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Shield law: state to defy Greens

Victoria aims to strike
the right balance in its
bid to protect sources

CHRIS MERRITT
LEGAL AFFAIRS EDITOR

VICTORIA looks set to be the first state to introduce a shield law for journalists' sources broadly in line with a newly approved federal scheme.

But while the Victorian government plans to match the central mechanism of the new federal shield law, it has rejected that part of the federal scheme drawn up by the Greens.

The Victorian shield law would only protect journalists' confidential sources, unlike the Greens' scheme which would also protect the identify of anyone who supplies information to amateur bloggers and non-journalists who publish information.

"The Greens have gone too far," said Victorian Attorney-General Robert Clark.

"There is a real worry that the Greens' amendment threatens to unreasonably restrict the ability to put evidence before the court.

"We believe the shield should apply to journalists who receive

information in the normal course of their work."

He was worried that the changes to the federal scheme would also complicate the task of determining who came within its protection. "The Greens' changes are cast in extremely broad terms," Mr Clark said.

"Simply running a blog does not make you a journalist. If you are a professional carrying on on-line journalism in the course of your work, electronic media journalists qualify (for protection) just as the print media does.

"But if you are an amateur running a blog, in principle and practice, it is not appropriate that the privilege extend to such a person."

Victoria intended to legislate this year to create a rebuttable presumption that the identity of those who provide information to journalists will be protected by state law, Mr Clark said.

This scheme is based on shield laws in New Zealand that won support last year from Mr Clark, the media as well as the government and Coalition parties in Canberra, and independents Nick Xenophon and Andrew Wilkie.

Mr Clark said the original schemes favoured by Labor and the Coalition in Canberra had struck a fair balance between pro-

tecting the interests of the public in the free flow of information while providing courts with a discretion to require disclosure in the public interest. "The federal scheme, minus the Greens' amendments, still strikes a fair balance," he said.

Mr Clark's concerns about the wider federal shield laws are in line with those of federal opposition legal affairs spokesman George Brandis. Senator Brandis has said that any form of privilege means withholding information from courts and should, therefore, be done as conservatively and narrowly as possible.

Even though the Greens' changes have given the federal scheme a broader reach than the proposed Victorian law, Mr Clark said he believed the state law might be used more frequently.

"It is likely that state-based laws, in practical terms, are going to be more significant than the commonwealth's law," he said.

**"The Greens'
changes are cast
in extremely
broad terms"**

ROBERT CLARK
VICTORIAN ATTORNEY-GENERAL

Ablett, Maia

From: Driver, Sarah
Sent: Friday, 8 April 2011 11:49 AM
To: Shallies, Brad; Stack, Liam; Ablett, Maia
Subject: Shield law: state to defy Greens [SEC=UNCLASSIFIED]

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Shield law: state to defy Greens

- Chris Merritt, Legal Affairs editor
- From: [The Australian](#)
- April 08, 2011 12:00AM

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Sarah Driver

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2010-2011

The Parliament of the
Commonwealth of Australia

HOUSE OF REPRESENTATIVES

As passed by both Houses

**Evidence Amendment (Journalists'
Privilege) Bill 2011**

No. , 2011

**A Bill for an Act to amend the *Evidence Act 1995*,
and for related purposes**

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1 **A Bill for an Act to amend the *Evidence Act 1995*,**
2 **and for related purposes**

3 The Parliament of Australia enacts:

4 **1 Short title**

5 This Act may be cited as the *Evidence Amendment (Journalists'*
6 *Privilege) Act 2011*.

7 **2 Commencement**

8 This Act commences on the day after it receives the Royal Assent.

9 **3 Schedule(s)**

10 Each Act that is specified in a Schedule to this Act is amended or
11 repealed as set out in the applicable items in the Schedule

1
2
3

concerned, and any other item in a Schedule to this Act has effect
according to its terms.

1 **Schedule 1—Amendments relating to**
2 **journalists' privilege**
3

4 ***Evidence Act 1995***

5 **1 Division 1A of Part 3.10**

6 Repeal the Division, substitute:

7 **Division 1A—Journalists' privilege**

8 **126G Definitions**

9 (1) In this Division:

10 ***informant*** means a person who gives information to a journalist in
11 the normal course of the journalist's work in the expectation that
12 the information may be published in a news medium.

13 ***journalist*** means a person who is engaged and active in the
14 publication of news and who may be given information by an
15 informant in the expectation that the information may be published
16 in a news medium.

17 ***news medium*** means any medium for the dissemination to the
18 public or a section of the public of news and observations on news.

19 **126H Protection of journalists' sources**

20 (1) If a journalist has promised an informant not to disclose the
21 informant's identity, neither the journalist nor his or her employer
22 is compellable to answer any question or produce any document
23 that would disclose the identity of the informant or enable that
24 identity to be ascertained.

25 (2) The court may, on the application of a party, order that
26 subsection (1) is not to apply if it is satisfied that, having regard to
27 the issues to be determined in that proceeding, the public interest in
28 the disclosure of evidence of the identity of the informant
29 outweighs:

30 (a) any likely adverse effect of the disclosure on the informant or
31 any other person; and

1 (b) the public interest in the communication of facts and opinion
2 to the public by the news media and, accordingly also, in the
3 ability of the news media to access sources of facts.

4 (3) An order under subsection (2) may be made subject to such terms
5 and conditions (if any) as the court thinks fit.

6 **2 Subsection 131A(1)**

7 Repeal the subsection, substitute:

8 (1) This section applies if, in response to a disclosure requirement, a
9 person claims that they are not compellable to answer any question
10 or produce any document that would disclose the identity of the
11 informant (within the meaning of section 126H) or enable that
12 identity to be ascertained.

13 (1A) A party that seeks disclosure pursuant to a disclosure requirement
14 may apply to the court for an order, under section 126H, that
15 subsection 126H(1) does not apply in relation to the information or
16 document.

17 **3 After section 131A**

18 Insert:

19 **131B Extended application of Division 1A etc. to all proceedings for**
20 **Commonwealth offences**

21 In addition to their application under section 4 to all proceedings in
22 a federal court or an ACT court, Division 1A and section 131A
23 apply to all proceedings in any other Australian court for an
24 offence against a law of the Commonwealth, including proceedings
25 that:

- 26 (a) relate to bail; or
27 (b) are interlocutory proceedings or proceedings of a similar
28 kind; or
29 (c) are heard in chambers; or
30 (d) relate to sentencing.

