Human Rights Law Centre

In the Public Interest

Shielding Confidential Sources: Balancing the Public's Right to Know and the Court's Need to Know

Submission to Department of Justice and Attorney-General (Qld)

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Human Rights Law Centre

The Human Rights Law Centre uses strategic legal action, policy solutions and advocacy to support people and communities to eliminate inequality and injustice and build a fairer, more compassionate Australia. We work in coalition with key partners, including community organisations, law firms and barristers, academics and experts, and international and domestic human rights organisations.

The Human Rights Law Centre acknowledges the people of the Kulin and Eora Nations, the traditional owners of the unceded land on which our offices sit, and the ongoing work of Aboriginal and Torres Strait Islander peoples, communities and organisations to unravel the injustices imposed on First Nations people since colonisation. We support the self-determination of Aboriginal and Torres Strait Islander peoples.

Contents

1. Introduction

> *A vigorous, rigorous, and independent press holds people and institutions to account, uncovers the truth, and informs the public. It provides the public with the information it needs to engage in informed debate … The right to convey information to the public is fragile unless the press is free to pursue leads, communicate with sources, and assess the information acquired.*
>
> *R v Vice Media*, Supreme Court of Canada
> [2018] SCR 374

The Human Rights Law Centre is a national not-for-profit legal centre which promotes and protects human rights in Australia. We welcome the opportunity to provide feedback on the proposal from the Queensland Attorney-General and Department of Justice to introduce a shield law to protect the identity of journalists' confidential sources.

Public interest journalism is essential to democracy. It informs public debate, exposes cover-ups and drives change. Without public interest reporting, we may never have learned about abuses within the Don Dale Detention Centre, the alleged killing of unarmed civilians by the Australian military in Afghanistan, the horrific conditions in offshore detention centres and misogynistic behaviour within Federal Parliament.

Despite its vital role, public interest journalism is under unprecedented threat. In response to nationally-important stories, media organisations have been raided, police have accessed the metadata and travel records of journalists, and reporters – who were only doing their jobs – have been threatened with prosecution. At the same time, dwindling revenue, layoffs and news outlet closures have reduced the capacity of media organisations to engage in public interest reporting.

Sources are also being targeted. Whistleblowers, on whom public interest reporting often depends, are being prosecuted for revealing the unethical practices of the Australian Tax Office, Australia's spying on East Timor and potential war crimes perpetrated by Australian forces.

In the face of legal, financial and reputational risks, some brave Australians still speak up. They often do so on the express condition of confidentiality. It is this promise of anonymity that enables the free exchange of information and underpins the journalist-source relationship. The ability of journalists to maintain confidentiality is the "cornerstone principle of journalism recognised the world over".[1] It must be protected.

A shield law is an important first step towards this goal. We urge the Queensland Government to enact a comprehensive and broad framework that enhances media freedom. Without strong protections for journalists and their sources, public interest journalism will continue to decline. As it declines, so does our democracy.

[1] Media, Entertainment and Arts Alliance, 'Queensland to Finally Get a Shield Law – But What About "Journalist F"?', *Press Freedom* (online, 1 May 2021) <https://pressfreedom.org.au/queensland-to-finally-get-a-shield-law-but-what-about-journalist-f-bf6e62b9dd80>.

2. Recommendations

The Human Rights Law Centre recommends that:

1. the Queensland Government adopt a broad definition of 'journalist' based on s 126J of the *Evidence Act 1995* (Cth);

2. the shield law apply to a journalist's employer, a person who engages a journalist under a contract for services and any other person prescribed via regulations;

3. the Queensland Government adopt the definition of 'informant' contained in s 126J of the *Evidence Act 1995* (Cth);

4. the Queensland Government adopt the definition of 'news medium' contained in s 126J of the *Evidence Act 1995* (Cth);

5. the shield law protect informants who reasonably expected their identity to remain confidential, regardless of whether an express promise of confidentiality was made.

6. the shield law apply to all judicial and administrative proceedings, including proceedings before all courts and tribunals in Queensland;

7. the shield law apply to all inquisitorial proceedings in Queensland. The Supreme Court should be given the power to consider the claim of privilege, either at first instance or on appeal;

8. the shield law apply to all preliminary proceedings and investigations, including search warrants. The Queensland Government should adopt the wording of s 131A of the *Evidence Act 2008* (Vic);

9. the courts be permitted to consider removing the shield only on the application of a party to the proceeding;

10. the courts be permitted to remove the shield only where the public interest in disclosing the identity of the source outweighs the considerations specified at 5.2;

11. the courts be required to give written reasons explaining why the shield was removed or left intact;

12. if the shield is removed, the courts should be required to consider whether it is necessary to impose conditions to protect the journalist or their source. The courts should be empowered to impose any conditions they see fit; and

13. the Queensland Government should push for national reforms to Australia's media laws, including harmonised shield protections and the introduction of a federal Charter of Human Rights and Freedoms.

