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To shield or not to shield: A discussion of recent contempt of court cases where journalists have been charged for maintaining the confidentiality of a source

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The thought of going to jail for doing nothing more than your job is not an "attractive proposition," and given the important role the media plays in Australia's democratic system, the imprisonment of journalists sits uncomfortably with law makers and the public, but is the risk Australian journalists take when compiling news stories on an 'off the record' basis. Despite Freedom of Information legislation, unauthorised leaks to journalists remain important for public interest journalism. Without the ability to obtain information in this way, fewer hard hitting exposes on corporate or government corruption or maladministration will appear in the media. Confidentiality between a journalist and his/her source is enshrined in the Australian Journalists Association (AJA) Code of Ethics and the profession's representative bodies are demanding a legal right to retain the confidentiality of their sources through the protection of a shield law. While in theory, shield laws ought to strengthen press freedoms, there is an air of ambivalence towards them on behalf of journalists. Drawing on qualitative interviews with three journalists, two of whom have been charged or convicted for contempt of court, and two lawyers who specialise in contempt law, the following paper explores the issue, arguing that legislation is the only satisfactory resolution.

Keywords

Journalism, Ethics, Court, Freedom of Information, Identity

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Introduction

[1] Journalists hold a special position within society "spy[ing] on the public for its own sake" (Masters 3). Here the media are charged with remaining independent of the political system and "monitoring" or reporting on the happenings of government and political institutions (Louw 60; Schultz 102-103). This idea of news media independence is the role of the Fourth Estate (Boyce; Economou, Tanner; Henningham; Kirkpatrick; Kuypers; Masters; Willis) and sees the media with a social responsibility (Siebert et al. 73-104; Nerone, Berry 77-124), to safeguard 'the rights of the individual' (Siebert et al.74).

[2] But this responsibility of the news media and journalists has been put at risk by those in power seeking to withhold important information from the eyes of the public. This was seen in June 2007 when, for the first time since 1993, two News Limited journalists, Michael Harvey and Gerard McManus, were charged and convicted for contempt after refusing to give evidence in court revealing the identity of a confidential source who had leaked to them government documents that had provided the basis for a story they had written.

[3] The law of contempt means, 'Words or actions which interfere with the proper administration of justice or constitute a disregard for the authority of the court' (Pearson 84). Any journalist, who has stood in the witness box and refused to reveal the identity of a confidential source, has more often than not come into conflict with this law.

[4] Protection of the identity of a confidential source of information, if anonymity has been agreed to is a basic ethical obligation of Australian journalists, once entered into there is no opt-out clause as there is with doctor-patient codes (Pearson 257-258). According to *Herald Sun* 'Insight' editor, Keith Moor; 'if journalists were not able to offer to a source that you would never reveal their name, no matter what the circumstances, then you wouldn't be privy to the sort of information that confidential sources provide' (Moor). Section three of the AJA Code of Ethics, which is displayed on the Media, Entertainment and Arts Alliance (MEAA) website, provides that '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' (MEAA 2010a). While this is an important ethic for all journalists to abide by, it is not recognised in Australian law. Thus the profession's representative bodies have been urging federal and state governments to introduce

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shield laws to protect journalists, similar to legislation that exists in New Zealand, the United States and the United Kingdom (Flynn 256).

[5] A shield law is legislation that would provide journalists with the right to refuse to answer questions regarding a source's identity when questioned in court proceedings. In 2007, the incoming Rudd government announced that they would "strengthen protection for journalists' sources" (McClelland), but progress on this has been "torturously slow" (Fernandez 26). While there was a glimmer of hope for shield laws in March 2009 when Attorney-General Robert McClelland announced the introduction to parliament of the *Evidence Amendment (Journalists' Privilege) Bill* 2009, the Bill is still awaiting approval after five members of a nine member Senate Committee reviewing the Bill, found it inadequate. This prompted an MEAA claim that governments need to "do more than just pay lip service to proper shield laws" (Fernandez 26).

[6] However, the legal issues raised by offering journalists this kind of exemption continue to divide those involved. This article explores the contemporary 2007 case of two Canberra based political journalists, one that has prompted renewed calls for such protections to be implemented. The research on which it is based was conducted in 2008 as part of a university Honours thesis and involved a series of interviews with journalists, some of whom have been charged with, or found guilty of, contempt of court and also interviews with legal experts who specialise in this area of media law.

