



QUEENSLAND COUNCIL FOR CIVIL LIBERTIES

Protecting Queenslanders' individual rights and liberties since 1967

The Secretary
Legal Affairs and Safety Committee
Parliament House
QLD 4000

lasc@parliament.qld.gov.au

Dear Sir/Madam,

Evidence and Other Legislation Amendment Bill 2021

Kindly accept this submission in relation to the above Bill.

This submission is directed only to the journalist privilege provisions. That fact should not be taken as meaning that the Council approves of any of the other provisions contained in the Bill. It simply reflects the fact that the Council is an organisation of volunteers which does not have the resources to address all the issues that it wants to.

The Bill enables a journalist to refuse to disclose to a Court of record or in response to a search warrant the identity of their informant, unless a Court having considered all factors concludes that the public interest requires the disclosure of the informant's identity.

In summary the QCCL's position is that the Bill does not go anywhere near far enough.

1. Freedom of Speech

In our view the journalist's privilege is required by our society's commitment to freedom of speech.

To work out the content of the right to freedom of speech in any particular context, it is necessary to consider the interests of the three parties who may be involved in the speech act: the speaker, the audience and bystanders. In this case, it is the audience's interest that needs to be considered.

The audience's interest is, amongst other things, in having a good environment for the formation of their beliefs and desires. This means that the audience has an interest in access to information. The media is one such source of that information. The right of freedom of speech, dictates that the media must be given the widest possible latitude to seek and publish truthful speech about matters of public interest so that the audience is best able to form their beliefs and desires.¹

Freedom of speech is rooted in a distrust of the government's capacity to regulate speech, particularly political speech, where it is in a position of a conflict of interest. This conflict is no starker when it is seeking to have access to embarrassing information obtained by journalists.

If the law too readily allows a journalist to be compelled to identify a source or disclose information they have obtained in the course of their work, journalists and informants will be

¹ T M Scanlon "Freedom of Expression and Categories of Expression" in Scanlon *The Difficulty of Tolerance- Essays in Political Philosophy* Cambridge University Press 2003 Pages 90-92



deterred from collecting and providing information which is vital to the public interest. Consequently, the press has a presumptive, though not unconditional, right to seek out the news.

2. The Provisions of the Bill

We will now review the individual provisions of the Bill which we consider to be important and worthy of comment

- a) Clause 14Q(1)(a)-this provision applies the division to a situation where the informant gives the journalist information “in the expectation that the information may be published in any news media”. It is submitted that this is too narrow a requirement and that the preferred formulation would be that contained in the Northern Territory legislation² which simply requires that the information was given to the journalist for the “use of” the journalist. It seems to us that requiring that the informant expects the information will be published is too narrow.
- b) Clause 14Q(1)(b) the law only applies to protect the journalist from disclosing their informant’s identity or information that would identify the informant and only in situations where the journalist has promised the informant not to disclose the informant’s identity.

In our submission this exposes the fundamental flaw in this legislation. Firstly, it only protects the informant’s identity and secondly only does so in circumstances where the journalist has promised confidentiality. To properly secure the public’s right to know, the privilege must extend beyond the identity of the informant and beyond circumstances in which the journalist has promised confidentiality. It must extend to any information obtained by a journalist for their use as well as to their informant’s identity.

Some 17 States in the United States have statutes which extend the privilege to any information obtained by the journalist for the use of the journalist or for communication by the journalist³ whether they have published or not.

The purpose of the privilege is to protect the public interest in the maintenance of an independent media as part of the public’s right to access information. That interest is not uniquely jeopardised by the disclosure of confidential sources. In order to effectively perform its vital democratic role of disseminating information to the public, the media must be given the widest possible latitude to seek and publish truthful speech about matters of public interest.

