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Title: Pass the source – journalism’s confidentiality bane in the face of legislative onslaughts.

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Abstract

‘Journalism under siege’ proclaimed the cover of an Australian publication dedicated to promoting journalism excellence – *The Walkley Magazine*, March 2017 issue. It reflects the severe disruption journalism is experiencing globally. Facts used to be facts and news was news but now we have ‘alternative facts’ and ‘fake news’ (Media Watch, 2017). Against this backdrop, a persistent dilemma for journalism has been the impact of the law on journalists relying on confidential sources who play a critical part in providing access to information. The journalism profession’s apparent source protection gains have been undermined legislative and other assaults and it has had a chilling effect on journalists’ contacts with confidential sources. The Media Alliance has warned that ‘it is only a matter of time’ before a journalist is convicted for refusing to disclose a confidential source (Murphy, P., 2017, p. 3). This article builds on earlier work examining how Australian journalists are coping in their dealings with confidential sources. This article: (a) reports on the findings from an Australian study into journalists’ confidential sources; and (b) identifies lessons and reform potentials arising from these findings.

Key words: *journalists’ confidential sources; source protection; surveillance; confidentiality promises; chilling effect; whistleblowing; right to know*

Introduction

The justifications for protecting journalists' confidential sources can be taken as settled. There is 'widespread recognition in international agreements, case law and declarations that protection of journalists' sources are a critical aspect of freedom of expression that should be protected by all nations (Banisar, 2017, p. 30). The US, Canada, New Zealand and Australia, for example, provide protection through *shield laws* or *journalist's privilege*. In the US, the protection began more than 120 years (Smith, 2013, p. 3). About 40 US states have shield laws (Middleton, Lee & Daxton, 2017, p. 517). In the UK, protection is provided in the *Contempt of Court Act 1981*, section 10. In Australia, shield laws exist in all but three of the nine jurisdictions (Dobbie, 2017, p. 50; Fernandez, 2014a, pp. 24–29). Without this protective lynchpin 'it is likely that critical information benefiting the public will not be passed on' (Fernandez, 2015a, p. 305). Early attitudes of 'universal disgust' at the notion of granting journalists a privilege – what one writer decried as 'making the most irresponsible tramp reporter a privilege person...the same as doctors and lawyers' (Smith, 2013, p. 17) – has abated. A recent UNESCO study notes, however, that the 'result of the increasing risk to both journalists and their sources is a further constraining, or "chilling", of public interest journalism dependent upon confidential sources' (Posetti, 2017, p. 12). As the discussion below demonstrates, it is more important than ever for journalists to evaluate the risks of relying on confidential sources and to respond accordingly.

Background

Journalist source protection has a long history covering a complex conceptual framework and a vast array of actors – legislators, judges, lawyers, journalists, whistleblowers, scholars, corporate players, advocacy groups, and ordinary people among them (Smith, 2013, pp. 3–9). The present work covers two national surveys of practising journalists that the author conducted in 2014 and 2015 and related interviews with key personalities. The findings from the 2014 survey were reported in earlier works (Fernandez, 2015a; Fernandez, 2015b; Fernandez & Pearson, 2015). The author continued the investigation in 2015, through a second survey and through interviews, partly to identify any discernible impact on the initial inquiry arising from the time lapse between the first and second surveys. The first survey was conducted when Australia's federal parliament was moving on laws impacting on the existing shield laws. The Australian media was said to have been 'somewhat apathetic on the press freedom front, not vigilant enough or as willing to fight as we should have been' (Oakes, 2016, p. 4). Responses in the 2014 survey, for example, 'revealed a significant lack of concern about' the prospect of an official raid at work/home in pursuit of information that would identify their confidential source (Fernandez & Pearson, 2015, p. 72). The primary objective in conducting the

follow-up survey was to discover if any belated media ‘awakening’ would have impacted on the responses where relevant if asked again.

