



**LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY**

**Economic Policy Scrutiny Committee**

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**Inquiry into the Evidence  
(National Uniform Legislation)  
Amendment (Journalist  
Privilege) Bill 2017**

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**March 2018**



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## Chair's Preface

This report details the Committee's findings regarding its examination of the Evidence (National Uniform Legislation) Amendment (Journalist Privilege) Bill 2017. The purpose of the Bill is to create a journalist shield law to provide a legal protection for journalists against being compelled to provide evidence in a court which would disclose the identity of a journalist's source. The privilege provided in this Bill is a qualified one, meaning that a court can make a determination, based on overriding public interest factors, that the privilege not apply and compel a journalist to provide evidence that reveals their informant's identity.

The Bill is based on the Commonwealth journalist privilege legislation, however it contains additional provisions which have been included to allow journalist privilege to apply to a broad spectrum of people involved in public interest journalism, not only to those employed as traditional journalists.

The Committee received four submissions on the Bill, all of which supported the intent of the Bill, although two also recommended amendments. The Committee has recommended that the Assembly pass the Bill.

On behalf of the Committee, I would like to thank the organisations that made submissions to the inquiry and the Department of the Attorney-General and Justice for the evidence provided at the public hearing. I would also like to thank the Department of the Legislative Assembly for the support it provided to the Committee and the Committee members for their bipartisan support of the legislative review process.



**Tony Sievers MLA**

**Chair**

## Committee Members

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## **Acknowledgments**

The Committee acknowledges the individuals and organisations that have made written submissions to this inquiry and appeared as witnesses at public hearings.

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## Terms of Reference

### Sessional Order 13

#### *Establishment of Scrutiny Committees*

- (1) Standing Order 178 is suspended.
- (2) The Assembly appoints the following scrutiny committees:
  - (a) The Social Policy Scrutiny Committee
  - (b) The Economic Policy Scrutiny Committee
- (3) The Membership of the scrutiny committees will be three Government Members and one Opposition Member nominated to the Speaker in writing by the respective Whip and one non-party aligned Member to be appointed by motion.
- (4) The functions of the scrutiny committees shall be to inquire and report on:
  - (a) any matter within its subject area referred to it:
    - (i) by the Assembly;
    - (ii) by a Minister; or
    - (iii) on its own motion.
  - (b) any bill referred to it by the Assembly;
  - (c) in relation to any bill referred by the Assembly:
    - (i) whether the Assembly should pass the bill;
    - (ii) whether the Assembly should amend the bill;
    - (iii) whether the bill has sufficient regard to the rights and liberties of individuals, including whether the bill:
      - (A) makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review; and
      - (B) is consistent with principles of natural justice; and
      - (C) allows the delegation of administrative power only in appropriate cases and to appropriate persons; and
      - (D) does not reverse the onus of proof in criminal proceedings without adequate justification; and
      - (E) confers powers to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer; and
      - (F) provides appropriate protection against self-incrimination; and
      - (G) does not adversely affect rights and liberties, or impose obligations, retrospectively; and

- (H) does not confer immunity from proceeding or prosecution without adequate justification; and
  - (I) provides for the compulsory acquisition of property only with fair compensation; and
  - (J) has sufficient regard to Aboriginal tradition; and
  - (K) is unambiguous and drafted in a sufficiently clear and precise way.
- (iv) whether the bill has sufficient regard to the institution of Parliament, including whether the bill:
- (A) allows the delegation of legislative power only in appropriate cases and to appropriate persons; and
  - (B) sufficiently subjects the exercise of a delegated legislative power to the scrutiny of the Legislative Assembly; and
  - (C) authorises the amendment of an Act only by another Act.
- (5) The Committee will elect a Government Member as Chair.
- (6) Each Committee will provide an annual report on its activities to the Assembly.

Adopted 24 August 2017

## **Recommendations**

### **Recommendation 1**

The Committee recommends that the Legislative Assembly pass the Evidence (National Uniform Legislation) Amendment (Journalist Privilege) Bill 2017.

