

# EVALUATING THE MERITS OF QUEENSLAND'S NEW SHIELD LAW: REFORM LESSONS FOR THE REST OF AUSTRALIA

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*This article provides the first comprehensive analysis of Queensland's new 'journalist privilege' provisions (or 'shield law'), introduced into div 2B of the Evidence Act 1977 (Qld) in 2022, and evaluates the merits of these provisions against comparable legislation in other jurisdictions. This article aims to inform law reform to protect press freedom by recommending that shield laws across Australia be amended to adopt the favourable aspects of Queensland's new shield law. Conversely, the article also argues that the shortfalls in Queensland's own shield law, and the shield laws of other jurisdictions, can be rectified by incorporating into them the beneficial features of shield laws nationwide. Doing so would produce a uniform and exemplar shield law which provides uniform protections in all Australian jurisdictions.*

## I INTRODUCTION

In the course of acting as a public watchdog and gathering news, journalists occasionally guarantee anonymity to sources to preclude them from being 'subject to retribution for exposing matters of public [interest] to the media'.<sup>1</sup> Source confidentiality is a core ethical obligation for journalists and an essential feature of the operation of a free press.<sup>2</sup> Failing to respect source confidentiality would risk deterring sources from assisting the press, resulting in a chilling effect that undermines the free flow of information that would otherwise be in the

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<sup>1</sup> Sanette Nel, 'Journalistic Privilege: Does it Merit Legal Protection?' (2005) 38(1) *Comparative and International Law Journal of South Africa* 99, 100.

<sup>2</sup> Rebecca Ananian-Welsh, 'Journalistic Confidentiality in an Age of Data Surveillance' (2019) 41(2) *Australian Journalism Review* 225, 225; *Mahon Tribunal v Keena* [2009] IESC 64, [23] (Fennelly J). See also Human Rights Committee, *General Comment No 34: Article 19, Freedoms of Opinion and Expression*, 102<sup>nd</sup> sess, UN Doc CCPR/C/GC/34 (12 September 2011) [13], [45].

public interest.<sup>3</sup> The importance of the media's unimpeded ability to provide accurate and reliable information as a public watchdog cannot be overstated, and this sentiment is succinctly encapsulated by the notion that the media are the 'eyes and ears' of the public.<sup>4</sup>

As has been expressed elsewhere, '[p]ublic interest journalism is essential to democracy: it informs public debate, exposes [wrongdoing], and drives [positive] changes'.<sup>5</sup> Although the exact content of 'public interest journalism' remains difficult to define, a general understanding of the concept is that it entails journalists pursuing information that the public has the right to know which, but for such journalism, would remain hidden by governments and other powerful interests.<sup>6</sup> It is a 'step above' ordinary journalism because it involves journalists exercising investigative or watchdog functions, as opposed to 'ordinary' journalism which generally entails publishing stories that are merely 'interesting to the public' or 'entertaining, but with no civic value'.<sup>7</sup> The characteristics of public interest journalism include (and are aimed at) publishing reliable information upon which citizens may base political, economic, and social choices, enhancing government accountability, and ensuring transparency of activities impacting the public.<sup>8</sup>

Despite serious legal, financial, and reputational risks, sources continue to provide information to journalists on conditions of confidentiality about issues that those in power would have otherwise preferred to sweep under the rug. The ability of journalists to maintain confidentiality, even in the face of legal proceedings, is therefore crucial to enable the free exchange of information between journalists and sources which facilitates public interest journalism. To this end, legislation exists in all Australian jurisdictions providing that if a journalist has promised to a source not to disclose their identity, neither the journalist nor their employer is compellable in court proceedings to answer questions or produce documents that would disclose the source's identity or enable their identity to be ascertained.<sup>9</sup> These statutory provisions are widely known as 'shield laws'. Despite the fact that shield laws had been progressively

<sup>3</sup> *Goodwin v United Kingdom* (1996) 22 EHRR 123 [39]; Joseph Fernandez, 'Pass the Source: Journalism's Confidentiality Bane in the Face of Legislative Onslaughts' (2017) 27(2) *Asia Pacific Media Educator* 202, 203; Des Butler and Sharon Rodrick, *Australian Media Law* (Thomson Reuters, 5<sup>th</sup> ed, 2015) 497.

<sup>4</sup> *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 183 (Sir Donaldson MR).

<sup>5</sup> Human Rights Law Centre, Submission to Department of Justice and Attorney-General (Qld), *Shielding Confidential Sources: Balancing the Public's Right to Know and the Court's Need to Know* (13 July 2021) 4 ('HRLC Submission').

<sup>6</sup> Andrea Carson, 'Explainer: What is Public Interest Journalism?', *The Conversation* (online, 15 June 2017) <<https://theconversation.com/explainer-what-is-public-interest-journalism-78996>>.

<sup>7</sup> *Ibid.*

<sup>8</sup> James Meehan, 'Protecting Public Interest Journalism in Australia: A Defence to Information Secrecy Offences' (2020) 23 *Media and Arts Law Review* 347, 351.

<sup>9</sup> *Evidence Act 1995* (Cth) s 126K(1); *Evidence Act 2011* (ACT) s 126K(1); *Evidence Act 1995* (NSW) s 126K(1); *Evidence (National Uniform Legislation) Act 2011* (NT) s 127A(1); *Evidence Act 2008* (Vic) s 126K(1); *Evidence Act 1929* (SA) s 72B(1); *Evidence Act 2001* (Tas) s 126B; *Evidence Act 1906* (WA) s 20I.

introduced nationwide since 2007 in all Australian jurisdictions (but for Queensland, which enacted them in 2022), journalists and their sources have nevertheless been the subject of attack. Newsrooms and journalists' homes have been raided, journalists' metadata has been accessed, and journalists have been threatened with prosecution for adhering to their confidentiality obligations.<sup>10</sup>

Queensland's historic lack of a shield law has long been criticised as undermining public interest journalism. So has the precariousness of common law protections for journalists who have given undertakings of confidentiality to sources, which Queensland journalists have been required to rely on in the absence of any statutory protections.<sup>11</sup> However, following longstanding criticisms of Queensland for being the only Australian jurisdiction to lack a shield law,<sup>12</sup> Queensland's parliament passed legislation on 26 May 2022 protecting journalists from having to reveal confidential sources in legal proceedings where certain conditions are met. The Evidence and Other Legislation Amendment Bill 2021 amended the *Evidence Act 1977* (Qld) to establish a statutory framework to better protect the identity of journalists' confidential informants.<sup>13</sup> It did this by creating a qualified privilege<sup>14</sup> preventing a journalist or other relevant person from being compelled to disclose the identity of an informant who has been promised confidentiality, unless a court considers that the balance of public interests requires disclosure.<sup>15</sup> The Bill's Explanatory Notes recognise the merits of this, noting that '[a] free, independent, and effective media, and well-informed citizens, are crucial for a strong democracy' while acknowledging that journalists 'may depend on confidential informants to access sensitive information to fulfil their role as facilitators of free communication and report on

<sup>10</sup> See, eg, *Australian Broadcasting Corporation v Kane (No 2)* (2020) 377 ALR 711 ('Kane'); *Smethurst v Commissioner of Police* (2020) 376 ALR 575; Bevan Shields, 'Federal Police Accessed the Metadata of Journalists Nearly 60 Times', *Sydney Morning Herald* (online, 8 July 2019) <<https://www.smh.com.au/politics/federal/federal-police-accessed-the-metadata-of-journalists-nearly-60-times-20190708-p52598.html>>; Paul Karp, 'Australian Federal Police Ask Prosecutors to Consider Charges Against ABC Journalist', *The Guardian* (online, 2 July 2020) <<https://www.theguardian.com/australia-news/2020/jul/02/australian-federal-police-ask-prosecutors-to-consider-charges-against-abc-journalist>>.

<sup>11</sup> Media, Entertainment & Arts Alliance, 'Queensland to Finally Get a Shield Law — But what about "Journalist F"?'', *Press Freedom* (Web Page, 1 May 2021) <<https://pressfreedom.org.au/queensland-to-finally-get-a-shield-law-but-what-about-journalist-f-bf6e62b9dd80>>.

<sup>12</sup> See, eg, Joseph M Fernandez, 'Chaos Reigns as Shields Fall' in Mike Dobbie (ed), *Secrecy and Surveillance: The Report into the State of Press Freedom in Australia in 2014* (MEAA, 2014) 24, 24.

<sup>13</sup> The shield law framework is contained within *Evidence Act 1977* (Qld) Pt 2 Div 2B ('EAQ').

<sup>14</sup> A 'privilege' is a 'right to resist disclosing information that would otherwise be required to be disclosed': Australian Law Reform Commission, *Privilege in Perspective: Client Legal Privilege in Federal Investigations* (Report No 107, 2007) 77 [3.1] citing Jeremy Gans and Andrew Palmer, *Australian Principles of Evidence* (Cavendish Publishing, 2<sup>nd</sup> ed, 2004) 91. The relevant statutory provisions that will be discussed are a form of statutory privilege because they give journalists a right to withhold certain information in judicial proceedings where certain conditions are met despite that information's relevance to the issues to be determined.

<sup>15</sup> Legal Affairs and Safety Committee, Parliament of Queensland, *Evidence and Other Legislation Amendment Bill 2021* (Report No 23, February 2022) 5 ('Committee Report').

matters of legitimate public concern.<sup>16</sup> This brings Queensland into line with all other Australian jurisdictions, which all have a broadly similar qualified privilege in their respective Evidence Acts. However, several aspects of Queensland's protections are stronger than those provided by other jurisdictions, especially with respect to Queensland's definition of 'journalist' and 'news medium', the framing of the balancing exercise required to be undertaken when disclosure of a source is argued for, and the shield's applicability to police investigations.

As such, this article aims to inform law reform to protect press freedom and ongoing efforts to harmonise shield laws by highlighting the abovementioned protections in Queensland's shield law as providing ideal benchmarks which other jurisdictions should emulate. This article contends that deficiencies in other Australian shield laws can be ameliorated by implementing protections across Australia that are aligned with Queensland's approach to these provisions. It accordingly recommends that other jurisdictions should amend those deficient provisions to be more akin to Queensland's shield law. However, this article acknowledges that Queensland's shield law also faces numerous deficiencies, particularly with respect to the shield's inapplicability to circumstances where confidentiality can be expected or inferred, and its inapplicability to corruption and integrity body proceedings. Accordingly, this article suggests that in order to remedy these deficiencies, a proposed national approach to the harmonisation of shield laws would entail all jurisdictions adopting the positive features of certain jurisdictions' (particularly Queensland's) shield laws. Combining the efficacious characteristics of each of Australia's varied shield laws would not only rectify the Queensland law's shortfalls, but it would also provide a desirable and achievable framework that should be adopted in every Australian jurisdiction. Harmonising shield laws across Australia in line with this framework would further enhance press freedom by providing journalists with uniform and consistently strong protections nationwide, instead of the inconsistent protections currently available across Australian jurisdictions. Doing so would produce a uniform and exemplar shield law which provides the same strong protections in all Australian jurisdictions.

This article begins, in Section II, by examining the basis for and context of journalists' ethical obligations to maintain source confidentiality when this is promised. Section II also examines the historical position of 'journalists' privilege' at common law, which courts have consistently refused to recognise, and considers how this has been rectified by statutes across Australia in the form of shield laws. Section III then considers the primary positive features of Queensland's shield law, namely its functional definition of 'journalist', non-journalists it protects, its balancing exercise, and its applicability to warrants. It is argued in Section III that these features provide a solution to deficiencies in

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<sup>16</sup> Explanatory Notes, Evidence and Other Legislation Amendment Bill 2021 (Qld) 1 ('Explanatory Notes').

shield laws nationally. Section III also argues in favour of additional provisions, which are present in other jurisdictions' shield laws, being included in Queensland's shield law, namely: the shield being applicable in circumstances where confidentiality can be expected or inferred, and the shield applying in corruption and integrity body proceedings.

## II THE WATCHDOG MUZZLED?

### *A Contextualising Journalists' Ethical Obligations*

Negative repercussions inevitably flow from journalists failing to abide by an agreement to ensure a source's confidentiality,<sup>17</sup> such as exposing the individual source to danger and generally eroding the trust between journalists and their sources.<sup>18</sup> Despite this, Australian law has historically provided limited protection for journalists who were faced with demands to reveal their sources.<sup>19</sup> One judgment went so far to suggest that if a journalist refuses to reveal a source and subjects themselves to the consequences of being held in contempt of court as a result, this is a matter of 'personal choice'.<sup>20</sup> Yet countless journalists have made that 'personal choice', even with the prospect of severe fines or imprisonment as a result of being held in contempt for refusing to disclose sources in court proceedings.<sup>21</sup> This refusal to disclose occurs because journalists have ethical obligations to preserve the confidentiality of a source where they have agreed to do so. Such an obligation is generally found in industry codes, such as cl 3 of the Media, Entertainment & Arts Alliance (MEAA) Journalist Code of Ethics.<sup>22</sup> Clause 3 relevantly provides that 'where confidences are accepted, respect them in all circumstances'.<sup>23</sup> This obligation underpins the journalist-source relationship.

<sup>17</sup> 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, 81–2.

<sup>18</sup> Media, Entertainment & Arts Alliance, Submission No 90 to Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the Telecommunications (Interception and Access Amendment (Data Retention) Bill 2014* (19 January 2015) 4 ('MEAA Submission'); Kane (n 10) 720 [36]–[37], 723 [46] (Abraham J); Mark Pearson and Mark Polden, *The Journalist's Guide to Media Law: A Handbook for Communicators in a Digital World* (Routledge, 6<sup>th</sup> ed, 2019) 318.

<sup>19</sup> Sally Walker, *The Law of Journalism in Australia* (Law Book Company, 1989) 87; McNamara and McIntosh (n 17) 81.