Methodology and research questions

The 2014 survey using Qualtrics covered the following themes: (a) participants’ general profile; (b) familiarity with shield laws; (c) perceptions of shield law effectiveness and coverage; (d) perceptions of story outcomes when relying on confidential sources; (e) concerns about official surveillance and enforcement (reported in Fernandez & Pearson, 2015); (f) journalists’ authority to promise confidentiality; (g) when such promises are made; and (h) the types of sources given such promises (reported in Fernandez, 2015a). The 2015 survey featured the following themes: participants’ general profile; journalists’ familiarity with laws/rules impacting on source confidentiality (expanded from previous reference only to *shield laws*); any changes in practice; importance of and reliance on confidential sources; keeping abreast of information impacting on source protection; and perceptions and attitudes towards source protection). The 2015 Qualtrics survey design featured fewer questions and included new questions addressing the ‘changed circumstances’ – that is, whether the belated media focus on troubling legislative changes that were being introduced around the time of the 2014 survey impacted on the key aspects of the study. The reduction in the number of questions was aimed at addressing feedback that the 2014 survey comprising 40 questions was too long. Thus, the 2015 survey featured 32 questions.

The response rate to the survey conducted in 2015 ranged from 41 to 47, depending on the question being addressed by the participant. Primarily the same distribution channels used in the 2014 survey were used for the 2015 survey – the key channel being the MEAA. The poor response may be attributed to any number of factors including survey fatigue given that the surveys occurred one year apart; the survey still being considered too long; or to inherent sensitivity towards the subject. These characterisations, however, do not apply to those who shared their views generously with the author during interviews. Interviews were conducted in person, via email or by telephone with participants in Sydney, Melbourne, Canberra and Perth and some via email or by telephone. For the earlier survey, 30 interviews were conducted and have been reported on (Fernandez and Pearson, 2015, p. 66). The 19 interviews for the second survey were, except for two, conducted in person *in situ* with the participants. Three of the 2015 interviews were with the same participants interviewed in the 2014 survey while the remainder were ‘new interviewees’, thirteen of them based at the Canberra Press Gallery. The interviews were with those operating at senior levels of journalism with strong involvement in the present subject area. In total, the audio recordings for the interviews covered 940 minutes. The interviews cited in this work are only those associated with the second survey.

Findings, discussion and analysis

The first part of the discussion under this heading examines the combined responses to the two Qualtrics surveys; and the second part presents the responses to the interviews.

The Qualtrics survey responses

The expectation that a shorter questionnaire would lead to a healthy number of responses in the second (2015) survey did not materialise. Of the 47 participants in the second survey, seven said they had completed the first (2014) survey. The challenge in conducting a study involving the present subject is accentuated by the very nature of the subject – it seeks input from those who are heavily committed to respecting confidentiality and who, possibly, have strong reservations about revealing how they operate in this area even though participation guarantees anonymity and the survey itself is subject to rigorous ethics approval and governance processes. The following analysis considers the responses from both periods and compares them where the questions were similar or identical and it presents data from the limited findings in the second survey. Due to rounding off some totals may amount to 99. A limited reference is made to ‘text entry’ responses (where the response boxes allowed for additional detail to be provided) participants gave in the second survey, to provide some insight into the data discussed.

A high ratio of participants with good experience in journalism took part in both surveys – 73 per cent of the 154 participants in 2014 had more than seven years experience, and 79 per cent of the 47 participants in 2015. If the experience bracket was widened to those with four or more years of experience in journalism the figures were 80 per cent in 2014, and 98 per cent in 2015.

Roles performed: In respect of the question seeking to understand the nature of work performed by the participants, the proportion of participants who said they were mostly engaged in interviewing sources/researching and writing stories and editing/processing stories for publication remained identical in both study periods (94 per cent of the 154 participants in 2014; and of the 47 participants in 2015).

Organisation size: Another aspect of the survey sought to identify the size of the organisation for which the participant worked, partly to understand what kind of facilities, resources, training and rules frameworks impacting on work involving confidential sources could be expected to be in place. The question in this respect was how many participants in the organisation were engaged in journalism duties in the organisation. In this regard, 65 per cent of the 154 participants in the 2014 survey said their organisation had 21 or more employees engaged in journalism duties. In the 2015 survey, the corresponding figure was 60 per cent of the 47 participants. This question included freelancers in the

second survey based on feedback regarding this in the previous survey and 19 per cent said they were employed as freelancers.

