28 October 2014

The Hon John Rau MP
Attorney-General
GPO Box 464
ADELAIDE SA 5001
agd@agd.sa.gov.au

Dear Attorney-General,

Evidence (Protections for Journalists) Amendment Bill 2014

The media organisations that are parties to this correspondence – AAP, ABC, APN, ASTRA, Bauer Media, Commercial Radio Australia, Fairfax Media, Free TV, MEAA, News Corp Australia, SBS, The Newspaper Works and West Australian Newspapers (the Media Organisations) – write to you regarding the *Evidence (Protections for Journalists) Amendment Bill 2014* (the Bill) which passed the Legislative Council on 24 September 2014.

The Bill provides what is commonly known as 'shield laws' for journalists.

The Media Organisations that are party to this correspondence strongly support the introduction of shield laws, as would be enabled by the Bill, in South Australia.

Shield laws have been introduced into a number of other jurisdictions in Australia, namely the Commonwealth, New South Wales, Victoria, Western Australia and the ACT. The introduction of shield laws in these jurisdictions, particularly the Commonwealth, received bi-partisan support.

We urge the South Australian Government to also take a bi-partisan approach to this important issue, and support the Bill.

1. The role of journalists and their sources

As we outlined in a submission to the Senate Standing Committee on Legal and Constitutional Affairs in 2009, the role of the media is to report on matters in the public interest, and to scrutinise information on behalf of the public that it serves.

In the ordinary course of their jobs, journalists disclose the sources of information. However, in some instances, information of legitimate public interest will only be disclosed if the identity of the source is kept confidential. This may be required for a range of reasons, but it is usually to avert negative consequences for the source, such as a threat to their safety, employment or standing in the community. In most cases sources approach journalists only after they have exhausted all official channels available to them.

In responding to a question posed by the ABC's Media Watch program in September 2013 regarding why it is important for journalists to be able to protect their sources, Dr Johan Lindberg of the Monash University School of Journalism responded:

> *'It's important to remember that journalists do not grant anonymity lightly. A named source will always lend more credibility to the story…However, when all other information avenues*

have been explored and you're faced with publishing or not publishing a story in the highest public interest…to grant anonymity is at times the only option left.
If journalists do not stick to their confidentiality agreements and start naming sources, the flow of information from whistleblowers would slow to a trickle and make it harder for journalists to perform one of the most important tasks – scrutinising power.'[1]

Keeping a source confidential is fundamental to the ability of journalists to maintain trust with their sources, and to encourage other sources to trust journalists and reveal information in the public interest.

The Media Entertainment and Arts Alliance *Journalist Code of Ethics*[2] states:

> *'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.'*

A journalist, when pressed by a court of law to reveal the identity of a source, is therefore faced with the ethical dilemma of deciding between breaking the confidence and revealing the identity of the source, or maintaining the anonymity of the source and being charged with contempt of court and facing the ensuing penalties, including fines and jail.

2. The function of shield laws, and why they are necessary

The protection of the identity of journalists' sources is one of the basic conditions of a free press. It is central to the principles and ethics of journalists and the media organisations that employ them. Shield laws provide recognition, at law, that there is a legitimate public interest in allowing journalists to protect the identity of confidential sources.

The effect of a shield law is to generally preclude a journalist from being found in contempt of court – and therefore avoiding the subsequent civil or criminal penalties – for refusing to disclose a source to a court or other judicial body. However, this protection is limited, as set out below.

A limited protection

Shield laws do not provide an absolute protection. Rather the 'shield' is a rebuttal presumption, and is subject to judicial discretion.

- *Rebuttal presumption*

  In practical terms this means that the jurisdictions where shield laws are in place in Australia – Commonwealth, NSW, Victoria, WA and ACT – there is now a presumption that journalists will not have to give up their confidential sources.

  The courts can, however, override that presumption and order the disclosure of confidential sources if it is satisfied that the benefit of disclosure would outweigh harm to the source, the journalist and the free flow of information.

