Evidence Amendment (Protection of Journalists' Sources) Bill 2011 (Proof)

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EVIDENCE AMENDMENT (PROTECTION OF JOURNALISTS' SOURCES) BILL 2011

Bill introduced, and read a first time and ordered to be printed on motion by Mr David Shoebridge.

Second Reading

Mr DAVID SHOEBRIDGE [2.36 p.m.]: I move:

That this bill be now read a second time.

This year there have been proceedings before the Supreme Court that bring no credit to the State of New South Wales. The New South Wales Crime Commission has been seeking orders to prevent the Police Integrity Commission from holding public hearings into its practices and procedures for asset seizures. We now know that the Crime Commission has for many years been engaged in a practice by which it effectively cut deals with organised crime figures in proceeds of crime seizure proceedings. This practice came to light as a result of investigative reports published earlier this year by two *Sydney Morning Herald* reporters. The reports raised real issues of governance and political oversight in relation to the New South Wales Crime Commission. The New South Wales Crime Commission was however terribly concerned that the public had been informed of its longstanding practice of cutting deals with organised crime. It was apparently concerned that some members of the Police Integrity Commission may have provided some documents or information to the two journalists that they then used as sources for their articles.

Apparently, in order to prosecute a separate case that the New South Wales Crime Commission was running against the Police Integrity Commission, the Crime Commission decided to attack the independence of the two journalists. Its lawyers issued subpoenas in the proceedings that the Crime Commission had in the Supreme Court seeking the production of documents from those journalists. They were seeking orders that the journalists produce to the Crime Commission their mobile phones, their SIM cards and their telephone records. They wanted this material in order to hunt down the journalists' confidential sources. This was a direct attack on independent journalism in this State. It was effectively a case of the State's secret police in the form of the Crime Commission using the coercive powers of the State's highest court to force journalists to give up their sources. Thankfully, after a degree of public outrage, the Crime Commission determined to withdraw the subpoenas. However, this sorry tale has highlighted a significant gap in the protection that this State's laws give to journalists and their confidential sources. Under the current law, journalists' sources can be attacked and their disclosure can be compelled without the court considering the broader public interest in allowing the media to hold the Government and its agencies to account. This is not good enough. Urgent reform is required, and that reform is the substance of this bill.

For journalists, bloggers and online writers to be able to do their job, and give the public information about the workings of government and other powerful interests in our society, they must have people willing to give them information on a confidential basis. Unless people can feel sure that journalists will not be compelled to divulge the source of their information, the sources of information will dry up and secrecy will prevail. A core function of news outlets, whether online or print, is to hold the government of the day to account. This function is severely limited if a government is able to muzzle news reporters by demanding that they reveal their sources. Journalists' sources need to be able to speak freely, without fear of retribution from their employers or governments. Without this freedom we simply will not have people willing to come forward and speak the truth in the face of government or, indeed, well-heeled private pressure. When a journalist faces the threat of court orders, which if disobeyed include the potential for jail for contempt for the simple fact of standing up to a government agency to protect the confidential source who gave the public its first insight into how a government is acting—for example, when it was disclosed that the Crime Commission had cut million-dollar deals with organised crime figures—it is clearly time for the Legislature to act. That is what this bill proposes.

The bill is closely modelled on a similar bill that the Commonwealth Parliament passed recently. Following the lead of the Independent member Andrew Wilkie—I note that he was once a member of the New South Wales

Greens—the Commonwealth Parliament passed the Evidence Amendment (Journalists' Privilege) Bill 2011, which gives protection to employed journalists. The provisions in The Greens bill complement the Commonwealth Act. This bill will ensure the protection of journalists' sources in proceedings in the Local Court, the District Court and the Supreme Court in New South Wales. Not only that, it will protect both print media and online media. The recent Federal legislation failed to recognise the modern reality of news—that is, anyone with access to the internet is a potential source of news, whether or not they are employed as a journalist.

The Evidence Amendment (Protection of Journalists' Sources) Bill 2011 is modelled on the Commonwealth provisions but expands the protections to include not only employed journalists but those who are engaged and active in the publication of news, whether in print or online. Members may ask why a separate New South Wales law is required when the Commonwealth has acted. The Commonwealth's law applies only to proceedings in a Federal court, proceedings brought in the Australian Capital Territory or proceedings for breaches of Commonwealth criminal laws. As we have seen in the current proceedings before the Supreme Court, the Commonwealth Act does not apply to the bulk of proceedings that occur in New South Wales. Those proceedings occur generally under State laws and in the Supreme Court, the District Court and the Local Court. Indeed, they include thousands of criminal prosecutions under State law. I turn now to the substantive provisions of the bill.

