

**DISCUSSION PAPER**

**Shielding confidential sources: balancing the public's right to know and the court's need to know**

**Shield laws to protect journalists' confidential sources**

June 2021





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## Foreword

A free, independent, and effective media, and well-informed citizens, are crucial for a strong democracy.

To report on matters of legitimate public concern journalists sometimes depend on confidential sources to access sensitive information. However, the protection of a confidential source's anonymity, which is often necessary to facilitate the ongoing access to sensitive information, is not currently protected under Queensland law.



The Palaszczuk Government acknowledges the importance of this issue and need for consultation for informed consideration of a range of complex issues involved in the development of a workable and fair legislative framework for shield laws in Queensland.

Our approach also includes reviewing laws in other states and territories and examining recent Queensland case law.

Shield laws are complex and must strike the right balance between competing interests and operate effectively in Queensland's legal system.

This paper raises a number of key issues that should be considered in developing an effective shield law framework for Queensland. The information outlined in this paper is intended to guide the consideration of issues in relation to the development of a legislative framework for shield laws in Queensland.

The consultation process provides an opportunity for all interested stakeholders to provide feedback on possible changes. I encourage all stakeholders, including the media, legal fraternity and the public, to have their say on the framework for shield laws in Queensland.

A handwritten signature in black ink, appearing to read 'Shannon Fentiman'.

**Shannon Fentiman MP**

Attorney-General and Minister for Justice

Minister for Women

Minister for the Prevention of Domestic and Family Violence

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# Introduction

## Background

Journalists obtain information from a variety of sources to produce and publish news media. In some instances, information is only provided on the condition that the source remains anonymous. Promising to keep the identity of a source confidential is a long-standing practice in journalism.

In Australia the principle that journalists must protect their confidential source stems from the code of ethics developed by the Australian Journalists Association in 1944. This principle is currently articulated in the Media, Entertainment and Arts Alliance (MEAA) Journalist Code of Ethics as:

*Journalists will educate themselves about ethics and... [a]im to attribute information to its source. Where a source seeks anonymity, do not agree without first considering the source's motives and any alternative attributable source. Where confidences are accepted, respect them in all circumstances.*

The MEAA Code applies only to MEAA members. However, some media employers operate in-house codes of ethics/practice for their employees.

In Queensland there is an ongoing tension between the codes of ethics/practice and professional duties of journalists and the legal duty to reveal information disclosed in confidence to the courts.

Despite the various professional codes, there is no common law privilege that entitles a journalist to withhold evidence from the courts on the grounds of protecting confidential sources. In considering journalist privilege, the High Court noted that:

*Privilege from disclosure in courts of justice is exceptional and depends upon only the strongest considerations of public policy. The paramount principle of public policy is that the truth should be always accessible to the established courts of the country.<sup>1</sup>*

The common law position creates a conflict, both conceptually and practically, between the interests of justice and the journalist's obligation to maintain confidentiality in the interests of a free and effective press.

To address this conflict, the Commonwealth and other Australian states and territories have strengthened the protections for journalist-source relationships through legislation that provides a qualified journalist privilege. While there are some differences, legislation in most jurisdictions creates a presumption that a journalist, and their employer, cannot be compelled to disclose the identity of a confidential source. However, the presumption is rebuttable and the court may order disclosure if the public interest in disclosure outweighs any likely adverse effects on the source and the public interest in ensuring news media can access sources and communicate facts and opinions to the public.

The shield law frameworks in other jurisdictions provides an opportunity to consider the different elements of each framework to create shield laws that represent the best approach for Queensland.

A list of the Commonwealth and other Australian state and territory legislation referred to in this paper is set out in **Attachment 1**.

Consideration of shield laws often focusses on public interest journalism. However, shield laws have a broader application and may equally be relevant in relation to personal disputes between a freelance journalist and an individual. Any legislative framework for shield laws needs to appropriately consider the various circumstances in which shield laws may be relevant.

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<sup>1</sup> *McGuinness v Attorney General of Victoria* [1940] HCA 6.

## Purpose of the discussion paper

The purpose of the discussion paper is to guide consultation on the development of a new law to protect journalists from being compelled to reveal confidential sources ('shield laws'). The Queensland Government is seeking feedback on the best way to achieve reform in this area.

This paper sets out some key elements for consideration in the development of shield laws, including the positions in other Australian jurisdictions. A list of questions has also been developed to guide consideration of key issues.

## How to get involved

### Make submission

You may wish to comment on all of the elements set out in the discussion paper, or only the elements that are of particular interest to you. You can provide comments or make a submission on the development of shield laws for Queensland by:

Email: [shieldlaws@justice.qld.gov.au](mailto:shieldlaws@justice.qld.gov.au)  
Mail: Strategic Policy and Legal Services  
Department of Justice and Attorney-General  
GPO Box 149  
Brisbane Qld 4001

**Submissions close at 5pm Tuesday, 13 July 2021.**

### Answer an online survey

You can also provide feedback on the development of shield laws for Queensland by completing the online survey. The survey will close at **5pm Tuesday, 13 July 2021**.

## Privacy statement

Personal information in your comment or submission will be collected by the Department of Justice and Attorney-General (DJAG) for the purpose of informing reforms to introduce shield laws in Queensland. DJAG may contact you for further information on the issues you raise. Your comments or submission may also be provided to others with an interest in the reforms.