31 ***Family Law Act 1975***

32 **4 Subsection 69ZX(4)**

1 Repeal the subsection, substitute:

2 (4) In proceedings under this Part in which the court is required to
3 regard the best interests of the child as the paramount
4 consideration:

5 (a) subsection 126H(1) of the *Evidence Act 1995* does not apply
6 in relation to information that would:

7 (i) reveal the identity of a journalist's source; or

8 (ii) enable that identity to be discovered;

9 if the court considers that it is in the best interests of the child
10 for the information to be disclosed; and

11 (b) the court must not direct, under a law of a State or Territory
12 relating to professional confidential relationship privilege
13 specified in the regulations, that evidence not be adduced if
14 the court considers that adducing the evidence would be in
15 the best interests of the child.

16 **5 Section 100C**

17 Repeal the section.
18
19
20

(256/10)



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GREEN AMENDMENTS TO BILL A SERIOUS SETBACK FOR THE RIGHT TO KNOW

Labor's new shield laws have been extended to tweeters and may limit freedom of speech

GEORGE BRANDIS

THE federal Coalition is a long-standing supporter of the "Right to Know" campaign.

The Fraser government introduced the first Freedom of Information laws in Australia in 1978. The Howard government referred the protection of journalists' sources (shield laws) to the Australian Law Reform Commission in 2004. The next year, following the release of the ALRC's discussion paper, I became the first federal parliamentarian to call for the introduction of commonwealth shield laws following the anomaly revealed by the Harvey and McManus case.

At last year's election the Coalition, unlike Labor, pledged to introduce comprehensive shield laws. Late in the day, as part of the price for securing the support of independent Andrew Wilkie, Labor came on board.

On Monday, the bill introduced by Wilkie and independent senator Nick Xenophon and then adopted by the government, passed in the House of Representatives. It was prematurely greeted by many as a victory for the public's right to know. However, in the form the bill ultimately took, it was a serious setback. The reason is because the government was foolish enough to adopt several amendments moved in the Senate by the Greens.

Superficially, the Greens' amendments appear to expand the scope of the legislation, but their practical effect will be to limit its operation. This results from the alteration to the definition of journalist. In its original form, the bill sought to protect information obtained from sources by a journalist "in the normal course of that person's work in the expectation that the information may be published in a news medium".

In its amended form, the protection has been expanded to

cover any person who "is engaged and active in the publication of news" in "any medium".

The alteration of the focus of the definition from "the normal course of a person's work" to being "engaged and active" in the publication of news clearly takes the definition well beyond those professionally engaged in journalism.

Because news itself is not defined, these alterations make a serious difference. They potentially include anybody, whether a journalist or not, who publishes in "any medium" what they consider to be news, including bloggers, tweeters and those who post on social media such as Facebook and YouTube. The legislation has ceased to be a law for the protection of journalists and their sources. It has become a law that protects any secret told by one person to another which the latter considers to be newsworthy and decides to publish in any form.

There are two reasons this matters. First, the legislation has immediately made secret a vast body of information that was never secret before.

Given that the objective of the Right to Know campaign has been to extend the public's access to information, it is a bizarre example of the law of unintended consequences — or perhaps poorly thought-out lawmaking masquerading as law reform — that the bill may now keep much more information from the eyes of the public.

The second reason is the likely reaction of the courts against the bill's extended operation.

The way in which the bill originally proposed to protect journalists' sources, following the model of the NSW Evidence Act, was to give the courts a discretion to exclude evidence that would have revealed the source. Shield laws work by keeping certain facts from disclosure; that is, the identity of a

source. Paradoxically, it is by concealing one type of information that such laws serve the policy of extending the right to know because journalists will have a greater capacity to publish other types of information more widely.

Justice is served by having all of the relevant facts before the court. Excluding otherwise admissible evidence is justified only if an important public value is served by doing so. Where those relevant facts are not excluded per se by the operation of the laws of evidence but on a discretionary basis, judges approach the exercise of the discretion with proper scepticism. The wider the exclusion — the wider the range of otherwise material evidence that is sought to be kept from the court — the more reluctant will judges be to exercise discretion in favour of doing so.

The opposition originally proposed to assimilate the law with respect to the protection of journalists' sources within the general law of the protection of professional confidences.

Such legislation would have served the public policy purpose of shield laws without over-reaching.

Sadly, in the form in which they have emerged from the parliamentary sausage machine, Labor's much-vaunted new shield laws are no longer focused on journalists, no longer concerned to protect their sources, and are, in their operation, likely to weaken the very policy objective they purport to serve.

George Brandis is the shadow attorney-general.

The legislation has ceased to be for journalists and their sources



Media shield law to be widened

Australian, Page: 3

By Matthew Franklin

Tuesday, 22 March 2011

Ref: 96175489

Media shield law to be widened CHIEF POLITICAL CORRESPONDENT BLOGGERS, tweeters and "citizen journalists" will have the same right to protect sources as professional journalists after parliament's acceptance of a push by the Australian Greens to dramatically broaden the definition of journalism.

The House of Representatives yesterday backed new shield laws for journalists that would allow anyone involved in the production of news, regardless of where they work, to seek to avoid identifying a source.

Courts would have to decide whether to accept their claims with regard to whether they received the information legally and whether there could be potential harm to the source, or the journalist, if a source was revealed. The shield law was originally conceived by Tasmanian Independent MP Andrew Wilkie but was amended by the Greens in the Senate.

The House of Representatives yesterday backed the amended bill by 72 to 70 votes, making it the first private member's bill to be passed by the current parliament.

Greens senator Scott Ludlam said in a statement the bill would apply to "citizen journalists, bloggers and independent media organisations" as well as news professionals. "This is another good example of a cross-bench initiative bringing results where the government had stalled," Senator Ludlam said.

