



**ALLIANCE** *for*  
**JOURNALISTS'**  
**FREEDOM**

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**Submission to the Queensland Attorney General  
Proposal for a State Shield Law  
Alliance for Journalists' Freedom**

**Introduction:**

The Alliance for Journalists' Freedom is an advocacy group formed in 2017 by journalist Peter Greste, lawyer Chris Flynn, and strategic communications consultant Peter Wilkinson. The group emerged out of a conviction that questions around press freedom and journalist safety were not being taken seriously enough in Australia and the Asia Pacific region.

The principle of press freedom as a fundamental part of a functioning democracy is universally accepted. Every Western democracy has press freedom written into its constitution, with the notable exception of Australia. The absence of clear protections for the underlying principle our constitution or statutes makes the need for robust protections for journalists and their democratic role even more crucial.

When performing properly, journalists act as informal watchdogs over public affairs, exposing problems such as failures of policy, abuse of public money, abuse of authority, corruption, and mismanagement. If sources are denied protection, many would refuse to talk to journalists and their stories would simply not get told; the public would be the poorer. That is why every established media code of practice includes an explicit obligation for journalists to protect the identity of their sources.

The value of allowing journalists to have a protected relationship with sources is also well established in law. The Commonwealth and every state and territory in Australia has a shield law of some form, with the notable exception of Queensland. The Alliance for Journalists' Freedom thus commends the Queensland Government for acknowledging this shortfall and moving to address it.

We take this opportunity to acknowledge the submission offered by Dr Rebecca Ananian-Welsh, Anna Kretowicz, and Prof Kath Gelber from the University of Queensland, and Associate Professor Jason Bosland from Melbourne University who we have worked closely with on similar issues. While we differ in our respective approaches to definitions, we broadly endorse their submission.

The AJF offers the following responses to the questions posed in the Queensland Government's discussion paper:

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

Because it is possible to imagine extreme circumstances where there may be a compelling public interest in identifying a source, the AJF recognizes that granting journalists an impenetrable shield would be inappropriate. However, any shield law should be explicit in placing the burden on investigators to show why the shield should be removed. The law should also be narrowly prescriptive in the circumstances under which it may be appropriate to compel a journalist to reveal a



source. Those include a direct threat to national security, a story that may have compromised an ongoing investigation, and so on. In any event, a court should be compelled to balance both the public interest in protecting the journalist/source relationship and the story in question, against the public interest in the administration of justice, before agreeing to lift a shield.

**2a. How should a journalist be defined for the purpose of shield laws in Queensland? Why?**

The AJF has given considerable thought to the best way to define the thing the shield should be protecting. In short a journalist should not be defined; instead; the *process* of journalism should be the focus.

Most traditional approaches have focused on the individual – the *journalist* – by defining their profession or source of income. For example, Queensland’s Public Interest Disclosure Act (2010) says a journalist is “a person engaged in the *occupation* of writing or editing material intended for publication in the print or electronic news media.” (Emphasis added.) The discussion paper rightly points out that because the technological developments have radically altered the way news is collected, compiled, and distributed, such a definition fails to capture many others who produce works of journalism, but who may not be professionally recognized as a journalist in the way the Public Interest Disclosure Act describes them. Academics, volunteers for community radio stations and news services, humanitarian workers and so on might all from time to time produce legitimate works of journalism but fail to meet the definition.

What matters is not granting special legal privileges to a particular class of individual, but protecting the role that *journalism* plays in a democracy, and its attendant relationship to sources.

Journalists widely understand their craft as a process of collecting, verifying, preparing, and distributing information. It involves gathering raw information, a process of confirming facts, organizing the information in a form that adheres to a widely accepted code of conduct, and publishing it in a public forum of some sort. While the internet carries a lot of stories that have the appearance of works of journalism, not all are created with the rigor, discipline and ethics that lie behind authoritative news stories.

For this reason, the AJF proposes an entirely new approach, defining journalism as an identifiable *process*.

Crucially, we believe the process must be underpinned by a commitment to a recognised journalists’ code of conduct. Such an approach is not determined by an individual’s employment or professional background, or the technology used to collect and distribute the information. Further, as the business of journalism becomes fragmented and diverse, such an approach protects anyone involved in the process, including editors, photographers, producers, researchers and so on.