# 1 Introduction

## Introduction of the Bill

1.1 The Evidence (National Uniform Legislation) Amendment (Journalist Privilege) Bill 2017 (the Bill) was introduced into the Legislative Assembly by the Attorney-General and Minister for Justice, the Hon Natasha Fyles MLA, on 23 November 2017. The Assembly subsequently referred the Bill to the Economic Policy Scrutiny Committee for inquiry and report by 13 March 2018.<sup>1</sup>

## Conduct of the Inquiry

1.2 On 8 December 2017 the Committee called for submissions by 24 January 2018, although it did receive some submissions after the due date. The call for submissions was advertised via media release, the Legislative Assembly website, Facebook, Twitter feed and email subscription service.

1.3 The Committee received four submissions and held a public hearing on 28 February 2018.

## Outcome of Committee's Consideration

1.4 Sessional order 13(4)(c) requires that the Committee after examining the Bill determine:

- (i) whether the Assembly should pass the bill;
- (ii) whether the Assembly should amend the bill;
- (iii) whether the bill has sufficient regard to the rights and liberties of individuals; and
- (iv) whether the bill has sufficient regard to the institution of Parliament.

1.5 Following examination of the Bill, and consideration of the evidence received, the Committee is of the view that the Legislative Assembly pass the Bill.

### Recommendation 1

**The Committee recommends that the Legislative Assembly pass the Evidence (National Uniform Legislation) Amendment (Journalist Privilege) Bill 2017.**

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<sup>1</sup> Hon Natasha Fyles MLA, Attorney-General and Minister for Justice, Evidence (National Uniform Legislation) Amendment (Journalist Privilege) Bill 2017 (Serial 37), Explanatory Speech, Northern Territory Legislative Assembly, 23 November 2017.

## **Report Structure**

- 1.6 Chapter 2 provides an overview of the policy objectives of the Bill and the purpose of the Bill as contained in the Explanatory Statement.
- 1.7 Chapter 3 considers the main issues raised in evidence received.

## 2 Provisions of the Bill

### Background to the Bill

2.1 Journalists obtain information from a diverse range of sources and, in some instances, information will only be provided on the condition that the source remain anonymous. Promising to keep sources' details anonymous is a long standing practice in journalism, and the Media, Entertainment and Arts Alliance's (MEAA) *Journalist Code of Ethics* states journalists should:

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.<sup>2</sup>

2.2 The problem is codes of ethics do not provide a legal basis for journalists who refuse to provide evidence in court that will divulge the source of their information. There have been a number of federal legislative changes to provide and strengthen protections for journalist-informant relationships through the enactment of journalist privilege legislation, commonly referred to as journalist shield laws.

2.3 Journalist shield laws provide legal protections against journalists being compelled to provide evidence to a court that would disclose the identity of a confidential informant. The push for journalist shield laws came after two journalists were found in contempt of court in 2007, and each fined \$7,000, for refusing to disclose the identity of their source of information.<sup>3</sup>

2.4 In 2007, amendments were made to the *Evidence Act 1995* (Cwlth) to include limited professional confidential relationship privilege provisions for journalists. In 2009, the Evidence Amendment (Journalist Privilege) Bill 2009 (Cwlth) was introduced to the Federal Parliament, however the Bill lapsed on the proroguing of the 42<sup>nd</sup> Parliament.

2.5 In 2010, two Bills with the same title, the Evidence Amendment (Journalists' Privilege) Bill 2010 (Cwlth) were introduced into the Federal Parliament, a private member's Bill by Mr Andrew Wilkie MP and a private senator's Bill by the former Senator George Brandis QC, with both Bills referred to the Senate Legal and Constitutional Affairs Legislation Committee. Both of the Bills were modelled on the New Zealand journalist privilege legislation, which is known as the 'rebuttal principle model', where privilege automatically exists unless a determination is made to the contrary.<sup>4</sup>

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<sup>2</sup> Media, Entertainment and Arts Alliance, *Journalist Code of Ethics*, viewed on 1 March 2018, <https://www.meaa.org/meaa-media/code-of-ethics/>

<sup>3</sup> Commonwealth, Senate, Legal and Constitutional Affairs Legislation Committee, *Evidence Amendment (Journalists' Privilege) Amendment Bill 2010 and Evidence Amendment (Journalists' Privilege) Amendment Bill 2010 (No. 2)*, November 2010, pp. 1-2.

