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## Shield Laws for Journalists

When the court requires a journalist to reveal a confidential source of information published in the media, that journalist has a dilemma. Revealing the source could be a breach of professional ethics but if the journalist refuses to disclose it, he or she could be found in contempt of court. However, the Commonwealth Parliament and some states have recently amended, or are about to amend, their Evidence Acts to establish a rebuttable presumption that the identity of a journalist's source is privileged. Provisions of this kind are colloquially known as 'shield laws'.

This Research Brief will:

- consider some court decisions where journalists have been found in contempt of court for refusing to reveal their sources;
- outline pre-2011 provisions of the Commonwealth Evidence Act 1995 allowing the court to exercise its discretion to protect the source of confidential communications made to journalists;
- discuss the 2011 amendments to the Commonwealth Evidence Act to provide greater protection for journalists' sources by establishing a rebuttable presumption that the identity of a journalist's source is privileged;
- briefly examine shield laws in other Australian jurisdictions; and
- consider the related issue of the protection of 'whistleblowers' who make public interest disclosures.

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**Research Brief 2012/No.03**

**February 2012**

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Readers may also wish to refer to the report on the Bill by the relevant portfolio committee (or other committee nominated when the Bill was presented) and the Parliament's Record of Proceedings (Hansard).

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## Key Points

In Queensland, if a court requires a journalist to reveal a confidential source of information published in the media, that journalist risks being in breach of the Australian Journalists Association's Code of Ethics but if the journalist refuses to disclose, there is a risk of being found in contempt of court.

The Commonwealth Parliament and some states have recently passed, or are in the process of passing, amendments to their *Evidence Acts* to establish a presumption that the identity of a journalist's source is privileged and it is for the party seeking disclosure of the source's identity to point to public interest considerations favouring disclosure. Provisions of this kind are colloquially known as '**shield laws**'.

### Professional Confidential Relationship Privilege

1. According to the common law rules of evidence, a 'privilege' can be thought of as the right not to reveal information that would otherwise need to be disclosed (e.g. through giving evidence in court). At common law, the only professional relationship attracting privilege is the lawyer and client relationship.
2. Evidence Acts in each jurisdiction expand on the various common law privileges. In Queensland, for example, Part 2, Division 2 of the [Evidence Act 1977 \(Qld\)](#) allows witnesses to claim specified privileges (e.g. self-incrimination). The [Evidence Act 1995 \(Cth\)](#) (Part 3.10) establishes a number of privileges in relation to proceedings in Commonwealth matters. A specific '**professional confidential relationship privilege**' – to protect sources of confidential communications to journalists – was first introduced into the Commonwealth Act in 2007 and has recently been broadened (see Section 2 of this Research Brief).

### Ability of Journalists to Protect Their Sources

3. In jurisdictions that do not have an Evidence Act providing for a professional confidential relationship privilege, journalists have been unable to claim privilege to avoid disclosure of their source to a court, Royal Commission, or parliamentary inquiry and could be held in contempt for refusing to disclose their sources. The court cases concerning journalists facing contempt charges for non-disclosure have clearly indicated that claims for privilege are of no effect, that contempts are viewed seriously and that, inevitably, a prison sentence should be imposed (Section 3).
4. The highly publicised conviction of two journalists (see [R v Gerard Thomas McManus & Michael Harvey](#) [2007] VCC 619, 25 June 2007) in 2007 for contempt of court in these circumstances has provided some impetus for the introduction of laws to protect journalists' sources (Section 4).

### The Commonwealth Legislative Framework

- 5 In **2007**, amendments to the Commonwealth Evidence Act introduced a **professional confidential relationship privilege** to protect journalists' sources. The amendments enabled the court to direct that evidence not be adduced if it found that doing so would disclose a protected confidence or identifying information about the source of the protected confidence. A 'protected confidence' was defined as a confidential communication made to a journalist. However, a number of limitations applied to the giving of such protection (Section 5.1).

6. In April **2011**, **amendments** to the Commonwealth Evidence Act (which began as a Private Member's Bill introduced by Independent member, Andrew Wilkie MP) came into effect to provide greater protection for journalists and their sources (Section 5.2). Features include:
- a presumption under s 126H(1) that if the journalist has promised an informant not to disclose the informant's identity, the identity of a journalist's source is privileged unless rebutted by the party seeking disclosure;
  - the party seeking disclosure may seek an order from the court that the presumption does not apply and the court may make the order if it is satisfied that the public interest in disclosure of the informant's identity outweighs any likely adverse effect of the disclosure (e.g. risk of physical harm to the informant or other person) and the public interest in the continuing communication of facts and opinion to the public (s 126H(2));
  - a broad definition of 'journalist' (provided by Australian Greens' amendments to the laws before being passed by the Senate) to include wider acts of journalism, not just the work of employed journalists (s 126G);
  - application of the protection to all proceedings in a federal court (apart from certain Family Court proceedings), an ACT court and to all proceedings in other Australian courts for Commonwealth offences (s 131B). The protection does not apply to Parliamentary Committee inquiries (Section 5.3).

### 'Shield Laws' in other Australian Jurisdictions

7. Apart from the Commonwealth, some Australian states have passed, or are in the process of passing, shield laws (see Section 6):
- **New South Wales** became the first state to enact shield laws specifically for journalists when amendments to the [Evidence Act 1995 \(NSW\)](#) came into effect on 21 June 2011. While similar to the recent Commonwealth Evidence Act amendments in providing for a rebuttable presumption of protecting a source's identity in court proceedings, the definition of 'journalist' is confined to journalists working in a profession or occupation of journalism. The NSW laws also continue to provide for a professional confidential relationship privilege applying to a broad range of professional relationships.
  - **Western Australia** has introduced the [Evidence and Public Interest Disclosure Amendment Legislation Bill 2011 \(WA\)](#). While it provides protection for journalists and sources, it also specifies a number of matters that the court must take into account in deciding whether or not the presumption should apply.

### Protection for Persons Making Public Interest Disclosures to Journalists

8. A related issue concerns the **protection of 'whistleblowers'** who make disclosures about matters of public concern to the media as an avenue of last resort. Queensland has, like Western Australia (and, in the past, NSW), addressed the issue in 2010 by enacting the [Public Interest Disclosure Act 2010 \(Qld\)](#) to protect persons who make public interest disclosures to a journalist when they have been unable to have the issue resolved through disclosure to the proper authority (Section 6.5).

*For further clarification and analysis of the relevant issues, the reader should consult the Research Brief and refer to the Explanatory Notes to the Bill as well as to the Bill itself.*

## 1 Introduction

As the law currently stands in Queensland, if a court requires a journalist to reveal a confidential source of information published in the media, that journalist is torn between ‘the devil and the deep blue sea’. Revealing a source could be a breach of professional ethics (the [Australian Journalists Association’s Code of Ethics](#)<sup>1</sup>) but if the journalist refuses to disclose, there is a risk of being found in contempt of court. The Commonwealth Parliament and some states have recently passed, or are about to pass, amendments to their *Evidence Acts* to establish a rebuttable presumption that the identity of a journalist’s source is privileged. It is then up to the party seeking disclosure of the source’s identity to overcome this presumption by pointing to public interest considerations favouring disclosure. Provisions of this kind are colloquially known as ‘shield laws’.

