Whistleblowers Australia
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"All it needs for evil to flourish is for people of good will to do nothing"- Edmund Burke

31 January 2018

Mr Tony Sievers MLA
Chairman
Economic Policy Scrutiny Committee
Northern Territory Government
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Telephone: (08) 8946 1429
Attention: Mr Russell Keith
Secretary to the Committee

Dear Sir,

Evidence (National Uniform Legislation) Amendment (Journalist Privilege) Bill

Thank for the opportunity to make this submission, which details why the bill should not be enacted in its present form.

Preamble

Section 127A(2) sets up the grounds for a contest between competing public interests, about why a journalist should be compelled by the court to break his or her promise not to disclose an informant's identity. It requires a court to weigh up whether disclosing the informant's identity outweighs any likely adverse effect of the disclosure on the informant or any other person or the media in sourcing information and communicating it to the public. It essentially repeats section 126H of the federal evidence act, which introduced the concept of journalist's privilege to stop informants becoming collateral damage.

An applicant is typically a person claiming the published information is defamatory or an employer or state claiming the informant's disclosure was unauthorised. Their interest is a self interest, often masquerading as a public interest depending upon who their target or targets might be.

Section 127A(3) goes much further than the federal legislation in a number of ways. It deals with the information provided as opposed to the information that was published and it requires a court to take into account whether the information 'provided by the informant' is a 'public interest matter' and whether the journalist 'used' the information provided fairly, accurately and minimised any undue harm to any person. The Explanatory Notes are inadequate for the purpose. Each raises significant concerns, so I'll deal with them in turn.

Section 127A(3) – terminology

Section 127A(3) refers to the information provided by the informant, as opposed to the information that was published, which may or may not be the same.

An application would as a matter of fact be made on the basis of the published material, not the information that is not known at that time. The application properly concerns the

promise made by the journalist to the informant and whether and why a court should order the journalist to break that promise. If the application succeeded, the applicant would then be able to exploit any apparent differences between the information provided and published.

Section 127A(3)(b) puts the cart before the horse. Even if it was amended to refer to the information or the information published it would still subvert the purpose of section 127A(2). See below, under heading Explanatory notes, harm and section 127A(3).

Section 127A(3)(a) - a 'matter of public interest'

Requiring a court to consider whether any set of published facts is a 'public interest matter' may assist in separating the whistleblowers out from the vast majority of sources that simply enable the press to communicate information and opinions freely in the public's interest. If that is the intention and I believe it is, then it is important to get the definition in the Explanatory Notes right, given they are meant to assist a court in defining terms like 'the public interest in …' (s.127A(2)(b)) or 'a matter of public interest' (s.127A(3)(a) or 'new or noteworthy information (s.127A(6)).

The Explanatory Notes indicate the term 'public interest' refers to 'information which could assist and improve society and the wellbeing of its members as opposed to information which the public may simply find interesting (for example, because it is salacious)' – but the notes are strangely silent about why and how that might be. The definition is less than useful and if used together with the criteria provided by section 127A(3), is likely to have disastrous consequences for the individuals caught up in the process and the press more generally.

In the public interest is a term commonly used to capture a collective sense and belief about what needs to be done in any given circumstance to protect and further the public's wider interests. It usually manifests as a demand and expectation based on a set of published facts, that our elected officials, institutions, corporate entities and watchdogs should operate openly and transparently and make themselves accountable to society - their constituency, the public. Invariably when information published in the media raises the spectre that something is seriously awry, the cry goes up for the wrongdoing to be properly investigated and dealt with. This is where the public's interest lies and it needs to be known. These considerations are what make any set of facts a public interest matter.

It is not the same as information that is interesting, informative and or entertaining, even salacious – but even this is essential to raising public awareness, education, health and wellbeing etc. which is why a source, any source should be protected to protect the press in the public's interest.

To my mind the public interest that lies at the very heart of section 127A(2) is protecting a source to allow the press to investigate, and inform and comment on matters of public concern and importance.

The committee could consider providing a list of the more commonly accepted public interest matters, for example: freedom of expression; including political communication; freedom of the media to investigate, and inform and comment on matters of public concern and importance; the proper administration of government, open justice and the prevention and detection of crime and fraud across all levels of society - as a judicial aid, with the object of providing certainty and predictability – so long as the list is stated not to be exhaustive, otherwise it would operate as a brake where none is required.