<sup>4</sup> Commonwealth, Senate, Legal and Constitutional Affairs Legislation Committee, *Evidence Amendment (Journalists' Privilege) Amendment Bill 2010 and Evidence Amendment (Journalists' Privilege) Amendment Bill 2010 (No. 2)*, November 2010, p. 5.

- 2.6 This was a significant shift from the 2007 amendments which required a journalist to “provide evidence unless they can establish that they fall within one of the grounds which justify an exemption”<sup>5</sup>, whereas the 2010 Bills:

effectively reverse the burden of proof so that, rather than a journalist having to prove that they should be given the privilege, the onus shifts to the person seeking the evidence who would have to prove why the journalist should not be given the otherwise automatic exemption.<sup>6</sup>

- 2.7 The Senate Committee’s report acknowledged the similarities between the Bills and recommended that the Wilkie Bill be passed by the Senate. A number of amendments were made to the Bill and it was passed by the Federal Parliament in 2011. Since the introduction of the federal journalist shield laws, New South Wales, Victoria, Western Australia and the Australian Capital Territory have enacted similar legislation.

## Purpose and Overview of the Bill

- 2.8 The purpose of the Bill, as noted in the Explanatory Statement, is to:

provide that a journalist may claim journalist privilege in order to protect a confidential source of information. The privilege is a qualified one, in that the court or judicial entity can require the journalist to identify the informant if this is justified by overriding public interest factors.<sup>7</sup>

- 2.9 The Department of the Attorney-General and Justice (the Department) informed the Committee:

The purpose of a journalist shield provision only relates to giving evidence in court. It is not about journalists being compelled to disclose who their sources are in other settings. It really applies only in a court proceeding when the court is weighing up whether all the relevant evidence should be made available. It becomes a reason on which relevant evidence can be excluded. The basis for that exclusion in the policy rationale is that there is value in the public interest in journalists being able to protect their sources so they can carry out public interest journalism.<sup>8</sup>

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<sup>5</sup> Commonwealth, Senate, Legal and Constitutional Affairs Legislation Committee, *Evidence Amendment (Journalists’ Privilege) Amendment Bill 2010 and Evidence Amendment (Journalists’ Privilege) Amendment Bill 2010 (No. 2)*, November 2010, p. 5.

<sup>6</sup> Commonwealth, Senate, Legal and Constitutional Affairs Legislation Committee, *Evidence Amendment (Journalists’ Privilege) Amendment Bill 2010 and Evidence Amendment (Journalists’ Privilege) Amendment Bill 2010 (No. 2)*, November 2010, p. 5.

<sup>7</sup> Explanatory Statement, Evidence (National Uniform Legislation) Amendment (Journalist Privilege) Bill 2017 (Serial 37), p. 1, <https://parliament.nt.gov.au/committees/EPSC/ENUL>

<sup>8</sup> Department of the Attorney-General and Justice, Committee Transcript, 28 February 2018, p. 2.

### 3 Examination of the Bill

#### Introduction

3.1 The four submissions received supported the introduction of a specific journalist privilege provision, however a number of concerns were raised regarding additional provisions that are not contained within the Commonwealth legislation and that of a number of other jurisdictions.

#### Model Uniform Legislation

3.2 Proposed subsection 127A(1) provides that, if a journalist has promised an informant not to disclose the informant's identity, neither the journalist nor their employer can be compelled to provide evidence in court proceedings that would disclose the identity of the informant. This is known as journalist privilege.