<sup>20</sup> *Harvey v County Court of Victoria* (2006) 164 A Crim R 62, 79–80 [90] (Hollingworth J).

<sup>21</sup> See, eg, *R v Kessing* (2008) 73 NSWLR 22, 35 [57] (Bell JA); *R v Barrass* (District Court of Western Australia, Judge Kennedy, 7 August 1990); *R v Budd* (Supreme Court of Queensland, Dowsett J, 20 March 1993). See also 'NPC Statement on the AFP Raids', *National Press Club of Australia* (online, 5 June 2019) <<https://www.npc.org.au/article/freedom-of-the-press/2019/75-npc-statement-on-the-afp-raids>>; MEAA Submission (n 18) 4; Wendy Bacon and Chris Nash, 'Confidential Sources and the Public Right to Know' (1999) 21(2) *Australian Journalism Review* 1, 1–2.

<sup>22</sup> Pearson and Polden (n 18) 318.

<sup>23</sup> 'MEAA Journalist Code of Ethics', *Media, Entertainment & Arts Alliance* (online) <<https://www.meaa.org/meaa-media/code-of-ethics/>>.

Even where journalists are not obligated to follow industry code requirements, journalists remain interested to strictly abide by promises of confidentiality because doing so fosters trust between journalists and their sources, which allows journalists to obtain information from those sources, and by extension, keep the public informed on crucial issues.<sup>24</sup> As to that latter point, the fact that this 'personal choice' has consistently been made by journalists is also unsurprising given that sources remain the 'wellspring of a journalists' work'.<sup>25</sup> Source confidentiality encourages the free flow of information in a democratic society because confidential disclosures provide vital information that supports public interest journalism,<sup>26</sup> and such information is 'more readily supplied to journalists' when confidentiality is promised and respected.<sup>27</sup>

Nevertheless, journalists' ethical codes have no legal status and courts have consistently refused to recognise the existence of any 'journalists' privilege' at common law.<sup>28</sup> A journalist was historically required to reveal a source's identity in court proceedings if this was 'necessary in the interests of justice'<sup>29</sup> as there is a paramount public interest in securing the administration of justice which no undertaking of confidentiality can override.<sup>30</sup> The paramountcy given to considerations of the administration of justice therefore created a conflict between those considerations and the interests of a free press as expressed through maintaining journalistic confidentiality.<sup>31</sup>

## B *Shield Laws*

Because of these limited protections historically, journalists in Australia were vulnerable to being compelled to disclose their sources in court proceedings. This historical lack of protections has now been remedied, and the entrenched heavy weighting given to the public interest in the administration of justice at common

<sup>24</sup> Aaron Quinn, 'Respecting Sources' Confidentiality: Critical but Not Absolute' in Christopher Meyers (ed), *Journalism Ethics: A Philosophical Approach* (Oxford University Press, 2010) 278.

<sup>25</sup> Butler and Rodrick (n 3) 687.

<sup>26</sup> *McKenzie v Magistrates' Court of Victoria* (2013) 39 VR 311, 313 [3] (Harper JA).

<sup>27</sup> *John Fairfax & Sons Ltd v Cojuangco* (1988) 165 CLR 346, 354–5 (Mason CJ, Wilson, Deane, Toohey and Gaudron JJ) ('*Cojuangco*').

<sup>28</sup> *R v McManus* [2007] VCC 619, [34]–[35] (Chief Judge Rozenes) ('*McManus*'); *Kane* (n 10) 755 [197] (Abraham J); *Liu v The Age Company Pty Ltd* (2016) 92 NSWLR 679, 706 [123] (McColl JA); *Re Evening News* (1880) 1 LR (NSW) 211, 240 (Martin CJ). See Joseph Fernandez, 'Journalists' Confidential Sources: Reform Lessons from Recent Australian Shield Law Cases' (2014) 20(1) *Pacific Journalism Review* 117, 129.

<sup>29</sup> *Cojuangco* (n 27) 354–5 (Mason CJ, Wilson, Deane, Toohey and Gaudron JJ).

<sup>30</sup> *Nicholls v Director of Public Prosecutions (SA)* (1993) 61 SASR 31, 41 (Legoe ACJ), 51 (Perry J); *Independent Commission Against Corruption v Cornwall* (1993) 38 NSWLR 207, 234 (Abadee J); *Von Doussa v Owens (No 3)* (1982) 31 SASR 116, 117 (King CJ); *Re Buchanan* (1964) 65 SR (NSW) 9.

<sup>31</sup> *McGuinness v Attorney-General (Vic)* (1940) 63 CLR 73, 87 (Rich J) ('*McGuinness*'). See also Department of Justice and Attorney-General (Queensland), *Shielding Confidential Sources: Balancing the Public's Right to Know and the Court's Need to Know* (Discussion Paper, June 2021) 1 ('Discussion Paper').

law has been legislatively overridden in most jurisdictions for some time now.<sup>32</sup> This has been done through these jurisdictions providing statutory protections for journalists' confidential sources in the form of shield laws, which are a form of legislative privilege that protect a journalist or their employer from being compelled to disclose the identity of and communications with a confidential source in court.<sup>33</sup> They represent an attempt to mediate the conflict between the administration of justice and journalists' obligations to uphold source confidentiality.<sup>34</sup> Such laws are a legislative acknowledgement of the public interest in source confidentiality, which may outweigh other public interests in certain circumstances, and aim to foster freedom of the press by protecting journalists' anonymous sources.<sup>35</sup>

The need for shield laws was finally recognised following the case of journalists Gerard McManus and Michael Harvey, who wrote an article in 2004 about the Commonwealth government's planned cutbacks to veterans' entitlements.<sup>36</sup> They were each fined \$7,000 for contempt of court after refusing to reveal the source of confidential communications on which the article was based.<sup>37</sup> The Commonwealth responded to this in 2007, and to recommendations from the Australian Law Reform Commission,<sup>38</sup> becoming the first jurisdiction in Australia to enact shield laws, which underwent further reform in 2011.<sup>39</sup> Subsequently, New South Wales also adopted a statutory shield, with the rest of Australia following suit.<sup>40</sup> Queensland was the last Australian jurisdiction to enact shield laws, doing so in 2022.

Under each of these regimes, a court may order that the shield law's protections do not apply if it is satisfied that 'the public interest in the disclosure of evidence of the identity of the informant' outweighs any likely adverse effect of the disclosure on the source and also outweighs the public interest in the communication of facts and opinion by the media and the ability of the media to

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<sup>32</sup> Fernandez (n 28) 119.

<sup>33</sup> See, eg, *Evidence Act 1995* (Cth) s 126K; *Evidence Act 1995* (NSW) s 126K; *Evidence Act 2008* (Vic) s 126K; *Evidence Act 2011* (ACT) s 126K; *Evidence Act 1906* (WA) s 20I.

<sup>34</sup> Georgia Price, "Pack Your Toothbrush!" Journalists, Confidential Sources and Contempt of Court' (2003) 8(4) *Media & Arts Law Review* 259, 260.

<sup>35</sup> *Hancock Prospecting Pty Ltd v Hancock* [2013] WASC 290, [174] (Pritchard J) ('*Hancock*'); Explanatory Memorandum, Evidence Amendment (Journalists' Privilege) Bill 2011 (Cth) [1] ('Commonwealth Explanatory Memorandum'); Joseph M Fernandez and Mark Pearson, 'Shield Laws in Australia: Legal and Ethical Implications for Journalists and their Confidential Sources' (2015) 21(1) *Pacific Journalism Review* 61, 67–8.

<sup>36</sup> Fernandez (n 28) 119.

<sup>37</sup> Matthew Tracey, 'Journalist Shield Laws' (2010) 29(2) *Communications Law Bulletin* 12, 12. See *McManus* (n 28).

<sup>38</sup> Australian Law Reform Commission, *Uniform Evidence Law* (Report No 102, December 2005) 510–11 [15.36] ('ALRC Evidence Report').

<sup>39</sup> Tracey (n 37) 13.

<sup>40</sup> Fernandez (n 28) 119.

access sources.<sup>41</sup> However, shield laws across Australian jurisdictions are inconsistent, meaning that journalists may be able to claim the shield law's protection in some jurisdictions but not in others, undermining the strength of these protections.<sup>42</sup> Ensuring clarity and certainty in the application of shield laws across Australia and facilitating the harmonisation of shield laws can be achieved in two ways. First, the strengths of Queensland's shield should be adopted by other jurisdictions. Secondly and alongside this, Queensland should adopt the favourable provisions found in other jurisdictions' shield laws that are missing from its own. Further, because shield laws are not uniform, all jurisdictions should also adopt those favourable provisions where they are missing from their respective shield laws in order to ensure that journalists receive uniform protections across Australia. This shall be considered now.

### III A PATCHWORK OF PROTECTIONS — THE NEED FOR HARMONISATION

#### A *Who is Protected and in What Circumstances?*

##### 1 *Threshold Considerations*

The new sub-ss 14Q(a)–(b) of the *Evidence Act 1977* (Qld) provide that the shield law's provisions apply if an informant gives information to a 'journalist', in the normal course of the journalist's activities as a journalist, in the expectation that the information may be published in a news medium. Relevantly, it also requires that *the journalist promises not to disclose the informant's identity as the source of the information*. Therefore, for the privilege to apply, there must be 'a sufficient nexus between the promise to protect the person's identity and the provision of information for the purposes of journalistic work'.<sup>43</sup> This is similar to the requirement for a sufficient connection between certain communications and giving or obtaining legal advice for legal professional privilege to attach to such communications.<sup>44</sup> This is a threshold requirement for the privilege to apply, as

<sup>41</sup> See, eg, *Evidence Act 1995* (Cth) ss 126K, 131A. 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* (Final Report, August 2020) 130 [3.306] ('PJCS Report'); Pearson and Fernandez (n 35) 64; Patrick George, 'Free Speech and Protecting Journalists' Sources: Preliminary Discovery, the Newspaper Rule and the Evidence Act' (2017) 36(2) *Communications Law Bulletin* 24, 30.

<sup>42</sup> Fernandez (n 27) 118, 130; Mike Dobbie, 'The Way Forward' in Mike Dobbie (ed), *The Public's Right to Know: The MEAA Report into the State of Press Freedom in Australia in 2019* (MEAA, 2019) 106, 107.

<sup>43</sup> Department of Justice and Attorney-General (Queensland), *Results of Consultation: Shield Laws Discussion Paper* (Report, 29 November 2021) 16 ('Consultation').

<sup>44</sup> *Ibid* 16. See *Esso Australia Resources Ltd v Commissioner of Taxation* (Cth) (1999) 201 CLR 49, 54 [2], 64 [35] (Gleeson CJ, Gaudron and Gummow JJ).

the privilege is necessarily premised on an assurance of confidentiality being made. A key purpose of shield laws is to allow journalists to access information that is otherwise unavailable in the absence of a confidentiality guarantee, so it is sensible that the guarantee ‘be reasonably proximate to when the informant gives the journalist with information’.<sup>45</sup>

However, s 14Q presents a double-edged sword in that a journalist must positively *promise* not to disclose the informant’s identity. Similar wording can be found in the equivalent provisions of most other Australian shield laws, which generally refer to a journalist ‘promising an informant’ not to disclose the informant’s identity.<sup>46</sup> This requirement of a ‘promise’ has been interpreted restrictively in relation to the Commonwealth legislation, requiring there to be an ‘express promise’ made in respect of specific information that is given *prior* to disclosure, as opposed to a promise that may be inferred or implied by reference to the character of the information being disclosed.<sup>47</sup> The drafting of s 14Q, like the drafting of shield laws which adopt similar wording, therefore overlooks the potential for confidentiality to be implied from the circumstances or negotiated after disclosure.<sup>48</sup>

The South Australian shield law is drafted with greater nuance. The shield under that regime may apply even in the absence of an express promise, provided that ‘the informant reasonably expected’ that their identity would be kept confidential, whether because of an express undertaking or otherwise.<sup>49</sup> The public interest in protecting sources when assurances of confidentiality are made remains applicable regardless of whether confidentiality is express, or based on an unspoken understanding, or negotiated after information is imparted on a journalist.<sup>50</sup> As such, s 14Q limiting the shield’s applicability to situations where an express promise is given fails to recognise the potential for more equitable outcomes by allowing more sources to be protected, which would be possible if the provision aligned with South Australia’s drafting.<sup>51</sup> Jurisdictions requiring an express promise, which are all the jurisdictions except South Australia, should therefore adopt South Australia’s position and amend their Evidence Acts to allow for the shield to apply where there is a ‘reasonable expectation’ of confidentiality.

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<sup>45</sup> Explanatory Notes (n 16) 4.

<sup>46</sup> See *Evidence Act 1995* (Cth) s 126K(1); *Evidence Act 2011* (ACT) s 126K(1); *Evidence Act 1995* (NSW) s 126K(1); *Evidence (National Uniform Legislation) Act 2011* (NT) s 127A(2); *Evidence Act 2008* (Vic) s 126K(1). Cf *Evidence Act 2001* (Tas) s 126B.

<sup>47</sup> *Kumova v Davison* [2021] FCA 753, [49] (Flick J) (*‘Kumova’*). Cf *Cowper v Fairfax Media Publications Pty Ltd* [2016] NSWSC 1614, [48] (Rothman J), where, by contrast to the judgment in *Kumova*, Justice Rothman commented in relation to s 126K of the *Evidence Act 1995* (NSW) that ‘the understanding as to the non-disclosure of the identity of the person providing the information may be as much custom or practice or derived from the terms of the conversation than an express prior promise to an informant’ (emphasis added).

<sup>48</sup> HRLC Submission (n 5) 9.

<sup>49</sup> *Evidence Act 1929* (SA) s 72B(1)(d).

<sup>50</sup> South Australia, *Parliamentary Debates*, Legislative Council, 31 July 2018, 1059–60 (John Darley).

