Journalists' Privilege) Act 2011 relevant to New South Wales?**

The *Evidence Amendment (Journalists' Privilege) Act 2011* is relevant in NSW for two reasons.

- (1) The Federal and State governments have for a number of years sought to obtain uniformity in evidence laws both at the Federal and State law.

The Federal Attorney-General Robert McClelland stated on 25 October 2010 in the second reading of the Evidence Amendment (Journalists' Privilege) Bill:

"The government is committed to the promotion of uniform evidence laws across Australia. I note the previous speaker also commented on this matter. The bill paves the way for the states and territories to introduce journalist shield laws based on the rebuttable presumption in favour of journalists' privilege. Victoria has indicated its intention to move similar amendments. I will be working with my state and territory counterparts to progress such a harmonised approach."

On 15 November 2010 Senator Ludwig stated:

"The government supports uniform evidence laws and will work with the states and territories through the Standing Committee of Attorneys-General to progress a harmonised approach to journalist shield laws. The bill will provide a good basis for the states and territories wishing to introduce laws based on rebuttable presumption in favour of journalist privilege."

Senator Wortley stated on 15 November 2010:

"Attorney-General Robert McClelland personally gave a public commitment to revisit the issue of shield laws if re-elected – and now we keep that promise. The government is also urging all state and territory governments to adopt similar provisions at a state level as part of uniform evidence laws. We are seeking a harmonised approach to journalist shield laws across Australia."

Accordingly, it is reasonable to assume that there will be considerable pressure for the NSW *Evidence Act* to be amended along the lines of s126H to obtain uniformity.

- (2) The Federal *Evidence Act* is regularly applied in proceedings in Federal Courts in NSW. In addition, the amending Act extends the operation of the new provisions to all Australian Courts (not only Federal Courts) for proceedings for an offence against a Federal law. Anomalous results may occur. The Director of Public Prosecutions in Victoria in his submission on the *Evidence Amendment (Journalists' Privilege) Act* wrote:

"This lack of uniformity may lead to a peculiar situation where in the running of a joint State/Commonwealth prosecution an issue of privilege is raised whereby evidence is capable of being admitted with respect of the Victorian offences but excluded with regard to the Commonwealth offences."

**3. What is the connection between the secretive nature of Government agencies (such as the NSW Crime Commission) and protecting journalists' sources?**

Government agencies are increasingly having greater powers of obtaining information about individuals whilst at the same time resisting any disclosure about their own activities. To this is added the culture in some agencies of cherry picking information gathered to present a case against the individual concerned – whilst at the same time refusing to provide favourable evidence to the individual.

For example, sections 29 and 29A of the *NSW Crime Commission Act* provides:

“29 Secrecy

- (1) This section applies to:
  - (a) a member of the Commission, and
  - (b) a member of the staff of the Commission, and
  - (c) a member of a police task force assisting the Commission in accordance with an arrangement under section 27A, and
  - (d) a person to whom information is given either by the Commission or by a person referred to in paragraph (a), (b) or (c) on the understanding that the information is confidential.
- (2) A person to whom this section applies who, either directly or indirectly, except for the purposes of this Act or otherwise in connection with the exercise of the person's functions under this Act, and either while the person is or after the person ceases to be a person to whom this section applies:
  - (a) makes a record of any information, or
  - (b) divulges or communicates to any person any information,being information acquired by the person by reason of, or in the course of, the exercise of functions under this Act, is guilty of an offence punishable, on conviction, by a fine not exceeding 50 penalty units or imprisonment for a period not exceeding one year, or both.
- (3) A person to whom this section applies shall not be required to produce in any court any document that has come into the person's custody or control in the course of, or by reason of, the exercise of functions under this Act, or to divulge or communicate to a court a matter or thing that has come to the person's notice in the exercise of functions under this Act, except where the Commission, or a member in the member's official capacity, is a party to the relevant proceedings or

it is necessary to do so:

- (a) for the purpose of carrying into effect the provisions of this Act, or
  - (b) for the purposes of a prosecution instituted as a result of an investigation conducted by the Commission in the exercise of its functions.
- (4) In this section: "court" includes any tribunal, authority or person having power to require the production of documents or the answering of questions "produce" includes permit access to."

"29A Disclosures prejudicing investigations

(1) A person who is required:

- (a) by a notice under section 10 or 17 to furnish information or to attend and produce a document or other thing, or
- (b) by a summons under section 16 to give evidence or to produce a document or other thing,

shall not disclose any information about the notice or summons that is likely to prejudice the investigation to which it relates.

Maximum penalty: 50 penalty units or imprisonment for 12 months, or both.

- (2) Subsection (1) does not apply to a notice or summons unless it (or a notice accompanying it) specifies that information about the notice or summons must not be disclosed.
- (3) A person does not contravene this section if:
- (a) the disclosure is made to an employee, agent or other person in order to obtain information to comply with the notice or summons and the employee, agent or other person is directed not to inform the person to whom the information relates about the matter, or
  - (b) the disclosure is made to obtain legal advice or representation in relation to the notice or summons, or
  - (c) the disclosure is made for the purposes of, or in the course of, legal proceedings.
- (4) A reference in this section to the disclosure of any information about a notice or summons includes a reference to:
- (a) a disclosure about the existence or nature of the notice or summons or of the investigation to which it relates, and

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- (b) a disclosure of any information to a person from which the person could reasonably be expected to infer the existence or nature of the notice or summons or of the investigation to which it relates.”

Thus, if a journalist receives a notice from the NSW Crime Commission to provide information obtained from a source it is a criminal offence (with imprisonment for 12 months) for the journalist to disclose to anyone (including publishing in the media) that he has received the notice if such disclosure is likely to prejudice the Commission’s investigation. How can the journalist know whether their disclosing receiving the notice from the Commission will prejudice the investigation? To be safe he might make no disclosure.

For public criticism of government and its agencies to be soundly based it may be necessary to have regard to sources who for a number of different reasons are not prepared to be public whistle blowers. There is an increasing need for protection of journalists’ sources, particularly with the growth of secretive government agencies. It is time for meaningful protection.

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