3.3 Proposed subsection 127A(2) qualifies the privilege by prescribing that a party can apply to a court or judicial entity to make a determination that subsection (1) does not apply, in which case a journalist can be compelled to provide evidence that would disclose the identity of their informant. When making a determination that journalist privilege does not apply, a court or judicial entity must be satisfied that the public interest in identifying the informant outweighs:

- any likely adverse effect of the disclosure on the informant or any other person; and
- the public interest in the communication of facts and opinion to the public and, accordingly also, in the ability of journalists to access sources of information.<sup>9</sup>

3.4 The provisions in proposed subsections 127A(1) and 127A(2) are based on the Commonwealth legislation which has been mirrored in New South Wales, Victoria and the Australian Capital Territory.

#### Committee's Comments

3.5 The submissions received support proposed subsections 127A(1) and 127A(2), and the Committee supports their inclusion in the Bill.

#### Definition of Journalist

3.6 The Committee notes that the definition of 'journalist' varies between jurisdictions and these definitions differentiate between whether a journalist is viewed in the traditional sense of being employed as a professional journalist by a media organisation, or in a broader sense which recognises the evolving nature of journalism and media platforms, and the role that freelancers, academics and other people play in public interest journalism.

3.7 Section 126J of the *Evidence Act 1995* (Cwlth) defines a journalist as:

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<sup>9</sup> Evidence (National Uniform Legislation) Amendment (Journalist Privilege) Bill 2017

a person who is engaged and active in the publication of news and who may be given information by an informant in the expectation that the information may be published in a news medium.<sup>10</sup>

- 3.8 The original definition in the Evidence Amendment (Journalists' Privilege) Bill 2010 (Cwlth), modelled on the New Zealand legislation, was a more conventional definition of a journalist with reference to a person who is given information in the normal course of their work. The definition was amended before the Bill was passed to allow privilege protections to apply to a broader spectrum of people reporting and commenting on information in a news medium.
- 3.9 The Victorian journalist privilege legislation uses the same definition as the Commonwealth, however the legislation prescribes a number of factors that must be considered in "determining if a person is engaged in the profession or occupation of journalism"<sup>11</sup> which include whether:
- A significant proportion of their professional activity involves collecting and preparing news or current affairs information, or providing opinion or analysis of news or current affairs.
  - The news and current affairs information collected and prepared by the person is published and the frequency of publication.
  - The person is obliged to comply with recognised journalistic or media professional standards or codes of conduct.<sup>12</sup>
- 3.10 The additional provisions contained within the Victorian legislation limit the definition of a journalist to a more conventional interpretation, and consequently are likely to restrict who can claim journalist privilege.
- 3.11 Proposed subsection 127A(6) of the Bill defines a journalist as a person who:
- (a) obtains new or noteworthy information about matters of public interest; and
  - (b) deals with the information by:
    - (i) preparing the information for a news medium; or
    - (ii) providing comment, opinion or analysis of the information for a news medium.<sup>13</sup>
- 3.12 The Department advised the Committee that an intentional policy decision had been made for a broad journalist definition to ensure the legislation takes into account specific characteristics of the Northern Territory:
- the Northern Territory provision tries to recognise that the Northern Territory is, I suppose, geographically a little different from the other areas in a way that may be relevant—in particular where, looking at some of the other jurisdictions, they have a high concentration of professional journalists acting in a full-time employed capacity. If the Northern Territory only protects those journalists—and we certainly want to protect those journalists—then protection is excluded for a whole lot of other smaller or Indigenous publications that do not fit within those

<sup>10</sup> *Evidence Act 1995* (Cwlth)

<sup>11</sup> Section 126(J)(2) *Evidence Amendment (Journalist Privilege) Act 2012* (Vic)

<sup>12</sup> Section 126(J)(2) *Evidence Amendment (Journalist Privilege) Act 2012* (Vic)

<sup>13</sup> Evidence (National Uniform Legislation) Amendment (Journalist Privilege) Bill 2017

traditional categories necessarily. That was taken into account in how we drafted the provision.<sup>14</sup>

