Journalist Shield Laws

Commonwealth legislation protecting journalists has been in place since 2007. New South Wales is the only state that has enacted shield laws but they do not offer the same level of protection as the Commonwealth laws. In this article, Matthew Tracey suggests that the shield offered by both legislative regimes is inferior in comparison to the United Kingdom and New Zealand and that the level of protection afforded to journalists' sources could be significantly strengthened by the incorporation of a presumption in favour of non-disclosure. At the time of publication, Liberal Senator and Shadow Attorney-General, George Brandis, has introduced a private members bill to the Senate in line with legislation in New Zealand which represents stronger protection for journalists. Independent Senators Xenophon and Wilkie are expected to introduce similar legislation that will attract the support of the ALP.

Introduction

This article has four sections. First, it will identify the legal and ethical obligations of journalists in Australia in relation to the confidentiality of sources and will trace the development of shield laws over the last twenty years. Second, it will analyse the future of shield laws in Australia. Third, it will discuss the strength of the current provisions in adapting to changes in the media landscape and the role of the journalist. Finally, this paper will examine the approaches taken by The United Kingdom, New Zealand and the United States. The main focus of this paper will be the legislative environment in Australia as it relates to journalists. However, brief attention will be given to the operation of the common law in relevant states and territories.

Journalists' obligations

In both New South Wales and the Commonwealth, journalists' disclosures in court are governed by a legislative regime.[1] All other Australian states and territories are subject to the common law. The current laws apply only to proceedings in New South Wales and Commonwealth courts (including an ACT court). In addition, investigations undertaken by regulatory bodies such as anti-corruption agencies could operate outside the provisions of the Evidence Acts and therefore journalists would not receive the benefit of their protection.

Despite the undertakings given to sources by journalists, the common law has consistently confirmed that such undertakings cannot "stand in the way of the imperative necessity of revealing truth in the witness box."[2] This point was developed in John Fairfax & Sons Ltd v Cojuangco[3] where the High Court held that a journalist should not be compelled to disclose the identity of a source, unless disclosure is required in the interests of justice.[4]

Journalists have ethical standards in addition to, but not in replacement of, their legal obligations. The Media Entertainment and Arts Alliance (**MEAA**) Code of Ethics states that when confidences are accepted by journalists they should be respected in all circumstances.[5] Disclosing the identity of a source is the clear point of tension between the legal and ethical obligations of a journalist.

Journalists may feel that their reputation would be damaged if they identify a source to which they have given an undertaking of confidentiality. It is not inconceivable that journalists may feel a stronger allegiance to the Code of Ethics than the law. Despite clear warnings that legal obligations take precedence over allegiance to the Code of Ethics, implementing this in practice can be highly problematic.[6]

A clear illustration is R v Gerard Thomas McManus & Michael Harvey[7] (**McManus**) where journalists Michael Harvey and Gerald McManus were each fined $7000 for contempt of court after refusing to reveal the source of a confidential communication.[8] Penalties for contempt of court can include a fines and custodial sentences. Most custodial sentences for contempt of court in relation to journalists have been no more than fourteen days in length.[9]

Detaining journalists can appear to have mixed results. Rozenes J has stated that specific reference to punishments needs resonance with the defendant. His Honour outlined how a fine may not be a sufficient deterrent compared to a custodial sentence.[10] Interestingly however, it has been suggested that some journalists have enjoyed a bolstered reputation because of their willingness to be found guilty of contempt of court in order to maintain their silence.[11]

Most legislation recognises that a free press entrenches the public's interest in being informed of important matters.[12] The test in most jurisdictions requires the court to balance this interest with the public

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1 Evidence Act 1995 (Cth) Div 1A; Evidence Act 1995 (NSW) Div 1A.

2 McGuinnes v Attorney-General (Vic) (1940) 63 CLR 73 at 102 as per Dixon J.

3 (1998) 165 CLR 346.