3. The evolving nature of journalism

Journalism is changing. With the growth of digital platforms, the revenue streams of traditional media companies have largely dried up. Cost-cutting and redundancies have become common. Permanent staff have been replaced by freelancers and independent contractors.[2] It is estimated the industry lost around one-quarter of all journalism jobs between 2012 and 2017 alone.[3]

But the rise of the internet and social media has also encouraged innovation. New entrants, many of whom defy the traditional media model, have emerged. The industry has been 'democratised', allowing a diverse range of individuals to become publishers.[4] Perceptions of who is a 'journalist' and what constitutes a 'news medium' have shifted. In order to remain relevant and adequately protect sources, shield laws must reflect these trends.

3.1 Who is a 'journalist'?

Public interest reporting is no longer performed solely by career journalists. Journalism educators, students, freelance writers, academics (writing for outlets like *The Conversation*), informed citizens and professionals from diverse fields may engage in public interest journalism.[5] These individuals also enter into confidential relationships with sources.

For this reason, Queensland's shield law should not restrict the definition of 'journalist' to those who are in the 'occupation' or 'profession' of journalism. Such a narrow definition would arbitrarily deny protection to:[6]

> *… [individuals] who might indeed be producing 'public interest' journalism but who do not devote a significant proportion of their professional activity to doing so, or who are not members of the journalist's union, the MEAA, or whose media outlets are not mainstream broadcasters or publishers covered by industry codes of conduct or the Australian Press Council.*

We therefore urge the Queensland Government to refrain from adopting the definition contained in the *Public Interest Disclosure Act 2010* (Qld), which unduly focuses on the person's 'occupation'.[7] Nor should there be a requirement that the journalist comply with a recognised code of practice. These codes are typically adopted only by legacy media and professional journalist associations, and may be difficult to apply in a court of law.[8]

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[2] Senate Select Committee on the Future of Public Interest Journalism, Parliament of Australia, *Inquiry into the Future of Public Interest Journalism* (Report, February 2018) 29–30.
[3] Ibid.
[4] Ibid 61.
[5] Public Interest Journalism Foundation, Submission No 13 to Senate Select Committee on the Future of Public Interest Journalism, Parliament of Australia, *Inquiry into the Future of Public Interest Journalism* (2017) 9; Economic Policy Scrutiny Committee, Parliament of the Northern Territory, *Inquiry into the Evidence (National Uniform Legislation) Amendment (Journalist Privilege) Bill 2017* (Report, March 2018) 16.
[6] Journalism Education and Research Association of Australia, Submission No 21 to Senate Standing Committees on Environment and Communications, Parliament of Australia, *Inquiry into Press Freedom* (2019) 5.
[7] The Act defines a 'journalist' as a person 'engaged in the *occupation* of writing or editing material intended for publication in the print or electronic news media': *Public Interest Disclosure Act 2010* (Qld) s 20(4).
[8] University of Queensland, Submission to Department of Justice and Attorney-General, Parliament of Queensland, *Shielding Confidential Sources: Balancing the Public's Right to Know and the Court's Need to Know* (July 2021) 5.

Instead, we recommend the definition focus on *journalistic activity*. Shield laws at a federal level and in the Australian Capital Territory already adopt this approach. Commonwealth legislation defines a 'journalist' as: [9]

> *a person who is engaged and active in the publication of news and who may be given information by an informant in the expectation that the information may be published in a news medium.*

We encourage Queensland to adopt the same or similar wording for three reasons:

- it will move Australia closer to a nationally consistent source protection framework, the need for which has been noted by three parliamentary inquiries;[10]
- the phrase 'engaged and active' rightly focuses the courts' attention on the individual's journalistic *output*, not their employment status and organisational links.[11] This will protect the broad range of individuals who engage in public interest journalism, while appropriately withholding the shield from individuals who *coincidentally* publish news-related content;[12] and
- it will ensure the legal definition of 'journalist' accommodates changing technologies and communication practices.[13]

To avoid undermining this flexibility, the legislation should not contain additional factors for the courts to consider when determining if a person is a journalist. On this point, we hold some concerns about the approach recently taken by the Federal Court in *Kumova v Davison*. In applying the Commonwealth definition of 'journalist', the Court relied on the factors listed in Victorian legislation.[14] In our opinion, this practice unnecessarily limits the explicitly broad drafting of s 126J of the *Evidence Act 1995* (Cth).