### 1.1 Scope of this Research Brief

This Research Brief will:

- consider some court decisions where journalists have been found in contempt of court for refusing to name their confidential sources (Sections 3-4);
- outline the pre-2011 provisions of the Commonwealth [Evidence Act 1995](#) allowing the court to exercise its discretion to protect the source of confidential communications made to journalists, including the limitations of those provisions (Section 5.1-5.2);
- discuss the 2011 amendments to the Commonwealth Evidence Act to provide greater protection for journalists’ sources in court proceedings by establishing a rebuttable presumption that the identity of a journalist’s source is privileged (Section 5.3);
- briefly examine recent shield laws in other Australian jurisdictions (Section 6.1-6.4); and
- consider the related issue of protection of ‘whistleblowers’ who make disclosures about matters of public concern to the media as an avenue of last resort – a matter which the Queensland Parliament has addressed through the enactment of the [Public Interest Disclosure Act 2010 \(Qld\)](#) (Section 6.5).

The information in this Research Brief is current to **17 February 2012**.

## 2 Professional Confidential Relationship Privilege

According to the common law rules of evidence, a ‘privilege’ can be thought of as the right, usually based on public policy considerations, not to reveal information that would otherwise need to be disclosed (e.g. through giving evidence in court or under a subpoena).<sup>2</sup> At common law, the only professional relationship attracting privilege is the lawyer and client

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<sup>1</sup> Also known as the Media Alliance Code of Ethics.

<sup>2</sup> Australian Law Reform Commission (ALRC), ‘[Uniform Evidence Law](#)’, *Report 102*, 2006, [para 14.1](#).

relationship,<sup>3</sup> even if the professional is obliged by a code of ethics not to disclose such confidential communications.

Evidence Acts in each jurisdiction expand on the various common law privileges. In Queensland, for example, Part 2, Division 2 of the [Evidence Act 1977 \(Qld\)](#) allows witnesses to claim specified privileges, such as in relation to self-incrimination. The [Evidence Act 1995 \(Cth\)](#) (Part 3.10) establishes a number of privileges in relation to proceedings in Commonwealth matters. Those include (as well as client legal privilege) privilege in respect of religious confessions etc.<sup>4</sup> A specific ‘**professional confidential relationship privilege**’ – to protect the identities of sources of confidential communications made to journalists – was first enshrined in legislation under the Commonwealth *Evidence Act* in 2007, based on the recommendations of the February 2006 Australian Law Reform Commission (ALRC) ‘[Uniform Evidence Law](#)’, Report 102 (ALRC Report). As was pointed out by the ALRC, excluding evidence from the court’s purview is something to consider carefully.<sup>5</sup>

### 3 Ability of Journalists to Protect Their Sources: An Overview

In jurisdictions that do not have an Evidence Act which includes provisions for a professional confidential relationship privilege, journalists have been unable to claim privilege to avoid disclosure of their source to a court, Royal Commission, or parliamentary inquiry and could be held in contempt for refusing to disclose their sources.<sup>6</sup> The courts have appeared reluctant to provide such protection and have tended to hold journalists refusing to disclose informants in contempt of court. The court cases indicate that contempts are viewed seriously and, inevitably, a prison sentence should be imposed.<sup>7</sup> This is despite recognition of the conflict between the need to discover the truth in the interests of justice and the obligation on journalists to maintain the confidentiality of their sources in the interests of a free and effective press.<sup>8</sup>

As has been concisely put by the group Australia’s Right to Know (AKR),<sup>9</sup> it is ordinarily expected that journalists should disclose their sources. This makes the source, the journalist and the media outlet accountable for what is reported and helps the reader to evaluate the credibility of the information. However, sometimes information of legitimate public interest will only be disclosed to a journalist if the journalist guarantees confidentiality of the informant’s identity. This might be needed by the informant ‘*for a variety of reasons but usually to avert any negative consequences such as a threat to their safety, their employment,*

<sup>3</sup> ALRC, ‘Uniform Evidence Law’, [para 15.3](#). Other professional relationships not covered at common law include, for example, doctor and patient, psychotherapist and patient, social worker and client or journalist and source: [para 15.4](#).

<sup>4</sup> Further, some types of evidence can be excluded in the public interest: evidence of reasons for judicial decisions; evidence of matters of state; and evidence of settlement negotiations.

<sup>5</sup> ALRC, ‘Uniform Evidence Law’, para 15.31. Legislation in other jurisdictions contains privilege provisions for certain professional communications (e.g. medical communications in civil actions under the *Evidence Act 2001* (Tas) and a more general professional communications privilege, together with more specific and stronger protection for journalists under the NSW *Evidence Act 1995*, (as will be discussed in Section 6.1 of this Research Brief)).

<sup>6</sup> Norman Abjorensen, ‘[Not good news: Australia’s shrinking media freedoms](#)’, *Discussion Paper 18/07, Democratic Audit of Australia*, ANU, September 2007, pp 7-8.

<sup>7</sup> *R v McManus & Harvey*, para 37.

<sup>8</sup> ALRC, ‘Uniform Evidence Law’, para 15.15; [R v Gerard Thomas McManus & Michael Harvey](#) [2007] VCC 619, 25 June 2007, paras 34-37.

<sup>9</sup> [Australia’s Right to Know](#) is a coalition of 12 major media organisations seeking to address concerns about free speech and to work with governments to establish new policy and best practice in this area.

*their standing in the community and so on*'.<sup>10</sup> AKR emphasised that source confidentiality is fundamental to the ability of journalists to maintain trust with sources and encourage other sources to come forward with matters of public concern.

Examples of journalists being held in contempt of court for refusing to reveal the identity of a source include:<sup>11</sup>

- in March 1992, a Courier Mail journalist, Joe Budd, was imprisoned for failing to reveal his sources for an article which had led to a defamation action against the Courier Mail;
- in 1993, a South Australian Advertiser journalist was fined for refusing to disclose a source and an ABC journalist was jailed for separate breaches;
- in 1994, Madonna King of the Australian and Paul Whittaker of the Courier Mail were threatened with contempt prosecutions for publishing material arising from Queensland Criminal Justice Commission (now the Queensland Crime and Misconduct Commission) investigations; and
- a West Australian journalist being threatened with a contempt charge over interview recordings, and, in 2008, a police raid on the Sunday Times office after a report on State Government advertising.<sup>12</sup>

#### 4 The Pivotal Case of R v McManus and Harvey

The highly publicised conviction of two journalists, Gerard McManus and Michael Harvey, for contempt of court in 2007<sup>13</sup> has provided some impetus for the introduction of laws to protect journalists' sources.<sup>14</sup>

In *R v Gerard Thomas McManus & Michael Harvey* a Commonwealth public servant was charged with a breach of s 70(1) of the Commonwealth *Crimes Act 1914* (which, in basic terms, makes it an offence for public servants to engage in unauthorised communication or publication of information received in the course of their duties) for allegedly disclosing a draft Ministerial statement to journalists, Harvey and McManus. An article in Melbourne's *Herald Sun* was based on that draft statement. At a pre-trial hearing of the charge against the public servant, the journalists refused to disclose their source of the information. It was this refusal that gave rise to the contempt proceedings against the two men.<sup>15</sup>

After noting that a Bill to amend the *Evidence Act 1995* to protect journalists' sources had been introduced into the Commonwealth Parliament,<sup>16</sup> Rozenes CJ said that the proposed protection would not have assisted the journalists in the circumstances of this case as, in any event, the

<sup>10</sup> Parliament of Australia, Senate Standing Committee on Legal and Constitutional Affairs, [Report on the Inquiry into the Evidence Amendment \(Journalists' Privilege Bill\) 2009](#), May 2009, para 3.30, referring to AKR Submission 8, p 2. The Senate Committee Inquiry related to the then Rudd Labor Government's proposed legislative changes to extend the Evidence Act privilege provisions to journalists themselves. These proposals did not proceed at that time.

