

**Australian Shield Laws for Journalists:
A Comparison with New Zealand, the United Kingdom
and the United States.**

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INTRODUCTION

In June 2007, two journalists from The Australian were each fined \$7000 for contempt of court.¹ Michael Harvey and Gerard McManus had refused to give evidence about the source for their article, Cabinet's \$500 million rebuff to veterans, detailing the Federal Government's secret decision to cut war veterans' benefits. Their case sparked public debate over the need for shield laws, that is, legislation protecting members of the press from charges of contempt.

A journalist being compelled to reveal his confidential source in court faces a dilemma. On one hand, the journalist has a loyalty to the source, to maintain the secrecy of his or her identity. On the other hand, the courts require full disclosure of all relevant evidence in order to administer justice between the parties. This has led to a tension between journalists and the courts, which has been described as a 'worship of fundamentally different gods'.²

Journalists who refuse to give evidence may be found to be in contempt of court. Several Australian journalists have been sent for protecting their sources.³ But, given the important role the media plays in Australia's democratic system, imprisonment of journalists sits uncomfortably with law makers and the public alike.

Shield laws – or laws giving journalists special privilege in court – have been proposed as one solution to this problem. Only two Australian jurisdictions have such laws: New South Wales and, since 2007, the Commonwealth.

Shield legislation also exists in many other countries. This essay will compare the Australian laws with those in New Zealand, the United Kingdom and the United

¹ *R v Gerard Thomas McManus and Michael Harvey* [2007] VCC 619.

² Richard Ackland, 'Bring Unto Me Your Sources For Sacrifice' (1993) 11 *City Ethics*, 1.

³ Two prominent cases were those of Tony Barrass (*DPP v Luders*, unreported, Court of Petty Sessions of Western Australia, No. 27602 of 189) and Joe Budd (*R v Budd*, unreported, Supreme Court of Queensland, No. 36188 of 1992, Brisbane, 20 March 1992).

States. The three jurisdictions have been chosen because their legal systems mirror ours, and their media performs a similar function to the Australian press.

The aim of this paper is two-fold. First, it will provide an understanding of how shield laws operate in different countries, and how the Australian legislation fares in comparison. Second, this paper will offer pragmatic suggestions on how the Australian legislation could be strengthened, by looking at the operation of such laws in other jurisdictions.

This paper is divided into four parts. *Part One* will explore the tension between journalists and courts. *Part Two* will look at the pros and cons of shield laws as a solution. *Part Three* is the main comparative chapter in this paper. I will begin by outlining the relevant legislation in NSW, the Commonwealth, New Zealand, the United Kingdom and the United States, before comparing six main features:

- Persons covered by the Act
- Qualified or absolute privilege
- Presumptions and onus of proof
- Broader public interest considerations
- Exceptions
- Constitutional protection

Part Four will conclude with an assessment of the Australian legislation. It will offer recommendations on how to strengthen the privilege for Australian journalists, without compromising the ability of courts to administer justice fairly and effectively.

Part One

TENSION BETWEEN JOURNALISTS AND THE COURTS

Loyalty to the source

1.1 For journalists, loyalty to the source is paramount. Protecting sources has been described as the ‘golden rule of journalism’⁴ which overrides all other considerations, including the administration of justice.

1.2 What is the origin of this loyalty? In its most tangible form, the obligation is contained in the journalists’ code of ethics. Australia’s Code is produced by the Media Entertainment & Arts Alliance (MEAA). Clause 3 states:

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*.⁵

1.3 Only the ‘substantial advancement of the public interest or risk of substantial harm to people’ can override this clause. There is no opt-out clause for when this ethical obligation comes into conflict with the law.⁶

1.4 Why do journalists adhere to the principle so adamantly? Two reasons are commonly cited. First, journalists want to protect their own personal reputation, to ensure sources will trust them in future.⁷ Second, there is concern about a wider ‘chill effect’.⁸ Once one or two journalists gain a reputation for betraying confidences, the entire profession is tainted, and sources potentially dry up for everyone.

1.5 Protecting sources is also critical for ensuring a free flow of information to the public – an essential requirement of healthy democracy. As Wendy Bacon and Chris Nash write:

⁴ Jeremy Dear of the UK National Union of Journalists, quoted in Caslon Analytics Guide, *Secrecy and accountability* <<http://www.caslon.com.au/secrecyguide15.htm>> at 2 August 2007.

⁵ Media, Entertainment & Arts Alliance (MEAA), *Media Alliance Code of Ethics*, <<http://www.alliance.org.au/code-of-ethics.html>> at 2 August 2007, emphasis added.

⁶ Mark Pearson, *The Journalist’s Guide to Media Law* (3rd ed, 2007), 257-8.

⁷ Interview with Ghassan Nakhoul, SBS journalist (15 August 2007).

[T]he right and responsibility to protect sources is part and parcel of the rights and responsibilities of a free press to publish... [these rights] are crucial to the formation and articulation of public opinion, which is fundamental to government of the people, by the people, for the people.⁹

1.6 Judges, however, have been unimpressed. In *ICAC v Cornwall*, Justice Abadee of the NSW Supreme Court dismissed the journalists' code of ethics as a fiction, 'drafted to operate despite the law, and perhaps intended to operate beyond it'.¹⁰

1.7 This scepticism is heightened by the fact the MEAA code is not binding or legally enforceable, unlike, for example, the lawyers' code of ethics.¹¹ The most severe punishment open to the Australian Journalists' Association is expulsion of a member. But, since membership of the Association is not a pre-requisite to practice journalism, this is a weak threat.¹²

Contempt of Court

1.8 Contempt is an old doctrine enabling the courts to punish those who interfere with its function or the administration of justice. Several categories relating to journalists are distinguishable.¹³

1.9 *Sub judice* contempt involves publishing information that interferes with the course of justice, such as publishing material that may prejudice jurors or the judge, or prejudging an accused's guilt. Contempt also covers publishing information which scandalises the court and impairs public confidence in judicial proceedings. Other categories include revealing the deliberation of jurors, or improper behaviour in the courtroom (called contempt in the face of the court). A final category is disobedience

⁸ Janice Brabyn, 'Protection against judicially compelled disclosure of the identity of news gatherers' confidential sources in common law jurisdictions' (2006) 69 *Modern Law Review*, 926.

⁹ Wendy Bacon and Chris Nash, 'Confidential sources and the public right to know' (1999) 21 *Australian Journalism Review*, 10.

¹⁰ *ICAC v Cornwall* (1995) 38 NSWLR 207 at 240, also discussed *ibid*, 13.

¹¹ Commonwealth, *Evidence Amendment (Journalists' Privilege) Bill 2007 (Cth)*, Bills Digest no. 172 2006-7 <<http://www.aph.gov.au/library/pubs/BD/2006-07/07bd172.htm>> at 13 July 2007.

¹² *Ibid*.

¹³ See Pearson, above n 6, 85. Also see Australian Press Council, *Press Law in Australia* <<http://www.presscouncil.org.au/pcsite/fop/auspres.html>> at 20 September 2007.

contempt, which covers disobedience of court orders and the refusal to give evidence.¹⁴

1.10 Powers to punish for contempt are vested in the presiding judge in superior courts under common law.¹⁵ In other courts, such as District, Magistrates and Local courts, plus Commissions and Tribunals, such powers are outlined in the legislation governing court operations.¹⁶

1.11 The test for whether a person is in contempt for refusing to give evidence depends on whether the question is relevant and necessary in the interests of justice. In *John Fairfax & Sons v Cojuangco*¹⁷ the High Court reiterated that disclosing a journalists' source will not be necessary *unless in the interests of justice*.¹⁸ That is, if justice can be done without compelling the journalist to reveal his source, the court should not require disclosure.¹⁹

1.12 There are certain categories of relationships which provide witnesses with a lawful excuse to refuse to give evidence. These include husband-wife, lawyer-client, and sometimes doctor-patient and priest-penitent relationships.²⁰ Could the journalist-source relationship also provide a lawful excuse, on the public policy ground that compelling disclosure hampers the free flow of information?