However, the fact information, whether an informant’s identity or other information obtained by a journalist, is not obtained on a confidential basis should be a factor to be weighed by the Court in considering where the public interest lies on the issue of its disclosure

- c) Clause 14S(2)-this excludes the Crime and Corruption Commission from the legislation. It is our view that the Crime and Corruption Commission should be the subject of this legislation. We note the comments by the Attorney General in the second reading speech

² Section 127A *Evidence (National Uniform Legislation) Act 2011*

³ S Davidson et al, *Needed - More than a Paper Shield* (2012) 20 William and Mary Bill of Rights Journal 1277 at pages 1345 - 1350

that further consultations are being undertaken in relation to the application of these laws to the Commission. We look forward to being consulted as part of that process.


- d) Clause 14T-definition of “disclosure requirement”- this is the fundamental provision in that it applies the legislation to the processes or orders of a “Court of record” for the disclosure of information. As is noted in the explanatory memorandum, the term “Court of record” is in the context of Queensland very broad and includes for example the Queensland Civil and Administrative Tribunal. Our position is that the law should apply broadly to any Court, tribunal or other body which has the power to compel the giving of testimony or production of documents. The obvious lacuna in the legislation is the *Commissions of Inquiry Act*. We see no reason why a Royal Commission should not be subject to these rules. As an organisation of volunteers, we do not have the resources to conduct a review of all Queensland legislation to see whether there is any other body which has the power to compel the giving of testimonial or the production of documents which is not covered by this concept of a “Court of record”. The committee should seek comments from the Department of Justice and Attorney General as to whether there are any other bodies established under Queensland legislation with such powers. The legislation should be amended to include all those bodies.
- e) Clause 14W(3) - as we read this provision, it puts the onus on the journalist to establish they are a journalist within the meaning of the legislation and that complying with the requirement to give evidence or make disclosure will disclose the identity of their informant or enable the identity of the informant to be ascertained. We have no difficulty with the proposition that the journalist should have the obligation to prove these initial requirements.
- f) Clause 14X -under this provision, once the journalist has established, they are a journalist and the identity of the informant is likely to be disclosed, a party to the Court proceedings may apply to the Court for an order that the journalist disclose the information notwithstanding the fact that the identity of the informant will be disclosed. On this issue, the onus will lie on the person making the application. We consider this to be entirely appropriate. It is not intended that the law should create an absolute privilege, but that it should create a presumptive right to withhold access to the information, departure from which should be justified by the person seeking access to the information
- g) Clause 14Y-this provision sets out the factors which the Court is to consider in deciding whether to compel the disclosure. It seems to us to adequately identify those factors.
- h) Clause 14Z - deals with the situation where a journalist objects to complying with the disclosure requirement on the basis that they will be required to disclose the identity of their informant. In short, it provides for a similar process to that contained in the previous provisions. However, it is our submission that the clause needs to be amended to make clear as to where the onus lies in respect of these matters, as is provided for in the previous provisions.
- i) Subdivision 3 deals with the situation where a journalist or a journalistic organisation is served with a search warrant.
- j) Clause 14ZD(1)-this Clause provides that if a journalist served with a warrant claims the privilege applies then the authorised officer under the warrant is to ask the journalist to agree to the document being sealed and stored and held by the officer for safekeeping. In our submission this is not a procedure designed to inspire confidence in the journalist.

The more sensible thing would be for the document to be immediately sealed up and deposited with the registry of the Supreme Court as the Bill currently provides will happen should the journalist lodge an application with that Court to assert their privilege

- k) Clause 14ZF-this provision sets out what a Court is to decide on an application by a journalist asserting their claim of privilege. Firstly, it provides that the onus of proof is on the journalist to establish that they are a journalist, and that the disclosure of the document will reveal the identity of their informant or enable the identity of the informant to be worked out. We have no objection to this provision. Further provision is made for the Court to conduct the same process provided for in clause 14Y which is discussed above. Whilst we anticipate that a Court will approach this on the basis that the onus lies on the authorised officer under the warrant, it is submitted that that should be put beyond doubt by the insertion into clause 14ZF of a provision specifically stating that the onus lies on the authorised officer.

We trust this is of assistance to you in your deliberations.

Yours Faithfully


Michael Cope
President
For and on behalf of the
Queensland Council for Civil Liberties
17 January 2022