3.13 The Department also noted the changing nature of journalism and media platforms:

since 2011 or 2012, I believe it is, a quarter of all Australian journalists lost their jobs... There has been a massive drain of revenue out of those traditional sources of public interest journalism into what they call the aggregators like Google and Facebook. The result is that, apart from the impact on those organisations, we have seen a lot of start-ups based on the web. But the quality and the business models of those start-ups are not necessarily the same as traditional public interest journalism. For example, you have websites like The Conversation. The business model, in order to be financially viable, is to arrange to get academics and experts in the field to do one-off articles—usually on an unpaid basis. That kind of article would not be covered by a traditional journalist privilege because that is not a traditional journalist regularly publishing news work.

The idea is we wanted to have a provision that would cover any kind of journalism being carried out in accordance with ethical standards of public interest journalism, irrespective of whether it is a full-time employed journalist in a traditional role.<sup>15</sup>

3.14 The Bill's Explanatory Statement also commented on the diversity in modern journalism:

news may be presented in a variety of styles and formats, using a variety of technologies, and aims to take an approach that does not privilege any particular style, technology, or medium. The definitions recognise that news can be communicated with text, audio, video, and other methods. It can be presented in a traditional, factual style, accompanied by opinions and verbal flourishes, in a strident or tempered tone, and seriously or combined with humour or entertainment. It can be communicated using traditional print and broadcast mediums, or via the web, email, and other emerging technologies. News encompasses not only new information (e.g. breaking news) but also noteworthy information about matters of ongoing public interest. This means the privilege can potentially extend to publications of longer form work rather than just short pieces aimed at the daily news cycle.<sup>16</sup>

### **Committee's Comments**

3.15 The Committee considers that, given the continuing evolution of journalism and media platforms, a broad definition of journalist is appropriate to ensure that the legislation remains relevant over time to changing technologies and communication practices.

### **Proposed subsection 127A(3)**

3.16 Proposed subsection 127A(3) prescribes additional factors that a court or judicial entity is to take into account when determining that journalist privilege should not apply. These factors focus on how the information was used by the journalist including whether the information was verified (if reasonably practicable); any undue

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<sup>14</sup> Department of the Attorney-General and Justice, Committee Transcript, 28 February 2018, p. 3.

<sup>15</sup> Department of the Attorney-General and Justice, Committee Transcript, 28 February 2018, p. 3.

<sup>16</sup> Explanatory Statement, Evidence (National Uniform Legislation) Amendment (Journalist Privilege) Bill 2017 (Serial 37), p. 3, <https://parliament.nt.gov.au/committees/EPSC/ENUL>

harm to any person was minimised; and the information was used in a fair and accurate manner.<sup>17</sup>

- 3.17 The Committee understands that this subsection is intended to provide limits on who can claim journalist privilege given the broad definition of journalist in the Bill. The Explanatory Statement notes:

The primary limitations on when the privilege can be claimed are not determined by the definition of a ‘journalist’, but rather through the factors set out in subsections (2) and (3). These limit the application of the privilege to situations where the journalist has abided by the kind of ethical practices that are expected of professional journalists, and where the journalist is in fact protecting a source of information that is of public interest value. These considerations aim to exclude protection for ‘fake news’, misleading information, or publications which simply repeat assertions without taking any reasonable steps to verify the accuracy of those assertions or adequately contextualise them.<sup>18</sup>

- 3.18 The Explanatory Statement refers to the factors outlined in this subsection as “ethical practices that are typically expected of professional journalists”<sup>19</sup> and these:

provide an incentive for journalists to verify their information, to handle it fairly and accurately, and to avoid causing harm to any person or organisation beyond what is needed to make fair comment and raise awareness about matters of public interest. Precisely where this line is to be drawn will be a matter for the courts to decide based on the competing public interest factors in a given case.<sup>20</sup>

- 3.19 Western Australia is the only other jurisdiction that has legislated additional considerations when determining if journalist privilege should not apply, but that legislation prescribes a much more extensive list of factors to be considered. The Committee questioned the Department why the provisions in proposed subsection 127A(3) are not as extensive as the Western Australian provisions and were advised:

It is not necessarily always helpful to have a really long list. Western Australia’s provision runs the risk of becoming overly complicated. It is a consideration. It is very broad. While they say the court can take into account misconduct, misconduct goes right down to inappropriate impartiality—whatever that means, and it is not defined—corruption—whatever that means, it is not defined. So, I am not sure it would actually assist in providing clarity unless you had definitions of all those terms.