1.13 The Australian courts have rejected this argument. In *Cojuangco* the High Court acknowledged the valuable role the media play in investigating and facilitating the free flow of information.²¹ But the judges unanimously held that the *paramount* public interest was the administration of justice.

This paramount public interest yields only to a superior public interest, such as the public interest in the national security. The role of the media in collecting and disseminating information to the public does not give rise to a public interest which can be allowed to prevail over the public interest of a litigant in securing a trial of his action on the basis of the relevant and admissible evidence.²²

¹⁴ Des Butler and Sharon Rodrick, *Australian Media Law* (2nd ed, 2004), 322.

¹⁵ Pearson, above n 6, 256.

¹⁶ *Ibid.*

¹⁷ (1988) 165 CLR 346.

¹⁸ *Ibid* at 14.

¹⁹ Butler and Rodrick, above n 14, 324.

²⁰ *Ibid*, 322.

²¹ *John Fairfax & Sons v Cojuangco* (1988) 165 CLR 346 at 11 and 13.

²² *Ibid* at 13.

The Newspaper Rule

1.14 In practice, there are two situations where journalists have generally not been required to disclose their sources: at the interlocutory stage of a defamation action (the ‘newspaper rule’) and during pre-trial discovery procedures.²³

1.15 Different bases have been advanced for the newspaper rule. One rationale is that the publishers hold a special position, in that they accept responsibility for the content of their journals, making the source’s identity unnecessary in pursuing a defamation action.²⁴ Another is the desirability of protecting those who contribute to newspapers from unnecessary disclosure of their identity.²⁵ The newspaper rule also prevents improper use of the discovery process for ‘fishing expeditions’ for the sole aim of identifying sources to be sued.²⁶

1.16 However, the newspaper rule has limitations. The High Court has confirmed that it is a rule of *practice*, rather than of evidence.²⁷ More importantly, the rule only applies to disclosure at the *interlocutory proceedings* in a defamation or analogous action.²⁸ It ceases to apply once the trial begins. The newspaper rule thus offers no protection for a journalist being pressed to disclose his source during a trial.

²³ Butler and Rodrick, above n 14, 325.

²⁴ *McGuinness v Attorney-General of Victoria* [1940] 63 CLR 73 at 104 per Dixon J.

²⁵ *Ibid.*

²⁶ *Attorney-General v Mulholland* [1963] 2 QB 477 at 490 per Denning MR, cited in Butler and Rodrick, above n 14, 326.

²⁷ *John Fairfax & Sons v Cojuangco* (1988) 165 CLR 346 at 18.

²⁸ *Ibid.*

Part Two

ARE SHIELD LAWS THE SOLUTION?

2.1 Shield laws, or laws giving journalists special privilege in court, have been advanced as one way to resolve this tension between courts and the media. Such laws protect a journalist from being held in contempt if he or she refuses to give certain evidence in court.

2.2 What are the arguments for such laws? The positive argument centres on the valuable democratic debate fostered by good journalism. By protecting confidential sources who might otherwise not come forward, shield laws promote the free flow of information to into the public arena.

2.3 But critics have cautioned that shield laws could, over time, create an unhealthy relationship between politicians and journalists, especially if the former assumes the role of press guardian.²⁹ Another concern is that the real beneficiaries of this type of legislation will not be the intended vulnerable whistleblowers, but rather ‘big end of town’ players such as spin-doctors, politicians, bureaucrats, business leaders, who often leak information to gain tactical advantages for themselves.³⁰

2.4 Further, shield laws might lead to the overzealous use of unattributed sources, which could in fact *disempower* the public, by denying them the details required to assess and verify a story’s source.³¹

2.5 Finally, there is the fundamental concern that shield laws will hamper the administration of justice, by allowing important evidence to be kept from the court. Striking the correct balance between these two competing interests has been the major concern of legislators both in Australia and overseas.

²⁹ Paul Brewer, ‘The Fourth Estate and the Quest for a Double Edged Shield: Why a Federal Reporters’ Shield Law Would Violate the First Amendment’ (2006) 36 *The University of Memphis Law Review*, 1105-1106. Also see Bree Nordenson, ‘The Shield Bearer’ (2007) 46 *Columbia Journalism Review*, 50.

³⁰ Bacon and Nash, above n 9, 14.

³¹ *Ibid*, 20.

Part Three

COMPARISON OF LEGISLATION

3.1 This chapter begins with an overview of the legislation in each of the jurisdictions, before comparing six main features of the laws.

New South Wales

3.2 New South Wales introduced Australia's first privilege for journalists. In 1997, the NSW Parliament amended the *Evidence Act 1995* (NSW), inserting a new Division 1A into Part 3.10 (Privileges). The provision applies to any compulsory process for disclosure, including pre-trial discovery processes, demands for subpoenas and search warrants, and notices to produce documents.³²

3.3 The new Division creates a privilege covering *all* confidential professional relationships. Under section 126A, information is a 'protected confidence' if given

- (a) in the course of a relationship in which the confidant was acting in a professional capacity, and
- (b) when the confidant was under an express or implied obligation not to disclose its contents, whether or not the obligation arises under law or can be inferred from the nature of the relationship between the person and the confidant.

3.4 This definition is flexible enough to cover a range of relationships where confidentiality is paramount. It could potentially extend to doctor/patient, psychologist/client, social worker/client, private investigator/client and journalist/source relationships.³³

3.5 The main operative provision, section 126B, provides:

- (1) The court may direct that evidence not be adduced in a proceeding if the court finds that adducing it would disclose:
 - (a) a protected confidence, or
 - (b) the contents of a document recording a protected confidence, or
 - (c) protected identity information.
- (2) The court may give such a direction:
 - (a) on its own initiative, or

³² Pearson, above n 6, 259.

³³ Stephen Odgers, *Uniform Evidence Law* (6th ed, 2004) at 1.3.11900, 492.

- (b) on the application of the protected confider or confidant concerned (whether or not either is a party).
- (3) The court must give such a direction if it is satisfied that:
- (a) it is likely that harm would or might be caused (whether directly or indirectly) to a protected confider if the evidence is adduced, and
 - (b) the nature and extent of the harm outweighs the desirability of the evidence being given.

3.6 The New South Wales privilege is not absolute: it is a *qualified* privilege available at the discretion of the court. The balancing test in section 126B(3) triggers the protection. Two elements of the test must be shown. First, that it is likely that harm would or might be caused (directly or indirectly) to a source if the evidence is adduced. Second, that the nature and extent of the harm outweighs the desirability of the evidence being given. ‘Harm’ includes physical bodily harm, financial loss, stress or shock, damage to reputation or emotional or psychological harm (such as shame, humiliation and fear).³⁴

3.7 The factors the court must consider in applying the balancing test include:

- the probative value of the evidence;³⁵
- the importance of the evidence to the proceeding;³⁶
- the nature and gravity of the relevant offence;³⁷
- the availability of other evidence;³⁸
- the likely effect of adducing evidence of the source, including the likelihood of harm, and the nature and extent of that harm;³⁹
- if the proceeding is a criminal one, whether the party seeking to adduce the evidence is the defendant or prosecution;⁴⁰ and
- whether the substance of the information being sought, or the identity of the source, has already been revealed by the journalist or by a third party.⁴¹

³⁴ *Evidence Act 1995* (NSW) s 126A(1).

³⁵ *Ibid* s 126B(4)(a).

³⁶ *Ibid* s 126B(4)(b).

³⁷ *Ibid* s 126B(4)(c).

³⁸ *Ibid* s 126B(4)(d).

³⁹ *Ibid* s 126B(4)(e).

⁴⁰ *Ibid* s 126B(4)(g).

⁴¹ *Ibid* s 126B(4)(h).

