



30 August 2019

**Submission by the Public Interest Journalism Initiative to the
Senate Standing Committees on Environment and Communications
Press Freedom Inquiry**

The Public Interest Journalism Initiative welcomes this inquiry and appreciates the opportunity to provide a submission.

The Public Interest Journalism Initiative (PIJI)

PIJI is a not-for-profit body established as a limited-life initiative (3-5 years) to conduct research, develop policy and promote public discussion on ensuring a sustainable future for public interest journalism.

What PIJI means by public interest journalism

Public interest journalism (the ‘fourth estate’ concept) is essential the proper functioning of democracy. It not only holds power to account but is critical to an informed citizenry. It is institutionally critical to constituting a genuinely deliberative democracy.

Public interest journalism includes both highly-prized investigative journalism and the essential daily grind: recording, investigating and explaining public policy and issues of public interest or significance with the aim of engaging citizens in public debate and informing democratic decision-making.

We note that the recent ACCC Digital Platforms Inquiry final report adopted, with minor modification, the definition of public interest journalism suggested in our submission. That definition is:

Journalism with the primary purpose of recording, investigating and explaining issues of public significance in order to engage citizens in public debate and inform democratic decision making at all levels of government.

Freedom of the press is an essential enabling condition for conducting public interest journalism.

Response to terms of reference

This submission addresses the following terms of reference:

- (a) disclosure and public reporting of sensitive and classified information, including the appropriate regime for warrants regarding journalists and media organisations and adequacy of existing legislation; and
- (b) the whistleblower protection regime and protections for public sector employees.

These terms of reference indicate that the committee's attention is focussed on the ability of journalists to receive and publish information, and protections that are in place for those who disclose information to them.

Shield laws

The *Evidence Act 1995* provides a limited degree of protection for journalists from being made to reveal the identity of anonymous sources. Under the journalist's privilege, commonly known as a 'shield law', a journalist cannot be compelled to provide evidence that would reveal the identity of a confidential source unless ordered to by a judge. That order must take into account both the likely adverse effect of the disclosure and the public interest in a free press. Shield laws now exist in most Australian jurisdictions.

The privilege is not uniform across the country however, with particular differences emerging in the definition of who can claim the privilege.

Definition of a journalist

The definition of a journalist adopted in the relevant legislation of Victoria, New South Wales, South Australia and Western Australia does not reflect the reality of those who conduct public interest journalism and thereby narrows the number of working journalists who are protected by the warrant process. In those places a journalist is

a person engaged in the profession or occupation of journalism in connection with the publication of information, comment, opinion or analysis in a news medium.¹

A news medium is defined broadly as

any medium for the dissemination to the public or a section of the public of news and observations of news.²

The Victorian legislation sets the relevant considerations for whether a person is engaged in the profession or occupation of journalist as:

- The amount of time spent gathering and preparing, or commenting on news;
- Whether they regularly publish news or commentary in a news medium; and
- Whether the person is accountable to a code of ethics or practice.³

Within the context of significant industry upheaval, including extensive redundancies, casualisation and hybridisation of journalism jobs⁴, it is out of step with the state of the media industry to tie shield law protections to an expectation of regular professional work. This would seem to exclude freelancers and casuals, journalism students, and academics who might have experience working as

¹ *Evidence Act 2008* (Vic) s. 126J.

² *Ibid.*

³ *Ibid.*

⁴ For discussion see Zion L., Sherwood M., O'Donnell P., Marjoribanks T., Ricketson M., Dodd A. and Winarita M. 2018. *New beats report: mass redundancies and career change in Australian journalism.*

journalists, identify as journalists, conduct public interest journalism but draw their salary from a university.⁵

The New Zealand High Court considered the definition of a journalist in the case of *Slater v Blomfield*,⁶ which concerned whether a blogger could be classed as a journalist under Section 68 of the New Zealand Evidence Act – which contains the shield law provisions concerning protection of sources. Justice Raynor Asher found that a blogger can be legally defined as a journalist. Likewise, a blog can be journalism, even if the work is carried out for a non-mainstream media outlet. His Honour found that the definition of a journalist “does not impose quality requirements and does not require the dissemination of news to be in a particular format”. He also said that the blogger deserved the relevant protections because the reports contained “genuine new information over a wide range of topics”. The key determinant was ‘the element of regularly providing new or recent information of public interest’.⁷

