

5. Shield laws in Australia

Legal and ethical implications for journalists and their confidential sources

Abstract: This article examines whether Australia's current shield law regime meets journalists' expectations and whistleblower needs in an era of unprecedented official surveillance capabilities. According to the peak journalists' organisation, the Media, Entertainment and Arts Alliance (MEAA), two recent Australian court cases 'despite their welcome outcome for our members, clearly demonstrate Australia's patchy and disparate journalist shields fail to do their job' (MEAA, 2014a). Journalists' recent court experiences exposed particular shield law inadequacies, including curious omissions or ambiguities in legislative drafting (Fernandez, 2014c, p. 131); the 'unusual difficulty' that a case may present (*Hancock Prospecting No 2*, 2014, para 7); the absence of definitive statutory protection in three jurisdictions—Queensland, South Australia and the Northern Territory (Fernandez, 2014b, p. 26); and the absence of uniform shield laws where such law is available (Fernandez, 2014b, pp. 26-28). This article examines the following key findings of a national survey of practising journalists: (a) participants' general profile; (b) familiarity with shield laws; (c) perceptions of shield law effectiveness and coverage; (d) perceptions of story outcomes when relying on confidential sources; and (e) concerns about official surveillance and enforcement. The conclusion briefly considers the significance and limitations of this research; future research directions; some reform and training directions; and notes that the considerable efforts to secure shield laws in Australia might be jeopardised without better training of journalists about the laws themselves and how surveillance technologies and powers might compromise source confidentiality.

Keywords: confidentiality, contempt of court, ethics, media law, shield law, sources, surveillance, whistleblowers

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AUSTRALIAN journalists have fought for more than two decades for effective source protection against a backdrop of the sweeping powers of the courts and the oppressive powers of investigating authorities and inquiry bodies to demand

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disclosure (Fernandez, 2014b, pp. 24-25). Journalists have sought stronger source protection through shield laws by mounting concerted campaigns, including one that attracted more than 37,000 signatures to a petition addressed to an influential plaintiff, mining magnate Gina Rinehart, who was pursuing disclosure of journalists' confidential sources (Heffernan, 2013); and by tending to prefer sustaining a penalty for contempt of court rather than disclose a confidential source (Fernandez, 2014a, p. 139).

This study reports on insights gained from an online survey conducted nationally and through follow-up one-on-one interviews with journalists, on their experiences in working with confidential sources. The study was aimed at addressing the paucity of data showing the experience of journalists at the coalface when dealing with stories necessitating reliance on confidential sources. While there has been ample discussion of journalist source protection among legislators, law reformers, academics and commentators, including journalism commentators, there is a dearth of empirical data showing how journalists accommodate shield laws in their day-to-day professional duties, if in fact a shield law bears upon them. This study takes a step towards remedying that situation.

The study's objectives are to:

- a. better understand how Australian journalists operate when obtaining information for publication through undertakings of confidentiality to their sources;
- b. better understand how legal and ethical rules and other considerations impact on journalists relying on confidential sources; and
- c. apply the understanding thereby gained towards efforts, including law reform efforts, aimed at addressing the issues identified.

As journalists persevere with their quest to ensure that all Australian jurisdictions are covered by effective shield laws, a South Australia Member of Parliament's observation during parliamentary debate on that state's failed attempt at introducing shield law, reinforces the argument for proper and comprehensive shield law protection for journalists:

I ask all members here to be honest when they think about the consideration of this bill and what they have had to seek from constituents when they have come forward and they have said, 'I want to disclose an ill. I want to have this situation remedied. Please don't use my name. I will be in trouble if you do. I might lose my job. My wife might lose her job. I might be ridiculed publicly. But I want to have this issue exposed.' There would not be a member in this house who could honestly say we have not had people contact us, or provide us information anonymously because they state in that material their concern about repercussions of that disclosure. (Chapman, 2014, p. 2566; on this point see also Wingard, 2014, p. 2565)

This study acknowledges the importance of whistleblowers being able to turn to journalists with important 'off the record' information of public concern, trusting in the assurance that their confidentiality will be protected. However, the research raises fundamental questions about journalists' use of confidential sources, the answers to which are

sometimes taken for granted. For example, although the desire for absolute protection against having to revoke a promise of confidentiality to a source appears to be beyond question, responses to this survey indicate a preparedness to recognise that a disclosure of the journalist's own volition, independently of any compulsion to do so by the courts, may be justified after taking into account overriding public interest considerations.

