

# Introducing a journalists' privilege into Queensland law

Submission to the  
Department of Justice and Attorney-General, Queensland

Friday 16 July, 2021

[Public  
Interest  
Journalism  
Initiative]



## 1. Introduction

The Public Interest Journalism Initiative (PIJI) and the Centre for Advancing Journalism at the University of Melbourne (CAJ) welcome the opportunity to comment on the Queensland Government Department of Justice and Attorney-General's discussion paper *Shielding confidential sources: balancing the public's right to know and the court's need to know*. The paper reflects an important commitment by the Queensland Government to introduce essential protections for journalists and for public interest journalism.

PIJI and CAJ strongly support the introduction of shield laws in Queensland, and we commend the Government's commitment to consider this issue. Our two organisations have come together to develop this joint submission as we share a common interest in the health of public interest journalism in Australia.

News is part of the civic infrastructure of any working democracy. Public interest journalism – the news and current affairs media that has the primary purpose of recording, investigating, and explaining issues of public interest or significance – plays a critical role in ensuring that the community is well and fairly informed. Without it, citizens' ability to engage in public debate and informed decision-making is impaired.

The importance of protecting sources is a key component of quality journalism and news gathering and among the highest ethical obligations that journalists face.

Queensland has the opportunity to introduce a shield law which benefits from the experience of implementation and operation in other jurisdictions and cases that have come before them. We submit that this gives Queensland the opportunity to introduce a best-practice shield law which provides the necessary safeguards for journalism, appropriately balanced with the administration of justice.

We hope that our submission is useful in achieving this balance and in the avoidance of any unintended or detrimental consequences, and that it contributes to the development of a practical, harmonised approach to shield laws across Australia.

This submission is structured as follows:

- Section 1 comprises this brief introduction.
- Section 2 addresses the questions asked in the discussion paper.
- Section 3 provides information about the Public Interest Journalism Initiative.
- Section 4 provides information about the Centre for Advancing Journalism.
- Section 5 provides information about the preparation of this submission.

## 2. Responses to questions posed in the discussion paper

### Absolute or qualified privilege

PIJI and CAJ acknowledge the fundamental importance of the judiciary having the ability to use its discretion on the merits of an individual case, and therefore recommend that the shield law in Queensland should offer a qualified privilege (Q. 1A).

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

Shield laws seek to resolve the tension that exists between a journalist's ethical obligation to uphold a promise of confidentiality to a source, and the court's need to have access to the truth in order to administer justice. It is essential, then, that a shield law be carefully drafted so as to meet the legitimate needs of all parties.

PIJI and CAJ recommend that the Queensland Government adopt the definition of a 'journalist' contained within the Commonwealth and Australian Capital Territory legislation as *a person who is engaged and active in the publication of news and who may be given information by a source with the expectation that the information may be published in a news medium* (Q. 2A). This definition appropriately defines a journalist by their engagement in news publishing activities and is better suited to the modern news environment. PIJI has advocated for the use of this definition in previous submissions to the Senate Standing Committees on Environment and Communications' inquiry into press freedom<sup>1</sup> and to the ACCC's development of the News Media Bargaining Code.<sup>2</sup>

However, we note that a literal reading of the Commonwealth/ACT definition would limit protection to those who *may be given information by a source*. We suggest that there are people in the news production process who may not be given information by a confidential source but who may come to learn the source's identity through the normal course of their work (such as editors, producers, camera operators and other news and support staff). We recommend that, in order 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. (Q. 2E).

PIJI and CAJ do not recommend the adoption of the definition adopted by New South Wales, Victoria, South Australia and Western Australia, as a person *engaged in the profession or occupation of journalism*. As the shield law consultation paper recognises, there have been significant shifts in news production during the digital era. No longer are all people conducting journalism, who may legitimately require the protection of a shield law,

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<sup>1</sup> Dickson G. and Simons M. 2019. *Submission by the Public Interest Journalism Initiative to the Senate Standing Committees on Environment and Communications Press Freedom Inquiry*. p. 2.

[<https://piji.com.au/research-and-inquiries/our-submissions/senate-press-freedom-inquiry/>](https://piji.com.au/research-and-inquiries/our-submissions/senate-press-freedom-inquiry/)

<sup>2</sup> Public Interest Journalism Initiative and Judith Neilson Institute for Journalism and Ideas 2020. *Joint submission to the Australian Competition and Consumer Commission's Mandatory News Media Bargaining Code concepts paper*; Public Interest Journalism Initiative and Judith Neilson Institute for Journalism and Ideas 2021. *Joint submission on the Australian Competition and Consumer Commission's Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020 (Exposure Draft)*.