Comments and submissions in relation to this discussion paper will be treated as public documents and may be published on DJAG's website. If you would like your submission, or any part of it, to be treated as confidential, please indicate this clearly. Please note however that all submissions may be subject to disclosure under the *Right to Information Act 2009*.

# Nature of the shield

## Absolute or qualified privilege

Shield laws generally take the form of a statutory legal privilege. Broadly, there are two types of legal privilege: qualified and absolute.

A qualified privilege is rebuttable. It balances competing public interests by presuming the privilege applies unless a decision is made to the contrary. A shield law in the form of a qualified privilege means that a journalist cannot be compelled to disclose the identity of a confidential source unless the privilege was removed by a judicial decision. A qualified privileged involves a case by case basis balancing of the public interest in the ability for journalists to access sources and communicate facts and opinions to the public, against the public interest in the court having before it all relevant information in the interests of justice.

An absolute privilege cannot be rebutted. There is no question of balancing the competing interests as the protection provided is absolute. Absolute privilege is rare. Legal professional privilege, which protects communications between a lawyer and a client from disclosure, is absolute (unless expressly abrogated by legislation) because it is always considered to be in the interests of justice for a client to make a full disclosure to their legal representative, with the assurance of confidentiality, and to in turn receive fully informed legal advice.

Introduction of an absolute journalist privilege in Queensland would mean there would be no mechanism for a court to compel the disclosure of the identity of a journalist's source. There would be no question of balancing the public interest in the ability for journalists to access sources and communicate facts and opinions to the public against the public interest in the court having before it all relevant information in the interests of justice; the journalist privilege from disclosure would be absolute.

### *Law in other jurisdictions*

Shield laws, in the form of journalist privilege, in other Australian jurisdictions operate as a qualified privilege (no jurisdiction has an absolute privilege). Legislation in all jurisdictions except Tasmania provides that a journalist cannot be compelled to disclose the identity of a confidential source unless the court is satisfied that requiring the disclosure is justified by overriding public interest considerations.

Tasmania has a different legislative framework that is not specific to journalists. These protections apply to a person who receives confidential information while acting in a professional capacity. Tasmanian law does not presume that the professional confidential relationship privilege applies, but rather provides that the court may, on a case by case basis, direct that evidence not be adduced in a proceeding if it would disclose a confidential information.

### Questions

1A. Should shield laws in Queensland take the form of qualified or absolute privilege? Why?

# Applying the shield

## Who may use the shield to protect a source?

### Definition of journalism

There has been a notable shift in recent years away from traditional forms of news towards new and innovative modes and methods of communication. This shift has allowed a wide variety of people to publish news and information, changing who is considered to be a journalist. The traditional concept of a journalist is a professional employed by a media organisation to produce content for publication by that organisation. However, as the nature of journalism has evolved it is recognised that freelancers, academics, citizen journalists, and others play a role in public interest journalism. This shift raises the complex issue of what is journalism, and in turn who should be protected by shield laws.

A broad definition of journalist recognises that news may be presented in a variety of styles and formats using a range of technologies, and aims to apply equal protection to all styles, mediums, and technologies. However, a broad definition may raise concerns about shield laws applying to individuals who are not part of a community of practice and are not subject to common ethical or professional standards.

The ordinary meaning of journalism is defined by the Macquarie Dictionary as the business or occupation of writing, editing, and producing photographic images for print media and the production of news and news analysis for broadcast media. A journalist is defined as someone who is engaged in journalism.

### Other Queensland laws

Under the *Public Interest Disclosure Act 2010* a journalist is currently defined as a person engaged in the occupation of writing or editing material intended for publication in the print or electronic news media.

### Law in other jurisdictions

For the purpose of shield laws, Commonwealth and Australian Capital Territory (ACT) legislation defines a journalist as a person who is engaged and active in the publication of news and who may be given information by a source with the expectation that the information may be published in a news medium.

The legislation in New South Wales (NSW), South Australia (SA), and Western Australia (WA) defines a journalist as a person engaged in the profession or occupation of journalism in connection with the publication of information in a news medium. Legislation in Victoria uses a very similar definition but extends the definition to include those involved in the publication of comment, opinion, or analysis as well as information in a news medium. Victoria also requires the court to consider the following factors when determining whether a person is engaged in the profession or occupation of journalism:

- whether a significant proportion of the person's professional activity involves collecting and preparing information having the character of news or current affairs, or commenting or providing opinion on or analysis of news or current affairs;
- whether the information, comments, opinion or analysis is regularly published in a news medium; and
- whether the person or publisher of the information, comment, opinion or analysis is accountable to comply with recognised journalistic or media professional standards or codes of practice.



The Northern Territory (NT) takes a different approach, defining a journalist as a person who obtains new or noteworthy information about matters of public interest and deals with the information by preparing the information or providing comment, opinion or analysis of the information for a news medium.

Because the Tasmanian framework is not specific to journalists, it does not include a definition of journalist.

## Extending the shield to other parties

The shift away from traditional forms of news has also changed the way journalists are employed, and raises complex issues regarding whether shield laws should be extended beyond the journalist to persons they work with or who engage them.

In the course of investigating issues and preparing information for publication in a news medium, it may be necessary for a journalist to disclose the identity of a source, or information that could identify the source, to a manager, editor, employer, or contracting party. The application of shield laws to persons associated with the work of the journalist may be necessary to ensure the protection of the source's identity.