Background

The European Court of Human Rights has described the protection of journalistic sources as 'one of the basic conditions for press freedom' (*Goodwin v UK*, 1996, para 39). The court has noted further: 'Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest' (ibid). The formal consideration of statutory protection for Australian journalists' confidential sources began in the mid-1990s (Senate Standing Committee, 1994). This is a relatively recent start in an international context. Shield laws for journalists are in operation in 49 US state jurisdictions (Society of Professional Journalists, 2015)—the first was introduced in Maryland in 1896 (Silverman, 2010, p. 2). In the United Kingdom, journalists were granted confidential source protection under s.10 of the *Contempt of Court Act 1981*. New Zealand introduced legislation to offer some protection to a range of confidential relationships as early as 1980 under s.35 of its *Evidence Act 1908*. An important policy consideration is that all three of those countries have constitutional or human rights instruments protecting free expression (US Constitution First Amendment, UK *Human Rights Act 1998* and NZ *Bill of Rights Act 1990*), which have shaped judicial interpretation of shield laws. See, for example, the US Supreme Court's decision in *Branzburg v Hayes* in 1972 where, despite refusing the journalist source protection by a 5-4 majority, the court detailed a strict set of requirements under which a journalist could be subpoenaed to give evidence. Unlike the US and other Western democracies, Australia has no written free expression instrument at a national level—only a High Court finding of an implied constitutional freedom to communicate on matters of politics and government which has been interpreted narrowly since it was introduced by the High Court in 1992 in *Australian Capital Television Pty Ltd v Commonwealth*.

The problem this study seeks to address primarily arises from the gaping *expectations disjunct* afflicting the extent of shield law protection. Simply stated, the term 'shield law' refers to law providing legal recognition of the need for journalists to protect their confidential sources of information (*LexisNexis* dictionary, 2015, p. 579). That protection is defined, for example, in the Commonwealth law in a provision entitled 'Protection of journalists' sources', as follows:

If a journalist has promised an informant not to disclose the informant's identity, neither the journalist nor his or her employer is compellable to answer any question or produce any document that would disclose the identity of the informant or enable that identity to be ascertained. (*Evidence Act 1995* (Cth), s. 126H(1))

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That provision is, however, qualified by the ensuing sub-section, setting out two specific grounds to over-ride the protection—if the public interest in disclosure outweighs:

- a. any likely adverse effect on the informant or others; and
- b. the public interest in the communication of facts and opinion to the public by the news media and the news media's ability to access sources of facts.

These qualifications set important bars on the protection. For example, it is clear that recognition of the protection turns entirely on the court's discretion; and it is not enough that the claimed adverse effect resulting from a court-ordered disclosure *may* occur, it must be a '*likely* adverse effect' (s. 126H(2)). The broad thrust of the legislation is similar in the various jurisdictions that currently provide a statutory shield. In addition to the Commonwealth statute, the protection is found in the respective *Evidence Acts*: Australian Capital Territory (s. 126K(1)); New South Wales (s. 126K(1)); Tasmania (s. 126B); Victoria (s. 126K(1)); and Western Australia (s. 20I). Inconsistencies may be found in respect of 'who is protected, when, how and in what circumstances' (Fernandez, 2014b, p. 24).

While legislators deem the balance struck by statutory shields to be satisfactory, the mainstream media industry has expressed dissatisfaction. Then Attorney-General Philip Ruddock when introducing the first real statutory recognition through the *Evidence Amendment (Journalists' Privilege) Bill* said the Bill 'implements an important reform... by introducing a privilege that will protect confidential communications between journalists and their sources' (Ruddock, 2007, p. 6). His successor, Robert McClelland, when introducing a shield law amendment, said the Bill 'delivered on [an] election commitment to strengthen journalist shield laws'; that 'the Bill recognises the important role that the media plays in informing the public on matters of public interest'; that the Bill 'strengthens provisions relating to the information provided to journalists'; and that the amendments 'are about ensuring the public is able to access information' (McClelland, 2009). The Attorney-General criticised the Howard government's 'flawed legislation in 2007 which was a quick fix to a complex issue' (ibid). The Bill's Explanatory Memorandum said the amendment would 'give recognition to the important function the media plays in enhancing the transparency and accountability of government [and that the media's] role in informing the community on government matters of public interest is a vital component of a democratic system' (McClelland, 2008-2009, item 4). Such lofty aspirations may be found in parliamentary documents accompanying other shield Bills. For example, the Explanatory Memorandum accompanying the Western Australia *Evidence and Public Interest Disclosure Amendment Legislation Bill 2011* said the protection being introduced 'represents an important reform to evidence law' (Porter, 2011).