4 John Fairfax & Sons Ltd v Cojuangco (1988) 165 CLR 346 at 354.

5 Media Entertainment and Arts Alliance Code of Ethics, Article 3.

6 Independent Commission Against Corruption v Cornwall (1995) NSWLR 27 as per Abadee J at 238.

7 [2007] VCC 619.

8 Ibid.

9 DPP v. Luders, unreported, District Court of WA No. 177 of 1990, Tony Barrass, seven days; Copley v Queensland Newspapers Pty Ltd (unreported) Queensland Supreme Court, 20 March 1992, Gerard Budd, six days; State Bank of South Australia v Hellaby (unreported) Supreme Court of South Australia, 4 September. 1992, No 1627 of 1992, David Hellaby, fourteen days.

10 R v Gerard Thomas McManus & Michael Harvey [2007] VCC 619 at 44 quoting Independent Commission Against Corruption v Cornwall (No 2) (Unreported, Supreme Court of NSW, no 11043 or 1993, 8 September 1993) as per Abadee J.

11 Transcipt, Tony Barass in the Law Report, ABC Radio, 18 July 2006, accessed on 1 September 2010 at http://www.abc.net.au/rn/lawreport/stories/2006/1687921.htm.

12 Evidence Amendment (Journalists' Privilege) Bill 2009 (Cth), Explanatory Memorandum; Evidence Amendment (Journalists' Privilege) Bill 2007 (Cth), Explanatory Memorandum.

interest in the administration of justice. The potential protection for each jurisdiction is entrenched within that jurisdiction's Evidence Act. Therefore, the source of protection will depend on the particular legislation under which the action is commenced.

History

The Senate Standing Committee on Legal and Constitutional Affairs first considered the need for journalists' shield laws in 1993.[13] After examining the equivalent provisions in the United Kingdom and New Zealand, the Committee's final recommendation was for State and Commonwealth Evidence Acts to be amended to include a qualified privilege that could be overridden at the court's discretion.[14] Interestingly, the Committee advocated for a presumption in favour of non-disclosure.

New South Wales

In 1997, protections for those people in a professional relationship against disclosure of certain information were inserted into the Evidence Act 1995 (NSW) (**NSW Act**). The presumption is that the source should be disclosed unless the potential harm to the source outweighs the desirability of the evidence being adduced.[15]

These amendments received Royal Assent on 31 March 1998. The provisions apply to all proceedings in New South Wales courts.[16] Brereton J correctly categorised the operation of the section not as one that created a privilege upon certain communications, but rather one that "confers on the court a discretion by which it may direct that evidence of a confidential communication not be adduced."[17]

In 2002 these provisions were tested where the National Roads and Motorists Association sought the identity of a source who supplied information to a journalist. The source was thought to be a director and as such, would be in breach of fiduciary duties owed to the Association and its members. Master Macready stated that the privilege for professional relationships did cover journalists.[18] Ultimately, the interests in allowing the NRMA to pursue an action against the source was found by the court to outweigh any likely harm to the source.[19]

Commonwealth

As a result of both the decision in McManus[20] and the Australian Law Reform Commission report entitled Uniform Evidence Law tabled on 8 February 2006, then Attorney-General Philip Ruddock introduced amendments to the Evidence Act 1995 (Cth) (**Commonwealth Act**) that were modelled on the NSW Act. However, the striking difference was that the Commonwealth provisions related only to journalists. The balancing test remained the same, however issues of national security were to be "afforded the greatest possible weight".[21]

These amendments received Royal Assent on 28 June 2007. The Commonwealth Act applies only to proceedings in a federal court or a court of the Australian Capital Territory.[22] As yet, there have been no instances in the Commonwealth jurisdiction where a journalist has relied on section 126B of the Commonwealth Act.

On 19 March 2009, the Evidence Amendment (Journalists' Privilege) Bill 2009 (Cth) (**2009 Bill**) was introduced to the House of Representatives. Several changes were proposed but a presumption in favour of disclosure remained.

