

**Ref: WA A-G, Hon C. Christian Porter MLA  
letter of 30 June 2010 to  
Mr Michael Sinclair-Jones, WA Branch Secretary  
Media, Entertainment and Arts Alliance  
concerning proposed Professional Confidential Relationships Privilege  
(Shield Law)<sup>1</sup>**

**Note:** For referencing convenience in this Submission the lines in the A-G’s letter have been numbered from 1 to 186. Line 1 commences with the words “I write to you” (p. 1) and Line 186 contains the words “reform for our State”.

**Introduction**

1. On 30 June 2010 the WA A-G Hon Christian Porter wrote to the WA Branch of the MEAA “with respect to the Government’s intention to legislate to create a professional confidential relationships privilege” – a privilege that has also been commonly referred to a shield law to protect journalists’ confidential sources (A-G’s letter of 30 June 2010, Ref 35-09627, Lines 1-4). The term *shield law* is used frequently in this Submission to refer to *professional confidential relationships privilege*.

The purpose of the WA A-G’s (hereafter, the “A-G”, unless otherwise stated) letter was:

- (a) “to advise of the central features of this proposed legislation” (Lines 25-26); and to “allow an opportunity for...comment” (Lines 26-27); and to “welcome any feedback” from the WA MEAA “regarding the development of the issue” (Lines 182-183)
- (b) to provide the WA MEAA this opportunity in light of the organisation’s role as “a key and significant representative of a profession to which [the Hon A-G’s] proposed model” for a shield law “would have great implications” (Lines 181-183).

The A-G also stated in the letter that the WA MEAA’s feedback was being sought in light of the organisation’s role as “a key and significant stakeholder in Western Australian journalism” (Lines 1-2) and as “a key and significant representative of a profession to which [the] proposed model would have great implications” (Lines 181-182).

This Submission contains the WA MEAA’s response to the A-G’s letter.

2. This opinion is structured as follows:
  - (a) Key points from the A-G’s letter attracting a WA MEAA response are identified and the WA MEAA’s responses are provided to each of these points; and
  - (b) The WA MEAA Makes Some General Points.

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<sup>1</sup> This document may be cited as follows: Michael Sinclair-Jones, ‘A Submission on *Shield Law* in response to the WA Attorney-General, Hon C. Christian Porter’s invitation on 30 June 2010 to the WA MEAA’, 30 July 2010.

### **Key points from the A-G's letter**

3. For the purposes of the present exercise the A-G's letter contains the following key points.

(a) *Key Point 1 – Purpose of the Journalists' Privilege*

The proposed privilege will recognise the public interest in certain communications remaining confidential, such that disclosure of the contents of the communication or the identification of the parties to it will not be permitted, and will not be compelled, in relevant legal proceedings in certain defined circumstances. The application of the privilege will depend on the particular circumstances, and will be decided in each case by the presiding judge through a weighing of relevant factors (Lines 28-34).

### **WA MEAA's Response:**

The WA MEAA broadly agrees with this approach subject to any qualifications below.

(b) *Key Point 2: When the Journalists' Privilege Will Apply*

The letter identifies broad conditions for the operation, or otherwise, of the privilege:

- (i) professional relationship requirement: the protection will be available only when the communication for which protection is sought occurs “in the course of a professional relationship” (Lines 66-68). In this respect, the courts should “maintain a discretion to consider each individual's claim, in effect, to be a professional journalist to whom the privilege should *prima facie* apply” (Lines 87-88);

### **WA MEAA's Response:**

While the WA MEAA broadly agrees with the essence of this objective, it proposes that adequate heed be paid to the dramatically evolving nature of the journalistic profession and the potential for claims for protection to arise in contexts that may not readily be characterised as being mainstream or traditional journalistic activity using traditional evaluation approaches. The example cited in the A-G's letter that claims for protection that may arise in blogging situations is a pertinent one. Likewise, a multitude of other contexts may present themselves as legitimate ones for protection including, but not limited to, publications by journalists in social networking spaces and other platforms. The WA MEAA acknowledges that the scope of protection in respect of the professional relationship requirement is one that is best left to the courts to develop in the course of judicial decision-making.

