



## Submission to the Legislative Assembly of the Northern Territory Evidence (National Uniform Legislation) Amendment (Journalist Privilege) Bill January 2018

### ***Introduction***

SBS supports legislation which protects journalists and their sources. The interest in protecting confidential sources has long been recognised both in other Australian states and internationally. Such protection is based on recognition of the fact that, without protection, many sources would be deterred from sharing information with journalists, given the potential professional and personal consequences they may suffer.

### ***General alignment with other jurisdictions***

The proposed *Evidence (National Uniform Legislation) Amendment (Journalist Privilege) Bill* (the **Bill**) aligns to a degree with similar provisions that contain protection for journalists and their sources at the Commonwealth level; and in Victoria, New South Wales, Western Australia, and the Australian Capital Territory. Proposed subsections 127A(1) and (2) of the Bill follow the structure of the *Evidence Act 1995* (Cth) (and some of the other state instruments) in providing protection to journalists and sources.

### ***Additional factors out of step with other jurisdictions***

However, SBS has some concerns over some of the additional tests or factors that have been included in the proposed Bill for the court to consider when assessing if the privilege applies. In weighing whether the public interest favours protection, proposed subsection 127A(3) directs the court to take into account the following non-exhaustive factors:

*(a) whether the information provided by the informant is a matter of public interest; and*

*(b) how the journalist used the information provided by the informant, including whether the journalist:*

*(i) verified the information before using the information (if reasonably practicable); and*

*(ii) used the information in a manner that minimised any undue harm to any person; and*

*(iii) used the information in a fair and accurate manner.'*

In our view, the factors set out above focus the court's attention away from the general public interest in facts being made available to the public; and towards the qualitative nature of the value of specific facts disclosed by an individual informant, and how those facts were used in any individual story by a journalist based on those disclosed facts.

This shift in scrutiny will impair free speech. The factors invite the court to consider highly subjective matters – including whether use of leaked material is “fair”, and whether impact on any individual amounts to “undue harm”. It is unclear how the courts will measure such concepts when applying these standards.

It is of serious concern that if a journalist is found by the court to have acted improperly (by not minimising undue harm, or not being “fair” in their reporting) – the impact may be most felt not by the journalist but by their source (who may then be revealed). Sources may reasonably conclude the risks are too high in coming forward; as their protection is conditional on (i) the information being considered itself “of public interest”; and, (ii) the behaviour of the journalist when deciding how to publish the information. Neither of these conditions are within the control of the source when deciding whether to come forward.

### ***Recommended amendment***

SBS therefore recommends the removal of subsection 127A(3) from the proposed Bill. If publication of leaked material by a media organisation turns out to be flawed in some way – for example, it is found to be “unfair” or inaccurate – there are other consequences for the media organisation and/or journalist which would flow. These could include defamation or complaints under enforceable codes of practice. SBS submits that these safeguards are sufficient, and that pursuing any concerns via these avenues is preferable to the outcome of stripping a source of their protection.