

2017

LEGISLATIVE ASSEMBLY OF THE
NORTHERN TERRITORY

ATTORNEY-GENERAL AND MINISTER FOR JUSTICE

**Evidence (National Uniform Legislation) Amendment
(Journalist Privilege) Bill 2017**

SERIAL NO. 37

EXPLANATORY STATEMENT

GENERAL OUTLINE

The Bill amends the *Evidence (National Uniform Legislation) Act* to provide that a journalist may claim journalist privilege in order to protect a confidential source of information. The privilege is a qualified one, in that the court or judicial entity can require the journalist to identify the informant if this is justified by overriding public interest factors.

The Bill also extends the time in which the courts will presume a person receives a letter by post, to reflect extended postal delivery times that have been adopted by Australia Post.

NOTES ON CLAUSES

Clause 1. Short Title

This is a formal clause, which provides for the citation of the Bill. The Bill, when passed, may be cited as the *Evidence (National Uniform Legislation) Amendment (Journalist Privilege) Act 2017*.

Clause 2. Commencement

This is a formal clause, which provides that the Bill will commence on the day after the Administrator's assent to the Act is declared.

Clause 3. Act amended

This is a formal clause that provides that the Bill amends the *Evidence (National Uniform Legislation) Act*.

Clause 4. Section 10A inserted

This clause provides that the rule concerning journalist privilege at new section 127A applies not only to courts, but also to a judicial entity (including the Northern Territory Civil and Administrative Tribunal, and any other prescribed person or body) irrespective of whether the judicial entity is required to apply the rules of evidence.

Clause 5. Section 127A inserted

This clause inserts a new section 127A, which enables journalists to claim that the identity of confidential sources of public interest information are privileged. This prevents journalists and their employers from being compelled to answer questions in a court or judicial entity (typically a tribunal) that would reveal a confidential source.

New subsection (2) provides a qualification on this privilege. Where a party persuades the court or judicial entity that there are overriding public interest considerations that require disclosure of the informant's identity, the court or judicial entity may order that the privilege does not apply in a given case. The term 'public interest' refers to information which could assist and improve society and the wellbeing of its members, as opposed to information which the public may simply find interesting (for example, because it is salacious).

In making this decision, the court or judicial entity is to consider any likely adverse effect of requiring disclosure, as well as whether any general 'chilling effect' might occur with respect to the ability of journalists to generally access confidential sources of information.

New subsection (3) provides further, specific factors that are relevant to making the court or judicial entity's decision. These factors refer to ethical practices that are typically expected of professional journalists. In particular, it directs the court or judicial entity to consider practices which are designed to minimise the risk that journalist privilege is misused, for example it would be misuse to disseminate unfair and untrue information that unduly harmed a person.

'Harm' is not defined but it is anticipated that reading the definition in context necessarily leads to consideration of a broad range of relevant harms, such as harm to a person's reputation.

The word 'undue' is important, in that it recognises that freedom of speech requires persons to be able to make fair comment in relation to matters of public interest, including comments that are critical of other persons. However, the democratic objectives of the principles of freedom of speech and freedom of political communication are not assisted by disseminating misleading information, or information that unfairly smears a person's reputation based on scant information presented in an unfair or misleading way. If information cannot be reasonably verified, this does not mean it cannot be reported, but rather that consideration should be given to the public interest value in doing so, and that it should be presented with appropriate qualifications that highlight that the information has not been verified. The factors in new subsection (3) provide an incentive for journalists to verify their information, to handle it fairly and accurately, and to avoid causing harm to any person or organisation beyond what is needed to make fair comment and raise awareness about matters of public interest. Precisely where this line is to be drawn will be a matter for the courts to decide based on the competing public interest factors in a given case.

New subsection (4) confirms that the court or judicial entity has a broad discretion to impose conditions when a journalist is required to disclose the identity of a confidential informant. These conditions could, for example, limit further disclosure of the confidential informant's identity or to close the court or judicial entity while the journalist or informant gives evidence.

New subsection (5) clarifies that the provisions of this section apply not only to courts but also to specified judicial entities that operate under less formal rules of evidence, meaning the NT Civil and Administrative Tribunal and other prescribed entities.

The term 'court' is defined to mean a 'Territory court' in the Dictionary of the *Evidence (Uniform Evidence Legislation) Act*, and includes persons or bodies other than a court that are required to apply the laws of evidence.

New subsection (6) provides definitions of key terms. The definition of 'journalist' deliberately eschews any requirement that the journalist be engaged in producing regular publications. This recognises that many examples of public interest journalism are the result of freelancers, academics, and other persons who may not meet a conventional definition of a professional journalist.

It recognises that news may be presented in a variety of styles and formats, using a variety of technologies, and aims to take an approach that does not privilege any particular style, technology, or medium. The definitions recognise that news can be communicated with text, audio, video, and other methods. It can be presented in a traditional, factual style, accompanied by opinions and verbal flourishes, in a strident or tempered tone, and seriously or combined with humour or entertainment. It can be communicated using traditional print and broadcast mediums, or via the web, email, and other emerging technologies. News encompasses not only new information (e.g. breaking news) but also noteworthy information about matters of ongoing public interest. This means the privilege can potentially extend to publications of longer form work rather than just short pieces aimed at the daily news cycle.

The definition encompasses activities preparatory to publication, so long as publication is the intended aim.

The primary limitations on when the privilege can be claimed are not determined by the definition of a 'journalist', but rather through the factors set out in subsections (2) and (3). These limit the application of the privilege to situations where the journalist has abided by the kind of ethical practices that are expected of professional journalists, and where the journalist is in fact protecting a source of information that is of public interest value. These considerations aim to exclude protection for 'fake news', misleading information, or publications which simply repeat assertions without taking any reasonable steps to verify the accuracy of those assertions or adequately contextualise them.

Clause 6. Part 3.10, Division 1A, note amended

This clause removes an obsolete reference to provisions in the Commonwealth uniform evidence legislation that no longer exist.

Clause 7. Section 160 amended

This clause amends section 160 of the *Evidence (National Uniform Legislation) Act*, which currently contains a presumption that postal articles will be received within four working days. Due to changes in Australia Post's processing times, this figure is now out of step with when a letter is likely to arrive. The amendment changes the presumption to seven working days. It is anticipated that other jurisdictions with equivalent provisions will pass similar amendments.

Clause 8. Chapter 8 inserted

This clause provides transitional provisions in relation to the substantive amendments made in the clauses above.

New section 217 provides that journalist privilege can be claimed in relation to information that informants have already provided before commencement, but not in relation to court proceedings which have already begun prior to commencement.

New section 218 provides that the amended presumption concerning postal articles applies to letters sent after the commencement of this Bill.

Clause 9. Dictionary amended

This clause inserts a definition of the term 'judicial entity' into the Dictionary of definitions in the *Evidence (National Uniform Legislation) Act*. 'Judicial entity' means the Civil and Administrative Tribunal and other prescribed entities, as the privilege can apply notwithstanding that these entities are not obliged to follow the rules of evidence. It is envisioned that other court-like tribunals may be prescribed, and that potentially some public inquiry-type proceedings may also be prescribed.

Clause 10. Repeal

This is a standard clause for amending acts, which causes them to be repealed once they have performed their amending function.