In recognition of the fact that journalists may need to share a source's identity with close associates, the privilege should be extended to the journalist's employer. All other states and territories adopt this approach (except Tasmania, which does not have a shield law framework specific to journalists).

However, in light of changing employment practices within the industry (namely, the rising number of independent contractors and freelancers), we recommend Queensland adopt the slightly broader approach taken by South Australia. Section 72 of the *Evidence Act 1929* (SA) extends the privilege to a journalist's employer, a person who engaged a journalist under a contract for services and any other person prescribed in the regulations.

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[9] *Evidence Act 1995* (Cth) s 126J(1).
[10] Senate Select Committee on the Future of Public Interest Journalism, Parliament of Australia, *Inquiry into the Future of Public Interest Journalism* (Report, February 2018) 138; Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Inquiry into the Impact of the Exercise of Law Enforcement and Intelligence Powers on the Freedom of the Press* (Report, August 2020) 131; Senate Standing Committees on Environment and Communications, Parliament of Australia, *Inquiry into Press Freedom* (Report, May 2021) 68.
[11] Joseph M Fernandez, 'Fixing Australia's "Swiss-Cheese" Shield Laws', *Press Freedom* (online, 1 May 2021) <https://pressfreedom.org.au/fixing-australias-swiss-cheese-shield-laws-by-joseph-m-fernandez-ec9ac2ac00ad>.
[12] *Kumova v Davison* [2021] FCA 753, [31]–[33]; University of Queensland, Submission to Department of Justice and Attorney-General, Parliament of Queensland, *Shielding Confidential Sources: Balancing the Public's Right to Know and the Court's Need to Know* (July 2021) 3–4.
[13] Economic Policy Scrutiny Committee, Parliament of the Northern Territory, *Inquiry into the Evidence (National Uniform Legislation) Amendment (Journalist Privilege) Bill 2017* (Report, March 2018) 16.
[14] *Kumova v Davison* [2021] FCA 753, [32]–[33]. See *Evidence Act 2008* (Vic) s 126J(2).

Recommendation 1: The Human Rights Law Centre recommends that the Queensland Government adopt a broad definition of 'journalist' based on s 126J of the *Evidence Act 1995* (Cth).

Recommendation 2: The Human Rights Law Centre recommends that the shield law apply to a journalist's employer, a person who engages a journalist under a contract for services and any other person prescribed via regulations.

3.2 Who is an 'informant'?

Shield laws in the Commonwealth, New South Wales, Australian Capital Territory, Victoria and Western Australia define an 'informant' as:[15]

> *a person who gives information to a journalist in the normal course of the journalist's work in the expectation that the information may be published in a news medium.*

South Australia adopts the same wording, but does not require the source to expect the information will be published in a news medium.[16] The Northern Territory takes a different approach, defining an informant as a person who provides 'new or noteworthy information to a journalist'. This wording has been criticised for its subjectiveness and for creating uncertainty over whether the privilege continues to apply to information that is no longer 'new' or 'noteworthy'.[17]

In the interests of national uniformity, we recommend the definition of 'informant' contained in the *Evidence Acts* of the Commonwealth, New South Wales, Australian Capital Territory, Victoria and Western Australia be adopted.

Recommendation 3: The Human Rights Law Centre recommends that the Queensland Government adopt the definition of 'informant' contained in s 126J of the *Evidence Act 1995* (Cth).

3.3 What is a 'news medium'?

News is no longer exclusively published through the traditional mediums of radio, television and print. More Australians consume news through digital platforms than non-digital ones.[18] Social media and podcasts have emerged as key ways for consumers to access news content.[19] 'News medium' should therefore be defined broadly to take into account the range of news platforms available. Sources deserve protection regardless of how their disclosures are published.

[15] *Evidence Act 1995* (Cth) s 126J(1); *Evidence Act 1995* (NSW) s 126J; *Evidence Act 2011* (ACT) s 126J; *Evidence Act 2008* (Vic) s 126J(1); *Evidence Act 1906* (WA) s 20G.
[16] *Evidence Act 1929* (SA) s 72.
[17] Whistleblowers Australia, Submission No 4 to Economic Policy Scrutiny Committee, Parliament of the Northern Territory, *Inquiry into the Evidence (National Uniform Legislation) Amendment (Journalist Privilege) Bill 2017* (31 January 2018) 3.
[18] Centre for Media Transition, *The Impact of Digital Platforms on News and Journalistic Content* (Report, 2018) 25.
[19] Ibid 25–26.

