EVIDENCE AMENDMENT (JOURNALIST PRIVILEGE) BILL 2011

27 May 2011, Page: 22

Bill introduced on motion by Mr Greg Smith.

Agreement in Principle

Mr GREG SMITH (Epping—Attorney General, and Minister for Justice) [12.20 p.m.]: I move:

> That this bill be now agreed to in principle.
> The Evidence Amendment (Journalist Privilege) Bill 2011 amends the Evidence Act 1995 to strengthen the protections available to journalists and their sources in New South Wales. The bill implements this Government's election commitment to introduce shield laws to protect journalists from being compelled to name their sources. Freedom of expression, including freedom of the press, is vital to the proper functioning of an open and transparent democracy. Where Government matters are concerned, the dissemination of information by the news media encourages political debate and scrutiny of the political process and supports the capacity of citizens to make informed choices. In the non-government sector journalists also play an important role in investigating and disseminating information and opinion about matters of public interest. Consequently, there is an important public interest served in supporting journalists to carry out their work.

In their work, journalists often depend on assistance from sources who may wish to remain anonymous. In many instances, sources may only be willing to provide important information on condition that their identity remains confidential. Journalists' ethical standards recognise that it is preferable, where possible, to attribute published information to its source, expect when information is provided on the basis of anonymity and good faith requires that a journalist withhold the identity of the source. Laws that allow journalists to preserve the anonymity of their sources—when they have made a promise to do so—are essential to support the work of journalists. This bill strengthens the capacity of journalists to maintain the anonymity of their sources by creating a presumption that they may withhold the identity of their sources in proceedings in New South Wales courts.

Any law permitting otherwise relevant information to be withheld from a court must be weighed against the general principle that, to the greatest extent possible, all relevant evidence should be placed before the court. The public interest in this principle is self evident: Justice requires that courts making decisions that significantly impact on the rights and interests of the parties should be properly informed of all relevant matters that could legitimately influence their decisions. Consequently, it is important that the law establish an appropriate balance between these two competing public interests—I will say more about this in discussing the detail of the bill.

The bill establishes, in the context of part 3.10 of the Evidence Act 1995, a new qualified "privilege" specifically for journalists. The new privilege takes the form of a presumption that when a journalist has promised not to disclose an informant's identity, the journalist is not

compellable in a civil or criminal proceeding to give evidence that would disclose the identity of the informant. The bill does not, however, establish an absolute prohibition on disclosure. A court may order that that presumption does not apply if satisfied that the public interest in disclosure of the identity of the informant outweighs, first, any likely adverse effect on the informant or any other person; and, secondly, the public interest in the communication of facts and opinion to the public by the news media and the public interest in the ability of the news media to access sources of facts.

The nature of the journalists' privilege established by this bill has a precedent in a similar provision enacted by section 68 of the New Zealand Evidence Act 2006. That was also the precedent for a private members' bill introduced into the Commonwealth Parliament last year by Senator George Brandis, as well as an alternative version of that provision subsequently enacted by the Commonwealth in the Evidence Amendment (Journalists' Privilege) Act 2011 in March of this year. It is also the basis of a bill recently introduced into the New South Wales Legislative Council by Mr David Shoebridge, MLC, from The Greens. There are, however, important differences in the nature of the journalists' privilege proposed by this bill and those enacted by the Commonwealth Government and proposed in Mr Shoebridge's bill.

The primary difference is the scope of the application of the privilege, which is determined by the definitions of "journalist" and "informant". Journalist is defined in this bill as "a person engaged in the profession or occupation of journalism in connection with the publication of information in a news medium". Informant is defined as a "person who gives information to a journalist in the normal course of the journalist's work in the expectation that the information may be published in a news medium". The definitions adopted in this bill are not intended to unnecessarily restrict the application of journalists' privilege or the persons by whom it may be claimed. It is intended that the privilege may be claimed by journalists who, in the course of their work, are broadly involved in investigating and/or disseminating to the public, information and opinion about matters that are, or may be, of public interest.