An objects section was to be inserted by the 2009 Bill that would inform the exercise of judicial discretion. That object was to achieve a balance between the public interest in the administration of justice and the public interest in the communication of facts to the public.[23] The likely harm to the journalist that may be caused by disclosure was added as a matter the court could consider.[24] According to the Explanatory Memorandum, harm could encompass damage to the journalist's professional reputation and the ability to access sources of fact in the future.[25]

Disclosing the identity of a source is the clear point of tension between the legal and ethical obligations of a journalist.

The court would be able to exercise its discretion despite the communication occurring through an unlawful act. Many disclosures to journalists are unlawful acts especially if the source is employed in the public sector. This point was raised by Australian Associated Press when the 2009 amendments were under review by the Senate Committee on Legal and Constitutional Affairs.[26]

The amendments attempted to fine tune the factors the court could assess by removing the reference to 'greatest weight' in relation to national security. Western Australia Director of Public Prosecutions, Robert Cock QC, questioned how "the reputation of one journalist could ever be more significant that the genuine security interests of a nation?"[27] The amendments placed the consideration of national security interests on par with other considerations that needed to be weighed up by the courts. It allows the court to apportion the appropriate gravity to each competing consideration. The magnitude of factors that could conceivably form part of national security is immense. By applying an artificial acceleration in the courtroom, issues of national security could unnecessarily distort the operation of the discretion.

In Committee, the most common objection to the proposed amendments was the retention of a presumption in favour of disclosure.[28] The Committee received submissions from many industry bodies

13 Senate Standing Committee on Legal and Constitutional Affairs, Commonwealth, Off the Record - Shield Laws for Journalists' Confidential Sources, 1993.
14 Ibid.
15 Evidence Act 1995 (NSW) s126B(3).
16 Evidence Act 1995 (NSW) s4.
17 Director-General, Dept of Community Services v D [2006] NSWSC 827 as per Brereton J at [23].
18 NRMA v John Fairfax Publications [2002] NSWSC 563 at para 5.
19 Ibid.
20 The Hon Philip Ruddock, MP, News Release, 201/2005, 'Submissions Lodged in Journalist Contempt Case,' 4 November 2005.
21 Evidence Act 1995 (Cth) s126B(4).
22 Evidence Act 1995 (Cth) s4.
23 Bills Digest, Parliamentary Library, Evidence Amendment (Journalists' Privilege) Bill 2009, p4, 11 May 2009 no 130 2008-2009.
24 Evidence Amendment (Journalists' Privilege) Bill 2009 (Cth).
25 Evidence Amendment (Journalists' Privilege) Bill 2009 (Cth), Explanatory Memorandum, para 6.
26 Evidence to Senate Standing Committee on Legal and Constitutional Affairs on Evidence Amendment (Journalists' Privilege) Bill 2009, Commonwealth, Melbourne, 28 April 2009, (Australian Associated Press), Submission 4, 2.
27 Evidence to Senate Standing Committee on Legal and Constitutional Affairs on Evidence Amendment (Journalists' Privilege) Bill 2009, Commonwealth, Melbourne, 28 April 2009, (WA Director of Public Prosecutions), Submission 11, 4.
28 Final Report of Senate Standing Committee on Legal and Constitutional Affairs on Evidence Amendment (Journalists' Privilege) Bill 2009, Commonwealth, Melbourne, 28 April 2009, (WA Director of Public Prosecutions), see comments by Liberal Senators, Greens Senator and Independent Senator Nick Xenophon.
29 Evidence to Senate Standing Committee on Legal and Constitutional Affairs on Evidence Amendment (Journalists' Privilege) Bill 2009, Commonwealth, Melbourne, 28 April 2009, Dr Joseph Fernandez, submission no 1; Media Entertainments and Arts Alliance, submission no 7; Australian Press Council, submission no 3; Australian Associated Press, submission no 4; Public Interest Advocacy Centre, submission 5; Rae Desmond Jones, submission no 12, as referred to in Majority Report.

that supported the introduction of a presumption in favour of non-disclosure.[29]

Young J commented that the 2009 amendments were "doubtful to make very much practical difference" given the limited number of journalists that have faced a custodial sentence.[30] Regardless of the actual number of journalists being imprisoned for contempt of court, the MEAA was quick to emphasise that in 2008 at least five Perth journalists were threatened with three years jail and fines of $60,000 in the past 10 months.[31]

Legislation has been proposed that would include a presumption in favour of non-disclosure in line with other jurisdictions such as New Zealand and the United Kingdom.