We recommend the Queensland Government adopt the definition of 'news medium' contained in the shield laws of the Commonwealth, New South Wales, Australian Capital Territory, Victoria, South Australia and Western Australia.[20] These jurisdictions define 'news medium' as:

> *a medium for the dissemination to the public or a section of the public of news and observations on news.*

The equivalent definition in New Zealand has been found to cover certain types of blog sites,[21] and appears wide enough to accommodate changing industry practices.[22]

Recommendation 4: The Human Rights Law Centre recommends that the Queensland Government adopt the definition of 'news medium' contained in s 126J of the *Evidence Act 1995* (Cth).

3.4 Promising confidentiality

The Human Rights Law Centre notes with concern that most jurisdictions prevent the privilege from applying unless the journalist promised confidentiality to their source.[23] The courts have interpreted this condition narrowly, requiring the promise to be explicit, made in respect of specific information and given *prior* to the disclosure of that information.[24] This approach is legalistic and too restrictive. It overlooks the fact that confidentiality may be implicit or negotiated after a disclosure. South Australia has adopted more nuanced drafting. The privilege applies if:[25]

> *the informant reasonably expected that the informant's identity would be kept confidential (whether because of an express undertaking given by the journalist or otherwise) …*

Focusing on what the source reasonably expected produces more equitable outcomes and better reflects industry practice.[26] Moreover, the public interest in protecting sources remains pressing, regardless of whether confidentiality is negotiated in detail or exists as an unspoken understanding.[27] Despite the importance of harmonising Australia's shield laws, South Australian legislation is vastly superior in this respect. We urge the Queensland Government to adopt similar wording that focuses on what the source reasonably expected.

Recommendation 5: The Human Rights Law Centre recommends that the shield law protect informants who reasonably expected their identity to remain confidential, regardless of whether an express promise of confidentiality was made.

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[20] *Evidence Act 1995* (Cth) s 126J(1); *Evidence Act 1995* (NSW) s 126J; *Evidence Act 2011* (ACT) s 126J; *Evidence Act 2008* (Vic) s 126J(1); *Evidence Act 1929* (SA) s 72; *Evidence Act 1906* (WA) s 20G.
[21] *Slater v Blomfield* [2014] NZHC 2221. See also *Evidence Act 2006* (NZ) s 68(1).
[22] *Kumova v Davison* [2021] FCA 753, [12]–[13].
[23] *Evidence Act 1995* (Cth) s 126K(1); *Evidence Act 1995* (NSW) s 126K(1); *Evidence Act 2011* (ACT) s 126K(1); *Evidence Act 2008* (Vic) s 126K(1); *Evidence Act 1906* (WA) s 20I; *Evidence (National Uniform Legislation) Act 2011* (NT) s 127A(2).
[24] *Kumova v Davison* [2021] FCA 753, [49].
[25] *Evidence Act 1929* (SA) s 72B(1)(d).
[26] Joseph M Fernandez, Submission No 1 to Senate Standing Committees on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into the Evidence Amendment (Journalists' Privilege) Bill 2009* (2009) 12.
[27] South Australia, *Parliamentary Debates*, Legislative Council, 31 July 2018, 1059–1060 (John Darley MLC).

4. Application of the shield

Currently, journalists in Queensland can be forced to disclose the identity of a source by courts, tribunals, inquiries and commissions. A journalist has no grounds on which to refuse, forcing them to choose between honouring their ethical obligations and obeying the request. Non-compliance may result in a fine or jail.

This is a troubling situation. Its negative effects on journalists, sources and public interest reporting are becomingly increasingly apparent.[28] To protect the free flow of information, shield laws should cover *all* circumstances in which a journalist may be asked to divulge a source's identity.

Concerns that this broad approach will hamper investigations are misplaced. Making the privilege universally *available* does not mean it will operate in all proceedings. In each case, a court may choose to abrogate the privilege if it is in the public interest. In our view, it is preferable to determine the application of shield laws on a case-by-case basis, rather than exempting entire classes of proceedings at the outset.