- *Judicial discretion*

[1] http://artsonline.monash.edu.au/journalism/mediawatch-abc-comment-on-shield-laws-for-journalists/
[2] http://www.alliance.org.au/code-of-ethics.html

> Shield laws are subject to judicial discretion. Cases are confined to the facts before the court, and are therefore decided on a case-by-case basis. The court has oversight and the power to decide the outcome of a case brought before it.

The Media Organisations acknowledges there may be instances whereby the public interest would be better served if the confidential nature of the source were disclosed. We are of the view that the onus in such instances should be on the party seeking to 'reveal' the confidential information.

The Bill currently before the SA Parliament enables this process to occur, and for the judiciary to be the final arbiter in such cases. The protection can be overturned by a judge, but only if they are satisfied that the public interest in disclosing the source outweighs:

- Any likely adverse effects on the informant or another person;
- The public interest relating to the communication of information by the news media; and
- The need of the news media to be able to access information held by potential informants.

We note that this is consistent with international jurisdictions such as New Zealand and the UK, and is also consistent with the Commonwealth shield laws, as set out in the *Evidence Act 1995* (Cth).

3. Identification of the necessity for national shield laws

Journalists are under increasing challenge to reveal their confidential sources. This is occurring across the country.

As part of the second reading debate on the *Evidence Amendment (Journalists' Privilege) Bill 2010* in the Federal Parliament, then Attorney-General, the Hon Robert McClelland MP, said:

> *'The Bill before the House today demonstrates the Government's willingness to work constructively with other members of this Parliament and reach agreement on significant issues. The Evidence Amendment (Journalists' Privilege) Bill 2010 is such an important Bill and the protections it provides reflect the wishes of all sides of politics. The Government is committed to open and accountable government. As part of this commitment the Government has long supported the implementation of appropriate protections for journalists and their s and sources…The Bill will contribute to transparency and accountability in government and, in turn and in its own way, add something to the vibrancy of Australia's democracy.'*

The broad support for shield laws internationally, and the bi-partisan support for the jurisdictions that have implemented shield laws in Australia, cannot be underestimated. It is hoped that the same can occur in South Australia to pass the current Bill.

The local and international jurisdictions that have implemented journalists' shield laws have done so not because there has been a raft of 'evidence' or 'court actions' or journalists paying fines and/or doing time in jail. Rather, and importantly, those jurisdictions have acknowledged the importance of strengthening the protections provided to journalists and their sources in fostering freedom of the media and the public's right – and need – to know.

Notwithstanding this, we outline below examples of journalists being required to disclose confidential sources, and the sub-optimal outcomes that can manifest as a result.

Journalists have been convicted or jailed for contempt of court for refusing to reveal sources

Over the last 25 years three a number of journalists in Australia have been convicted or jailed for contempt of court for refusing to reveal their sources. These include:

- 2005-2007 – Gerard McManus and Michael Harvey from the *Herald Sun* were convicted and fined for not revealing their confidential sources for a story relating to treatment of veterans and the Federal Government;

- 2002 – Belinda Tasker, Anne Lampe and Kate Askew from *AAP* and *The Sydney Morning Herald* refused to reveal their sources for a story about the NRMA board and avoided prison after the NRMA dropped the case;

- 1993 – Deborah Cornwall from the *Sydney Morning Herald* was given a suspended jail sentence for refusing to disclose a confidential source;

- 1993 – Chris Nicholls from the *ABC* received a prison sentence for his story relating to a conflict of interest of a South Australian Government Minister;

- 1992 – Joe Budd from *The Courier Mail* was imprisoned; and

- 1989 – Tony Barass from *The Sunday Times* in Perth was imprisoned for refusing to disclose a confidential source.

Journalists' sources are under increasing challenge in the courts

More recent cases have illustrated that the protection of journalists' confidential sources is still a very live issue, and under increasing challenge in the courts. These include:

- *Hancock Prospecting / Steve Pennells* and *Western Australian Newspapers [2013] WASC 290*[3]

  Gina Rinehart's company Hancock Prospecting issued subpoenas against Steve Pennells from *The West Australian* for the production of documents in an ongoing arbitration, requiring the disclosure of confidential sources.

  This case was one of the first cases to be considered under the shield laws in WA. Justice Janine Pritchard found that the shield law applied in this case, and Pennells could not be compelled to disclose confidential sources.