3.8 Although section 126B(2)(a) allows for the court to make a direction of its own initiative, in practice it will most likely be the *journalist* who raises this privilege, and who must therefore prove the balancing test in their favour.⁴²

3.9 The privilege is also subject to an exception. Section 126D states that the privilege will not apply in cases of ‘misconduct’. Misconduct is defined as:

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.⁴³

It suffices if there are ‘reasonable grounds’ for finding that the fraud, offence or act was committed.⁴⁴

NRMA v John Fairfax Publications⁴⁵

3.10 The New South Wales provisions were considered in *NRMA v John Fairfax Publications*, a Supreme Court decision in which the National Roads and Motorists Association (NRMA) had sought court orders for several journalists to reveal their source from confidential board meetings. The NRMA sought the information in order to pursue an action against the source, for breach of his or her fiduciary duty as a director.⁴⁶

3.1 Master Macready found that the privilege *could* apply to journalists as a profession.⁴⁷ After considering the factors set out in section 126B, Master Macready reverted to the test of whether the disclosure was necessary ‘in the interests of justice’.⁴⁸ He found that the interests of justice in giving the NRMA a remedy outweighed the possible harm to the journalist’s reputation, or their inability to obtain

⁴² Corrs Chambers Westgarth, *Corrs in Brief* (June 2007) <http://www.corrs.com.au/corrs/website/web.nsf/Content/Pub_LT_InBrief_060607_Journalists_Privilege> at 13 July 2007.

⁴³ *Evidence Act 1995* (NSW) s 126D(1).

⁴⁴ *Ibid* s 126D(2).

⁴⁵ [2002] NSWSC 563.

⁴⁶ *Ibid* at 5-7.

⁴⁷ *Ibid* at 150-152.

⁴⁸ *Ibid* at 168.

information if forced to disclose the source's identity.⁴⁹ The journalists' evidence was therefore held not to be covered by the privilege.⁵⁰

Commonwealth

3.12 Following public pressure after the *McManus and Harvey* decision, the Commonwealth Parliament introduced new legislation modelled almost exactly on the New South Wales provisions. The *Evidence Amendment (Journalists' Privilege) Bill 2007* amended the *Evidence Act 1995* (Cth) and various other acts.⁵¹

3.13 The Commonwealth legislation differs from NSW in two important ways:

(i) Who is covered

3.14 The Commonwealth definition of a 'protected confidence' in section 126A is confined to a 'journalist'.

3.15 This means that the Commonwealth shield has a much more limited application than the New South Wales law, which purports to cover a whole range of professional confidential relationships. As the Bills Digest pointed out, 'this distinction means the outcomes of the legislation could hardly be less uniform in terms of content'.⁵²

(ii) Balancing test

3.16 The Commonwealth balancing test in section 126B requires the court to consider, and 'give the greatest weight', to any risk of prejudice to national security.⁵³

Absence of strong whistleblower protection

⁴⁹ Ibid at 169.

⁵⁰ Ibid at 170.

⁵¹ See [Annex B](#) for the full text of the new Division 1A, *Evidence Act 1995* (Cth).

⁵² Commonwealth, above n 11, 4.

⁵³ *Evidence Act 1995* (Cth) s 126B(4).

3.17 Despite mirroring most of the New South Wales provisions, the Commonwealth laws have been singled out as ‘inadequate and half-baked’.⁵⁴ The major criticism is that, in practice, the privilege will apply in very few cases. This is due to the misconduct exception in section 126D, coupled with the absence of strong whistleblower protection in the Commonwealth jurisdiction.

3.18 The misconduct exception in section 126D ensures the privilege will not apply if the source’s communication to the journalist was made in the commission of a fraud, an offence or an act with civil penalty liability.⁵⁵

3.19 Under the *Crimes Act 1914* (Cth) and various other secrecy laws, almost all cases involving the unauthorised release of Commonwealth information will be an offence.⁵⁶ (A recent example was the case of Allan Kessing, the Customs official who leaked a confidential report on the subject of airport security to two journalists from *The Australian*. Kessing was found guilty of an offence under section 70(2) of the *Crimes Act 1914* (Cth) concerning Disclosure of Information by Commonwealth Officers, and received a nine month suspended sentence).⁵⁷

3.20 Whistleblower laws can step in to protect public servants who reveal information to an outside source. Every Australian jurisdiction has some form of whistleblower protection.⁵⁸

3.21 In New South Wales, for example, whistleblower laws are contained in the *Protected Disclosures Act 1994* (NSW). Sections 8(1)(d) and 19 protect public officials who disclose information to a journalist, under certain conditions.⁵⁹ These include a requirement that the whistleblower first disclose the matter to an investigating authority, which has failed to take action or decided not to investigate

⁵⁴ NSW Attorney-General John Hatzistergos quoted by Chris Merritt, ‘Federal shield shot full of holes’, *The Australian* (Sydney), 24 May 2007.

⁵⁵ *Evidence Act 1995* (Cth) s 126D(1).

⁵⁶ Commonwealth, above n 11, 11.

⁵⁷ *R v Allan Robert Kessing* [2007] NSWDC 138.

⁵⁸ See *Whistleblower Protection Act 1993* (SA), *Whistleblower Protection Act 1994* (QLD), *Protected Disclosures Act 1994* (NSW), *Public Interest Disclosure Act 1994* (ACT), *Public Service Act 1999* (Cth) s16, *Whistleblower Protection Act 2001* (Vic), *Public Interest Disclosures Act 2002* (Tas), *Public Interest Disclosures Act 2003* (WA).

⁵⁹ See [Annex F](#) for the full text of the *Protected Disclosures Act 1994* (NSW).

the matter.⁶⁰ The official must also have reasonable grounds for believing the disclosure is substantially true, and indeed that it *must be* substantially true.⁶¹

3.22 These are certainly onerous requirements. Many whistleblowers, for example, would struggle to conclusively prove the ‘truth’ of their disclosure in a court or tribunal, in the face of opposing evidence.⁶² Despite this, New South Wales stands out as the only Australian jurisdiction to contemplate media disclosures – a nationwide legislative gap that has been described as a ‘glaring’.⁶³

3.23 In contrast, the Commonwealth whistleblower laws provide *no protection* for media whistleblowers at all.⁶⁴ Commonwealth public servants who provide information to journalists are therefore highly likely to be committing an offence. *Consequently, the journalist receiving the information will be unable to benefit from the privilege, because of the misconduct exception in section 126D.*

3.24 Recently there have been moves to improve the Commonwealth regime. In 2007, Senator Andrew Murray (Democrats) introduced a Private Senators Bill on this topic. The *Public Interests Disclosure Bill 2007* (Cth) protects Commonwealth public officials who make disclosures to a journalist under certain conditions.⁶⁵ Senator Murray’s Bill is unlikely to pass into law however, as Private Members and Senators Bills very rarely do.⁶⁶

Situation in other Australian states and territories

3.25 Aside from New South Wales and the Commonwealth, no other Australian states or territories currently offer a privilege to journalists. The Law Reform Commission of Western Australia recently made recommendations to enact a

⁶⁰ *Protected Disclosures Act 1994* (NSW) s 19(3).

⁶¹ *Ibid* s 19(4) and 19(5).

⁶² A J Brown, ‘Public Interest Disclosure Legislation in Australia: Towards the Next Generation’ prepared as part of the Australian Research Council Linkage Project, *Whistling While They Work* (2006) <<http://www.griffith.edu.au/centre/slr/whistleblowing/>> at 13 July 2007, 44.

⁶³ *Ibid*, 42.

⁶⁴ See Annex G for the full text of the *Public Service Act 1999* (Cth) s 16. In fact, the Commonwealth is the *weakest* whistleblower protection regime in Australia. See Brown, above n 62, esp. Table 15.

⁶⁵ The full text of the Bill is reproduced in Annex H.