<sup>51</sup> *Ibid.*

Harmonising shield laws nationwide in this way would better accommodate and recognise the realities of journalist–source interactions and relationships.

## 2 *Who is a 'Journalist'?*

Partly due to the absence of a uniform definition of 'journalist' between Australian Evidence Acts, the scope of the protection conferred by existing shield laws varies between different Australian jurisdictions, with the most common (near-uniform) definition appearing in the Evidence Acts of New South Wales, Western Australia, Victoria, and South Australia.<sup>52</sup> This definition effectively provides that a journalist is a person engaged in the *profession or occupation* of journalism in connection with the publication of information in a news medium.<sup>53</sup> Narrow conceptions such as these may not properly accommodate all journalists operating in the 'modern media environment', leaving their sources unprotected by shield laws.<sup>54</sup> For example, the definition of 'journalist' in the *Evidence Act 2008* (Vic) is expressly limited to persons engaged in the profession or occupation of journalism,<sup>55</sup> and accordingly was intended to exclude 'amateur bloggers' and social networking site users.<sup>56</sup> These matters are especially pertinent given the notoriously vexed question amongst academics and the judiciary of whether 'alternate' forms of content creation, such as YouTube and blogging,<sup>57</sup> can be considered 'journalism'.<sup>58</sup> Scarce judicial consideration has been devoted to these statutory definitions.<sup>59</sup>

A distinctive feature of the definition of 'journalist' in Queensland's s 14R is that it is function-based and focussed on whether the person's activities are journalistic in nature, rather than on their employment status or organisational

<sup>52</sup> Anna Kretowicz, 'Reforming Australian Shield Laws' (Reform Briefing 2, 2021) 5.

<sup>53</sup> *Evidence Act 1995* (NSW) s 126J; *Evidence Act 1929* (SA) s 72; *Evidence Act 2008* (Vic) s 126J; *Evidence Act 1906* (WA) s 20G.

<sup>54</sup> Kretowicz (n 52) 5.

<sup>55</sup> *Evidence Act 2008* (Vic) s 126J(1).

<sup>56</sup> Explanatory Memorandum, Evidence Amendment (Journalist Privilege) Bill 2012 (Vic), 3–4.

<sup>57</sup> Some Evidence Acts give broad definitions that include both traditional and non-traditional forms of journalism: see, eg, *Evidence Act 1995* (Cth) s 126J; *Evidence Act 2011* (ACT) s 126J. See also the parliamentary debate on the introduction of journalists' privilege in the *Evidence Act 1995* (Cth), where it was considered necessary for the definition of journalist to be broad enough to encompass content creators on Facebook, Twitter, YouTube and blogs due to the 'seismic shift' of technology driving changes in how news is consumed and delivered: Commonwealth, *Parliamentary Debates*, House of Representatives, 21 March 2011, 2393–4 (Andrew Wilkie).

<sup>58</sup> See, eg, Jane Johnston and Anne Wallace, 'Who is a Journalist: Changing Legal Definitions in a De-Territorialised Media Space' (2017) 5(7) *Digital Journalism* 850, 855; Anne M Macrander, 'Bloggers as Newsmen: Expanding the Testimonial Privilege' (2008) 88(4) *Boston University Law Review* 1075; Randall D Eliason, 'Leakers, Bloggers, and Fourth Estate Inmates: The Misguided Pursuit of a Reporter's Privilege' (2006) 24(2) *Cardozo Arts and Entertainment Law Journal* 385; Linda L Berger, 'Shielding the Unmedia: Using the Process of Journalism to Protect the Journalist's Privilege in an Infinite Universe of Publication' (2003) 39 *Houston Law Review* 1371. See also *Obsidian Finance Group, LLC v Cox*, 740 F 3d 1284 (9<sup>th</sup> Cir, 2014).

<sup>59</sup> Rebecca Ananian-Welsh, 'Who is a Journalist? A Critical Analysis of Australian Statutory Definitions' (2022) 50(4) *Federal Law Review* 449.

links, which is what the definitions in New South Wales, Western Australia, Victoria, and South Australia direct attention to.<sup>60</sup> Section 14R(1) provides that a journalist is a person ‘engaged and active in (a) gathering and assessing information about matters of public interest; and (b) preparing the information, or providing comment or opinion or analysis of the information, for publication in a news medium.’ Section 14R(1) is supplemented by s 14R(2), which is similar to Victoria’s s 126J(2)<sup>61</sup> and provides additional factors which *may* be considered by a court in assessing whether someone is a journalist, such as whether the person or publisher complies with recognised professional codes in carrying out their activities. It is beneficial that the factors which may be considered in s 14R(2) are relatively confined, as an expansive list of factors, such as that found in Victoria’s s 126J(2), may unnecessarily limit the flexibility given to s 14R(1) by its broad drafting.<sup>62</sup>

The concept of a ‘news medium’ has bearing on the definition of ‘journalist’ because ‘journalist’ is defined partly by reference to whether the person prepares information about matters of public interest, or provides comment, opinion, or analysis of such information for publication in a ‘news medium’.<sup>63</sup> ‘News medium’ is defined as ‘a medium for the dissemination of news and observations on news to the public’.<sup>64</sup> This definition focusses protection on ‘journalistic news-related activities rather than on the sharing of any information’, although this will almost always fall within ‘journalistic activities’.<sup>65</sup> Queensland’s definition is virtually identical to the Commonwealth definition in s 126(J) of the *Evidence Act 1995* (Cth), which in turn was based on the New Zealand definition in s 68(5) of the *Evidence Act 2006* (NZ).<sup>66</sup>

It must be acknowledged that the same words in different statutes do not necessarily have the same meaning or intended operation.<sup>67</sup> However, similar statutes in different jurisdictions with similar or identical wording can aid the interpretation of an Act.<sup>68</sup> This is especially apposite where the statutes in

<sup>60</sup> Explanatory Notes (n 16) 5; Committee Report (n 15) 8.

<sup>61</sup> Although note that the Victorian provision lists more factors than the Queensland Bill and states that regard ‘must’ be had to the listed factors, whereas Queensland’s s 14R(2) provides a court discretion to consider the listed matters.

<sup>62</sup> HRLC Submission (n 5) 7. Cf *Kumova* (n 47) [32] (Flick J).

<sup>63</sup> EAQ (n 13) s 14R(1)(b).

<sup>64</sup> *Ibid* s 14T.

<sup>65</sup> Explanatory Notes (n 16) 4; Committee Report (n 15) 10.

<sup>66</sup> ‘Journalist’ is defined as ‘a person who in the normal course of that person’s work may be given information by an informant in the expectation that the information may be published in a news medium’: *Evidence Act 2006* (NZ) s 68(5). See also Commonwealth Explanatory Memorandum (n 35) [6].

<sup>67</sup> *Robert Bosch (Australia) Pty Ltd v Secretary, Department of Industry, Innovation, Science, Research and Tertiary Education* (2012) 206 FCR 92, 111 [71] (Kenny, Edmonds and Robertson JJ).

<sup>68</sup> For example, the expression ‘mining operation’ in the *Income Tax Assessment Act 1936* (Cth) was considered to require being interpreted by having regard to similar expressions used in state

question are sufficiently analogous,<sup>69</sup> as they are here, and the wording of the 'news medium' provisions across these three jurisdictions are identical. As a result, Queensland courts may choose to adopt or be guided by either the Commonwealth's or New Zealand's approaches to its own definition of 'news medium'. Were 'news medium' interpreted in the same manner as its Commonwealth equivalent,<sup>70</sup> the medium would be required to meet minimum thresholds of character of material, regularity of publication, and normative use by 'journalists'.<sup>71</sup> This construction would not capture persons publishing in a forum containing vast amounts of 'non-news' such that the forum cannot rightly be described as a 'news medium'.<sup>72</sup> In contrast to the Commonwealth's definition, 'news medium' has been interpreted by the High Court of New Zealand as *not* imposing quality requirements, with the determinative consideration being whether the medium disseminates new or recent information of public interest.<sup>73</sup> The identical wording of Queensland's shield law and the equivalent Commonwealth and New Zealand provisions makes it difficult to predict how Queensland's courts will ultimately interpret 'news medium' if they choose to be guided by the identical definitions in other jurisdictions.

Because the High Court of New Zealand found that the determinative element of whether an entity is a 'news medium' is that they regularly provide new or recent information of public interest, a person's employment status as a journalist was held to be largely irrelevant.<sup>74</sup> As opposed to solely focussing on employment or organisational links in concluding that someone is a journalist, like the New South Wales legislation does,<sup>75</sup> the New Zealand approach considers the importance of the regular receipt and dissemination of information through a news medium via the application of journalistic skill.<sup>76</sup> Similarly, by focussing on the function of journalism, rather than its traditional forms,<sup>77</sup> the Queensland

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mining legislation: *Federal Commission of Taxation v ICI Australia Ltd* (1972) 127 CLR 529, 541 (Walsh J), 581 (Gibbs J). See also the discussion of the *in pari materia* principle in Dennis C Pearce, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 9<sup>th</sup> ed, 2019) 119–21 [3.42]–[3.44], although the question of when statutes should be treated in accordance with that principle is beyond the scope of this article.

- <sup>69</sup> *Russell v Scott* [2017] NSWSC 1720, [71] (Adams J). Cf *Alfonso v Northern Territory* (1999) 131 NTR 8.
- <sup>70</sup> *Evidence Act 1995* (Cth) s 126(1).
- <sup>71</sup> *Kumova* (n 47) [33], [44] (Flick J); Committee Report (n 15) 8.
- <sup>72</sup> *Ibid.*
- <sup>73</sup> *Slater v Blomfield* [2014] 3 NZLR 835, 863 [140] (Asher J) ('Slater').
- <sup>74</sup> *Ibid* 850 [65] (Asher J).
- <sup>75</sup> *Evidence Act 1995* (NSW) s 126f.
- <sup>76</sup> *Slater* (n 73) 850–51 [66], 851 [69], 852 [74], 853 [82] (Asher J).
- <sup>77</sup> See, eg, *Broadcasting Services Act 1992* (Cth) s 202(5) for an example of the conception of 'traditional' journalism in legislation. This provision provides that a 'broadcast journalist' is: 'a person engaged in the profession or practice of reporting, photographing, editing, recording or making: (a) television or radio programs; or (b) datacasting content; of a news, current affairs, information or documentary character'. In Queensland, 'journalist' has been legislatively defined in the context of whistleblower protections as a person 'engaged in the occupation or writing or editing material intended for publication in the print or electronic news media': *Public Interest Disclosure Act 2010* (Qld) s 20(4).

definition of ‘journalist’ appears to incorporate this approach such that the core focus is whether a person is finding and disseminating information in the public interest, irrespective of whether they have the infrastructure of a media organisation supporting them.<sup>78</sup>

In this regard, the Queensland definition accommodates new and innovative methods of communication unconfined to traditional forms of media, and the broad and multifactorial definition of ‘journalist’ ensures that diverse modes of communicating news, such as blogging, are captured.<sup>79</sup> This is a principled approach in light of the purpose of shield laws, being to protect the free flow of information by encouraging sources to volunteer information to individuals who will disseminate it, provided that those individuals meet certain conditions (discussed further below).<sup>80</sup> The Queensland definition therefore goes further than other jurisdictions by removing the recognition of a ‘journalist’ being contingent on some professional engagement. Instead, the definition emphasises the process of ‘journalism’ — that is, the handling, gathering, and presenting of information — in a way that would survive future changes to technology or work practices.<sup>81</sup>

As the nature of journalism has evolved, it has been increasingly recognised that freelancers, academics, ‘citizen journalists’, and others play a role in public interest journalism.<sup>82</sup> A broad definition of ‘journalism’ raises concerns that shield laws could become practically unworkable if they are not confined to news media.<sup>83</sup> Fears remain that broadening the definition of ‘journalist’ (as Queensland has) could unjustly shield ‘sources’ who provide information that is detrimental to a party who cannot seek redress without knowing the source’s identity.<sup>84</sup> These concerns have some merit. With the advent of digital technologies, ‘journalism’ has become increasingly difficult to define as such technologies have made publishing material easier. This has allowed practically anyone calling themselves a ‘journalist’<sup>85</sup> to publish material that has serious consequences on a website or social media page.<sup>86</sup> The potential harm that can be

<sup>78</sup> Hannah Ryan, ‘What’s in a Name? Bloggers, Journalism and Shield Laws’ (2014) 33(4) *Communications Law Bulletin* 10, 11–12 (‘Bloggers’).

<sup>79</sup> Explanatory Notes (n 16) 4–5.

<sup>80</sup> Ryan, ‘Bloggers’ (n 78) 11; Slater (n 73) 850 [65] (Asher J).

<sup>81</sup> Peter Greste, ‘Define Journalism; Not Journalists’ (Reform Briefing 3, 2021) 2.

<sup>82</sup> 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.

<sup>83</sup> Discussion Paper (n 31) 4, 7.

<sup>84</sup> Sara Phung, ‘Function Not Form: Protecting Sources of Bloggers’ (2012) 17(1) *Media and Arts Law Review* 121, 129.

<sup>85</sup> As one author put it, this includes ‘basement-dwelling opinioners’: John D Castiglione, ‘A Structuralist Critique of the Journalist’s Privilege’ (2007) 23(2) *Journal of Law & Politics* 115, 131.