Western Australia

Recently the Western Australia Attorney-General, Christian Porter, proposed to enact shield laws. Limited information has been made available, however two outcomes are likely. First, a rebuttable presumption in favour of disclosure will exist. Second, communications will not be protected when made in furtherance of a fraud, criminal offence or an act attracting a civil penalty.[32] The proposed amendments would be very similar to the position outlined by the Standing Committee of Attorneys-General in July 2007. Specifically, the NSW Act was the preferred model and acceptable to insert into the Model Uniform Evidence Bill.[33]

Near future

Following the proroguing of the Federal Parliament on 19 July 2010, the 2009 Bill lapsed without being put to a vote. There were reports in the media that although the Bill was introduced to the Senate in mid-2009, its delay and eventual lapse was due to negative feedback from various stakeholders.[34]

Changes to journalist shield laws were raised by Commonwealth Shadow Attorney-General, George Brandis, during the Attorneys-General Debate on 13 August 2010. Senator Brandis proposed amendments to the Commonwealth Act that would include a presumption in favour of non-disclosure in line with other jurisdictions such as New Zealand, the United Kingdom and potentially the United States.[35] Amendments to the Commonwealth Act were introduced to the Senate on 29 September 2010. The legislation contains two major implications for journalists in courts exercising the Commonwealth jurisdiction. First, the introduction of a rebuttable presumption in favour of journalists mirroring the wording of section 68 of the Evidence Act 2006 (New Zealand). Second, expanding the protection offered under the Commonwealth Act to all professional relationships as opposed to just journalists. This would have the effect of providing similar protection for relationships of a professional nature across both New South Wales and the Commonwealth.

Independent Senators Andrew Wilkie and Nick Xenophon have announced plans to introduce shield laws containing a presumption in favour of non-disclosure similar to the bill moved by Senator Brandis.[36] At the same time, Victorian Attorney-General, Rob Hulls, has proposed similar shield laws to cover Victoria. Rob Hulls has publicly stated that he hasn't ruled out "going it alone"[37] if attempts by the independents fail. A spokesman for Federal Attorney-General Robert McLelland said shield laws should be uniform across the states.[38]

New South Wales Coalition legal affairs spokesman, Greg Smith, has received draft legislation containing a rebuttable presumption in favour of non-disclosure from Senator Brandis in order to propose amendments to the state law through a private members bill. It has been suggested that the legislation contains a provision identical to section 68(2) of the Evidence Act 2006 (NZ).[39] This would provide for a presumption in favour of non-disclosure unless a party can convince the court that on balance, the public interest in disclosing the source outweighs any likely adverse effect on any person and the public interest in the communication of facts and the ability of the news media to access sources of facts.[40]

Mr Smith has announced that if the current New South Wales government chose to reject his proposed laws then he would reintroduce the legislation if the state Coalition won government.[41]

The new journalist

The increasing role that bloggers and other new media entities play in the communication of facts to the public cannot be ignored. As such, a proper definition of 'journalist' is an important issue.

