

# Results of consultation

## Shield laws discussion paper

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



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# Introduction

The discussion paper entitled *Shielding confidential sources: balancing the public's right to know and the court's need to know* and accompanying online survey were released on 18 June 2021 seeking feedback on the development of shield laws to better protect journalists' confidential sources.

Key stakeholders and the general public were invited to review the discussion paper and make a written submission or complete an online survey to indicate their views on a range of key issues outlined in the discussion paper including:

- the nature of the shield - what form of privilege should the shield law framework take;
- applying the shield - who may use the shield to protect a source;
- shielding a source in court hearings - how the shield should apply in hearings and when should the shield be removed;
- shielding a source in other contexts - what contexts, other than court hearings, should the shield apply to;
- the practical approach to introducing a shield - what transitional arrangements should apply to the introduction of shield laws; and
- other matters relevant to shield laws such as human rights considerations.

Consultation closed on 13 July 2021.

This report summarises the survey results and feedback from written submissions.

## Summary

The online survey had 18 respondents, all of whom were individual community members, and 16 written submissions were received from a wide range of stakeholders.

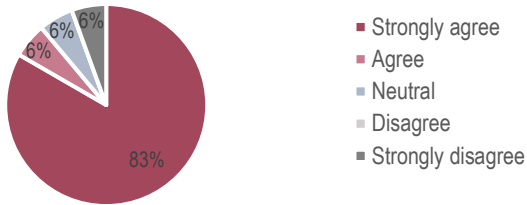
Submission no.	Submitter	Abbreviation
1	Confidential	-
2	Australian Press Council	APC
3	Queensland University of Technology Digital Media Research Centre	QUT – DMRC
4	Human Rights Law Centre	HRLC
5	Crime and Corruption Commission	CCC
6	Dr Rebecca Ananian-Welsh, Anna Kretowicz, Associate Professor Jason Bosland, and Professor Katharine Gelber	Dr Ananian-Welsh et al
7	Alliance for Journalists' Freedom	AJF
8	Australia's Right to Know	ARTK
9	Media, Entertainment and Arts Alliance	MEAA
10	Mr GH Chamberlin	-
11	Public Interest Journalism Initiative and Centre for Advancing Journalism	PIJI and CAJ
12	Queensland Council for Civil Liberties	QCCL
13	Queensland Law Society	QLS
14	Queensland Police Service	QPS
15	Confidential	-
16	Confidential	-

# General feedback

There was overall support for the introduction of shield laws in Queensland.

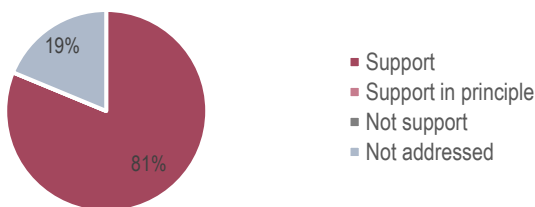
## Survey

The majority of survey respondents, 89 percent, supported the introduction of shield laws in Queensland.



## Submissions

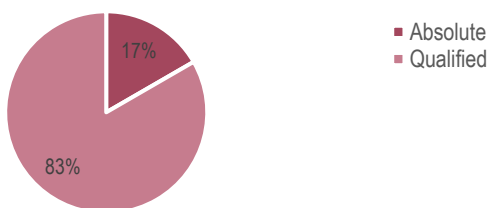
The majority of submitters supported the introduction of shield laws in Queensland. While some submitters did not offer a definite view on the introduction of shield laws, no submitter opposed the laws.



# Nature of the shield

## Survey

The majority of survey respondents indicated that shield laws to protect journalists' confidential sources should be qualified; 17 percent of respondents indicated the privilege should be absolute and not overridden in any circumstance.



## Submissions

The majority of submitters, 70 percent, supported the introduction of shield laws to protect journalists' confidential sources in the form of a qualified privilege.



## Key feedback

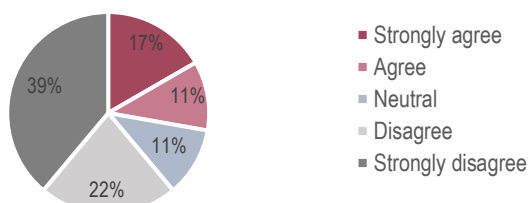
Submitter	Comments
APC	Noted that shield laws in other jurisdictions operate as a qualified privilege and no jurisdiction has absolute privilege. Submitted that there is merit in Queensland shield laws taking the form of qualified privilege, presuming the privilege applies unless a decision is made to the contrary.
HRLC	Acknowledged that shield laws should not give absolute protection, and it may be necessary to reveal a source's identity to protect other fundamental rights such as the right to a fair hearing.  Noted that most jurisdictions prevent the privilege from applying unless the journalist promised confidentiality, and that the courts have interpreted this condition narrowly, requiring the promise to be explicit, made in respect of specific information and given prior to the disclosure. Submitted that Queensland adopt a position similar to SA focused on whether the source reasonably expected that their identity would be kept confidential.
CCC	Supported shield law in the form of qualified privilege, and submitted it is appropriate that a court or other decision-maker balance the competing public interests surrounding whether to compel disclosure.
Dr Ananian-Welsh et al	Submitted that a qualified privilege in the form of shield laws should be introduced, and that there is no need for shield laws to provide an absolute privilege. A qualified privilege appropriately balances the competing public interests in press freedom and the administration of justice. Once it is established that the shield laws prima facie apply, it will be for the decision-maker to assess whether the privilege should be overridden.
AJF	Recognised that granting journalists and impenetrable shield would be inappropriate, however the law should be explicit in placing the burden on investigators to show why the shield should be removed.
ARTK	Supported a shield in the form of absolute privilege. But, noting that all other Australian jurisdictions have a shield that operates as a qualified privilege, submitted that it would be supportive of qualified privilege.
MEAA	Submitted that MEAA members have an absolute requirement of confidence that must be matched by enshrining absolute privilege for journalists.
PIJI and CAJ	Submitted that shield laws should offer a qualified privilege.
QCCL	Submitted that the law should create a presumptive right to withhold access to information, the departure from which should be justified by the person seeking access.
QLS	Submitted that any protections should be in the form of a qualified privilege to enable the court to assess a matter on its individual circumstances and act as a check and balance. Noted the Australian Law Reform Commission statement that 'the fact that the privilege is discretionary, and that parties are able to make an argument as to why the material should be disclosed, will allow a judge to circumvent illegitimate attempts to claim the privilege'.
QPS	Supported a legislated qualified privilege with courts retaining the ability to assess on a case-by-case basis if the identity of a source to be revealed. Noted that no jurisdiction provides an absolute privilege.

# Applying the shield

## Defining journalist

### Survey

The majority of survey respondents, 61 percent, did not support a restricted application of shield laws to journalists required to comply with a recognised code of conduct/practice.

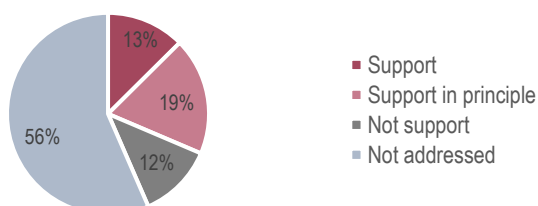


### Submissions

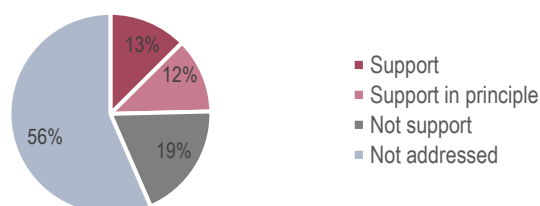
More than half of the submissions, 56 percent, did not address the issue of whether there should be a list of specific matters that must be considered when determining whether a person is a journalist. Of those that did, the majority supported such a list.

Similarly, the majority of submissions, 60 percent, did not address the issue of whether shield laws should only apply to journalists required to comply with a recognised code of conduct. Of those that did, the majority supported applying shield laws only to journalists required to comply with a recognised code.

#### Specific matters to determine a journalist



#### Requirement to comply with recognised code



## Key feedback

Submitter	Comments
APC	<p>Submitted that it would appear sensible to define journalist widely such that it can include contracted and freelance journalists, and that this is important in a time of rapid changes in the media landscape. Noted that the issue of whether bloggers are considered journalists is problematic and that not all bloggers can be considered journalists as not all of them even attempt to adhere to professional standards.</p> <p>Submitted that it is preferable that legal privileges be conditional on assurances that proper professional journalist standards apply and are adhered and to impose a requirement that to rely on shield laws the journalist must be able to demonstrate a commitment to ethical media standards. This could be demonstrated if the journalist writes regularly for publications that belong to the APC or a similar independent standards-setting and complaints-handling body.</p> <p>Noted that in the Privacy Act accessing an exemption is conditional on media organisations being publicly committed to published standards.</p>
QUT - DMRC	<p>Submitted that shield laws should protect the sources of the broad range of people now acting as journalists not just those formally employed as journalists in the traditional sense. Noted that if shield laws only applied to journalists with institutional affiliations they would not protect a significant portion of modern journalists.</p>