<sup>11</sup> See Australian Press Council, 'Press Law in Australia', *Media and the Law*, Chapter 20.

<sup>12</sup> Scott Ludlam, 'Greens call on WA Attorney-General to support journalists' shield laws', [Green MPs' website](#), 18 November 2010.

<sup>13</sup> *R v Gerard Thomas McManus & Michael Harvey* [2007] VCC 619, 25 June 2007.

<sup>14</sup> See M A Neilsen & K Magarey, Australian Parliamentary Library (APL), '[Evidence Amendment \(Journalists' Privilege\) Bill 2009](#)', *Bills Digest No 130*, 2008-09, 11 May 2009, p 4.

<sup>15</sup> Mr Kelly, the public servant in question, was found guilty of a breach of s 70(1) of the *Crimes Act 1914* but was acquitted on appeal: *R v Kelly* [2006] VSCA 221, 17 October 2006.

<sup>16</sup> The Solicitor-General for the Commonwealth, appearing for the then Commonwealth Attorney-General, sought to bring to the judge's attention the Government's intention to make these amendments: *R v McManus & Harvey*, paras 17-24, per Rozenes CJ.

proceedings were governed by Victorian evidence laws (which did not provide such protection), not Commonwealth laws.<sup>17</sup>

When convicting the journalists,<sup>18</sup> Rozenes CJ (paras 34-35) referred to previous cases revealing the conflict between the need for disclosure in the interests of justice and the obligation to maintain source confidentiality in the interests of a free and effective press. However, His Honour said (para 62):

Courts in Australia and England have made clear statements to the effect that journalists are not above the law and may not without penalty expect to be permitted to follow their personal collegiate standards where those standards conflict with the law of the land. ... Until that law is altered ... journalists remain in no different position than all other citizens.

This was despite the obligation under the Australian Journalists Association (AJA) Code of Ethics to maintain the confidentiality of sources.

Each defendant was convicted and fined \$7,000 (paras 60-64).<sup>19</sup>

## 5 'Shield Laws': The Commonwealth Legislative Framework

There have been a number of pieces of legislation introduced into the Commonwealth Parliament dealing with protecting sources of confidential communications with journalists. These developments, discussed in more detail below, are:

- **2007:** [Evidence Amendment \(Journalists' Privilege\) Act 2007 \(Cth\)](#), inserting the now repealed Part 3.10, Division 1A into the [Evidence Act 1995 \(Cth\)](#) giving the court a discretion to exclude evidence disclosing confidential sources of information provided to a journalist;
- **2009:** Evidence Amendment (Journalists' Privilege) Bill 2009 (Cth) which sought to expand the matters to which the court could have regard when exercising its discretion whether or not to protect a confidential source. The Bill lapsed when the 42<sup>nd</sup> Parliament was prorogued pending the 2010 Commonwealth election;
- **2011:** [Evidence Amendment \(Journalists' Privilege\) Act 2011 \(Cth\)](#), which began as a Private Member's Bill (Mr A Wilkie MP), repealing Part 3.10, Division 1A of the [Evidence Act 1995 \(Cth\)](#) and introducing new ss 126G-126H to introduce a rebuttable presumption that the identity of a journalist's source is privileged. A similar but not identical piece of legislation, the Evidence Amendment (Journalists' Privilege) Bill 2010 (No 2) (Cth), introduced by Senator George Brandis, is currently before the Parliament.

### 5.1 2007 Amendments to the [Evidence Act 1995 \(Cth\)](#): Introduction of the Privilege

In amendments to the [Evidence Act 1995 \(Cth\)](#) in 2007,<sup>20</sup> a 'professional confidential relationship privilege' was introduced to protect journalists' sources. The changes accorded with recommendations of the ALRC's 2006 Report, *Uniform Evidence Law*.<sup>21</sup>

<sup>17</sup> *R v McManus & Harvey*, para 24.

<sup>18</sup> The journalists had pled guilty.

<sup>19</sup> The Court considered that a non-custodial disposition was appropriate '*in the unique and exceptional circumstances of the case*' (para 61). The Commonwealth also appeared in the proceeding to mitigate on behalf of the journalists (paras 25-26).

<sup>20</sup> See [Evidence Amendment \(Journalists' Privilege\) Bill 2007](#) inserting the now repealed Part 3.10, Division 1A into the [Evidence Act 1995 \(Cth\)](#). See also, K Magarey, APL, '[Evidence](#)

While the Commonwealth Parliament adopted the ALRC's recommendation regarding the journalist-source privilege, it did not take up the recommendation for a more general professional confidential relationship privilege like that provided in the [Evidence Act 1995 \(NSW\)](#). Under the NSW legislation the privilege applies to confidential communications made specifically to journalists as well as to confidential communications within a range of other professional relationships.<sup>22</sup>

The amendments which inserted the now repealed Part 3.10, Division 1A<sup>23</sup> into the Commonwealth *Evidence Act 1995* enabled the court to direct that evidence not be adduced if it found that doing so would disclose a protected confidence or identifying information about the source of the protected confidence. A 'protected confidence' was defined as a confidential communication made to a journalist where the journalist is acting in a professional capacity and the journalist is under an express or implied obligation not to disclose its contents.

However, a number of **limitations** applied to the conferral of the privilege, as follows:

- the court retained a 'guided discretion' about whether or not to direct the evidence be adduced, taking into account various matters (such as the importance of the evidence in the proceeding; the nature and extent of harm that would be caused to the confider etc). In contrast, the comparable provision of the [New Zealand Evidence Act 2006 \(s 68\)](#) begins with a rebuttable presumption that the journalist will not be required to identify his or her source of information and it is for the person seeking to have the source revealed to rebut that presumption through satisfying specified criteria;
- the court had to take into account, and give 'greatest weight' to, any risk of prejudice to national security;
- importantly, the privilege did not apply where the evidence sought to be withheld would be evidence of a communication made, or the contents of a document prepared, in the furtherance of the commission of a fraud or an offence or the commission of an act rendering a person liable to a civil penalty. In *McManus and Harvey*, the evidence sought to be protected could have been an unauthorised 'leak' to a journalist from a public servant, an offence under s 70 of the *Crimes Act 1914* (Cth), and would not have been protected had the privilege existed at that time;<sup>24</sup>
- while the protection applied to all criminal and civil proceedings in federal and ACT courts, it did not apply to proceedings in other state and territory courts. Thus, a journalist would not be able to protect his or her source in a proceeding in a Queensland court.

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[Amendment \(Journalists' Privilege\) Bill 2007](#), *Bills Digest No 172*, 2006-07, 8 June 2007; M A Neilsen & K Magarey, APL, ['Evidence Amendment \(Journalists' Privilege\) Bill 2009'](#), esp pp 3-5. ALRC, 'Uniform Evidence Law', paras 15.34-15.36; recommendations 15-1, 15-2.