⁶⁶ Email from Senator Andrew Murray’s office to Lorraine Ingham, 28 September 2007.

privilege, but this has not yet been adopted.⁶⁷ Victoria and the ACT have expressed support for the Commonwealth model.⁶⁸ The issue of a uniform approach is being discussed by the Australian Attorneys-General at their Standing Committee meetings (SCAG). So far there has been no consensus on a way forward.⁶⁹

New Zealand

3.26 The New Zealand shield law is contained in section 68 of the *Evidence Act 2006* (NZ). The provision begins by stating neither the journalist nor his or her employer is compellable in a civil or criminal proceeding to answer any question or produce any document that would disclose the identity of the informant or enable that identity to be discovered.⁷⁰

3.27 This presumption can only be overturned if the court, applying a balancing test, finds that the public interest in disclosing the source outweighs

- (a) any likely adverse effect of the disclosure on the informant or any other person; and
- (b) the public interest in the communication of facts and opinion to the public by the news media and, accordingly also, in the ability of the news media to access sources of facts.⁷¹

3.28 The onus in the New Zealand legislation thus lies with the party seeking disclosure to rebut the initial presumption, by proving the balancing test in their favour.

3.29 It is worth noting that the New Zealand *Evidence Act* also contains an additional provision covering general relationships where confidential information is imparted, much like the NSW law.⁷² However, section 68 was specifically inserted

⁶⁷ Australian Law Reform Commission (ALRC), *Uniform Evidence Law*, Report 102 (2005) <<http://www.austlii.edu.au/au/other/alrc/publications/reports/102/>> at 13 July 2007. Also see Law Reform Commission of Western Australia, *Professional Privilege for Confidential Communications*, Report 90 <http://www.lrc.justice.wa.gov.au/2_reports.html> at 20 August 2007.

⁶⁸ Merritt, above n 54.

⁶⁹ Bacon and Nash, above n 9, 10 citing Chris Merritt, 'States reject journos' sources law', *The Australian* (Sydney), 13 April 2007, 23.

⁷⁰ *Evidence Act 2006* (NZ) s 68(1).

⁷¹ *Ibid* s 68(2).

⁷² *Ibid* s 69.

for journalists, to ‘give greater confidence to a source that his or her identity would not be revealed’.⁷³

United Kingdom

3.30 The United Kingdom has a long history of dealing with the tension between courts and the press.⁷⁴ Section 10 of the *Contempt of Court Act 1981* (UK) now provides a statutory protection. It states:

No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime.

3.31 Like New Zealand, the UK legislation begins with a presumption that a court may not require a person to disclose a source. The presumption is overcome only if the court is satisfied that the disclosure is ‘necessary in the interests of justice or national security or for the prevention of disorder or crime’. Again, like New Zealand, the onus lies with the party seeking disclosure to rebut the presumption.

3.32 This provision must be understood in light of recent cases, which have explored its relationship with Article 10 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*.⁷⁵

3.33 A recent case considering this was *Goodwin v United Kingdom*.⁷⁶ The case concerned William Goodwin, a trainee journalist, who received confidential information about a company struggling financially and trying to raise a 5 million-pound loan.⁷⁷ The information derived from a classified draft of a corporate plan that had probably been stolen. The company sought an injunction against the story and a court order requiring Goodwin to disclose his notes identifying the source.⁷⁸ When he

⁷³ New Zealand Law Commission, *Reform of the Law*, Evidence Report 55-Vol 1(1999) at 302.

⁷⁴ See *Attorney-General v Mulholland* [1963] 2 QB 477 for the first discussion of the balancing test between the interests of justice, versus the interest in maintaining a free flow of information.

⁷⁵ *European Convention for the Protection of Human Rights and Fundamental Freedoms* 213 UNTS 221 (entered into force 3 September 1953).

⁷⁶ [1996] ECHR 16.

⁷⁷ *Ibid* at 11.

⁷⁸ *Ibid* at 14-15.

refused, Goodwin was fined 5,000 pounds for contempt.⁷⁹ Goodwin appealed the decision all the way to the European Court of Human Rights (ECHR).

3.34 The ECHR held that the order to reveal Goodwin's source, and the fine imposed on him for refusing to do so, was a violation of Article 10 of the Convention. Article 10 states everyone has the right to freedom of expression⁸⁰ subject only to such restrictions which are

prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of other, for preventing the disclosure information received in confidence, or for maintaining the authority and impartiality of the judiciary.⁸¹

3.35 The ECHR held that a journalist may only be compelled in 'exceptional circumstances where vital public or individual interests were at stake'.⁸² The competing interests of the company – for example, in commencing proceedings against the source – did not sufficiently outweigh the vital public interest in protecting the source's identity.⁸³ *Goodwin* has since been considered and accepted by the United Kingdom courts.⁸⁴

United States (Federal)

3.36 Journalists in the United States do not yet enjoy statutory shield protection at the federal level.⁸⁵ However, in response to recent high-profile cases, including the Valerie Plame affair, moves have been made towards enacting a shield law.⁸⁶

⁷⁹ *Ibid* at 19.

⁸⁰ *European Convention for the Protection of Human Rights and Fundamental Freedoms* 213 UNTS 221 (entered into force 3 September 1953) Art 10.1.

⁸¹ *Ibid*, Art 10.2.

⁸² *Goodwin v United Kingdom* [1996] ECHR 16 at 37.

⁸³ *Ibid* at 45.

⁸⁴ See *Ashworth Hospital Authority v Mirror Group Newspapers Ltd* [2002] UKHL 29; [2002] 1 WLR 2033 and *Mersey Care NHS Trust v Ackroyd* [2006] EWHC 107.

⁸⁵ This paper will not consider the extensive state-level shield legislation in the US. A comprehensive comparison of these laws can be found at: Congressional Research Service (CRS), *Journalists' Privilege to Withhold Information in Judicial and Other Proceedings: State Shield Structures*, Report for Congress No. RL32806, 8 March 2005 <<http://italy.usembassy.gov/policy/crs/default.asp>> at 30 August 2007. Detailed commentary is also provided by the Reporters Committee for Freedom of the Press (RCFP) in their report *The Reporter's Privilege*, found at <www.rcfp.org> at 13 July 2007.

⁸⁶ The Valerie Plame affair involved the leaking of the identity of an undercover CIA operative to several reporters. One journalist served 85 days in jail for refusing to reveal the identity of her source, whilst another narrowly escaped jail following a last-minute reprieve from his source. See *In re Grand Jury Subpoena (Miller)* 397 F 3d 964 (2005).

3.37 In May 2007, identical legislation was introduced into the Senate and House of Representatives titled the *Free Flow of Information Act 2007*.⁸⁷ The Committees on the Judiciary are currently examining the bills.

3.38 The aim of the *Free Flow of Information Act* is to clarify the confusion which exists in the federal circuits on the issue of journalists' privilege. Nine of the circuit courts recognise a *qualified* reporters' privilege, however each circuit differs in its form and scope.⁸⁸

3.39 If passed, the *Free Flow of Information Act* will provide a high level of protection. As in New Zealand and the United Kingdom, this legislation begins with a presumption that in any proceeding connected with Federal law, a court may not compel a journalist to provide testimony, or documents possessed, as part of engaging in journalism.⁸⁹ To overcome the presumption, the party seeking disclosure bears the onus to prove four elements to the standard of the 'preponderance of the evidence'.⁹⁰

3.40 First, they must have exhausted all reasonable alternative sources to obtain the testimony or document being sought.⁹¹ Second (in criminal cases), the party must prove that there are reasonable grounds to believe that a crime has occurred, and that the journalist's evidence is essential to the case.⁹² Or (in non-criminal cases) they must show that the evidence is essential to the completion of the matter.⁹³ Third, it must be shown that disclosing the source's identity is necessary to prevent imminent and actual harm to national security;⁹⁴ imminent death or significant bodily harm;⁹⁵ or that the source's identity is necessary to identify a person who has disclosed a valuable trade secret, health information, or other non-public personal information.⁹⁶

⁸⁷ H.R. 2102 and S.1267 both 2 May, 2007.

⁸⁸ Brewer, above n 29, 1089.

⁸⁹ *Free Flow of Information Act 2007* s 2(a).

⁹⁰ *Ibid* s 2(a).

⁹¹ *Ibid* s 2(a)(1).

⁹² *Ibid* s 2(a)(2)(A)(i) and (ii).

⁹³ *Ibid* s 2(a)(2)(B).