In line with the New Zealand court’s judgment, we recommend a function-based definition that protects a person who is doing journalism, rather than one who is a journalist. A broader functional definition already exists in the Commonwealth and Australian Capital Territory legislation. For the purpose of providing the journalist privilege (shield law), the *Evidence Act 1995* (Cth) defines a journalist as

a person who is engaged and active in the publication of news and who may be given information by an informant in the expectation that the information may be published in a news medium.⁸

This definition recognises journalism as a methodological approach and separates the production of journalism from the employment status of the person who produces it. It is platform-agnostic and does not rely on a dated assumption that news is only that published in newspapers or aired on radio and television. As such it is more reflective of the modern media environment.⁹

Though in all instances the law protects both the journalist and their employer, it does not extend the shield law to others in the production process. It is conceivable that an editor or producer working with the journalist may not ‘be given information by an informant’, but whose material or evidence could nevertheless reveal that informant’s identity. With regard to a similar issue in data retention protection, the Law Council of Australia suggested that an additional paragraph should be added:

or any other person whose telecommunications data may reasonably be believed to be used to identify any journalist’s source.¹⁰

We recommend that:

- The federal government should lead an effort to harmonise shield laws across jurisdictions and adopt a broader functional definition of journalists.

⁵ Journalism Education and Research Association of Australia 2019. Submission 6. Inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press. Canberra: Parliamentary Joint Committee on Intelligence and Security.

⁶ [2004] NZHC 2221.

⁷ *Slater v Blomfield* [2014] NZHC 2221, [61].

⁸ *Evidence Act 1995* s 126J(1).

⁹ For a discussion of the applicability of shield laws to bloggers in New Zealand, which rely on a similar functional definition, see Ryan H. 2014. What’s in a name? Bloggers, journalism and shield laws. *Communications law bulletin* 33(4): 10-12.

¹⁰ Law Council of Australia 2019. Submission 40. Inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press. Canberra: Parliamentary Joint Committee on Intelligence and Security, par 161, p 37.

- Protection should be extended to all those involved in the newsgathering and publication process whose material or evidence may tend to reveal the identity of a source.

Data retention

The data retention regime significantly weakens one of the central pillars of journalistic ethics and methods of production: protecting the confidences of sources.¹¹ It provides police with a path to violate any guarantee given by a journalist to a source and undermines the privilege extended to journalists in the *Evidence Act 1995*.

It is worth noting that a similar data retention scheme in the United Kingdom led to widespread police use of journalists' metadata. A review by the Interception of Communications Commissioner's Office (IOCCO) in 2015 found that "19 police forces reported undertaking 34 investigations which sought communications data ... concern[ing] relationships between 105 journalists and 242 sources".¹² Separately, the mandatory data retention directive in the European Union was struck down by the Court of Justice of the European Union in April 2014, in part because it lacked an exemption for communications that are subject to an obligation of professional secrecy.¹³

We also note with concern that the Australian Federal Police obtained two warrants for journalists' metadata in 2017-18¹⁴ and that entities other than those named as enforcement agencies in the legislation have been accessing metadata using section 280 of the *Telecommunications Act 1997*.¹⁵

We recommend that:

- Section 280 of the *Telecommunications Act 1997* be amended to prevent agencies from accessing retained data except those enforcement agencies listed in the TIA Act.

Journalist information warrants

In Australia enforcement agencies are required to obtain a warrant before accessing a journalists' metadata. The existence of the journalist information warrant is implicit recognition of the importance of protecting freedom of the press. The principle that a journalist's professional obligation to protect their sources is important would seem to be the rationale for both the journalist information warrant and for the privilege afforded in the *Evidence Act 1995*. Little public interest journalism will occur if the public cannot trust journalists to protect their identities. The issuing authority is required to take the public interest into consideration, as well as any submissions made by the Public Interest Advocate, who represents a limited degree of contestability in the process.