"This legislation will not protect people making spurious or vexatious claims. It will allow the courts to determine the public interest in source disclosure and contribute to an atmosphere conducive to accountability and integrity in our public and private institutions," Senator Ludlam's statement said the amended bill had been passed "with the support of all parties". However, parliamentary minutes record the fact the Coalition opposed the amendments. Opposition justice spokesman George Brandis told The Australian last night the Coalition believed in shield laws for professional journalists and had preferred the journalists-source relationship be taken into existing legal treatment of other professional relationships.

Senator Brandis said he opposed the Greens' amendments because their broadening of the definition of journalism invited judges to make decisions when judges were usually not disposed to make decisions that would exclude otherwise relevant evidence. "The more comprehensive the shield, the less likely the judge will be to entertain it," Senator Brandis said.

"They (Labor) have been foolish enough to allow the Greens, by over-reach, to thwart the intention of the law," Mr Wilkie and Labor backed the amendments.

And the journalists' union the Media Arts and Entertainment Alliance was also supportive, with secretary Chris Warren insisting bloggers and tweeters were able to deliver journalism as well as print or broadcast journalists.

ADDITIONAL REPORTING: CHRISTIAN KERR



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Shield law now covers everyone

CHRIS MERRITT
 LEGAL AFFAIRS EDITOR

THE scope of the planned federal shield law for journalists' sources has been dramatically widened by the Greens, who have persuaded the government to extend the scheme beyond the traditional news media.

The federal shield law will still create a rebuttable presumption that journalists' confidential sources will be legally protected, but the government has made changes to ensure it is "technology neutral".

Anyone "engaged and active" in the publication of news in any medium will be considered to be a journalist and will be able to claim protection for their sources.

The changes, which were approved by the Senate on Thursday, triggered a warning from opposition legal affairs spokesman George Brandis.

While endorsing the need to protect journalists' sources, Senator Brandis said the changes supported by the government and the Greens had given the

term "journalist" a meaning that was too broad.

"It says to every person in society that, whether they are journalists or not, if they are seeking to publish or bring to public awareness a fact which they assert to be a newsworthy fact, they should have a presumptive privilege," Senator Brandis told the Senate.

He said this was not the protection of journalists' sources, but the protection of communication between people that resulted in one of them publishing news. Any form of privilege meant withholding information from courts and should therefore be done as conservatively and narrowly as possible, he said.

Justin Quill of legal firm Kelly Hazell Quill said the changes would make no practical difference to journalists working for mainstream media.

The great benefit of the scheme for the mainstream media was that the shield law would shift the onus of proof so those

seeking disclosure of a source would need to prove their case.

Mr Quill believed the changes could make it possible for bloggers and people such as WikiLeaks founder Julian Assange to claim protection for their sources but each case would need to be examined by a court.

Media lawyer Veronica Scott of Minter Ellison said the scheme that had been passed by the Senate was quite different to the original, more limited shield law bill drawn up by independents Nick Xenophon and Andrew Wilkie and endorsed by the government.

"It now extends the protection of sources to anybody who sends news by the internet and I query what news means in terms of this broadened definition of journalist," Ms Scott said.

She said the expanded definition meant anyone who published information that had been disclosed to them could be protected from not having to disclose the identity of their source.

Ms Scott believed the practical effect of the Greens' changes would be to encourage judges to apply another part of the shield law more rigorously when deciding whether the presumption in favour of protecting sources should be overturned.

"You will have a court opening up a much broader line of inquiry in relation to what is the public interest and the competing considerations as to whether that source's identity should be disclosed, potentially developing case law that could broaden the attack on your traditional journalists' sources," Ms Scott said.

She accepted that there were arguments in favour of protecting confidences, but she believed the shield law might not be the appropriate mechanism.

Many "citizen journalists" seeking to claim its protection could fail because they may not have extended a promise of confidentiality.

"If there is no promise, there is no shield," Ms Scott said.

**Changes could
make it possible for
bloggers to claim
protection**



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Add to List Save Search		Permalink Prev Next Return to results list	
Title	SJ No 23 - 3 March 2011 EVIDENCE AMENDMENT (JOURNALISTS' PRIVILEGE) BILL 2010		Database Senate Journals
Note: Where available, the PDF/Word icon below is provided to view the complete and fully formatted document			
Download PDF	EVIDENCE AMENDMENT (JOURNALISTS' PRIVILEGE) BILL 2010		
Previous Fragment Next Fragment	Order of the day read for the consideration of the bill in committee of the whole. In the committee		
Senate Journal No. 23 - 3 March 2011 1 MEETING OF SENATE 2 PROTECTING CHILDREN FROM JUNK FOOD ADVERTISING (BROADCASTING AMENDMENT) BILL 2010 3 ENVIRONMENT PROTECTION (BEVERAGE CONTAINER DEPOSIT AND RECOVERY SCHEME) BILL 2010 4 NOTICES 5 SELECTION OF BILLS—STANDING COMMITTEE—REPORT NO. 2 OF 2011 6 COMMUNICATIONS—AUSTRALIA POST—DOCUMENT 7 ORDER OF BUSINESS—REARRANGEMENT 8 POSTPONEMENT 9 LEAVE OF ABSENCE 10 SCRUTINY OF BILLS—STANDING COMMITTEE—REFERENCE 11 NOTICE OF MOTION WITHDRAWN 12 ENVIRONMENT AND COMMUNICATIONS REFERENCES COMMITTEE—REFERENCE 13 RURAL AFFAIRS AND TRANSPORT REFERENCES COMMITTEE—EXTENSION OF TIME TO REPORT 14 RURAL AFFAIRS AND TRANSPORT REFERENCES COMMITTEE—LEAVE TO MEET DURING SITTING 15 WOMEN—INTERNATIONAL WOMEN'S DAY 16 FAMILY AND COMMUNITY SERVICES—INTERNATIONAL DAY OF PEOPLE WITH DISABILITY—APPOINTMENT OF AMBASSADOR—ORDER FOR PRODUCTION OF DOCUMENTS	Bill, taken as a whole by leave, debated. Senator Ludlam moved the following amendment: Schedule 1, item 1, page 3 (line 11), omit "work", substitute "activities". Question—That the amendment be agreed to—put and negatived. On the motion of Senator Ludlam the following amendments, taken together by leave, were agreed to: Schedule 1, item 1, page 3 (lines 13 and 14), omit "in the normal course of that person's work", substitute "is engaged and active in the publication of news". Schedule 1, item 1, page 3 (line 17), omit "a medium", substitute "any medium". Senator Brandis moved the following amendments together by leave: Schedule 1, page 3 (after line 4), before item 1, insert: 1A Subsection 126A(1) (definition of protected confidence) Omit "a journalist", substitute "another person". 1B Subsection 126A(1) (note to the definition of protected confidence) Repeal the note, substitute: Note: Communications with journalists are covered by Division 1B. Schedule 1, item 1, page 3 (lines 5 to 7), omit: Division 1A of Part 3.10 Repeal the Division, substitute: Division 1A—Journalists' privilege substitute: After Division 1A of Part 3.10 Insert: Division 1B—Journalists' privilege Debate ensued. Question—That the amendments be agreed to—put and negatived. Bill, as amended, agreed to. Bill to be reported with amendments. The Acting Deputy President (Senator Bishop) resumed the chair and the Temporary Chair of Committees reported accordingly. On the motion of the Minister for Agriculture, Fisheries and Forestry (Senator Ludwig) the report from the committee was adopted and the bill read a third time.		