### *Law in other jurisdictions*

Commonwealth, NSW, ACT, Victorian and NT legislation provides that the journalist's employer may also use the shield to protect the identity of the journalist's source. WA uses slightly different terminology applying the shield to a person for whom the journalist was working at the time the promise of confidentiality was made.

SA takes a broader approach, providing that the shield applies to:

- an employer of the journalist;
- a person who engaged the journalist under a contract for services; or
- any other person prescribed by the regulation.

The Tasmanian framework is not specific to journalists; the protections apply to a person who receives confidential information while acting in a professional capacity who is under an express or implied obligation not to disclose the information.

### Questions

- 2A.** How should a journalist be defined for the purpose of shield laws in Queensland? Why?
- 2B.** Should there be specific matters that must be considered when determining whether a person is a journalist? Why or why not?
- 2C.** Should there be a requirement that to rely on the shield laws the journalist must comply with a recognised code of conduct/practice? Why or why not?
- 2D.** Should the definition of journalist for the purpose of shield laws be consistent with the definition of journalist for a public interest disclosure? Why or why not?
- 2E.** Should shield laws be extended beyond the journalist to others involved in the publication of information in a news medium? If yes, who should be protected?
- 2F.** Are there any specific matters that should be considered in developing the legislative framework for shield laws in relation to the definition of a journalist, and who the shield laws should apply to?

## Who is a source?

The new and innovative modes and methods of communication, and the range of people engaged in 'journalism' has also changed the way journalists seek and obtain information. This raises issues regarding who is protected as a confidential source.

### *Law in other jurisdictions*

Commonwealth, NSW, ACT, Victorian, SA and WA legislation defines a source (informant) as a person who gives information to a journalist in the normal course of the journalist's work with the expectation the information may be published in a news medium. The NT takes a different approach defining a source (informant) as a person who provides new or noteworthy information to a journalist for use in a news medium.

Because the Tasmanian framework is not specific to journalists, the definition of a protected confider is much broader and means any person who makes a protected confidence. That is, a person who communicates in confidence with another person in a course of a relationship in which that person was acting in a professional capacity and was under an express or implied obligation to not disclose the content of the communication.

#### Questions

- 3A.** How should a source (informant) be defined for the purpose of shield laws in Queensland? Why?
- 3B.** Are there any specific matters that should be considered in developing the legislative framework for shield laws in relation to the definition of a source (informant)?

## What is news medium?

Shifts in communication styles and formats, in conjunction with considerations about what constitutes journalism, raises the issue of what is 'news', and what published material the shield should apply to.

Traditionally news has been conceptualised as information published in a newspaper, or on television or radio. However, with technological changes, news is being reported in a wide range of electronic formats, from online newspapers to blog sites and social media feeds, and by a wide range of publishers, from large media organisations to individuals.

### *Law in other jurisdictions*

Commonwealth, NSW, ACT, Victoria, SA and WA legislation defines news medium for the purpose of shield laws as a medium for the dissemination to the public, or a section of the public, of news and observations on news. The NT takes a different approach defining news medium as any medium for the dissemination of information to the public or a section of the public.

Because the Tasmanian framework is not specific to confidential disclosures and sources in the context of journalism, it does not include a definition of news medium.

#### Questions

- 4A.** How should news medium be defined for the purpose of shield laws in Queensland? Why?
- 4B.** Are there any specific matters that should be considered in developing the legislative framework for shield laws in relation to the definition of news medium?

# Shielding a source in court proceedings

A shield in the form of a qualified privilege would mean that a journalist could be compelled by a court to disclose the identity of a confidential source. This raises complex issues regarding the application of the shield in different types of court proceedings, the process for overriding the shield, what test should be applied in determining whether to override the shield, and what protections may be necessary if an order/decision is made to override the shield.

The issues relating to the application of shield laws in other contexts, such as commissions of inquiry and coronial proceedings, are discussed in the following sections of the discussion paper.

## Court proceedings

Courts deal with both criminal and civil matters. Criminal proceedings deal with crimes such as violence against another person, theft, damage to property, fraud, and corruption. Civil proceedings deal with disputes between two or more parties (individuals or organisations) where one party sues the other, usually for compensation for harm done or loss sustained. These different types of court proceedings raise the issue as to whether the shield protecting the source should apply to both criminal and civil proceedings.

The identity of a confidential source may be relevant in criminal proceedings in relation to an accused person seeking to obtain information important to establishing their innocence, or the police or prosecuting authority seeking to obtain evidence about the commission of a crime.

In civil proceedings, the identity of a confidential source may be particularly relevant in defamation proceedings where the identity of the source may be important to determine the reliability of the information, whether there was any malicious intent, and to progress a separate claim in defamation against the source.

Courts dealing with criminal and civil matters are traditionally bound by the rules of evidence; the rules and legal principles that govern what information may be presented to the court and how the information may be presented. However, courts are not always bound by the rules of evidence, for example Magistrates Courts hearing proceedings relating to domestic violence orders are not bound by the rules of evidence.

### *Law in other jurisdictions*

In NSW, Victoria, NT and Tasmanian evidence laws, including shield laws and laws for a professional confidential relationship privilege, apply to all proceedings in the state and territory Supreme Courts and any other court created by the parliament, including any person or body that is required to apply the laws of evidence in exercising a function under the law of the state or territory. In the ACT, evidence laws apply, including shield laws, to all proceedings in the Supreme Court or Magistrates Court, and any person or body that is required to apply the laws of evidence in exercising a function under the law of the ACT.