Moreover, concerns about the appropriateness of applying shield laws to all types of proceedings are rebutted by the fact that, for each proceeding type, at least one Australian jurisdiction extends the privilege to it. This not only indicates that there are grounds to make the privilege available in all proceedings, but also appropriate methods of doing so.

4.1 Judicial and administrative proceedings

Shield protections should apply to all judicial proceedings in which evidence may be given, regardless of whether the *Evidence Act 1977* (Qld) applies. There should be no carveouts, even for proceedings where the rules of evidence are excluded. Western Australia has taken this approach, applying the shield to every legal proceeding in which evidence may be given.[29]

Likewise, shield laws should apply to all administrative proceedings. The public interest in protecting journalists and their sources is just as compelling in relation to administrative hearings as it is for court proceedings.[30] Witnesses before the Queensland Civil and Administrative Tribunal can refuse to answer a question or produce a document if they plead the privilege against self-incrimination or have a 'reasonable excuse'.[31] There is no reason why journalistic privilege should not also apply. This is currently the case in New South Wales, where the privilege may excuse a journalist from producing a document.[32]

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[28] Media Watch, 'Journalist F: A Push for Queensland to Adopt Shield Laws to Better Protect Journalists After a Local TV Reporter Refuses to Reveal His Source', *ABC News* (online, 15 March 2021) <https://www.abc.net.au/mediawatch/episodes/f/13250290>; *F v Crime and Corruption Commission* [2020] QSC 245.

[29] *Evidence Act 1906* (WA) s 20H(3).

[30] University of Queensland, Submission to Department of Justice and Attorney-General, Parliament of Queensland, *Shielding Confidential Sources: Balancing the Public's Right to Know and the Court's Need to Know* (July 2021) 10–11.

[31] *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 214.

[32] *Civil and Administrative Tribunal Act 2013* (NSW) s 67. Although shield laws do not apply to answering questions in a NSW tribunal proceeding, we urge the Queensland Government to adopt a broader approach.

Recommendation 6: The HRLC recommends that the shield law apply to all judicial and administrative proceedings, including proceedings before all courts and tribunals in Queensland.

4.2 Inquisitorial proceedings

Shield protections should also apply to all types of inquisitorial proceedings. Commissions and inquiries possess extraordinarily coercive powers, designed to expose serious corruption. Yet they are increasingly being used on journalists. Reporters – under threat of serious consequences – are being forced to answer questions, hand over interview notes and reveal their sources.[33] As things stand, these powers pose an unacceptable threat to press freedom. At a minimum, journalists deserve the *ability* to request an exemption from disclosing a source's identity.

Queensland Crime and Corruption Commission

In our view, the privilege should be extended to matters before the Queensland Crime and Corruption Commission. Dozens of stories have emerged of Australian anti-corruption commissions using confidential summons to force journalists to reveal their sources.[34] Under the terms of these summons, journalists can only tell a lawyer about their predicament.[35] Speaking up about how the summons can be a criminal offence. Recent comments by interstate corruption watchdogs have fuelled fears that some commissions are targeting journalists without considering the wider implications.[36]

We recommend the Queensland Government follow the example set by the Australian Capital Territory. Under the *Integrity Commission Act 2018* (ACT), a witness before the Commission may claim journalistic privilege.[37] This is despite the fact that the rules of evidence and the privilege against self-incrimination do not apply. Upon making a claim of privilege, the matter is sent to the Supreme Court for a determination on whether the privilege applies.[38]

We suggest that a similar regime could be enacted in Queensland. The *Crime and Corruption Act 2001* (Qld) recognises claims for other types of privilege in some contexts.[39] There is also a mechanism for the Supreme Court to determine whether a privilege applies.[40] Given the legislative

