Press Freedom Policy Papers
Reform Briefing 2/2021

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REFORMING AUSTRALIAN SHIELD LAWS

SUMMARY

KEY POINTS

- Shield laws allow journalists to maintain the confidentiality of information that would disclose the identity of a confidential source.
- Shield laws are necessary to enable a free flow of information between members of the public and the news media. Sources, including whistleblowers, are less likely to supply the media with information if they believe that journalists will be unable to maintain their anonymity.
- The scope of the protection conferred by Australia's existing shield laws varies between different jurisdictions. This is in part due to the absence of a uniform definition of 'journalist'.
- In most Australian jurisdictions, shield laws do not prevent law enforcement agencies from accessing a journalist's confidential information under a regular search and seizure warrant.

REFORM CONSIDERATIONS

- Shield laws should be **harmonised** nationwide.
- Shield laws should be **extended** to police investigations.
- The terms 'journalist' and 'news medium' should be **defined in a consistent and broad** way in order to maximise the protection of confidential sources in the modern media environment.

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"Journalists are bound by their code of ethics not to disclose sources, and to demand that they do is asking them to break a covenant recognised the world over as crucial to uncovering misconduct – when authorities would prefer the public to stay in the dark."[1]

- The Board of the National Press Club of Australia

This statement was released the day after the Australian Federal Police (AFP) raid on News Corp journalist Annika Smethurst in June 2019. The search warrant over Smethurst's Canberra home had been issued to investigate an alleged breach of federal secrecy offences, arising out of her reporting on a proposal to expand federal surveillance powers. One aim of the raid had been to identify the anonymous source who had provided Smethurst with a classified government memo concerning the proposal.

The June 2019 raids, first on Smethurst and then on the Australian Broadcasting Corporation (ABC), sent a message to journalists that police were willing to exercise powers under warrant in order to identify anonymous sources. Nick McKenzie from *The Age* described his response:

> **"I did an immediate stocktake of what was at my desk because I thought Jesus, am I going to be next? It was in some respects surprising and deeply concerning".**

Laws exist across most of Australia to protect journalists' confidential sources from being identified. These are known as shield laws or 'journalists' privilege'. In this Policy Paper, I summarise the current state of Australian shield laws and identify necessary reforms to better protect source confidentiality and press freedom, without unduly compromising the public interest in law enforcement.

What are Shield Laws?

Shield laws are a **legal protection that allow journalists to keep their confidences**. In certain circumstances a journalist (or their employer) can claim 'privilege' and avoid disclosing information that could identify a source. Relying on a shield law could look like not answering a question in court, or not handing over a document in the course of litigation or a police raid.

Why Should Journalists Have This 'Privilege'?

Shield laws aim to "foster freedom of the press and better access to information for the Australian public".[2] They do this not by protecting the journalists themselves, but their anonymous sources.

Sources are the "wellspring of journalist's work".[3] Sometimes, like when acting as a 'whistleblower', sources may only agree to cooperate with a journalist on a confidential basis. Thus, confidential tip-offs and disclosures **provide vital information that feeds public interest journalism**.[4]

Public interest journalism **ensures accountability and transparency** of government and other authorities, and cannot be effective without a free press, or the 'fourth estate'. The critical link between press freedom and source confidentiality is widely recognised, including by the United Nations Human Rights Committee.[5] It is also a core ethical obligation for journalists. For example, the Media, Entertainment & Arts Alliance (MEAA) imposes a code of ethics on professional journalists, an element of which is to "respect confidences in *all* circumstances".[6]

Journalists take source confidentiality very seriously, even going to jail to protect a source. For example, in 1990 Tony Barrass, a journalist for *The Sunday Times* in Western Australia, was sentenced to seven days' jail for refusing to reveal who had given him two tax files in a case against a tax clerk accused of leaking information. Barrass duly served his time and was fined a further $10,000 for maintaining his refusal.[7]

More recently, journalist Ben Fordham received a phone call from the Department of Home Affairs following a story revealing confidential departmental information. Fordham was asked to assist in the investigation, but declared that "under no circumstances will I be revealing my sources on this story or any story".[8]

Australia's Existing Shield Laws

While shield laws currently exist in Australia, the framework is of the "**Swiss cheese variety**".[9] All Australian jurisdictions, except Queensland, have some form of shield law.