Similarly, Commonwealth journalist shield laws apply to proceedings in the High Court and any other court created by the Commonwealth Parliament, including any person or body required to apply the laws of evidence in performing a function or exercising a power under a law of the Commonwealth.

SA and WA take different approaches. SA evidence law, including journalist shield laws applies to every proceeding before any court, including a tribunal, authority, or person with judicial or quasi-judicial powers, or with authority to make any inquiry or to receive evidence. In WA, evidence law, including shield laws, applies to every legal proceeding including, any action, trial, inquiry, cause, or matter, whether civil or criminal, in which evidence is or may be given.

## Questions

- 5A.** In which types of court proceedings should shield laws apply? Why?
- 5B.** Should shield laws apply in court proceedings that are not bound by the rules of evidence, such as proceedings for domestic violence orders? Why or why not?

## Overriding the shield

### Initiating consideration of overriding the shield

Allowing the court to override the shield and order a journalist to disclose the identity of a source, raises the issue as to when a court should consider overriding the shield. It is likely that in most court proceedings where issues regarding overriding the shield arise, the opposing party would be seeking the disclosure of the source's identity. In these circumstances the court's consideration of whether the shield should be overridden could be initiated by an application from the party seeking the disclosure. However, there may be other circumstances where it may be appropriate for a court to consider on its own motion whether an order should be made ordering disclosure, such as if the parties are not legally represented and may not understand the operation of the shield law.

### *Law in other jurisdictions*

Commonwealth, NSW, ACT, Victorian and NT legislation provide that a court may order overriding the shield after receiving an application from a party to the proceeding. SA legislation also allows the court to make an order on its own motion if all parties to the proceedings are not legally represented, or the court is one that does not make orders on the application of parties.

Tasmanian legislation provides that the court may give a direction that confidential information may not be adduced on its own motion or after receiving an application from the protected confider or confidant.

The legislation in WA does not prescribe the circumstances in which a court may make an order overriding the shield.

### Balancing test

Allowing the court to override the shield protecting the identity of a confidential source also raises issues regarding what the court should consider in determining whether to order the disclosure of the identity of a confidential source.

Shield laws in the form of a qualified privilege require the court to balance competing interests to determine if a journalist should be compelled to disclose the identity of the source.

On one hand are interests concerning sources and a free press. Given that the source provided information on the condition of confidentiality, any likely adverse effects on them, or other persons such as their family, would be relevant considerations. The public interest in a free press and the ability for journalists to access sources and information would also be relevant considerations.

On the other hand, is the public interest in a court having before it all relevant information in the interests of justice. Relevant considerations would vary according to each particular case, but may include the nature of the information provided by the source, the manner in which the information was obtained, whether the evidence could be obtained without compelling the journalist to disclose the identity of the source, the nature of the proceeding (criminal or civil), the parties' right to know all relevant information to protect their right to a fair hearing, and the seriousness of the charge in a criminal proceeding.

## ***Law in other jurisdictions***

Commonwealth, NSW, ACT, Victorian and NT legislation provides that a court may order that shield laws do not apply if having regard to the issues to be determined in the proceeding, the court is satisfied the public interest in disclosing the identity of the source outweighs:

- any likely adverse effect of the disclosure on the source or anyone else;
- the public interest in the news media communicating facts and opinions to the public; and
- the need for the news media to be able to access information held by potential sources.

WA, Tasmania and the NT also require the court to consider a range of factors when determining whether to override the shield. In WA and Tasmania factors that must be considered include:

- the value of the confidential evidence;
- the importance of the confidential evidence;
- the nature and gravity of the relevant offence, cause of action or defence, and the nature of the subject matter of the proceeding;
- the availability of any other evidence concerning the same matters as the confidential evidence;
- the likely effect of disclosing the confidential evidence, including the likelihood of harm, and the nature and extent of harm that would be caused to the source or any other person;
- the means available to the court to limit the harm or extent of the harm likely to be caused if the confidential evidence is disclosed;
- the likely effect of the confidential evidence in relation to a prosecution that has commenced but not finalised and investigations into whether an offence has been committed;
- whether the substance of the confidential evidence has already been disclosed by the source or any other person;
- whether or not there was misconduct on the part of the source or journalist in relation to obtaining, using, giving or receiving information.

In the NT the court must consider whether the information given to the journalist is a matter of public interest, and how the journalist used the information, including whether the journalist verified the information, and used it in a fair and accurate manner that minimised undue harm to any person.

## **Conditions and restrictions**

A decision to override the shield and compel the disclosure of a confidential source's identity, may have implications for the source, including potential risks to their safety or their family. Consequently, mechanisms to protect the source's identity to the greatest extent possible is an important consideration when compelling a journalist to disclose the information. This may involve limiting who may be present to hear the relevant evidence, such as by closing the court to the public, media or certain persons, and restricting what may be done with the information, such as prohibiting the further disclosure or publication of the source's identity. However, any restrictions need to be balanced against the potential impacts on the parties' human rights, such as their right to a public hearing and the right to freedom of expression, including imparting information and ideas.