Is there, however, really a disjunct in expectations? The foregoing avowals of a strong commitment to protecting journalists' confidential sources are, in fact, underpinned by qualifications that journalists and media bodies appear to overlook. Ruddock qualified his support for a shield law by observing that the Bill 'seeks to achieve a balance'; that 'the

new privilege will not be absolute'; and that in deciding whether to exclude the evidence that would disclose confidential communications made to a journalist, the courts would 'take into account' a range of factors (Ruddock, 2007, p. 6). Likewise McClelland, in the very first paragraph of his general outline on the amendment, stated that the privilege would only operate 'in certain circumstances' (McClelland, 2008-2009, item 1). He said the privilege would 'provide that the court is to achieve a balance' between the public interest in the administration of justice and the public interest in the media communicating facts and opinion; and that the privilege would apply only 'in appropriate circumstances' (McClelland, 2008-2009, items 2 and 11). In pursuing statutory source protection media organisations have not advocated absolute protection—that is, the protection sought has always been for an attenuated protection, one predicated on a 'stronger presumption in favour of protection of journalists' confidential sources' (Media, Entertainment and Arts Alliance, 2009). A major coalition of Australian media organisations took a similar position, characterising 'effective shield law' as being one 'based on a presumption' that sources should not be revealed unless ordered to do so on strictly limited grounds by a judge (Moss, 2007, p. 73).

The above authorities set out the following fundamental propositions: (a) the protection of journalists' confidential sources is critical to media freedom and to democracy; (b) various Australian legislatures have recognised, in some measure, the importance of protecting journalists' confidential sources; (c) legislatures and the media are generally agreed that the protection to be afforded is necessarily a qualified one; (d) the critical remaining question is where the fulcrum should be set on the scales balancing journalists' need to protect their confidential sources and all other interests that militate against such protection, including that of the courts whose primary task is to administer justice for all.

Methodology and research questions

This study, approved under a university ethics process for low-risk studies, used the Qualtrics web-based survey software. It comprised 42 questions allowing for varying modes of answers. The questions allowed for 'yes/no' answers or multiple choice answers allowing for a selection of up to 14 choices in one question (the question on precautions) and 12 choices in another (the question on types of individuals given a confidentiality undertaking); answers allowing for text box entries to expand on answers ticked in the multiple choice section; questions requiring forced text box entry where particular responses were chosen; and questions allowing for the identification of the respondent for the purposes of follow-up interviews. The findings discussed in this article are set out under the next heading. It covers selected themes in the survey. The survey was opened on 8 August 2014 and the data were extracted on 7 October 2014. The survey was distributed mainly through the Media, Entertainment and Arts Alliance (MEAA), which disseminated the survey invitation through its member network. A selection of media outlets also assisted with distributing the survey, including the *Australian*

Broadcasting Corporation, The Australian, The Sydney Morning Herald, The Age and The West Australian. The MEAA reported having 5913 ‘media’ members in June 2014 (Media, Entertainment and Arts Alliance, 2014b, p. 27). A total of 154 valid responses were received, comprising 93 completions and 61 partial completions (explaining why the response rates varied across questions). The sample error was calculated at 7.8 percent based on a 95 percent confidence interval. This was followed up by 30 interviews, conducted via telephone, with respondents who agreed to follow-up interviews. Each interview lasted 15 to 45 minutes.

The findings, discussion and analysis

This article discusses selected themes drawn from the survey referred to above. As a general early note, where percentages below should total 100 percent, due to rounding off some totals arrive at 99 percent or 101 percent. Some questions permitted multiple selections that did not require the answer tally to total 100.

Participants’ general profile:

Of the 154 responses to the question to ‘describe your journalistic role’, 53 percent said they were mostly engaged in interviewing sources or involved in researching or writing stories, while 18 percent said they were mostly engaged in editing or processing stories for publication, for example, as sub-editor or editor. Those who were engaged in all the foregoing roles constituted 23 percent of respondents. Thus, those who were engaged in one or more of the foregoing roles amounted to 94 percent of respondents. Those who opted for ‘other’ (6 percent) indicated roles such as work involving ‘government publications’ and ‘blogger’. In response to the question asking participants to indicate the ‘platform’ on which their work was published, more than 70 percent of respondents said they published in print and online, with the bulk of the remainder working in radio or television. Journalistic roles included: General Duties (39 percent); Government and Politics (47 percent); Crime and Courts (25 percent); Business and Economics (23 percent); Arts and Entertainment (21 percent); Higher Education; (10 percent); Sport (14 percent); Society and Community (40 percent); Defence and Security (14 percent); and Other (23 percent). Those who selected ‘Other’ cited the following as some of their areas of activity: Freelance, Health, Investigative, Real Estate, Travel and Lifestyle, Heritage, Law, Environment, Indigenous Affairs, Media, Industrial Relations, Rural and Agriculture, International Affairs, and Human Rights. These data indicate that the participants are engaged in a broad spread of journalistic activities and stark variations might arise as to the need to rely on confidential sources. More than half of participants nominated a full time work status. Most had more than seven years’ experience (73 percent) with the rest indicating as follows: less than one year (4 percent); one-to-three years (16 percent); and four-to-seven years (7 percent). The final ‘profile’ question asked participants to indicate the type of employer by reference to number of employees in that organisation