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[33] Media, Entertainment and Arts Alliance, 'Anti-Corruption Bodies: Australia's Star Chambers' in Jonathan Este (ed) *Progress Under Liberty: The State of Press Freedom in Australia 2010* (Media, Entertainment and Arts Alliance, 2010) 17.
[34] Robin Speed, 'Australia's Star Chambers' in Jonathan Este (ed) *Kicking at the Cornerstone of Democracy: The State of Press Freedom in Australia 2012* (Media, Entertainment and Arts Alliance, 2013) 35.
[35] Cameron Stuart, 'Silenced in Secret' in Mike Dobbie (ed) *Power, Protection and Principles: The State of Press Freedom in Australia 2013* (Media, Entertainment and Arts Alliance, 2013) 24–25.
[36] Jano Gibson, 'NT Chief Minister Says ICAC Boss's Comments About Whisteblower Were Unwise', *ABC News* (online, 21 June 2021) <https://www.abc.net.au/news/2021-06-21/michael-gunner-says-ken-fleming-comments-unwise/100230766>.
[37] *Integrity Commission Act 2018* (ACT) s 174.
[38] See, eg, *Integrity Commission Act 2018* (ACT) ss 95–97 (preliminary inquiry notices), ss 127–129 (search warrants) and ss 161–163 (examinations).
[39] *Crime and Corruption Act 2001* (Qld) ss 76–81 (notices to produce) and ss 184–192 (hearings). Depending on the circumstances, a witness may plead legal professional privilege, public interest immunity, parliamentary privilege or a 'reasonable excuse'.
[40] The Supreme Court determines all claims of privilege made in relation to a corruption or confiscation-related investigation: ss 195A–196. Claims of privilege made during crime investigations or intelligence and witness protection hearings are determined by the Commission at first instance, but may be appealed to the Supreme Court: ss 193–195B.

framework is already in place, we recommend amending the *Crime and Corruption Act 2001* (Qld) to:

- allow a witness to plead journalistic privilege in all proceedings before the Commission; and
- allow the Supreme Court to determine the matter, either at first instance or on appeal.

Commissions of inquiry and coronial inquests

The same approach should be taken for commissions of inquiry and coronial inquests. Both have similar coercive powers that threaten to undermine press freedom and public interest reporting. We note that the *Commissions of Inquiry Act 1950* (Qld) and *Coroners Act 2003* (Qld) allow witnesses to refuse to attend a hearing, answer a question or produce documents if they have a 'reasonable excuse'.[41] 'Reasonable excuse' incorporates various forms of privilege,[42] and should include journalistic privilege once a shield law is enacted.

The privilege against self-incrimination

The discussion paper queries whether journalistic privilege should apply in the absence of the privilege against self-incrimination, which is abrogated in most inquisitorial proceedings. In our view, its abrogation should not influence a shield law. There are two reasons for this.

First, other jurisdictions allow witnesses to plead journalistic privilege despite the abolition of the privilege against self-incrimination.[43] Second, the privileges safeguard different interests. The privilege against self-incrimination seeks to protect a witness from the risk that their disclosures may be used against them in other proceedings. This risk can be minimised through restricting how the information may be utilised in the future.

In contrast, journalistic privilege not only seeks to protect journalists and their sources from retribution, but broader interests as well: the free flow of information, the public's right to know and democratic accountability. Disclosing a source's identity *irreversibly* harms these interests. Unlike the privilege against self-incrimination, this harm cannot be sufficiently mitigated by restricting how the information is used. Once it is known that a source's identity has been revealed, potential whistleblowers are deterred from coming forward.

Recommendation 7: The HRLC recommends that the shield law apply to all inquisitorial proceedings in Queensland. The Supreme Court should be given the power to consider the claim of privilege, either at first instance or on appeal.

4.3 Preliminary proceedings and investigations

If shield laws are to offer real protection to journalists and their sources, it is essential that they apply to preliminary proceedings and investigations. Failing to do so creates a gap in the law. It allows parties to use pre-hearing processes to access a source's identity, when, if the same request

[41] *Commissions of Inquiry Act 1950* (Qld) ss 5, 14; *Coroners Act 2003* (Qld) ss 16, 37.
[42] *Commissions of Inquiry Act 1950* (Qld) s 3 (definition of 'reasonable excuse'), noting that only the privilege against self-incrimination is expressly abrogated (s 14(1A)); Queensland Government, *State Coroner's Guidelines 2013* (Chapter 7, Version 3, June 2019) 5–6.
[43] *Integrity Commission Act 2018* (ACT) ss 174–175.

were made *inside* the courtroom, the source's identity would be protected.[44] As Western Australia's Supreme Court observed in relation to subpoenas:[45]

> *… if the Shield Laws do not apply in respect of the production of documents under a subpoena, the very protections the Shield Laws are designed to provide could be significantly undermined, if not rendered nugatory.*

As a result, the Commonwealth, New South Wales, Australian Capital Territory, Victoria and the Northern Territory apply their shield law frameworks to pre-trial 'disclosure requirements'. This includes summons, subpoenas, pre-trial discovery, non-party discovery, interrogatories, notices to produce and requests to other parties to produce documents.[46]

We recommend the Queensland Government adopt the same approach, albeit with one important amendment. As is the case in Victoria, the privilege should apply to search warrants. If police can obtain evidence through a search warrant, there may be no need to seek disclosure in court.[47] The consequences of this loophole are illustrated by the 2019 raids on the home of journalist Annika Smethurst and the ABC's headquarters.[48] In both cases, the shields available to Smethurst and the ABC were locked away in the courtroom, unable to be used.[49]

Recommendation 8: The HRLC recommends that the shield law apply to all preliminary proceedings and investigations, including search warrants. The Queensland Government should adopt the wording of s 131A of the *Evidence Act 2008* (Vic).