In the current Commonwealth Act, 'journalist' is not defined. In their most recent report, the Senate Committee discussed how 'journalist' should be defined if it were to be included in the amended Act. The foreseeable problem for the Committee was whether or not the ambit of the legislation would be wide enough to cover bloggers and other new media entities. Despite the suggested definitions on offer,[42] the Committee resolved to leave the court to decide whether a particular scenario fits within the ambit of the privilege.[43]

Amendments proposed by Senator Brandis incorporate a definition of journalist as found in the New Zealand legislation meaning:

> a person who in the normal course of that person's work may

30 Current Issues, Australian Law Journal (2009) 83 ALJ 359 a5 359.

31 Media Entertainment and Arts Alliance, Media Release, accessed on 28 August 2010 at http://www.alliance.org.au/documents/080310pr_washeildlaws.pdf.

32 Letter from Media Entertainment and Arts Alliance to Western Australian Attorney-General Christian Porter accessed on 3 September 2010 at http://www.alliance.org.au/documents/meaa_response.pdf.

33 Standing Committee of Attorneys-General, Summary of Decisions, July 2007 4(b)(e) accessed on 4 September 2010 at http://www.scag.gov.au/lawlink/SCAG/ll_scag.nsf/vwFiles/2010_MAY_Summary_of_OOS_Decisions.pdf/$file/2010_MAY_Summary_of_OOS_Decisions.pdf.

34 Chris Merritt, The Australian, Coalition promise to introduce shield laws prompts labor to re-examine its position, 20 August 2010.

35 Attorneys-General Debate Transcript, accessed on 6 September 2010 at http://www.alp.org.au/federal-government/news/transcript--robert-mcclelland,-debate,-sydney/

36 Chris Merritt, The Australian, Protection for reporters' sources tops Andrew Wilkie agenda, 13 September 2010.

37 David Rood, The Age, A-G pushes for shield laws to protect journalists, 13 September 2010.

38 Ibid.

39 Chris Merritt, The Australian, Uniform shield laws coming for the big three jurisdictions, 24 September 2010.

40 Evidence Act 2006 (NZ) s68(2).

41 Chris Merritt, The Australian, Uniform shield laws coming for the big three jurisdictions, 24 September 2010.

42 Evidence to Senate Standing Committee on Legal and Constitutional Affairs on Evidence Amendment (Journalists' Privilege) Bill 2009, Commonwealth, Melbourne, 28 April 2009, (5, 10, 23, 32).

43 This is consistent with the 1993 report of the Senate Standing Committee on Legal and Constitutional Affairs: Evidence to Senate Standing Committee on Legal and Constitutional Affairs, Commonwealth, 1993, Off the record: shield laws for journalists' confidential sources, para 2.29.

44 Evidence Amendment (Journalists' Privilege) Bill 2010 (Cth) Sch 1.

be given information by an informant in the expectation that the information may be published in a news medium.[44]

News medium, for the purposes of the Bill, means a medium for the dissemination to the public of news and observations on news which could easily incorporate blogs and other new media. The question for courts is whether or not the particular person was acting as a journalist in the normal course of their work.

The court must consider the increasing importance of non-traditional publishers in the contemporary media landscape. For example, there may be instances where professional journalists as defined by their employment status and publishing history would be obligated to disclose if they were acting outside their professional capacity at the time. Alternatively, bloggers performing the same service to the public as that of a journalist should not be unworthy of protection simply because they may be receiving remuneration through non-traditional models such as website traffic advertising revenue. Recently, the state of Washington in the United States has introduced a state-based shield law that explicitly includes internet based communications in defining a journalist.[45]

International

New Zealand

Shield laws in New Zealand are contained in the Evidence Act 2006 (NZ) (**NZ Act**).[46] Under the NZ Act, the party seeking disclosure must convince the court that, on balance, the public interest in disclosing the source outweighs any likely adverse effect on any person and the public interest in the communication of facts and the ability of the news media to access sources of facts. This was designed to "give greater confidence to a source that his or her identity would not be revealed."[47] A similar approach in Australia would bolster any potential source's confidence that their identity would remain secret.