In 2020, the Parliamentary Joint Committee on Intelligence and Security (PJCIS) recommended that the National Cabinet promote the **harmonisation** of Australian shield laws, "with relevant updates to expand public interest considerations, and to reflect the shifting digital media landscape". Hence, current provisions could be amended in coming years.

Table 1: Existing Legislation

Jurisdiction	Legislation	Express Application	
		Legal Proceedings*	Search Warrants
Commonwealth	*Evidence Act 1995* (Cth) s 126K	✓	✗
New South Wales	*Evidence Act 1995* (NSW) s 126K	✓	✗
South Australia	*Evidence Act 1929* (SA) s 72B	✓	✗
Northern Territory	*Evidence (National Uniform Legislation) Act 2011* (NT) s 127A	✓	✗
Australian Capital Territory	*Evidence Act 2011* (ACT) s 126K	✓	✗
Western Australia	*Evidence Act 1906* (WA) s 20I	✓	✗
Tasmania	*Evidence Act 2001* (Tas) s 126B	✓	✗
Victoria	*Evidence Act 2008* (Vic) s 126K	✓	✓
Queensland	No shield laws	✗	✗

*Includes summons or subpoenas to produce documents or give evidence, pre-trial discovery, non-party discovery, interrogatories, notices to produce, and other statutory requests to produce documents.[10] It should be noted that no jurisdiction extends shield laws to answering questions or producing documents before non-judicial bodies.

Who May Rely on Shield Laws?

Shield laws may only be relied on by **journalists or their employers**.

The term 'journalist' is defined in legislation. The Evidence Acts of each state and territory, and the Commonwealth, each contains its own definition of 'journalist'. While the definitions are broadly similar, they are also different enough to make protection uncertain and somewhat inconsistent across the country. Some jurisdictions, like the Commonwealth and the ACT, give a broad definition that includes both traditional and non-traditional forms of journalism like bloggers, Twitter users and YouTube content creators.[11] Yet jurisdictions such as New South Wales, Victoria and South Australia are arguably more restrictive.[12]

Narrower definitions may not properly accommodate for all journalists operating in the modern media environment, leaving their sources without protection in the form of shield laws.

Helpfully, the Victorian legislation lists factors that *must* be considered in assessing whether someone is a journalist, such as whether a significant proportion of their professional activity involves collecting and preparing news or current affairs information, the regularity of publication and accountability through professional standards or codes of practice.[13]

WHO IS A 'JOURNALIST'?

Different definitions of journalist are used across Australian evidence law.

The most common definition appears in the Evidence Acts of NSW, WA and SA (as well as in whistleblower protection laws of WA and SA). These Acts effectively provide that:

'journalist' means a person engaged in the profession or occupation of journalism in connection with the publication of information in a medium for the dissemination to the public or a section of the public of news and observations on news.

In summary, the shield is restricted to journalists and their employers. If a journalist discloses information potentially identifying a source to someone who is not a journalist, that person cannot rely on shield laws and may be required to identify the source in legal proceedings. Thus, **journalists have to be exceedingly careful if talking *about* their sources** to friends, family, colleagues and even lawyers.[14]

When May Shield Laws be Invoked?

Generally, shield laws may be invoked in the context of a **legal proceeding** – both in the lead-up to a trial and during the trial itself. For example, a journalist could rely on shield laws to withhold information in a defamation hearing, or if called to give evidence in a national security trial.

Only the Victorian legislation goes further, extending the privilege to **police investigations**.[15] This means a document that would identify a journalist's confidential source is privileged in that context and, as a rule, police will not be able to access that information under a regular search and seizure warrant.

This is an important distinction that brings Victoria closer into line with other countries, including New Zealand and the United Kingdom.[16] Practically, source confidentiality is just as important in a police investigation:

> **"If investigators can coercively obtain documentary evidence during the investigatory stage of the criminal process, then there will rarely be any need to seek disclosure in court proceedings".**[17]

In Smethurst's case, for example, her ethical obligations were compromised when the AFP raided her home. Simply in executing the search warrant and downloading the contents of her phone, the AFP had access to any-and-all material – confidential or not. Smethurst's shield was locked away in the courtroom, by which time it offered little protection.

Piercing the Shield

Shield laws do not confer absolute protection. They operate as a **rebuttable presumption**. In practice, after a journalist raises the shield, the onus shifts to the opposing party to establish that the information should be disclosed.