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[44] Mia Herrman, 'Enhancing Press Freedom in Australia: Establishing a Media Freedom Act With Coordinated National Security Law Reform' (2021) 21(6) *University of New South Wales Law Journal Student Series* <http://classic.austlii.edu.au/au/journals/UNSWLawJlStuS/2021/6.html>.
[45] *Hancock Prospecting Pty Ltd v Hancock* [2013] WASC 290, [104].
[46] *Evidence Act 1995* (Cth) s 131A; *Evidence Act 1995* (NSW) s 131A; *Evidence Act 2011* (ACT) s 131A; *Evidence Act 2008* (Vic) s 131A; *Evidence (National Uniform Legislation) Act 2011* (NT) s 131A.
[47] Lawrence McNamara and Sam McIntosh, 'Confidential Sources and the Legal Rights of Journalists: Re-thinking Australian Approaches to Law Reform' (2010) 32(1) *Australian Journalism Review* 81, 89, cited in Anna Kretowicz, *Reforming Australian Shield Laws* (Press Freedom Policy Papers, 2021) 6.
[48] Denis Muller, 'Court Ruling Against ABC Highlights the Enormous Deficiency in Laws Protecting Journalists' Sources', *The Conversation* (online, 18 February 2020) <https://theconversation.com/court-ruling-against-abc-highlights-the-enormous-deficiency-in-laws-protecting-journalists-sources-131991>.
[49] Anna Kretowicz, *Reforming Australian Shield Laws* (Press Freedom Policy Papers, 2021) 6.

5. Removing the shield

The Human Rights Law Centre acknowledges that shield laws should not give absolute protection to journalists and their sources. In some (albeit extremely rare) circumstances, it may be necessary to reveal the identity of a source in order to protect other fundamental rights.[50] However, the grave consequences of revealing a source's identity – for the journalist, their source and democratic accountability – warrant a restrictive test that focuses the court's attention on these harms.

5.1 When should a court consider removing the shield?

In our view, a court should only consider removing the shield after an application by a party to the proceeding. It should not do so on its own motion. This will narrow the circumstances in which the privilege can be abrogated. It is also in line with the approach taken by the Commonwealth, New South Wales, Australian Capital Territory, Victoria and the Northern Territory.[51]

Recommendation 9: The HRLC recommends that the courts be permitted to consider removing the shield only on the application of a party to the proceeding.

5.2 What should a court consider?

We favour the adoption of a 'public interest' test, as is currently used in all Australian shield laws.[52] However, 'public interest' is a nebulous concept that is difficult to define.[53] There is some concern that the term is too subjective,[54] leading to interpretations that may disregard the public's right to know.[55]

The legislation should therefore explicitly direct the courts to consider the importance of protecting journalists, their sources and the free flow of information. As a starting point, we recommend Queensland adopt the approach taken by the Commonwealth, New South Wales, Australian Capital Territory, Victoria and Western Australia. These jurisdictions require the court to consider if the public interest in disclosing the identity of the source 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 and, accordingly also, in the ability of journalists to access sources of information.

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[50] For example, the right to a fair hearing: *Human Rights Act 2019* (Qld) s 31.
[51] *Evidence Act 1995* (Cth) s 126K(2); *Evidence Act 1995* (NSW) s 126K(2); *Evidence Act 2011* (ACT) s 126K(2); *Evidence Act 2008* (Vic) s 126K(2); *Evidence (National Uniform Legislation) Act 2011* (NT) s 127A(2).
[52] Ibid; *Evidence Act 1929* (SA) s 72B(4); *Evidence Act 1906* (WA) s 20J(2).
[53] Joseph M Fernandez, Submission No 1 to Senate Standing Committees on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into the Evidence Amendment (Journalists' Privilege) Bill 2009* (2009) 11; Australian Law Reform Commission, *Open Government: A Review of the Federal Freedom of Information Act 1982* (Report No 77, 1995) 67 [8.13].
[54] Madeline Moncrieff, 'No Names…Unless the Court Decides Otherwise', *The Guardian* (online, 8 April 2002) <https://www.theguardian.com/media/2002/apr/08/mondaymediasection4>.
[55] Media, Entertainment and Arts Alliance, 'Queensland to Finally Get a Shield Law – But What About "Journalist F"?', *Press Freedom* (online, 1 May 2021) <https://pressfreedom.org.au/queensland-to-finally-get-a-shield-law-but-what-about-journalist-f-bf6e62b9dd80>.