## ***Law in other jurisdictions***

Commonwealth, NSW, ACT, Victoria and NT legislation provides a court order overriding the shield may be made subject to any terms and conditions the court thinks fit. SA legislation similarly provides that the court may make any ancillary order the court thinks is appropriate.

Legislation in WA and Tasmania provides similar protections using a slightly different approach, stating that the court may, without limiting any other action it may take to limit harm, order all or part of the confidential evidence be heard in camera and make orders relating to suppressing publication of confidential evidence to protect the source's safety and welfare and are in the interests of justice.

## Giving reasons

Allowing parties to a proceeding to apply to the court for an order overriding the shield and compelling the disclosure of a source's identity raises the issue as to whether the court should be required to provide reasons for making, or refusing to make, an order compelling the disclosure.

At common law a decision-maker is usually required to give sufficiently detailed reasons so as to enable a person affected by a decision to understand why the decision was made. Giving reasons for a decision serves a number of purposes, including:

- allowing parties to see the extent to which their arguments were understood and accepted;
- allowing parties, and any relevant appellate court, to see the basis for the decision;
- fostering judicial accountability; and
- facilitating certainty in the law by assisting interested parties, such as legal practitioners, to see how similar cases may be decided.

### *Law in other jurisdictions*

Legislation in WA requires the court to state the reasons for giving, or refusing to give, a direction that information identifying the source must be given in a proceeding (there is no express requirement for the reasons to be given in writing).

The Tasmanian framework for professional confidential relationship privilege also requires the court to state the reasons for giving, or refusing to give, a direction that confidential information must not be given (there is no express requirement for the reasons to be given in writing). Similar legislation in NSW and ACT regarding professional confidential relationship privilege also require the court to give reasons for giving, or refusing to give, a direction that confidential evidence not be disclosed, but this requirement has not been extended to the shield law framework in these jurisdictions.

### Questions

- 6A.** In what circumstances should the court consider overriding the shield? Why?
- Should the court be permitted to make an order overriding the shield on its own motion?
  - Should a person, other than the parties to the proceeding, be permitted to make an application for an order to override the shield?
- 6B.** What test or criteria should the court apply when considering whether to make an order overriding the shield?
- 6C.** What restrictions, if any, should be imposed when an order overriding the shield is made?
- 6D.** Should there be specific factors that the court must (or must not) consider when determining whether to make an order overriding the shield? Why or why not?
- 6E.** If the court decides to override the shield what factors should be considered in determining whether to impose terms and conditions on the order?
- 6F.** If the court decides to override the shield and compel the journalist to disclose the identity of the source, should the court be permitted or obligated to consider imposing terms and conditions on the order to protect the source's safety and welfare? Why or why not?
- 6G.** Should the court be obliged to give reasons for making, or refusing to make, an order that the shield be overridden? Why or why not?
- 6H.** Are there any other matters that should be considered in developing the legislative framework for shield laws in relation to overriding the shield?

## Consent

The principle underlying shield laws is the protection of the identity of the journalists' sources. This raises the issue as to whether the source can later choose to be identified.

While a source may originally give information to a journalist on the condition of confidentiality, they may later reconsider this position, particularly if their identification could be significant in a court proceeding. A source may choose to self-identify, publicly disclosing that they are the source of the information, removing the need for a journalist to maintain confidentiality regarding their identity, or may give permission to the journalist to disclose their identity in a publication or in a court proceeding.

### *Law in other jurisdictions*

Legislation in WA expressly provides that the shield laws do not prevent the disclosure of confidential evidence with the consent of the source.

The Tasmanian framework for professional confidential relationships also provides that the protection of confidential information does not prevent evidence being given with the consent of the source. Similar legislation in NSW and ACT regarding professional confidential relationships also provides that the protection of confidential information does not prevent evidence being given with the consent of the source, but this has not been extended to the shield law framework in these jurisdictions.

### Questions

- 7A.** Should the confidential source be able to waive confidentiality, and have their identity disclosed with their consent? Why or why not?
- 7B.** Are there any other matters that should be considered in developing the legislative framework for shield laws in relation to the confidential source self-identifying or agreeing to the disclosure of their identity?

## Shielding a source in other contexts

A shield in the form of qualified privilege introduces a presumption against a journalist being compelled to disclose the identity of a confidential source. This raises complex issues regarding whether the protection of the shield should apply beyond criminal and civil proceedings, such as preliminary court proceedings, coronial inquests, and crime and corruption investigations.

### Preliminary proceedings and investigations

Before a criminal or civil court proceeding commences there are a range of pre-hearing processes that require the disclosure of information, which may include the information about the identity of a confidential source. These processes include:

- subpoenas and summonses, which require a person to attend court in civil or criminal proceedings to provide documents or give evidence;
- pre-trial disclosure duties, which require a party to a proceeding to disclose to the other party certain information directly relevant to an allegation in issue and;
- notices of non-party disclosure, which require a person who is not a party to a civil proceeding to produce specific documents before the trial begins; and
- interrogatories, which require a party to a civil proceeding to answer specific questions before the trial.

In some circumstances a person required to disclose information may object to producing the documents or giving evidence. For example, a person served with a subpoena or summons may object to producing the documents or giving evidence if the information is not relevant to the proceedings, the document is subject to legal professional privilege or it would be against the state or public interest.

Information containing the identity of a source may also be obtained by search warrants, which authorise police officers to enter premises and search for and seize evidence specified in the warrant relevant to criminal offences.