<sup>86</sup> Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the National Security Legislation Amendment Bill (No 1) 2014* (Final Report, September 2014) 62 [3.101].

caused by internet publications is compounded by the internet's ability to instantaneously disseminate information widely and rapidly. Because of this ability, a party that is significantly harmed by such publications may be left without sufficient redress if a person who meets the statutory definition, but is not a journalist in substance, is not required to disclose a source.<sup>87</sup>

The argument can be made that because shield laws are premised on journalists' professional and ethical obligations, it follows that a 'journalist' should have professional obligations and should be honouring the essential watchdog function that a free press plays to claim the benefit of these protections.<sup>88</sup> This is because requiring an individual and their employer to have such obligations, and requiring them to adhere to the accountability practices that come with those obligations, demonstrates that they are committed to truth and serving the public interest.<sup>89</sup> Applying this reasoning, it becomes dangerous and undermines that special watchdog function when self-described journalists are given special rights and privileges, as opposed to the applicability of shield laws being limited to a category of people devoted to monitoring and reporting on matters of public interest while adhering to common professional and ethical standards.<sup>90</sup> Requiring a commitment to a recognised professional code of conduct in any definition of 'journalist' would offer a powerful incentive for journalists to adhere to those codes, consequently providing the public with confidence that such codes are meaningful.<sup>91</sup> Making the question of whether someone is a journalist contingent on their membership of a recognised news provider would also provide internal mechanisms within those news organisations (who often employ staff to verify facts) to confirm the legitimacy of their sources before publication.<sup>92</sup> These mechanisms may be absent amongst non-professional journalists — that is, individuals who collect and present information having the character of news, irrespective of whether they work for

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<sup>87</sup> Phung (n 84) 129–30.

<sup>88</sup> Sonja R West, 'Press Exceptionalism' (2014) 127(8) *Harvard Law Review* 2434. See also Grete (n 81) 4.

<sup>89</sup> Amy Bauer, 'Blogging on Broken Glass: Why the Proposed Free Flow of Information Act Needs a Specific Test for Determining When Media Shield Laws Apply to Bloggers' (2009) 10(2) *Minnesota Journal of Law, Science & Technology* 747, 770. See also *NRMA v John Fairfax Publications Pty Ltd* [2002] NSWSC 563, [149] (MacReady M).

<sup>90</sup> West (n 88) 2457; Discussion Paper (n 31) 4, 7.

<sup>91</sup> Consultation (n 43) 9.

<sup>92</sup> Bauer (n 89) 769. One illustrative example of bloggers publishing irresponsibly and failing to verify their facts is *Cohen v Google LLC*, 887 NYS 2d 424 (NY Sup Ct, 2009), where a blogger maintained a blog entitled 'Skanks in NYC' and published sexually suggestive pictures of the plaintiff with captions describing her as a 'skank' and 'whore' and suggesting she was promiscuous.

a media organisation or adhere to a recognised code<sup>93</sup> — like bloggers.<sup>94</sup> Verifying the legitimacy of sources is especially important when publishing about ‘grey matter’ areas, such as the private affairs of a public figure.<sup>95</sup> Further, failing to require individuals to adhere to the codes of professional journalism bodies, such as the MEAA, in order to be categorised as a ‘journalist’ under shield laws increases the likelihood of persons reporting on public interest matters who fail to honour promises of confidentiality incurring no personal consequences, while eroding the trust between actual journalists and their sources.

Despite the practical and policy arguments as to why ‘journalist’ should be defined, at least to some degree, by reference to professional associations or recognised ethical codes of conduct, Queensland’s process-based definition presents a viable middle-ground. By providing that a court ‘may’ consider whether the person in question complies with a recognised professional standard or code of practice in deciding whether they are a ‘journalist’,<sup>96</sup> rather than obliging the court to do so (as in the *Evidence Act 2008* (Vic)),<sup>97</sup> the Queensland definition maintains flexibility. A journalist’s ethical obligations or professional affiliation can therefore ‘inform a decisionmaker’s application of the definition, without courting the significant problems that can arise if such characteristics become requirements of journalistic status.’<sup>98</sup> However, as Ananian-Welsh acknowledges, such considerations may problematically evolve into factors that are effectively obligatory, depending on how Queensland courts interpret them.<sup>99</sup> In any event, s 14R(2) implicitly acknowledges that adherence to an industry code is not a decisive factor in determining whether someone is a ‘journalist’ given that it is a factor which ‘may’ be considered in determining that question. Accordingly, a ‘non-professional’ journalist who, for example, does not adhere to such codes, can nevertheless be a ‘journalist’ for the purposes of s 14R(1) provided that the primary statutory criteria in s 14R(1) are otherwise met.<sup>100</sup>

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<sup>93</sup> See the definition of ‘journalist’ as being ‘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’ (emphasis added) in *Evidence Act 1995* (Cth) s 126J and *Evidence Act 2011* (ACT) s 126J as examples of statutory definitions which accept that non-professional journalists can still fall within the definition of ‘journalist’. See also the discussion in Commonwealth, *Parliamentary Debates*, House of Representatives, 21 March 2011, 2393–4 (Andrew Wilkie).

<sup>94</sup> Bauer (n 89) 769.

<sup>95</sup> Although arising in a different legal context, for an example of ‘kiss and tell’ reporting on the activities of a public figure, see: *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB).

<sup>96</sup> EAQ (n 13) s 14R(2)(b).

<sup>97</sup> *Evidence Act 2008* (Vic) s 126J(2)(d).

<sup>98</sup> Ananian-Welsh (n 59) 478.

<sup>99</sup> *Ibid* 475.

<sup>100</sup> See also *von Burlow v von Burlow*, 811 F 2d 136, 142 (2<sup>nd</sup> Cir, 1987) where it was held that: ‘an individual successfully may assert the journalist’s privilege if he is involved in activities traditionally associated with the gathering and dissemination of news, even though he may not ordinarily be a member of the institutionalized press.’

While ‘the difficulty of defining journalism is undeniable’, adopting functionalist considerations, as Queensland’s definition of ‘journalist’ has, rather than rigidly adhering to traditional conceptions of journalism, is likely the more meritorious approach.<sup>101</sup> Eschewing references to occupation or ethical obligations and focussing on a person’s journalistic activities provides the flexibility that modern shield laws require in light of the way that new media and technology has re-defined and re-territorialised traditional media functions, and how the ‘democratisation’ of the industry has allowed a range of individuals to be publishers.<sup>102</sup> This necessitates that shield laws reflect these trends in order for them to remain relevant and adequately protect sources, as is examined below.

The qualified nature of the privilege also favours a broader definition of ‘journalist’, as potential overreach may be addressed through the application of a public interest balancing test when determining whether disclosure is justified (discussed below in Section III.B). This makes it unlikely that courts will provide undue protection to bloggers or other ‘non-professional’ journalists given the already conservative approach adopted by courts when applying the balancing exercise to professional journalists.<sup>103</sup> The focus of the Queensland definition is not on individuals, but on journalistic output; it therefore properly ensures that the broad range of individuals engaging in public interest journalism and their sources receive deserving protections while accommodating changing technologies and communication methods.<sup>104</sup> It also allows for the shield to be appropriately withheld from individuals who publish news-related content as a by-product of some other non-journalistic activity or from individuals who publish recklessly.<sup>105</sup> Provided that non-traditional or non-professional journalists use anonymous sources justifiably, follow procedures to verify newsworthy information, and adhere to recognised journalistic-standards of professionalism such as those prescribed by industry codes, it remains sensible to legislatively treat platforms of that nature, like blogs, as functionally equivalent to traditional news media and protect them accordingly.<sup>106</sup>

<sup>101</sup> Ryan, ‘Bloggers’ (n 78) 12; Ananian-Welsh (n 59) 474–475.

<sup>102</sup> Mark Deuze and Tamara Witschge, ‘Beyond Journalism: Theorizing the Transformation of Journalism’ (2018) 19(2) *Journalism* 165, 177; 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; Johnston and Wallace (n 58) 858; Consultation (n 43) 7.

<sup>103</sup> Consultation (n 43) 7; Phung (n 84) 131.

<sup>104</sup> See, eg, Commonwealth, *Parliamentary Debates*, Senate, 15 November 2010, 1141 (Nick Xenophon).

<sup>105</sup> Kumova (n 47) [31]–[33] (Flick J); 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; 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; Ryan, ‘Bloggers’ (n 78) 12; Greste (n 81) 9.

<sup>106</sup> Richard Faron Jr ‘Protecting the New Media: Application of the Journalist’s Privilege to Bloggers’ (2007) 120 *Harvard Law Review* 996, 1005; Phung (n 84) 131; *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127.

The shield laws of New South Wales, Western Australia, South Australia, and Victoria only being applicable to journalists with institutional or employment affiliations has the consequence of arbitrarily leaving unprotected a significant proportion of journalists' sources where those sources provide information to individuals producing public interest journalism.<sup>107</sup> Limiting the scope of protection by reference to a person's employment status as a journalist unduly restricts the protection's applicability with respect to who may claim it. This gives rise to inconsistencies across Australia where some people may be able to claim the protection in some jurisdictions but others cannot. The definitional breadth of 'journalist' that is provided by the Queensland definition assists in achieving the purpose of the shield law by ensuring that its protection can be enjoyed by sources who disclose information to a diverse range of journalists, including non-professional journalists as described above.<sup>108</sup> The consistent adoption of this definition across Australian shield laws would not only provide strong protections in this way, but would address the divergence in judicial approaches and inconsistent degrees of protection that are likely to arise from nationwide definitional differences.<sup>109</sup>

### 3 '*Relevant Persons*'

The Commonwealth, Australian Capital Territory, New South Wales, and Victorian Evidence Acts all provide that a journalist's employer may rely on the shield to protect the identity of a journalist's source.<sup>110</sup> By contrast, Queensland's shield protections can be invoked by any 'relevant person', which is broader than just a journalist's employer. 'Relevant persons' are current or previous employers of the journalist, a person who has engaged the journalist under a contract, or a person who is or has been involved in the publication of a news medium and works or has worked with the journalist in relation to publishing the information in the news medium.<sup>111</sup> Like the definition of 'journalist', this definition goes further than other jurisdictions by recognising that additional parties, such as editors, producers, and camera operators, may be exposed to the identity of or information about a source in the course of investigating issues and preparing information for publication.<sup>112</sup>

It is sensible to extend the protection of shield laws across Australia to everyone involved in producing a piece of journalism, as Queensland has, for three

<sup>107</sup> HRLC Submission (n 5) 6; Consultation (n 43) 6. See also 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.

<sup>108</sup> Ananian-Welsh (n 59) 463.

<sup>109</sup> *Ibid* 463; Kumova (n 47) [16] (Flick J).

<sup>110</sup> *Evidence Act 1995* (Cth) s 126K(1); *Evidence Act 2011* (ACT) s 126K(1); *Evidence Act 1995* (NSW) s 126K(1); *Evidence Act 1929* (SA) s 72; *Evidence Act 2008* (Vic) s 126K(1).

<sup>111</sup> EAQ (n 13) s 14T.

<sup>112</sup> Explanatory Notes (n 16) 5; Discussion Paper (n 31) 5.

reasons. First, because the purpose of shield laws is to maintain the integrity of the relationship between the journalist and their sources; secondly, because there has been a shift away from traditional forms of news and this shift has changed the way journalists are employed; and thirdly, because journalism is generally a collaborative process.<sup>113</sup> Failing to do so would allow the shield to be easily circumvented by simply compelling an involved non-journalist to expose the source, defeating the shield's intended purpose. Stronger protections on this point through uniformity in line with Queensland's definition of 'relevant person' is therefore warranted across Australia.

## B *Balancing the Public Interests For and Against Disclosure*

### 1 *The Statutory Framework*

Queensland's shield law does not guarantee an absolute privilege that would enshrine the right of journalists to never reveal a confidential source as their ethical obligations demand. Instead, the protection from compellability is limited and specific. Section 14V(1) provides a rebuttable presumption that a journalist cannot be compelled to give evidence or comply with a disclosure requirement in relation to a 'relevant proceeding' if doing so would disclose the identity of the informant or enable their identity to be ascertained.<sup>114</sup> Section 14V(2) also extends this rebuttable presumption to 'relevant persons' where they become aware of an informant's identity in the normal course of the relevant person's work with a journalist or as a result of a relevant proceeding. The presumption is rebuttable because despite the importance of protecting journalists' sources and the public interest in upholding freedom of the press, these considerations can and do clash with 'equally important public interest considerations'.<sup>115</sup>

As such, under ss 14W(1)–(2), if a journalist or relevant person is called to give evidence at a relevant proceeding and claims the privilege under s 14V, the court must decide whether their claim is established.<sup>116</sup> If a court decides that the claim under s 14W is established, a party to the relevant proceeding may apply for an order from the court directing the journalist to give the evidence despite s 14V.<sup>117</sup> Under s 14Y, an order to remove the shield may be made if the court is satisfied, having regard to the issues in the proceeding, that the public interest in

<sup>113</sup> Discussion Paper (n 31) 5; Consultation (n 43) 10.

<sup>114</sup> In this sense, s 14V may be better characterised as an exemption from compellability, which is technically conceptually distinct from an entitlement to privilege, but has the same effect in that it allows journalists to withhold certain information in judicial proceedings despite that information's relevance to the issues to be determined: JD Heydon, *Cross on Evidence* (LexisNexis Butterworths, 12<sup>th</sup> ed, 2020) 893 [25005].

<sup>115</sup> Commonwealth Explanatory Memorandum (n 35) [19].

<sup>116</sup> The journalist or relevant person has the onus of establishing the claim on the balance of probabilities: EAQ (n 13) s 14W(3).

