

AUSTRALIA'S RIGHT TO KNOW

Response to

INTEGRITY AND ACCOUNTABILITY IN QUEENSLAND

Discussion Paper August 2009

Introduction

Australia's Right to Know (ARTK) is a coalition of 12 major media organisations formed in 2007 to examine and improve the effectiveness of legislation and policy relevant to the media's capacity to keep the public informed of matters of public interest including matters of how Australians are governed.

ARTK welcomes the opportunity to comment on the Queensland Government's discussion paper, *Integrity and Accountability in Queensland*.

As noted in the discussion paper, earlier this year the Queensland government implemented their Right to Information reforms replacing the freedom of information regime. ARTK applauds the move by the Bligh government towards more open and transparent government. Queensland has led the way, being the first jurisdiction in Australia to comprehensively review and revise their freedom of information law and practice in recognition of the need to improve accountability of government.

Building on the positive reforms, we encourage the Queensland government to take a similar leadership position in relation to protection of whistleblowers and journalist sources.

We would like to respond to two of the key questions raised in the discussion paper, namely:

- Question 29: Are the current systems and processes in place to manage investigations appropriate.
- Question 28: How could the current legislative protections for whistleblowers be enhanced?

Both of these issues raise issues of the free flow of information in the interest of the public and concerns regarding the ability of journalists to protect their sources. The third section of our submission deals with the need to specific legal protection for journalists' sources.



In summary, ARTK submits:

- the *Crime and Misconduct Act 2001* (CMC Act) which curtails the ability of journalists to refuse to answer questions about their sources, should be amended to enable journalists to protect their sources;
- the *Whistleblowers Protection Act 1994* (Whistleblowers Protection Act) should be amended to enable a whistleblower to legally make disclosures to the media; and
- The Queensland Parliament should:
 - o recognise at law there is a legitimate public interest in allowing journalists to protect the identity of confidential sources, when disclosure by the source is demonstrably in the public interest; and
 - o adopt a British or New Zealand type model that legally recognises the primary interest that allows journalists to protect identity of confidential sources when the disclosure by the source is demonstrably in the public interest.

Amendments to CMC Act: *Criminal code and Jury and Another Act Amendment Bill 2008*

ARTK is concerned about amendments made to the CMC Act in 2008 which curtailed the ability of journalists called in front of the Crime and Misconduct Commission (CMC) to refuse to answer questions about the sources of their stories (the 2008 amendments).

ARTK submits that the CMC Act should be amended further to enable journalists to protect their sources on the basis of protection of free speech.

Background

In 2008, Part 4 of the *Criminal Code and Jury and Another Act Amendment Bill 2008* amended the CMC Act to alter the obligations of a witness at a misconduct investigation hearing before the CMC to answer questions

Prior to 2008, it was believed section 192 of the CMC Act allowed a witness at a CMC misconduct investigation hearing to refuse to answer a question on the basis of legal professional privilege, public interest immunity or parliamentary privilege, but prevented a witness from refusing to answer a question on the basis of self-incrimination privilege. That changed following the decision of Justice Martin of the Supreme Court of Queensland in *Witness "D" v Crime and Misconduct Commission* [2008] QSC 155. Justice Martin held that, read properly, the CMC Act did not prevent a witness at a CMC misconduct investigation hearing from refusing to answer a question on the basis of self-incrimination privilege.

Issue

The 2008 amendments appear to have been introduced to reverse the effect of Justice Martin's decision in *Witness D* by amending the CMC Act to put it beyond doubt that a witness is not entitled to refuse to answer a question at a CMC misconduct investigation hearing on the ground of self-incrimination privilege.

As a result, if a witness at a CMC misconduct investigation hearing refuses to answer a question other than on the ground of legal professional privilege, public interest immunity or parliamentary privilege, the witness will be liable for prosecution for a:

- criminal offence which attracts a penalty of up to \$6,375 or one year's imprisonment; or
- contempt of the presiding officer conducting a CMC misconduct investigation hearing which attracts a penalty determined by the Supreme Court of Queensland.

Any incidental protection afforded to journalists by *Witness D* was lost by the passing of the 2008 amendments. For example, if a public sector whistleblower who wishes to keep their identity secret provides a journalist with information of public interest in breach of laws prohibiting the disclosure of such information, the journalist could be asked at a CMC misconduct investigation hearing to confirm they had been leaked the information and to reveal the identity of the whistleblower regardless of the public benefit accruing from any such disclosure. After Justice Martin's decision in *Witness D* was handed down, there would have been scope for the journalist to refuse to answer the question on the basis that to give an answer would incriminate the journalist by way of an admission that the journalist has aided or abetted the whistleblower in breaching certain laws. After the amendments were passed this protection was lost.

The 2008 amendments not only give rise to an inflexible rule which provides no scope for the protection of a journalist's confidential sources, but expose a journalist who dares to honour the strict ethical and legal obligations of confidence they owe their sources, to criminal prosecution.