The fact that pre-hearing and investigatory processes may require a journalist to provide documents or other evidence that discloses the identity of a confidential source raises the issue as to whether shield laws should apply to some or all pre-hearing and investigatory processes.

### *Law in other jurisdictions*

Under the legislative frameworks in the Commonwealth, NSW, Victoria, ACT, NT and Tasmania a journalist who is required by a disclosure requirement to provide information or a document that would disclose a source's identity may object to providing the information or document. The objection must be considered by a court as though the objection was an objection to giving evidence in a proceeding. A disclosure requirement is defined as a court process or order that requires the disclosure of information or a document, including summons, subpoena, pre-trial discovery, non-party discovery, interrogatories, a notice to produce, and a request to another party to produce a document. Victorian legislation also expressly provides that a search warrant is a disclosure requirement.

The legislation in SA and WA does not extend shield laws to preliminary court proceedings or investigations.



## Questions

- 8A.** Should shield laws apply to protect the identity of a confidential source in preliminary court proceedings and/or investigation processes? Why or why not?
- Should shield laws apply in relation to subpoenas and summonses?
  - Should shield laws apply in relation to pre-trial disclosure duties?
  - Should shield laws apply in relation to notices of non-party disclosure?
  - Should shield laws apply in relation to interrogatories?
  - Should shield laws apply in relation to search warrants?
  - Should shield laws apply in relation to any other preliminary court proceeding or investigation processes?
- 8B.** If shield laws were to apply to preliminary proceeding and/or investigation processes how should the process for the journalist asserting the application of the shield laws operate?
- 8C.** In relation to investigation processes, such as search warrants, what, if any, mechanisms should there be to protect the evidence while the application of shield laws is determined?
- 8D.** Are there any other matters that should be considered in developing the legislative framework for shield laws in relation to preliminary proceedings and investigations?

## Coronial investigations and inquests

Coroners in Queensland are responsible for conducting investigations and inquests into reportable deaths, including deaths that occur in custody or during police operations, are health-care related, occur in suspicious circumstances, or are violent or otherwise unnatural. A coronial inquest may also be held if directed or ordered by the Attorney-General, District Court or the State Coroner, or if it is otherwise in the public interest. Investigations and inquests seek to determine the medical cause of death and the circumstances surrounding the death.

During an investigation, the coroner may require a person to give them information, a document, or other item relevant to the investigation. Failing to comply with a requirement, without a reasonable excuse, is an offence punishable by a fine of up to \$4,003 (30 penalty units). During an investigation a person may refuse to provide information, a document, or other item if doing so would tend to incriminate them.

In conducting an inquest, the Coroners Court Queensland (CCQ) is not bound by the rules of evidence and may inform itself in any way it considers appropriate. The CCQ may require a person to produce a document or other item and may order a person to attend an inquest to give evidence as a witness and to take an oath or answer a question. Failing to comply with an order of the CCQ, without a reasonable excuse, is an offence.

The CCQ has exceptional powers and may require a witness to give evidence, even if that evidence may incriminate them, if the coroner is satisfied it is in the public interest. However, safeguards apply to any such evidence; it is not admissible in any other proceeding, other than a proceeding for perjury against the witness; and derivative evidence obtained as a result of the evidence is not admissible against the witness in a criminal proceeding.

The different functions of coroners and the CCQ, the exceptional powers of the CCQ, and the fact that the rules of evidence do not apply in coronial inquests raise the issue as to whether shield laws should apply to coronial investigations and inquests. In particular, consideration must be given to whether shield laws should apply to protect the identity of a confidential source, if the privilege of self-incrimination does not apply to protect a witness from giving evidence that incriminates them.

## Law in other jurisdictions

The coroner's legislative framework in Victoria provides that shield laws, as well as the privilege against self-incrimination, apply to coronial investigations and inquests.

In NSW, the coroner's legislative framework provides that a person is not required to produce a document or other thing to assist the coroner in an investigation if they would be entitled on grounds of privilege, including shield laws and the privilege against self-incrimination, to refuse to produce the document or other thing in a court. However, in a coronial inquest the coroner is not bound by the rules of evidence and may be informed and conduct an inquest in any matter the coroner reasonably thinks fit, including requiring a witness to give evidence that may incriminate them if it is in the interests of justice to require that the witness give the evidence.

The coronial legislative frameworks in Tasmania, WA, SA, NT and ACT provide that the coroner is not bound by the rules of evidence in a coronial inquest and may be informed and conduct an inquest in any matter they reasonably think fit. However, the power to require a witness to give evidence varies between the jurisdictions. In Tasmania a witness may refuse to answer a question or comply with a direction if they have a reasonable excuse, however reasonable excuse is not defined. In WA, NT and ACT a witness may be required to give evidence that may incriminate them if it is in the interests of justice to require that the witness give the evidence, noting that safeguards are in place restricting the subsequent use of the evidence. In SA, a person is not required to answer a question, or to produce a record or document in a coronial inquest if doing so would tend to incriminate them.

### Questions

- 9A.** Should shield laws apply to protect the identity of a confidential source in coronial investigations and inquests? Why or why not?
- 9B.** Are there any specific matters that should be considered in developing the legislative framework for shield laws in relation to coronial investigations and inquests?