<sup>117</sup> *Ibid* s 14X(1). Here, the onus shifts to the applicant: s 14X(2).

disclosing the informant's identity outweighs any adverse effect of the disclosure on the informant or another person.<sup>118</sup> The court must also be satisfied that the public interest in disclosing the informant's identity outweighs the public interest in communicating facts and opinion by the media and accordingly, the media's ability to access sources.<sup>119</sup> This 'public interest test' is substantially identical to equivalent provisions in all Australian shield laws.<sup>120</sup> Queensland's new shield law therefore requires courts to take the public interest in maintaining source confidentiality as the starting point, and only order disclosure if disclosing the source outweighs the public interest in protecting them.<sup>121</sup>

Journalists or relevant persons in relevant proceedings can also object to complying with disclosure requirements in pre-trial proceedings, which includes summons, subpoenas, and discovery, among other things,<sup>122</sup> if complying with such requirements would disclose the identity of an informant or enable their identity to be ascertained under s 14Z.<sup>123</sup> The considerations in deciding whether to order disclosure in this context are the same as the considerations for an order disclosing a source's identity through the giving of evidence. That is, the public interest test in s 14Y(1) must be considered,<sup>124</sup> and the court may also consider the matters in s 14Y(2) (considered below).<sup>125</sup> An important distinction between ss 14Y and 14Z is that if the court decides the objection under s 14Z is not established, the journalist or relevant person *must* comply with the disclosure requirement.<sup>126</sup> However, the court has a discretion to make an order requiring disclosure of an informant's identity having regard to the matters in s 14Y if an application for a journalist to give evidence about a source's identity is made under s 14X.<sup>127</sup> If the shield is removed, the court has the power to impose conditions on the order.<sup>128</sup> The scope for conditions is potentially very wide, such as being able to limit access to the relevant evidence or prohibiting further disclosure of the source's identity, and this is advantageous as it allows the court to craft conditions that protect the journalist and their source from reprisals in the context of the circumstances.<sup>129</sup>

<sup>118</sup> Ibid s 14Y(1); Explanatory Notes (n 16) 5; Discussion Paper (n 31) 1, 3.

<sup>119</sup> EAQ (n 13) s 14Y(1); Explanatory Notes (n 16) 5; Discussion Paper (n 31) 1, 3.

<sup>120</sup> *Evidence Act 1995* (Cth) s 126K(2); *Evidence Act 2011* (ACT) s 126K(2); *Evidence Act 1995* (NSW) s 126K(2); *Evidence (National Uniform Legislation) Act 2011* (NT) s 127A(2); *Evidence Act 1929* (SA) s 72B(4); *Evidence Act 2008* (Vic) s 126K(2); *Evidence Act 1906* (WA) s 20J(2).

<sup>121</sup> Hannah Ryan, 'The Half-Hearted Protection of Journalists' Sources: Judicial Interpretation of Australia's Shield Laws' (2014) 19(4) *Media and Arts Law Review* 325, 327 ('Half-Hearted Protection').

<sup>122</sup> EAQ (n 13) s 14T.

<sup>123</sup> Ibid ss 14Z(1), 14Z(2)(a).

<sup>124</sup> Ibid s 14Z(2)(a)–(b).

<sup>125</sup> Ibid s 14Z(3).

<sup>126</sup> Ibid s 14Z(6).

<sup>127</sup> Ibid s 14Y(1).

<sup>128</sup> Ibid s 14Y(5).

<sup>129</sup> Ibid s 14ZA(2)–(3); HRLC Submission (n 5) 15.

## 2 *Merits of a Qualified Privilege — is an Absolute Protection Needed?*

It is apt to acknowledge a tension between the qualified nature of the privilege provided under ss 14V–14Y and the codes of ethics and professional duties of journalists,<sup>130</sup> which generally prescribe an absolute requirement to respect confidences ‘in all circumstances’.<sup>131</sup> Because of the absolute nature of this requirement, it has been argued that this obligation should be reflected in Queensland’s shield law by enshrining an absolute privilege for journalists in it,<sup>132</sup> that is, an unqualified protection against journalists having to disclose information about sources.<sup>133</sup> Critics of the qualified privilege model have described the possibility of the shield being removed where the public interest in doing so outweighs countervailing considerations as a ‘tokenistic’ protection.<sup>134</sup>

But there are three counter-arguments that highlight the conceptual and practical difficulties of absolutely protecting journalists from disclosure in certain circumstances. First, such a far-reaching protection may come at the expense of other important interests, such as the detection and prevention of crime, national security, and the ability to respond to situations where lives are endangered.<sup>135</sup> Secondly, implementing an absolute privilege gives rise to the danger that this will encourage or facilitate poor journalistic practices, at least to a greater degree than under a qualified privilege, such as inventing or misquoting confidential sources.<sup>136</sup> By creating these opportunities for abuse, an absolute protection would also be counterproductive to an essential goal of shield laws, that is, to enable or assist journalists to act as public watchdogs and uncover the truth about public interest matters.<sup>137</sup> Thirdly, courts have considered that having available all relevant and admissible information before them to facilitate the administration of justice is a paramount principle.<sup>138</sup> This is tempered by the public policy argument that it is in the public interest for journalists to be able to ‘assure sources that their information can be imparted without fear that courts

<sup>130</sup> Mike Dobbie (ed), *Truth vs Disinformation: The Challenge for Public Interest Journalism* (MEAA Report, 2019), 52–3 (*‘Truth vs Disinformation’*); ALRC Evidence Report (n 38) 508–9 [15.31].

<sup>131</sup> See, eg, MEAA Code cl 3: ‘MEAA Journalist Code of Ethics’, *Media, Entertainment & Arts Alliance* (Web Page) <<https://www.meaa.org/meaa-media/code-of-ethics/>>.

<sup>132</sup> Dobbie, *Truth vs Disinformation* (n 130) 53.

<sup>133</sup> Joseph Fernandez and Pauline Sadler, ‘A Shield Law for Journalists in Australia: The Never Ending Story?’ in Pauline Sadler (ed), *Contemporary Issues in Law & Policy* (Applied Law & Policy, 2010), 123, 140.

<sup>134</sup> Queensland, Parliamentary Debates, Legislative Assembly, 25 May 2022, 1386 (Stephen Andrew).

<sup>135</sup> Damian Carney, ‘Theoretical Underpinnings of the Protection of Journalists’ Confidential Sources: Why an Absolute Privilege Cannot be Justified’ (2009) 1(1) *Journal of Media Law* 97, 119; Louis A Day, *Ethics in Media Communication: Cases and Controversies* (Thomson Wadsworth, 5<sup>th</sup> ed, 2006) 187.

<sup>136</sup> Carney (n 135) 120.

<sup>137</sup> *Ibid* 126.

<sup>138</sup> *McGuinness* (n 31) 87 (Rich J), 102–3 (Dixon J); *Cojuangco* (n 27) 354–5 (Mason CJ, Wilson, Deane, Toohey and Gaudron JJ).

will be able to discover their identity'.<sup>139</sup> By operating to always override the public interest in the administration of justice, an absolute privilege fails to achieve the proper balance between these competing public interests.<sup>140</sup>

Consequently, a qualified privilege that provides for a presumption of non-disclosure which can only be displaced where the public interest in disclosure outweighs the public interest in the protection of sources<sup>141</sup> (like in Queensland's shield law) is the only model that can effectively accomplish this balancing. The fact that Queensland's shield law is not absolute does not mean it is ineffective or 'tokenistic'. Queensland's shield law emphasises the primacy of source protection by providing a rebuttable presumption of non-disclosure in s 14V(1) and requiring the party seeking disclosure<sup>142</sup> to demonstrate a compelling justification under the statutory criteria for forcing disclosure.<sup>143</sup> In doing this, the shield provides a high, but not overriding, level of protection.<sup>144</sup> In this regard, Queensland's shield law (as well as the shield laws of other jurisdictions adopting similar models)<sup>145</sup> permits neither set of competing public interests – that is, the interests for and against disclosure – to automatically prevail, allowing the appropriate balance to be struck on a case-by-case basis.<sup>146</sup> As will be discussed below, the provisions of a shield law of this nature can still provide an appropriate protection for journalists, irrespective of the privilege being qualified and accordingly, this does not reduce the persuasiveness of the argument that there is merit to modelling a uniform shield law based on the drafting of Queensland's privilege.

### 3 *How Protective is s 14Y?*

The approach under s 14Y(1) largely follows the approaches taken in all other Australian jurisdictions, as this provision recognises that in rare circumstances, it may be necessary to reveal a source's identity in order to protect other fundamental interests.<sup>147</sup> Section 14Y also recognises the potential grave consequences of revealing a confidential source's identity for journalists, sources, and the democratic accountability provided by a robust free press, and accordingly provides a restrictive test which focuses attention on these harms to

<sup>139</sup> Sharon Rodrick, Jennifer Ireland, Brendan Clift and Lesley Power, *Australian Media Law* (Thomson Reuters, 6<sup>th</sup> ed, 2021) 572–3.

<sup>140</sup> *Ibid* 574.

<sup>141</sup> *Ibid* 574–5.

<sup>142</sup> EAQ (n 13) s 14X(2).

<sup>143</sup> That is, having regard to whether the public interest in disclosure outweighs any likely adverse effect of the disclosure and the public interest in the communication of facts and opinion to the public by the media and the ability of the media to access sources under s 14Y(1), alongside the discretionary factors provided in s 14Y(2).

<sup>144</sup> Carney (n 135) 121–2, 127.

<sup>145</sup> These jurisdictions are the Australian Capital Territory, New South Wales, and Western Australia: Rodrick, Ireland, Clift and Power (n 139) 575–6.

<sup>146</sup> Carney (n 135) 123.

<sup>147</sup> HRLC Submission (n 5) 14.

mitigate them.<sup>148</sup> The presumption in s 14V can therefore be displaced if a party seeking disclosure satisfies the court that a countervailing public interest is paramount in the particular case,<sup>149</sup> and the matters articulated in s 14Y(2) allow varying relevant considerations to be addressed in assessing the competing public interests according to each particular case.<sup>150</sup> In this respect, the operation of s 14Y is comparable to s 10 of the *Contempt of Court Act 1981* (UK), which provides that:

No court may require a person to disclose ... the source of information contained in a publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime.

While Queensland's courts may draw on jurisprudence considering s 10 in interpreting s 14Y, especially jurisprudence prior to the introduction of the *Human Rights Act 1998* (UK),<sup>151</sup> it should be acknowledged that s 10 needs to be understood in light of its relationship with the *European Convention on Human Rights*.<sup>152</sup> The applicability of such jurisprudence may therefore be somewhat limited.<sup>153</sup> Nevertheless, the English judiciary have approached the balancing of public interests under s 10 similarly to how Australian courts have approached the balancing exercises in shield laws that are similar to s 10.<sup>154</sup>

Section 14Y requires a value judgement, which turns on assessing the weight of competing public interests and the likelihood of adverse effects materialising from disclosure.<sup>155</sup> The requirement for the court to undertake a balancing exercise between competing interests is further affirmed by the use of the word 'outweighs' in s 14Y(1), although the nature of this balancing exercise may be better described as an evaluative judgment of fact and degree rather than purely an exercise of discretion as conventionally understood.<sup>156</sup> Further, the text of s 14Y(1) indicates that the public interest in the disclosure of the source's identity must outweigh *two* factors as described above: any adverse effect of the disclosure on the informant or another person, and the public interest in communicating facts and opinion by the media and the media's ability to access sources. Despite s 14Y lacking guidance as to the relative weight to be attached to these two factors, the trend of authority in New Zealand and the United Kingdom is to attach

<sup>148</sup> Ibid 14; Discussion Paper (n 31) 8.

<sup>149</sup> *Carolan v Fairfax Media Publications Pty Ltd (No 2)* [2015] NSWSC 1010, [8], [15] (McCallum J). See also *X Ltd v Morgan-Grampian Publishers Ltd* [1991] 1 AC 1, 44 (Lord Bridge).

<sup>150</sup> Discussion Paper (n 31) 8; Consultation (n 43) 16; Ryan, 'Half-Hearted Protection' (n 121) 349.

<sup>151</sup> See, eg, *Madaferri v The Age Company Ltd* (2015) 50 VR 492, 506 [42] (John Dixon J) ('Madaferri').

<sup>152</sup> *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

<sup>153</sup> See Ruth Costigan, 'Protection of Journalists' Sources' [2007] (Autumn) *Public Law* 464.

<sup>154</sup> Ryan, 'Half-Hearted Protection' (n 121) 349.

<sup>155</sup> *Madaferri* (n 151) 507 [47], 508 [50] (John Dixon J). See also *Camelot Group Plc v Centaur Communications Ltd* [1999] QB 124, 138 (Thorpe LJ) ('Camelot').

<sup>156</sup> *Police v Campbell* [2010] 1 NZLR 483, 502 [89]–[90] (Randerson J) ('Campbell'). See also *Austin, Nichols & Co Inc v Stichting Lodestar* [2008] 2 NZLR 141, 151 [17] (Elias CJ).

substantial weight to freedom of expression as well as encouraging the free flow of information and protecting journalists' sources.<sup>157</sup> It must be acknowledged that this conclusion is influenced by the respective human rights legislation in those jurisdictions which guarantee freedom of expression.<sup>158</sup> Nevertheless, this trend, and the requirement that Queensland courts interpret legislation in a way that is compatible with human rights (including the right to freedom of expression)<sup>159</sup> both indicate that it is likely that courts will not depart lightly from the presumptive high public importance attached to journalists' source protection.<sup>160</sup> Those two matters also indicate that any departure will only occur following a careful weighing of the prescribed statutory considerations in s 14Y.<sup>161</sup> Alternatively, even if the *Human Rights Act 2019* (Qld) is considered to not interact with Queensland's shield law, shield laws in other Australian jurisdictions have nevertheless been given beneficial interpretations,<sup>162</sup> and it is likely that Queensland's courts will follow this trend, consistently with statements of intent in the shield law's Explanatory Notes.<sup>163</sup>

That is not to say that compelling journalists to reveal their sources would only be permissible under s 14Y in truly exception circumstances<sup>164</sup> — this would impermissibly extend the operation of s 14Y in the absence of Parliament including a qualifying expression in s 14Y.<sup>165</sup> Courts will nevertheless inevitably order disclosure in some matters related to national security and the commission of crime,<sup>166</sup> which are relevant matters under the s 14Y(2).<sup>167</sup> But this is counterbalanced by the consideration of the importance of the information and the informant's identity to the proceeding, and the availability of other evidence.<sup>168</sup> In other words, journalists and their sources are provided an additional degree of protection through the consideration that the evidence of the informant's identity, while not needing to be essential or critical, must at least be important and not merely desirable.<sup>169</sup> It appears that under these provisions, similarly to the interpretation given to s 68 of the *Evidence Act 2006* (NZ), the more crucial the identity of the informant is, the greater the weight which will be attached to the public interest in disclosing their identity.<sup>170</sup> The importance of a

<sup>157</sup> *Campbell* (n 156) 502 [92] (Randerson J).