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2010-2011

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

Evidence Amendment (Journalists' Privilege) Bill 2010

Schedule of the amendments made by the Senate

-
- (1) Schedule 1, item 1, page 3 (lines 13 and 14), omit "in the normal course of that person's work", substitute "is engaged and active in the publication of news".
- (2) Schedule 1, item 1, page 3 (line 17), omit "a medium", substitute "any medium".

ROSEMARY LAING
Clerk of the Senate

The Senate
3 March 2011

2010-2011

The Parliament of the
Commonwealth of Australia

THE SENATE

Evidence Amendment (Journalists' Privilege) Bill 2010

(Amendments to be moved by Senator Ludlam on behalf of the Australian Greens in committee of the whole)

- (1) Schedule 1, item 1, page 3 (line 11), omit "work", substitute "activities".
[definitions—informant]
- (2) Schedule 1, item 1, page 3 (lines 13 and 14), omit "in the normal course of that person's work", substitute "is engaged and active in the publication of news".
[definitions—journalist]
- (3) Schedule 1, item 1, page 3 (line 17), omit "a medium", substitute "any medium".
[definitions—news medium]

Ronan, John

From: Angel, Joseph [Joseph.Angel@ag.gov.au]
Sent: Thursday, 17 February 2011 10:48 AM
To: Ronan, John
Cc: Williams, Kimberley
Subject: Journalist shield laws and PID Bill [~~SEC-IN-CONFIDENCE:LEGISLATION~~]
Categories: Red Category

~~LEGISLATION-IN-CONFIDENCE~~

Hi John

I just wanted to touch base with you on a couple of matters.

Am I correct in understanding that your Department has progressed the request for policy approval for amendments to the Evidence Amendment (Journalists' Privilege) Bill 2010 (ie the Wilkie Bill), and that the request is now with the Parliamentary Secretary to the Prime Minister? I just wanted to confirm these details before providing an update to the Attorney-General's Office.

I also wanted to let you know that I have not yet had a chance to progress your query about other instances where evidence given at a pre-trial stage may be covered by the privilege against self-incrimination. I will get back to you on that soon.

Kind regards

Joe

Joe Angel | Legal Officer

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Ronan, John

From: Ronan, John
Sent: Thursday, 17 February 2011 10:57 AM
To: Ronan, John
Subject: FW: Minor Policy Approval - Journalists' Privilege Bill [~~SEC=PROTECTED:CABINET-IN-CONFIDENCE~~]

s.47C



From: Ronan, John
Sent: Friday, 11 February 2011 2:11 PM
To: O'Connor, Anne
Cc: Ablett, Mala; Sheedy, Joan
Subject: Minor Policy Approval - Journalists' Privilege Bill [~~SEC=PROTECTED:CABINET-IN-CONFIDENCE~~]

)
Anne,

s.47C



Kind Regards,

John Ronan
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Australian
10/02/2011
Page: 7
By: Drew Warne-Smith
Section: General News
Region: Australia Circulation: 136268
Type: Australian National
Size: 584.00 sq.cms
Frequency: MTWTF

Fairfax trio told: reveal emails

DREW WARNE-SMITH

A SYDNEY court has ordered three Fairfax journalists to release a series of emails with confidential sources in a bid to determine whether they relied on forged documents in claiming former defence minister Joel Fitzgibbon was on the payroll of a mysterious Chinese businesswoman.

The Age newspaper reported last February that Helen Liu had paid Mr Fitzgibbon \$150,000, which he did not declare, as an attempt to curry political favour.

The MP has confirmed his friendship with Ms Liu, who also paid for two first-class trips to China for him. However, he denies receiving the \$150,000 payment, which was allegedly revealed in a copy of Ms Liu's personal financial records obtained by the journalists.

Mr Fitzgibbon and Ms Liu have each launched defamation proceedings against Fairfax, pub-

lisher of *The Age*.

And Ms Liu has applied separately to the NSW Supreme Court to force the journalists — Richard Baker, Philip Dorling and Nick McKenzie — to reveal the identity of their sources.

Dorling, now a freelancer, is the reporter who obtained WikiLeaks cables relating to Australia from Julian Assange.

Only Baker has submitted a sworn affidavit, with McKenzie and Dorling declining to do so.

Ms Liu, a Chinese-Australian property developer, has returned to Australia for the hearings.

Yesterday, her lawyers successfully argued that they should have access to all the emails between the journalists, an intermediary and the sources of documents where the correspondence related to the 135 documents the journalists had been sent.

Bruce McClintock SC, for Ms Liu, denied the request was a "fishing expedition", saying the emails could reveal whether the documents were a fake, as Ms Liu

believes. "On the evidence ... there is a very serious case that these documents were forged and *The Age* was duped by a hoax," Mr McClintock told the court.

Judge Lucy McCallum said she was "not unsympathetic" to the need for journalists to protect their sources but it was "critical" the emails were released in case they cast doubt on the quality of the information reported. The sources' names will be redacted.