## Commissions of inquiry

A commission of inquiry is a temporary body established by the Governor in Council to investigate matters of public concern. Commissions of inquiry are aimed at encouraging transparency through fact finding and, if necessary, providing input for future investigations.

A commission of inquiry is not bound by the rules of evidence and may inform itself on any matter in any way it considers appropriate. The chairperson of a commission of inquiry may require a person to produce documents, records, property or other things, to attend before an authorised person to give evidence and answer questions, and to summon a witness to give evidence. Failing to comply with a requirement of the chairperson, without a reasonable excuse, is an offence.

Commissions of inquiry have exceptional investigatory powers, and a person attending before a commission is not entitled to remain silent, refuse to answer any question, or refuse to produce documents, record, property, or other things on the ground that to do so might tend to incriminate them. Some safeguards apply to the use of the evidence that might tend to incriminate the person. A statement or disclosure made in answer to a question is not admissible in any proceeding, other than a proceeding about conspiracy to commit an offence, contempt of the commission, and certain offences relating to the administration of justice such as perjury, fabricating evidence, and deceiving witnesses. However, documents records, property or other things produced by the person may be admissible in evidence against them in a proceeding.

The different functions of commissions of inquiry, their exceptional powers, and the fact that the rules of evidence do not apply in their investigations raise the issue as to whether shield laws should apply to commissions of inquiry. In particular, as witnesses appearing in relation to a commission of inquiry may not claim the privilege of self-incrimination, should shield laws should apply to protect the identity of a confidential source.

### **Law in other jurisdictions**

The legislative frameworks in relation to commissions of inquiry vary significantly between states and territories. Generally, commissions may inform themselves on any matter as they see fit, are not bound by the rules of evidence, and have exceptional powers to conduct inquiries. The legislation provides that a commission may require a person to give evidence at a hearing or produce documents or other things.

The Commonwealth, Victorian, ACT, SA, WA, NT and Tasmanian legislation does not afford protection to a witness who refuses to answer a question or produce a document or thing on the ground of that providing the evidence might tend to incriminate them.

The NSW legislative framework distinguishes between commissions chaired by a current or former Judge or Justice and those chaired by other persons. For commissions chaired by a current or former Judge or Justice, the legislation provides that a person is not excused from answering a question or producing a document or other thing on the ground of that providing the evidence might tend to incriminate them, or on the ground of privilege. For commissions chaired by other persons, the legislation provides that it is a reasonable excuse for a person to refuse to answer any question or produce any document or other thing if they would be excused from providing the evidence if summoned as a witness before a court.

## **Crime and Corruption Commission**

The Queensland Crime and Corruption Commission (CCC) is a statutory body with functions to prevent and investigate major crime, such as drug trafficking, fraud and money laundering, and allegations of corrupt conduct in state government departments, public sector agencies and statutory bodies, the Queensland Police Service (QPS), local governments, government-owned corporations, universities, prisons, courts, tribunals and elected officials. The CCC also has functions relating to confiscation of the proceeds of crime and witness protection.

The CCC has extensive coercive powers in conducting crime and corruption investigations, including powers to require a person to give an oral or written statement of information or produce a document or thing, and to attend before the CCC at a hearing to give evidence or produce a document or thing. Failing to comply with a requirement to give an oral or written statement, give evidence, or produce a document or thing may be an offence even if providing the evidence may tend to incriminate the person.<sup>2</sup>

Generally, safeguards will apply to the use of the evidence that might tend to incriminate a person; it is not admissible in any other proceeding, other than a proceeding about the falsity or misleading nature of the evidence, document or thing, contempt in relation to a hearing, or an offence under the *Crime and Corruption Act 2001*. However, information, documents or other things obtained as a result of the person giving the evidence may be admissible in evidence against them in a proceeding.

In conducting a hearing, the CCC is not bound by the rules of evidence and may inform itself in any way it considers appropriate.

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<sup>2</sup> The *Crime and Corruption Act 2001* provides for the review/appeal of some decisions to require evidence to be given.

The different functions of the CCC, the exceptional powers of the CCC, and the fact that the rules of evidence do not apply to CCC examinations raises the issue as to whether shield laws should apply to CCC investigations, particularly having regard to the approach in relation to the abrogation of the privilege against self-incrimination.

### **Law in other jurisdictions**

The legislative framework in relation to the various crime, corruption and integrity commissions, including the application of shield laws, varies significantly between states and territories.

In Victoria, the legislative framework expressly provides that shield laws do not apply to an investigation undertaken by the Independent Broad-based Anti-corruption Commission.

In NSW and SA, the legislation does not afford protection to a witness who refuses to answer a question or produce a document or thing on the ground of privilege. The corruption commission legislative framework in WA also does not provide for the application of privilege in relation to the exercise of the WA Corruption and Crime Commission functions.

In the NT, the corruption commission legislative framework provides that no obligation of secrecy or confidentiality or other restriction on disclosing information applies to giving evidence, and no privilege exists to protect the refusal to give evidence on grounds of public interest immunity. A witness is also not entitled to refuse to give evidence on the ground that it might tend to incriminate them.

In Tasmania and the ACT, a person may claim privilege, including legal professional privilege, journalist privilege/professional communication privilege and self-incrimination privilege, in relation to a requirement to answer a question, provide information, or produce a record, material or thing. A person issued a notice to comply despite the claim of privilege may make application to the Supreme Court, for the Court to determine the claim of privilege.