[<https://piji.com.au/research-and-inquiries/our-submissions/accc-mandatory-news-media-bargaining-code-submission/>](https://piji.com.au/research-and-inquiries/our-submissions/accc-mandatory-news-media-bargaining-code-submission/)

necessarily working inside a traditional newsroom. A definition that bases protection on being *engaged in the profession or occupation of journalism* may exclude freelancers, students, volunteers, academics and others with hybrid news careers whose activity and output is otherwise indistinguishable from that of full-time reporters and who may have legitimate need to invoke the privilege in order to protect a confidential source.

Additionally, we note some circularity in the *profession or occupation of journalism* definition, which seems to suggest that a journalist is a person employed as a journalist.

If the Queensland Government chooses to adopt that definition, it may wish to provide further guidance to assist with the application of the definition, consistent with the approach of Victoria. (Q. 2B). These factors may include:

- The professional standards and processes which distinguish journalism from other types of information gathering and publishing. These include prior verification of facts; application of the harm principle; fairness, meaning adherence to the principles of natural justice; balance, meaning following the weight of evidence; and decision-making based on news values and the public interest, which are extensively defined in the literature<sup>3</sup> and well-known to practitioners.
- Whether a person or their employer is subject to a recognised code of conduct, such as those overseen by the Australian Press Council, Australian Communications and Media Authority, or an equivalent standard. There is a practical difficulty as there is no single code or authority which governs all individuals who are engaged in journalism, however, commitment to a code may indicate that an individual is in the profession of journalism, even if it is not their main occupation.

PIJI and CAJ recommend that these additional factors for determining whether a person is engaged in the profession or occupation of journalism be treated as guidance, rather than a prerequisite for accessing the shield.

## Other definitions

PIJI and CAJ recommend that the definition of a *source* (Q. 3A) and *news medium* (Q. 4A) be consistent with the definitions contained within the relevant Commonwealth, NSW, ACT, Victorian, SA and WA legislation.

## Applicability of shield laws

As a base principle, PIJI and CAJ believe legislative and policy interventions in support of news media should be linked to outcomes for the underlying public good of their work.

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<sup>3</sup> As the starting point of research into news values, see Galtung J. and Ruge M. H. 1965. The structure of foreign news: the presentation of the Congo, Cuba and Cyprus crises in four Norwegian newspapers. *Journal of Peace Research* 2(1): 64-90. For the public interest, see Muller D. 2014. *Journalism ethics in the digital age*. Melbourne: Scribe Publishing.

We submit that a journalist's protection of confidences comes from their ethical and professional obligations to the source; consideration of the potential harm that a source could experience if their identity were to be revealed; and the public interest in freedom of the press and open communication about matters which affect the public or in which the public have invested trust. These factors remain consistent regardless of the setting in which a journalist is compelled to appear.

We therefore recommend that the shield law apply in any proceeding where a journalist can be compelled to appear or to provide evidence, including court proceedings (S. 5); preliminary proceedings and investigations (S. 8); coronial inquests (S. 9); commissions of inquiry (S. 10) and tribunals and other decision-making bodies (S. 11).

### Overriding the shield

Consistent with the principle that a qualified privilege is justified by the public benefit provided by journalists, the decision to override a shield should be made with consideration of the public benefit. We also submit that the interests of parties to the proceedings, as well as the interests of the source, are relevant factors.

PIJI and CAJ recommend that a shield should only be overturned in rare and exceptional circumstances (Q. 6A). The overriding of a shield to enable a civil damages claim does not appear to meet a public benefit test. In criminal matters, where the liberty of an accused person is at stake, we recognise that there is a greater need for the court to have full access to evidence. In that circumstance, we submit that there are several factors that a court should consider before overriding a shield.

We strongly recommend that the court should consider the potential harm that the source could face if their identity were revealed.

Other considerations to be taken into account (Q. 6D) may include the future ability of journalists to receive information from confidential sources; press freedom and the ability of journalists to publish on matters which affect the public and in which the public have invested trust; whether the relevant evidence could be obtained without compelling a journalist to reveal their source and the seriousness of the charge in a criminal proceeding.

We do not consider the manner in which information was obtained by the source as a relevant factor in determining whether the shield should be overridden unless that manner has direct bearing on the proceedings.