⁹⁴ *Ibid* s 2(a)(3)(A).

⁹⁵ *Ibid* s 2(a)(3)(B).

⁹⁶ *Ibid* s 2(a)(3)(C)(i) to (iii).

3.41 Finally, the party must convince the court that non-disclosure of this information is contrary to the public interest, according to a balancing test. The test requires the court to weigh the public interest in compelling disclosure, versus the public interest in newsgathering and maintaining the free flow of information.⁹⁷

⁹⁷ Ibid s 2(a)(4).

COMPARISON OF KEY FEATURES IN THE SHIELD LAWS

Persons covered by the Act

3.42 In this digital age, where bloggers and other online amateurs perform roles akin to traditional journalism (including reporting of news), the question of exactly *who* is covered by a journalists' privilege is an important one.

3.43 In New South Wales, a range of 'professional confidential relationships' is covered. The focus is thus on the *confidential quality* of the relationship, rather than whether the recipient was a journalist or not.⁹⁸ *NRMA v John Fairfax* has established that journalism is a profession which certainly can be covered by the NSW laws.⁹⁹

3.44 In contrast, the Commonwealth privilege applies only to 'journalists'.¹⁰⁰ Yet it is the only jurisdiction to use this term without providing a definition.

3.45 The New Zealand privilege, for example, applies to both journalists and their employers.¹⁰¹ It defines a journalist as 'a person who in the normal course of that person's work may be given information by an informant in the expectation that the information may be published in a news medium'.¹⁰² This definition takes a more traditional view of a journalist, as a professional who publishes in the normal course of work.

3.46 A broader definition can be found in the US *Free Flow of Information Act*, where a covered person is one who is 'engaged in journalism', including a supervisor, employer, parent, subsidiary or affiliate of such covered person.¹⁰³ The definition of 'journalism' is also wide, being the gathering, preparing, collecting, photographing, recording, writing, editing, reporting, or publishing of news or information that concerns local, national or international events or other matters of public interest for

⁹⁸ See the definitions in *Evidence Act 1995* (NSW) s 126A(1).

⁹⁹ *NRMA v John Fairfax Publications* [2002] NSWSC 563 at 150-152.

¹⁰⁰ *Evidence Act 1995* (Cth) s 126A(1).

¹⁰¹ *Evidence Act 2006* (NZ) s 68(1).

¹⁰² *Ibid* s 68(5).

¹⁰³ *Free Flow of Information Act 2007* s 4(2).

dissemination to the public'.¹⁰⁴ This definition possibly would cover bloggers, freelance journalists without contracts, and student journalists.¹⁰⁵

Qualified or absolute privilege

3.47 None of the five jurisdictions examined give journalists an absolute privilege, that is, a right to withhold evidence in all circumstances. Very few jurisdictions worldwide do; Austria, Germany and some US states being among the few.¹⁰⁶

3.48 Whilst an absolute privilege does have attractions in terms of simplicity and efficiency, it does not provide the flexibility required in exceptional cases.¹⁰⁷ Justin Quill, an Australian media lawyer, notes:

It must be acknowledged that there are exceptional circumstances in which the law (not necessarily the media or journalists) would consider that disclosure of the identity of the source is more important to the public than promoting the public interest of protecting that confidential source.¹⁰⁸

Presumptions and onus of proof

3.49 The Australian jurisdictions stand alone as the only two lacking a presumption in favour of the journalist. Instead, the Australian legislation offers a *discretionary privilege*, meaning the privilege is available at the court's discretion after consideration of the balancing test in section 126B. As noted above, in practice it will most likely be the *journalist* who raises the privilege, and who will therefore carry the onus to prove the balancing test in their favour. The absence of a presumption has led some commentators to note that it is not a true privilege.¹⁰⁹

3.50 The Australian position is in stark contrast to the legislation in New Zealand, the United Kingdom and United States. All three jurisdictions begin with a

¹⁰⁴ Ibid s 4(5).

¹⁰⁵ RCFP, *Special Report: Reporters and Federal Subpoenas* <http://www.rcfp.org/shields_and_subpoenas.html> at 8 August 2007.

¹⁰⁶ Butler and Rodrick, above n 14, 330.

¹⁰⁷ Brabyn, above n 8, 928.

¹⁰⁸ Justin Quill, 'Contempt of Court and Journalists' Sources' (Speech delivered at the Centre for Media and Communications Law Courts and Media Conference, Melbourne, 27 July 2007).

¹⁰⁹ Corrs Chambers Westgarth, above n 42.

presumption that the privilege exists, then the onus to rebut the presumption is placed on the *party seeking disclosure*. In effect, it is the reverse of the Australian situation.

Broader public interest considerations

3.51 Two of the five jurisdictions examined in this paper require the court to consider the wider public interest in maintaining the confidentiality between journalist and source, as part of a balancing test.

3.52 The New Zealand balancing test requires consideration of ‘the public interest in the communication of facts to the public by the media, including the ability of the media to access sources’.¹¹⁰ Similarly, the US legislation requires the court to weigh the public interest of compelling disclosure against the ‘public interest in news-gathering and maintaining the free flow of information’.¹¹¹

3.53 The inclusion of this type of consideration reflects a concern that forced disclosure might hamper the media’s ability to function properly. No similar consideration is required in Australia. The New South Wales and Commonwealth balancing tests focus on *harm to the source*, rather than harm to the journalist, the media, or the public at large.¹¹²

3.54 In *NRMA v John Fairfax*, Master Macready *did* take into account the public interest in ensuring a free flow of information, stating that:

the very nature of the discretion to be exercised under s 126B(1)...must take into account relevant policy considerations.¹¹³

But this is certainly not required by the legislation. So long as there is no explicit reference to such a factor in the wording of the statute, ‘the question as to whether similar considerations will be taken into account by future decision makers will remain open’.¹¹⁴

¹¹⁰ *Evidence Act 2006* (NZ) s 68(2).

¹¹¹ *Free Flow of Information Act 2007* s 2(a)(4).

¹¹² *Evidence Act 1995* (NSW) and *Evidence Act 1995* (Cth) s 126B(3).

¹¹³ *NRMA v John Fairfax Publications* [2002] NSWSC 563 at 165-166.

¹¹⁴ Commonwealth, above n 11, 13.

Exceptions to the privilege

3.55 New South Wales and the Commonwealth are also the only two jurisdictions to explicitly identify instances in which the privilege will *not* apply. The misconduct exception in section 126D has been discussed in some detail above.

3.56 In the other three jurisdictions, the commission of an offence does not automatically rule out the privilege. For example, the ECHR *Goodwin*¹¹⁵ case involved the commission of an offence (as the information Goodwin received was probably stolen from classified business documents), but still the ECHR held the privilege should apply. Subsequent UK cases, such as *Mersey Care NHS Trust v Ackroyd*,¹¹⁶ have also found that a journalist can maintain confidentiality despite the commission of an offence.

3.57 The New Zealand and United States legislation is silent on the commission of an offence.¹¹⁷ It would most likely be considered as a part of the balancing test, as one factor in favour of disclosure.

Constitutional protection

3.58 Of all the jurisdictions examined, the United States provides the most explicit constitutional protection for journalists. The First Amendment of the US Constitution states:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; *or abridging the freedom of speech, or of the press*; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

3.59 *Branzburg v Hayes*¹¹⁸ is the leading US constitutional case considering sources. In a five-four decision, the Supreme Court held that the First Amendment

¹¹⁵ *Goodwin v United Kingdom* [1996] ECHR 16.

¹¹⁶ [2006] EWHC 107.

¹¹⁷ See the balancing tests contained in *Evidence Act 2006* (NZ) s 68(2) and *Free Flow of Information Act 2007* s 2(a)(4).

¹¹⁸ 408 US 665 (1972).

did *not* provide a privilege against disclosing confidential sources when subpoenaed to a grand jury.¹¹⁹

3.60 *Branzburg* has since been interpreted differently by various state courts and federal circuits. Some courts have read *Branzburg* as creating a qualified privilege in certain situations (each to be judged on its facts), whereas others have rejected the privilege altogether.¹²⁰ So there is currently an inconsistent body of US case law, both at state and federal levels, on the question of type of protection (if any) the First Amendment provides to journalists.