HRLC	<p>Submitted that the definition should focus on journalistic activity and encouraged Queensland to adopt the same or similar wording to Commonwealth laws. Adopting this definition would move Australia closer to a nationally consistent source protection framework, and focuses the court's attention on the individual's journalistic output rather than their employment status and organisational links, protects a broad range of individuals engaged in journalism while appropriately withholding the shield from individual's who coincidentally publish news related content, and ensures the definition accommodates changing technologies and communication practices.</p> <p>Submitted that the legislation should not contain additional factors for the court to consider when determining if a person is a journalist, as this may unnecessarily limit the broad drafting of the definition.</p>
CCC	<p>Supported adopting the definition of journalist in Commonwealth and NSW law.</p> <p>Submitted that the assumption that journalists are ethically bound to protect assurances of confidence given to sources is central to the justification for shield laws, and it therefore follows that a journalist should have such a professional obligation in order to take the benefit of the protection. As shield laws are founded in professional obligations, shield laws should not extend protections to those who fall outside that category. If the protections are not confined to journalists and news media, the laws could become practically unworkable.</p> <p>Noted that the actual professional obligations of journalists regarding protecting a source are vague. Where a journalist is not a member of a professional association, not employed by a media organisation, or their employer does not have a code of conduct, there may be no consequence for a journalist who does not honour a promise to keep a source's identity secret.</p> <p>Suggested that media organisations or the MEAA should consider amending their codes to place obligations on journalists to comply with the law and a specific exemption to the obligation of confidentiality to require a journalist to disclose information where legally compelled to do so, which would align journalists with other professions.</p>
Dr Ananian-Welsh et al	<p>Submitted that the qualified nature of the privilege means that a broader definition should be favoured as any over-reach may be addressed through the application of the public interest balancing test. Any definition should be flexible enough to apply in the continually evolving media environment.</p> <p>Submitted that the Commonwealth definition should be adopted in Queensland. This definition is preferred as it:</p> <ul style="list-style-type: none"> <li>• eschews references to profession or occupation, and focuses on the persons journalistic activities and provides the flexibility that modern shield laws require in that it covers newer forms of journalism like blogging where appropriate;</li> <li>• avoids the potential circularity of defining a journalist by reference to journalism;</li> <li>• is well suited to the shield laws context by including reference to an informant/source;</li> <li>• is sufficiently broad to capture a range of newsroom professionals who (although not reporters) may be given information in connection with the journalist's work.</li> </ul> <p>Noted the potential for the Commonwealth definition to be read in a limited way excluding individuals who do not receive information from the informant/source, such as editors, administrative workers, and suggested that it be made clear in Queensland law that such persons are intended to be covered by the definition of journalist.</p> <p>Submitted that they would not oppose the provision of additional guidance to a decision-maker but that a permissive, rather than mandatory, approach is preferable for its flexibility and capacity to broaden rather than constrain decision-makers' flexibility. A person is more likely to be a journalist if a significant proportion of the person's professional activity involves the practice of 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 for dissemination in a news medium. It is also relevant to consider whether the information, comments, opinion, or analysis is regularly published in a news medium.</p>

	<p>Submit that whether a person or publisher is accountable to comply with recognised journalistic or media standards or codes of practice is a consideration but there should be no requirement that a journalist must comply with a recognised code to rely on shield laws or that a decision-maker must take the consideration into account.</p> <p>Noted that the recent draft proposal of the NSW Law Reform Commission's Open Justice review recommends modelling a definition of journalist on Commonwealth shield laws with the addition of guiding consideration.</p> <p>Submitted that concentrating on the behaviour of the journalist as the basis for shield protection could undermine the driving purpose of shield laws. For example, a source who has acted in good faith could find their anonymity compromised because the journalist has behaved unethically or failed to comply with a code of conduct.</p>
AJF	<p>Submitted that journalist should not be defined but rather the process of journalism should be the focus. Proposed that journalism be defined as the practice of investigating, collecting, verifying and/or preparing, or editing, for dissemination of information, commentary, opinion or analysis, including but not limited to news or current affairs; for the purpose of making that information, commentary, opinion or analysis available to the public, or a section of the public; and in respect of which a relevant person or persons abides by a journalists' code of practice, or the organisation for which they work is governed by, or submits to, a journalists' code of practice.</p> <p>Submitted that a key part of the process of claiming privilege should be a commitment to a recognised code of conduct that contains ethical commitments including reporting accurately, fairly and crucially protecting the identity of sources. Noted that such a requirement would offer a powerful incentive for journalists to adhere to those codes and give the public confidence that the codes have meaning.</p> <p>Submitted that the definition of journalist for the purpose of shield laws should be consistent with the definition of a public interest disclosure, suggesting that there is a compelling case for maintaining consistency throughout the statute.</p>
ARTK	<p>Submitted that shield laws be drafted in a way that definitions are useful descriptions but are not determinative, and that a court should decide on a case-by-case basis whether the elements of the shield have been met in the circumstances. Recommended the Commonwealth law as an appropriate reference point.</p>
PIJI and CAJ	<p>Submitted that the definition of a journalist contained in the Commonwealth and ACT law should be adopted, as this definition appropriately defines a journalist by their engagement in news publishing activities and is better suited to the modern news environment. A definition that bases protection on being engaged in the profession or occupation of journalism may exclude freelancers, students, volunteers, academics, and others whose activity and output is otherwise indistinguishable from a full-time reporter. Suggested that if a definition based on engagement in the profession or occupation of journalism is adopted further guidance may assist with the application of the definition such as:</p> <ul style="list-style-type: none"> <li>• professional standards and processes that distinguish journalism from other types of information gathering and publishing including prior verification of facts, application of the harm principle, adherence to the principles of natural justice, following the weight of evidence, and decision-making based on news values and the public interest</li> <li>• whether the person or their employer is subject to a recognised code of conduct or an equivalent standard, as a commitment to a code may indicate they are in the profession of journalism even if it is not their main occupation.</li> </ul> <p>Submitted that additional factors are guidance rather than a prerequisite for accessing the shield.</p> <p>Submitted that the law should be harmonised where appropriate and the definition of journalist in the Commonwealth and ACT laws be adopted as the definition of journalist for public interest disclosure.</p>
QCCL	<p>Submitted that the definition of journalist should be extended beyond the traditional categories but should require some level of regularity and organisation. Suggested that the NT definition provides a useful model.</p>

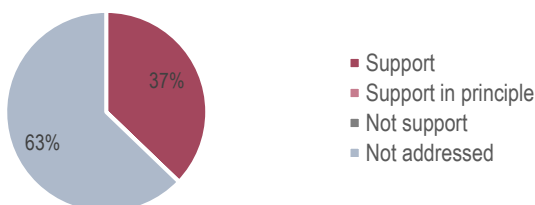


QLS	<p>Submitted that there should be an express definition of journalist in Queensland law that strikes the right balance between being broad enough to be effective and practical in providing the protection and linking the definition to the purpose of this legislation and therefore adding in some qualifiers. Supported consideration of the following in determining an appropriate definition:</p> <ul style="list-style-type: none"> <li>• the fact that the concept of a journalist continues to change over time, and the definition should apply in a technologically neutral way;</li> <li>• a journalist should be included regardless of who they are or in what medium they publish; and</li> <li>• the adverse impacts from a definition that was so broad “that otherwise probative evidence may be excluded from trials”.</li> </ul> <p>Noted that the Commonwealth definition allows a court to assess whether a person is a journalist, broadly, and on a case-by-case basis and that the factors set out in the Victorian legislation have been applied by courts in other jurisdictions to make a determination as to whether someone is a journalist. Submitted that there may be merit in listing the factors to be considered in determining if a person is a journalist in Queensland legislation to give the courts and parties to an application some guidance.</p> <p>Submitted that it may be appropriate to include a requirement that the source had an expectation that the information may be published in a news medium in the definition so that the need for the protection is clear, noting that establishing an expectation might be difficult without evidence from the source.</p> <p>Submitted that there should not be a requirement to comply with a recognised code of conduct or practice, per se, in order to access the shield, however this may be a relevant factor for a court to take into account when deciding whether there are any reasons the privilege should or should not be maintained.</p> <p>Submitted that further consideration be given to a definition of journalist that:</p> <ul style="list-style-type: none"> <li>• is broad enough to capture people who are engaged in traditional and non-traditional media, as well as their employers (and the like);</li> <li>• makes reference to “occupation” or “profession” even if there is no requirement for a journalist to be formally engaged by a media company or under an employment contract; and</li> <li>• makes reference to an expectation about information given to the person by an informant.</li> </ul>
QPS	<p>Recognised that the definition of journalist must necessarily be broad but noted that the bar must not be set too low and that the criteria used in Victoria may serve as a suitable model for appropriately narrowing the definition.</p>

## Extending the shield to others

### Submissions

More than half of the submissions, 63 percent, did not address the issue of whether the shield should be extended to people who work with or who engage the journalist. Of those that did, all supported the extension of the shield.



However, submitters had differing views on who the shield should apply to beyond the journalist as can be seen in the key feedback.

## Key feedback

Submitter	Comments
HRLC	Submitted that the privilege should be extended to the journalist's employer, a person who engaged the journalist under a contract for service and any other person prescribed in the regulations.
CCC	Submitted that the shield should extend to media organisations involved in the publication of the news.
Dr Ananian-Welsh et al	Submitted that the protection should extend to journalist's employers.
AJF	Submitted that as the purpose of shield laws is to maintain the integrity of the relationship between the journalist and their sources, it makes sense to extend the law to anyone involved in process. Noted that journalism is a collaborative process and suggested that if the shield fails to protect all people involved in producing a piece to journalism it fails in its intended purpose.
ARTK	Submitted that the shield should apply to anyone involved in the editorial process associated with the publication of the story by the journalist.
PIJI and CAJ	Recommended that to achieve the goal of facilitating the flow of information, the privilege should extend to anybody who by their role in the production of journalism comes to learn the identity of a source who has been promised anonymity. Noted that people in the normal course of their work such as editors, producers, camera operators and support staff may come to learn the source's identity.
QLS	Submitted that extending shield laws beyond the journalist to others involved in the publication of information in a news medium, is necessary to give effect to the policy intent behind the laws. Supported the extension of the protection to a journalist's employer or someone who engages them as occurs in other jurisdictions and recommends there be a specific list for clarity, but that the list should not be exhaustive and the courts should have the ultimate discretion.

## Defining a source

### Submissions

#### Key feedback

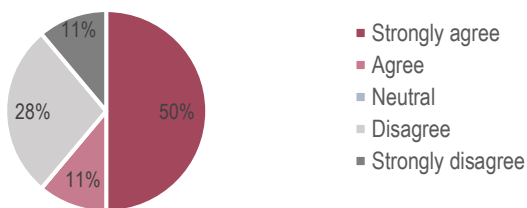
Submitter	Comments
HRLC	Submitted that, in the interest of national uniformity, Queensland should adopt the definition of informant (source) in the Evidence Acts of the Commonwealth, NSW, ACT, Victorian, and WA.
CCC	Supported adopting the definition of source in the Commonwealth and NSW shield laws.
Dr Ananian-Welsh et al	Submitted that there is no need to define source as the term is sufficiently precise to be amenable to judicial or administrative interpretation on a case-by-case basis, and the lack of a definition preserves a degree of flexibility that could allow the definition to adapt with the changing media environment. Suggested that the Commonwealth law definition simply aligns with the definition of a journalist, and that while the repetition is probably unnecessary, it does no damage to the provisions.
AJF	Submitted that a source should be defined as a person who provides information to someone engaged in producing journalism for the purpose of that journalism, noting that key to the relationship is an understanding that the information will be prepared and made public in journalistic work.
ARTK	Submitted that shield laws be drafted in a way that definitions are useful descriptions but are not determinative, and that a court should decide on a case-by-case basis whether the elements of the shield have been met in the circumstances. Recommended the Commonwealth law as an appropriate reference point.