Our approach already has a legal precedent in Australian law. While the Victorian Evidence Act requires the court to consider a person’s professional activity in deciding if they are a journalist or not – something we disagree with – it also



requires the court to consider, “whether the person or publisher of the information, comment, opinion or analysis is accountable to comply with recognised journalistic or media professional standards or codes of practice.”

For those reasons, the AJF proposes the following definition:

*Journalism means:*

- a. *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;*
- b. *for the purpose of making that information, commentary, opinion or analysis available to the public, or a section of the public; and*
- c. *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.*

**2c. Should there be a requirement that to rely on the shield laws the journalist must comply with a recognised code of conduct/practice? Why or why not?**

Yes.

As we have already mentioned, a key part of that process should be a commitment to a recognized code of conduct. It would be inappropriate to write a code into law, but all recognized codes contain ethical commitments that include (among other things) reporting accurately, fairly, and crucially, protecting the identity of their sources where appropriate.

Writing such a requirement into law would offer a powerful incentive for journalists and news organisations to adhere to those codes of practice and give the public confidence that the codes actually have meaning.

**2d. Should the definition of journalist for the purpose of shield laws be consistent with the definition of journalist for a public interest disclosure? Why or why not?**

Yes.

The AJF believes there is a compelling case for maintaining consistency throughout the legal code in defining *journalism*. We see no reason why our proposed definition could not work equally well for a public interest disclosure.

**2e. Should shield laws be extended beyond the journalist to others involved in the publication of information in a news medium? If yes, who should be protected?**

Yes.

If the purpose of the law is to maintain the integrity of the relationship between journalists and sources, it makes sense for the law to extend to anyone involved in the process. Journalism is often a collaborative process, including people who



would not fit the classic definition of journalist. People such as researchers, producers, photographers, camera operators, editors, and technicians might all be involved in producing a piece of journalism, and so might all be aware of or involved in the relationship with a source. If the shield fails to protect them all, it fails in its intended purpose.

By focusing on the process of journalism, the AJF's proposed definition captures all who are involved, regardless of their job description or role.

**3a. How should a source (informant) be defined for the purpose of shield laws in Queensland? Why?**

A source should be defined as a person who provides information to someone engaged in producing journalism, for the purposes of that journalism. Key to that relationship is an understanding that the information will be prepared and made public in a journalistic work.

**4a. How should news medium be defined for the purpose of shield laws in Queensland? Why?**

In the same way that the digital revolution has challenged the traditional ways of defining a journalist, it has also confused the traditional understanding of a news medium. It would have been impossible for early legislators to conceive of social media platforms such as Twitter, Facebook and TikTok. Any legislation must be agnostic about future developments in media that might change the way news is presented and delivered.

The AJF believes that because our approach focuses on the *process* of producing journalism, it applies equally well to both an individual and an organisation, regardless of the technology involved. In either case, as long as recognized journalistic processes are applied in accordance with a code of conduct the relationship with sources ought to be covered by a shield law.

**5a. In which types of court proceedings should shield laws apply? Why?**

As we have outlined above, the purpose of the law is not to protect any particular individual or profession, but to the role that sources play in informing the public. If that is the case, the protection should apply regardless of where it is being challenged. In other words, if such protection is appropriate in a criminal court, it is equally appropriate before a civil court, a Royal Commission, a Star Chamber, or any other tribunal, extra-judicial or quasi-judicial body. It is hard to imagine circumstances in which it would be appropriate for a court, but not in some other forum.

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. Any hearing would remain ignorant of the source, but also remain ignorant of the information that might otherwise have been published, and the net effect on the public interest will be negative.



**7a. Should the confidential source be able to waive confidentiality, and have their identity disclosed with their consent? Why or why not?**

Yes.

The AJF believes that if the principle underlying the protection of sources remains maintaining the integrity of that relationship and confidence in any agreed confidentiality, it follows that a source who wishes to self-identify is unlikely to damage that principle. We therefore believe that sources should be able to waive confidentiality if they choose to do so.

**8a. Should shield laws apply to protect the identity of a confidential source in preliminary court proceedings and/or investigation processes? Why or why not?**

Yes.

As we have already mentioned, 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. It should therefore explicitly cover both any court proceedings and any pretrial and investigation process. This includes subpoenas and summonses, pretrial disclosures, interrogations, search warrants, notices to produce, and any other pre-trial process. As previously stated, the shield is necessarily a qualified privilege, so it would be appropriate to allow investigative authorities an opportunity to apply to a court, to have the shield lifted in the same exceptional circumstances as for a court itself.