3.61 In contrast, the Australian Constitution does not provide an explicit guarantee of free speech. The High Court has, however, found there to be an implied freedom of political communication.¹²¹ The implied freedom is limited to what is necessary for the effective operation of the system of representative and responsible government provided for by the Constitution.¹²² Could this be the basis for a journalists' privilege?

3.62 A constitutional argument will be difficult to make. One hurdle will be showing that the content of the article constitutes 'political communication'. In *NRMA v John Fairfax*, Master Macready rejected the defendants' submission that the articles in question fell under the definition of 'political discussion', and therefore declined to pursue the inquiry of whether the constitution offered any protection in that case.¹²³

3.63 Even if it could be shown that an article fell within the definition of political discussion, there is real question as to whether the 'silence' of the journalist refusing to give evidence constitutes 'communication' as such. In *ICAC v Cornwall* it was held that the right a journalist asserts to withhold a source cannot be characterised as freedom of speech.¹²⁴

¹¹⁹ Ibid at 690, 708-09.

¹²⁰ Brewer, above n 29, 1088.

¹²¹ See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

¹²² Ibid at 561-562.

¹²³ *NRMA v John Fairfax* at 144. The articles concerned the size of the NRMA board, upgrades to non-executive directors' expenses, and the decision to include election ads in the NRMA Open Road magazine. See 133 – 134.

¹²⁴ *ICAC v Cornwall* (1995) 38 NSWLR 207 at 254, discussed Butler and Rodrick, above n 14, 325.

Part Four

CONCLUSION & RECOMMENDATIONS

4.1 On the basis of the comparison undertaken in this paper, the Australian privilege for journalists appears to lag well behind its foreign counterparts. The main deficiencies can be summarised as follows:

- Only two Australian jurisdictions – New South Wales and the Commonwealth – recognise such a privilege. All the other states and territories are yet to adopt similar legislation.
- There is uncertainty over who is covered by the Commonwealth legislation, since there is no definition for the term ‘journalist’.
- Both Australian jurisdictions lack a presumption that the journalist need not reveal their sources – a presumption which exists in all the other regimes. This has led to the situation, in practice, where the journalist will carry to burden of proving, on balance, the value of protecting the source.
- The misconduct exception in section 126D, unique to Australia, means that the privilege will not work effectively without strong concurrent whistleblower protection, particularly covering media disclosures. This is notably lacking in the Commonwealth jurisdiction.
- The Australian legislation also lacks any explicit reference to wider policy issues, such as the public interest in ensuring a free flow of information. This consideration is a central feature of both the New Zealand and United States laws.

4.2 How, then, could the privilege in Australia be strengthened?

1. Define the term ‘journalist’, or uniformly adopt the term ‘professional confidential relationship’.

Section 126A of the Commonwealth legislation should be amended to include a comprehensive definition of ‘journalist’. The United States and New Zealand laws provide models, but neither may be appropriate. New Zealand has adopted a very narrow definition, which really only covers the traditional ‘professional’ journalist. This neglects the important quasi-journalistic role now played by bloggers and other amateurs. But the US definition potentially extends the privilege to a very wide group of laypeople, possibly making it too broad.

A better solution would be for the Commonwealth to adopt the flexible term ‘professional confidential relationships’, found in the New South Wales law.¹²⁵ This allows each case to be tested on its facts, so avoiding the unnecessary and difficult task of defining the term ‘journalist’. Such a move would have the added benefit of bringing the Commonwealth legislation into relative uniformity with New South Wales, which is the continuing goal of the *Uniform Evidence Acts* process.

2. Presumption in favour of the journalist.

Section 126B should be amended to include a presumption that a journalist is not required to reveal his source, which could be modelled on the wording of the New Zealand or United States legislation. This will place the onus squarely on the *party seeking disclosure* to rebut the presumption.

3. Include a broader public interest consideration.

The balancing test in section 126B(3) should require the court to consider the broader public interest in maintaining confidentiality between journalist and source. The Australian laws could adopt the New Zealand formulation (considering the ‘public

¹²⁵ Contained in the *Evidence Act 1995* (NSW), s 126A.

interest in the communication of facts to the public by the media, including the ability of the media to access sources')¹²⁶ or alternatively, the US wording ('public interest in news-gathering and maintaining the free flow of information').¹²⁷

4. Improve whistleblower protection.

If the privilege is to be subject to a misconduct exception, then legislation protecting whistleblowers who disclose to the media must be strengthened, particularly in the Commonwealth jurisdiction. Section 19 of the *Protected Disclosures Act 1994* (NSW) and section 9(2) of the *Public Interest Disclosure Bill 2007* (Cth) provide potential models.¹²⁸

5. Uniformity across all Australian jurisdictions.

The protection will be most effective if all Australian states and territories adopt uniform legislation. The Standing Committee of Attorneys-General is currently considering this issue.

¹²⁶ *Evidence Act 2006* (NZ) s 68(2).

¹²⁷ *Free Flow of Information Act 2007* s 2(a)(4).

¹²⁸ See [Annex F](#) and [Annex H](#) for full text of these provisions.

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Annexes

Annex A – *Evidence Act 1995* (NSW) Division 1A

Division 1A – Professional confidential relationship privilege

126A Definitions

(1) In this Division: "**harm**" includes actual physical bodily harm, financial loss, stress or shock, damage to reputation or emotional or psychological harm (such as shame, humiliation and fear). "**protected confidence**" means a communication made by a person in confidence to another person (in this Division called the "**confidant**"):

(a) in the course of a relationship in which the confidant was acting in a professional capacity, and

(b) when the confidant was under an express or implied obligation not to disclose its contents, whether or not the obligation arises under law or can be inferred from the nature of the relationship between the person and the confidant.

"**protected confider**" means a person who made a protected confidence. "**protected identity information**" means information about, or enabling a person to ascertain, the identity of the person who made a protected confidence.

(2) For the purposes of this Division, a communication may be made in confidence even if it is made in the presence of a third party if the third party's presence is necessary to facilitate communication.

126B Exclusion of evidence of protected confidences

(1) The court may direct that evidence not be adduced in a proceeding if the court finds that adducing it would disclose:

(a) a protected confidence, or

(b) the contents of a document recording a protected confidence, or

(c) protected identity information.

(2) The court may give such a direction:

(a) on its own initiative, or

(b) on the application of the protected confider or confidant concerned (whether or not either is a party).

(3) The court must give such a direction if it is satisfied that:

(a) it is likely that harm would or might be caused (whether directly or indirectly) to a protected confider if the evidence is adduced, and

(b) the nature and extent of the harm outweighs the desirability of the evidence being given.

(4) Without limiting the matters that the court may take into account for the purposes of this section, it is to take into account the following matters:

(a) the probative value of the evidence in the proceeding,

(b) the importance of the evidence in the proceeding,

(c) the nature and gravity of the relevant offence, cause of action or defence and the

nature of the subject matter of the proceeding,

(d) the availability of any other evidence concerning the matters to which the protected confidence or protected identity information relates,

(e) the likely effect of adducing evidence of the protected confidence or protected identity information, including the likelihood of harm, and the nature and extent of harm that would be caused to the protected confider,

(f) the means (including any ancillary orders that may be made under section 126E) available to the court to limit the harm or extent of the harm that is likely to be caused if evidence of the protected confidence or the protected identity information is disclosed,

(g) if the proceeding is a criminal proceeding--whether the party seeking to adduce evidence of the protected confidence or protected identity information is a defendant or the prosecutor,

(h) whether the substance of the protected confidence or the protected identity information has already been disclosed by the protected confider or any other person.

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

126C Loss of professional confidential relationship privilege: consent

This Division does not prevent the adducing of evidence given with the consent of the protected confider concerned.