  Justice Pritchard acknowledged that while such a disclosure order would 'constitute a breach of the fundamental ethical obligation,' but for the enactment of the shield law Pennells would have failed to maintain anonymity of his source. Pennells and WAN were successful in maintaining the confidentiality of the source because of the existence of the WA shield law.

  Justice Pritchard also outlined the deficiencies of the WA shield laws, as it related to the case at hand, in the judgement.

- *Hancock Prospecting / Adele Ferguson and Fairfax Media*

[3] para [84 – 176], http://decisions.justice.wa.gov.au/Supreme/supdcsn.nsf/PDFJudgmentsWebVw/2013WASC0290/%24FILE/2013WASC0290.pdf

Hancock Prospecting also sought disclosure of sources from Adele Ferguson, an employee of Fairfax Media. However, the application for disclosure was withdrawn following the decision handed down by Justice Pritchard in the Pennells/WAN case.

- *Nathan Tinkler / Paddy Manning* and *Fairfax Media*

  Paddy Manning, a journalist at the *Sydney Morning Herald,* was subject to a subpoena that required him to disclose confidential information about a source relating to the business affairs of Mr Tinkler. A super-injunction was imposed on the publication of information from the source. An agreement reached between the parties saw the subpoena and super-injunction lifted, and the suppression of details of the report.

- *Helen Liu / Nick McKenzie, Richard Baker, Philip Dorling* and *Fairfax Media*

  Chinese-Australian businesswoman Helen Liu had sued Fairfax Media and the journalists for defamation in the NSW Supreme Court over a series of articles about her relationship with Federal Labor MP Joel Fitzgibbon. During the proceedings, Ms Liu made two applications for disclosure of documents that would reveal information about the journalists' confidential sources so that she could sue the sources. The journalists were ordered to disclose their sources and the court found that a journalist's pledge to keep a confidential source 'is not a right or an end in itself' and could be overridden 'in the interests of justice'. This decision was upheld on appeal to the Court of Appeal. The High Court refused the journalists' application for special leave to appeal from the Court of Appeal's decision.

- *Note Printing and Securency / Nick McKenzie, Richard Baker* and *Fairfax Media*

  During the committal of the former Note printing/Securency executives accused of bribery, one of the accused applied to serve two Fairfax journalists with witness summonses requiring them to appear before the Magistrate to give evidence in person and to hand over documents that would reveal their sources for an article they had written about the case. The article concerned the deal apparently done by an overseas witness who was going to be giving evidence against the defendants. It referred to government sources. The accused claimed the information would assist his defence. The Magistrate granted the application. Fairfax applied to set the summonses aside but the Magistrate refused. Fairfax sought judicial review of the decision in the Supreme Court, this was also refused. Fairfax then appealed this decision and the Court of Appeal set aside the Magistrate's order and ordered the accused to pay Fairfax's costs. The Court of Appeal found that the Magistrate did not have the power to make the order. Had the journalists been ordered to give evidence, they could have faced immediate imprisonment for refusing to answer questions that would have revealed their sources. The Court of Appeal noted in the judgment that 'investigative journalists have a legitimate interest in uncovering the truth about a story such as this; and they serve an important public interest in having that truth revealed'.

<u>Identified need for national unified shield laws</u>

Then Commonwealth Attorney-General, Mark Dreyfus QC MP stated in June 2013[4] that his Government would pursue uniform national protection for journalists and their sources. He said:

[4] http://www.markdreyfus.com/portfolio/media-releases.do?newsId=7710

'Journalists play an important role in our society by providing the community with access to information that is in the public interest and the media must be given freedom to perform that role effectively.

Journalists need to be confident that they can protect the identity of their sources without being held in contempt of court.'

While national unified shield laws are not currently on the agenda of the Standing Council on Law and Justice, the Media Organisations urge the minority of Australian jurisdictions that currently do not have journalists' shield laws in place, including South Australia, to enact relevant laws as soon as possible.

4. Bipartisan support for shield laws

As we have outlined previously, the Commonwealth, New South Wales, Victoria, Western Australia and ACT have enacted shield laws. There was bi-partisan support for the passage of those laws.