**8b. If shield laws were to apply to preliminary proceeding and/or investigation processes how should the process for the journalist asserting the application of the shield laws operate?**

In circumstances where a journalist's source or their data is being investigated, it is appropriate to give them an opportunity to contest any pre-trial process or investigation. In the United Kingdom, The Police and Criminal Evidence Act 1984 (UK) (PACE) sets out a scheme by which journalistic material is protected under the exercise of search warrants by police. Section 13 of PACE defines journalistic material broadly as any 'material acquired or created for the purposes of journalism', provided that material is 'in the possession of a person who acquired or created it for the purposes of journalism'. (This, incidentally, is consistent with our proposed definition of 'journalism'.)

Journalistic material is considered 'excluded material', meaning that it cannot be seized under the ordinary search warrant process. Instead, a special procedure found in Schedule 1 must be followed. This involves applying to a judge for an order that the journalistic material must be produced within 7 days. Notice must be given to the journalist(s) or relevant media organisation, and the application must be heard inter partes (i.e. the journalists must be given an opportunity to make submissions). The journalistic material must not be destroyed unless and until the application has been complied with or dismissed. The relevant test used by the judge is twofold: (1) whether other possible methods of obtaining the

material have been tried without success, and (2) it is in the public interest that the material should be produced or access granted.

There is no evidence that the process contained in the PACE Act has compromised justice or national security in any meaningful way, so the AJF recommends using it as a model for adopting a similar approach in Queensland.

***8c. In relation to investigation processes, such as search warrants, what, if any, mechanisms should there be to protect the evidence while the application of shield laws is determined?***

See above. Given that the PACE Act establishes a mechanism that gives journalists an opportunity to contest any warrant application, and rules around the handling of evidence under investigation, the AJF recommends using the Act as a model.

***9a. Should shield laws apply to protect the identity of a confidential source in coronial investigations and inquests? Why or why not?***

Yes.

Given the compelling interest in protecting the integrity of the journalist/source relationship, the AJF sees no reason to give coronial investigations and inquests powers to override the principle, over and above any exceptions that would apply in any other court.

***10a Should shield laws apply to protect the identity of a confidential source in CCC investigations? Why or why not?***

Given the compelling interest in protecting the integrity of the journalist/source relationship, the AJF sees no reason to give CCC investigations powers to override the principle, over and above any exceptions that would apply in any other court. We recommend adopting a similar procedure to Tasmania and the ACT, where any person claiming privilege but still issued with a notice to comply, can apply to the Supreme Court to determine the matter. In those circumstances, the Supreme Court would use the same rules placing the burden on investigators to show a compelling reason for overriding the shield.

***11a: Should shield laws apply to protect the identity of a confidential source in hearings conducted by tribunals or other decision-making bodies? Why or why not? If shield laws should apply, in which tribunals or other bodies should they apply?***

Given the compelling interest in protecting the integrity of the journalist/source relationship, the AJF sees no reason to give any other tribunal or decision-making body special powers to override the principle. In circumstances where a person is issued with a notice to comply, we recommend allowing that person to apply to the Supreme Court to determine the matter. In those circumstances, the Supreme Court would use the same rules as any other court, placing the burden on investigators to show a compelling reason for overriding the shield.



**12a. Should shield laws apply to information disclosed by a confidential source before the shield laws begin? Why or why not?**

Yes.

The principle underlying the privileged nature of the journalist/source relationship exists regardless of the timeframe involved. Therefore the AJF believes that any shield laws that the state might introduce, should apply to information disclosed to a source before they formally take effect. Similarly, the laws should apply retrospectively to any investigations or proceedings that might already have begun.

An example of this would be an employee who gives relatively benign information to a journalist without a condition of anonymity, and subsequently discovers criminal activity by their employer and requests confidentiality before passing it on to the journalist. The name of that person should be protected.

We would be happy to expand on any of these points in further submissions, either in writing or in person.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'P. Greste', with a stylized flourish at the end.

Prof. Peter Greste

A handwritten signature in black ink, appearing to read 'Chris Flynn', with a simple, clean style.

Chris Flynn

A handwritten signature in black ink, appearing to read 'Peter Wilkinson', with a cursive style.

Peter Wilkinson