It is our view however that the journalist information warrant does not provide sufficient protection for a number of reasons.

Definition of a journalist

¹¹ Clause three, MEAA Journalist Code of Ethics. <https://www.mea.org/meaa-media/code-of-ethics/>

¹² Interception of Communications Commissioner's Office. 2015. *IOCCO inquiry into the use of Chapter 2 of Part 1 of the Regulation of Investigatory Powers Act (RIPA) to identify journalistic sources*. February 4 2015.

¹³ Judgment, C-293/12 Digital Rights Ireland and Seitlinger and Others.

¹⁴ Taylor J. 2019. Australian federal police accessed journalists' metadata 58 times in a year. *Guardian Australia* 9 July.

¹⁵ Schliebs M. 2019. Data snooping free-for-all: loophole exploited. *The Australian* 31 July.

The definition of a journalist as adopted into the TIA Act is a similarly narrow definition as adopted into the Victorian Evidence Act:

a person who is working in a professional capacity as a journalist.¹⁶

The explanatory memoranda elaborate that indicators that a person is ‘working in a professional capacity as a journalist’ are regular employment, adherence to enforceable ethical standards and membership of a professional body.¹⁷ The employer of such a person is similarly protected.

For the same reasons discussed regarding shield laws, we recommend that:

- The definition of a journalist provided in the TIA Act should be changed to be consistent with the definition provided in the *Evidence Act 1995*. Additional protection should be extended to other people whose metadata may reveal the identity of a source.
 - The definition a source in the TIA Act should be changed accordingly.

Public interest

After an application for a journalist information warrant has been made the issuing authority must consider the public interest, defined in the legislation as:

(i) the extent to which the privacy of any person or persons would be likely to be interfered with by the disclosure of information or documents under authorisations that are likely to be made under the authority of the warrant; and

(ii) the gravity of the matter in relation to which the warrant is sought; and

(iii) the extent to which that information or those documents would be likely to assist in relation to that matter; and

(iv) whether reasonable attempts have been made to obtain the information or documents by other means.

(v) any submissions made by a Public Interest Advocate under section 180X; and

(vi) any other matters the Part 4-1 issuing authority considers relevant.¹⁸

This is a very limited framework for assessing the public interest that would seem to be weighted toward issuing the warrant. It does not consider whether there was a public interest in revealing the information that prompted the investigation, nor the public’s interest in maintaining the freedom of journalists to undertake their fourth estate responsibility. Beyond the impact on their privacy there is also no consideration of the harm that could come to the journalist, the source or the profession by the issuance of the warrant.

As noted above, the use of a journalists’ data to identify a source undermines the shield law privilege in the *Evidence Act 1995*, a principle acknowledged by the existence of the journalist’s information warrant. Setting aside the shield law privilege has to make a public interest consideration that:

¹⁶ *Telecommunications (Interception and Access) Act 1979* s 180G(1)(a)(i); s 180H(1)(a)(i) and s 180H(2)(a)(i).

¹⁷ *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015* Supplementary Explanatory Memorandum, (at [178]).

¹⁸ *Telecommunications (Interception and Access) Act 1979* s 180T(2)(b).

- (a) any likely adverse effect of the disclosure on the informant or any other person; and
- (b) the public interest in the communication of facts and opinion to the public by the news media and, accordingly also, in the ability of the news media to access sources of facts.

Adopting this public interest framing into the consideration could improve protection for journalists and partially reconcile the problem of inconsistency between data retention and the shield law.

We recommend that:

- The public interest consideration should be expanded to include the potential harm that could be done by the issuance of the warrant and the public interest in a free press.

Public interest advocates

Section 182A establishes that it is an offence to disclose information about journalist information warrants, including that one has been applied for, granted or revoked, including by the journalist if they become aware that their data is sought by authorities. The subject of the warrant has no opportunity to contest.

It is our view that the issuance of a journalist information warrant should be contestable by the subject of the warrant or their employer.