At the Coal Face: Researching real life experiences

[7] For this paper I have taken a qualitative research approach to focus on the real life experiences, stories and opinions of selected journalists who have had experiences with confidential sources and contempt of court proceedings as well as lawyers who have a working knowledge of this area of media law. It was a requirement of interview that some background experience or knowledge on shield laws and confidential sources was known.

[8] Of the three journalists interviewed (Keith Moor, Steve Lewis, Gerard McManus), two had been involved in contempt of court proceedings and when contacted all were in senior editorial positions at various News Ltd. newspapers around Australia. It was not a deliberate aim of the initial research to focus on just News Ltd. journalists and their publications, instead this was a result of the "snowball" effect whereby the study sample was partly gathered during the interviews conducted.

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Gerard McManus was chosen for interview because his case was the most recent, and has been the impetus for calls to implement shield law protections. This was the first non-media interview he had undertaken on his case since conviction.

[9] Two Melbourne based lawyers were also approached for interviews. The first was Justin Quill, then a lawyer with the firm Corrs Chambers Westgarth (Corrs). Because of Corrs' prior arrangements as legal representatives for the Herald and Weekly Times Ltd. (HWT) – publisher of the *Herald Sun* – Quill was involved in the defence team for Harvey/McManus in their contempt of court case. His law firm was also involved in the independent audit of free speech, commissioned by the Australia's Right to Know Campaign (ARKC). Quill was chosen for interview because he was able to give a first hand account of what happened in the Harvey/McManus case from a legal perspective. The other legal interviewee was non-practicing academic lawyer, Andrew Kenyon, Director of the Centre for Media and Communications Law in the Law School at the University of Melbourne, who was able to provide an extensive knowledge of the issues related to shield laws and contempt of court and offered an independent legal voice on the Harvey/McManus case.

$500million embarrassment: the Harvey/McManus case

> There was an adjournment and our lawyers warned us that we could be in jail that night. We were told to let our families know. I was able to explain to my children that there are risks in many professions. Fireman can get injured in a fire. Journalists who stand up for their principles can risk going to jail. (McManus)

[10] In late 2005 a 547-word, page three report in Melbourne's *Herald Sun* nearly cost Canberra based journalists Michael Harvey and Gerard McManus, their freedom. They had been called by the prosecution as witnesses to identify career public servant, Desmond Patrick Kelly as the source for their article, "Cabinet's $500 million rebuff revealed" (Harvey, McManus 3). Kelly was accused of breaching Section 70 of the *Commonwealth Crimes Act 1914* for the "unauthourised communication" of government documents (Ester 157-158). Despite being offered indemnity Harvey/McManus refused to reveal their source and as a result were charged with contempt of court during Kelly's pre-trial proceedings.

[11] Their story revolved around the 2003-2004 review into veterans' entitlements by the Howard Government, and caused the Coalition massive embarrassment in an election year (Flynn 269). After

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the review had been tabled, Cabinet decided to give veterans and war widows $500 million less than had been recommended (Harvey, McManus 3). The story caused an "outcry amongst the veteran's community" (McManus) and resulted in the scrapping of the plan, the resignation of then Veterans Affairs Minister, Danna Vale, and a lengthy investigation into the leak by the Australian Federal Police (AFP).

[12] The Commonwealth government's case against the journalists was based on arguments that their refusal to name their source at the beginning of Kelly's trial impeded the overall investigation and prosecution of a person responsible for the leak. Without a definite name:

> The prosecution could not have excluded the possibility that someone other than Mr Kelly supplied the defendants with the impugned document. Their Honours went on to say that "the Crown was plainly hindered by the journalist's refusal to testify. (*R v Gerard Thomas McManus and Michael Harvey* 5)

During the pre-trial hearing, McManus gave evidence first, followed by Harvey, it was at this point that Harvey/McManus came close to being jailed (McManus). Harvey pleaded guilty to four counts of contempt of court and McManus to five (Berry, Wood 4). Their sentencing was delayed for several months, during which time there was debate in the public sphere regarding their case. Federal secretary of the MEAA, Christopher Warren, described the charges as "a train wreck waiting to happen" (Ester 157). In January 2007, a jury found Kelly guilty of publishing Commonwealth documents without authorisation (he was later acquitted on appeal). At the time, Chief Justice Rozenes said