Types of platforms: In seeking an idea as to the types of platforms on which the participant's work was published (print, TV, radio, online) the distribution between print and online was even among the participants in 2014 and 2015. It was 71 and 72 per cent of the 154 participants, respectively, for print and online in 2014. In 2015, a gap opened up between print and online with more saying their work was published online (55 and 79 per cent, respectively).

Understanding source protection laws: A core question in the present inquiry concerns participants' understanding of source protection laws. This inquiry took slightly different forms in the two surveys. In the first survey participants were asked to describe their understanding of how shield laws work. Of the 147 responses 29 per cent had 'no understanding' and 62 per cent had 'some understanding'. Only 9 per cent said they had a 'good understanding', and 1 per cent had 'excellent understanding'. The inquiry was broadened in the second survey. The 2014 survey did not address laws impacting on journalists' confidential sources other than shield laws, largely because the other relevant laws were in their infancy of passage or implementation. The 2015 survey, however, took a broader scope. Participants were asked to describe their familiarity with the laws that protect or undermined their confidential sources. The responses from 46 participants were: 'no understanding' (4 per cent); 'some understanding' (54 per cent); 'good understanding' (30 per cent); and 'excellent understanding' (11 per cent). In relation to each of the following laws that they had 'heard of' in the second survey, the responses from the 46 participants were: shield laws (89 per cent); *ASIO Act* section 35P (41 per cent); *Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014* (80 per cent); and *Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (67 per cent). These laws attracted keen media attention largely spearheaded by the MEAA and publishers in the run up to the second survey. There were varying responses as to which of these laws participants saw as having a bearing on their work involving confidential sources. Of the 42 responses the distribution was 62 per cent (shield laws); 33 per cent (*ASIO Act*); *Data Retention* law (60 per cent); and *Foreign Fighters* law (26 per cent).

Another question seeking to build on the previous survey was the question in the 2015 survey asking participants to indicate how their understanding of laws/rules impacting on journalists' confidential sources had changed in the course of the year in question. Of the 43 responses, 51 per cent said it had 'not changed', while 16 per cent said it had been reduced. The remaining participants said it had improved 'somewhat' or 'a lot'. The text entry responses for those who said their understanding had been reduced include the following: 'I haven't kept up to date with changes'; 'There's more laws but I don't really understand them'; 'It's been hard to keep pace with the extent of changes and new laws'. For those who said their understanding had improved the responses included: 'Media exposure has heightened awareness'; 'Media coverage and discussions with colleagues'; 'MEAA updates'; 'Did

Media Law course...'; and 'continuing professional development course'. These responses indicate that there is work to be done in educating journalists on what the various laws mean for their professional performance.

Level of concern: As to the level of concern about 'laws/rules impacting on journalists' confidential sources', there was no change for 35 per cent of the 43 participants, while 63 per cent said it had 'increased somewhat' or 'increased a lot'. Participants were given an opportunity to provide text entries elaborating on the prescribed response choices to this question. Two columns were provided, one for additional comments concerning 'somewhat increased' and one for 'increased a lot'. In the 'somewhat increased' concern column participants said: 'if I communicated with a source via mobile or email it would be impossible to guarantee that a government agency could not identify them'; 'I do not like the idea that there is a record of the sites I have browsed, the addresses I have emailed and the numbers that I have contacted'; 'don't trust the Coalition'; 'concerned [that the] legislation has been framed widely to capture communications beyond the purpose for which the legislation was passed'; 'general climate of "shooting the messenger" has prevailed for a couple of years'; 'I haven't had the time to seek this information [about the new laws] out myself'; 'laws seem to be constantly changing...hard to keep up'; and 'sources seem more hesitant in dealing with journalists'. The following were some of the comments in the concern has 'increased a lot' column: 'I was defamed and subjected to severe retribution as a result of publishing abuse of state power lawfully'; 'increasing use of "national security" as a catch-all excuse for prying into journalistic practice'; 'the government's sledgehammer approach threatens confidential sources and encourages self-censorship'; and 'because I don't really understand how [the laws] will apply in practice or what I can or cannot guarantee/tell a source'.