The scheme instead allows for the appointment of Public Interest Advocates. The Department of Home Affairs told Media Watch¹⁹ that the Advocate's job is to "promote the rights of a journalist to seek and impart information" but that responsibility is not established in the legislation nor its explanatory memoranda.

It is our view that the Advocate is far too constrained to act as a sufficient representative of the interests of the journalist, the source or the public more broadly. The Public Interest Advocate is not necessarily a journalist, nor are they necessarily familiar with journalistic ethics and news production. They are unable to consult with the subject of the warrant and are therefore unable to properly assess the harm that could be done by the issuance of the warrant, or the specific public benefit in the warrant being refused and the source remaining confidential. Harm from the granting of the warrant may include harm to the informant or harm to the journalist themselves. Furthermore, harm to the journalist may not be confined to physical harm or potential harassment: it has been recognised that a journalist whose sources are revealed, even against the journalist's will, may suffer significant detriment to their career as an investigative journalist.²⁰ As direct appointees of the Prime Minister, they are unlikely to have any formal capacity to withstand political pressure placed on them. The disclosure of who might be appointed a Public Interest Advocate by the Prime Minister also raises significant issue regarding transparency of government.

There is also no public reporting requirement regarding the overall number of journalist information warrants applied for, granted and refused, and by which enforcement agencies. The reporting of this basic information, even on an annual basis, is essential to provide a minimum level of transparency and accountability regarding government interference or attempted interference with the journalists and their sources under the extraordinary powers available to enforcement agencies under the data retention regime.

¹⁹ Media Watch 2019. Journalist information warrants. 22 July.

²⁰ See, e.g., *Madafferi v The Age* [2015] VSC 687 (9 December 2015), where Justice John Dixon agreed (at [116]) that compliance with an order of the court compelling a journalist to disclose a source's identity would be likely to 'effectively end his career as an investigative journalist'.

We therefore recommend that:

- Journalists and/or their employers should be informed when enforcement agencies seek access to their metadata and journalist information warrants should be contestable by the subject of the warrant and their employer.
- If the current scheme is to be kept, allow the Public Interest Advocate to consult with the subject of the warrant and present their assessment of the public interest and the potential harms of disclosure.
- The identities of Public Interest Advocates should be public, and their appointment made in consultation with legal and media peak bodies.
- Public Interest Advocates should be required to publicly report the number of submissions made each year as well as the number of times they contest the issuance of a warrant.

Public sector whistleblowers

We welcome the Government's recent efforts to strengthen whistleblower protections in the private sector and its declaration of an intention to reform the *Public Interest Disclosure Act 2013*.²¹ Disclosures in the public interest are critical to ensuring the accountability of institutions, the prevention of corruption and the safety of the public. Where disclosures are made to journalists in the public interest those who blow the whistle should be supported in their efforts and protected from retaliation.

The PID Act has not lived up to expectations, not least because it is likely to be unclear to a potential whistleblower when their conduct is protected, and it is therefore unlikely to provide confidence that they will receive protection following their disclosure. It has been described by Justice Griffiths as

“a statute which is largely impenetrable, not only for a lawyer, but even more so for an ordinary member of the public or a person employed in the Commonwealth bureaucracy”.²²

The review conducted by Philip Moss AM and completed in 2016 found that the “experience of whistleblowers was an unhappy one”²³ and that whistleblowers felt unsupported by their agencies and felt that they had faced reprisals.²⁴

A recently-completed project led by Professor A. J. Brown of Griffith University²⁵ found that, though disclosures to external organisations can be vital for ensuring integrity in institutions, few whistleblowers reported approaching the media. Those that did disclose externally said that they experienced reprisals at a higher rate than those who only reported internally.²⁶

The authors made the following recommendations to improve protections for disclosers approaching the media and other external parties:

- Simplified, consistent criteria for when whistleblowers may go public and be protected;

²¹ Australian Government 2019. *Australian Government response to the Parliamentary Joint Committee on Corporations and Financial Services report into whistleblower protections in the corporate, public and not-for-profit sectors*.

²² Applicant ACD13/2019 v Stefanic [2019] FCA 548 (at [17]).