> In the real world, how can there be a conflict between the law and professional journalistic ethics? What's been said is: "We put our ethics above the law; we're not bound by law"… [t]his is almost a badge of honour, upholding the best traditions of journalistic ethics… How can any court tolerate that? (Berry 3)

[13] This case highlighted the lengths to which the Howard government was prepared to go to, to suppress embarrassing information, and when, after public outcry and media criticism of how they had handled the conviction, the actions of key government members in attempts to 'fix' the issue, were widely viewed by some as acts of damage control

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> [Former Attorney-General, Phillip Ruddock's interference] was an entirely point scoring exercise, to be seen to the public to be trying to assist journalists and to be seen by the media to be assisting journalists when they caused the problem and also when they, one would have hoped, knew it really wouldn't make any difference at all. (Quill)

This included the Attorney-General issuing a press release expressing sympathy for the journalists (Crittenden) and his asking that the judge take into account planned Australian Law Reform Commission recommendations that would have partially protected journalists from naming confidential sources (Taylor).

[14] More importantly it also included the Howard government's running amendments to the *Commonwealth Evidence Act 1995* – 'a "quick fix to a somewhat complex issue"' (McClelland, 2009). These amendments were a 'basic carbon copy' (Quill) of the NSW Shaw provision. Until these changes were implemented NSW was the only state in Australia to offer journalists some protections under Section 126A of the *NSW Evidence Act 1995*. Under this section, a court has the discretion to direct that evidence not be adduced where it would involve the disclosure of a 'protected confidence.' This section appears to offer some 'limited protection' to journalists '[but] it does not create a true privilege [or] provide a journalist with a 'right' to refuse to disclose the identity of a source' (Leder, Quill 5). Quill observes that the changes made by the Howard government did not go far enough and would have made 'no difference' to the Harvey/McManus case, or to any other journalists in the same position.

> My view is that it's irrelevant, you can put it in every state act and it wouldn't make a difference… it is no protection at all. There might be a rare occasion when it can be used but my view is that it [was] very weak. (Quill)

Six months after Kelly's conviction, on June 25 2007, both journalists were found guilty and convicted of contempt of court and fined $7000 each.

[15] Despite the conviction, McManus believes that a positive to come from his and Harvey's conviction was that it may prompt changes to the law:

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> We only did what every other journalist in the country would do [and] even though we both have a criminal record as a result of our stand, journalists who follow us may be given new rights which enable them to offer protection to sources without fear of ending up in a similar predicament or worse. (McManus)

No Real Defence

> Ultimately our defence wasn't a defence, our strategy was to try and avoid a situation where they were asked about the source…. [O]nce the question was asked then there was nothing that could be done… [t]he guys did what they did, which was to abide by their journalistic code of ethics, and ultimately they were found in contempt… and at that point again we didn't have any defence. The only defence, in inverted commas, was one to try and lessen the penalty (Quill)

[16] The first such instance of judicial refusal to recognise a journalist's ethical obligation to retain source confidentiality was in 1940 with *McGuiness v The Attorney-General of Victoria* where it was said that

> No one doubts that editors and journalists are at times made the repositories of special confidences which… they would preserve from public disclosure, if it were possible. But the law was faced at a comparatively early stage of the growth of the rules of evidence with the question of how to resolve the inevitable conflict between the necessity of discovering the truth in the interests of justice on the one hand and on the other the obligation of secrecy or confidence which an individual called upon to testify may in good faith have undertaken to a party or other person…. (*R v Gerard Thomas McManus and Michael Harvey* 10-11)

[17] The same was said in the 1988 case of *John Fairfax and Sons Ltd. and Anor v Cojuanco* and the consequences of a failure to answer relevant questions, in the absence of a recognised privilege, were illustrated again a year later in the 1989 conviction of Western Australia journalist, Tony Barrass.

[18] According to Andrew Kenyon, the law has long recognised some "other" protections for journalists wishing to protect confidential sources, citing the *newspaper rule* (Kenyon). Whilst there is some limited protection by virtue of the *newspaper rule*, a journalist still has no general "right" to refuse to answer a question regarding the identity of a source.