PIJI and CAJ	Submitted that the definition of source should be consistent with the definitions in the relevant Commonwealth, NSW, ACT, Victorian, SA and WA legislation.
QCCL	Submitted that the definition of source should include persons who provide new or noteworthy information to a journalist for use in a news medium. Suggested that the NT definition provides a helpful approach.
QLS	Submitted that consistency with other jurisdictions in the definition of source is desirable, and that a definition similar to the majority of the other jurisdictions should be adopted. Noted that there is merit in the definitions of journalist and source having similar elements.

## Defining news medium

### Survey

More than half of the survey respondents, 61 percent, supported the application of shield laws to anyone who published news in any format.



### Submissions

#### Key feedback

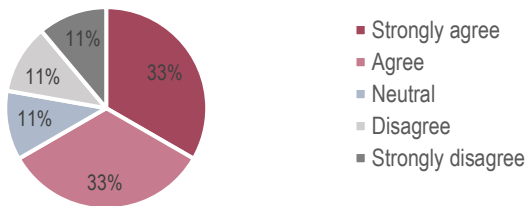
Submitter	Comments
APC	Emphasised that the definition must be broad enough to cover digital and online media as well as print media.
HRLC	Submitted that news medium should be defined broadly to take into account the range of news platforms available and that sources deserve protection regardless of how their disclosures are published.  Submitted that Queensland should adopt the definition of news medium contained in the shield laws of the Commonwealth, NSW, ACT, Victorian, and WA. The definition appears wide enough to accommodate changing industry practices.
CCC	Supported adopting the definition of news medium in the Commonwealth and NSW shield laws.
Dr Ananian-Welsh et al	Submitted that there is no need to define news medium as the term is sufficiently precise to be amenable to judicial or administrative interpretation on a case-by-case basis, and the lack of a definition preserves a degree of flexibility that could allow the definition to adapt with the changing media environment. Suggested that if a definition is introduced, it should be broad.
AJF	Submitted that legislation must be agnostic about future developments in media that might change the way news is presented and delivered.  Submitted that as long as recognised journalistic processes are applied in accordance with a code of conduct, the relationship with a source ought to be covered by a shield.
ARTK	Submitted that shield laws be drafted in a way that definitions are useful descriptions but are not determinative, and that a court should decide on a case-by-case basis whether the elements of the shield have been met in the circumstances. Recommended the Commonwealth law as an appropriate reference point.
PIJI and CAJ	Recommended that the definition of news medium be consistent with the definitions in the relevant Commonwealth, NSW, ACT, Victorian, SA and WA legislation.

QCCL	Submitted that the definition of news medium should capture any medium designed for the dissemination of information to the public or a section of the public. Suggested that the NT definition represents the most helpful approach.
QLS	Submitted that there is merit in consistency with other jurisdictions in the definition of news medium. Agreed with the approach set out in the explanatory material for the Commonwealth laws that news medium should be defined broadly so it can include, where appropriate blogs, Facebook pages, Twitter accounts, YouTube channels, in addition to traditional news mediums.

## Disclosure with the source's consent

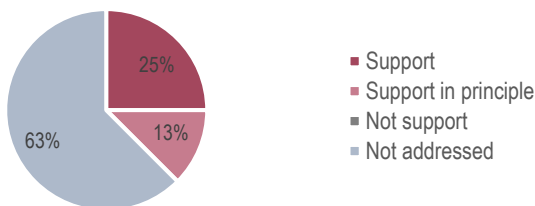
### Survey

More than half of the survey respondents, 66 percent, supported the source being able to waive confidentiality and choose to have their identity disclosed.



### Submissions

More than half of the submissions, 63 percent, did not address this issue in their submission. Of those that did, all supported the principle that the source should be able to self-identify or consent to the disclosure of their identity.



### Key feedback

Submitter	Comments
CCC	Submitted that the source should in all cases be able to disclose that they were a confidential source. Noted that to allow otherwise may lead to perverse outcomes, such as depriving a source from correcting the record if they feel they were misquoted, or their views misrepresented. Also noted that in all other cases where an obligation of confidence is imposed on a professional, the 'client' retains the right to disclose the confidential information.
AJF	Submitted that sources should be able to waive confidentiality. Noted that as the principle underlying the protection of sources is maintaining the integrity of the relationship and confidence in any agreed confidentiality, a source who wishes to self-identify is unlikely to damage that principle.
ARTK	Submitted that sources being able to waive confidentiality is a matter for the journalist and the source and is not something that requires legislating.

QLS	Submitted that as the laws are premised on a covenant between the journalist and the source, any legislation should provide for the circumstances where the covenant is rescinded and there should be the ability for the source to waive this privilege, as there is for other privileges, with appropriate safeguards. However, the waiver should be express and the privilege should not be automatically waived if the source self-identifies or is identified, inadvertently or otherwise as there could be other consequences for the journalist, source, or the proceeding/investigation from the privilege being abrogated simply because the identity of the source is known, or purported to be known.
QPS	Submitted that if a confidential source were permitted to consent to the disclosure of their identity, provision should be made to ensure it is informed consent.

## Shielding a source in court proceedings

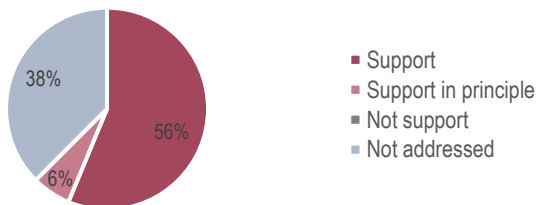
### Court proceedings

#### Submissions

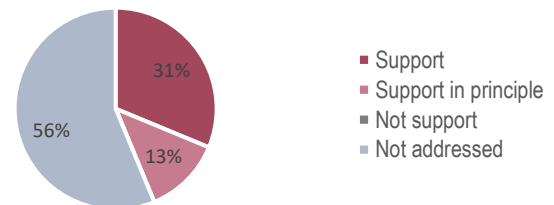
More than half of the submissions, 62 percent, supported the application of shield laws to both criminal and civil court proceedings.

More than half of the submissions, 56 percent, did not address the issue of whether shield laws should apply to court proceedings that are not bound by the rules of evidence. Of those that did, all supported the application of shield laws to court proceedings not bound by the rules of evidence.

#### *Criminal and civil proceedings*



#### *Proceedings not bound by the rules of evidence*



### Key feedback

Submitter	Comments
APC	Submitted that shield laws should apply to civil and criminal proceedings and should extend to any proceeding in which a person may be compelled to answer questions or produce documents or other material.
HRLC	Submitted that shield laws should cover all circumstances in which a journalist may be asked to divulge a source's identity. Concerns that a broad approach may hamper investigations are misplaced as making the privilege universally available does not mean it will operate in all proceedings; the court will determine in each case whether to abrogate the privilege. Submitted it is preferable to determine the application of shield laws on a case-by-case basis rather than exempting entire classes of proceedings. Submitted that shield laws should apply to all judicial proceedings in which evidence may be given regardless of whether the Evidence Act applies; there should be no carveouts even for proceedings where the rules of evidence are excluded. Noted that WA has taken this approach applying the shield to every legal proceeding in which evidence may be given.
CCC	Submitted that shield laws should apply in all courts and tribunals regardless of whether the tribunals are bound by the rules of evidence and regardless of whether the body is adversarial or inquisitorial in nature. Noted that to apply shield laws broadly to legal proceedings in Queensland would be to radically expand the sphere of protections available to journalists in all proceedings while allowing a court to determine how the public interest is best served.

	<p>Submitted that there is no relevant distinction between criminal and civil proceedings in the court determining where the public interest lies between competing considerations. While the public interest in favour of the court being apprised of all relevant information may be higher in criminal proceedings where the liberty of a defendant is at issue that would be taken into account by the court in its assessment.</p> <p>Submitted that while shield laws, as framed in other jurisdictions, do not apply to all types of legal proceedings, there would be value in such laws applying in all jurisdictions. While shield laws in other jurisdictions are generally located within the evidence laws and deal with notions of compellability, there is no good reason why they would not apply to proceedings not bound by the rules of evidence. Noted that in court proceedings that dispense with the rules of evidence, such as bail hearings and domestic violence proceedings, there are still provisions that govern compellability of witnesses, and that while the rules of evidence do not apply in a strict sense, they may provide guidance to a tribunal even where they are not binding.</p>
Dr Ananian-Welsh et al	<p>Submitted that the core characteristic of shield laws is that they ensure that a journalist is not compellable to disclose the identity of a confidential source in court proceedings, and effective protection therefore requires application to trials and court hearings as well as pre-trial proceedings. The public interest balancing test will ensure the shield is applied appropriately and with sufficient flexibility across the different settings whilst offering a consistent level of protection to press freedom and democratic values.</p>
AJF	<p>Submitted that as the purpose of the shield is to protect the role that sources play in informing the public, the shield should apply regardless of where it is being challenged. If the shield is appropriate in a criminal court, it is equally appropriate before a civil court, royal commission, star chamber or any other tribunal, extra-judicial or quasi-judicial body. Suggested that if the shield applies in some circumstances but not in others it is likely to have the effect of frightening off sources who are nervous about being exposed.</p>
ARTK	<p>Submitted that the shield should apply to all court proceedings, including those not bound by the rules of evidence.</p>
PIJI and CAJ	<p>Recommended that shield laws apply in any proceeding where a journalist can be compelled to provide evidence including court proceedings.</p> <p>Suggested that journalists' protection of sources comes from their ethical and professional obligations, consideration of potential harm to the source and the public interest in freedom of press and open communication, which remain consistent regardless of the setting in which a journalist is compelled to appear.</p>
QCCL	<p>Submitted that the shield should apply broadly to any court, tribunal or other body that has the power to compel the giving of evidence or production of documents.</p>
QLS	<p>Submitted that it does not have an objection to the laws applying to all court proceedings governed by Queensland law, and that whether a court or other body is bound by the rule of evidence is not an important distinction in this context, noting that just because a court is not bound by rules of evidence, it does not mean that the court disregards them. Noted that to give effect to this position, the specific legislation governing the proceedings will need to be amended or a provision included in the <i>Evidence Act 1977</i> to ensure application to all proceedings similar to the Northern Territory legislation.</p>

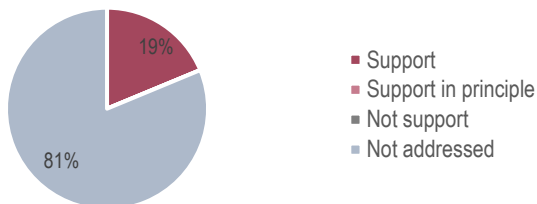
## Removing the shield

### Circumstances for making an order to override

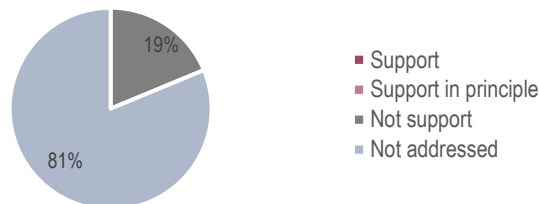
#### Submissions

The majority of submitters, 81 percent, did not address this issue in their submission. Of those that did, all submitted that only the parties to the proceeding should be permitted to make an application for the removal of the shield; third party applications should not be permitted and the court should not be able to remove the shield on its own motion.