Under cross-examination on Friday, Baker conceded one document had wrongly described Mr Fitzgibbon as a minister at a time when he was not — and that he had changed the wording of his article to remove this mistake.

Yesterday he was forced to amend his affidavit for a second time, having incorrectly claimed he had only ever emailed an intermediary (described in court as a "contact") and not the actual source of the documents.

The case continues.

Australian
10/02/2011

Page: 7

By: Drew Warne-Smith

Section: General News

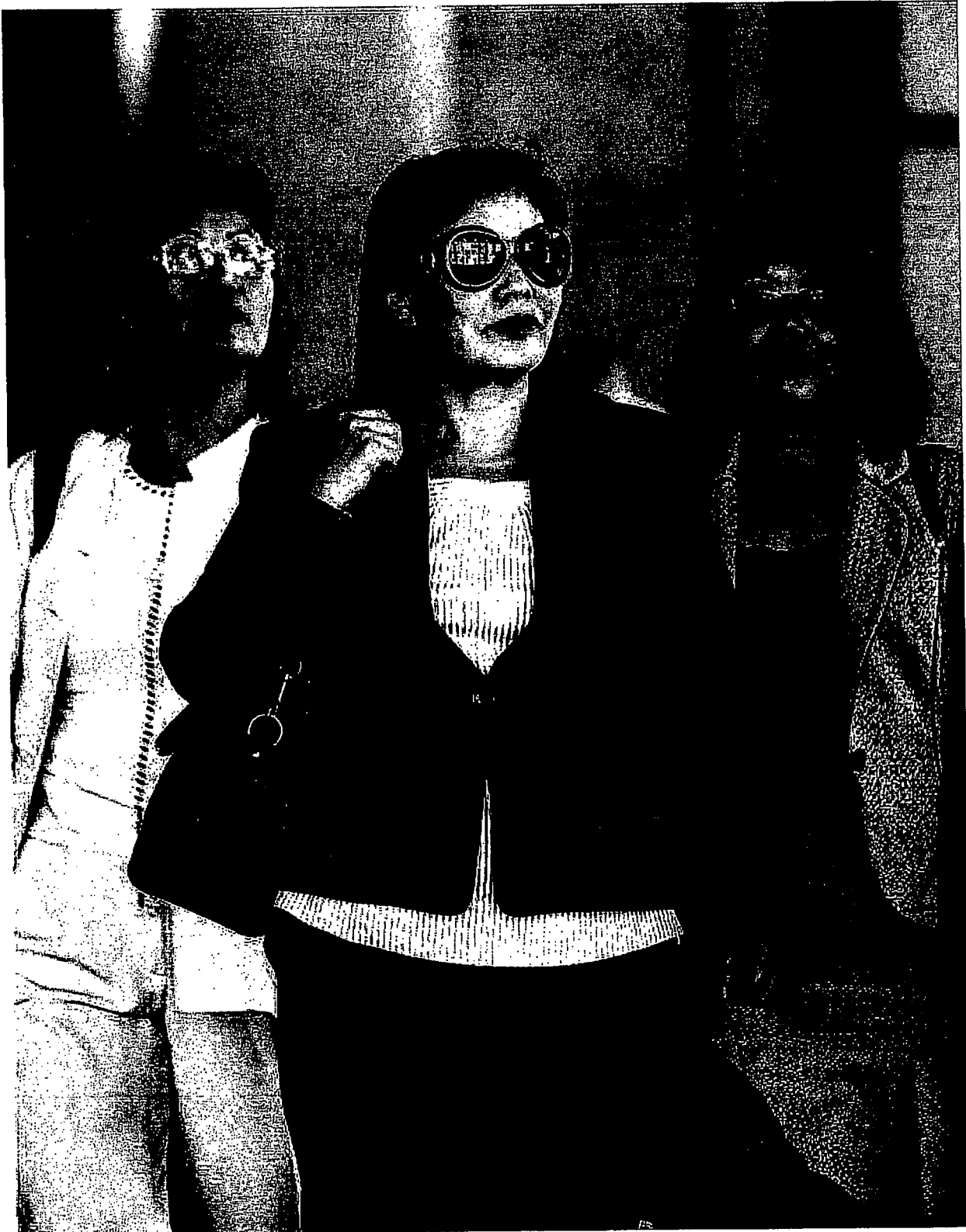
Region: Australia Circulation: 136268

Type: Australian National

Size: 584.00 sq.cms

Frequency: MTWTF

Page 2 of 2



CAMERON RICHARDSON

Businesswoman Helen Liu, centre, at the Supreme Court in Sydney yesterday for her case against *The Age* newspaper

**Sydney Morning Herald****28/01/2011**

Page: 11

By: Richard Ackland

Section: General News

Region: Sydney Circulation: 204421

Type: Capital City Daily

Size: 301.00 sq.cms

Frequency: MTWTFSS-

Page 1 of 2

Bill protecting journalists' sources curdles in Canberra

**RICHARD
ACKLAND**


The fresh development on the whistleblowing front is that the Pentagon has been unable to directly link Julian Assange with Bradley Manning.

Manning is the army private cooling his heels in uncomfortable conditions at the Quantico Marine Corps base, close to Washington.

The Pentagon is satisfied Manning downloaded classified material relating to the Iraq war and about 250,000 classified State Department cables. What it cannot establish, at least for now, is that Manning gave this material to Assange or WikiLeaks.

Wired magazine speculates that, maybe, this is because Manning erased from his system any evidence of the transfer of documents.

He confessed to a former hacker, Adrian Lamo, in online chats, that anything incriminating had been "zerofilled" from his computers. Still, that doesn't help the US government's efforts to stitch up Assange, who is still on bail in England pending the outcome of extradition proceedings.

Assange was demonised in America because of the publication of diplomatic cables. Right-wingers call him a "terrorist" who should be "taken out".

Using WikiLeaks, the media have been able to reveal an altogether different perspective on the wars in Iraq and Afghanistan; information that citizens know their politicians would never fully reveal.

The political lies surrounding the justification of the Iraq war have shifted the ground substantially. There is now a more powerful legitimacy in publishing state secrets that expose the current circumstances of those wars. More than ever, the ferreting out of government lies takes

on a major importance for the media.