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[19] Therefore journalists and their representative bodies have been calling for shield law protections. Quill and lawyers from Corrs put forward their version of a shield law when submissions for changes to the *Uniform Evidence Act* were sought. The change proposed was that once a journalist said they were a journalist and could prove that they were "a real" journalist with a confidential source, then the onus would switch to the prosecution or the party trying to get the identity of that source out of them (Quill). Under the heading 'who should be protected?' the law firm proposed that

> Whilst the protection has been discussed generally in the context of journalists, it is proposed that a class of persons be defined to who the statutory protection applies. It is submitted that those protected should include journalists and related staff who are employed by or acting on behalf of recognised media organisations (Leder, Quill 14-15)

[20] This submission was based loosely around shield law protections that were enacted in Belgium in March 2005 and raises the problem of whether or not journalists should be "licensed" as is the case with doctors, accountants and lawyers. In this new age of the internet and blogging it is theoretically possible for anyone to "become" a journalist and therefore quite possible for anyone to claim a shield privilege in court if one existed. Kenyon believes that a better approach would be to have "relaxed" shield legislation

> You're going to have these weird categorisations that in five years time won't fit anymore. So there may be an initial burden on… the journalist, to show that they were doing something that looked like journalism but ideally in the statute that would be described in quite a broad way, so it would include things like blogging. (Kenyon)

[21] Also raised from this is the prospect of changing the AJA Code of Ethics to include an escape clause similar to that which is seen in the Australian Medical Associations (AMA) Code of Ethics. This escape clause allows the practitioner to disclose confidential sources or information if they are required to do so in legal proceedings (Pearson 258).

It's a sore point for journalists who believe that if they were allowed to reveal their sources through their code of ethics, sources of important information would not trust them

> The only circumstance where a journalist can reveal their source should be when the source gives permission for this to happen. Even then you would not have to be obliged to do so. (McManus)

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Keeping secrets in a court of law

[22] During my research in 2008 I asked each journalist I interviewed about their experiences within an industry with no shield law protection. While responses varied, many claimed that irrespective of whether or not shield laws were in place, journalists would conduct their day-to-day business as they always had done.

> Journalists use confidential sources all the time and will continue to do so regardless of the shield laws. [But] [i]f there are no shield laws more people are going to suffer the same fate or worse as Michael and I. (McManus)

[23] While there is a quite common belief that without shield laws, vital sources of information will dry up, the journalists and lawyers I interviewed debunked this idea, saying that confidential sources are often well known to the journalist (Moor).

[24] There are two possible reasons for the non-reform of the laws relating to journalists' disclosure of sources. The first may be an inherent distrust of journalists by the legal fraternity and politicians. Journalists do, after all, have a large part to play in the publication of political "leaks" both in favour of governments and to their detriment (Ester 157). As a result, governments are afraid to create a new class of citizen that would not be subject to the laws and regulations that apply to all other citizens. 'If a precedent is made for journalists to refuse the direction of a judge, then others could argue too [that] they need to protect their source/client' (McManus).

[25] Secondly, a shield law could place considerable importance on the free press and the public interest proviso of the information that whistleblowers[1] provide journalists. But should this be seen as a problem? As already outlined journalists will protect their un-named sources of information regardless of whether shield laws are in place. This shows the importance that journalists ascribe to their professional ethics, and also shows their concern for future stories that the public will need to know, that are only likely to emerge through a leak by a whistleblower, journalists are calling for press freedoms to be absolute, this is a different argument to the one presented by American journalist/lawyer, Norman Pearlstein, who challenges the idea that freedom of the press *is* absolute (Pearlstine).[2]

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[26] Quill adds that even though serious cases such as that of Harvey/McManus only occur 'once in a blue moon,' they highlight the important role journalism plays in uncovering information that otherwise would stay out of the light of public scrutiny (Quill).

[27] This suggests that shield law may not make much difference to the way journalists currently operate, especially if contempt cases only happen occasionally. However, Quill observes the public should be concerned that without shield laws many important stories may go untold.