A judge applies a **public interest test** to determine whether to order disclosure, weighing:

1. the public interest in disclosing the informant's identity;
2. any likely adverse effect of the disclosure on the informant or any other person; and
3. 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.[18]

The central question is whether the public's right to know a journalist's source outweighs protecting that source and the public interest in a free press. Other factors may be considered on a case-by-case basis such as the nature and importance of the information involved. This allows a nuanced application of the privilege.

THE LIMITS OF SHIELD LAWS: F v CRIME AND CORRUPTION COMMISSION [2020] QSC 245

In *F v Crime and Corruption Commission*, a television journalist fell outside the scope of shield law protections.

The journalist had received an anonymous tip from a police officer on the time and location of an impending high-profile arrest. Acting on that information, F attended the location and was able to film the arrest.

The Crime and Corruption Commission (CCC) commenced an investigation into the police officer's conduct, where F was questioned and asked to identify them. F refused on the grounds of public interest immunity, but the judge – Justice Jackson – dismissed the claim.

Even though the officer has since been identified, F is challenging Justice Jackson's decision. At the time of writing it remains to be seen whether three judges of the Court of Appeal will decide if F may rely on public interest immunity to protect their source in a CCC hearing. Being able to rely on an immunity to maintain source confidentiality in these kinds of proceedings would be a significant win for press freedom.

What about shield laws? Shield laws did not assist F in protecting their confidential source. First, although F would likely have fallen under any definition of a 'journalist', Queensland has no shield laws and therefore the usual rules of evidence applied without exception. Second, the questioning occurred in an administrative proceeding (not in court or a pre-trial context) – even if Queensland had shield laws comparable to most other states, that shield would not have helped F.

Strengthening the Shield: Recommendations for Reform

Shield laws are undoubtedly beneficial; they are a legal recognition of journalists' ethical obligations of confidentiality, and thereby support press freedom. Australia is on the right track by having a basic framework but reform is needed.

Weaknesses in shield laws risk 'chilling' public interest journalism and undermining democratic accountability. If journalists operate in an environment knowing they can become the subject of an invasive search warrant and potential sources know their confidences cannot be assured, neither party will be as willing to engage in the practice of public interest journalism. Whether the press is uncovering corruption or simply reporting on the daily activities of government, the free flow of information is a central tenet of democracy and it risks being undermined if journalists and their sources are inadequately protected.

At present, Australian shield protections are inconsistent. Queensland law confers no privilege, while Commonwealth and ACT law generously cover both traditional and non-traditional forms of journalism, and the Victorian iteration extends to search warrants.[19] Consistent with Recommendation 15 from the PJCIS report and repeated calls by the MEAA,[20] **legislation should be harmonised nationwide** to establish journalists' privilege in all jurisdictions. Harmonisation will also require grappling with more complex definitional questions. As a priority, **Queensland should introduce shield laws**.

'Journalist' and 'news medium' should be defined consistently and broadly to maximise the protection of confidential sources in the modern media environment. For example, the New Zealand High Court in 2014 endorsed a function-based test in finding that a blogger could be considered a journalist for the purposes of their shield laws, the key determinant being "the element of regularly providing new or recent information of public interest".[21] The Commonwealth definition of 'news medium' sets a good benchmark, covering *any* medium for the public dissemination of news.[22]

To ensure that source confidentiality is being adequately protected, shield laws should **extend to police investigations**. This avoids the problem of 'too little, too late' and does not leave sources vulnerable to identification at the early, often crucial, stages of a matter. The Victorian legislation already implements this by extending to search warrants.

Furthermore, as the case of *F v Crime and Corruption Commission* demonstrates, source confidentiality is equally pertinent in proceedings before **non-judicial bodies**. The legislation in each State or Territory that establishes these bodies tends to provide for other privileges, such as public interest immunity.[23] The extension of shield laws to these contexts deserves serious consideration.

Together, these reforms ensure more robust and complete coverage so that shield laws can fulfil their ultimate purpose: to encourage the free flow of information in a democratic society.[24] They would also bring Australia in line with international standards, as other jurisdictions like the United Kingdom and New Zealand already have strong protections for source confidentiality.[25]

About the Author

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Press Freedom Policy Papers offer short, evidence-based insights and recommendations informed by scholarship and consultation.

Reform Briefings present targeted, evidence-based recommendations for law reform to enhance the appropriate protection of press freedom.

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