<sup>21</sup> The relevant provisions are in Part 3.10, Div 1A of the *Evidence Act 1995* (NSW). The confidential relationships privilege provision is one of a number of aspects where the divergence from the Commonwealth legislation diminished the uniformity that had initially been established between the Commonwealth and NSW Evidence Acts (see ALRC, 'Uniform Evidence Law', [paras 1.8-1.10](#)).

<sup>22</sup> The repeals were made by the *Evidence Amendment (Journalists' Privilege) Act 2011* (Cth), discussed below.

<sup>23</sup> *R v McManus & Harvey*, para 24.

## 5.2 Background to the 2011 Amendments to the Evidence Act 1995 (Cth): The 'Wilkie Bill' and the 'Brandis Bill'

The [Evidence Amendment \(Journalists' Privilege\) Bill 2010 \(Cth\)](#) (the Wilkie Bill) was introduced into the House of Representatives as a Private Member's Bill by Independent Member, Mr Andrew Wilkie MP, on 18 October 2010.<sup>25</sup> Its introduction came just weeks after Liberal Senator George Brandis introduced a similar, but not identical, Private Senator's Bill into the Senate (the Brandis Bill).<sup>26</sup> While both Bills provided for a rebuttable presumption that journalists' sources are privileged, the Brandis Bill goes further to extend the privilege (but subject to judicial discretion rather than as a presumption) to other professional confidential relationships – as in New South Wales.

The Wilkie Bill passed the House with bipartisan support and was introduced into the Senate on 15 November 2010 where it, together with the Brandis Bill, was referred to the Legal and Constitutional Affairs Legislation Committee for inquiry and report.<sup>27</sup>

The Committee's [Report on the Evidence Amendment \(Journalists' Privilege\) Bill 2010 and the Evidence Amendment \(Journalists' Privilege\) Bill 2010 \(No 2\)](#) (Committee's 2010 Report) was provided to the Senate on 23 November 2010, with the Majority Report recommending that Mr Wilkie's Bill be passed.<sup>28</sup>

The Committee's 2010 Report noted that both Bills were modelled on the New Zealand Act to create a rebuttable presumption that journalists can refuse to give evidence to protect their sources. Under both Bills, the privilege applies to all proceedings for Commonwealth offences. The Senate Committee said that the main difference was that the Brandis Bill created a general privilege in respect of a range of professional confidential relationships, not just sources of information imparted to journalists.<sup>29</sup>

The Majority Report considered (paras 3.27-3.30) the Wilkie Bill preferable to the Brandis Bill for various reasons. Among these were that, in the Committee's view, the implications of a general professional confidentiality privilege in Commonwealth law, as provided for in the Brandis Bill, had not been adequately explored and past consideration of the issue by the ALRC had found there was a range of views about the matter. It was concluded that the

<sup>25</sup> An earlier attempt to broaden the privilege regarding journalists' sources was made in a Government Bill (Evidence Amendment (Journalists' Privilege) Bill 2009 (Cth)) introduced in March 2009. A notable feature was the move to allow the court to consider, when deciding whether or not to protect the relevant evidence, the nature and extent of any likely harm to the journalist, not just to the source of the information, if the evidence were to be adduced. As discussed earlier, the Bill lapsed pending the 2010 election. For a discussion of this Bill, see Senate Standing Committee on Legal and Constitutional Affairs, Evidence Amendment (Journalists' Privilege) Bill 2009, [Report](#), May 2009. See also, M A Neilsen & K Magarey, APL, '[Evidence Amendment \(Journalists' Privilege\) Bill 2009](#)'.

<sup>26</sup> [Evidence Amendment \(Journalists' Privilege\) Bill 2010 \(No. 2\)](#) (Brandis Bill). Although the Brandis Bill was introduced into the Parliament before the Wilkie Bill, the numbering arrangements resulted in the Brandis Bill being the Evidence Amendment (Journalists' Privilege) Bill 2010 (No. 2). See the Senate Committee's 2010 Report, p 3.

<sup>27</sup> This referral was based on a motion by Senator GH Brandis, Deputy Leader of the Opposition in the Senate and Shadow Attorney-General, Evidence Amendment (Journalists' Privilege) Bill 2010 (Cth), Second Reading Debate, *Senate Hansard*, 15 November 2010, p 6.

<sup>28</sup> During the Inquiry on the Bills, the Committee invited submissions from a number of organisations and individuals and held a public hearing. Seven submissions were received. See also, K Magarey, APL, 'Evidence Amendment (Journalists' Privilege) Bill 2010 (No. 2) and Evidence Amendment (Journalists' Privilege) Bill 2010', *Bills Digest No 38-39*, 2010-11, 11 November 2010, upon which the Senate Committee's 2010 Report stated it relied 'heavily' in considering the Bills before it.

<sup>29</sup> Senate Committee's 2010 Report, pp 5-6.

proposal could potentially '*have serious consequences for the introduction of evidence in legal proceedings involving relevant professionals*'.

The Majority Report said that journalists' privilege could be distinguished from other professional privileges (para 3.29):

Journalists' privilege operates not only to protect the privacy of the source and the relationship of trust between the journalist and the source, but also to protect public interests in the accountability of public officials, an informed public and the free flow of information, all of which are vital components of a democratic society.

Liberal Senators on the Committee published a dissenting view,<sup>30</sup> preferring the Brandis Bill because they could see no reason why the protection should be confined to journalists. Further, extending it to a broader range of confidential professional relationships would restore uniformity between the NSW and Commonwealth legislation.

The Wilkie Bill was passed by the Senate on 3 March 2011, incorporating amendments moved on behalf of the Australian Greens (in Committee) to broaden the definition of 'journalist' and 'news medium'. These amendments had been foreshadowed by the Australian Greens in the Senate Committee's 2010 Report.<sup>31</sup>

The new provisions of the *Evidence Act 1995*, inserted by the [Evidence Amendment \(Journalists' Privilege\) Act 2011 \(Cth\)](#), commenced on 13 April 2011 (s 2).<sup>32</sup>

### 5.3 The 'New Shield Laws': Amendments by the Evidence Amendment (Journalists' Privilege) Act 2011 (Cth)

Schedule 1 of the [Evidence Amendment \(Journalists' Privilege\) Act 2011 \(Cth\)](#) (the 2011 Amendment Act) repeals Chapter 3, Part 3.10, Division 1A (ss 126A-126F) of the [Evidence Act 1995 \(Cth\)](#) (the Act).<sup>33</sup> It is intended that the new protections for journalists' sources (commonly referred to as 'shield laws') will operate alongside the Australian Journalists Association (AJA) Code of Ethics although the Code binds only its members.<sup>34</sup>

The [Explanatory Memorandum](#) to the Wilkie Bill (which became the 2011 Amendment Act), commented (para 1) that the new provisions were similar to laws in New Zealand, the United Kingdom and in various US states.

#### 5.3.1 Definitions

The new s 126G of the Act sets out relevant definitions. The definition provisions of both the Wilkie Bill and the Brandis Bill generated considerable discussion during the abovementioned 2010 Senate Committee inquiry (see paras 3.8-3.16).

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<sup>30</sup> Senate Committee's 2010 Report, Dissenting Report by Liberal Senators, pp 19-20.

<sup>31</sup> Senate Committee's 2010 Report, Additional Comments by the Australian Greens, pp 21-22.