The real risk to journalists and thereby press freedom is well illustrated by events in Western Australia in 2008 and the responses of the then Western Australian Attorney-General Jim McGinty and Premier Alan Carpenter. Five Perth journalists from four media outlets were threatened with three years' jail and \$60,000 fines for failing to provide answers disclosing confidential sources to Western Australia's Corruption and Crime Commission (CCC). In response, Mr McGinty indicated that shield laws would be considered in respect of coercive powers granted to the CCC which are similar to those granted to the CMC.

Also in 2008, *The Australian* reported that a Perth journalist, Paul Lampathakis, was warned by a Western Australian Parliamentary Committee that he could be found in contempt of the Western Australian Parliament or in violation of the criminal code for failing to disclose a confidential source. Mr Carpenter responded by saying the situation was ridiculous, that no journalist should be forced to reveal a confidential source, and that at most the journalist deserved a reprimand. We are concerned that as a result of the CMC Act, such a common sense approach could not be taken in Queensland where a journalist failed to disclose a source in the course of a CMC misconduct investigation hearing in breach of the CMC Act.

Conclusion

ARTK does not oppose the underlying rationale of the amendments that were made in 2008 to abolish the self-incrimination privilege in CMC misconduct investigation hearings. However, we are strongly of the view the CMC Act needs to be further amended to provide journalists with a reasonable level of protection on the basis that

the powers vested in the CMC by virtue of the 2008 amendments could be contrary to press freedom.

Whistleblowers

ARTK believes the public has right to be informed about the administration of government programs and policies. The public should have access to government information except in cases where disclosure is not in the public interest: for example to protect the privacy of individuals, to protect national security or to protect cabinet confidentiality.

This public interest is served by exposing maladministration or corruption within the public service. This public interest overrides any embarrassment or other backlash against the government.

Whistleblowers need to be protected from retribution for their actions and as people well placed to identify improper activity, they should be encouraged to expose problems by having a range of mechanisms that allow public servants to bring issues to light.

Ability to disclose to the media

The media, which brings issues of public interest to the public's attention, is often the only or most effective way for a whistleblower to expose wrongdoings within government or its administration.

We are strongly of the view, the Whistleblowers Protection Act should be amended to enable a whistleblower to legally make disclosures to the media.

As noted in the discussion paper, the Whistleblowers Protection Act was amended in 2007 to allow public interest disclosures to be made to Members of Parliament. This amendment was a direct result of the disclosures by Toni Hoffman in relation to malpractice by Dr Patel. This amendment did not go far enough.

Toni Hoffman, raised her concerns with the police, the Queensland Coroner and her employer. Action was not taken and the matter was eventually raised with a Member of Parliament. But the problems were only fully aired and brought to the attention of the public through the media. Toni Hoffman should have had the option to disclose to the media in the first place or at a time of her choosing.

Disclosure to a Member of Parliament may not be sufficient where the relevant Member of Parliament fails to air these matters publicly at all or in a timely manner.

There is potentially evidence of this shortfall in the case of Allan Kessing.

In 2005 *The Australian* published reports of Customs Officer Allan Kessing on lax airport security, after the reports had been ignored by his superiors. Only after the reports became public knowledge, was a \$200 million program put in place to improve security. At the time, Allan Kessing was convicted of disclosing official information without authority to the media.

Kessing has now recently claimed that he made disclosures to a Federal Member of Parliament and that the Member of Parliament did not act on the information. If this is correct and the Court was correct in deciding Kessing made a disclosure to the media, it is clear that permitting external disclosures only to a Member of Parliament is inadequate. Disclosure to a Member of Parliament was not sufficient to ensure the matters was aired and addressed.

We disagree with the proposition that protection should only be given to a whistleblower who discloses to the media once he or she has exhausted all official channels within government (political and administrative). In some circumstances, a public servant may make a judgement that allegations should be aired publicly in order to expedite appropriate action that may protect the safety of the public.

Conclusion

ARTK is of the view there are legitimate circumstances where media disclosure is warranted as an option and should be protected. These include cases where an agency has not fulfilled its obligations to a whistleblower or the disclosure framework may not adequately handle an issue. Alternatively, that initial exposure to the media may be the only or most effective way of ensuring the public are informed and that positive action is taken on important matters.

ARTK submits that the Whistleblowers Protection Act should be amended to permit a public servant, in certain circumstances to make a disclosure directly to the media without the need to first pursue official channels.

However, we recognise that disclosure to the media which bypass official channels warrants a higher threshold test than that which should apply to disclosures through official channels.

We submit there should be protection on the following terms:

- Where a matter has been disclosed internally and to an external integrity agency, or to an external integrity agency alone, and has not been acted on in a reasonable time having regard to the nature of the matter; or
- Where a matter is serious and circumstances exist to make prior disclosure impossible or unreasonable.

Protection of journalist sources

As an adjunct to genuine whistleblower protection, a journalist should not be compelled to disclose the identity of a confidential source, unless a court is satisfied it is necessary to do so.