It even has a really unusual provision, which is:

*...conduct providing reasonable grounds for disciplining the informant or journalist in relation to unsatisfactory conduct or professional misconduct in relation to their profession, whether or not they are a member of the body that prescribed the standard.*

How would you evaluate that? How are you a member of the profession if you are not part of the body that prescribed the standard? When you start unpacking that Western Australian definition, it is more detailed, but I do not know if it will necessarily help.<sup>21</sup>

<sup>17</sup> Evidence (National Uniform Legislation) Amendment (Journalist Privilege) Bill 2017

<sup>18</sup> Explanatory Statement, Evidence (National Uniform Legislation) Amendment (Journalist Privilege) Bill 2017 (Serial 37), p. 3, <https://parliament.nt.gov.au/committees/EPSC/ENUL>

<sup>19</sup> Explanatory Statement, Evidence (National Uniform Legislation) Amendment (Journalist Privilege) Bill 2017 (Serial 37), p. 2, <https://parliament.nt.gov.au/committees/EPSC/ENUL>

<sup>20</sup> Explanatory Statement, Evidence (National Uniform Legislation) Amendment (Journalist Privilege) Bill 2017 (Serial 37), p. 2, <https://parliament.nt.gov.au/committees/EPSC/ENUL>

<sup>21</sup> Department of the Attorney-General and Justice, Committee Transcript, 28 February 2018, p. 9.

### **Ethical Codes of Conduct**

3.20 In their submission to the inquiry, SBS stated proposed subsection 127A(3) shifts the court's focus away from a general public interest test and towards a qualitative assessment of the value of specific facts provided to a journalist and how the journalist uses those facts. SBS criticised proposed subsection as unnecessary stating:

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.<sup>22</sup>

3.21 In response to SBS's suggestion that codes of conduct are the preferable means by which to address unethical behaviour, the Department informed the Committee:

Some organisations are obliged to follow ethical standards. For example, SBS and ABC are obliged to have codes of conduct. Some organisations voluntarily self-regulate... Essentially, the Media, Entertainment and Arts Alliance that most journalists belong to has a code of conduct and all their members are obliged to follow that code of conduct...

Now, the new start-ups do not necessarily—some behave very ethically, but they are not necessarily obliged to follow any particular code of conduct. I suggest there is a great deal of variation in whether they follow certain standards that are the traditional standards...

The idea is that subsection (3) is supposed to mirror the obligations that a professional journalist would have under one of those codes... The idea is that then you can open it up to the people who are in different business models and employment roles and focus on how they are behaving rather than whether they meet that traditional definition of a journalist.<sup>23</sup>

3.22 The Media, Entertainment and Arts Alliance's *Journalist Code of Ethics* states that journalists should:

Report and interpret honestly, striving for accuracy, fairness and disclosure of all essential facts. Do not suppress relevant available facts, or give distorting emphasis. Do your utmost to give a fair opportunity for reply.<sup>24</sup>

3.23 However, the Committee notes that MEAA cannot investigate potential breaches or take any action against journalists that are not MEAA members.

### **Chilling Effect**

3.24 In their submissions to the inquiry, both SBS and Whistleblowers Australia raised concerns that if a journalist is found to have acted improperly or negligently (by not minimising undue harm or acting in a fair manner) and this leads to a journalist being compelled to disclose the informant's identity, then the informant may be the one who feels the greatest impact from the disclosure despite them having no control over the

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<sup>22</sup> SBS, Submission No. 3, 2018, p. 2.

