

EVIDENCE AMENDMENT (JOURNALISTS' PRIVILEGE) BILL 2007

Second Reading

[Mr KELVIN THOMSON](#) (Wills) (2.08 p.m.)—I am generally supportive of the [Evidence Amendment \(Journalists' Privilege\)](#) Bill 2007, which provides a measure of professional [privilege](#) to [journalists](#) who refuse to name their sources. The bill is modelled on similar provisions in the New South Wales Evidence Act 1995. The key difference is that the New South Wales legislation offers a general protection, whereas the current bill offers protection only to [journalists](#). The structure of the protection allows a judge discretion to refuse to adduce evidence if they believe that the harm the evidence would cause to the source outweighs a range of other considerations, such as the probative value of the evidence. In effect, it would offer the court a discretion as to whether to exclude the evidence and would also allow the court to make a range of ancillary orders to protect the identity of the person. In my view, this appears on the face of it to be a sensible test. It weighs the competing interests of the court to hear evidence from all relevant parties against the right of [journalists](#) to keep the confidence of informers. This on its own does not go far enough.

Indeed, Labor has proposed a series of reforms in this area. At its recent national conference, Labor's national platform was amended to include the following: (1) we would legislate for proper freedom of information laws that enable Australians to access appropriate information about government activities; (2) we would move to implement the Australian Law Reform Commission recommendations on sedition laws; (3) we would provide shield laws for protecting confidential sources and whistleblowers; and (4) we would review those laws that criminalise reporting of matters of public interest. Without such a full range of reforms, it is clear that the Howard government is not committed to bringing about an open or transparent government. This is a government which is secretive and which has taken every opportunity to shield itself from public scrutiny. We need a fuller set of reforms to ensure open government. In many ways, this bill encapsulates the things that are wrong with this government and how flawed it is. It is essentially too little, too late.

If you look at the nature of the proposed legislation, you will see it is very restricted in its scope in that it relates only to [journalists](#). There is no protection for whistleblowers or what are now known as public interest disclosures. The government has been dragged kicking and screaming to do something, despite the fact that there have, in effect, been similar and indeed better laws for many years in other jurisdictions. The legislation has only appeared after enormous media pressure stemming from a particular case, and the government seeks to solve a particularly embarrassing problem rather than operating from first principles.

While I am happy to support this bill, it introduces the minimum reform which the government could possibly introduce and still call it reform. In a nutshell, that encapsulates the nature and character of this administration. In areas where the government is not sincere or fair dinkum, such as global warming, the government's modus operandi is: do as little as is absolutely necessary, do it at the last minute, only act under extreme duress or pressure or where there is a problem in the polls. Time and again we see this approach from a government which has run out of puff, run out of thinking, run out of genuine concern about the future and run out of the ability to engage in substantive, quality policy reform. If you look at the record of recent months, we saw last-minute water reform, the Murray-Darling \$10 billion scheme—

The DEPUTY SPEAKER (Hon. IR Causley)—Order! The member for Wills will come back to the bill.

Mr KELVIN THOMSON—Mr Deputy Speaker, I am happy to do so. The government has essentially succumbed to hubris and arrogance with respect to this legislation. The government fervently hopes that, in passing this most minimal of changes in this area, the public will forget the way in which they have treated issues of access to information and the protection of sources. It demonstrates a contempt for the democratic system and the democratic process—that is, all of us who believe in an independent and professional media as an integral component of a healthy democracy. By addressing the smaller issues and ignoring the bigger issues, the government is acting at the last minute and in the face of pressure concerning two **journalists** to do a little bit of market repair work.

This bill is a last-minute attempt to ameliorate the rising tide of media criticism of this government for its failure to provide adequate protection to Michael Harvey and Gerard McManus, who were just doing their job. What did they do? They simply revealed that the government had failed to deliver \$500 million in extra pensions promised to veterans and war widows. When the **journalists** refused to reveal their sources, they ended up being charged with contempt. That charge has hung over their heads as a form of intimidation and blackmail not just for those individual **journalists** but by way of example to the profession as a whole. This case has essentially been used to hang the threat of contempt over other **journalists** and would-be whistleblowers who might seek to embarrass the government by revealing the truth in the name of the public interest. My fear and belief is that the government has enjoyed the situation of the last couple of years, where **journalists** have felt intimidated and threatened. The **privilege** of office does not simply mean a licence to use government coffers and bureaucracy as another marketing mechanism for the government. It is a requirement that we genuinely respect independent sources of thought and expression and that we genuinely treat information as being beneficial in the development of public policy.

It is a matter of concern to me that Australia continues to drop in the international rankings for press freedom. Just last year we saw independent groups such as Freedom House and Reporters sans Frontieres dropping our ranking for press freedom. We are now in the position of being behind countries such as Namibia. In the modern era the currency of democracy is information, but regrettably the government has an empty wallet to show the public. If you look at the gutting of freedom of information, if you look at the abuse of conclusive certificates to quash legitimate freedom of information requests, these are stark reminders to us all of habitual abuse of office.

The nature of the modern media is that we are increasingly living in an era that could be dubbed 'rip and read' journalism. The media is a massive machine that chews through information. In feeding this process, it is all too easy for time-starved and pressured **journalists** to simply take the convenient path of reporting the latest turn in the scandal of the day or taking what claims are made at face value and simply running claim and counterclaim without any checking. The time allowed for genuine investigation, analysis and digging is dwindling in an age when the public seek entertainment as much as information. We are also well aware of the shortening time frame of the news cycle.