But that said, the phrase 'in the public interest' is commonly used in public discourse and legislation and is one with which the courts are already familiar. It is a broad concept that is flexible enough to respond to the facts and circumstances of any particular case, without aids being provided which is why I would be equally content with an accurate definition, a list or both.

Section 6 - new or noteworthy

Section 6 defines an informant as a person who provides new or noteworthy information to a journalist: presumably the idea being that the public interests identified by section 127A(2) are somehow; no longer is relevant if or once the news no longer new or noteworthy? I think not. Those public interests don't just go away with time: they remain, whether the journalist draws on old or new information provided by the informant.

And once given, a promise to protect a source should remain binding unless or until the informant releases him or her from it or a court orders that it is to be broken. It is no small thing and our law recognises that, because a journalist can face gaol and a fine for contempt of court if s/he chooses to keep that promise.

Then, there's the fact that old news can very quickly become relevant and timely as events unfold, so it would be more sensible to remove this definition, save court time, argument and cost and allow the court to consider the published information on its merits in the context provided by section 127A(2).

Explanatory notes, harm and section 127A(3)(b)

The Explanatory Notes state that 'harm is not defined, but it is anticipated that reading the definition in context necessarily leads to consideration of a broad range of relevant harms, such as harm to a person's reputation.'

It wasn't the first thing that came to mind, when thinking about relevant harms, because section 127A(2) clearly makes prospective harm the court's priority, at a time when any reputational harm that might have been done, would have already been. I was more concerned with the hiding that most informants would get from their employer when they become known.

If the person claiming reputational harm can't prove the published allegations are wrong and defamatory based on their own intimate knowledge of the full circumstances, then they should not be given a free kick, first pitting informant against journalist against whistleblower before deliberately driving the informant out of his or her job on some bogus claim. This is not in the public interest.

The problem as I see it is that section 127A(3)(b) could be interpreted to require a court to weigh up whether a journalist's claim for privilege should be negated by his or her likely negligence, with the informant paying the price - even though the accused may have lost his case and the proper authorities later found he was guilty as originally published. I think section 127A(3)(b) should be removed. It serves no good purpose and would cause undue harm.

These concerns become even more compelling when the published material reveals wrongdoing in public office or in breach of corporate law because the subpoena could well be a cover for an employer eager for the opportunity to hound the suspected whistleblower out of his very existence. The public interest should lie unequivocally in ensuring a free press and freedom of speech when it is clear on the facts that its purpose is spurring the institutions and watchdogs with the responsibility for investigating and prosecuting wrongdoing into action.

It would not be in the public interest for a party, who is at the centre of allegations published by the journalist to succeed in an application pursuant to section 127A(2), unless and until s/he has been cleared of the alleged wrongdoing by the proper authorities - lest it be later found that he was guilty after all - having already trashed the life, reputation and livelihood of the journalist and informant.

Equally in those circumstances, it would not be in the public's interest to expose a journalist to contempt of court proceedings in the interests of a party seeking to identify a source. It's especially egregious when the applicant is the government.

Section 127A(3) will harm the public good. It should go.

History really matters

I've downloaded the links and material below for you to read if you aren't already familiar with some of the history that drove calls in the public's interest, for the reform of the various evidence acts.

"Michael Harvey and Gerard McManus who were convicted for contempt of court after refusing to answer questions in court about a source of a newspaper report written by the pair in 2004.

http://www.heraldsun.com.au/news/victoria/journalists-avoid-jail/news-story/6f9b73d90686b8b5ce26183dfcf461bb?sv=3da981c88c428fd5f7cb3a08ca6d1fd

The reporters' story, headlined "Cabinet's $500 million rebuff revealed", said Cabinet had planned to adopt only five out of 65 recommendations from a review into veterans' entitlements before a backbench revolt."

You'll also recall " Steve Pennells of the West Australian and Fairfax Media journalists Adele Ferguson, Richard Baker, Nick McKenzie and Philip Dorling. The court actions were brought against Pennells and Ferguson by Fairfax's majority shareholder Gina Rinehart. Chinese. Australian businesswoman Helen Liu brought actions against Baker, McKenzie and Dorling. Baker and McKenzie also faced separate proceedings brought by defendants in the Securency case. "

http://theconversation.com/protecting-the-journalists-privilege-reporters-go-to-court-13232 "

Yours faithfully,

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