‘engaged in journalism duties’. Most (60 percent) worked for organisations with more than 41 employees.

Journalists’ familiarity with shield laws:

The survey indicated a gaping chasm in journalists’ understanding of shield laws. Three-quarters of the 154 respondents were ‘uncertain’ as to whether a shield law applied in their jurisdiction. Of the remaining responses 11 percent said they were covered by ‘State/Territory and Federal’ shield laws; 6 percent said ‘only Federal’; and 11 percent said ‘State/Territory’. The next question was—‘how would you describe your familiarity with shield law and the way it works?’ Almost one-third (29 percent) of 147 respondents said they had ‘no understanding’ of shield laws and how they operate. The remaining 72 percent of respondents said they had ‘some understanding’ (62 percent); a ‘good understanding’ (9 percent); or ‘excellent understanding’ (1 percent).

The next question in the sequence sought to establish responses in relation to a key operational matter when it comes to confidentiality undertakings—how do journalists determine which portions of the communications made to them by sources, where a confidentiality undertaking claim might arise, are actually part and parcel of the undertaking given? In other words, when is information ‘on the record’; ‘off the record’; or ‘background information’? A convenient summary of what these terms mean can be found in the *Australian Broadcasting Corporation* guideline:

On the record, meaning both parties agree that the information imparted to the journalist may be disclosed and attributed to the source by name. *On background*, meaning both parties agree that the information imparted to the journalist may be disclosed but not attributed to the source. *Off the record*, meaning both parties agree that the information imparted is not to be disclosed, with or without attribution. (ABC Editorial Policies, Guidance Note, 2011, p. 3)

Controversies have arisen in the past involving information that may be characterised as being ‘off the record’ (ABC TV, *Media Watch*, 2005; ABC TV, *Media Watch*, 2012; Pearson, 2014). Only 2 percent of 147 respondents said they had ‘no understanding’. The remaining 98 percent said they had a ‘some understanding’ (16 percent); ‘good understanding’ (46 percent); or ‘excellent understanding’ (36 percent). The responses suggest that while the majority claim to have a good or excellent understanding, 18 percent say they have ‘no understanding’ or only ‘some understanding’ and this can lead to particular difficulties for this group when it comes to their reliance on shield laws. This is because a clear apprehension of what is ‘in or out’ of the confidentiality promise is important for the purposes of establishing the precise content of the promise and thereby any obligation of confidentiality arising from that promise. As this was a self-estimate, further research might test the level of that understanding. In response to the question ‘are you aware that there are penalties for withholding information when it involves

police or other investigating authorities' the majority of the 146 respondents (75 percent) said 'yes'. However, the rest (25 percent) answered 'no'. On a related question 'are you aware that there are penalties for withholding information when it involves the courts?' while 81 percent of the 147 respondents said 'yes', it is a concern that 19 percent said 'no', especially given the high profile of such cases in recent years. In the text entry section (allowing participants to elaborate on the answer ticked) for this question two of the responses were: 'But I don't care, sources are protected'; and 'Pretty much tell them to stuff off'. Such responses may explain either resoluteness in subscribing to the source protection obligation even at the expense of incurring a penalty; a refusal to acknowledge the stakes involved; or, a failure to appreciate the qualified nature of statutory source protection provisions.