### Application by a party to the proceeding



### Application by a third party or court own motion



### Key feedback

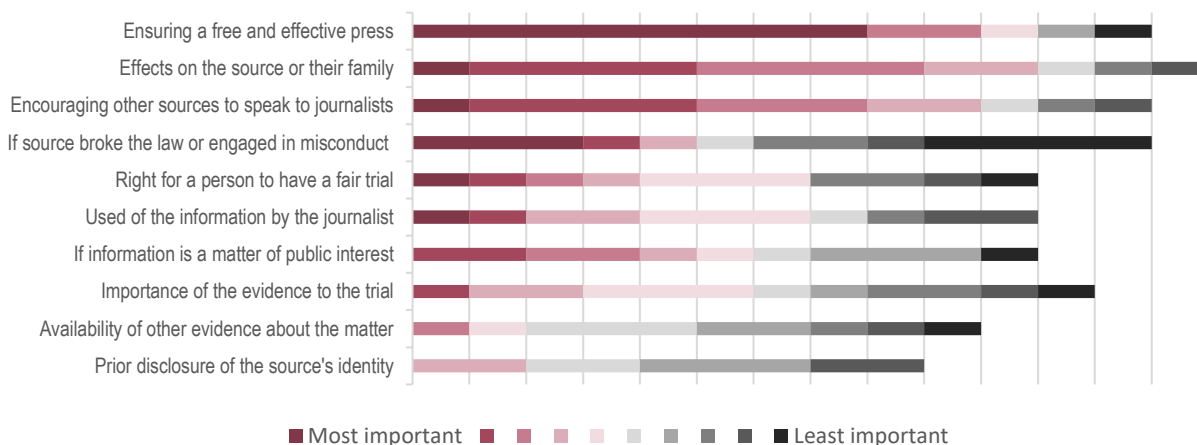
Submitter	Comments
HRLC	Submitted that a court should only consider removing the shield after an application by a party, as this will narrow the circumstances in which the privilege can be abrogated. The court should not consider removing the shield on its own motion. Noted that this approach is consistent with the Commonwealth, NSW, ACT, Victoria, and the NT.
ARTK	Submitted that the role of the court is to determine the application of the shield in the specific circumstances, not to participate as a party to the proceedings. The court must not be permitted to make an own motion to test or override the shield. Only parties to the proceeding should be able to make an application for an order to override the shield.
QLS	Submitted that the court should be able to make an order overriding the shield on application by a party or based on its own initiative. The circumstances in which a person, other than a party, may make an application to the court to compel disclosure should be limited as if the application is not supported by a party, it may be difficult to see a justification for overriding the shield.

## Balancing test

### Survey

Survey respondents indicated that the three most important factors for the court to consider when deciding whether to remove the shield were ensuring a free and effective press, the effects of removing the shield on the source and their family and encouraging other sources to speak to journalists.

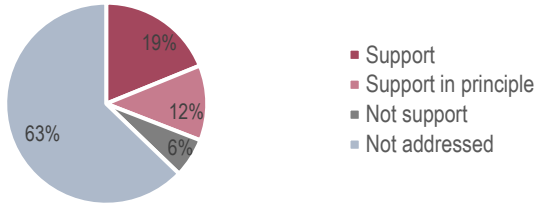
### Ranking factors for consideration by the court



## Submissions

More than half of the submissions, 63 percent, did not indicate whether or not there should be a list of prescribed matters that the court should consider when determining an application to remove the shield. Of those that did, the majority supported a list of prescribed matters.

**Prescribing matters for consideration by the court**



**Key feedback**

Submitter	Comments
QUT - DMRC	Submitted that shield laws should not be easily overridden and that a strong public interest test is necessary. Submitted that broad and tenuous ground of national security should not allow governments to bypass shield laws.
HRLC	Submitted that the grave consequences of revealing a sources' identity warrant a restrictive test that focusses the court's attention on those harms.  Noted that it favoured the adoption of a public interest test as is used in all Australian shield laws. Submitted that as 'public interest' is a nebulous concept and there is some concern that the term is too subjective, the legislation should explicitly direct the court to consider the importance of protecting journalists, their sources and the free flow of information. In addition of the considerations enshrined in other jurisdictions the following additional consideration should be added to recognise the connection between source confidentiality, public interest journalism and democratic accountability: 'the importance of public interest journalism in facilitating greater transparency, openness and democratic accountability and the chilling effect that disclosing the identities of sources may have on these functions'.
CCC	Supported the adoption of shield laws that reflect the test set out in the Commonwealth and NSW evidence laws. Noted that WA and Tasmanian laws have prescriptive list of factors that a court must consider in determining whether to override the shield. Submitted that each of those articulated factors may be relevant in assessing the competing public interest and may all be considered when applying the test in the Commonwealth and NSW laws.  Submitted that a live question in considering whether a journalist should be afforded protection under shield laws would be the factual question of whether the assurance of confidence given to the source was for the purpose of doing journalism. There must be a sufficient nexus between the promise to protect the person's identity and the provision of information for the purposes of journalist work, similar to the criteria that must be met for legal professional privilege to attach to a communication.  Submitted that the definition of informant in the Commonwealth laws provides guidance directing the courts attention to the factual inquiry as to the nature of the relationship in which the source provided the information, which may be crucial in determining whether the shield should apply.
Dr Ananian-Welsh et al	Submitted that Queensland should adopt the same test as applies in other Australian jurisdictions recognising that it is well-aligned to the core purpose of the shield law provisions in the context of the Evidence Act. Additional guidance, such as that found in WA, the NT, and Tasmanian laws, may be helpful but does not and ought not impact the decision-maker's final discretion or the overarching balancing exercise. Any listed factors, such as the probative value of the evidence, the importance of the evidence to the proceeding, the nature, gravity and subject matter of the proceeding, and whether there was any misconduct by the journalist or source, should be permissive not mandatory



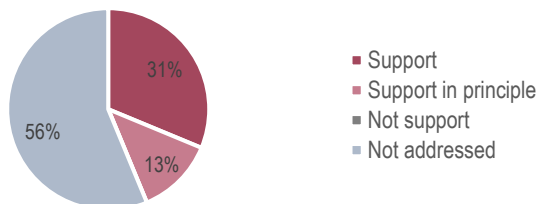
	<p>Submitted that an order requiring a journalist to reveal the identity of a source should be a 'last resort' and the balancing test should only be undertaken if it is first established that there is no reasonably available alternative source from which the information could be obtained. Noted that a test of 'reasonable necessity' has recently been adopted in Canada: 'the court, person or body may authorise the disclosure of information or a document only if they consider that the information or document cannot be produced in evidence by any other reasonably available means', and a balancing test is satisfied. The burden of establishing that no alternative source exists rests on the person seeking disclosure.</p>
ARTK	<p>Submitted that the court should decide on the specifics of the case whether or not the application made by a party for the shield to not apply outweighs/displaces the of the shield.</p>
PIJI and CAJ	<p>Submitted that the shield should only be overturned in rare and exceptional circumstances. Suggested that overriding a shield to enable civil damages claims does not meet the public benefit test. Recognised a greater need for the court to have access in criminal matters where the liberty of an accused person is at stake, and that in that circumstance the court should consider:</p> <ul style="list-style-type: none"> <li>• potential harm the source could face if their identity is revealed;</li> <li>• further ability of journalists to receive information from confidential sources;</li> <li>• press freedom and the ability of journalist to publish on matters that affect the public;</li> <li>• whether the evidence could be obtained without compelling the journalist;</li> <li>• seriousness of the charge in criminal proceedings.</li> </ul> <p>Submitted that the manner in which the information was obtained by the source is not a relevant factor in determining whether the shield should be overridden unless it has a direct bearing on proceedings. The court's ability to impose terms and condition to mitigate harm that may be suffered by the source should also not be a factor in determining any override of the shield, as despite a court's best efforts it may be unable to fully mitigate the harm.</p>
QCCL	<p>Submitted that the court should be able to override the privilege where the information is critical or necessary for a case, the information cannot be reasonably obtained by alternative means, and disclosure is necessary in a public interest that outweighs the public interest served by the shield.</p> <p>Submitted that in assessing whether there is an overriding public interest the court should have regard to all of the circumstances including whether:</p> <ul style="list-style-type: none"> <li>• the proceeding is a criminal or civil proceeding;</li> <li>• in the case of a criminal proceeding, the prosecutor or accused is seeking access</li> <li>• the journalist has given an undertaking of confidentiality;</li> <li>• the substance of the information has been disclosed by the source or other person.</li> </ul>
QLS	<p>Noted that most of the legislation in other jurisdictions provide factors to which a court should have regard when deciding to apply or override the shield. Submitted that any Queensland reforms should clearly outline in legislation the relevant factors the court should assess in deciding to compel disclosure of the confidential source.</p> <p>To ensure the credibility of the information, an important factor is the provision in Northern Territory legislation regarding how the journalist used the information provided by the informant, including whether the journalist: verified the information before using the information (if reasonably practicable); used the information in a manner that minimised any undue harm to any person; and used the information in a fair and accurate manner. Consideration should also be given to a factor about the extent to which the journalist kept contemporaneous records about the source and information.</p> <p>Noted that information could then be provided to the judge on a confidential basis to allow an assessment of credibility and of other issues such as the impacts to the other party from the nondisclosure of the information.</p>

QPS	Submitted that if a list of considerations were to be legislated it would prefer that the list be non-exhaustive. Noted that other jurisdictions have recognised that misconduct in relation to obtaining, using, giving or receiving the information, and the other relevant considerations may include risk to life or safety.
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## Conditions and ancillary orders

### Submissions

More than half of the submissions, 56 percent, did not indicate whether or not the court should impose conditions or make ancillary orders to protect the source's safety and welfare. Of those that did, all supported allowing the court to impose conditions or make ancillary orders.