126D Loss of professional confidential relationship privilege: misconduct

(1) This Division does not prevent the adducing of 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 that renders a person liable to a civil penalty.

(2) For the purposes of this section, if the commission of the fraud, offence or act is a fact in issue and there are reasonable grounds for finding that:

(a) the fraud, offence or act was committed, and

(b) a communication was made or document prepared in furtherance of the commission of the fraud, offence or act,

the court may find that the communication was so made or document so prepared.

126E Ancillary orders

Without limiting any action the court may take to limit the possible harm, or extent of the harm, likely to be caused by the disclosure of evidence of a protected confidence or protected identity information, the court may:

(a) order that all or part of the evidence be heard in camera, and

(b) make such orders relating to the suppression of publication of all or part of the evidence given before the court as, in its opinion, are necessary to protect the safety and welfare of the protected confider.

126F Application of Division

(1) This Division does not apply in relation to a proceeding the hearing of which began before the commencement of this Division.

(2) This Division applies in relation to a protected confidence within the meaning of this Division whether made before or after the commencement of this Division.

(3) This Division does not apply in relation to a protected confidence within the meaning of Division 1B or Division 2 of Part 5 of Chapter 6 of the *Criminal Procedure Act 1986*.

(4) The court may give a direction under this Division in respect of a protected confidence or protected identity information whether or not the protected confidence or protected identity information is privileged under another section of this Part or would be so privileged except for a limitation or restriction imposed by that section.

Annex B – Evidence Act 1995 (Cth) Division 1A

Division 1A—Professional confidential relationship privilege

126A Definitions

- (1) In this Division:

harm includes actual physical bodily harm, financial loss, stress or shock, damage to reputation or emotional or psychological harm (such as shame, humiliation and fear).

protected confidence means a communication made by a person in confidence to a journalist (in this Division called the *confidant*):

- (a) in the course of a relationship in which the confidant was acting in a professional capacity; and
- (b) when the confidant was under an express or implied obligation not to disclose its contents, whether or not the obligation arises under law or can be inferred from the nature of the relationship between the person and the confidant.

Note: This definition differs from the corresponding definition in subsection 126A(1) of the NSW Act, which is not limited to communications to journalists.

protected confider means a person who made a protected confidence.

protected identity information means information about, or enabling a person to ascertain, the identity of the person who made a protected confidence.

- (2) For the purposes of this Division, a communication may be made in confidence even if it is made in the presence of a third party if the third party's presence is necessary to facilitate communication.

126B Exclusion of evidence of protected confidences

- (1) The court may direct that evidence not be adduced in a proceeding if the court finds that adducing it would disclose:
- (a) a protected confidence; or
- (b) the contents of a document recording a protected confidence; or
- (c) protected identity information.
- (2) The court may give such a direction:
- (a) on its own initiative; or
- (b) on the application of the protected confider or confidant concerned (whether or not either is a party).
- (3) The court must give such a direction if it is satisfied that:

- (a) it is likely that harm would or might be caused (whether directly or indirectly) to a protected confider if the evidence is adduced; and
 - (b) the nature and extent of the harm outweighs the desirability of the evidence being given.
- (4) Without limiting the matters that the court may take into account for the purposes of this section, it is to take into account the following matters:
- (a) the probative value of the evidence in the proceeding;
 - (b) the importance of the evidence in the proceeding;
 - (c) the nature and gravity of the relevant offence, cause of action or defence and the nature of the subject matter of the proceeding;
 - (d) the availability of any other evidence concerning the matters to which the protected confidence or protected identity information relates;
 - (e) the likely effect of adducing evidence of the protected confidence or protected identity information, including the likelihood of harm, and the nature and extent of harm that would be caused to the protected confider;
 - (f) the means (including any ancillary orders that may be made under section 126E) available to the court to limit the harm or extent of the harm that is likely to be caused if evidence of the protected confidence or the protected identity information is disclosed;
 - (g) if the proceeding is a criminal proceeding—whether the party seeking to adduce evidence of the protected confidence or protected identity information is a defendant or the prosecutor;
 - (h) whether the substance of the protected confidence or the protected identity information has already been disclosed by the protected confider or any other person.

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

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

126C Loss of professional confidential relationship privilege: consent

This Division does not prevent the adducing of evidence given with the consent of the protected confider concerned.

126D Loss of professional confidential relationship privilege: misconduct

- (1) This Division does not prevent the adducing of 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 that renders a person liable to a civil penalty.
- (2) For the purposes of this section, if the commission of the fraud, offence or act is a fact in issue and there are reasonable grounds for finding that:

- (a) the fraud, offence or act was committed; and
- (b) a communication was made or document prepared in furtherance of the commission of the fraud, offence or act;

the court may find that the communication was so made or document so prepared.

126E Ancillary orders

Without limiting any action the court may take to limit the possible harm, or extent of the harm, likely to be caused by the disclosure of evidence of a protected confidence or protected identity information, the court may:

- (a) order that all or part of the evidence be heard in camera; and
- (b) make such orders relating to the suppression of publication of all or part of the evidence given before the court as, in its opinion, are necessary to protect the safety and welfare of the protected confider.

126F Application of Division

- (1) This Division does not apply in relation to a proceeding the hearing of which began before the commencement of this Division.
- (2) This Division applies in relation to a protected confidence within the meaning of this Division whether made before or after the commencement of this Division.

Note: The NSW Act includes a subsection (3) relating to sexual assault communications privilege.

- (4) The court may give a direction under this Division in respect of a protected confidence or protected identity information whether or not the protected confidence or protected identity information is privileged under another section of this Part or would be so privileged except for a limitation or restriction imposed by that section.

Note: Subsection 69ZX(4) and section 100C of the *Family Law Act 1975* have the effect of modifying this Division as it applies to certain proceedings under that Act.

- (5) In this section:

commencement of this Division means the commencement of Schedule 1 to the *Evidence Amendment (Journalists' Privilege) Act 2007*.

Annex C – *Evidence Act 2006 (NZ) section 68*

68 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 in a civil or criminal proceeding to answer any question or produce any document that would disclose the identity of the informant or enable that identity to be discovered.

(2) A Judge of the High Court may order that subsection (1) is not to apply if satisfied by a party to a civil or criminal proceeding 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

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

(3) The Judge may make the order subject to any terms and conditions that the Judge thinks appropriate.

(4) This section does not affect the power or authority of the House of Representatives.

(5) In this section,—

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

public interest in the disclosure of evidence includes, in a criminal proceeding, the defendant's right to present an effective defence.

Annex D – *Contempt of Court Act 1981 (UK) c 49 s 10*

10. Sources of information.

No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime.

Annex E – *Free Flow of Information Act 2007 (US Federal)*

Note: Identical legislation was introduced at the same time to the House of Representatives (HR 2102). The Senate version is reproduced here.

Free Flow of Information Act of 2007 (Introduced in Senate)

S 1267 IS

110th CONGRESS

1st Session

S. 1267

To maintain the free flow of information to the public by providing conditions for the federally compelled disclosure of information by certain persons connected with the news media.

IN THE SENATE OF THE UNITED STATES

May 2, 2007

Mr. LUGAR (for himself, Mr. DODD, Mr. GRAHAM, Mr. DOMENICI, and Ms. LANDRIEU) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To maintain the free flow of information to the public by providing conditions for the federally compelled disclosure of information by certain persons connected with the news media.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the `Free Flow of Information Act of 2007'.

SEC. 2. COMPELLED DISCLOSURE FROM COVERED PERSONS.