Changes in practice: As to whether participants changed the way they communicated with sources taking into account the laws introduced since January 2014, 40 per cent of the 42 participants said 'not at all', while the remainder said they were 'somewhat more careful' or 'a lot more careful'. On a related point participants who changed the way they communicate with sources due to laws introduced since January 2014, were asked to elaborate on the influences on this change and the following were some of the responses: it was a combination of personal decision; advice from the professional body (the MEAA); or employer's rules. While the above figure of 40 per cent indicating no change at all, the text entries to this question indicate that this was due not to an indifference to the new circumstances but rather, for example, because 'I have always been mindful, as I know how corrupt government polities, ASIO and cops have been historically' or because 'I have practised my own form of source protection for 40 years'.

Importance of source protection: An obvious related question to put to participants in the present exercise, the answer to which might be assumed as foregone, was 'how important is it to be able to provide strong protection for confidential sources?' Of the 95 responses to the first survey, 96 per cent

indicated that it was ‘extremely important’. In the second survey, 85 per cent of 41 participants gave this answer with 10 per cent saying it was ‘moderately important’. The question was supplemented in 2015 to determine how important confidential sources were in different stages of journalistic practice. In response 79 per cent of the 41 participants indicated that they used such sources for research and where appropriate for published work, whereas 17 per cent said they used such sources ‘only for research and not for the published work’. As for the extent of protection desired there was a noticeable increase in support for the protection of confidential sources in the second survey. Whereas in 2014, of the 93 participants 59 per cent advocated protection “in all circumstances”, in 2015, 76 per cent of the 41 participants gave this answer. The remainder in both periods advocated protection only when the confidentiality is justified. Viewed in combination the responses in the two periods showed that there was strong support for protection ‘in all circumstances’.

Form of source protection: In both surveys participants were asked how source protection should be reflected, if they thought it was important to be able to provide strong protection for confidential sources. Some of the answer choices allowed participants to freely choose from the answer choices provided so as not to limit the total value to 100 per cent. Ninety-five participants responded in the first survey, and 41 in the second and the responses on the preferred form of protection are provided in brackets for the first and second surveys, respectively: a binding professional code of ethics (77 per cent/59 per cent); employer’s rules (40 per cent/41 per cent); law made by parliament (72 per cent/63 per cent); court decisions (51 per cent for both surveys); and ‘other’ (5 per cent/6 per cent). It is significant that more participants subscribed to the idea of ‘strong protection’ being provided through a ‘binding code of ethics’ rather than through law made by parliament. Needless to say, strong protection enshrined through an act of parliament would provide an ideal avenue for clearly defining the nature and scope of protection – although that would not necessarily result in protection that journalists would deem as ‘strong’. A further consideration, as expressed in one text entry is the fear that providing special protection to journalists to protect their sources would entail defining the term ‘journalist’ and, consequently, require some form of licensing of journalists.

Concerns about surveillance: In response to the question ‘how concerned are you about the implications of surveillance of your communications and communications devices for the sanctity of your confidentiality undertakings to sources?’ the responses from 95 participants in 2014 was: ‘very concerned’ (31 per cent); ‘generally concerned’ (27 per cent); ‘a little concerned’ (26 per cent); ‘neutral’ (7 per cent); and ‘not concerned’ (8 per cent). On one reading the responses in the second survey were puzzling if it is assumed that the seriousness of the then unfolding legislative moves would sink in and elicit serious concern. In the second survey, however, only 29 per cent of 41 participants said they were ‘very concerned’ while 41 per cent said they were ‘generally concerned’. The others said: ‘a little concerned’ (20 per cent); ‘neutral’ (7 per cent); and ‘not concerned’ (2 per cent). It can be argued that combining the ‘very concerned’ and ‘generally concerned’ figures would

show a marked increase in concern in the second survey – a total of 70 per cent fell into this category in the 2015 survey, whereas the total was 58 per cent in the previous survey.