In our view, these considerations only go some way towards recognising the connection between source confidentiality, public interest journalism and democratic accountability. We therefore recommend the addition of an extra consideration:

(c) the importance of public interest journalism in facilitating greater transparency, openness and democratic accountability, and the chilling effect that disclosing the identities of sources may have on these functions.[56]

Recommendation 10: The HRLC recommends that the courts be permitted to remove the shield only where the public interest in disclosing the identity of the source outweighs the above considerations.

5.3 Other safeguards

If a court decides to remove the shield, it must have the power to impose conditions to protect the journalist and their source from reprisals. This may include limiting who can access the relevant evidence or prohibiting further disclosure of the source's identity.

In our view, the importance of protecting journalists and their sources means the court should be *obligated* to consider whether it is necessary to impose any conditions. We also recommend the legislation give the court discretion to impose any conditions it sees fit.

Moreover, given the significant ramifications of removing the shield, the court should be required to give written reasons for removing (or refusing to remove) the shield. This will improve transparency, aid judicial accountability and assist the parties in understanding how the court interpreted the public interest test.[57]

Recommendation 11: The HRLC recommends that the courts be required to give written reasons explaining why the shield was removed or left intact.

Recommendation 12: The HRLC recommends that, if the shield is removed, the courts should be required to consider whether it is necessary to impose conditions to protect the journalist or their source. The courts should be empowered to impose any conditions they see fit.

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[56] Joseph M Fernandez, Submission No 1 to Senate Standing Committees on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into the Evidence Amendment (Journalists' Privilege) Bill 2009* (2009) 11.

[57] See also, University of Queensland, Submission to Department of Justice and Attorney-General, Parliament of Queensland, *Shielding Confidential Sources: Balancing the Public's Right to Know and the Court's Need to Know* (July 2021) 8.

6. Broader reforms

Enacting a shield law will give journalists and their sources vital protection. However, these laws alone cannot overcome the challenges to press freedom in Australia. Following the 2019 raids that targeted Annika Smethurst and the ABC, Australia's ranking in the 2020 World Press Freedom Index dropped to 26th – a decrease of five ranking places. The shift was one of the largest drops experienced by any country in a one-year period, placing Australia in league with nations such as Benin, Singapore and Djibouti.[58] Wider reform is needed.

We believe the Queensland Government can play an important role in advocating for this reform. In our view, two changes are particularly important:

- the harmonisation of state and territory shield laws to create a broad, nationally consistent approach;[59] and
- the introduction of a federal Charter of Human Rights and Freedoms that guarantees freedom of expression and, by extension, a 'free, uncensored and unhindered press'.[60]

These changes would honour our international human rights obligations. They would also affirm the important role that journalists and their sources play in keeping individuals, corporations and governments accountable.

Most importantly, they would make our democracy more vibrant and resilient.

Recommendation 13: The HRLC recommends that the Queensland Government push for national reforms to Australia's media laws, including harmonised shield protections and the introduction of a federal Charter of Human Rights and Freedoms.

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[58] Mia Herrman, 'Enhancing Press Freedom in Australia: Establishing a Media Freedom Act With Coordinated National Security Law Reform' (2021) 21(6) *University of New South Wales Law Journal Student Series* <http://classic.austlii.edu.au/au/journals/UNSWLawJlStuS/2021/6.html>.
[59] See the recommendations of: Senate Select Committee on the Future of Public Interest Journalism, Parliament of Australia, *Inquiry into the Future of Public Interest Journalism* (Report, February 2018) 138; Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Inquiry into the Impact of the Exercise of Law Enforcement and Intelligence Powers on the Freedom of the Press* (Report, August 2020) 131; Senate Standing Committees on Environment and Communications, Parliament of Australia, *Inquiry into Press Freedom* (Report, May 2021) 68.
[60] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 19(2); Human Rights Committee, *General Comment No 34: Article 19: Freedom of Opinion and Expression*, 102nd session, UN Doc CCPR/C/GC/34 (12 September 2011) 3–4.