<sup>32</sup> Senator Brandis' Bill is currently before the Senate: see [Bill Homepage](#).

<sup>33</sup> The [Evidence Act 1995 \(Cth\)](#) is part of a Uniform Evidence scheme. The Explanatory Memorandum to the [Evidence Amendment \(Journalists' Privilege\) Bill 2010 \(Cth\)](#) ([Explanatory Memorandum](#)), para 5, notes that it is important that changes to the Commonwealth Act do not impact on the uniform numbering scheme. Accordingly, ss 126A-126F are repealed but the new provisions begin at s 126G, leaving ss 126A-126F free for future use.

<sup>34</sup> Explanatory Memorandum, para 7.

**'Informant'** means a person who gives information to a journalist in the normal course of the journalist's work expecting that the information may be published in a news medium.

**'Journalist'** means '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'.

The italicised words were substituted by the Senate as a result of amendments to broaden the definition sought by the Australian Greens at the Committee stage of debate. The Wilkie Bill defined a 'journalist' more narrowly as '*a person who, in the normal course of that person's work, may be given information by an informant ...*'.

The [Explanatory Memorandum](#) to the Wilkie Bill indicated (para 8) that the 'in the normal course of ... work ...' requirement 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 ...*'.

- **Senator Ludlam (Australian Greens)** said that this narrower definition could exclude an act of journalism that is not paid for and might not necessarily appear in the *Sydney Morning Herald* or on the ABC but might be up in [Crikey](#) or on one's own blog. The question was whether it was in the public interest that disclosure should occur or not, rather than whether the person publishing the material was paid for his or her work.<sup>35</sup> The Opposition was opposed to the amendment, believing it was too broad. Senator Brandis said that anyone "*engaged or active in the publication of news*" could mean any person who, for example, publishes material on the internet or contributes to a blog', whether that person is a journalist or not.<sup>36</sup>
- **Media lawyer, Peter Timmins**, argues that if a person is a journalist, this should be sufficient, not whether he or she can demonstrate employment at the relevant time. He did not, however, believe that any private individual who simply posts something on the Internet should obtain the privilege.<sup>37</sup>
- **Senator Brandis (Liberal Party)** (whose Bill is confined to mainstream journalists) has warned that the last minute amendment by the Greens was too broad and could prevent the court from examining relevant evidence.<sup>38</sup>

**'News medium'** means any medium for dissemination to the public or a section of the public of news and observations on news.<sup>39</sup>

<sup>35</sup> Evidence Amendment (Journalists' Privilege) Bill 2010 (Cth), [Senate Hansard](#), 3 March 2011, pp 1095-1096.

<sup>36</sup> [Senate Hansard](#), p 1097. To follow the In Committee Debate, see [Senate Hansard](#), pp 1095-1104. The amendment had the support of the Government.

<sup>37</sup> Peter Timmins, 'Shield laws, and the fine print', Open and Shut, [foi-privacy.blogspot.com](http://foi-privacy.blogspot.com), 20 October 2010.

<sup>38</sup> Chris Merritt, 'Another state decides against shield laws to protect bloggers', *Australian*, 29 April 2011, p 30.

<sup>39</sup> The original definition in the Wilkie Bill was that a news medium was a medium for dissemination of news etc. The amendment, moved by the Greens, sought to broaden the definition to cover a wider range of media and to be 'technology neutral'. This amendment also had Government support. See [Senate Hansard](#), 3 March 2011, pp 1095-1104, esp p 1096. For the Opposition's objections, see p 1097 (Senator Brandis).

### 5.3.2 The Protection of Journalists' Sources Presumption

The presumption for protection for journalists' sources is set out in **s 126H** of the Act and is modelled on s 68 of the *Evidence Act 2006* (NZ) (New Zealand Act) with necessary variations.<sup>40</sup>

While, previously, the journalist seeking the privilege had to prove that the protection should be given, new **s 126H(1)** creates a rebuttable presumption that if the 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 informant's identity or enable it to be ascertained.<sup>41</sup>

The onus is on the party seeking disclosure to apply to the court for an order that the aforementioned presumption does not apply. The presumption in s 126H(1) may be rebutted as provided for in **s 126H(2)(a)** and **(b)**.

The court may make an order,<sup>42</sup> on the application of a party, that the presumption does not apply. It may do so if it is satisfied, having regard to the issues to be determined in the proceeding, that the public interest in disclosure of evidence of the informant's identity outweighs:

- any likely adverse effect of the disclosure on the informant or any other person (the identical form of words in the New Zealand Act have been interpreted to include an adverse effect on the *journalist*, such as a risk of physical harm or property damage);<sup>43</sup> 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. (In other words, if the order was made, would the ability of the news media to get sensitive information from sources in the future be hampered if sources were to doubt that their identity would be protected? (see Explanatory Memorandum, para 22)).

As Mr Wilkie observed in his Second Reading Speech (p 4), safeguards are essential with this type of legislation because so-called whistleblowers can sometimes be disgruntled employees making vexatious claims or a disclosure might be reckless or dangerous. Thus, there may be circumstances where the public interest in disclosure of the informant's identity is so strong that it should be given to the court. However, it is:

up to ... parties [seeking disclosure] to prove that the public interest is best served in disclosing the source, and that the public interest benefit of a disclosure genuinely outweighs the likely harm to the source.

### 5.3.3 Proceedings to Which the Protection Will Apply

Previously, the protection applied only in proceedings in federal courts (i.e. the High Court or a court created by the Commonwealth Parliament such as the Federal Court of Australia and

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<sup>40</sup> The provision is identical to s 126D of Senator Brandis' Bill.

<sup>41</sup> However, as the Explanatory Memorandum (para 15) observes, if the answer or document would not lead to the disclosure of the informant's identity, the journalist cannot refuse to provide that information.

<sup>42</sup> The order can be made subject to any terms and conditions thought fit by the court: s 126H(3) (e.g. a suppression order limiting publication of the identity of the informant).

<sup>43</sup> See Explanatory Memorandum, para 21, citing the NZ High Court *Police v Campbell* [2010] 1 NZLR 483 at [100].

the Family Court of Australia, including a person or body required to apply the laws of evidence) or an ACT court.<sup>44</sup>

The new s 131B provides that the protection will apply to all proceedings in a federal court or an ACT court and also to all proceedings in any other Australian court for an offence against a law of the Commonwealth.<sup>45</sup> Thus, the protection will apply to a prosecution of a Commonwealth offence in a Queensland court.<sup>46</sup> However, it would not apply to the prosecution of a State offence in a Queensland court.

Under s 131A(1A), a party seeking disclosure pursuant to a disclosure requirement may apply for an order that s 126H(1) does not apply. A 'disclosure requirement' means (s 131A(2)) a court order/process requiring the disclosure of information or a document and includes pre-trial discovery; interrogatories etc. The Explanatory Memorandum (para 28) notes that the provision has the effect of extending s 131A to **pre-trial** proceedings.