²³ Moss P. 2016. *Review of the Public Interest Disclosure Act*. Canberra: Commonwealth of Australia. p. 6.

²⁴ *Ibid*, p. 17.

²⁵ Brown A. J. et al. 2019. *Clean as a whistle: a five step guide to better whistleblowing policy and practice in business and government*. Brisbane: Griffith University.

²⁶ *Ibid*, p. 47-48.

- Reform of the system of carve-outs of particular types of information to reflect the principle that public interest disclosures should be protected in all circumstances except when it poses a genuine risk of harm;
- Availability of a general public interest defence in criminal cases of alleged unauthorised disclosure; and
- Stronger legislative protection for journalists' use of whistleblowing information for public interest purposes.²⁷

The authors also recommended the establishment of a whistleblower protection authority that would support disclosers. We join the authors of this report in these recommendations.

Media Warrant proposal

Finally, we would like to draw the committee's attention to a proposal relevant to the terms of reference of this inquiry. In their submission²⁸ to the PJCIS inquiry into press freedom, Dr Rebecca Ananian-Welsh et al. propose an enhanced Media Warrant scheme. It is suggested that scheme would improve press freedom by:

- Using a broad definition of journalist, journalism and source in order to appropriately capture the range of actors that contribute to the production of public interest journalism;
- Requiring enforcement agencies to seek a warrant before using a wider range of powers, including using optical surveillance and tracking devices and obtaining documents related to serious and terrorism offences;
- Restricting the issuing of warrants to serving judges or the Attorney-General;
- Requiring the issuing authority to consider the public interest, including the impact on freedom of the press, and where possible, allow journalists and their employers to contest warrants;
- Granting greater independence to the Advocate by appointing them in consultation with peak legal and media bodies; and
- Limiting access to journalistic materials that are held in confidence.

If introduced the Media Warrant could address many of the concerns that we have with the existing journalism information warrant while also extending protection to journalists and sources in other contexts. We support further inquiry into the adoption of such a scheme.

²⁷ Ibid, p. 50.

²⁸ Ananian-Welsh R., Cronin R., Gelber K., Greste P. and Murray R. 2019. Submission 17. Inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press. Canberra: Parliamentary Joint Committee on Intelligence and Security.

Recommendations

General recommendations

- Enshrine a positive protection for freedom of speech and freedom of the press in Australian law.
- Conduct a further inquiry, perhaps by the Australian Law Reform Commission, into the introduction of a unified Media Warrant scheme.

Shield laws

- The federal government should lead an effort to harmonise shield laws across jurisdictions and adopt a broader functional definition of journalists.
- Protection should be extended to all those involved in the newsgathering and publication process whose material or evidence may tend to reveal the identity of a source.

Data retention

- The definition of a journalist provided in the TIA Act should be changed to be consistent with the definition provided in the *Evidence Act 1995*. Additional protection should be extended to other people whose metadata may reveal the identity of a source.
 - The definition a source in the TIA Act should be changed accordingly.
- The identities of Public Interest Advocates should be public, and their appointment made in consultation with legal and media peak bodies.
- Journalists and their employers should be informed when enforcement agencies seek access to their metadata and journalist information warrants should be contestable by the subject of the warrant and their employer.
 - Where that is not possible, allow the Public Interest Advocate to consult with the subject of the warrant and present their assessment of the potential harms of disclosure.
- The public interest consideration should be expanded to consider the potential harm that could be done by the issuance of the warrant and the public interest in a free press.
- Amend section 280 of the *Telecommunications Act 1997* to prevent agencies from accessing retained data except those enforcement agencies listed in the TIA Act.

Whistleblower protections

- Simplified, consistent criteria for when whistleblowers may go public and be protected;
- Reform of the system of carve-outs of particular types of information to reflect the principle that public interest disclosures should be protected in all circumstances except when it poses a genuine risk of harm;
- Availability of a general public interest defence in criminal cases of alleged unauthorised disclosure; and
- Stronger legislative protection for journalists' use of whistleblowing information for public interest purposes.
- Establish a central whistleblower protection authority to support disclosers in both the public and private sectors.