WikiLeaks' revelations, the sources involved and the relationships with mainstream newspapers bring into focus the languid state in this country of whistleblower protection for sources and shield laws for journalists, so that they can adequately protect their sources. The two sides of the equation must surely go together.

The Labor government has not lived up to its rhetoric on this topic. Journalists' privilege legislation, introduced into Parliament in March 2009 by the Attorney-General, Robert McClelland, granted only minor concessions. It required courts to weigh the likely harm to journalists and their sources that would flow from an order for disclosure.

It also amended the usual provisions so a breach of the law by a source in communicating with a journalist would no longer be an automatic bar to protection. This really was tinkering at the edges. In any event, the bill lapsed, never to become law. Now we have two shield laws before Parliament, one from the Opposition's legal spokesman, Senator George Brandis, and one from the independent MP Andrew Wilkie, a former whistleblower.

Wilkie's bill has a bold premise: "It is intended to foster freedom of the press and better access to information for the Australian public."

All very well, but it can only create a journalist's privilege for Commonwealth offences. It is by no means certain all the states would allow their public servants the same security.

The essential element in the proposed legislation is that confidential communication between a journalist and a source is presumed to be protected, unless "public interest

concerns" outweigh the disclosure. You can forecast with some confidence a good proportion of the judicial attitude to what constitutes the "public interest". The bill also has a narrow definition of "journalist", confining it to someone who is employed as such. The Greens would widen it to include bloggers, "citizen journalists" and filmmakers.

Despite its limitations, the Senate Legal Affairs Committee has approved the Wilkie bill. Oddly enough, some of the media organisations that would benefit from it have campaigned relentlessly against a charter of rights. But it was the European Convention on Human Rights, which is part of British law, that strengthened the position of journalists in Britain after a celebrated decision by the European Court of Human Rights.

The court essentially said that, *prima facie*, it is always contrary to the public interest for media sources to be disclosed. The Wilkie bill could only work for journalists as intended if there were free-speech protections that courts were obliged to consider.

It seems those journalists who booed the proposed charter off the stage here scored an own-goal.

The latest whistleblower law was announced almost a year ago by the then cabinet secretary, Joe Ludwig. The earlier idea of limited protection for public servants was to be scrapped in favour of a more effective one. This version extended the protection in certain circumstances to public servants who went to the media or other third parties with evidence of malpractice or wrongdoing.

The Bundaberg Hospital nurse who raised concerns about Dr Jayant Patel says she was intimidated by officials. It was not until she went to an MP that



the media got the story. As a result
Queensland now has quite a good
protected disclosure law. In Canberra
there is no evidence of progress. No
new bill has emerged. We should not
be surprised if a government that
deplored WikiLeaks for behaving irre-
sponsibly and illegally now drags the
chain on these fundamental reforms.

justinian@lawpress.com.au

Ablett, Maia

From: Ronan, John
Sent: Thursday, 27 January 2011 3:19 PM
To: Ablett, Maia
Subject: s.47C [SEC-PROTECTED:CABINET-IN-CONFIDENCE]

Security Classification:
~~Cabinet in Confidence~~

Maia,

Just spoke to Ruvani -

- s.34(3) [REDACTED]
- [REDACTED]
- s.47C [REDACTED]
- It is therefore unnecessary to mention it in our S E Brief.
- s.47C [REDACTED]

On a separate note, Ruvani expects the Journalist Shield laws Bill to be (hopefully) passed before Senate Estimates.

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Bills of the current Parliament

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Evidence Amendment (Journalists' Privilege) Bill 2010

Type	Private
Originating house	House of Representatives
Status	Before Senate
Sponsor	WILKIE, Andrew, MP

Summary

Amends the: *Evidence Act 1995* to extend protection to confidential communications between journalists and their sources by: presuming the communication is not subject to disclosure unless established as necessary or that public interest concerns outweigh the disclosure; and extending this privilege to all professional confidential relationships and to all prosecutions for Commonwealth offences heard in all Australian courts; and *Family Law Act 1975* to make consequential amendments.

Progress of bill

For committee reference information, please see the Notes section at the end of this page.

House of Representatives	
Introduced and read a first time	18/10/10
Referred to Main Committee	20/10/10
Second reading moved	25/10/10
Second reading debate	25/10/10
Second reading agreed to	28/10/10
Third reading agreed to	28/10/10

Senate	
Introduced and read a first time	15/11/10
Second reading moved	15/11/10
Second reading debate	15/11/10
Second reading agreed to	15/11/10

Links

To download documents listed, click on an icon or hyperlink below.

Text of bill

[Information on document types]

First reading

Explanatory memoranda

[Information on document types]

Explanatory memorandum

Second reading speeches

- All second reading speeches
- Private Member's Introductory Speech

Proposed amendments

[Information on document types]

Senate

Opposition [sheet 6190]
BRANDIS, Sen George

Schedules of amendments

[Information on document types]

Bills Digest

Notes

- Referred to Committee (15/11/2010): Senate Legal and Constitutional Affairs Legislation Committee
- Committee report (23/11/2010)
- Access Information for House of Representatives and Senate committees

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2010

The Parliament of the
Commonwealth of Australia

HOUSE OF REPRESENTATIVES

Presented and read a first time

**Evidence Amendment (Journalists'
Privilege) Bill 2010**

No. , 2010

(Mr A. Wilkie)

**A Bill for an Act to amend the *Evidence Act 1995*,
and for related purposes**

Contents

1	Short title	1
2	Commencement	1
3	Schedule(s)	1
Schedule 1—Amendments relating to journalists' privilege		3
<i>Evidence Act 1995</i>		3
<i>Family Law Act 1975</i>		4

1 **A Bill for an Act to amend the Evidence Act 1995,**
2 **and for related purposes**

3 The Parliament of Australia enacts:

4 **1 Short title**

5 This Act may be cited as the *Evidence Amendment (Journalists'*
6 *Privilege) Act 2010*.

7 **2 Commencement**

8 This Act commences on the day after it receives the Royal Assent.

9 **3 Schedule(s)**

10 Each Act that is specified in a Schedule to this Act is amended or
11 repealed as set out in the applicable items in the Schedule

1
2
3

concerned, and any other item in a Schedule to this Act has effect
according to its terms.