In emasculating freedom of information, the government has removed a vital potential source of media inquiry. This tends to make the media more beholden

to other sources of information and it enables the government to engage in what in footy parlance we would call a process of 'flooding'—where they can drop stories and bombard media outlets with a coordinated campaign of announcements, particularly if there is something embarrassing or awkward to get off the front pages. In cutting off avenues such as freedom of information, the government seeks to snow the media and, in consequence, the public.

The DEPUTY SPEAKER—The member for Wills is again straying from the bill. The bill is about evidence amendment **privilege** and the amendment talks about whistleblowers and information to **journalists**. He will stick to the bill.

Mr KELVIN THOMSON—Thank you, Mr Deputy Speaker. The importance of freedom of information is that, without it and without documents being made public, we end up in a situation where people do blow the whistle because they think the public is entitled to be aware of what is actually happening. If you do not have an adequate freedom of information regime, you get the issue of public interest disclosures.

I believe that the media is an important check and balance to the misuse of power. I believe that information plays an essential role in ensuring that we produce good public policy. Rather like the scientific community, which engages in peer review as its modus operandi, the media has a vital role in covering public policy issues adequately so that policies are exposed to scrutiny. Through this kind of process, better policies ultimately win out.

While the bill should be supported, it represents an inadequate first step. If we look at what is ignored, there is no commitment to protecting what are referred to as whistleblowers, so in any case where someone may have revealed confidential information they can be prosecuted and that may still well include any **journalists** who report the story.

There is indeed a contrast here between the case of Michael Harvey and Gerard McManus on the one hand and Mr Allan Kessing on the other: the whistleblower gets no protection under Commonwealth law even with this change, whereas under New South Wales law there is a 'stepped disclosure' regime where legal protection is extended to disclosures by public servants, provided they meet certain conditions. Nor do we have a commitment to genuine freedom of information.

Our democracy will ultimately require major reforms in this arena, not merely for the sake of protecting **journalists** or, indeed, whistleblowers for that matter; rather, it is a major task to build public confidence in our public and civic institutions. Critical in this rebuilding of trust will be creating a culture of accountability which, in turn, rests on creating a culture that is pro disclosure and the opening up of information sources.

This legislation has been the subject of considerable public criticism on the basis that it is inadequate. For example, Fairfax Media spokesman Bruce Wolpe said that, unless the federal shield law was accompanied by whistleblower protection and state shield laws, the new scheme would be missing 'an essential part of the package'. The New South Wales Attorney-General, John Hatzistergos, has noted that federal shield law would be 'inadequate and half-baked' unless it was accompanied by protection for whistleblowers along the lines of the protected disclosure laws in New South Wales. We have also heard Alexander Brown, head of a national project to reform whistleblower laws at Griffith University, stating

that **journalists** would still be dragged into prosecutions unless the government introduced whistleblower protection laws.

As I have mentioned, the New South Wales system establishes a 'stepped disclosure' regime in which legal protection is extended to disclosures by public servants if they meet certain conditions. This is in stark contrast to the threat facing federal public servants such as Mr Kessing if they make unauthorised disclosures, even if those disclosures are in the public interest. In the case of Allan Kessing, there were disclosures that came from the area of Customs about airport security, and it was reported in the *Age* that, a week after these disclosures became public, the federal government appointed the British aviation security expert Sir John Wheeler to examine Australia's airport security.

The DEPUTY SPEAKER—The member for Wills is a serial offender. He is off the bill again. If he does it once more I will sit him down.

Mr KELVIN THOMSON—Mr Deputy Speaker, I have to draw to your attention that I am referring to the case of a whistleblower and therefore absolutely speaking to the amendment.

The DEPUTY SPEAKER—You were well off the whistleblower; you were starting to talk about airport security.

Mr KELVIN THOMSON—The disclosures which were made related to airport security. The government accepted recommendations concerning them. At the same time, however, the Australian Federal Police sought to track down the person who had leaked the reports that had so embarrassed the government. The man ultimately blamed for the leak was Mr Kessing. In March of this year he was found guilty, by a Sydney District Court jury, of leaking one classified Customs report, in breach of the Commonwealth Crimes Act. In fact, he has no public interest defence available to him. The secretary of the Media Entertainment and Arts Alliance said in relation to these matters:

"I think there has been a very serious deterioration in the state of freedom of speech in Australia over the past five years," ...

The media coalition titled Australia's Right to Know notes that Australia now lags in the worldwide press freedom rankings compiled by international media organisation Reporters without Borders. That latest index shows that Australia has slipped two places to 35, behind nations such as Bolivia, which is 16th, South Korea, which is 31st, and Ghana, which is 34th. This slip is reported as having come after a horror few years for advocates of press freedom in Australia. Indeed, the Leader of the Opposition has indicated his support for the media in relation to press freedom issues, saying there is an emerging abuse of conclusive certificates by the federal government and that when it comes to whistleblowers protection legislation, this also needs to be reviewed in the light of recent cases. Of course, he is referring to the cases of Michael Harvey and Gerard McManus and also the case of the former Customs officer Alan Kessing.

It is clear that this legislation is inadequate. We need more in the way of protection for **journalists** and their sources and we need more in the way of protection for whistleblowers. The present regime will not be adequate to protect whistleblowers. It is part of a series of failures on the part of this government, if we are talking about freedom of information, privacy protection and the like. Where information is the currency of democracy we need to do better and we can do better. I believe that the legislation can be supported as a small step forward

but it is regrettable that this government, acting under duress, is doing too little too late.