Keeping abreast of knowledge: The second survey, unlike the first, included questions aimed at obtaining an idea as to how participants ‘kept abreast’ of knowledge in this area. Two questions were framed to identify the mode of keeping abreast, and the frequency of keeping abreast. There were 41 responses to each of these questions. As to mode of keeping abreast more than half the participants said they relied on information disseminated through the MEAA (e.g. *The Walkley Magazine*; the MEAA’s annual Press Freedom Report; and other MEAA literature) and the news media generally. Less than one quarter relied on academic literature such as books or academic journals. As for the frequency of accessing such materials half of the participants said they occasionally accessed such materials while the rest said they regularly or often accessed such materials.

The interviews

One problem when researching the relationship between journalists and their confidential sources is the actual confidential dealings almost always occur beyond the researchers’ view (Vobic and Kovacic, 2015, p. 596, citing Gassaway). Important insights can be obtained through in-person interviews. Speaking face-to-face with an interviewee fosters candidness and authenticity and where the interviews are semi-structured, as in the present case, it facilitated inquiry that took into account what Weerakkody has described as ‘the respondent’s unique characteristics or circumstances’ (2015, p. 187). For this article, the author selected quotations from eleven interviewees who agreed to go on the record. Their responses are denoted below as ‘interview’ to distinguish these from other sources. While the interviewee comments below were made during the period in which the second study was undertaken, these comments were re-checked with the interviewees in mid-2017 and in a few instances interviewees updated their earlier comments. The key themes selected for the present discussion are: (a) the importance of sources and source protection; (b) concerns about surveillance and the chilling effect; (c) acknowledgment of the utility of surveillance; (d) advice to journalists working with confidential sources; and (e) journalist education on dealings with confidential sources.

Importance of sources and source protection: It should come as no surprise that participants unanimously emphasised the importance of confidential sources to journalists. As Brett McCarthy, editor of *The West Australian* newspaper said, however, his organisation’s first preference is to get sources on the record:

In our experience, confidentiality is requested in the political arena more than anywhere else. And if the only way we can get the information is by promising confidentiality I think that that’s acceptable. But it’s never our first preference because as a reader I would want to know the source of the information so I can decide why that’s being said (interview).

McCarthy's newspaper mounted a successful challenge for source disclosure by a mining magnate in *Hancock Prospecting Pty Ltd v Hancock* [2013] WASC 290 (Fernandez, 2014b). Sean Nicholls, State Political Editor of *The Sydney Morning Herald*, stated:

For those working in the area of politics and government confidential sources are vitally important. In my line of work almost not a day goes by when I am not calling a contact with whom I have a standing arrangement in terms of confidentiality, or calling someone to start a new confidential source relationship. It is a fundamental part of the way I do my job and it is what my employer expects (interview).

Protection for confidential sources is often argued as being particularly essential for investigative journalism (Posetti, 2017, p. 11). As Nicholls stated, however, most journalists carry out investigations 'in the normal course of their work' (interview). Andrew Greene, the ABC's national security correspondent in the Canberra Press Gallery, captured the commonly expressed sentiment regarding the importance of confidential sources to journalists thus:

Confidential sources are essential for democracy otherwise we would never find out anything. If sources have something that the system doesn't want being revealed then we should give them protection otherwise we will never hear from these people. I don't have much faith in the existing mechanisms to protect whistleblowers and leakers (interview).

Concerns about surveillance and the chilling effect: Interview sources reinforced the findings revealed elsewhere in this study about the impact of recent official surveillance initiatives. Nick Butterly, a Canberra Press Gallery reporter at the time of the interview, and now a reporter with *The West Australian*, observed:

I've had stories I wrote referred to the Federal Police for leak investigations. So you become more conscious about the fact that the Government seems a lot more aggressive in trying to pursue leakers. The public service and bureaucracy also seem a lot more intent on covering their backsides. A colleague and I who wrote stories about asylum seeker boats arriving in Australia and the turn back of boats were referred to the Federal Police for investigation as part of leak inquiries. We won a Press Gallery of the Year award for those stories (interview).