Journalists' perceptions of shield law effectiveness and coverage:

An important recurring issue in the area of shield laws anywhere in the world is the breadth of the protection that should apply. Butler and Rodrick broadly classify the privilege into three categories: (a) absolute—to apply in *all* circumstances; (b) judicial discretion—giving judges discretion to excuse journalists from disclosure; and (c) presumption of non-disclosure—where those seeking disclosure carry the burden of displacing the protection (2012, pp. 430–431). The privilege currently available in Australia generally falls in the last two categories (Butler & Rodrick, 2012, p. 431). In any event, absolute privilege is not available at all for the protection of journalists' sources. In response to the question 'how important is it to be able to provide strong protection for confidential sources' the 95 survey participants who responded overwhelmingly, and unsurprisingly, indicated that it was 'extremely important' (96 percent), while the remainder said it was 'moderately important'. In response to the question asking participants to choose from a list of preferences how the 'protection should be reflected' the participants indicated as follows: 'through a professional code of ethics that you can show binds you' (77 percent); 'through laws made by parliament' (72 percent); 'through decisions made by the courts' (51 percent); 'through rules laid down by your media employer' (40 percent); and 'Other' (5 percent). Text entry responses in the last category included such responses as through 'professional courage', through 'personal ethics' and through the teachings of educational institutions. It is notable that participants put the showing of an obligation under a binding professional code of ethics ahead of any other mode of protection. In response to the question asking participants to rate the present state of shield law protection in Australia it is noteworthy that 65 percent of the 95 who responded said it was 'somewhat adequate'; while 34 percent said it was 'totally inadequate'. One percent said it was 'totally adequate'. In interpreting these responses it is useful to keep in mind the earlier responses showing ignorance of whether shield laws might operate and confessing a limited understanding of shield laws.

Participants were asked to indicate, 'if it were entirely up to me', what type of shield

law they would introduce. Unsurprisingly 59 percent of the 95 participants said they would introduce ‘absolute protection’; 35 percent said they would ‘retain the qualified protection with a presumption against disclosure’. In the text entry provided by those who chose ‘Other’ (5 percent), one suggestion was to amend defamation law to prevent the ‘abuse of defamation proceedings as a cover for source identification’, while another participant proposed to ‘do as I please. I’ll suffer the consequences ... as long as the community’s interests are duly served’. In response to the question ‘which one of the following best describes your view of how shield law should work?’ 59 percent of the 93 participants said the law ‘must protect the confidential source in all circumstances’, while 41 percent advocated such protection ‘only when the confidentiality is justified’. On this point the responses were roughly similar to the above question in this section ‘if it were entirely up to me’ ... although it indicates an inconsistency with another view above in this section, where 65 percent of participants said the present state of shield law was ‘somewhat adequate’.

A critical and unsettled point is: whom should shield laws cover? Current statutory provisions are not consistent on the law’s coverage in relation to professional journalists and others who, for example, publish material on the internet (Fernandez, 2014b, pp. 24–25). The following question was aimed at eliciting views on ‘who should be covered by shield law?’ and participants were invited to choose from a list of potential answers. The responses were: ‘only journalists who can show that they are bound by a recognised journalistic code of practice governing journalism’ (39 percent of 93 respondents); ‘all journalists as long as the content in question... was produced in keeping with a journalistic code of practice, even though the journalist cannot show that they are bound by that code’ (32 percent); ‘all journalists, in any circumstance, regardless of whether they can show that they are bound by a recognised journalistic code of practice’ (24 percent); ‘all journalists regardless of whether they are employed by a “mainstream” media organisation, or whether they are “citizen journalists” or bloggers and other producers of journalistic content (18 percent); ‘only those who can demonstrate that they perform the role of “journalist” for a living’ (18 percent); and ‘Other’ (6 percent). The text entry for ‘Other’ included the following comments: ‘I am not sure’; that protection ‘shouldn’t be extended to citizen journalists or bloggers who self-publish. Nor should it be extended to advocates who masquerade as freelance journalists’; and that ‘full-time employment in the sector means nothing’. A related question asked participants to indicate how they would define ‘journalist’. Of the 93 responses the largest group (48 percent) indicated that the term should mean that the person ‘belongs to a registered professional journalism body that observes a professional code of practice’. The remaining definitions participants chose were: ‘a person who is primarily engaged in work that is clearly governed by being employed in an organisation that has a news and current affairs function’ (45 percent); ‘a person who may not be strictly defined as a journalist but whose work for which protection is claimed qualifies as journalistic output (38 percent); ‘any person who

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claims source protection for something they published regardless of whether it meets a journalistic standard' (6 percent); and 'Other' (5 percent).