- (ii) weighing up of competing interests: in determining whether the privilege should apply the court should weigh up and have consideration for the likely harm to the public interest that could or would result from the evidence of the “confider's identity being given to the court” (Lines 91-93);

### **WA MEAA's Response:**

The WA MEAA broadly agrees.

- (iii) when privilege won't apply: there will be circumstances where the privilege will not apply. Such examples include when the confider consents to disclosure; if the communication was made in furtherance of a fraud, a criminal offence, or an act attracting a civil penalty” (Lines 97-101; see also Lines 116-117; and 119-120). Other instances in which the protection will not be available will include instances that will require concealing the identity of persons who make disclosures that constitute some serious form of wrongdoing – “[s]uch disclosures could include disclosures achieved through the theft of information, unlawful breaches of privacy or confidence, or the unauthorised disclosure of confidential government information, especially when there is no perceivable public benefit” (Lines 107-111, italics added).

**WA MEAA's Response:**

While the WA MEAA in principle does not advocate the conferring of protection for the perpetuation of serious crime it has concerns about certain aspects of the points in the foregoing paragraph. One pertains to the meaning and scope of “civil penalty”. In a context not necessarily relevant to the present discussion, it has been said that for a civil penalty to be imposed by a court, the regulator will only need to prove its case on the balance of probabilities and not the criminal standard of beyond reasonable doubt.<sup>2</sup> Needless to say, the ‘burden of proof’ aspect here alone is a cause of great concern to the WA MEAA. The WA MEAA may have other concerns upon examination of the full meaning and implication of the “civil penalty” point the A-G makes.

The other point of concern in the foregoing paragraph pertains to the A-G's view that the protection “will not be available” to a “serious form of wrongdoing [that] could include...unlawful breaches of privacy or confidence, or the unauthorised disclosure of confidential government information” (italics added). This exclusion is far too sweeping and could severely undermine the effectiveness of the proposed shield law. The state of legal protection of privacy is in an unsettled state in Australia. As to breach of confidence, clearly the very purpose of the proposed shield law is to also protect confidences, albeit of a kind particularly important to journalists and their confidential sources.

As for the reference to the “unauthorised disclosure of confidential government information”, such unauthorised disclosure, without more, cannot in itself be said to “constitute some serious form of wrongdoing”.

*(c) Key Point 3: The protection will not be absolute*

In summarising the Government's position concerning journalists' confidential sources, the letter states that “the professional confidential relationships privilege would, if it applied in a particular case, prevent evidence of the identity of the person making the disclosure, i.e. the source, being given in court. However, this protection will not be absolute...” (Lines 102-105; see also Lines 176-177).

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<sup>2</sup> See Madeleine Kearney and Jocelyn Kellam, “There was movement at the station: The Australian consumer law reforms are being enacted into law”, 30 September 2009. Retrieved 23 July 2010, from <[http://www.claytonutz.com/publications/newsletters/pharmaceutical\\_insights/20090930/home.page](http://www.claytonutz.com/publications/newsletters/pharmaceutical_insights/20090930/home.page)>

**WA MEAA’s Response:**

Neither the WA MEAA, nor its parent body or other media organisations, have advocated absolute protection for Australian journalists’ confidential sources.<sup>3</sup>

*(d) Key Point 4: The privilege and defamation proceedings*

The letter raises a number of concerns about the potential impact of the proposed shield law on defamation proceedings brought in respect of a publication that was based or justified on information from confidential sources (Lines 126-129). The letter states further: “In such proceedings, the accuracy of the disclosure will likely be in issue. As the privilege should only apply to *bona fide* and truthful communications, it is essential that the responsible court is satisfied (and has some legal means of being satisfied) of the accuracy of the disclosure for considering the application of the privilege, subject to certain additional protections applying to protect the identity of the confider” (Lines 129-134).