The general chill induced by the prevailing climate of surveillance is also illustrated by the experience of a Canberra Press Gallery journalist with *The Australian* newspaper in the area of defence and security at the time of the interview, Brendan Nicholson (currently Defence Editor at *The Strategist*):

About 30 years ago, if there was a budget to deliver and if there was a new tax on widgets I could go to the relevant department, ask the person on the switchboard who I could talk to. I'd then be put through to the expert on widgets, who might tell me that it was a good tax or a bad tax or that the government had ignored some advice and that there might be problems with that.

There would be no way that the Minister would sack the officer for speaking with me. That's all eroded very badly and nobody's basically safe. So it's very, very hard to get information out.

This sentiment is echoed by Mark Riley, Political Editor of the Seven Network, based at the Canberra Press Gallery:

Bureaucratic sources, particularly, are much more cagey about their communications than they were when I started doing political journalism 25 years ago. Sources are more concerned about being prosecuted if the information is deemed to be "sensitive". People are less likely to disclose information now even if they know that the disclosure will bring sunshine onto certain information in a way that will improve democracy. They're worried about the personal consequences of doing that.

Multi-award winning investigative journalist at *The Sydney Morning Herald*, who served as the chair of the Walkley Advisory Board, Kate McClymont, stated:

In the present surveillance climate sources are not as ready to speak. In the past you could ring up a police officer and they would chat with you quite happily. Nowadays they are beside themselves worrying that their phone records will be available, and that somehow it might emerge that they've talked to you. This happens even when they're not leaking things per se. Everyone is feeling the consequences of the present state of hyper-vigilance.

Similarly the ABC's Greene told of a perception among his sources that under the current laws it will be easier to identify them than it was previously:

So they're either scared of the fact that it would be easier to be identified or they would be very familiar with the fact that these new provisions help catch out whistleblowers and leakers. Rather than me being scared of someone going through my phone, it's the sources who are scared that people will go through my devices and find them. I personally am not too worried but if it scares off my sources, it makes my job incredibly difficult to do (interview).

The Editorial Director of the ABC, Alan Sunderland, identifies an underlying problem when it comes to dealing with confidential sources:

It's all very well to say a journalist might have some degree of ability to protect themselves when their confidential source is pursued, but if there is a risk for the source and the whistleblower in the first place then the problem is almost as bad... You can't always point to a specific story that didn't happen in order to show that there has been a chilling effect. You'll find people just thinking "I'm not even sure where to begin" and that lack of certainty is the result of the chilling effect.

Government assurances to journalists that journalists are not the government's real targets in the suite of legislation introduced in recent years has not assuaged the journalism profession. The Media Alliance Media Section Communications Manager, Mike Dobbie, said:

The Attorney General George Brandis has stated that section 35P of the *ASIO Act* which provides for jail terms for up to 10 years for journalists was “primarily, in fact, to deal with a Snowden-type situation”. This would enable the Government to prevent a whistleblower from speaking out about illegal, corrupt, dishonest activities by a Government agency. It is disturbing that not only are they going after the whistleblower with a lengthy jail term, they're also going after the journalist. This has nothing to do with counter-terror objectives and everything to do with intimidating whistleblowers and journalists and threatening their confidential relationships (interview).

Dobbie said there was a cosmetic change to section 35P of the *ASIO Act*, which looked attractive, but it still means that journalists can go to prison for doing their job.

We haven't had real progress in securing parliament's understanding of legitimate journalism and of the work of journalists who are publishing genuine public interest news stories (interview).

Acknowledgment of the utility of surveillance: Journalists rarely acknowledge the utility of surveillance of communications possibly because of a fear that such an acknowledgement would undermine their own claims for protection. This study found a degree of preparedness, however, to concede that surveillance by law enforcement authorities does play a role where the competing public interest in addressing serious crime should take precedence. Nicholson, while conceding that the data retention law is ‘probably an essential tool for law enforcement in the modern world’, said it should not be accepted ‘as the norm’:

We should treat it as abnormal and use it only to deal with an ongoing crisis. There should be very strict rules about its use. The killer of ABC employee Jill Meagher was apprehended because police were able to use metadata to track her mobile phone and that of the killer who buried her body in a rural area. If they had not caught him, it is likely he would have killed again. It is also important that during investigations of major crimes involving, for instance, paedophile rings or terrorists, it is vital for police to be able to identify possible networks of accomplices (interview).