<sup>158</sup> *New Zealand Bill of Rights Act 1990* (NZ) s 14; *Human Rights Act 1998* (UK) s 12. See *Secretary of State for Defence v Guardian Newspapers Ltd* [1985] AC 339, 361 (Scarman LJ) ('Guardian').

<sup>159</sup> *Human Rights Act 2019* (Qld) ss 4(f), 21.

<sup>160</sup> *Campbell* (n 156) 503 [93] (Randerson J). See *Hancock* (n 35) [151], [165] (Pritchard J).

<sup>161</sup> *Ibid.*

<sup>162</sup> *Hancock* (n 35) [174] (Pritchard J); *Madaferri* (n 151) 506 [42]–[43] (John Dixon J).

<sup>163</sup> Explanatory Notes (n 16) 4–6.

<sup>164</sup> *Costigan* (n 153) 486–7.

<sup>165</sup> *Campbell* (n 156) 502 [91] (Randerson J).

<sup>166</sup> *In re An Inquiry Under the Company Securities (Insider Dealing) Act 1985* [1988] AC 660; *Guardian* (n 158).

<sup>167</sup> EAQ (n 13) ss 14Y(2)(d), 14Y(2)(j)(i)–(ii).

<sup>168</sup> *Ibid* s 14Y(2)(b).

<sup>169</sup> *Campbell* (n 156) 503 [96]–[97] (Randerson J).

<sup>170</sup> *Ibid.*

fair trial (in a criminal context) and the ability to present an effective case or whether non-disclosure will unfairly deny an effective remedy to a party (in a civil context) also remain relevant to this assessment of the public interest in disclosure.<sup>171</sup> All of these matters pertaining to the balancing exercise are largely the same throughout all Australian jurisdictions, so Queensland has essentially caught up with respect to s 14Y(1).

The drafting of Queensland's shield law diverges from other jurisdictions in s 14Y(2), which prescribes matters that a court *may* consider to further assist in deciding whether to remove the shield. The shield law provisions of Western Australia, Tasmania, Victoria, and the Northern Territory similarly prescribe factors to be considered when assessing whether to override the shield, although the language of these statutes positively *requires* these factors to be considered.<sup>172</sup> Allowing the court to consider the matters in s 14Y(2) as part of the broader weighing exercise under s 14Y(1)'s public interest test beneficially allows for a nuanced consideration of the privilege on a case-by-case basis.<sup>173</sup> Because the s 14Y(2) factors are permissive, and not prescriptive, this also allows for the court's decision-making to be assisted, without unnecessarily restricting or impacting the decision-maker's final discretion or the overarching balancing exercise.<sup>174</sup> These listed matters relate to other public interest considerations and include: whether the information provided is a matter of public interest; the importance of the provided information to the relevant proceeding and the availability of other information; and an accused's right to a fair hearing in a criminal proceeding. Other relevant considerations include the way in which the journalist used or kept the information, including whether they verified the information and used it in a way that is fair and accurate and minimised likely adverse effects on other persons. The informant's identity as the source of the information already being in the public domain is also a relevant factor.<sup>175</sup> This is a potentially critical factor if Queensland's shield law is interpreted similarly to s 126K of the *Evidence Act 1995* (Cth). That is, if a party seeking disclosure can establish that there is already information available which discloses an informant's identity or enables their identity to be ascertained, then the privilege will be displaced.<sup>176</sup> A statutory list of guiding considerations to assist the balancing exercise therefore beneficially allows for contextual concerns to be addressed and weighed without

<sup>171</sup> EAQ (n 13) ss 14Y(2)(b), 14Y(2)(c), 14Y(2)(d); Ryan, 'Half-Hearted Protection' (n 121) 355; *Madafferri* (n 151) 510 [57] (John Dixon J).

<sup>172</sup> *Evidence (National Uniform Legislation) Act 2011* (NT) s 127A(3); *Evidence Act 2001* (Tas) s 126B(4); *Evidence Act 2008* (Vic) s 126K(2); *Evidence Act 1906* (WA) s 20J(3).

<sup>173</sup> *Kretowicz* (n 52) 6; *Butler and Rodrick* (n 3) 499–500.

<sup>174</sup> Consultation (n 43) 16.

<sup>175</sup> EAQ (n 13) s 14Y(2)(f).

<sup>176</sup> *Roberts-Smith v Fairfax Media Publications Pty Ltd (No 3)* [2020] FCA 2, [81] (Besanko J); *Roberts-Smith v Fairfax Media Publications Pty Ltd (No 27)* [2022] FCA 79, [24]–[25] (Besanko J).

introducing them as defining considerations, guiding a decision-maker's discretion without unnecessarily constraining it.<sup>177</sup>

The inquiry into the likely adverse effect of the disclosure on the informant or another person under s 14Y(1)(a) is expected to focus on the consequences to the informant or another person, like the journalist, such as the risk of physical harm or property damage. This is similar to how the New Zealand equivalent embraces consideration of these adverse effects.<sup>178</sup> In appraising the public interest in the communication of facts and opinion by the media, Queensland courts should consider that there exists a baseline level of public interest in these matters in every case by reference to those potential consequences. The existence of such a baseline is evident in, for example, the emphasis placed on source protection as demonstrated through the rebuttable position provided in s 14V(1) that a journalist cannot be compelled to give evidence that discloses the identity of their source or enables their identity to be ascertained.

This baseline is also necessary due to the prospect of a chilling effect on sources entrusting journalists with information, which would arise where the identity of sources can be easily disclosed.<sup>179</sup> This chilling effect can be described as the phenomenon that where journalists are compelled to betray confidences through legal proceedings, sources will be discouraged from trusting journalists with information they may have to offer, making accessing sensitive information difficult for journalists.<sup>180</sup> Because the concept of the 'public interest' is notoriously nebulous and subjective,<sup>181</sup> it may have been desirable to explicitly direct the court to consider the link between source confidentiality, public interest journalism, and democratic accountability. This could have been done by including in s 14Y(2) a specific consideration about the importance of public interest journalism in facilitating democratic accountability, and the need to avoid the 'chilling effect' that disclosing sources may produce.<sup>182</sup>

In Queensland, unlike other Australian jurisdictions, 'the extent to which making the order [for disclosure] is likely to deter other persons from giving information to journalists' is explicitly provided as a relevant discretionary factor in assessing whether to order disclosure in s 14Y(2)(k). This inclusion acknowledges that public interest journalism and the free flow of information are inextricably linked, and often contingent on, source confidentiality being maintained. It also implicitly addresses the need to avoid this chilling effect,

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<sup>177</sup> Ananian-Welsh (n 59) 576–577.

<sup>178</sup> Campbell (n 156) 504 [100] (Randerson J).

<sup>179</sup> Ryan, 'Half-Hearted Protection' (n 121) 352–3.

<sup>180</sup> See Janice Brabyn, 'Protection Against Judicially Compelled Disclosure of the Identity of News Gatherers' Confidential Sources in Common Law Jurisdictions' (2006) 69(6) *Modern Law Review* 895, 926; Commonwealth Explanatory Memorandum (n 35) [22]; *Camelot* (n 155) 138 (Schiemann LJ).

<sup>181</sup> Greste (n 81) 9; HRLC Submission (n 5) 14.

<sup>182</sup> 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* (May 2009) 11; HRLC Submission (n 5) 15.

which benefits public interest journalism and democracy more broadly. While it is challenging to empirically assess the extent of any chilling effect,<sup>183</sup> s 14Y(2)(k) nevertheless permits courts to consider this as part of the balancing exercise. Due to these difficulties however, at best, the nature and extent of any chilling effect is likely to be assessed as a matter of intuition taking into account the circumstances of each case, the frequency with which courts are willing to require disclosure, and the circumstances in which courts will do so.<sup>184</sup> A greater chilling effect is likely to be observed where there is a greater frequency to court-ordered disclosure coupled with publicity surrounding the making of such orders.<sup>185</sup> Recognising that there is a consistent baseline level of public interest in maintaining the *prima facie* position that it is contrary to the public interest that sources should be disclosed beneficially seeks to avoid the harms of the chilling effect. This is so even where the source has illegitimate or selfish motives in providing the information, as this baseline is constant in every case, but the source's motives will ultimately have bearing on the separate question of whether there is an overriding public interest in disclosing the source.<sup>186</sup> Adopting an explicit consideration allowing this chilling effect to be taken into account in a statutory list, as opposed to it being embedded in the public interest test as is the case in most shield laws, would strengthen shield laws across Australia and better recognise the public interest in avoiding this chilling effect.

Even if Australian jurisdictions adopt the position that the public interest in non-disclosure remains constant regardless of a source's motives, this is not a licence to publish irresponsibly as such considerations can be tempered by countervailing factors. These factors appear in Queensland's s 14Y(2), such as whether the information is a matter of public interest, whether the information was used fairly and accurately, and whether the journalist complied with a professional standard or code.<sup>187</sup> As such, despite being difficult to quantify, the Queensland Parliament has nevertheless recognised the public interest in preserving the ability of the media to access sources; and other jurisdictions can do the same by introducing a similar list of guiding factors. Queensland is set apart from other jurisdictions in this respect, because even though the prospect of a chilling effect is an inherent component of the public interest test generally, it has been explicitly provided as a separate factor (alongside other matters) in the assessment of an order for disclosure, which will likely work in favour of journalists as a factor militating against disclosure.<sup>188</sup> Provided that ss 14V and 14Y

<sup>183</sup> *Branzburg v Hayes*, 408 US 665, 693–5 (1972).

<sup>184</sup> *Campbell* (n 156) 493 [49] (Randerson J).

<sup>185</sup> *Ibid* 493 [49].

<sup>186</sup> *Ashworth Hospital Authority v MGN Ltd* [2001] 1 WLR 515, 537 [101] (Laws LJ).

<sup>187</sup> EAQ (n 13) ss 14Y(2)(b), 14Y(2)(h), 14Y(2)(i).

<sup>188</sup> See, eg, while not explicitly included in the New Zealand legislation like the Queensland Bill, the New Zealand High Court has nevertheless interpreted 'the public interest in the communication of

are interpreted consistently with their purpose, that is, to better protect journalists and their confidential informants, and accordingly to facilitate the ‘free, independent and effective media’ that is ‘crucial for a strong democracy’,<sup>189</sup> it is likely that courts will generally only order disclosure where the public interest in doing so is very strong. Because gathering and disseminating news by the media is a robust public interest, the privilege under these shield laws as it is currently formulated in Queensland has the potential to significantly improve the protection of journalists and their sources,<sup>190</sup> and therefore how these provisions are framed should also be adopted nationwide.

### C *Circumventing the Shield — Applicability to Warrants*

#### 1 *The Source of the Problem*

Shield laws in most Australian jurisdictions do not extend to investigatory or non-curial processes.<sup>191</sup> As a consequence, most Australian law enforcement agencies are able to circumvent the object of shield laws by using search and seizure powers to investigate journalists’ records and identify their confidential sources before legal proceedings have commenced.<sup>192</sup> This is in contrast to the Victorian position where shield law protections apply to search warrants, preventing a document that would identify a journalist’s confidential source from being accessed under a regular warrant.<sup>193</sup> Practically, source confidentiality remains just as important in police investigations as it is in court proceedings.<sup>194</sup> In jurisdictions where shield laws do not apply to warrants, law enforcement can coercively obtain documentary evidence during the investigatory stage of criminal proceedings, obviating the need to seek disclosure in court proceedings and consequently eroding the utility of shield laws.<sup>195</sup>

Indeed, the vulnerability of source confidentiality was highlighted by the Australian Federal Police’s raid on the home of journalist Annika Smethurst in June 2019, which arose out of Smethurst’s reporting on a proposal to expand

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facts and opinion by the news media and, accordingly also, in the ability of the news media to access sources of facts’ under the *Evidence Act 2006* (NZ) s 68(2)(b) to inherently include considerations of whether an order for disclosure would contribute to this chilling effect: *Campbell* (n 156) 504 [101] (Randerson J).

<sup>189</sup> Explanatory Notes (n 16) 1.

<sup>190</sup> Ryan, ‘Half-Hearted Protection’ (n 121) 352; Leah Jessup, ‘Journalists’ Privilege — Improved Protection Made Law’ (2011) 30(1) *Communications Law Bulletin* 5, 7. See also Michael Douglas, ‘A Broad Reading of WA’s Shield Laws’ (2013) 18(4) *Media and Arts Law Review* 377.

<sup>191</sup> Stephen Odgers, *Uniform Evidence Law* (Thomson Reuters, 15<sup>th</sup> ed, 2020) 20; Kretowicz (n 52) 2.

<sup>192</sup> Rebecca Ananian-Welsh and Joseph Orange, ‘The Confidentiality of Journalists’ Sources in Police Investigations: Privacy, Privilege and the Freedom of Political Communication’ (2020) 94(10) *Australian Law Journal* 777, 789.

<sup>193</sup> *Evidence Act 2008* (Vic) s 131A(2)(g).

<sup>194</sup> Kretowicz (n 52) 6.