(a) Conditions for Compelled Disclosure- In any proceeding or in connection with any issue arising under Federal law, a Federal entity may not compel a covered person to provide testimony or produce any document related to information possessed by such covered person as part of engaging in journalism, unless a court determines by a preponderance of the evidence, after providing notice and an opportunity to be heard to such covered person--

(1) that the party seeking to compel production of such testimony or document has exhausted all reasonable alternative sources (other than a covered person) of the testimony or document;

(2) that--

(A) in a criminal investigation or prosecution, based on information obtained from a person other than the covered person--

(i) there are reasonable grounds to believe that a crime has occurred; and

(ii) the testimony or document sought is essential to the investigation or prosecution or to the defense against the prosecution; or

(B) in a matter other than a criminal investigation or prosecution, based on information obtained from a person other than the covered person, the testimony or document sought is essential to the successful completion of the matter;

(3) in the case that the testimony or document sought could reveal the identity of a source of information or include any information that could reasonably be expected to lead to the discovery of the identity of such a source, that--

(A) disclosure of the identity of such a source is necessary to prevent imminent and actual harm to national security with the objective to prevent such harm;

(B) disclosure of the identity of such a source is necessary to prevent imminent death or significant bodily harm with the objective to prevent such death or harm, respectively; or

(C) disclosure of the identity of such a source is necessary to identify a person who has disclosed--

(i) a trade secret of significant value in violation of a State or Federal law;

(ii) individually identifiable health information, as such term is defined in section 1171(6) of the Social Security Act (42 U.S.C. 1320d(6)), in violation of Federal law; or

(iii) nonpublic personal information, as such term is defined in section 509(4) of the Gramm-Leach-Bliley Act (15 U.S.C. 6809(4)), of any consumer in violation of Federal law; and

(4) that nondisclosure of the information would be contrary to the public interest, taking into account both the public interest in compelling disclosure and the public interest in gathering news and maintaining the free flow of information.

(b) Limitations on Content of Information - The content of any testimony or document that is compelled under subsection (a) shall, to the extent possible--

(1) be limited to the purpose of verifying published information or describing any surrounding circumstances relevant to the accuracy of such published information; and

(2) be narrowly tailored in subject matter and period of time covered so as to avoid compelling production of peripheral, nonessential, or speculative information.

SEC. 3. COMPELLED DISCLOSURE FROM COMMUNICATIONS SERVICE PROVIDERS.

(a) Conditions for Compelled Disclosure- With respect to testimony or any document consisting of any record, information, or other communication that relates to a business transaction between a communications service provider and a covered person, section 2 shall apply to such testimony or document if sought from the communications service provider in the same manner that such section applies to any testimony or document sought from a covered person.

(b) Notice and Opportunity Provided to Covered Persons- A court may compel the testimony or disclosure of a document under this section only after the party seeking such a document provides the covered person who is a party to the business transaction described in subsection (a)--

- (1) notice of the subpoena or other compulsory request for such testimony or disclosure from the communications service provider not later than the time at which such subpoena or request is issued to the communications service provider; and
- (2) an opportunity to be heard before the court before the time at which the testimony or disclosure is compelled.

(c) Exception to Notice Requirement- Notice under subsection (b)(1) may be delayed only if the court involved determines by clear and convincing evidence that such notice would pose a substantial threat to the integrity of a criminal investigation.

SEC. 4. DEFINITIONS.

In this Act:

(1) **COMMUNICATIONS SERVICE PROVIDER**- The term `communications service provider'--

(A) means any person that transmits information of the customer's choosing by electronic means; and

(B) includes a telecommunications carrier, an information service provider, an interactive computer service provider, and an information content provider (as such terms are defined in sections 3 and 230 of the Communications Act of 1934 (47 U.S.C. 153, 230)).

(2) **COVERED PERSON**- The term `covered person' means a person engaged in journalism and includes a supervisor, employer, parent, subsidiary, or affiliate of such covered person.

(3) **DOCUMENT**- The term `document' means writings, recordings, and photographs, as those terms are defined by Federal Rule of Evidence 1001 (28 U.S.C. App.).

(4) **FEDERAL ENTITY**- The term `Federal entity' means an entity or employee of the judicial or executive branch or an administrative agency of the Federal Government with the power to issue a subpoena or issue other compulsory process.

(5) **JOURNALISM**- The term `journalism' means the gathering, preparing, collecting, photographing, recording, writing, editing, reporting, or publishing of news or information that concerns local, national, or international events or other matters of public interest for dissemination to the public.

Annex F – *Protected Disclosures Act 1994* (NSW) section 19

19 Disclosure to a member of Parliament or journalist

- (1) A disclosure by a public official to a member of Parliament, or to a journalist, is protected by this Act if the following subsections apply.
- (2) The public official making the disclosure must have already made substantially the same disclosure to an investigating authority, public authority or officer of a public authority in accordance with another provision of this Part.
- (3) The investigating authority, public authority or officer to whom the disclosure was made or, if the matter was referred, the investigating authority, public authority or officer to whom the matter was referred:
 - (a) must have decided not to investigate the matter, or
 - (b) must have decided to investigate the matter but not completed the investigation within 6 months of the original disclosure being made, or
 - (c) must have investigated the matter but not recommended the taking of any action in respect of the matter, or
 - (d) must have failed to notify the person making the disclosure, within 6 months of the disclosure being made, of whether or not the matter is to be investigated.
- (4) The public official must have reasonable grounds for believing that the disclosure is substantially true.
- (5) The disclosure must be substantially true.

Annex G – *Public Service Act 1999 (Cth) section 16*

16 Protection for whistleblowers

A person performing functions in or for an Agency must not victimise, or discriminate against, an APS employee because the APS employee has reported breaches (or alleged breaches) of the Code of Conduct to:

- (a) the Commissioner or a person authorised for the purposes of this section by the Commissioner; or
- (b) the Merit Protection Commissioner or a person authorised for the purposes of this section by the Merit Protection Commissioner.
- (c) an Agency Head or a person authorised for the purposes of this section by an Agency Head.

Annex H – *Public Interest Disclosure Bill 2007(Cth)* section 9

9 Disclosure to persons other than proper authorities

- (1) A public official may make a public interest disclosure to a senator or member of the House of Representatives if:
- (a) under all the circumstances, it is reasonable for the public official to make the public interest disclosure; and
 - (b) the disclosure has already been made to a proper authority under section 8, but has not been acted upon, to the knowledge of the public official, within 6 months of the disclosure; or
 - (c) the disclosure has already been made to a proper authority under section 8, and acted upon, but it is reasonable for the public official to believe that the action was not adequate or appropriate; or
 - (d) the disclosure concerns especially serious conduct, and exceptional circumstances exist to justify the public official making the disclosure.
- (2) A public official may make a public interest disclosure to a journalist if:
- (a) the public official does not make the disclosure for purposes of personal gain; and
 - (b) under all the circumstances, it is reasonable for the public official to make the public interest disclosure; and
 - (c) the disclosure has already been made to a proper authority under section 8, or a senator or member of the House of Representatives under subsection (1), but has not been acted upon, to the knowledge of the public official, within 6 months of the disclosure; or
 - (d) the disclosure has already been made to a proper authority under section 8 or a senator or member of the House of Representatives under subsection (1), and acted upon, but it is reasonable for the public official to believe that the action was not adequate or appropriate; or
 - (e) the disclosure concerns especially serious conduct, and exceptional circumstances exist to justify the public official making the disclosure.
- (3) For the purposes of this section, in determining whether it was reasonable for a public official to make a disclosure or to hold a belief relevant to the making of a disclosure, regard must be had to:
- (a) whether a competent public official with the same level of seniority and experience as the public official making the disclosure would have made the disclosure; and
 - (b) the identity of the person to whom the disclosure was made; and
 - (c) the seriousness of the conduct contained in the public interest information; and
 - (d) whether the relevant conduct was continuing or likely to occur in the future; and
 - (e) the substance of any action which a proper authority, a senator or a member of the House of Representatives has taken or might reasonably be expected to have taken with respect to a disclosure; and

(f) any procedures relevant to the making, receipt or investigation of public interest disclosures, prescribed by regulation or published by a proper authority in accordance with this Act; and

(g) whether the public official making the disclosure complied with any procedures prescribed by regulation or published by a proper authority in accordance with this Act.

(4) Determinations as to whether it is or was reasonable, under this section, for a public official to make a disclosure or hold a belief relevant to the making of a disclosure, are questions for a court, commission or tribunal to decide when determining the liabilities, rights or entitlements of any person or body under Part 3.