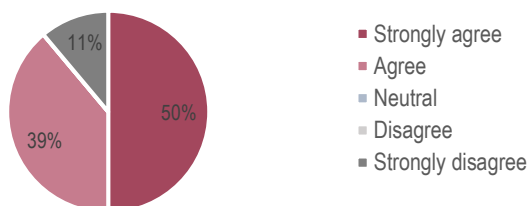
### Key feedback

Submitter	Comments
HRLC	Submitted that if a court decides to remove the shield it must have the power to impose conditions to protect the journalist and the source from reprisal, such as limiting who can access the evidence or prohibiting further disclosure of the source's identity. The court should be obligated to consider whether it is necessary to impose any conditions, and that the court has discretion to impose any conditions it sees fit.
CCC	Submitted that the court should be able to impose orders designed to limit any harm from the disclosure of a source's identity if overriding the shield. This should be framed in broad terms to allow the court to make orders appropriate in the interests of justice. Submitted that in some circumstances a risk of harm may accrue to a source if their identity is disclosed, in other cases the source and journalist may have engaged in reprehensible conduct the disclosure of which may be in the public interest, or a source's identity may be central to an issue in a publicly litigated case where disclosure is inevitable (weighing against the making of such orders).
ARTK	Submitted that if it is proposed to override the shield, the court should be encouraged to make whatever orders are necessary to minimise the extent to which the identity of the source is disclosed. The court should not be limited in the factors it can take into account in determining whether to impose terms and conditions, the decision should be made on a case-by-case basis. Noted that retribution is a significant and real concern for sources.
PIJI and CAJ	Submitted that if the court overrides a shield, it should be empowered to impose any conditions it sees fit, consistent with the approach of the Commonwealth, NSW, ACT, Victoria, and the NT. In particular the court should consider an order to preserve the confidentiality of a source to the greatest extent possible including limitations on who may hear and use the evidence. If the court determines a source may face harm by disclosure of their identity there should be an obligation to mitigate that harm.
QLS	Submitted that the court should be given express power to impose appropriate conditions on the privilege. A condition could be in the form of a journalist providing a judge a signed statement by the informant that they are the source, with a judicial confirmation of receipt provided rather than the statement being put on the court file or given to the other party

## Giving reasons

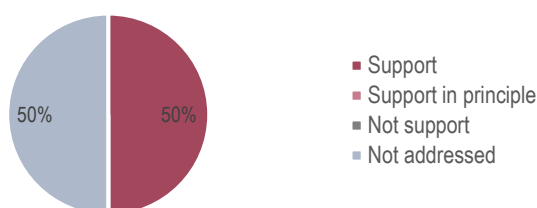
### Survey

The majority of survey respondents, 89 percent, supported requiring the court to give reasons for making, or refusing to make, an order to override the shield.



### Submissions

Half of the submissions did not address whether or not the court should be required to give reasons. Of those that did, all supported imposing a requirement that the court must give reasons for its decision.



### Key feedback

Submitter	Comments
HRLC	Submitted that given the significant ramifications of removing the shield, the court should be required to give written reasons for removing, or refusing to remove, the shield. This will improve transparency, aid judicial accountability, and assist parties to understand how the court interpreted the public interest test.
CCC	Supported the requirement that a court deciding a shield law application must provide reasons whether they are protecting the confidence or ordering disclosure. However, any requirement to give reasons should allow the court to appropriately confine reasons or the publication of reasons where publication itself may reveal confidential information, prejudice ongoing investigations or proceedings or would otherwise damage the public interest. It would be perverse if the requirement to provide reasons defeated the purpose of the shield or was otherwise contrary to the public interest.
Dr Ananian-Welsh et al	Supported a requirement that a decision-maker give reasons for a decision to override journalists' privilege though not necessarily in writing. Giving reasons plays a key role in enhancing judicial and administrative integrity and public confidence in the justice system and in illuminate how the public interest balancing test is applied in each case.
ARTK	Submitted that there must be a requirement for a detailed and full written record of the decision to ensure there is a public record of reasons regardless of the outcome. Suggested that this is an important element of open justice. Noted that in other jurisdictions orders (not necessarily related to shield laws) are made that lack detailed and full written reasons for the decision, and that Queensland should distance itself from this practice by making giving reasons a requirement in the law.
PIJI and CAJ	Submitted that the court should be obligated to give reasons in making or refusing to make an order to override the shield as this is consistent with the principles of open justice, helps to ensure public accountability among the judiciary, provides an opportunity for education of the proper functioning of the law, and is critical to inform the developing area of law.
QLS	Submitted that given the serious implications for the journalist, source and party, a court should be required to provide written reasons.

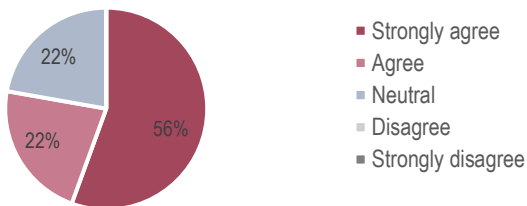
QPS	Submitted that it would prefer that courts be required to give reasons for their decisions, as this would assist parties to determine whether to make an application and assist in preparing applications.
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## Shielding a source in other contexts

### Preliminary court proceedings

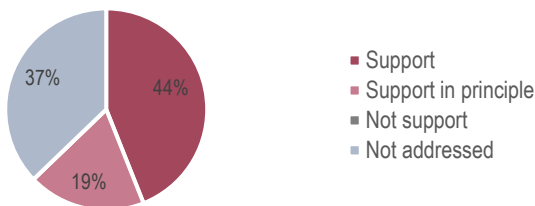
#### Survey

The majority of survey respondents, 78 percent, supported the application of shield laws to preliminary court proceedings, including subpoenas, summonses, pre-trial disclosure duties, non-party disclosures, and interrogatories.



#### Submissions

More than half of the submitters supported the application of shield laws to preliminary court proceedings, including subpoenas, summonses, pre-trial disclosure duties, non-party disclosures, and interrogatories.



### Key feedback

Submitter	Comments
QUT - DMRC	Submitted that where confidential information is revealed before the opportunity to appeal against a decision arises shield laws will not adequately protect journalists' sources and the freedom of the press.
HRLC	Submitted that if shield laws are to offer real protection it is essential that they apply to preliminary proceedings and investigations as failing to do so creates a gap in the law. It would allow parties to use pre-hearing processes to access a source's identity when if the same request was made inside the courtroom the identity would be protected. Noted that the Commonwealth, NSW, ACT, Victorian and NT apply their shield laws to pre-trial disclosure requirements, including subpoenas, summonses, pre-trial discovery, non-party discovery, interrogatories, notice to produce and requests to other parties to produce documents. Submits that Queensland should adopt the same approach with the inclusion of search warrants.

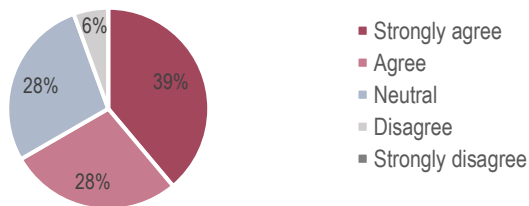
CCC	Submitted that a shield that provided protection in all legal proceedings would allow for the court to make an assessment at any stage of the proceedings. It may be that the interests of justice may favour protecting the information at an early stage but may require disclosure at a later stage. Noted that there are existing processes for objecting to summonses, subpoenas, and other pre-trial processes to compel production of information. Submitted that there would not be particular prejudice or significant additional burden if the journalist or media organisation could object to production and the court could determine the objection on the basis of shield law principles.
Dr Ananian-Welsh et al	Submitted that the core characteristic of shield laws is that they ensure a journalist is not compellable to disclose the identity of a confidential source in court, and effective protection therefore requires application to trials and court hearings as well as pre-trial proceedings including subpoenas, summonses, pre-trial discovery, notice of non-party disclosure, interrogatories, notices to produce and request to another party to produce information or documents. Shield laws must apply both within and outside the courtroom. This is consistent with shield laws across Australia. The public interest balancing test will ensure the shield is applied appropriately and with sufficient flexibility across the different settings whilst offering a consistent level of protection to press freedom and democratic values.
AJF	Submitted that confidence in the integrity of the journalist-source relationship can only be maintained if it is protected throughout the entirety of any investigative and judicial process. The shield should explicitly cover any court proceeding and any pre-trial and investigation process including subpoenas, summonses, pre-trial disclosures, interrogations, search warrants, notices to produce and any other pre-trial process. It would be appropriate to allow investigative authorities to apply to a court to have the shield lifted in the same exceptional circumstance as for the court itself.
ARTK	Submitted that shield laws should apply in relation to subpoenas, summonses, pre-trial and disclosure duties, notices and non-party disclosures, interrogatories, search warrant and any other preliminary court proceedings or investigation processes, as if the shield does not apply in all circumstances it is able to be circumvented and is undermined.  Noted that the Commonwealth law provides a process for a party to challenge the shield by applying to the court for an order overriding it.
PIJI and CAJ	Recommended that shield laws apply in any proceeding where a journalist can be compelled to provide evidence including preliminary proceedings and investigations.  Suggested that journalists' protection of sources comes from their ethical and professional obligations, consideration of potential harm to the source and the public interest in freedom of press and open communication, which remain consistent regardless of the setting in which a journalist is compelled to appear.
QLS	Submitted that there is merit in the protections applying to all proceedings, investigations and inquiries capable of being legislated by the Queensland Parliament, where evidence or information/documents can be compelled or where there is an adverse inference drawn from a journalist not providing this information, and if there is an adverse consequence resulting from a journalist not revealing their source in initial proceedings and processes, then the protection will be needed before the journalist gives evidence at a final hearing.  Has no objection to the shield law protections applying to subpoenas and summonses, pre-trial disclosure duties, notices of non-party disclosure, interrogatories, search warrants, and preliminary court proceeding or investigation processes, provided there is provision for the court to intervene upon application of party or on its own initiative to override the protection in appropriate circumstances.