### 5.3.4 Family Court Proceedings to Which the Protection Will Not Apply

The 2011 Amendment Act also amended s 69ZX(4) of the [Family Law Act 1975 \(Cth\)](#) to refer to the new s 126H of the Evidence Act and to reflect how it will operate. Section 69ZX sets out the court's general duties and powers relating to evidence. New s 69ZX(4) provides that in child related proceedings in which the Family Court must regard the best interests of the child as the paramount consideration, the s 126H(1) protection does not apply if the court considers it is in the best interests of the child for the information about the source's identity to be disclosed.<sup>47</sup>

### 5.3.5 Parliamentary Committees

The [Explanatory Memorandum](#) (at paras 25-27) notes that the new provisions do not include an equivalent to s 68(4) of the New Zealand Act which prevents the protection for informants applying in relation to a New Zealand Parliamentary Select Committee. This enables the Select Committee to ascertain a journalist's source. The provision was not included in the 2011 Amendment Act because '*the Evidence Act does not apply beyond court proceedings so the application of s 126H will not extend to Parliamentary Committee inquiries*'.<sup>48</sup>

## 6 Shield Laws in Other Australian Jurisdictions

Apart from the Commonwealth, some states have passed, or are in the process of passing, so called 'shield laws' to protect journalists' sources and to prevent journalists risking contempt of court proceedings for failing to disclose their source.

Shield laws have been discussed at meetings of the Standing Committee of Attorneys-General (SCAG) in the context of the [Model Uniform Evidence Bill 2007](#) (drafted by the Parliamentary

<sup>44</sup> See, Dictionary to the Act. See also definition of 'ACT court'.

<sup>45</sup> Including proceedings relating to bail; or which are interlocutory or similar proceedings; or are heard in chambers; or relate to sentencing.

<sup>46</sup> Explanatory Memorandum, para 30.

<sup>47</sup> See also, new s 69ZX(4)(b) regarding State or Territory laws.

<sup>48</sup> See Explanatory Memorandum, para 27. Further, in [R v Richards; ex parte Fitzpatrick & Browne](#) (1955) 92 CLR 157, the High Court (per Dixon CJ) pointed to the wide reach of s 49 of the *Commonwealth Constitution*. Section 49 provides that the powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House, shall be such as are declared by the Parliament, and until declared, shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth.

Counsel's Committee) which contains journalists' privilege provisions. Uniform national evidence laws have been an agreed objective for some time and SCAG agreed to the Model Uniform Evidence Bill on 26 July 2007. It is based on the NSW *Evidence Act 1995*, as amended in 2007, and applies to a broad range of professional relationships (see draft ss 126A-126F). In early 2010, a [draft Evidence Amendment \(Professional Confidential Relationship Privilege\) Bill](#) was prepared which inserted two further matters into draft s 126B for the court to consider in deciding if the privilege should apply. Those matters were the public interest in preserving the confidentiality of protected confidences; and the public interest in preserving protected identity information.

Ministers have noted that the adoption of the model provisions was a matter for each jurisdiction.<sup>49</sup>

Outside of Australia, some countries have passed shield laws in various forms, most notably New Zealand (with s 68 of the [Evidence Act 2006 \(NZ\)](#) forming the basis (but with some differences) for the Commonwealth shield laws) and the United Kingdom (s 10 of the [Contempt of Court Act 1981 \(UK\)](#)).

## 6.1 New South Wales

New South Wales became the first state to provide shield laws for journalists when amendments to the [Evidence Act 1995 \(NSW\)](#) came into effect on 21 June 2011, fulfilling an election commitment of the new Government.<sup>50</sup> Prior to the amendments in 2011, the legislation already contained a general professional confidential relationship privilege which was capable of applying to journalists. However, these recent changes strengthen the position of journalists by introducing a rebuttable presumption that a journalist's source is to be protected from being adduced in evidence. Thus, the NSW legislation essentially mirrors the Brandis Bill.

### 6.1.1 Specific Privilege for Journalists

A new **Chapter 3, Part 3.10, Division 1C** was inserted into the NSW Evidence Act 1995 by the [Evidence Amendment \(Journalist Privilege\) Act 2011](#) which, in terms of the rebuttable presumption, mirrors the Commonwealth journalists' shield laws under s 126H of the Evidence Act 1995 (Cth). It creates a rebuttable presumption that an informant's identity is to be protected when such protection has been promised by the journalist asking for the protection. However, the court can order disclosure if it is satisfied that the public interest in doing so outweighs any likely adverse effect on the informant or any other person and the public interest in communication of facts and opinion by the news media and its ability to access sources.

The protection applies to civil and criminal proceedings in NSW courts (see s 4), including pre-trial proceedings (s 131A).

However, there is a difference between the NSW and the Commonwealth provisions regarding journalists' privilege. The scope of the application of the privilege is narrower in the NSW legislation because 'journalist' is defined to mean *'a person engaged in the profession or occupation of journalism in connection with the publication of information in a*

<sup>49</sup> [SCAG Communiqué, 7 May 2010](#).

<sup>50</sup> Greg Smith MP, Shadow Attorney-General and Shadow Minister for Justice, 'NSW Libs & Nats to Introduce Shield Laws for Journalists', [NSW Liberal Party website](#), 6 October 2010.

*news medium*'. In his [speech](#) introducing the amending legislation into the NSW Legislative Assembly, the Attorney-General, the Hon Greg Smith MP, said that the definitions of 'profession', 'occupation' and 'journalism' rely on their plain ordinary meanings, allowing the laws to reflect contemporary journalistic practices but ensuring that the privilege will apply only to a person who is recognisably engaged in working as a journalist. It would not apply, for example, to amateur bloggers or users of social networking media who happen to obtain and publish information that might be of some public interest. For the privilege to apply, the informant must have provided information to a journalist for a reason connected to their work as a journalist.<sup>51</sup>

Mr Smith also said that while the 'responsible media' had made out a strong case for shield laws over many years '*bloggers are coming from all areas ... some may be criminals doing some blogging to block or deflect police and to con politicians and the media*'.<sup>52</sup>

### 6.1.2 Professional Confidential Relationship Privilege

The protections provided in the NSW Evidence Act are broader than communications between journalists and sources and potentially apply to an array of professional relationships. Protection for such professional relationships was introduced in 1997.<sup>53</sup> The 2011 amendments did not substantially affect this protection.<sup>54</sup>

**Chapter 3, Part 3.10, Div 1A** of the NSW Evidence Act (Professional confidential relationship privilege) enables the court to direct that evidence of communications made in confidence between persons in a professional relationship, or the identity of the confider, not be adduced in proceedings. This direction must be given if the court is satisfied that the nature and extent of potential harm to the confider outweighs the desirability of the evidence being given.

A range of matters are listed that the court is to consider in deciding whether or not to direct that the aforementioned evidence should be adduced (s 126B). The list of considerations was expanded by the aforementioned 2011 legislation by requiring the court to also consider factors in support of applying the privilege: the public interest in preserving the confidentiality of protected confidential communications; and the public interest in preserving the confidentiality of the identity of the confider of such information.

The privilege will be lost where the evidence in question is of a communication made or the contents of a document prepared in the furtherance of the commission of a fraud or an offence or the commission of an act that renders a person liable to a civil penalty (s 126D).

When introducing the aforementioned amendments, the Attorney-General said that the professional confidential relationship privilege applies to journalists but it provides only limited protection. However, there may be some circumstances where this privilege may give protection when the specific journalists' privilege may not. For instance, the journalists' privilege will not apply unless the informant expects that the information will be published.