Journalists' perceptions of their story outcomes when relying on confidential sources:

The media's default position on stories that rely on confidential sources is well established and reflected in the Media Alliance Code of Ethics provision:

Aim to attribute information to its source. Where a source seeks anonymity, do not agree without first considering the source's motives and any alternative attributable source. Where confidences are accepted, respect them in all circumstances. (Media, Entertainment and Arts Alliance, Code of Ethics, Clause 3)

While it is clear that the overwhelming majority of journalists deem source protection a *sine qua non* of the profession, how do journalists perceive the 'level of success', as demonstrated by published outcomes? In the first of the questions in this bracket, the participants were asked to 'rate your level of success (i.e. the published story served an important public good) in pursuing a story in reliance on information secured as a result of providing a confidentiality undertaking to your source'. The responses were: 'often good' (39 percent of 94 participants); 'sometimes good' (28 percent); and 'always good' (16 percent). Only 2 percent said 'no good', while 15 percent were 'neutral'.

The risk to a journalist of being manipulated by sources acting in bad faith is well recognised and acknowledged in some ethics code provisions to the extent of a readiness to deem the 'promise of anonymity no longer binding' if a source acting in bad faith were to succeed in using the medium to spread misinformation (*Los Angeles Times* Ethics Guidelines, 2011). In response to the question 'which of the following describes your experience in working with confidential sources?' participants were asked to select as applicable from the following: 'on occasion the source's information was flawed but the source was not motivated by bad faith' (49 percent of 94 responses); 'on occasion the source's information was flawed and the source appeared to be motivated by bad faith' (13 percent); 'on occasion the source's information was flawed but it was not clear if the source was motivated by bad faith' (26 percent); 'on occasion the source's information was readily available from other sources and therefore attributable and it was not necessary to enter into any confidentiality undertaking' (27 percent); and 'on occasion the source appeared to have ulterior motives but the overriding factor for you was whether the information had genuine public concern value' (55 percent).

Two further questions sought to elicit participants' perception of success, one focussed on the respondents themselves and the other upon 'other journalists'. The first of these questions was 'reflecting honestly on your own use of confidential sources, do you believe you may have over-used confidential sources in your own work?'. Not surprisingly the majority of the 94 responses (57 percent) were that, rating themselves personally, participants 'never over-used' confidential sources. The remaining responses

were: ‘sometimes over-used’ (12 percent); ‘justified use’ (30 percent); with only 1 percent saying ‘over-used’. Thus, the claim clearly was overwhelmingly that when rating their own use of confidential sources 87 percent saw their own use of confidential sources as either ‘never over-used’ or used justifiably. The picture is different when the question to participants was ‘when thinking about how *other* journalists use confidential sources, do you believe there is an over-use of confidential sources in their work?’ In response 62 percent said ‘sometimes over-used’ (50 percent) or ‘often over-used’ (12 percent). The remainder said ‘never over-used’ (16 percent) or ‘justified use’ (22 percent). While the partiality to the participant’s own positive rating of their personal reliance on confidential sources was to be expected, the apparent lack of confidence in such use by *other* journalists is concerning.

Journalists’ concerns about surveillance and enforcement actions by the authorities:

Journalists’ alarm about surveillance and enforcement actions by the authorities have become more pronounced in recent years as governments the world over invoke concerns over national security to bolster their powers and capabilities in this regard. It is referred to as the ‘golden age for surveillance’ (Swire & Ahmad, 2012, p. 463). Ewart et al state that those who take the risk of contacting sources by phone may be giving authorities access not only to conversations with the person contacted but may also be identifying other sources (2013, p. 121). The concern in Australia is reflected in media representations to the government in response to legislative initiatives that impact on journalists. For example, the peak professional organisation representing Australian journalists, the MEAA, in a submission on national security stated:

Due to the rise of telecommunications interceptions, journalists must assume their conversations with sources could be intercepted – obliterating any professional right the journalist has to protect the confidentiality of their source and, thus, negating the intent of shield laws that recognise and protect journalist privilege. (Media, Entertainment and Arts Alliance, 2012, p. 7)

Pearson (2013) has suggested surveillance by the state is so sophisticated in the modern era that a source like ‘Deep Throat’ in the *Washington Post*’s infamous Watergate investigation could not be protected in the modern era.