	Noted that the <i>Evidence Act 1977</i> will not apply outside court proceedings and the relevant legislation for each of the initial proceedings and processes will need to be amended and, where possible, be consistent with the provisions for the protections applying to each of the other related processes and search warrants. Submitted that the amendments could require the journalist to proactively make an application to set aside a subpoena or notice to produce, rather than simply not complying with the notice. This would provide a level of court oversight of the privilege and even though it may impose a burden at the early stages of an investigation for the investigative body to respond to an application, the determination being made at this early stage could assist the body with administrative or strategic decisions and the preservation of evidence, for example, if the court makes an order imposing conditions on the privilege. These issues will need to be reviewed based on each specific process.
QPS	Submitted that providing the privilege is qualified, it does not necessarily oppose shield laws applying in preliminary court proceedings. Noted that existing processes applying to the assertion of claims of other types of privilege may be adaptable such as the use of confidential affidavits and ensuring evidence remains sealed until an application is determined.

## Investigations – search warrants

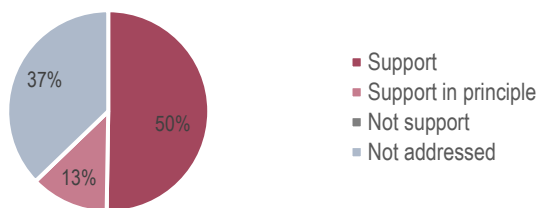
### Survey

More than half of the survey respondents, 67 percent, supported the application of shield laws to evidence authorised for seizure under a search warrant.



### Submissions

More than half of the submitters, 63 percent, supported the application of shield laws to search warrants.



However, submitters had differing views on the mechanisms for applying shield laws to the search warrant process as can be seen in the key feedback.

### Key feedback

Submitter	Comments
QUT - DMRC	Submitted that journalist and news organisations should be notified and have the opportunity to contest applications for warrants against them before warrants are issued or before material collected in the execution of a warrant is turned over. Where confidential information is revealed before the opportunity to appeal against a decision arises shield laws will not adequately protect journalists' sources and the freedom of the press.

HRLC	<p>Submitted that if shield laws are to offer real protection it is essential they apply to preliminary proceedings and investigations as failing to do so creates a gap in the law, allowing parties to use pre-hearing processes to access a source's identity when if the same request was made inside the courtroom the identity would be protected. Noted that the Commonwealth, NSW, ACT, Victorian and NT apply their shield laws to pre-trial disclosure requirements, including subpoenas, summonses, pre-trial discovery, non-party discovery, interrogatories, notice to produce and requests to other parties to produce documents. Submits that Queensland should adopt the same approach with the inclusion of search warrants.</p>
CCC	<p>Submitted that unlike processes to compel production in the course of litigation, search warrants cannot be the subject of pre-emptive objection. A fundamental principle of investigations is that investigators should be free to carry out their work without the target looking over their shoulder, and that as a matter of practical reality once an investigation becomes overt targets may change their behaviour to defeat investigative strategies. As such it is neither practicable nor realistic to allow contested applications for search warrants. A search warrant is often the first overt step taken in an investigation, they are authorised without notice to potential subjects to avoid the possibility that evidence may be concealed or destroyed. While professional journalists may be expected to behave lawfully and not destroy evidence if given notice of an impending search, that is too great a risk to take.</p> <p>Submitted that search warrant applications are determined by a judicial officer, and they make a determination based on clear criteria, and that there would be no particular difficulty with requiring search warrants to be executed on journalist's premises to require consideration of the same types of factors as apply under shield laws. Where extraordinary powers of search are to be exercised, they are generally required to be authorised by a magistrate or Supreme Court judge, and those principles could be extended to warrants relating to journalists.</p> <p>Submitted that the appropriate mechanism for journalists to challenge a search warrant, or access to materials located during a search, would be similar to claims of legal professional privilege or other privilege asserted when a search is executed. The party asserting the claim of privilege identifies the matters subject to the claim and those documents or records are sealed or delivered to the court that is to determine the claim and kept in the court's custody pending determination. Noted that QLS has produced guidelines that set out the protocols for execution of search warrants on lawyers' premises where claims of privilege are made. An approach that allows a journalist or media organisation to bring proceedings to challenge a warrant or actions taken is available under existing law.</p>
Dr Ananian-Welsh et al	<p>Submitted that Queensland should adopt the same position as Victoria and extend shield law to search warrants as this is essential to achieve the basic purpose of shield laws to appropriately protect journalist's confidential sources and thereby press freedom, free expression, and democracy.</p> <p>Submitted that the same problematic risk of identifying a confidential source exists during police investigations as it does in court proceedings and pre-trial procedures. Police investigations are a significant stage for information gathering facilitated by search warrants and preliminary investigations inform whether there will be a sufficient basis for pressing charges and instigating court proceedings, and law enforcement may want to know the identity of a confidential source before deciding whether to proceed.</p> <p>Submitted that mechanisms already exist to ensure that claims of privilege will not unduly interfere with the investigative process and that the information obtained is protected pending determination of the claim, and that this does not need to be addressed in the Evidence Act. Noted that the Australian Federal Police have a national guideline for execution of search warrants where parliamentary privilege and legal professional privilege may be involved, and that QPS may enter into a similar agreement with the MEAA or specific news organisations. Alternatively, police may undertake to the court not to access or use any of the material obtained in the search under the final determination of the claim.</p>

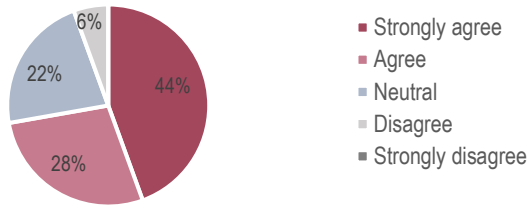
AJF	Submitted that it is appropriate to give journalists the opportunity to contest any pre-trial process or investigation. Noted that in the UK journalistic material (material acquired or created for the purposes of journalism in the possession of a person who acquired or created it for the purposes of journalism) cannot be seized under ordinary search warrant processes. Application must be made for an order that the journalist material must be produced within seven days, and the application must be heard inter-partes (in the presence of the law enforcement agency seeking the warrant and the journalist in relation to whom the warrant is sought). The journalist material must not be destroyed unless the application has been complied with or dismissed. The relevant test applied by the judge is: whether other possible methods of obtaining the material have been tried without success and it is in the public interest that the material be produced. Submitted that as there is no evidence that the UK process has compromised justice or national security in any meaningful way, and that this model or a similar approach should be adopted.
ARTK	Submitted that shield laws should apply in relation to search warrants and any other investigation processes, as if the shield does not apply in all circumstances it is able to be circumvented and is undermined. No mechanisms are required to protect evidence while the application of shield laws is determined as destroying evidence that should be produced in answer to a search warrant puts the journalist, publisher, or broadcaster at risk of being in contempt of court and that is a sufficient protection.
PIJI and CAJ	Recommended that shield laws apply in any proceeding where a journalist can be compelled to provide evidence including preliminary proceedings and investigations. Suggested that journalists' protection of sources comes from their ethical and professional obligations, consideration of potential harm to the source and the public interest in freedom of press and open communication, which remain consistent regardless of the setting in which a journalist is compelled to appear.
QLS	Submitted that it has no objection to the shield law protections applying to search warrants provided there is provision for the court to intervene upon application of the party or on its own initiative to override the protection in appropriate circumstances. Noted that the <i>Evidence Act 1977</i> will not apply outside court proceedings and the relevant legislation for search warrants will need to be amended and, where possible, be consistent with the provisions for the protections applying to court proceeding related processes such as subpoenas and interrogatories. Submitted that the amendments could require the journalist to proactively make an application to set aside a subpoena or notice to produce, rather than simply not complying with the notice, which could provide a level of court oversight of the privilege and even though it may impose a burden at the early stages of an investigation for the investigative body to respond to an application, the determination being made at this early stage could assist the body with administrative or strategic decisions and the preservation of evidence, for example, if the court makes an order imposing conditions on the privilege. As not providing particular evidence could prejudice an investigation, an early determination of issues related to search warrants in appropriate cases if recommended.
QPS	Submitted that providing the privilege is qualified, it does not necessarily oppose shield laws applying in investigation processes. Noted that existing processes applying to the assertion of claims of other types of privilege may be adaptable such as the use of confidential affidavits and ensuring evidence remains sealed until an application is determined.

## Coronial investigations and inquests

### Survey

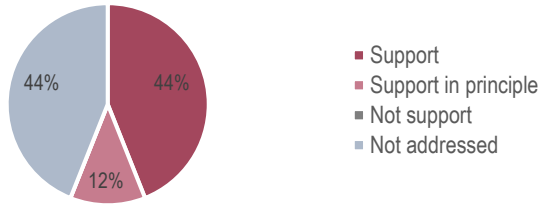
The majority of survey respondents, 94 percent, supported the application of shield laws to coronial investigations and inquests.





## Submissions

More than half of the submitters, 56 percent, supported the application of shield laws to coronial investigations and inquests.



## Key feedback

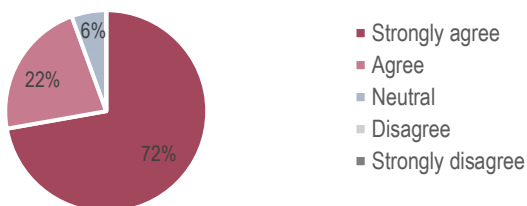
Submitter	Comments
APC	Submitted that shield laws should apply to civil and criminal proceedings and should extend to any proceeding in which a person may be compelled to answer questions or produce documents or other material.
HRLC	Submitted that coronial inquests have coercive powers that threaten to undermine press freedom and public interest reporting. Noted that the Coroners Act allows witnesses to refuse to attend a hearing, answer a question or produce a document if they have a reasonable excuse, and that reasonable excuse incorporates various forms of privilege. Submitted that reasonable excuse should include journalistic privilege. Submitted that the abrogation of the privilege against self-incrimination should not influence a shield law as other jurisdictions allow witnesses to plead journalistic privilege despite the abolition of the privilege against self-incrimination and the privileges safeguard different interests. The privilege against self-incrimination seeks to protect a witness from the risk that their disclosure may be used against them in other proceedings, which can be minimised through restricting how the information may be used in the future. Journalistic privilege seeks to protect not only the journalist and their source from retribution but broader interests as well, namely the free flow of information, the public's right to know and democratic accountability. Disclosing a source's identity irreversibly harms these interests, and the harm cannot be sufficiently mitigated by restricting how the information is used. Once it is known that a source's identity has been revealed potential whistleblowers are deterred from coming forward.
CCC	Noted that coronial proceedings are inquisitorial proceedings established for particular purposes with limited statutorily defined jurisdiction and extraordinary powers that reflect the particular public purpose it performs. The body has power to compel persons to answer questions or produce documents or things and may override the privilege against self-incrimination. Noted that most other jurisdictions do not provide an avenue for protection of journalists and their sources before their integrity/investigative agencies, a position that may be understood when regard is had to the nature, purpose and legislative scheme that underpins these entities.
Dr Ananian-Welsh et al	Submitted that by the investigative nature of their work journalists may be involved in non-judicial proceedings such as coronial investigations.