The definition of "journalist" in the bill relies on the ordinary plain English meanings of the words "profession", "occupation" and "journalism". This will allow the bill to reflect contemporary journalistic practices in determining by whom the privilege may be claimed, but ensures that the privilege applies only to persons who are recognisably engaged in working as a journalist, and their employers. Consequently, the privilege would not apply, for example, to amateur bloggers or users of social networking media who happen to obtain and publish information or opinion that may be of some public interest. The requirement that the information be given to a journalist in the normal course of the journalist's work further clarifies that, for the privilege to apply, an informant must have given information to a journalist for a reason connected with their work as a journalist. It would not be open to a journalist to claim the privilege when they obtain the information in some way not connected to their work as a journalist. This is consistent with the public interest that the creation of the privilege is intended to serve—that is, to support the capacity of journalists to investigate and report on matters of public interest.

The new journalists' privilege will apply to giving or adducing evidence in civil and criminal proceedings in New South Wales courts, as that term is defined in the Evidence Act 1995. Like other privileges established by part 3.10 of the Evidence Act 1995, the new journalists' privilege will also apply to processes or orders of a New South Wales court that require the disclosure of information or production of documents such as a subpoena, including those set out at section 131A of the Evidence Act 1995. Consequently, if a journalist is required by a process or order of a New South Wales court to give information or to produce a document that would result in the disclosure of the identity of an informant, the journalist may rely upon the privilege to resist the requirement. If a party to a proceeding wishes the court to determine that the privilege does not apply, it will be incumbent upon the party to make that application to the court.

In addition to establishing a new journalists' privilege, the bill also reforms the existing Professional Confidential Relationships Privilege [PCRP]. The Professional Confidential Relationships Privilege applies to confidential communications with professionals—including journalists—in the context of their work. It gives courts discretion to direct that evidence of a communication made by a person in confidence to a professional or information about the identity of a person who made a protected confidence may be withheld from the court. The professional confidential relationships privilege clearly applies to journalists but as it does not apply automatically it provides only limited protection. To obtain the protection of the professional confidential relationships privilege a journalist must first convince a court that it is likely that disclosure of the identity of an informant, or the content of the communication, would cause harm to the informant and that the harm outweighs the desirability of evidence being given.

As members of this House would be aware, New South Wales is one of a number of jurisdictions—including the Commonwealth, Victoria, Tasmania, the Australian Capital Territory and Norfolk Island—that has established a substantially uniform statutory code for evidence law. Like evidence laws in the other jurisdictions, the New South Wales Evidence Act is modelled on and substantially uniform with the Model Uniform Evidence Bill. The professional confidential relationships privilege in the New South Wales Evidence Act mirrors the professional confidential relationships privilege in the Model Uniform Evidence Bill.

In 2010 the Standing Committee of Attorneys-General, known as SCAG, considered options for journalist shield laws for potential inclusion in the Model Uniform Evidence Bill. The Standing Committee of Attorneys-General decided to amend the professional confidential relationships privilege provisions in the Model Uniform Evidence bill to strengthen the protection for journalists under those provisions. As a consequence, the Standing Committee of Attorneys-General amended the Model Uniform Evidence Bill to require that when called upon to determine whether the professional confidential relationships privilege should apply a court consider the following public interest matters: one, the public interest in preserving the confidentiality of protected confidences; and, two, the public interest in preserving the confidentiality of protected identity information.

The Evidence Amendment (Journalists' Privilege) Bill 2011 implements the recent amendments to the Model Uniform Evidence Bill in New South Wales. The amendments will strengthen the protection available to journalists, and other professionals, under the existing professional confidential relationships privilege by changing the balance of matters that are required to be considered by a court and, in particular, by requiring the court to consider public interest factors in support of applying the privilege. In most instances, journalists will seek to rely on the new qualified journalists' privilege rather than the professional confidential relationships privilege.

However, there are some circumstances in which the professional confidential relationships privilege may provide protections for journalists that the specific journalists' privilege will not. For example, the specific journalists' privilege will not apply unless there is an expectation that the information will be published. Neither will the specific journalists' privilege apply where a journalist seeks to protect the content of a confidential communication from a source rather than or in addition to the identity of the source. In each of these cases a journalist could seek to protect the content of the communication under the professional confidential relationships privilege.

The two reforms of the Evidence Amendment (Journalists' Privilege) Bill 2011 I have just described significantly improve the protection of journalists and their sources in court proceedings. They do this in a way that appropriately balances two important public interests: the public interest in supporting the capacity of journalists to investigate and disseminate information about matters of public concern and the public interest in ensuring that courts dispensing justice are properly informed of matters that might legitimately influence their decisions. I commend the bill to the House.