<sup>51</sup> Hon G Smith MP, Attorney-General and Minister for Justice, Evidence Amendment (Journalist Privilege) Bill 2011 (NSW), [Agreement in Principle](#), *NSW Legislative Assembly Hansard*, 27 May 2011, p 1318. See also: 'Agenda pushers have no shield under state law', *Australian*, 11 July 2011, p 34.

<sup>52</sup> As reported in Chris Merritt, 'Another state decides against shield laws to protect bloggers'.

<sup>53</sup> See the [Evidence Amendment \(Confidential Communications\) Act 1997 \(NSW\)](#).

<sup>54</sup> As noted by the NSW Attorney-General (Agreement in Principle, p 1320), the Bill implements the recent amendments to the Model Uniform Evidence Bill in New South Wales as regards the professional confidential relationship privilege.

Further, it will not apply where the journalist wants to protect the content of the confidential communication. However, the more general confidential relationship privilege may apply.<sup>55</sup>

## 6.2 Western Australia

The [Evidence and Public Interest Disclosure Amendment Legislation Bill 2011 \(WA\)](#) was introduced into the Western Australian Legislative Council by Hon Michael Mischin MLC, Parliamentary Secretary to the Attorney General, on 20 October 2011. It was referred to the Standing Committee on Procedure and Privileges on 10 November 2011. The Committee tabled its [report](#) on 29 November 2011.<sup>56</sup>

The [Explanatory Memorandum](#) (p 1) to the WA Bill notes that the Bill proposes to:

- insert a new protection for professional confidential relationships (modelled on the NSW Evidence Act, Part 3.10, Div 1A);
- introduce a further level of protection for journalists to provide that they are not compellable to give evidence disclosing the identity of sources in direct response to the Commonwealth and NSW recent shield law amendments;
- enhance the capacity of people to disclose public interest information under the *Public Interest Disclosure Act 2003 (WA)*.<sup>57</sup>

### 6.2.1 Professional Confidential Relationship Privilege

The professional confidential relationship privilege provisions (proposed ss 20A-20F) to be inserted into the *Evidence Act 1906 (WA)* are largely identical to Chapter 3, Part 3.10, Division 1A of the NSW *Evidence Act 1995* and seek to apply to a range of professionals (including journalists) receiving information in circumstances of confidentiality.

The privilege is not absolute and would be subject to the discretion of the court having regard to whether the harm to the confider outweighs the public interest in adducing the information in question. This protection would not ([Explanatory Memorandum](#), p 2) be available for journalists in situations where the informant expects that the information will be published and not kept confidential; the specific privilege discussed below would need to be relied upon. A range of factors to which the court must have regard, similar to those in the NSW Act, are set out to assist the court in determining where the balance lies. The matters also include and replicate additional factors inserted into the NSW Act by the 2011 amendments.

However, there is a proposed provision providing an exception to the protection being given (see [Explanatory Memorandum](#) (p 13)). It provides that, if a protected confider engages in any of the listed actions in the proposed s 20E(1) that constitute misconduct, the protection will not apply. Such actions would include, for example, committing an offence but can also cover conduct providing reasonable grounds for terminating the confider's employment.

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<sup>55</sup> Hon G Smith MP, [Agreement in Principle](#), p 1320.

<sup>56</sup> To follow the passage of this Bill through the WA Parliament, please go to the [Bill homepage](#).

<sup>57</sup> See also, 'Shield laws set the standard', *Australian*, 21 October 2011, p 6; 'West's shield laws also protect whistleblowers', *Australian*, 20 October 2011, p 5.

### 6.2.2 Protection of Identity of Journalists' Informants

The [Explanatory Memorandum](#) (p 16) states that the proposed provisions (ss 20G-20M), seeking to protect journalists' sources, in addition to the general protections above, were inspired by the recent amendments to the Commonwealth and NSW Evidence Acts.

The definition provisions are modelled on the new provisions in the NSW Act for protecting journalists' sources rather than on the broader Commonwealth definitions.

An 'informant' is '*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*'.

A 'journalist' means '*a person engaged in the profession or occupation of journalism in connection with the publication of information in a news medium*'. The Explanatory Memorandum (p 17) states that the narrow definition seeks to ensure that the protection extends only to persons employed as journalists and acting in their professional capacity, not to persons such as bloggers or those who comment on, or disseminate information on, matters of public interest via social networking media such as Twitter and Facebook.<sup>58</sup>

The intended protection in the proposed s 20I will apply as a qualified protection so that where a journalist has promised not to disclose an informant's identity, the journalist (or the person he or she was working for at the time) cannot be compelled to give evidence disclosing that identity. The protection will not apply where the balance of the public interest lies in disclosure of the informant's identity (proposed s 20J). Further, a number of matters under s 20J(3) are required to be taken into account in deciding whether or not the presumption should apply. While certain of these matters are modelled on s 126B(4) of the NSW *Evidence Act*, other considerations ie whether there is a risk to national or State security; or whether there has been any misconduct (broadly defined in the Bill) on the part of the informant or journalist do not appear to be reflected in the NSW or the Commonwealth shield laws.

Provision is also sought to be made under new s 20K regarding the effect of misconduct on the court giving a direction about giving evidence or not (which will usually depend on the type of misconduct).

The journalists' protection provisions are intended to apply in any proceeding where the decision maker is a person acting judicially, not just as a judge in a court. The Explanatory Memorandum (p 19) comments that the purpose is to ensure that the protection applies to courts, tribunals and inquiries, including Parliamentary inquiries where a journalist may be required to appear and give evidence.<sup>59</sup>

### 6.2.3 Amendments to Expand Protections under the *Public Interest Disclosure Act 2003* (WA)

The Bill also seeks to amend the WA [Public Interest Disclosure Act 2003](#) (the Act) to expand the protections available to persons making public interest disclosures under that Act consistently with the new shield law provisions in the *Evidence Act 1906*.

Among other amendments (including those enabling the Supreme Court to restrain detrimental action against persons making disclosures under the Act; enabling relocation of a

<sup>58</sup> The definition of 'news medium' is similarly narrow.

<sup>59</sup> The Committee Report's main focus was on raising issues about the impact of this provision on parliamentary privilege: Report of the Standing Committee on Procedure and Privileges in Relation to the Reference from the House - Evidence and Public Interest Disclosure Legislation Amendment Bill 2011, [Report 23](#), November 2011.

public servant; anonymous disclosures), proposed new provisions seek to allow a person to make a public interest information disclosure to a journalist as an avenue of last resort and receive the protections afforded by the Act. 'Journalist' has the same narrow definition as proposed for the above shield laws (see [Explanatory Memorandum](#) (p 32, 33)). The proposed provisions are modelled, in part, on the *Public Interest Disclosure Act 2010* (Qld).<sup>60</sup>

The protection will only apply where the entity that initially received the information has refused to investigate, has delayed investigation, has not recommended any action be taken after investigation or has failed to comply with certain notification obligations.