### **Questions**

- 10A.** Should shield laws apply to protect the identity of a confidential source in CCC investigations? Why or why not?
- 10B.** Are there any specific matters that should be considered in developing the legislative framework for shield laws in relation to CCC investigations?

## **Tribunals and other decision-making bodies**

A range of tribunals and other decision-making bodies, such as the Queensland Civil and Administrative Tribunal and Industrial Relations Commission, hear and decide a range of matters. These bodies are generally not bound by the rules of evidence and may inform themselves in any way they consider appropriate.

The different functions of tribunals and other bodies, and the fact that the rules of evidence do not apply in their proceedings raises the issue as to whether shield laws should apply.

### **Law in other jurisdictions**

The Commonwealth and all other states and territories have various legislative frameworks for a range of tribunals and decision-making bodies.

All Australian jurisdictions except Tasmania have a primary civil and administrative tribunal broadly equivalent to the Queensland Civil and Administrative Tribunal. These tribunals are not bound by the rules of evidence and may inform themselves in any way they consider appropriate. However, the frameworks for the functions, powers, and practices of the tribunals vary.

The Commonwealth and WA legislation provides that a person directed by the relevant tribunal to lodge a statement or document must comply with the direction notwithstanding any rule of law relating to privilege or the public interest in relation to the production of documents.

Conversely, in NSW the legislation does not require the disclosure of a document that is subject to privilege, including journalist privilege, if the tribunal is satisfied the document could not be presented in court proceedings because of the operation of the relevant privilege. The same protection does not apply to answering questions in a tribunal proceeding.

### Questions

- 11A.** Should shield laws apply to protect the identity of a confidential source in hearings conducted by tribunals or other decision-making bodies? Why or why not? If shield laws should apply, in which tribunals or other bodies should they apply?
- 11B.** Are there any specific matters that should be considered in developing the legislative framework for shield laws in relation to tribunals and other decision-making bodies?

## Practical approach to introducing a shield

The introduction of any new legislation raises practical and legal issues of how best to transition to the new legislative framework. Key issues include whether the shield should be applied to:

- information disclosed to a journalist prior to the commencement of new laws;
- proceedings and other processes that have begun prior to the commencement of new laws; and
- disclosure requirements that are issued or are in force for a particular matter prior to the commencement of new laws,

There is a general common law principle against the retrospective operation of laws. Retrospective laws that interfere with the exercise of judicial power, such as by altering the law of evidence, may also be unconstitutional.<sup>3</sup>

### Law in other jurisdictions

The Commonwealth, NSW, ACT, WA, NT and Tasmanian legislation provides that the protections under shield laws apply to information that was provided by a source before or after the legislation was enacted, but did not apply to court proceedings that commenced before the enactment.

In Victoria and SA, the protections were extended to court proceedings that commenced before the legislation was enacted.

### Questions

- 12A.** Should shield laws apply to information disclosed by a confidential source before the shield laws begin? Why or why not?
- 12B.** Should shield laws apply to proceedings or investigations commenced before the shield laws begin? Why or why not?
- 12C.** Are there any specific matters that should be considered in developing the legislative framework for shield laws in relation to when the information was disclosed and when relevant proceedings or investigations commenced?

<sup>3</sup> *Liyanage v The Queen* [1967] AC 259; approved in *Australian Building Construction Employees' and Builders Labourers' Federation v Commonwealth* (1986) 161 CLR 88, 96

## Other matters

The *Human Rights Act 2019* (HR Act) protects 23 fundamental human rights recognised under international law. One of the main objects of the HR Act is to protect and promote human rights in Queensland. Under the HR Act parliament must consider human rights when proposing and scrutinising new laws.

The Queensland Government's human rights strategy sets a vision for a modern, fair, and responsive Queensland where we respect, protect, and promote human rights.

The introduction of shield laws in Queensland may engage a range of human rights, such as freedom of expression, right to privacy and reputation, and the right to a fair trial.

### Questions

**13A.** What issues regarding human rights should be considered in developing the legislative framework for shield laws?

# Attachment 1. Legislation in other jurisdictions

## Commonwealth

- *Evidence Act 1995*
- *Royal Commission Act 1902*

## Australian Capital Territory

- *Coroners Act 1997*
- *Evidence Act 2011*
- *Integrity Commission Act 2018*
- *Royal Commissions Act 1991*

## New South Wales

- *Coroners Act 1980*
- *Evidence Act 1995*
- *Independent Commission Against Corruption Act 1988*
- *Royal Commissions Act 1923*

## Northern Territory

- *Coroners Act 1993*
- *Evidence (National Uniform Legislation) Act 2011*
- *Independent Commissioner Against Corruption Act 2017*
- *Inquiries Act 1945*

## South Australia

- *Coroners Act 2003*
- *Evidence Act 1929*
- *Independent Commissioner Against Corruption Act 2012*
- *Royal Commissions Act 1917*

## Tasmania

- *Commissions of Inquiry Act 1995*
- *Coroners Act 1995*
- *Evidence Act 2001*
- *Integrity Commission Act 2009*

## Victoria

- *Coroners Act 2008*
- *Evidence Act 2008*
- *Independent Broad-based Anti-corruption Commission Act 2011*
- *Inquiries Act 2014*

## Western Australia

- *Coroners Act 1996*
- *Evidence Act 1906*
- *Royal Commissions Act 1968*