The Hon. Trevor Khan: What if the informant is engaged in criminal activity?

Mr DAVID SHOEBRIDGE: I will get to that. Unlike the Commonwealth legislation, this bill is designed to complement the existing provisions in the New South Wales Evidence Act on protected confidence. It does not seek, as does the Commonwealth legislation, to remove the protected confidence provisions from the Act; it seeks to complement them. That is provided in items [1] and [2] in schedule 1 to the bill. Item [3], which is the substantive provision, inserts a new division 1C, headed "Journalists' privilege", in the Evidence Act. New section 126J provides:

> (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 to answer any question or produce any document that would disclose the identity of the informant or enable that identity to be ascertained.

That is the key protective provision. To answer the Hon. Trevor Khan's concern, new section 126J further provides:

> (2) The court may, on application by a party to a proceeding, order that subsection (1) is not to apply if it is satisfied 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
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> (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.

Subsection (2), which is modelled on the Commonwealth provision, provides that if it is alleged that a source must be disclosed for, say, a criminal prosecution or a forensic purpose in a civil matter, the court must first presume that the communication will be privileged and not ordered to be produced, and then only allow it to be produced if the party seeking the document can prove that those interests—either the immediate forensic interest or some interest in getting to the bottom of a criminal matter—outweigh the accepted public interest in not disclosing. The courts must also take into account any adverse impact that an order for disclosure may have on an informant and protect the public interest by ensuring that journalists' confidential sources are protected.

In the normal fashion, subsection (3) provides that that order can be made on terms. For example, it may prevent the broader disclosure or may allow the document to be provided to a legal advisor only in certain circumstances. Subsection (4) provides:

> If, in response to a disclosure requirement, a person claims that they are not compellable to answer any question or produce any document that would disclose the identity of an informant or enable that identity to be ascertained, a party that is seeking disclosure pursuant to the disclosure requirement may apply to the court for an order.

In other words, people who are the subject of a subpoena in the initial stages of a proceeding, even if they are not a party, can object to disclosure and are not required to bring proceedings or to argue the case as to why their disclosure should be protected. The person seeking the document must seek an order that the subject is compelled to produce in light of the privilege they have claimed. That is the only sensible way of providing the onus in those circumstances.

In subsection (5) it is intended to have the privilege apply to information that was provided before or after the commencement of the section. In other words, it gives some retrospective protection to people who may have been providing material on a confidential basis before the bill comes into effect. However, subsection (6) makes it clear that the section applies only to proceedings that are commenced after the bill comes into effect. That will provide some legal certainty for those people engaged in litigation.

The definitions provided in subsection (7) are closely modelled on the Commonwealth provisions. However, one

important distinction is provided in the definition of "informant". The bill provides:

> ***informant*** means a person who gives information to a journalist in the normal course of the journalist's activities in the expectation that the information may be published in a news medium.

"News medium" is defined broadly to mean any medium for the dissemination to the public or a section of the public of news and observations on news. The important point is that an informant is someone who gives information to a journalist in the normal course of the journalist's activities. The Commonwealth legislation provides only that an informant is a person who gives information to a journalist in the normal course of the journalist's work. The distinction is between the words "activities" and "work".

Providing for the broader definition of "journalist's activities" means that it also protects journalists, bloggers and online commentators who may not be in paid employ but who are a necessary part of getting the word out and giving the public information in the modern online world.

There is concern that the Commonwealth legislation only protects employed journalists and therefore arguably will not provide that protection to the broader class of commentators and bloggers who are only online. This altered definition of "informant", ensuring that the privilege applies to a person who gives information to a journalist in the normal course of the "journalist's activities", gives that broader protection. That protection is necessary, given the current new media and given how much of our news is now broken not only by paid, employed journalists but by online commentators and bloggers. People in our community are increasingly accessing the media through the online community.

The Hon. Trevor Khan: What if the information is a conditional precedent for other information that is then made public—that is, it is the trigger?

Mr DAVID SHOEBRIDGE: The capacity to weigh the public interest and the accepted public interest against forensic interests that a party may have is appropriately at the court's discretion. The Parliament should not be scared to give the courts the power to weigh the public interest, to assume that the public interest is found in non-disclosure and then to allow for the disclosure of material in a limited class of cases where there is an overwhelming interest to do so. Currently there is no protection either at common law or in statute. This bill is a major advance for the people of New South Wales in ensuring they have open access to information. It is a necessary step to protect the integrity of the fourth estate, and journalism generally, and I commend the bill to the House.

Debate adjourned on motion by the Hon. Amanda Fazio and set down as an order of the day for a future day.