<sup>195</sup> McNamara and McIntosh (n 17) 89.

federal surveillance powers.<sup>196</sup> One aim of the raid had been to identify the anonymous source who had provided Smethurst with classified information concerning the proposal. The raid on Smethurst's home 'demonstrated the stunning fragility' of press freedom and source confidentiality in Australia, as the AFP had access to all material on Smethurst's phone — confidential or otherwise — with the relevant shield laws offering no protection due to their exclusive applicability to court proceedings.<sup>197</sup>

As shown by this raid, law enforcement agencies in jurisdictions where shield laws do not apply to warrants can use search powers to identify confidential sources before legal proceedings have commenced.<sup>198</sup> Promises of confidentiality by journalists are therefore rendered meaningless where search warrants entitle law enforcement to examine the entire contents of a newsroom or a journalist's home without prior warning.<sup>199</sup> The rise of metadata interception also necessitates that journalists must assume their conversations with their sources could be intercepted, further undermining the intent of shield laws.<sup>200</sup> These weaknesses in shield laws across Australia risk 'chilling' public interest journalism because if journalists operate knowing that they can become the subject of an invasive search warrant and potential sources understand that confidences cannot be assured because of this, neither party will be willing to engage in such journalism.<sup>201</sup>

## 2 *The Position in Queensland*

As canvassed above, the protections in Queensland's shield laws apply to pre-trial stages of civil and criminal proceedings.<sup>202</sup> Additionally, Queensland's laws go further than most other Australian jurisdictions by extending to search warrants<sup>203</sup> and aligning these protections more closely, but not entirely, with the shield law framework of Victoria.<sup>204</sup> For shield law protections in relation to warrants to apply, a journalist or relevant person must object during the warrant's execution to an 'authorised officer' dealing with a document or thing

<sup>196</sup> Rebecca Ananian-Welsh, 'Smethurst v Commissioner of Police and the Unlawful Seizure of Journalists' Private Information' (2020) 24 *Media & Arts Law Review* 60, 60–1. See *Smethurst v Commissioner of Police* (2020) 376 ALR 575.

<sup>197</sup> Ananian-Welsh and Orange (n 192) 789.

<sup>198</sup> *Ibid* 789.

<sup>199</sup> Nel (n 1) 111; *Hancock* (n 35) [104] (Pritchard J).

<sup>200</sup> Media, Entertainment and Arts Alliance, Submission No 98 to Parliamentary Joint Committee on Intelligence and Security, *Inquiry into Potential Reforms of National Security Legislation* (2012) 7. See also *F v Crime and Corruption Commission* (2021) 9 QR 451, 456 [4] (Mullins JA) ('*F Appeal*'). For an analysis of how national security powers and metadata retention and access regimes undermine journalists' ethical obligations, see: Adam Lukacs, 'Source Confidentiality Under Siege: How Law Enforcement Powers Threaten Journalists' Ethical Obligations' (2022) 41(2) *Communications Law Bulletin* 33.

<sup>201</sup> Nel (n 1) 111; Kretowicz (n 52) 5.

<sup>202</sup> EAQ (n 13) s 14Z.

<sup>203</sup> *Ibid* s 14ZC.

<sup>204</sup> *Evidence Act 2008* (Vic) s 131A(2)(g).

in a way authorised under warrant on the grounds that the document contains information that would disclose the identity of the informant or enable their identity to be ascertained.<sup>205</sup> If the authorised officer still wishes to deal with the document despite the objection, they may request the journalist or relevant person to agree to the document being stored in a secure way specified by the officer and held for safekeeping.<sup>206</sup> The journalist, relevant person, or authorised officer can apply to the Supreme Court within seven days of the request being made to decide whether the document may be dealt with in a way authorised by the warrant.<sup>207</sup> However, if the journalist does not agree to the document being stored and does not avail themselves of these procedures, the officer may deal with the document as authorised by the warrant.<sup>208</sup> If an application is made to the Supreme Court, the authorised officer must ensure that the document is provided to the Supreme Court Registrar for safekeeping until the application is decided.<sup>209</sup>

The Supreme Court must first decide whether the document would in fact disclose the identity of the informant or enable their identity to be ascertained, with the journalist or relevant person bearing the onus to prove this.<sup>210</sup> If this is established, the court may decide that the document may be dealt with in a way authorised by the warrant despite the objection. It may only order this if the court is satisfied that the public interest in disclosing the informant's identity outweighs any likely adverse effect of disclosure on the informant or another person, and the public interest in the communication of facts and opinion by the media and the media's ability to access sources.<sup>211</sup> The party seeking to deal with the sealed document under warrant, such as the police, has the onus of proving this on the balance of probabilities.<sup>212</sup> The court may also have regard to the matters in ss 14Y(2)(a) and (e)–(l), the nature of the investigation to which the warrant relates, the importance of the information and the informant's identity to the investigation to which the warrant relates, the availability of other evidence, and the purposes for which the information and informant's identity are intended to be used.<sup>213</sup> In this way, an application for dealing with such a document under warrant involves balancing competing public interest considerations as analysed above.

These provisions for warrant applications are somewhat similar to the procedures in the United Kingdom, which prohibit search warrants from being issued for material subject to a confidentiality undertaking, and instead a

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<sup>205</sup> EAQ (n 13) s 14ZC.

<sup>206</sup> *Ibid* s 14ZD(1).

<sup>207</sup> *Ibid* ss 14ZE(2), 14ZE(3).

<sup>208</sup> *Ibid* s 14ZD(3).

<sup>209</sup> *Ibid* s 14ZD(5).

<sup>210</sup> *Ibid* s 14ZF(1).

<sup>211</sup> *Ibid* s 14ZF(3).

<sup>212</sup> *Ibid* s 14ZF(3A).

<sup>213</sup> *Ibid* s 14ZF(4).

contested warrant application proceeding is provided for such material.<sup>214</sup> Under this arrangement in the United Kingdom, a judge retains an overarching discretion whether to *issue* a warrant (as opposed to an objection to the warrant's execution, like in Queensland). In deciding this, they may have regard to factors such as the value of the material, the viability of other methods of obtaining the information, and whether certain public interest criteria are met.<sup>215</sup> The higher procedural bar for accessing a document containing information subject to confidentiality undertakings under s 14ZF, coupled with the need to balance the public interest in media freedom and source protection with other matters when deciding warrant applications, is a great strength of Queensland's warrant procedures.<sup>216</sup> If the approach taken by the United Kingdom's courts to their similar legislation provides any indication, and similarly to the balancing exercise under s 14Y, there will likely be significant weight attached to the importance of protecting sources when deciding warrant applications under s 14ZF.<sup>217</sup> Equally, the consideration of matters favouring uncovering the source will probably need to be convincingly established and approached with caution.<sup>218</sup> Sections 14ZD–14ZF therefore effect meaningful change in this respect, reaching a middle ground between allowing law enforcement to easily circumvent the shield by using warrants, and imposing a blanket prohibition on accessing documents that may impact source confidentiality under warrants. For these reasons, not only should other Australian jurisdictions extend their shield laws to apply to warrants,<sup>219</sup> they should also lay down an application process for accessing material under warrants where objections to this are taken, subject to public interest considerations, as Queensland has done.

This is especially so in light of the argument that failing to extend shield laws to preliminary and non-curial proceedings creates a gap in the law, allowing parties to use pre-hearing processes such as warrants to access a source's identity when this would be protected if the same request were made in court proceedings.<sup>220</sup> However, the efficacy of warrants may arguably be undermined by allowing pre-emptive objections due to the risk of targets defeating investigative strategies by concealing or destroying evidence if they are given

<sup>214</sup> *Police and Criminal Evidence Act 1984* (UK) s 11(2)–(3), Sch 1.

<sup>215</sup> *Ibid* Sch 1 [2](b)–(c), [12]–[14]; University of Queensland, Submission No 20 to Senate Standing Committees on Environment and Communications, Parliament of Australia, *Press Freedom* (30 August 2019) 11.

<sup>216</sup> *McNamara and McIntosh* (n 17) 90–1.

<sup>217</sup> *R v Central Criminal Court, Ex parte Bright* [2001] 2 All ER 244, 259–60 [83]–[84] (Judge LJ).

<sup>218</sup> *R (on the application of Malik) v Manchester Crown Court* [2008] 4 All ER 403, 426–7 [87] (Dyson LJ).

<sup>219</sup> In the same way that some jurisdictions' shield laws not applying to subpoenas has been said to be 'curious' (at least in relation to Western Australia's shield laws), the same can also be said for shield laws not applying to warrants (except in Victoria): *Hancock* (n 35) [102] (Pritchard J).

<sup>220</sup> Mia Herrman, 'Enhancing Press Freedom in Australia: Establishing a Media Freedom Act with Coordinated National Security Law Reform' (2020) 21(6) *University of New South Wales Law Journal Student Series*; PJCIS Report (n 41) 63 [3.62]; HRLC Submission (n 5) 13.

notice of an impending search.<sup>221</sup> However, the process provided by ss 14ZD–14ZF is apt to assuage such concerns, as is the fact that there is no evidence that the similar processes in the United Kingdom have compromised the interests of justice or national security.<sup>222</sup>

Other Australian jurisdictions should adopt this process and make accessing information about sources under warrants subject to a balancing exercise, because such a process ensures that sources are not left vulnerable to identification at early, often crucial, stages of an investigation.<sup>223</sup> This also allows the effect of warrants to take precedence over source confidentiality where there is an overriding public interest in doing so. This framework thereby offers a more robust and complete protection than that currently provided by other Australian jurisdictions. It strikes an appropriate balance between the interests of law enforcement and journalists while ensuring shield laws fulfil their operative purpose — to encourage the free flow of information, which risks being undermined if journalists and their sources are inadequately protected.<sup>224</sup>

### **D ‘Relevant Proceedings’: Applicability of Shield Laws to Corruption and Integrity Bodies**

The need for robust shield laws in Queensland, and nationwide, was given prominence in Queensland in the case of a journalist known only as ‘F’. In 2018, F received a tip-off from a police officer about an impending raid on the home of a murder suspect, leading to the suspect’s arrest being filmed by a camera operator and reporter dispatched by F.<sup>225</sup> Queensland’s Crime and Corruption Commission (‘CCC’) investigated the disclosures made, and required F to answer questions at a CCC hearing to identify the source.<sup>226</sup> F refused to answer questions that would identify the source on the grounds that F had agreed to keep the source’s identity confidential and because, *inter alia*, journalists’ ethical obligations to maintain source confidentiality are encompassed within public interest immunity.<sup>227</sup> F applied to Queensland’s Supreme Court on these grounds to prevent the source

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<sup>221</sup> Discussion Paper (n 31) 12.

<sup>222</sup> Consultation (n 43) 24.

<sup>223</sup> Kretowicz (n 52) 7.

<sup>224</sup> *Ashby v Commonwealth (No 2)* (2012) 203 FCR 440, 446 [18] (Rares J).

<sup>225</sup> Allyson Horn, ‘Journalist Loses Court Appeal to Keep Confidential Source a Secret, Could be Jailed for Up to Five Years’, *ABC News* (online, 15 November 2021) <<https://www.abc.net.au/news/2021-11-15/qld-journalist-loses-court-appeal-keep-source-secret/100622164#:~:text=Queensland%20is%20the%20only%20jurisdiction,having%20to%20reveal%20their%20sources>>. See also Mark Pearson and Joseph M Fernandez, ‘Surveillance and National Security ‘Hyper-Legislation’: Calibrating Restraints on Rights with a Freedom of Expression Threshold’ in Johan Lidberg and Denis Muller (eds), *In the Name of Security: Secrecy, Surveillance and Journalism* (Anthem Press, 2018) 51.

<sup>226</sup> *F v Crime and Corruption Commission* [2020] QSC 245, [2], [6], [11]–[14] (Jackson J).

<sup>227</sup> *Ibid* [2], [3], [14] (Jackson J).

from being exposed, but these arguments were rejected by the Court and also subsequently by the Court of Appeal.<sup>228</sup> This ruling is just one in a tapestry of cases highlighting the lack of legal protection for journalists' ethical obligations to maintain source confidentiality where no statute confers such a protection, as was the case at the time in Queensland.

As indicated above, the privilege applies only in relation to a 'relevant proceeding',<sup>229</sup> which means any proceeding before a court of record, including the Supreme Court, District Court, Queensland Industrial Relations Commission, and the Queensland Civil and Administrative Tribunal.<sup>230</sup> A major deficiency in the Queensland shield law is that its protections do not apply to CCC proceedings.<sup>231</sup> The CCC retains the power to require journalists to attend hearings and give evidence or produce a document,<sup>232</sup> subject to the journalist being able to refuse to answer questions because of a statutorily applicable privilege.<sup>233</sup> Journalists' privilege is not one of these applicable privileges, so journalists remain barred from staying silent in response to questions at CCC hearings.<sup>234</sup> As such, even if Queensland had its current shield law in place at the time, they would have been of no assistance to journalist F.

The legislative framework in relation to crime, corruption, and integrity commissions varies significantly between Australian jurisdictions. For example, shield laws do not apply to investigations undertaken by Victoria's Independent Broad-Based Anti-Corruption Commission,<sup>235</sup> nor does anti-corruption body legislation in New South Wales protect witnesses who refuse to answer questions or produce a document or thing on the ground of privilege.<sup>236</sup> Source confidentiality is equally pertinent in proceedings before non-judicial bodies such as corruption and integrity commissions. If the shield is appropriate in a criminal or civil court, in principle, it is equally appropriate in an integrity body given that journalists' confidentiality obligations remain consistent irrespective of the setting in which they are compelled to appear.<sup>237</sup> This is especially so if one considers the wider implications of removing the shield in proceedings before integrity bodies. Such implications include the prospective impact of a chilling effect on public interest journalism and press freedom more broadly, in an environment where these types of bodies are increasingly exercising their coercive powers to compel journalists to reveal their sources under threat of

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<sup>228</sup> Ibid [39] (Jackson J); *F Appeal* (n 200).