	Submitted that shield laws should apply in all non-judicial proceedings where the body has the power to compel a person to give evidence and/or make inquiries whether or not they are bound by the rules of evidence. While an expansive step this is necessary to fulfil the purpose of the laws to support a free press and a strong democracy. A well-crafted balancing test allows decision-makers to test whether or not the circumstances of the case merit application of the privilege.
AJF	Submitted that given the compelling interest in protecting the integrity of the journalist-source relationship there is no reason to give coronial investigations and inquests power to override the principle over and above any exceptions that would apply in any other court.
ARTK	Submitted that shield laws should apply in all circumstances and that parties to the proceedings can make an application for an order to override the shield.
PIJI and CAJ	Recommended that shield laws apply in any proceeding where a journalist can be compelled to provide evidence including coronial inquests. Suggested that journalists' protection of sources comes from their ethical and professional obligations, consideration of potential harm to the source and the public interest in freedom of press and open communication, which remain consistent regardless of the setting in which a journalist is compelled to appear.
QCCL	Submitted that the shield should apply broadly to any court, tribunal or other body that has the power to compel the giving of evidence or production of documents.
QLS	Noted that <i>Coroners Act 2003</i> allows the coroner to issue a search warrant, imposes a duty on a person to help an investigation, including requiring that person to give documents and information, and that there is a penalty for non-compliance without a reasonable excuse. Submitted that while its preference is for broad shield laws that apply to all proceedings and investigations, it is cognisant that there needs to be a balance of policy interests and noted that the Victorian legislation does apply to coronial investigations.

## Commissions of inquiry

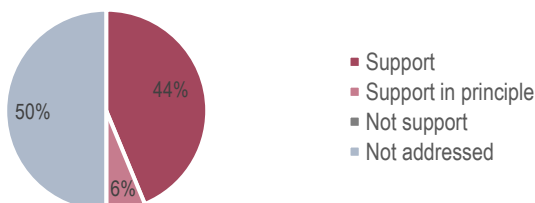
### Survey

The majority of survey respondents, 94 percent, supported the application of shield laws to commissions of inquiry.



### Submissions

Half of the submitters supported the application of shield laws to commissions of inquiry.



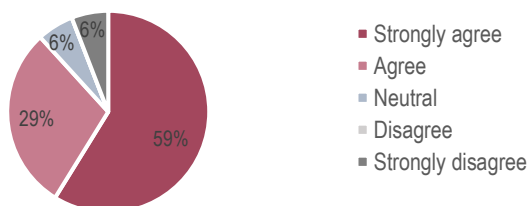
## Key feedback

Submitter	Comments
APC	Submitted that shield laws should apply to civil and criminal proceedings and should extend to any proceeding in which a person may be compelled to answer questions or produce documents or other material.
HRLC	<p>Submitted that commissions of inquiry have coercive powers that threaten to undermine press freedom and public interest reporting. Noted that the Commissions of Inquiry Act allows witnesses to refuse to attend a hearing, answer a question or produce a document if they have a reasonable excuse, and that reasonable excuse incorporates various forms of privilege. Submitted that reasonable excuse should include journalistic privilege.</p> <p>Submitted that the abrogation of the privilege against self-incrimination should not influence a shield law as other jurisdictions allow witnesses to plead journalistic privilege despite the abolition of the privilege against self-incrimination and the privileges safeguard different interests. The privilege against self-incrimination seeks to protect a witness from the risk that their disclosure may be used against them in other proceedings, which can be minimised through restricting how the information may be used in the future. Journalistic privilege seeks to protect not only the journalist and their source from retribution but broader interests as well, namely the free flow of information, the public's right to know and democratic accountability. Disclosing a source's identity irreversibly harms these interests, and the harm cannot be sufficiently mitigated by restricting how the information is used. Once it is known that a source's identity has been revealed potential whistleblowers are deterred from coming forward.</p>
CCC	<p>Noted that commissions of inquiry are inquisitorial proceedings established for particular purposes with limited statutorily defined jurisdiction and extraordinary powers that reflect the particular public purpose it performs. The body has power to compel persons to answer questions or produce document or things and may override the privilege against self-incrimination.</p> <p>Noted than only Tasmania and the ACT apply the concept of shield laws to their integrity/investigative agencies.</p> <p>Submitted that as a general proposition, principles protecting journalist's sources have not application to commissions of inquiry (<i>McGuinness v Attorney-General (Vic)</i> (1940) 63 CLR 73).</p>
Dr Ananian-Welsh et al	<p>Submitted that by the investigative nature of their work journalists may be involved in non-judicial proceedings such as commissions of inquiry.</p> <p>Submitted that shield laws should apply in all non-judicial proceeding where the body has the power to compel a person to give evidence and/or make inquiries whether or not they are bound by the rules of evidence. While an expansive step this is necessary to fulfil the purpose of the laws to support a free press and a strong democracy. A well-crafted balancing test allows decision-makers to test whether or not the circumstances of the case merit application of the privilege.</p>
ARTK	Submitted that shield laws should apply in all circumstances and that parties to the proceedings can make an application for an order to override the shield.
PIJI and CAJ	<p>Recommended that shield laws apply in any proceeding where a journalist can be compelled to provide evidence including commissions of inquiry.</p> <p>Suggested that journalists' protection of sources comes from their ethical and professional obligations, consideration of potential harm to the source and the public interest in freedom of press and open communication, which remain consistent regardless of the setting in which a journalist is compelled to appear.</p>
QCCL	Submitted that the shield should apply broadly to any court, tribunal or other body that has the power to compel the giving of evidence or production of documents.

## Crime and Corruption Commission (CCC)

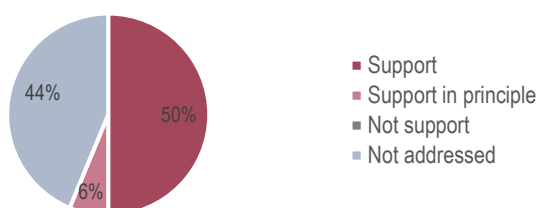
### Survey

The majority of survey respondents, 94 percent, supported the application of shield laws to investigations conducted by the CCC.



### Submissions

More than half of the submitters, 56 percent, supported the application of shield laws to CCC investigations.



### Key feedback

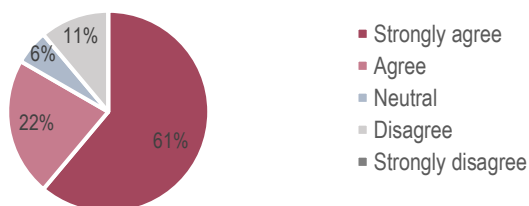
Submitter	Comments
APC	Submitted that shield laws should apply to civil and criminal proceedings and should extend to any proceeding in which a person may be compelled to answer questions or produce document or other material.
HRLC	<p>Submitted that shield laws should be extended to matters before the CCC. Suggested that dozens of stories have emerged of Australian anti-corruption commissions using confidential summons to force journalist to reveal their sources.</p> <p>Noted the ACT approach, which allows a witness before the commission to claim journalistic privilege, despite the fact that the rule of evidence and the privilege against self-incrimination applying, and if privilege is claimed the matter is sent to the Supreme Court to determine whether the privilege applies.</p> <p>Noted that the Queensland Crime and Corruption Act recognises claims for some types of privilege in some contexts, and that there is a mechanism for the Supreme Court to determine whether a privilege applies. Submitted that, given the legislative framework is already in place, a witness should be allowed to plead journalistic privilege in all proceedings before the CCC and allow the Supreme Court to determine the matter at first instance or on appeal.</p> <p>Submitted that the abrogation of the privilege against self-incrimination should not influence a shield law as other jurisdictions allow witnesses to plead journalistic privilege despite the abolition of the privilege against self-incrimination and the privileges safeguard different interests. The privilege against self-incrimination seeks to protect a witness from the risk that their disclosure may be used against them in other proceedings, which can be minimised through restricting how the information may be used in the future. Journalistic privilege seeks to protect not only the journalist and their source from retribution but broader interests as well, namely the free flow of information, the public's right to know and democratic accountability. Disclosing a source's identity irreversibly harms these interests, and the harm cannot be sufficiently mitigated by restricting how the information is used. Once it is known that a source's identity has been revealed potential whistleblowers are deterred from coming forward.</p>