More recently the MEAA raised similar concerns in relation to the Federal Government’s *Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2015* (Media, Entertainment and Arts Alliance, 2014c). The Bill was referred to the Joint Intelligence and Security Committee and the committee recommended that the matter of protecting journalists’ sources ‘requires further consideration before a final recommendation be made’. (Parliamentary Joint Committee on Intelligence and Security, 2015, p. 258). The Bill (2015) passed with modest concessions aimed at protecting journalists’ sources. In this study participants were asked ‘how concerned are you about the implications

of surveillance of your communications and communications devices (e.g. computers, mobile devices, telephones, web browsers, cameras, emails) for the sanctity of your confidentiality undertakings to sources?'. Somewhat surprisingly less than one-third of participants (31 percent) said they were 'very concerned'. The remaining responses were: 'not concerned' (8 percent); 'a little concerned' (26 percent); 'generally concerned' (27 percent); and 'neutral' (7 percent). These responses suggest that journalists are either not sufficiently aware of the reach of the government's surveillance powers and its implications for the sanctity of journalists' confidential sources, or that journalists are savvy enough to avoid detection. Some of the responses to the next question provide a clue regarding both assumptions. Participants were also asked 'how concerned are you at the prospect of an official raid at work/home in pursuit of information that will identify your confidential source?' Such raids have occurred in the past giving rise to strong protests from the media (Shorten et al, 2014; Senate Legal and Constitutional Affairs References Committee, 2014) and in one case, prompted a parliamentary inquiry into a police raid on a newspaper (Select Committee into the Police Raid on *The Sunday Times*, 2009).

The question put to participants in the present study was 'how concerned are you at the prospect of an official raid at work/home in pursuit of information that will identify your confidential source?'. The findings revealed a significant lack of concern about such raids. More than half the participants were 'not concerned' (46 percent of 108); while 22 percent said they were 'sometimes concerned'; 4 percent were 'often concerned'; 10 percent were 'always concerned'; while 18 percent were 'neutral'. The responses indicating a lack of concern may be attributable to a lack of interest, or more likely, the perception among the participants concerned that their work was unlikely to be of interest to the authorities to the extent that it was vulnerable to a police raid. Participants were also asked 'what precautions do you take to safeguard your sources, and materials such as documents, recordings, notes, digital data?'. The responses were: 'do not record identifying information' (36 percent); 'record identifying information but keep it separately from the information itself' (24 percent); 'assign a "code" to the source identity but keep the identifying information separately' (22 percent); 'keep the materials at my workstation' (15 percent); 'keep the materials in the editor's/line manager's office' (1 percent); 'keep the materials in a safe at work' (8 percent); 'keep the materials at home' (26 percent); 'leave the materials in the custody of a third party' (13 percent); 'avoid using the telephone to communicate with the confidential source' (62 percent); 'avoid using any form of traceable record of communication with the source' (38 percent); 'Other' (9 percent); and 'none' (6 percent). This final statistic, despite its small proportion is still a concern. The text entry responses from some of those who selected 'Other' included: 'I may arrange to meet a source using a traceable form of communication, but that conversation remains unrecorded by electronic means'; 'destroy the materials as soon as possible'; 'most of the sensitive information including source identity is committed to human memory alone...can't even be hacked'; 'password protected USB or cloud

account'; and 'if I felt a life was in danger, I wouldn't record anything at all, at least not in a form that someone else could understand'. The range of measures journalists resort to in order to protect their sources, while it reveals an attitude of care or concern, may not necessarily always provide the real protection they expect. For example, it may be asked why so many journalists assume that keeping the materials at their workstation, at home or in the editor's/line manager's office are, *per se*, safe options given recent police raids on news premises.

Conclusion

In proposing reforms in this area, whether in the form of legislation, work practice or other reforms, the limitations of this research noted above are acknowledged. Furthermore, this work did not examine commercial pressures on journalists, the rivalry between journalists to get 'exclusives', and other pressures on journalists to rely on confidential sources. Notwithstanding these limitations, the findings above provide a useful foundation for some assumptions, directions for future research, and for some preliminary observations.

First, how well do journalists understand shield laws? A good understanding of shield law is critical for journalistic work involving reliance on confidential sources. It is significant that 75 percent of 154 participants were uncertain whether they were covered by a shield law. So too is the high number of participants who said they had 'no understanding' (29 percent) or only 'some understanding' (62 percent) of how shield laws work. In the follow-up interviews it appeared that participants were unaware of explanatory literature in this area (for instance, Media Alliance publications on the subject); found the area too complex; or admitted to neglecting this area.

Second, participants' claim to have a 'good' or 'excellent' understanding of information obtained 'on the record', 'off the record' and 'background information' merits closer attention. It is significant that 18 percent of this sample said they had 'no understanding' or only 'some understanding' of these three categories of information. For shield laws to operate effectively, a key element is the existence of a promise regarding confidentiality (for example, Commonwealth *Evidence Act*, s.126H(1)). Uncertainty as to the content of the promise can give rise to difficulties in a claim for protection.