If a court, in its discretion, overrides a shield (Q. 6E) PIJI and CAJ recommend that it be empowered to impose any conditions that it sees fit, consistent with the approach of the Commonwealth, NSW, ACT, Victoria and the Northern Territory. In particular, we recommend that the court considers an order to preserve the confidentiality of a source to the greatest extent possible while facilitating the administration of justice, including limitations on who may hear evidence and the use of that evidence.

Where the court determines that a source may face harm by disclosure of their identity, there should be an specific obligation to mitigate that harm (Q. 6F). However, a court's ability to impose terms and conditions for harm mitigation should not be an originating factor in determining any override of a shield. PIJI is concerned that despite a court's best efforts, it may be unable to fully mitigate the harm that some sources may face if their identities were to be revealed.

Finally, the court should be obligated to give reasons in making, or refusing to make, an order that the shield be overridden (Q. 6G). This approach is consistent with principles of open justice, helps to ensure public accountability among the judiciary and provides an opportunity for education of the proper functioning of the law. Such reasoning is also critical to informing this developing area of law.

### Other matters

- PIJI and CAJ recommend that the shield law protections should be extended retrospectively to the greatest possible extent within the boundaries of common law and the Constitution, consistent with the approach of Victoria and South Australia (Q. 12A; Q. 12B).
- PIJI and CAJ note that Queensland may have to provide a Statement of Compatibility of a law to introduce a shield under the *Human Rights Act 2019* (Q. 13). We commend the Queensland Government for its initiative in having passed the Act and committing itself to protecting and promoting human rights.

We note that a similar obligation exists for the Victorian Government under the *Charter of Human Rights and Responsibilities Act 2006*.

We believe that the introduction of a shield law strengthens Queensland's commitments to promoting rights to freedom of expression; to take part in public life and to privacy and reputation. We also acknowledge that a shield potentially infringes on rights to a fair hearing and in criminal proceedings, insofar as a shield may interfere with the administration of justice.

However, we submit that, appropriately balanced by legislation and the courts, the benefits of a qualified privilege for journalists - through the positive effect on the production of public interest journalism which contributes to community cohesion and good governance - will outweigh its impacts.

- Finally, the paper considers whether the definition of a journalist should be consistent with the definition under the *Public Interest Disclosure Act 2010*. (Q. 2D). PIJI and CAJ believe in harmonisation of law wherever appropriate. However, we suggest that it is preferable to adopt the definition of a journalist contained within the Commonwealth and ACT shield laws for both purposes, rather than use the definition within the *Public Interest Disclosure Act 2010* for this new purpose.

### 3. About the Public Interest Journalism Initiative

The Public Interest Journalism Initiative (PIJI) is a specialist think tank focussing on how Australia can secure the future of public interest journalism. Established in late 2018, PIJI's evidence-based work informs practical policy solutions and public conversation on the importance of an effective, pluralistic news media of all sizes.

As a registered charity (ACN 630 740 153), PIJI is governed by a board of independent directors and guided by an Expert Research Panel and Policy Working Group. PIJI is a limited shelf-life initiative, due to cease operation in June 2023 in line with achieving its intended impact.

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#### 4. About the Centre for Advancing Journalism

The Centre for Advancing Journalism at the University of Melbourne exists to foster and encourage journalism that is useful to people in being informed and engaged citizens. We advance journalism through our innovation in teaching, research and engagement. We see opportunities in the power of the new tools for informing and being informed. We are a hub of thinking, conversation and creativity. We embrace the opportunities in change, even as we heed the threats. We will harness the unprecedented potential for a more engaged citizenry.

Our fundamental aim is to advance the practice of journalism at a time of great change. Through the triple helix of teaching, research and engagement, we seek to play a constructive role in the future of news media.

The Centre for Advancing Journalism (CAJ) was established in 2009 within the Faculty of Arts at the University of Melbourne. In 2015, the Centre joined the School of Culture and Communication (SCC).

## 5. Preparation of this submission

This submission was developed jointly by the Public Interest Journalism Initiative and the Centre for Advancing Journalism: Anna Draffin (Chief Executive Officer, PIJI); Gary Dickson (Research and Projects Manager, PIJI); Associate Professor Andrew Dodd (Director, Centre for Advancing Journalism) and Dr Denis Muller (Senior Lecturer, Centre for Advancing Journalism).

PIJI's Policy Working Group approved this submission. Within CAJ, this joint submission was reviewed and approved by Associate Professor Andrew Dodd, Director.

# [Public Interest Journalism Initiative]

## CONTACT US

Public Interest Journalism Initiative

ABN 69 630 740 153

[info@piji.com.au](mailto:info@piji.com.au)

[www.piji.com.au](http://www.piji.com.au)

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