<sup>23</sup> Department of the Attorney-General and Justice, Committee Transcript, 28 February 2018, pp. 3-4.

<sup>24</sup> Media, Entertainment and Arts Alliance, *Journalist Code of Ethics*, viewed on 1 March 2018, <https://www.meaa.org/meaa-media/code-of-ethics/>

journalist's behaviour. When asked about whether the provisions in 127A(3) would have a chilling effect, the Department advised:

The baseline for this question is asking whether there is a better way to do it which would have less of a chilling effect. Introducing a journalist privilege law, in essence, will help with the chilling effect that is already there. It will offer a protection that was not previously there. The question is whether we would be better to model ourselves more closely on something like the Commonwealth, or will this provision have more of a chilling effect than what the Commonwealth is doing. If you assume that informants are reluctant to speak to journalists at the moment because there is no shield law, having a shield law is a step forward.

Under the Commonwealth-type or Victoria-type model, there is arguably more certainty around disclosing to a traditional journalist because you have seen what that person does—that they tick certain criteria. However, to some extent, when you are evaluating what the risks are, there is always risk to an informant, irrespective of the privilege law. That risk is that the journalist does not handle their information with care and their identity comes out. It is not necessarily that it will come out in court, it will come out in things like gossip. If you have a journalist you are already confident enough in that they will protect your identity, you have to make that call anyway, irrespective of what the privilege law says. The kind of journalist who will adhere to ethical standards is probably not the kind of journalist who will leak your identity anyway...The risk is not just the journalist privilege law. In fact, for the informant there are probably bigger risks associated with just having their name leak out generally. They always have to make a call as to whether a particular journalist will be one who is trustworthy, irrespective of what the journalist privilege test is.

I am not sure that will have a substantive additional chilling effect. What the Commonwealth provision might do which would have a chilling effect in the Territory, is it would not cover a lot of potential sources for getting information out there. Say you have a concerned community member who is not a full-time journalist but decides to write something for, say, the *Katherine Times*. They are getting some sources of information from other people in the community, they write it up, give it to the *Katherine Times* to present and have done it fairly and reasonably and tried to accurately portray what was said. That person is definitely not covered under the Commonwealth legislation, but would be covered under our legislation if they have behaved in an ethical manner.<sup>25</sup>

### **Committee's Comments**

- 3.25 The Committee notes that while all submissions support the introduction of journalist privilege legislation, SBS recommended that proposed subsection 127A(3) be completely removed from the Bill, while Whistleblowers Australia recommended that proposed subsection 127A(3)(b) be removed from the Bill.
- 3.26 The Committee considers that the deliberate policy decision to include a broad definition of journalist necessitates provisions to prevent people claiming privilege in situations that would clearly undermine the concept of journalist privilege.
- 3.27 The Committee is satisfied with the Department's explanations of the rationale for the provisions contained within proposed subsection 127A(3), supports their inclusions in the Bill, and recommends the Bill be passed in its current form.

<sup>25</sup> Department of the Attorney-General and Justice, Committee Transcript, 28 February 2018, p. 4.

## Judicial Interpretation

3.28 SBS also expressed concerns about the subjective nature of determining whether the use of the information is ‘fair’ and if an impact on an individual amounts to ‘undue harm’. Whistleblowers Australia also questioned the adequacy of the explanation for the absence of a definition of harm, with the Explanatory Statement saying “‘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.”<sup>26</sup>

3.29 The Committee sought clarification from the Department as to what undue harm would mean in this context of journalist privilege and was advised:

The reason why ‘undue’ is in there, essentially, is because public interest journalism will not make everyone happy. If it points out true things that people are doing that are of concern, it may indeed cause them adverse effects. The idea of inserting the word ‘undue’ is that it allows the court to distinguish between harm and harm that is undue. ‘Undue harm’ might be deliberately distorting the facts to present a view that is not, in fact, accurate, in order to harm someone—along the lines of something like defamation, but not restricted by defamation’s strict criteria.<sup>27</sup>