**WA MEAA’s Response:**

The law of defamation generally, on its own, has been described as a creature of “labyrinthine” complexity, to borrow the words of Blackburn J.<sup>4</sup> The difficulties that might arise as a result of an interaction between defamation law and shield law may, likewise, be complex. That said, the following further broad proposition may be made concerning defamation law – the prevailing law places the burden of proof of the truth of defamatory matter upon the defendant. The media may be said to be well aware that they bear the onus of establishing the truth of the defamatory publication. They may also be said to be aware that if they choose to fail to adduce the requisite evidence in defence of the defamatory matter concerned, they do so at their own peril. In any event, the history of significant instances that gave rise to the law’s collision with journalists’ claims for protection for confidential sources does not reveal any serious conflict between shield law and the law of defamation.

*(e) Key Point 5: Other Shield Law Provisions*

The A-G makes reference to professional confidential relationships privilege regimes operating elsewhere in Australia so as to provide “a greater understanding of the State Government’s general position on this issue” (Lines 139-141). The A-G describes that discussion as a “brief comparison” (Line 139).

**WA MEAA’s Response:**

The subject at hand is not amenable to a “brief comparison”. This is a very complex area of law-making and the literature in this area is voluminous. Some headway would have been made if the A-G expressed a clear commitment in the letter to enacting “effective shield law” to protect journalists’ confidential sources, taking into account

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<sup>3</sup> For example, see Submission by Media, Entertainment and Arts Alliance to the Senate Standing Committee on Legal and Constitutional Affairs Regarding *Evidence Amendment (Journalists’ Privilege) Bill 2009* (Commonwealth).

<sup>4</sup> *Renouf v Federal Capital Press* (1977) ACTR 35, at 58.

the high ideals of a vibrant democracy, freedom of speech, and openness transparency and accountability in government. Further, for the purposes of advancing the present discussion the A-G might have clearly indicated which aspects of the various existing shield provisions would be adopted or abandoned in the proposed WA model. The A-G has not done so.

### **The WA MEAA Makes Some General Points**

4. Further to the points made above, the WA MEAA states as follows:

(a) While the WA MEAA broadly agrees with the essence of the objective of the shield law as set out in the A-G's letter (Lines 28-34), it proposes that the proposed legislation clearly identifies the following as ideals or objectives that underpin the legislation:

- (i) the public interest in the maintenance of openness, transparency and accountability in government; and
- (ii) the public interest in the freedom of speech.

The ethos behind such avowals is reflected in the Commonwealth Attorney-General's Second Reading Speech in 2009 pertaining to the Commonwealth shield law:

[The Bill reflects] commitment to enhancing open and accountable government. [It] recognises the important role that journalists play in informing the public on matters of public interest...The value of a well-informed community was highlighted by the Commonwealth Ombudsman in the 1994-95 annual report, where it stated: *Information is the currency that we all require to participate in the life and governance of our society. The greater the access we have to information, the greater will be the responsiveness of our governments to community needs, wants, ideas and creativity...*the media, which is often regarded as the fourth estate, has an important role to play in our democracy. That is unquestionably true and is accepted by the government...It is not a mere platitude to say that a well-informed, well-functioning and responsible media is in fact a vital cog in the democratic wheel.<sup>5</sup>

While the Commonwealth A-G also addressed competing concerns about the introduction of a shield law in the speech referred to, he also found it appropriate to address the points recognising the importance of government accountability and the media's important role in our democracy in the above quotation. And whereas the WA A-G has indicated support in his letter for the proposed shield law (see Lines 17-19; 28-31; and 53-60) the focus of the WA A-G's letter is on the restraints that the proposed shield law should contain rather than on ensuring an effective shield for journalists' confidential sources.