Schedule 1—Amendments relating to journalists' privilege

Evidence Act 1995

1 Division 1A of Part 3.10

Repeal the Division, substitute:

Division 1A—Journalists' privilege

126G Definitions

(1) In this Division:

informant means 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

journalist means 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

news medium means a medium for the dissemination to the public or a section of the public of news and observations on news

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 evidence of the identity of the informant outweighs:

(a) any likely adverse effect of the disclosure on the informant or any other person; and

1 (b) the public interest in the communication of facts and opinion
2 to the public by the news media and, accordingly also, in the
3 ability of the news media to access sources of facts.

4 (3) An order under subsection (2) may be made subject to such terms
5 and conditions (if any) as the court thinks fit.

6 **2 Subsection 131A(1)**

7 Repeal the subsection, substitute:

8 (1) This section applies if, in response to a disclosure requirement, a
9 person claims that they are not compellable to answer any question
10 or produce any document that would disclose the identity of the
11 informant (within the meaning of section 126H) or enable that
12 identity to be ascertained.

13 (1A) A party that seeks disclosure pursuant to a disclosure requirement
14 may apply to the court for an order, under section 126H, that
15 subsection 126H(1) does not apply in relation to the information or
16 document.

17 **3 After section 131A**

18 Insert:

19 **131B Extended application of Division 1A etc. to all proceedings for**
20 **Commonwealth offences**

21 In addition to their application under section 4 to all proceedings in
22 a federal court or an ACT court, Division 1A and section 131A
23 apply to all proceedings in any other Australian court for an
24 offence against a law of the Commonwealth, including proceedings
25 that:

- 26 (a) relate to bail; or
27 (b) are interlocutory proceedings or proceedings of a similar
28 kind; or
29 (c) are heard in chambers; or
30 (d) relate to sentencing.

31 ***Family Law Act 1975***

32 **4 Subsection 69ZX(4)**

1 Repeal the subsection, substitute:

2 (4) In proceedings under this Part in which the court is required to
3 regard the best interests of the child as the paramount
4 consideration:

5 (a) subsection 126H(1) of the *Evidence Act 1995* does not apply
6 in relation to information that would:

7 (i) reveal the identity of a journalist's source; or

8 (ii) enable that identity to be discovered;

9 if the court considers that it is in the best interests of the child
10 for the information to be disclosed; and

11 (b) the court must not direct, under a law of a State or Territory
12 relating to professional confidential relationship privilege
13 specified in the regulations, that evidence not be adduced if
14 the court considers that adducing the evidence would be in
15 the best interests of the child.

16 **5 Section 100C**

17 Repeal the section.
18
19

2010

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

EVIDENCE AMENDMENT (JOURNALISTS' PRIVILEGE) BILL 2010

EXPLANATORY MEMORANDUM

(Circulated by authority of Mr A. Wilkie)

GENERAL OUTLINE

1. This Bill amends the *Evidence Act 1995* (Evidence Act) by strengthening the protection provided to journalists and their sources. This Bill is intended to foster freedom of the press and better access to information for the Australian public.
2. This Bill provides that if a journalist has promised an informant not to disclose his or her 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 their identity to be ascertained.
3. This is based on the premise that it is vital that journalists can obtain information so they can accurately inform the Australian public about matters of interest. Accordingly, strong protection must be provided to enable the full disclosure of information.
4. The Bill does recognise that there may be circumstances where the public interest in the disclosure of information is so strong that it should be provided to the court, but it is in line with existing legislation in the United Kingdom, New Zealand and many states in the United States, where it is up to those parties who want to force a journalist to reveal their source to prove that the public interest in disclosing the source outweighs the likely harm to the source and the public interest in the information being provided in the first place.
5. In 2007, journalists, Gerard McManus and Michael Harvey were convicted of contempt of court and fined \$7000 each for refusing to reveal their source behind stories they wrote in 2004 for Melbourne's Herald Sun newspaper. This was a clear example of when journalists would not have otherwise been able to report on the actions of the Government (in this case, the Federal Government's decision to reject a \$500 million increase in war veterans' entitlements) without their source, who, had he or she been revealed, would have suffered harm .
6. This Bill will replace the existing provisions in Division 1A of the Evidence Act. It will include a new provision that provides clear authority for a presumption that a journalist is not required to give evidence about the identity of the source of their information. This presumption can be rebutted in circumstances where the public interest outweighs any likely adverse effect for the person who provided the information to the journalist as well as the public interest in communication of information to the public by the media. These amendments are based on similar provisions of the New Zealand *Evidence Act 2006*, modified to ensure appropriate application in the context of Australian evidence law.

NOTES ON CLAUSES

Clause 1 – Short title

This clause provides for the Bill to be cited as the *Evidence Amendment (Journalists' Privilege) Act 2010*.

Clause 2 – Commencement

2. This clause provides that the Act will commence the day after it receives Royal Assent.

Clause 3 – Schedule(s)

3. This clause provides that the Schedules to the Bill will amend the Acts set out in those Schedules in accordance with the provisions set out in each Schedule.

SCHEDULE 1 – AMENDMENTS

Evidence Act 1995

Item 1 – Division 1A of Part 3.10 of Chapter 3

4. Item 1 removes the existing professional confidential relationship privilege which is set out in sections 126A – 126F, contained in Division 1A of Part 3.10 of Chapter 3 of the *Evidence Act 1995* (Evidence Act).

5. Item 1 then inserts a new section 126G. The Commonwealth Evidence Act is part of the Uniform Evidence scheme (along with New South Wales, Victoria, Tasmania and Norfolk Island). The numbering of sections within Acts in uniform evidence jurisdictions is consistent, so it is important that the new provision does not impact upon the uniform numbering scheme. By inserting the new provision at section 126G, this problem is avoided and sections 126A – 126F remain free for future use.

6. Section 126G sets out some definitions that assist with the interpretation of new section 126G. The terms 'journalist', 'news medium' and 'informant' are all defined and the content of these definitions has been taken from subsection 68(5) of the New Zealand Act.