### 6.3 Victoria

It appears that the Victorian Government has worked with the New South Wales Government in developing journalists' shield laws and the Victorian Attorney-General, the Hon Robert Clark MP, has said that his State intended to introduce similar legislation.<sup>61</sup> The Attorney-General said that adjustments to the proposed laws were needed to try to achieve consistency with the NSW legislation. As with the NSW journalists' privilege, Mr Clark said that the Victorian provisions would be limited to journalists working for the mainstream media.<sup>62</sup>

The Attorney-General said that he was concerned that the broader definition of journalist under the Commonwealth shield laws could unreasonably restrict the ability to put evidence to the court and complicate the issue of who falls within the protection. If one is '*an amateur running a blog, ... it is not appropriate that the privilege extend to such a person*'.<sup>63</sup>

### 6.4 Australian Capital Territory

The [Evidence Amendment Act 2011 \(ACT\)](#), passed by the ACT Legislative Assembly on 15 November 2011, introduced shield laws for journalists mirroring the Commonwealth provisions including the broader definition of 'journalist'. It also introduced a more general professional confidential relationship privilege similar to the NSW provisions. The laws are due to commence in March 2012.<sup>64</sup>

### 6.5 Queensland

In October 2010, the then Queensland Attorney-General was reported as indicating that the Queensland Government preferred a national approach to shield laws and would be monitoring developments.<sup>65</sup>

However, Queensland has, like Western Australia (and, in the past, NSW), addressed the issue of protecting persons who make public interest disclosures to journalists as an avenue of last resort in certain circumstances.

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<sup>60</sup> The New South Wales *Public Interest Disclosures Act 1994* (s 19) also allows for making public interest disclosures to journalists as an avenue of last resort.

<sup>61</sup> It has been reported that the laws are currently being prepared by the Attorney-General: Josh Gordon and Clay Lucas, 'Fears watchdog could keep secrets', *Age*, 13 December 2011, online.

<sup>62</sup> Chris Merritt, 'Agenda pushers have no shield under state law', *Australian*, 11 July 2011, p 34.

<sup>63</sup> Chris Merritt, 'Shield law: state to defy Greens', *Australian*, 8 April 2011, p 33.

<sup>64</sup> See [Evidence Commencement Notice 2012](#), 30 January 2012.

<sup>65</sup> Debbie Guest & Chris Merritt, Western Australia defies shield law push', *Australian Financial Review*, 1 October 2010, p 29.

The [Public Interest Disclosure Act 2010 \(Qld\)](#)<sup>66</sup> protects persons who make public interest disclosures (defined in ss 12-13)<sup>67</sup> to a journalist when the issue is not resolved through disclosure to the proper authority (defined as a 'public sector entity' or a member of the Legislative Assembly (s 5)). A 'public sector entity' is further defined in s 6 to include a broad range of bodies<sup>68</sup> such as Parliamentary Committees; the Parliamentary Service; a court or tribunal or an administrative office attached to such; the Executive Council; a department; a local government; certain educational institutions; entities established under legislation for a government purpose or prescribed under a regulation and publicly funded. The proper authority for receiving the disclosure depends on the type of public interest disclosure being made.

However, s 20 provides for the making of a public interest disclosure to a journalist as a matter of last resort – where the person has already made such disclosure through the proper channels and the entity receiving the disclosure (or to which the disclosure was referred under ss 31 or 34):

- decides not to investigate or deal with the matter,<sup>69</sup>
- investigates but does not recommend the taking of any action; or
- fails to notify the person within 6 months whether or not the disclosure is to be investigated or dealt with.

A 'journalist' is defined in s 20(4) as a person engaged in the occupation of writing or editing material intended for publication in the print or electronic news media.

Persons making public interest disclosures also receive protection under Chapter 4, Part 1 including exemption from civil liability (e.g. defamation action) or criminal liability or administrative action unless the liability arises from the person's own conduct. A person making such disclosure does not commit an offence under any Act imposing a confidentiality obligation or any other restriction on disclosure of information; or breach an obligation by way of oath, rule, practice or agreement requiring confidentiality be maintained. This may overcome issues such as the source in the McManus and Harvey case being in breach of the Commonwealth *Crimes Act* for making unauthorised disclosures.<sup>70</sup>

Professor AJ Brown of Griffith Law School and leader of the Australian Research Council's [Whistling While They Work](#) project has commented that the Queensland Act was historic in '*affirming when whistleblowers can go to the media, and still receive legal protections ...*'. Professor Brown said that if the agency responds professionally and properly explains the outcome to the whistleblower, he or she must still be sure that there is a reasonable basis for believing the outcome is wrong before going to the media:

<sup>66</sup> The Act commenced on 1 January 2011 (see s 2 and SL 2010 No. 305 (*Government Gazette*)). It replaced the *Whistleblowers Protection Act 1994* (Qld).

<sup>67</sup> Such a disclosure may be about matters such as offences or contraventions endangering the environment; possible misconduct of a public servant; substantial and specific danger to public health or safety or the environment.

<sup>68</sup> However, note the exclusions in s 6(2).

<sup>69</sup> Under s 30, the entity may decide not to investigate or deal with the disclosure in certain circumstances (e.g. the issue being too trivial to warrant the necessary diversion of resources; the information is old; or it has already been investigated by another process etc.). Written reasons for decision have to be given and there are rights of review.

<sup>70</sup> Further, taking of reprisal action is an offence attracting a fine of up to \$16,700 or 2 years imprisonment and might pave the way for a person suffering detriment as a result of the reprisal to pursue an action for damages: ss 40-42. In addition, the entity may be vicariously liable for the reprisal action of an employee in certain situations. See also, ss 44, 47, 48.

The provision is not a licence for disgruntled public servants to simply complain, and rush to the media with their complaints. Public officials will need to stop and be sure that their concerns remain based on a reasonable belief that wrongdoing [official misconduct, serious maladministration] needs to be rectified – or they may run the risk ... that going public will leave them exposed to criminal, disciplinary or civil action.<sup>71</sup>

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<sup>71</sup> AJ Brown, '[Whistle can now be blown louder in Queensland](#)', *Australian online*, 17 September 2010.

## Key Documents and Links

### Legislation

#### Commonwealth

- [Evidence Act 1995 \(Cth\)](#)

#### New South Wales

- [Evidence Act 1995 \(NSW\)](#)
- Hon G Smith MP, Attorney-General and Minister for Justice, Evidence Amendment (Journalist Privilege) Bill 2011 (NSW), [Agreement in Principle](#), NSW Legislative Assembly Hansard, 27 May 2011, p 1318

#### Western Australia

- [Evidence and Public Interest Disclosure Amendment Legislation Bill 2011 \(WA\)](#)
- [Explanatory Memorandum](#)

#### Queensland

- [Public Interest Disclosure Act 2010 \(Qld\)](#)

#### Former Standing Committee of Attorneys-General (SCAG)

- Standing Committee of Attorneys-General, [Model Uniform Evidence Bill 2007](#), draft Evidence Amendment (Professional Confidential Relationship Privilege) Bill

#### Other Countries

- [Evidence Act 2006 \(NZ\)](#)
- [Contempt of Court Act 1981 \(UK\)](#)

### Reports and Articles

- Norman Abjorensen, '[Not good news: Australia's shrinking media freedoms](#)', Discussion Paper 18/07, Democratic Audit of Australia, ANU, September 2007
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**Queensland Parliamentary Library and Research Service Research Publications - 2012**

<b>No.</b>	<b>Title</b>	<b>Date</b>
RBR 2012/01	Police Powers and Responsibilities (Motor Vehicle Impoundment) Amendment Bill 2011 (Qld)	Jan 2012
RBR 2012/02	The Heavy Vehicle National Law and the National Heavy Vehicle Regulator: Heavy Vehicle National Law Bill 2011 (Qld)	Feb 2012
RBR 2012/03	Shield Laws for Journalists	Feb 2012