CCC	<p>Noted that CCC inquiries are inquisitorial proceedings established for particular purposes with limited statutorily defined jurisdiction and extraordinary powers that reflect the particular public purpose it performs. The body has power to compel persons to answer questions or produce document or things and may override the privilege against self-incrimination.</p> <p>Noted than most other jurisdictions do not provide an avenue for protection of journalists and their sources before their integrity/investigative agencies, a position that may be understood when regard is had to the nature, purpose and legislative scheme that underpins these entities.</p> <p>Submitted that the statutory purposes of the CCC already require any decision, including a decision to require a journalist to disclose the identity of a source, must be made with due regard to the importance of protecting the public interest and that such a decision is amenable to challenge. As a general rule it may be considered that the public interest would ordinarily favour investigations being able to access information in furtherance of the statutory purposes.</p> <p>Noted that the extraordinary powers afforded to the CCC include the power to abrogate the privilege against self-incrimination, a fundamental right that is overridden in CCC proceedings reflecting the high public purpose in its core functions.</p> <p>Submitted that shield laws could be applied to CCC proceedings but that the default position should be that a witness is required to answer questions and the onus would be on the journalist or media organisation seeking to withhold that information to reflect that the public interest would generally be presumed to favour the effective investigation of serious crime and corruption.</p>
Dr Ananian-Welsh et al	<p>Submitted that by the investigative nature of their work journalists may be involved in non-judicial proceedings such as investigations of corruption.</p> <p>Submitted that shield laws should apply in all non-judicial proceeding where the body has the power to compel a person to give evidence and/or make inquiries whether or not they are bound by the rules of evidence. While an expansive step this is necessary to fulfil the purpose of the laws to support a free press and a strong democracy. A well-crafted balancing test allows decision-makers to test whether or not the circumstances of the case merit application of the privilege.</p>
AJF	<p>Submitted that given the compelling interest in protecting the integrity of the journalist-source relationship there is no reason to give the CCC power to override the principle over and above any exceptions that would apply in any other court. Recommended a process where a person claiming privilege can apply to the Supreme Court to determine the claim and that the Supreme Court would use the same rules placing the burden on investigators to show a compelling reason for overriding the shield.</p>
ARTK	<p>Submitted that shield laws should apply in all circumstances and that parties to the proceedings can make an application for an order to override the shield.</p>
PIJI and CAJ	<p>Recommended that shield laws apply in any proceeding where a journalist can be compelled to provide evidence including preliminary proceedings and investigations.</p> <p>Suggested that journalists' protection of sources comes from their ethical and professional obligations, consideration of potential harm to the source and the public interest in freedom of press and open communication, which remain consistent regardless of the setting in which a journalist is compelled to appear.</p>
QCCL	<p>Submitted that the shield should apply broadly to any court, tribunal or other body that has the power to compel the giving of evidence or production of documents.</p>
QLS	<p>Submitted that if shield laws are introduced, the preliminary view is that their coverage should extend to CCC investigations, as the investigations can lead to criminal proceedings in a court or disciplinary proceeding in the tribunal, and both are settings in which shield laws are likely to apply.</p> <p>While the CCC plays an important function in our society, shield laws should be considered to protect the identity of a confidential source in CCC investigations where information can be compelled, notwithstanding that the privileges have been excluded from applying to corruption commission investigations in other jurisdictions. A court would act as a check and balance on this privilege and be able to hear reasons from the CCC as to why, in a particular case, the shield should be overridden.</p>

## Tribunals and other decision-making bodies

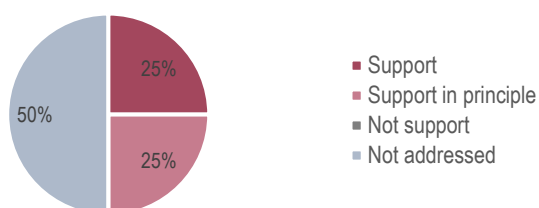
### Survey

The majority of survey respondents, 83 percent, supported the application of shield laws to tribunals and other decision-making bodies.



### Submissions

Half of the submitters supported the application of shield laws to tribunals and other decision-making bodies.



### Key feedback

Submitter	Comments
APC	Submitted that shield laws should extend to any proceeding in which a person may be compelled to answer questions or produce documents or other material.
HRLC	Submitted that shield laws should apply to all administrative proceedings as the public interest in protecting journalists and their sources is just as compelling in relation to administrative hearings as court proceedings. Noted that witnesses before QCAT can refuse to answer a question or produce a document if they plead the privilege against self-incrimination or have a reasonable excuse, and suggested that there is no reason why journalistic privilege should not apply. Noted that in NSW journalist privilege may excuse a journalist from producing a document in NSW Civil and Administrative Tribunal.
CCC	Submitted that shield laws should apply in all courts and tribunals regardless of whether the tribunals are bound by the rules of evidence and regardless of whether the body is adversarial or inquisitorial in nature. Noted that to apply shield laws broadly to legal proceedings in Queensland would be to radically expand the sphere of protections available to journalists in all proceedings while allowing a court to determine how the public interest is best served. Submitted that while shield laws as framed in other jurisdictions do not apply to all types of legal proceedings, there would be value in such laws apply in all jurisdictions. Submitted that while shield laws in other jurisdictions are generally located within the evidence laws and deal with notions of compellability, there is not good reason why they would not apply to proceedings bound by the rules of evidence. Noted that proceedings before QCAT there are still provisions what govern compellability of witnesses, and that while the rules of evidence do not apply in a strict sense, they may provide guidance to a tribunal even where they are not binding.

Dr Ananian-Welsh et al	<p>Submitted that it is important that journalists' privilege extend to matters in QCAT as it occupies a central position in the Queensland court system. As QCAT undertakes a significant proportion of the judicial work in the state, and has capacity to exercise jurisdiction (it has been held to be a court of record under the Australian Constitution capable of exercising federal jurisdiction (<i>Owens v Menzies</i> [2013] 2 Qd R 327)) the justification for extending shield protection in the District and Magistrates courts applies equally to QCAT.</p> <p>Submitted that shield laws should apply in all non-judicial proceedings where the body has the power to compel a person to give evidence and/or make inquiries whether or not they are bound by the rules of evidence. While an expansive step this is necessary to fulfil the purpose of the laws to support a free press and a strong democracy. A well-crafted balancing test allows decision-makers to test whether or not the circumstances of the case merit application of the privilege.</p>
AJF	Submitted that given the compelling interest in protecting the integrity of the journalist-source relationship there is no reason to give any tribunal or decision-making body power to override the principle over and above any exceptions that would apply in any other court. Recommended a process where a person claiming privilege can apply to the Supreme Court to determine the claim and that the Supreme Court would use the same rules placing the burden on investigators to show a compelling reason for overriding the shield.
ARTK	Submitted that shield laws should apply in all tribunals and decision-making bodies related to the administration and operation of the state, otherwise the same potential risk to the obligation of confidence that applies if the shield does not pertain to the preliminary processes arises.
PIJI and CAJ	Submitted that shield laws should apply in any proceeding where a journalist can be compelled to provide evidence including tribunals and other decision-making bodies. Suggested that journalists' protection of sources comes from their ethical and professional obligations, consideration of potential harm to the source and the public interest in freedom of press and open communication, which remain consistent regardless of the setting in which a journalist is compelled to appear.
QCCL	Submitted that the shield should apply broadly to any court, tribunal or other body that has the power to compel the giving of evidence or production of documents.

## Practical approach to introducing a shield

### Submissions

#### *Key feedback*

Submitter	Comments
CCC	Submitted that fundamental legislative principles weight against legislation having retrospective effect, and that allowing shield laws to operate with retrospective effect would seem to have limited impact and applicability.
AJF	Submitted that shield laws should apply to information disclosed to a source before the laws formally take effect, and that the laws should apply retrospectively to any investigations or proceedings that have already begun.
ARTK	<p>Submitted that shield laws should apply to information disclosed by a source before the shield laws begin.</p> <p>Submitted that given the long time that Queensland has operated without a journalists' shield the status of proceedings or investigations that are currently on-foot where a shield would be applicable should be seriously considered.</p>
PIJI and CAJ	Submitted that the shield law protections be extended retrospectively to the greatest possible extent within the boundaries of common law and the Constitution consistent with the approach of Victoria and SA.

QLS	<p>Noted that several jurisdictions have allowed shield laws to be relied on in respect of information passed to a journalist by a source prior to the laws commencing. While much of the explanatory material is silent on the issue, submitted that potentially, the retrospective application was to avoid confusion about when the protections would apply, particularly in circumstances where the time of the communication between the journalist and the source may not be known or the information was communicated over a period of time.</p> <p>Submitted that it has concerns about applying the protections to journalists where court proceedings have been started prior to commencement of the laws, as a party may have made decisions about the proceeding based on these laws not being in place and a change may produce substantial consequences for a party where proceedings are already on foot. A journalist should not have advised a source before the commencement of these laws that shield laws are in force and are able to be relied on. Submitted that regardless of whether the laws apply retrospectively or prospectively there should be clear transitional provisions providing how a privilege can be claimed at each stage of a process or proceeding.</p>
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## Other matters

### Human rights

#### Submissions

##### *Key feedback*

Submitter	Comments
HRLC	Submitted that the Queensland Government should push for the introduction of a federal Charter of Human Rights and Freedoms that guarantees freedom of expression and by extension a 'free, uncensored and unhindered press'.
CCC	Submitted that shield laws are likely to engage the rights to a fair hearing, to privacy and reputation, to liberty and security of person, and freedom of expression. Fair hearing rights are central to shield law considerations, the right for a litigant to present all relevant information to a court for a full consideration of the relevant issues is of paramount importance. The right to privacy and reputation is also core, an order requiring disclosure of information that a source provided on a confidential basis and has sought to keep their role as a source private may not be compatible with the right. Human rights engaged by the introduction of shield laws are not absolute and in many instances a decision will involve balancing competing rights to determine the most appropriate outcome in the public interest.
PIJI and CAJ	Submitted that the introduction of shield laws strengthens Queensland's commitments to promoting rights to freedom of expression, to take part in public life, and to privacy and reputation, and potentially infringes on rights to a fair hearing and in criminal proceedings insofar as the shield may interfere with the administration of justice. But appropriately balance by legislation and the courts the benefits of shield laws through the positive effect on the production of public interest journalism that contributes to community cohesion and good governance, outweigh its impacts.
QLS	Submitted that the current options available to a journalist is such cases and F v CCC are insufficient and shield laws will generally assist the promotion and protection of human rights. Decisions by the courts on an application to apply or override the shield should be conscious of the human rights of individuals involved and the need to balance any consequential human rights impacts flowing from a decision.



## Nationally consistent shield laws

### Submissions

#### *Key feedback*

Submitter	Comments
APC	Submitted that all states and territories should have effective journalist shield laws and that these should be uniform, as a lack of uniformity could mean that an attack on the protection is likely to be mounted in the jurisdiction that has the weakest protection.
HRLC	Recommended that the Queensland Government push for the harmonisation of state and territory shield laws to create a broad, nationally consistent approach.
CCC	Submitted that modelling Queensland laws on existing legislation would allow for a consistent approach between jurisdictions, allowing for the common law, which informs the interpretation and application of these law, to develop in a uniform way.
Dr Ananian-Welsh et al	Submitted that national consistency is particularly important in the context of shield laws. Noted the Parliamentary Joint Committee on Intelligence and Security recommended the harmonisation of Australian shield laws and submitted that journalists' sources ought to expect a similar level of protection across the Australian justice system.
PIJI and CAJ	Hoped that the submission contributes to the development of a practical, harmonised approach to shield laws across Australia.
QLS	Noted that it agreed with the repeated calls to harmonise shield laws across jurisdictions but submitted that harmonisation should not be pursued for its own sake at the expense of quality laws for Queensland.