The Bill before the South Australian Parliament is of similar political parentage to the Commonwealth *Evidence Amendment (Journalists' Privilege) Bill 2010 (Cth)*, also known as the Wilkie Bill.

The Wilkie Bill was introduced as a Private Members Bill by Independent MP Andrew Wilkie with the support of independent Senator Nick Xenophon. Liberal Senator, the Hon George Brandis SC also introduced a Private Senator's Bill, the *Evidence Amendment (Journalists' Privilege) Bill 2010 (No.2)*, known as the Brandis Bill. Both Bills sought to provide a shield law for journalists, and contained identical provisions on the substantive issues.

The Brandis Bill however went further to provide for a general 'professional' privilege. This was not progressed beyond the Senate Committee stage of inquiry into the Bills.

The Wilkie Bill was supported and was enacted as the *Evidence Amendment (Journalists' Privilege) Act 2011* and is the current Commonwealth shield law.

Notably, it is also the basis for some provisions of the South Australian Bill, particularly the definition of journalist.

5. The *Evidence (Protections for Journalists) Amendment Bill 2014 (SA)*

<u>Media Organisations support the Bill</u>

As you are aware, the *Evidence (Protections for Journalists) Amendment Bill 2014* to enact shield laws passed the Legislative Council of the SA Parliament in September 2014. It was introduced by the Hon John Darley MLC (Independent), amended by the Liberals, and then supported by all non-government Members in the Legislative Council.

The Bill must now pass the House of Assembly to become law.

The Media Organisations support the amended Bill. It provides a comprehensive regime that appropriately balances the need for protection of journalists' sources with judicial oversight.

We urge the Government to take a bi-partisan approach to this important issue and support the Bill in the House of Assembly.

Comments regarding the Bill

The Media Organisations are satisfied that the Bill (as amended) is representation of the issues facing modern-day journalists and the circumstances in which those issues may arise.

The Bill provides a sound basis for balancing the public interest in a robust news media, protection the integrity of confidential sources, and the administration of justice. It draws on legislation from other Australian jurisdictions, for example the definition of 'journalist' as proposed in section 72 in the Bill mirrors the definition at subsection 126G(1) of the *Commonwealth Evidence Act 1995.*
Key components of the Bill are:

- Application to proceedings commenced before and after the application of the legislation;

- Protection of journalists in both court and commission proceedings, as well as 'any proceedings comprising a hearing, examination or other proceedings at which a person may, but for this section, be compelled to answer questions or produce documents…';

- The protection can be applied to any other person prescribed by the regulation for the purposes of this definition; and

- The protection can be overturned by a judge, but only if they are satisfied that the public interest in disclosing the source outweighs:
    - Any likely adverse effects on the informant or another person;
    - The public interest relating to the communication of information by the news media; and
    - The need of the news media to be able to access information held by potential informants.

The criteria set out at proposed ss 72B(4)(a)(c) and ss 72C (4)(a)-(c) is particularly important given the under s 72B(3) and s 72C(3) a court (or other body or person) can, either on the application of a party to the proceedings or of its own motion, order that the shield does not apply. This means that the protections for journalists are effectively balanced by the criteria enabling the 'shield' to be removed if the court is satisfied about certain matters.

The Media Organisations are of the view that the definition of 'prescribed person' should include a publisher who is approached with information by a journalist where that journalist is neither an employee nor a contractor of the publisher. This will encompass freelancing arrangements, which are increasingly commonplace in the modern media landscape. If the shield Bill passes in its current dorm, the regulations should prescribe that this is the case in relation to proposed sections 72B(5) and 72C(7).