In addition to the reasons for protection discussed below it is important to bear in mind that a whistleblower may be discouraged from making disclosures that might reasonably be considered in the public interest unless a journalist is able to maintain confidentiality of their sources

To date the Queensland government has failed to introduce legislation to amend the *Evidence Act* to protect journalists' sources.

ARTK argues the Queensland government should:

- recognise at law there is a legitimate public interest in allowing journalists to protect the identity of confidential sources when disclosure by the source is demonstrably in the public interest; and
- adopt the British and New Zealand models that legally recognise the primary interest that allows journalists to protect identity of confidential sources when the disclosure by the source is demonstrably in the public interest.

The role of journalists and their sources

The role of the media is to report on matters of public interest and to scrutinise information on behalf of the public it serves.

In the ordinary course of their duties journalists are expected to disclose the sources of their information. It makes the source, the journalist and the media outlet accountable for their reports, makes the process of reporting more transparent and is likely to help the consumer of the information to evaluate the integrity and credibility of the information.

However, in some instances, information of legitimate public interest will only be disclosed to journalists if the identity of the source is kept confidential. In these instances, an informant may require a guarantee of anonymity for a variety of reasons but usually to avert any negative consequences such as a threat to their safety, their employment, their standing in the community and so on.

Keeping a source confidential is fundamental to the ability of journalists to maintain trust with their sources and to encourage other sources to trust journalists and bring forward information of public concern.

The Australian journalists' Code of Ethics states:

“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.”¹

The Code does not have legal standing and is not recognised at law.

A journalist who refuses when requested by a court to give evidence which would reveal the identity of their source is open to a contempt charge for disobedience to the court.

Therefore, a journalist confronted with a court demanding they reveal their source is faced with an ethical dilemma of choosing between breaking their confidence and breaking the law and facing possible consequences of penalties including jail.

¹ Media, Entertainment & Arts Alliance, *Media Alliance Code of Ethics*
www.alliance.org.au/resources/media

In recent years, a number of journalists in Australia have been convicted or jailed for contempt of court for refusing to reveal their sources including:

- Gerard McManus and Michael Harvey (2005) from the *Herald Sun* were convicted and fined for not revealing their confidential source;
- Belinda Tasker, Anne Lampe and Kate Askew (2002) from *AAP* and *The Sydney Morning Herald*, refused to reveal their sources for a story about the NRMA board and avoided prison after NRMA dropped the case;
- Chris Nicholls (1993) investigative journalist from the *ABC* received a prison sentence for his story relating to a conflict of interest of a South Australian Government Minister;
- Deborah Cornwall (1993) from the *Sydney Morning Herald* was given a suspended jail sentence for refusing to disclose a confidential source;
- Gerard Budd (1992) from *The Courier Mail* was imprisoned; and
- Tony Barass (1989) from *The Sunday Times* in Perth, was imprisoned, for refusing to disclose a confidential source.

Protection in Australia

Traditionally, Australian law has failed to recognise the value of the public interest in the protection of confidential journalists' sources.

The first jurisdiction to attempt to introduce protection for confidential professional sources, including journalists' sources, was NSW in 1997.

In the wake of the McManus and Harvey case, the Commonwealth followed in 2007 amending its *Evidence Act* to incorporate very similar provisions to those in place in NSW.

Although the prospect of introduction of a uniform model across the Commonwealth and States and Territories has been discussed by the Australian Attorneys-General at their SCAG meetings, Queensland and other States and Territories have not passed legislation.

The provisions in the NSW and the Commonwealth Acts which form the basis for the current SCAG model create a qualified privilege which is available at the discretion of a court. The provisions start from the position that a source must be disclosed unless the court determines and gives a direction that the evidence is not permitted to be called.

This qualified privilege provides inadequate protection for journalists.

Protection in UK, New Zealand

In contrast, the United Kingdom, New Zealand and parts of the United States all provide substantially more protection for journalists and their confidential sources than Australian law.

The starting presumption in these jurisdictions is in favour of the journalist and the onus is on the party seeking disclosure to rebut the presumption.

The New Zealand protection for journalists' sources states that:

“(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 in a civil or criminal proceeding to answer any question or produce any document that would disclose the identity of the informant or enable that identity to be discovered.

(2) A Judge of the High Court may order that subsection (1) is not to apply if satisfied by a party to a civil or criminal proceeding 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
- (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.²

Similarly, the United Kingdom legislation provides a presumption in favour of the journalist withholding their evidence. The provision states:

“no court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of a disorder or a crime.”³

Additional protection is available through Article 10 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* which states that everyone has the right to freedom of expression (subject to certain restrictions).

Conclusion

ARTK is strongly of the view, protection for journalists sources should be provided but a qualified privilege which relies on a balancing test and the discretion of the court provides some but not sufficient protection.

ARTK recognises there may be instances when it is in the public interest that confidential information be disclosed but the onus should be on the party seeking to adduce the confidential information, to establish the evidence is necessary.

This can be achieved by adopting a framework in the form of the New Zealand or United Kingdom legislation.

² *Evidence Act 2006 (NZ)* section 68

³ *Contempt of Court Act 1981 (UK)* c 49 s 10