(b) The WA MEAA reinforces the submission made by its parent body in its submission to the Senate in May 2009.<sup>6</sup> For the sake of conciseness in this submission, the WA MEAA avoids repeating the arguments and proposals made there.

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<sup>5</sup> Excerpts taken from Commonwealth Attorney-General, Hon Robert McClelland, House of Representatives, *Evidence Amendment (Journalists' Privilege) Bill 2009*, Second Reading Speech, 19 March 2009, House of Representatives, Hansard p. 3244-5.

<sup>6</sup> Submission by Media, Entertainment and Arts Alliance to the Senate Standing Committee on Legal and Constitutional Affairs Regarding *Evidence Amendment (Journalists' Privilege) Bill 2009 (Commonwealth)*: see <[http://www.aph.gov.au/Senate/committee/legcon\\_ctte/journalists/submissions/sublist.htm](http://www.aph.gov.au/Senate/committee/legcon_ctte/journalists/submissions/sublist.htm)>

The WA MEAA's broad position is also reflected in other submissions made to that Senate Committee: see, for example, Australian Press Council Submission; and Australia's Right to Know Coalition's Submission.

(c) In the WA MEAA's view, the subject of shield law enactment in Australia has gone on for far too long. For example, the Western Australia Law Reform Commission in a report prepared 17 years ago, stated:

[T]he Commission has concluded that courts should be given a general discretion to excuse a witness from answering a question or producing a document which would otherwise be a breach by the witness of a confidence. In appropriate circumstances, confidential information held by journalists, including the identity of sources, could be withheld as a result of the exercise of that discretion.<sup>7</sup>

Since then various other inquiries have been held, submissions made and reports published. Some Australian jurisdictions have proceeded to enact shield provisions. In WA, we are still at the stage of identifying "the central features of this proposed legislation [to] allow an opportunity for...comment"; the stage of pursuing "an informed debate" (Line 180); and the stage of "development of the issue" (Line 183).

This is an unacceptable state of affairs considering especially that the A-G (when holding the office of Shadow A-G), is on record as having said two years ago:

I don't think the legislation [shield law] should be held back until after the election so journalists are allowed to properly function in the lead up to an election and know their position.<sup>8</sup>

(d) The WA MEAA's view is that the A-G has had more than adequate foundation to produce a draft shield Bill by now. Such a draft, taking into account the various arguments already made and considered so far, and the models previously considered and/or enacted, would have been far more productive for the purposes of facilitating final legislation, than the letter of 30 June 2010, which largely leans towards a discussion of the brakes that should apply in considering the proposed shield law.

Furthermore, while the A-G has discussed various "central features" (Line 26) of the proposed legislation in the letter, how these features will apply in reality remains largely ambiguous. The WA MEAA agrees with the A-G that the proposed model "would have great implications" (Lines 181-182) for the media and is particularly concerned at the potential implications in light of the apparent emphasis in the A-G's letter to provisions that could negate the proposed journalist source confidentiality protection.

Having a draft Bill is also important to any exercise in evaluating how those provisions might have impacted on the real life source endangerment experiences that the media in WA, in particular, has had so far. For instance, in respect of the case of the event usually referred to as the "Police Raid on *The Sunday Times*", there is little or nothing in the A-G's letter that would enable an evaluation as to whether a claim to source confidentiality would have survived under the proposed WA model. It is disappointing that WA is not noticeably any closer to a shield law that is acceptable to the journalism fraternity.

Broadly speaking the WA A-G's recent move is a step in the right direction. It is high time, however, that the WA A-G put concrete proposals for a shield law acceptable to the media on the table, in the form of a draft Bill, and followed this up with active steps to enact the Bill into law. This is a law that WA journalists have waited far too long for.

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<sup>7</sup> Law Reform Commission of Western Australia (May 1993), Report on Professional Privilege for Confidential Communications, Project No 90, Para 4.97.

<sup>8</sup> Kate Campbell, "Opposition renews push for press shield laws", *The West Australian*, 3 July 2008, p. 4.