> If there are ten stories in the *Herald Sun* that involve a confidential source, you wonder whether or not there might actually be 15 stories that would have been there if shield laws existed…. (Quill)

[28] While journalists may make light of the risks they take, the involvement of news media executives in the establishment of the Right to Know Campaign, launched in 2007, indicates the importance the news media sector attributes to these matters. This was highlighted by the watershed 2007 audit into the state of Australia's free speech by the Australia's Right to Know Campaign (ARKC) (Moss et al., 2007). The ARKC was set up in 2007 to extend press freedom across a number of areas. The campaign commissioned the *Report of the Independent Audit into the State of Free Speech in Australia* which published its findings on 31 October 2007. This audit reviewed legislation and practices related to free speech and as a result of this campaign and its findings; one of the 10 issues discussed at the 2020 Summit in 2008 was governance encompassing press freedom (ARKC; Moss et al.; McManus). The ARKC audits chairwoman, Irene Moss, concluded in a letter to the report's CEO, John Hartigan, that Australia's free speech and media/press freedoms were being "whittled away by gradual and sometimes almost imperceptible degrees." The body of the audit concluded that Australia's press freedoms were under threat due to increased restrictions placed on journalists and legislation that is designed to protect freedom of the press and the wider area of free speech was inconsistent across state boundaries (Moss et al.).

[29] Recent reports by Reporters Without Borders, the international non-governmental organisation that defends journalists and other media contributors (Oates 62), confirms the fears raised by the Moss audit, stating that Australia's press freedom ranking is slipping lower and lower (Reporters Without Borders, 2007a, 2007b, 2009; Herman 910) compared to world standards. According to Moss (2007) as well as submissions from prominent law firms such as Corrs Chambers Westgarth (Leder, Quill), Australia's freedom of speech and the press is steadily being eroded by government restrictions on the information that is released to the public.

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However an increasing problem for journalists in the Australian media industry is the lack of adequate avenues to gain legitimate information, which often results in them having to use and keep confidential sources. During the Harvey/McManus case, the ABC's *Media Watch* (Jackson) program claimed that because of the "woeful state" of FoI in Australia many journalists have to depend on whistleblowers/public servants to leak information.

[30] FoI laws in Australia were set up in 1982 by the Fraser Government and have since, however, become a constant problem for journalists as federal and state governments have introduced more restrictions: raising application fees; increasing time delays; and expanding the scope of material classified as confidential.

[31] While 'journalists rely on all sorts of sources, from FoI requests… to conversations in a bar' (McManus) FoI, plays a significant role in their access to government information. McManus explains that as journalists have become more sophisticated in their use of requests, politicians and government officials have adopted two tactics: 'One, tighten up restrictions and two, not put anything sensitive down on paper which could be later requested under an FOI application' (McManus).

Handing Down Judgment

[32] Australian law in mid-2010 still affords journalists scant legal protection for preserving the confidentiality of an un-named source, which presents extensive challenges for the profession. Apart from some protection offered through the "newspaper rule", a journalist still has no "right" to refuse to identify a source. Refusal to reveal a confidential source often results in a hefty financial penalty or jail, which is presumably intended to deter future journalistic defiance. But as the case study outlined in this paper shows this intended deterrent is ineffective. Journalists continue to uphold the AJA Code of Ethics, thus asserting that the public's right to know, is more important than court requests made in the course of administering justice.

[33] Public airing of the topic at the 2020 summit in 2008 and the passing of changes to FoI legislation offer hopeful signs but the issue is one that warrants much more public debate and the ambivalent views of journalists expressed in this piece will not disappear until effective legislation is implemented.

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About the Author

Perrin Brown recently graduated with a first class honours degree in journalism from La Trobe University in Melbourne. This paper draws on research Perrin undertook for his honours thesis – *The Chill Effect: Journalists, Their Un-Named Sources and the Issue of Contempt of Court* – which explored the legal and ethical complexities and arguments for shield laws in Australia. A PhD candidate in the Media and Cinema Studies program at La Trobe University, Perrin is currently researching the impact of Australia's Freedom of Information laws on journalists and news media organisations.

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[1] It is argued that shield laws and whistleblower protection need to be considered together to ensure all parties are protected (Johnston, Pearson 80), but a 6,000word piece is too short to undertake a proper discussion of whistleblower protection. A great source on this argument is Moss et al. 2007.

[2] When editor-in-chief of Time Inc. Pearlstine gave a reporter's notes on confidential sources to investigators in the Valerie Plame scandal, see Pearlstine's book *Off the record: The press, the government, and the war over anonymous sources*.