Third, participants indicate a lack of awareness of the penalties that can flow from withholding information from the courts or the police. While the staunch defiance in some of the responses (for example, 'Pretty much tell them to stuff off') reveals a high level of commitment to source protection, and is to be lauded, journalists stand to benefit from appreciating that it is possible to avoid difficult situations through greater care when entering into confidentiality commitments.

Fourth, to a question on how to provide 'strong protection for confidential sources' the main preference was for a system that allowed journalists to show that they were bound by a professional code of ethics (77 percent of 95 participants). This was, as seen above,

slightly ahead of the preference for statutory protection, and well ahead of the preference for protection through court decisions. This position merits further examination.

Fifth, as seen above, about one-third of the participants considered the present law ‘totally inadequate’ while 59 percent would introduce ‘absolute protection’. Overall the survey responses advocating ‘absolute protection’ can be read as seeking the kinds of protection afforded to other established ‘privileged classes’ such as legal counsel and medical doctors. In reality, such a strong form of protection for journalists’ confidential sources is next to non-existent, as noted above. It is likely, therefore, that the respondents are in fact voicing a desire for ‘effective protection’—protection that would forestall the pursuit of sources on questionable grounds or grounds described in one shield law case as ‘oppressive or constitutes an abuse of process’ (*Hancock Prospecting No 2*, 2014, paras 6 and 44). There are also inconsistencies: between the data concerning the preference for absolute protection; the apparent strong preference for protection through the commitment to a code of ethics ahead of statutory protection; and the strong support for protection ‘only when the confidentiality is justified’. Such responses illustrate the present lack of understanding of how shield laws operate and the substantial challenges facing reform initiatives. Notwithstanding this, the present lack of uniform and effective rules that are couched in clearer and simpler terms needs addressing.

Sixth, the question of ‘who’ should be protected indicates a deep division. On the one hand is the wide view that embraces an unwieldy constituency by encompassing much more than those who would pass as ‘professional journalists’ in the conventional sense. On the other is a narrow view that would greatly reduce the size of the group entitled to seek source protection. The present statutory framework in this regard is inconsistent (see item 5 on ‘Definitions’, Fernandez, 2014b, pp. 26–27). The acknowledgement in one court case that journalism is a ‘profession’ suggests that the courts are likely to take a measured approach in considering who is entitled to source protection (*NRMA v John Fairfax*, 2002, paras 146–150). One view is that media privileges generally ‘are capable of applying to bloggers, tweeters and other users of the new media’ (Finkelstein, 2012, para 5.14). In New Zealand, the High Court has ruled that a blogger can be defined as a journalist (*Slater v Blomfield*, 2014, para 140).

Seventh, while a high number (58 percent of 95 responses) indicated they were ‘generally concerned’ or ‘very concerned’ about official surveillance of their communications, the fact that the rest did not evince a similar view requires further examination. Preliminary indications are that a lack of concern may be due to the ‘low risk’ nature of the work these participants undertake, whether by choice or by coincidence, and their confidence (perhaps misguided) in their own precautionary measures. A related issue is the extent of culpability that may be attached to a journalist whose failure to properly safeguard the source results in a claim for damages. In one incident, a journalist lost her recording device, leading that journalist to observe that ‘the simple fact is that journalists have a responsibility to protect their sources and I deeply regret this incident has

compromised mine' (Tomazin, 2014). A range of legal remedies might be available to a whistleblower who has been misled by a journalist about the confidentiality they are offering including breach of contract (particularly in chequebook journalism), negligence and breach of confidence. Of course, none would apply if the journalist has been ordered to reveal a source in court.

The most alarming aspect of this study is the effect of apparent journalists' ignorance about shield laws, the various types of confidential information, safe protocols for confidential data storage, and the powers of courts and government agencies to compel their disclosure; combined with the sophistication of modern surveillance technologies and the new legal powers available to government agencies to use them. The combined effect of these contributing factors raises serious questions about the level of confidence a whistleblower can have in a journalist being knowledgeable and competent enough to protect their identity. The research indicates some journalists show a sense of bravado about their willingness to protect their sources, which is not underpinned by a working knowledge of shield laws or an understanding of surveillance technologies and agency powers. While the journalist might express a preparedness to be jailed for refusing to reveal a source, it is the source who will be burned if the reporter's ignorance and poor practices lead to their detection. Our sobering conclusion is that the efforts of media lobbyists over several decades to win shield laws in several Australian jurisdictions might go to waste if journalists do not learn more about their existence, their scope and their reliability in a new age of surveillance. Our strong recommendation is that training in shield laws, levels of confidentiality and source and data security should be implemented promptly. The liberty of both journalists and whistleblowers depends upon it.

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