The NZ Act contains an implicit acknowledgment that the disclosure of confidential communications in court may have an effect on the ability of the news media to access sources of facts.[48] This is in stark contrast to Australian state courts where any connection between disclosure and ability to access sources is seldom recognised.[49] The High Court recognised an alternative view in John Fairfax & Sons Ltd v Cojuangco[50] in accepting that confidentiality had a role in encouraging sources to come forward.[51]

United Kingdom

The United Kingdom position under the Contempt of Court Act (**UK Act**) requires the party seeking disclosure to convince the court that it is necessary in the interests of justice or national security or for the prevention of disorder or crime.[52] The UK Act exists in concert with Article 10 of the European Convention of the Protection of Human Rights and Fundamental Freedoms as was considered in X Ltd v Morgan Grampian Ltd.[53] The case involved a journalist who refused to disclose his source in relation to an article regarding a confidential corporate plan. The journalist was found in contempt of court and subsequently appealed to the European Court of Human Rights.[54] The Court found that the order to reveal the source was in contravention of the journalists' rights under Article 10 of the Convention which guarantees freedom of expression.

United States of America

The First Amendment to the United States Constitution provides the basis for many claims to protect journalists from disclosure of their sources. This Amendment declares that Congress shall make no law abridging freedom of speech, or of the press.[55] The Amendment was not used in relation to journalist sources until Branzburg v Hayes.[56] According to Senator Russ Feingold in his statement to the United States Senate Committee on the Judiciary, "forty-nine states and the District of Columbia have already adopted some form of reporter's shield, either by statute or court decision."[57] In the thirty-eight years that have passed since Branzburg v Hayes,[58] the United States still does not have a federal shield law protecting journalists.

If a journalist has ethical obligations and occupational pressures to keep the identity of a source confidential, it follows that the law should recognise these factors.

The Free Flow of Information Act was introduced to the United States Congress on 13 February 2009. It has been introduced to the United States Congress several times and was reported on by the Committee on 10 December 2009. If it passes, it will contain special protection for bloggers and freelance journalists and hold a presumption in favour of non-disclosure similar to New Zealand and the United Kingdom.

Conclusion

Shifting the presumption in favour of non-disclosure does not limit the court's ability to ascertain the identity of a source. This is because the underlying balancing test remains the same regardless of which party has the burden of convincing the court. If a journalist has ethical obligations and occupational pressures to keep the identity of a source confidential, it follows that the law should recognise these factors. This is not to suggest that the law should bend to serve these obligations, rather that the law should assist the free flow of information to the public. It can serve this end while simultaneously ensuring that the public interest in the administration of justice is recognised.

The future of legislative change in the Federal sphere is becoming increasingly clear. The rejection of the proposed amendments in 2009 by Liberal and Independent Senators and media industry groups has signalled a new era of recognising the importance of shield laws to the effective operation of a free press. Whether or not a new legislative environment could prevent another case similar to Harvey and McManus will be a matter for the future.

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45 Revised Code of Washington, Title 5 Evidence, Ch 5.68 (United States of America).

46 Evidence Act 2006 (NZ) s68.

47 New Zealand Law Commission, Evidence, Report 55 Vol 1, Reform of the Law (1999) at paragraph 302.

48 Evidence Act 2006 (NZ) s68(2).

49 Arthur Christopher Nicholls v DPP for the State of South Australia (1993) 61 SASR 31 at 48 as per Perry J; R v Gerard Thomas McManus & Michael Harvey [2007] VCC 619.

50 John Fairfax & Sons Ltd v Cojuangco (1988) 165 CLR 346 at 354.

51 Ibid.

52 Contempt of Court Act 1981 (United Kingdom) s10.

53 X Ltd v Morgan Grampian Ltd [1991] 1 AC 1.

54 Goodwin v the United Kingdom [1996] ECHR 16.

55 Constitution (United States) Amendment 1.

56 Branzburg v Hayes 408 US 665 (United States).

57 Senator Russ Feingold in his statement to the United States Senate Committee on the Judiciary, November 19 2009, Senate Judiciary Committee 'Executive Business Meeting' Thursday November 19 2009.

58 Branzburg v Hayes 408 US 665 (United States).