It has been reported that the Government will not support the Bill

The Attorney-General and Deputy Premier, the Hon John Rau MP, has been quoted as saying: 'The Bill is flawed and no pressing need for this legislation has been identified.'[5]

[5] 25 September 2014, Adelaide Advertiser, *'Shield laws for journalists pass Upper House but face battle in the Lower House,'* http://www.adelaidenow.com.au/news/south-australia/shield-laws-for-journalists-pass-upper-

Unfortunately no further information has been provided regarding these concerns. Notwithstanding this, we are of the view that the detailed reasoning above adequately rebuts such a claim. However, we offer the following points to specifically address the elements of the statement made by the Attorney-General:

- *The Bill is flawed*
    - The role of the media is to report on matters in the public interest, and to scrutinise information on behalf of the public that it serves;
    - In the ordinary course of their jobs, journalists disclose the sources of information. However, in some instances, information of legitimate public interest will only be disclosed if the identity of the source is kept confidential. In these instances a source may require a journalist to maintain the source's anonymity;
    - Shield laws provide recognition, at law, that there is a legitimate public interest in allowing journalists to protect the identity of confidential sources when disclosure by the source is demonstrably in the public interest;
    - Shield laws do not provide an absolute protection. Rather the 'shield' is a rebuttal presumption, and is subject to judicial discretion;
    - The Bill (as amended) is representation of the issues facing modern-day journalists and the circumstances in which those issues may arise; and
    - The Bill provides a sound basis for balancing the public interest in a robust media, protection the integrity of confidential sources, and the administration of justice. It draws on legislation from other Australian jurisdictions, for example the definition of 'journalist' as proposed in section 72 in the Bill mirrors the definition at subsection 126G(1) of the *Commonwealth Evidence Act 1995*; and
    - Lastly, the bi-partisan support for the jurisdictions that have implemented shield laws in Australia, and also internationally, cannot be underestimated. It is hoped that the same can occur in South Australia to pass the current Bill.

- *No pressing need for this legislation has been identified*
    - The local and international jurisdictions that have implemented journalists' shield laws have done so not because there has been a raft of 'evidence' or 'court actions' or journalists paying fines and/or doing time in jail. Rather, and importantly, those jurisdictions have acknowledged the importance of strengthening the protections provided to journalists and their sources in fostering freedom of the media and the public's right – and need – to know;
    - Notwithstanding this, journalists around Australia have been convicted or jailed for contempt of court for refusing to reveal sources; and
    - More recent cases have illustrated that journalists' sources are under increasing challenge in the courts;
    - Unified national shield laws was supported by the Standing Committee of Attorneys-General – and the lack of this on the current agenda should not stop any of the remaining states and territories from introducing their own shield laws; and
    - As above, the bi-partisan support for the jurisdictions that have implemented shield laws in Australia, and also internationally, cannot be underestimated. It is hoped that the same can occur in South Australia to pass the current Bill.

---

house-but-face-battle-in-the-lower-house/story-fni6uo1m-1227070025226?nk=652f94643292af68f7e1d233d3a018be

It has also been suggested to representatives of the Media Organisations that if shield laws are implemented in South Australia, then the floodgates will open on spurious and defamatory stories causing reputational damage, and confidential sources will multiply by virtue of being 'protected.'
In response to this suggestion, we note that:

- the hypothetical situation proposed above has not been evidenced in the jurisdictions that have implemented shield laws in Australia, and nor in international jurisdictions that we are aware of; and
- in any event, the shield laws do not provide an absolute protection that would enable such behaviour. Rather the 'shield' is a rebuttal presumption, and is subject to judicial discretion, and the other reasons provided above in response to the claim that 'the bill is flawed.'

To support this, we again note Dr Johan Lindberg's full input to Media Watch, specifically in response to the question posed, 'should journalists be allowed by law to protect their sources under any circumstances?' His response includes reference to shield laws in Scandinavia which he describes as the *'most far-reaching'* and heavily weighted in favour of sources and journalists – yet still, he says, *'there is no evidence to suggest that this has caused misuse of journalist-source privilege to defame individuals.'*

Dr Johan Lindberg goes on to state that:

> *'It's not unreasonable to ask of the justice system and lawmakers to amend the shield laws to better protect journalists, sources and the individuals being reported on.*
> *Fining or putting journalists in jail for doing their job is not an option and frankly an international embarrassment.'*

Shield laws and their role in a free press is an important issue that should not be politicised, as demonstrated in other Australian jurisdictions. We hope that you will take a similar approach and support the Bill when it comes before the House of Assembly.

We look forward to your consideration of this matter.