Likewise Nicholls said:

Should our intelligence agencies have strong surveillance powers? In the counter-terrorism space the answer would be “yes”. But there remains the danger that intelligence agencies will use those powers to uncover confidential sources who have embarrassed governments or their

agencies. Journalists and their sources need strong and watertight laws to prevent this from happening. We recently saw the dangers starkly presented in the case of the metadata breach admitted to by the AFP (interview).

The Federal Police admitted in April 2017 that one of its investigators sought and obtained ‘access to the call records of a journalist without priority of a Journalist Information Warrant’ and in doing so it had ‘breached the Telecommunications Interception Act’ (Colvin, 2017). The Media Alliance CEO said it was ‘beyond belief’ that the AFP ‘did not even know it had to go through the process of a Journalist Information Warrant application’ (Murphy, P., 2017, p. 21). Nicholson said:

It is very important that the courts take a very dim view of any abuse of surveillance laws. It shouldn’t be used to nail, for instance, journalists who might have embarrassed the government. The courts should have enough gumption to actually throw that kind of stuff out; but it’s entirely different if it’s a case of terrorism, murder, child sex rings, or other major abuses (interview).

Advice to journalists working with confidential sources: The interview participants had demonstrable expertise in dealing with confidential sources and this study sought to tap into their counsel for journalism students and those who are new to the craft. More detailed advice can, of course, be found in the literature elsewhere on this subject (e.g. Posetti, 2017, p. 138; and Fernandez and Pearson, 2015). Some key messages from the present interviews were: (i) always encourage sources to go on the record (McCarthy, interview); (ii) carefully consider a source’s motivation for requesting confidentiality (ibid), although at times when a source offers ‘red hot information on condition of confidentiality a journalist must often make a decision on the spot’ (Nicholls, interview); (iii) in the chase for a by-line don’t give in to pressure and burn a good source because ‘sources have lives too and you’ve got to look after them and sometimes a fairly small story isn’t worth making life hell for these people’ (Butterly, interview); (iv) don’t be intimidated by threats to sue – such ‘behaviour is bullying and you can’t let such people get you down’ (McClymont, interview); (v) given the mass surveillance climate ‘don’t do foolish things. For example, if you’re going to have a really serious, sensitive conversation don’t do it on the telephone because you really don’t know who might be listening’ (Nicholson, interview); (vi) assume Big Brother is watching. As ABC lawyer Grant McAvaney who also teaches media law with the University of Technology Sydney and the Media Alliance noted:

These days, everything – phone records and text messages – can be accessed. The journalist or the organisation might keep its mouth shut about the source. But can the legal authorities find out anyway? In this day and age I think they can (McAvaney, interview);

and (vii) prefer in-person dealings with sources or when devices such as the ‘Mission Impossible apps’ are used ensure they are effective in protecting the source (Riley, interview):

When it comes to confidential sources chat face-to-face without a recording. I normally take notes using a mixture of shorthand and longhand and then check back with sources before publishing. And then I protect my notebooks because it helps to have a written record of your conversation in case it's required by a court of law. This approach also gives the source greater confidence that your discussion is being recorded in a way that cannot be easily distributed (ibid).

Journalist education on dealings with confidential sources: One difficulty in the area of journalists' source protection is a lack of understanding of how things work not only among journalists but also among sources. The debate arising from the leak involving Prime Minister Malcolm Turnbull's 2017 Midwinter Ball speech mocking the US President highlights the lack of consensus on the circumstances that attract confidentiality even at the highest levels. Senior journalist Laurie Oakes who was not present at the event where Chatham House Rules applied justifiably did not consider himself bound by those rules and he published the 'mocking content' arguing that for journalists to become parties to concealment was 'ridiculous, hypocritical and indefensible' (Oakes, 2017). Other senior journalists also supported this position (Murray, 2017, p. 87; Murphy, K., 2017). The Prime Minister, however, called it a 'breach of protocol, a breach of faith' and the head of the Press Gallery Andrew Meares, expressed disappointment that some guests did not comply with the non-publication request (Riordan, 2017). This work does not permit a detailed examination of that instance but it suffices to say that the operation of confidentiality rules remain widely misunderstood. As the Editor of *The West Australian* observed for the purposes of the present study:

Many journalists have absolutely no understanding of laws that affect our ability to do our job when it involves confidential sources and others have limited understanding and in a lot of cases they probably don't need detailed understanding of the laws but it is good for them to have some knowledge (McCarthy, interview).

In addition, the reach of surveillance laws is not fully appreciated. The Media Alliance's Mike Dobbie said:

The extensive reach of surveillance law is something all journalists need to understand and be concerned about. And it is not just big news stories that attract official attention – it can happen to anyone of us and about any story. This is illustrated by the experience of *Guardian Australia* journalist Paul Farrell who had a 200-page investigation file opened up by the Australian Federal Police on the basis of one news story that landed on his lap (interview).

As previously noted 'journalists are either not sufficiently aware of the reach of the government's surveillance powers and its implications for the sanctity of journalists' confidential sources, or that journalists are savvy enough to avoid detection' (Fernandez & Pearson, 2015, p. 72). And while the legislative framework in this area remains unsatisfactory, the advice from Grant McAvaney noted:

In the present climate the more you can come at it from the assumption that the law is not going to be your friend in protecting your confidential sources, the better it will be for you at the end of the day in helping you decide how to approach your story. The law is not the journalist's friend when it comes to confidential sources (interview).

His advice further, is that any representations to the courts by journalists seeking source protection will not work without strong grounds for the request:

Media lawyers must emphasise to clients the need to pay attention to how the confidentiality obligation comes about. There should be a clear conversation with the source as to why confidentiality is warranted. Saying to the court "Oh look, I just don't think the source will be comfortable with being identified" is not going to work. The courts do get it that it is a tough area but journalists should be prepared for the pointy end in the proceedings (interview).

Conclusion

The above discussion provides fertile avenues for further research and law reform initiatives. The *Telecommunications Interception Act*, for instance, remains a threat for journalism and 'parliament needs to revisit' the Act to remove the threat (Murphy, P., 2017, p. 21). Journalists and their sources are vulnerable without a strong constitutional recognition for freedom of expression. Senator Scott Ludlam who has had an active role in this area for a long time and who was interviewed for this study, said:

Ideally we would have a kind of US First Amendment protection. You can put shield laws in place and then watch them getting eaten away, for example, by section 35P of the ASIO amendments. You can have all the legal protections you want but if you're conducting your communications in the open then nobody's ever going to need to take you to court to find out your sources because they already know who you are talking to (interview).

In his view, also, we need some big ideas on improving protections for whistleblowers and journalists:

We have been playing around with small ideas for too long. We need stronger human rights protections, a national human rights framework... We need a renewed focus on rights with new people coming into the picture – some new stakeholders and more industry groups such as Electronic Frontiers Australia, various civil liberties and digital rights groups, network engineers and Internet Service Providers (interview).

A culture shift is needed in government to address the perception of information oppression through the denial of access to the facts necessary to form informed opinions on matters of legitimate public concern. More effort is needed to take governance towards openness rather than towards obfuscation and contempt for the public's right to know. An instance of this can be seen in the Immigration

Minister Peter Dutton's claim to have superior knowledge of 'the facts' involving a violent disturbance at an Australian-run offshore detention centre to evade the ABC interviewer's questioning aimed at clarifying disputed facts: 'Again, Barry, I think there are facts that I have that you don't...' (Cassidy, 2017, at 17.03; Gartrell, 2017). There is a renewed effort, spearheaded by Senator Nick Xenophon, to introduce legislation to make Commonwealth officers treat information disclosure as a default position and to subject claims for information secrecy to stricter public interest tests, through the introduction of a new Bill in the federal parliament (Fernandez, 2017, p. 52). Such initiatives are long over due and will serve to further fertilise democracy.

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