<sup>229</sup> EAQ (n 13) s 14U.

<sup>230</sup> Ibid s 14S(1); Explanatory Notes (n 16) 5.

<sup>231</sup> EAQ (n 13) s 14S(2).

<sup>232</sup> *Crime and Corruption Commission Act 2001* (Qld) s 82(1)(a)(i)–(ii).

<sup>233</sup> Ibid s 192(2A).

<sup>234</sup> Ibid ss 190(1)–(2), 192(1), 192(2)(a).

<sup>235</sup> *Independent Broad-Based Anti-Corruption Commission Act 2011* (Vic) s 99.

<sup>236</sup> *Independent Commission Against Corruption Act 1988* (NSW) ss 24(3), 98(c).

<sup>237</sup> Consultation (n 43) 14; Kretowicz (n 52) 7.

serious consequences.<sup>238</sup> Queensland's failure, and the failure of other Australian jurisdictions, to extend the applicability of the shield's protections to proceedings before corruption and integrity bodies not only undermines the purpose of shield laws (to support a free press and democracy) more broadly, but also significantly undercuts the benefit of the privilege for individuals.<sup>239</sup> As demonstrated by F's case, if the shield does not apply to such proceedings, journalists 'continue to risk being fined or jailed for simply doing their jobs' and adhering to their ethical obligations where they have undertaken to maintain confidentiality.<sup>240</sup>

A favourable option would be for all Australian jurisdictions to allow journalists or relevant persons to request an exemption from disclosing a source's identity in these proceedings and permit them to apply to their respective Supreme Court to determine the claim.<sup>241</sup> This would entail allowing the Supreme Court, and not the relevant integrity body, to determine whether the shield should apply on a case-by-case basis. This would allow the integrity body to advocate why the shield should be overridden on a case-by-case basis, as opposed to imposing a blanket rule that the privilege never applies in such proceedings.<sup>242</sup> In determining the claim, the Court should apply the balancing test referred to above in s 14Y(1), and consider other applicable matters as part of that assessment, such as those in s 14Y(2).<sup>243</sup> As discussed above, the application of the balancing exercise would ensure that an additional procedural protection is provided for journalists because the onus would be placed on the integrity body to demonstrate that a compelling public interest necessitates overriding the shield.<sup>244</sup>

The Australian Capital Territory's ('the ACT') Integrity Commission framework already adopts a similar procedure. Under that framework, a witness before the ACT Commission may claim journalistic privilege irrespective of the fact that the rules of evidence and privilege against self-incrimination do not apply.<sup>245</sup> If a claim for privilege is made, the ACT Supreme Court determines whether the privilege applies with respect to preliminary inquiries,<sup>246</sup> search warrants,<sup>247</sup> and examinations.<sup>248</sup> Every jurisdiction except New South Wales, Western Australia, and the Commonwealth (which, at the time of writing, will

<sup>238</sup> See Nick McKenzie and Cameron Stewart, 'Australia's "Star Chambers"' in Jonathan Este (ed), *Kicking at the Cornerstone of Democracy: The State of Press Freedom in Australia 2012* (Report, 2012) 35, 38–9.

<sup>239</sup> Butler and Rodrick (n 3) 520; Consultation (n 43) 29.

<sup>240</sup> Australia's Right to Know Coalition, Submission No 004 to Legal Affairs and Safety Committee, Parliament of Queensland, *Evidence and Other Legislation Amendment Bill 2021* (17 January 2022) 3; Queensland, Parliamentary Debates, Legislative Assembly, 25 May 2022, 1386 (Stephen Andrew). Consultation (n 43) 29.

<sup>241</sup> Queensland, Parliamentary Debates, Legislative Assembly, 25 May 2022, 1361 (Tim Nicholls).

<sup>242</sup> Queensland Law Society, Submission No 005 to Legal Affairs and Safety Committee, Parliament of Queensland, *Evidence and Other Legislation Amendment Bill 2021* (17 January 2022) 7.

<sup>243</sup> McKenzie and Stewart (n 238) 40; Consultation (n 43) 29.

<sup>244</sup> *Integrity Commission Act 2018* (ACT) ss 174–5.

<sup>245</sup> *Ibid* ss 95–7.

<sup>246</sup> *Ibid* ss 127–9.

<sup>247</sup> *Ibid* ss 161–3.

<sup>248</sup> *Ibid* ss 161–3.

implement a new National Anti-Corruption Commission on 1 July 2023)<sup>249</sup> have similar mechanisms allowing their respective Supreme Courts to determine whether a privilege applies in integrity body proceedings in certain circumstances.<sup>250</sup> Given that a similar legislative framework is already in place in several states and territories, procedures of this nature could be extended to integrity body proceedings and used by Supreme Courts (or the Federal Court in the Commonwealth's case) to determine whether shield law privileges should be overridden.<sup>251</sup> The beneficial effect of extending the shield to integrity body proceedings has already been acknowledged by the Queensland Government to some extent, yet the Government resiled from so extending the shield in the 2022 legislation due to its application in CCC proceedings being 'very complex'.<sup>252</sup>

Applying this sentiment nationwide, any journalists' privilege extending to integrity body proceedings would need to be recognised within each Australian jurisdiction's Evidence Act and integrity body framework. Such a privilege would also need to be drafted in such a way to apply the privilege to matters outside integrity body hearings but otherwise connected with the integrity body's powers,<sup>253</sup> such as the power to compel the production of documents.<sup>254</sup> Nevertheless, the Queensland Attorney-General has indicated that Queensland's shield law will be extended to apply in CCC proceedings, with legislation to this effect expected to be introduced in June 2023.<sup>255</sup> While this is a positive outcome, it remains to be seen what the full scope of the proposed protections will be in CCC proceedings. In any event, a national uniform privilege applying to integrity body proceedings would help to ensure that journalists and their sources were consistently protected in all contexts.

<sup>249</sup> Although see *National Anti-Corruption Commission Act 2022* (Cth) s 31(1)–(2). Instead of the Federal Court being empowered to determine whether privilege is to apply in the National Anti-Corruption Commission, this provision instead provides for a shield law protection where a source gives a journalist information on the express or implied understanding that the source's identity would not be disclosed. If this is satisfied, the journalist, their employer, and persons assisting the journalist (either in an employed or professional capacity) are not required to do anything under the Act which would disclose the identity of the informant or enable their identity to be ascertained. However, s 31(4) provides that this protection does not apply to law enforcement powers, such as executing search warrants, being exercised for the purposes of the Act but that a public interest test, found in s 124(2B), applies to the issuing of search warrants directed to journalists.

<sup>250</sup> *Integrity Commission Act 2018* (ACT) ss 128–9, 162–3; *Independent Commissioner Against Corruption Act 2017* (NT) ss 89–90; *Crime and Corruption Commission Act 2001* (Qld) ss 195, 195B, 196; *Independent Commissioner Against Corruption Act 2012* (SA) Sch 3 cls 3–4; *Integrity Commission Act 2009* (Tas) ss 92(5)–(7); *Independent Broad-Based Anti-Corruption Act 2011* (Vic) ss 59M–59N, 100–101, 147–8.

<sup>251</sup> Consultation (n 43) 29; HRLC Submission (n 5) 11.

<sup>252</sup> Queensland, Parliamentary Debates, Legislative Assembly, 16 November 2021, 3479–80 (Shannon Fentiman, Attorney-General).

<sup>253</sup> Queensland, Parliamentary Debates, Legislative Assembly, 26 May 2022, 1474 (Mark Ryan).

<sup>254</sup> See, eg, *Crime and Corruption Commission Act 2001* (Qld) s 72.

<sup>255</sup> Lydia Lynch, 'Queensland Moves to Lock in Whistleblower 'Shield Laws'', *The Australian* (online, 22 January 2023) <<https://www.theaustralian.com.au/business/media/queensland-moves-to-lock-in-whistleblower-shield-laws/news-story/53cbfc9e02447249c54c4c893b0da1c6>>.

## IV CONCLUSION

Australia enjoys a robust tradition of strong public interest journalism that is capable of holding government and institutions of power accountable by publishing stories that expose corruption and wrongdoing, as well as other stories that may be embarrassing to government but are necessary to keep the public well-informed.<sup>256</sup> In the same vein, source confidentiality serves the democratic purpose of supporting a free and independent press in the fulfilment of the fourth estate role of the media, ensuring and facilitating representative and responsible government while providing the public with the information it needs to engage in informed debate.<sup>257</sup> Indeed, as was poignantly recognised by the Supreme Court of Canada, the ability of the media to convey information to the public ‘is fragile unless the press is free to pursue leads, communicate with sources, and assess the information acquired.’<sup>258</sup>

Respecting source confidentiality and the ethical obligations which oblige journalists to maintain such confidentiality is therefore inextricably linked to, and an indispensable part of, the media’s ability to gather facts and ideas needed to report news. Exempting journalists, related persons, and their materials from the operation of standard evidentiary laws through shield laws is thereby necessary to protect journalists from undue interference in newsgathering, and to safeguard the fourth estate’s ability to meaningfully facilitate and participate in the democratic process unimpaired.<sup>259</sup> Queensland enacting shield laws is a positive step towards ensuring the better protection of journalists and their sources, and will enable Queensland courts to be cognisant of the realities of journalists’ ethical obligations when applying rules of evidence. Queensland’s new shield law has, however, equally highlighted the degree to which shield laws in other jurisdictions are deficient, underscoring the need for reforms that result in the harmonisation of shield laws Australia-wide. For the reasons set out in this article, the favourable provisions in Queensland’s shield law that have been discussed provide a desirable and achievable benchmark.

But the concept of the ‘ideal’ shield law framework has remained a chimera, due to the nature of such laws inherently requiring competing interests to be balanced, and the lack of uniform agreement between jurisdictions as to how particular elements of the shield should be framed.<sup>260</sup> As has been discussed, the shield law frameworks across Australia have common foundational elements — they all establish a qualified privilege that applies to court proceedings and disclosure requirements, and they all provide that a court may override the

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<sup>256</sup> Ananian-Welsh and Orange (n 192) 781.

<sup>257</sup> Ibid 784.

<sup>258</sup> *R v Vice Media Canada Inc* [2018] SCR 374, 434 [127] (Abella J).

<sup>259</sup> Ibid 434 [125] (Abella J); Ananian-Welsh and Orange (n 192) 788.

<sup>260</sup> For example, the definitional discourse and degree of uncertainty surrounding the concept of a ‘journalist’.

privilege where countervailing public interests prevail.<sup>261</sup> Notwithstanding this, in order for shield laws to confer robust protections in all jurisdictions, as is their intention, further nationwide commonalities should be adopted in line with the provisions outlined below in Queensland's shield law.

Specifically, other Australian jurisdictions should first adopt uniform, functionalist definitions of 'journalist' by focusing their definitions on the process of journalism as opposed to professional engagement, which would allow for a more liberal application of the privilege and capture practitioners of 'new media' like bloggers. Secondly, the applicability of shield laws throughout Australia should extend beyond just a journalist and their employer and recognise the realities of the journalism process by bringing additional parties that have been exposed to the source's identity through their involvement in the publication process under the shield's protections. This would uphold the shield's purpose by closing a potential loophole that could be exploited to easily reveal a source where non-journalists have learned the identity of a source in the process of publication. Thirdly, a discretionary list of guiding considerations should be included across all Australian shield laws as part of the balancing exercise required for deciding whether to order disclosure of a source's identity, and one discretionary consideration included in this list should be explicit consideration of any 'chilling effect' arising from ordering disclosure. Such discretionary guidance would also import some degree of objectivity into the nebulous and subjective 'public interest' concept. Finally, the ambit of shield law protections should be extended to non-curial processes and warrants throughout Australia and other jurisdictions should adopt amendments making accessing information about sources under warrant subject to a public interest balancing test. This would curtail the ability of law enforcement agencies to overreach in their desire to access confidential material via warrant, which is currently achievable for law enforcement in most jurisdictions.

Even though this article recommends the adoption of these aspects of Queensland's new shield law, that shield is not without its flaws, many of which are also seen in other jurisdictions' shield laws. The requirement that an 'express promise' of confidentiality is made for the shield law to apply should be uniformly rectified by amending shield laws across Australia to permit the shield to apply where such a promise may be reasonably expected or inferred from the circumstances. Every jurisdiction, including Queensland, should also adopt amendments allowing the shield to apply in integrity body proceedings. Those amendments should also allow applications to be made to Supreme Courts in each jurisdiction to determine whether the privilege applies in these bodies, offering a more complete protection for journalists in all contexts.

Queensland's shield law provides significantly beneficial protections, even if some aspects of those protections are imperfect. Crafting 'ideal' shield laws will

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<sup>261</sup> Committee Report (n 15) 14.

always be challenging, but Queensland's new law walks the tightrope of addressing competing interests and it does so in a way that strikes a balance in protecting journalists' confidential sources which is comparatively better to other jurisdictions' shield laws. Because of this, the Queensland shield law provides important lessons and attainable benchmarks for shield laws that the rest of Australia should follow. But of course, in order for shield laws in Queensland and elsewhere to be harmonised in an adequately protective manner, they also need to adopt amendments allowing the shield to apply where promises of confidentiality can be inferred or expected, as well as amendments making the shield applicable in integrity body proceedings. In any event, even though significant reforms still need to occur in other jurisdictions to ensure that shield laws nationwide are harmonised and adequately protective, Queensland's reforms are likely to be an advantageous catalyst for enhancing media freedoms within Queensland. If sunlight is the best disinfectant,<sup>262</sup> then Queensland's law reforms have at least made things a little bit brighter in the Sunshine State.

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<sup>262</sup> Louis Dembitz Brandeis, *Other People's Money and How the Bankers Use It* (Frederick A Stokes Company, 1914) 92.