3.30 The Committee questioned the Department about what considerations a court would take into account to determine if information had been used in a ‘fair and reasonable manner’:

It is, essentially, up to the court in a given case, depending on all the facts of the case. If you were to imagine, for example, an article being written about sexual assault of children in a small community. Someone might write an article and interview various people. All those people they interview—presumably most of them would not be named—would be the informants. So, then when the court comes to consider what kind of adverse effect, they might consider if the person, say, is an employee in a job and whether that person would suffer adverse effects in employment. They might consider whether a person would suffer adverse effects in community or family reactions. It could be financial adverse effects if there is a business.

All those examples someone might look at. It might be a very important public interest story, but the court has to balance the public interest and the impact on those different informants. They could form different views about different informants and the extent of the adverse impact on them versus what is at stake in the case. That would depend on the court case—it could be a defamation case or a criminal case—and the purpose for which they need the evidence. Is this evidence crucial to the case or is it really a peripheral fishing expedition?

The court would weigh up those factors. In evidence law, the court is weighing up these complex factors about admissibility using quite broad discretions all the time. One of the reasons we keep the discretions fairly broad is because we do not want to artificially limit the courts so they cannot take into account what is relevant in a case.<sup>28</sup>

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<sup>26</sup> Explanatory Statement, Evidence (National Uniform Legislation) Amendment (Journalist Privilege) Bill 2017 (Serial 37), p. 2, <https://parliament.nt.gov.au/committees/EPSC/ENUL>

<sup>27</sup> Department of the Attorney-General and Justice, Committee Transcript, 28 February 2018, p. 7.

<sup>28</sup> Department of the Attorney-General and Justice, Committee Transcript, 28 February 2018, p. 8.

**Committee's Comments**

- 3.31 The Committee considers that the terms in the Bill are sufficiently clear to enable judicial interpretation.

**Journalistic Standards**

- 3.32 The Committee was concerned whether the Bill, by protecting a journalist from revealing their source, might also shield a journalist who was failing to meet appropriate standards, for example by creating 'fake news' without a source.
- 3.33 Ensuring integrity in reporting is vital for a healthy democracy. Providing a shield to those who fail to maintain appropriate standards would clearly be against the public interest:

The answer to that, to some extent, is it is a policy decision to introduce journalist shield. But the other part of the answer is that the court is able to require parties to give evidence about what has occurred. Our test is focusing, still, on what has happened in this case. It will be of significance who the informant is, what their position is and what kind of information was provided, but also the nature of the case which is being called and the impact of the informant's action—whether there is other evidence that could deal with whatever issues the informant could give evidence about. The court would look at all those issues and be able to require evidence on it. It is not an absolute right. The court can turn around and say, 'I am not satisfied that it applies in this case'.<sup>29</sup>

**Committee Comment**

- 3.34 The Committee notes that the shield provided by the Bill only applies to the compulsion of revealing a source in judicial proceedings and is subject to the tests in proposed subsection 127A(3).
- 3.35 The Committee further notes that the recognition of the importance of journalism for our society also reflects the importance of those reporting news maintaining high standards of honesty and integrity.

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<sup>29</sup> Department of the Attorney-General and Justice, Committee Transcript, 28 February 2018, p. 6.

## **Appendix A: Submissions Received and Public Hearing**

### **Submissions Received**

1. Commissioner, Information and Public Interest Disclosures
2. Media, Entertainment and Arts Alliance
3. SBS
4. Whistleblowers Australia Inc.

### **Public Hearing – Darwin 28 February 2018**

- Ms Caroline Heske: Senior Policy Lawyer, Department of the Attorney General and Justice
- Ms Leonique Swart: Deputy Director of Legal Policy, Department of the Attorney General and Justice

**Note:** Copies of submissions and hearing transcript are available at:

<https://parliament.nt.gov.au/committees/EPSC/ENUL>

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