7. It is important that this protection operates alongside the Australian Journalists Association Code of Ethics¹ and this element of the definitions ensures this is the case. In addition to the principle of protecting sources, journalists are also expected to let their source know that they are a journalist. The principle is as follows:

Use fair, responsible and honest means to obtain material. Identify yourself and your employer before obtaining any interview for publication

¹ Although the limited application of the Code is recognised. The Code only binds members of the Media, Entertainment and Arts Alliance and does not bind media proprietors, editors and producers.

or broadcast. Never exploit a person's vulnerability or ignorance of media practice.

8. It is also significant to note that the journalist should be operating in the course of their work. This means that the journalist should be employed as such for the privilege to operate, and private individuals who make postings on the internet or produce non-professional news publications, where this is not their job, will not be covered by section 126H.

Protection of journalists' sources

9. Item 1 also inserts section 126H, titled 'Protection of journalists' sources' and is modelled on section 68 of the New Zealand *Evidence Act 2006* (New Zealand Act).

10. Section 126H is not exactly the same as section 68 of the New Zealand Act. Some changes have been necessary due to differences between Australian and New Zealand evidence law, court and political structures. These differences are explained as each subsection is considered below.

11. The overall purpose of section 126H is to send a clear message that people who wish to provide information to journalists will have their identity protected if the journalist promises them they will not disclose their identity, unless it is contrary to the public interest. This will be done by introducing a presumption that the identity of the source will not be disclosed in court, unless there is a public interest reason for it to be disclosed.

12. The provision does not apply in circumstances where the journalist or their employer decides to disclose the identity of the source, which it remains open to them to do.

Subsection 126H(1)

13. Subsection 126H(1) states that for protection to apply, the journalist has promised the informant that they will not disclose to anyone the informant's identity.

14. This is consistent with the Australian Journalists Association Code of Ethics which provides that journalists should:

Aim to attribute information to its source. Where a source seeks anonymity, do not agree without first considering the source's motives and any alternative attributable source. Where confidences are accepted, respect them in all circumstances.

15. If this requirement is satisfied, the journalist and their employer are entitled to refuse to disclose information that would reveal the identity of the source, or enable their identity to be discovered in a court proceeding. It does not, therefore, provide the journalist with a right to refuse to provide information where the information would not lead to the disclosure of the identity of the source.

16. The application of subsection (1) needs to be understood with reference to the definitions provided in subsection 126G above.

17. Journalists as a class of witnesses are not being provided with an exclusion from giving evidence in all circumstances. They are being provided with a privilege to refuse to disclose information where that information would lead to the identification of a source whose identity they promised not to disclose (unless this is contrary to the public interest, as set out in subsection 126H(2)).

Subsection 126H(2)

18. Subsection 126H(2) sets out the circumstances when a party may apply to the court to make an order that the presumption that the information will not be made available (provided in subsection 126H(1)) should not apply.

19. Whilst the protection of journalists' sources and the public interest in freedom of the press are very important considerations, these may clash with some equally important public interest considerations. These will be taken into account by the court under subsection 126H(2) and the court will need to weigh up the competing considerations and make a decision.

20. When weighing up the public interest in the disclosure of the information, the court needs to find that this outweighs both (a) any likely adverse effect of the disclosure on the source (or any other person) and (b) the public interest in freedom of the press that requires journalists' to be able to get information from sources who trust the journalist.

21. Paragraph (a) (which is identical to paragraph 68(2)(a) in the New Zealand Act) has been interpreted by the New Zealand High Court to also include 'an adverse effect on the journalist such as a risk of physical harm or damage to property'.²

22. Paragraph (b) recognises that if an order is made that the information be disclosed, this may make it more difficult for journalists to access sensitive information from sources in the future, as they may not trust that their identity will remain confidential and may therefore be reluctant to provide the information.

Subsection 126H(3)

23. Subsection 126H(3) allows the court to make the order on such terms and conditions as the court thinks fit.

24. An example of the type of order that might be made is an order limiting the publication of the identity of the source for their protection (eg. a suppression order under section 50 of the *Federal Court of Australia Act 1976*).

² *Police v Campbell* [2010] 1 NZLR 483 at [100].

Missing subsection from the New Zealand provision

25. Subsection 68(4) of the New Zealand Act provides that 'this section does not affect the power or authority of the House of Representatives'. The purpose of that subsection was to maintain a New Zealand Parliamentary Select Committee's power to ascertain a journalist's source.

26. An equivalent subsection has not been included in section 126G because the power of a Parliamentary Select Committee is not in question in the Australian context. First, the Evidence Act does not apply beyond court proceedings so the application of section 126H will not extend to Parliamentary Committee inquiries.

27. Second, the High Court decision in *R v Richards; Ex parte Fitzpatrick & Browne* (1955) 92 CLR 157 provides authority for the broad powers of inquiry of both Houses of Parliament under section 49 of the Constitution.

Item 2 – Subsection 131A(1)

28. Item 2 repeals subsection 131A(1) and substitutes it with a new subsection. Section 131A(1) has the effect of extending the provision to pre-trial proceedings.

Item 3 – Section 131B

29. Item 3 inserts section 131B, which will extend the application of journalists' privilege under Division 1A of Part 3.10, beyond Federal and ACT court proceedings to all proceedings in any Australian court for an offence against a law of the Commonwealth.

30. This provision will enable the new journalists' privilege to apply to all prosecutions for Commonwealth offences, including prosecutions that are heard in State and Territory courts.

Item 4 - Subsection 69ZX(4)

31. Item 4 amends subsection 69ZX(4) of the *Family Law Act 1975* (Family Law Act) to substitute a reference to subsection 126B(1) of the Evidence Act with the new section 126H. The language of subsection 69ZX(4) of the Family Law Act has also been amended to reflect the different operation of section 126H. For example, the court would no longer 'direct...that evidence not be adduced' but 'order...a person is not entitled to refuse to give information or produce a document'.

Item 5 – Subsection 100C

32. Item 5 repeals section 100C of the *Family Law Act 1975* (Family Law Act) which relates to evidence in respect of which a child is a protected confider by persons acting on a child's behalf. Under the new subsection 69ZX(4) of the Family Law Act, the court is required to regard the best interests of the child as the paramount consideration in all applications.