Existing shield laws do little to protect Australians, or our democracy

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Australia’s inferiority to leading democracies in ensuring press freedom and free flow of information is nothing new. But we can add failing to acknowledge the evolution of journalism to that list.

Shield laws are supposed to provide privilege for journalists, protecting them from forced disclosure of confidential sources and information. They attempt to mediate the conflict between a journalist wanting to protect their sources and a court needing the relevant evidence before it.

Publication of news may be stopped by cover-ups and intimidation if source confidentiality is compromised during journalistic investigations. Potential self-censorship by journalists is a threat to our democracy. A source being too afraid to come forward is even worse.

Our courts fail to recognise the value to the public interest of source protection. They continue to favour a presumption of disclosure. Their failure to protect modern forms of journalism is even more archaic.

Media organisations recognise legal requirements and do not advocate for absolute protection. But what they all agree on is the necessity of effective shield laws. Introducing a rebuttable presumption in favour of non-disclosure could make this happen.

Journalistic protection is found in respective Evidence Acts. The Evidence Amendment (Journalists’ Privilege) Act 2011 applies to “a person who is engaged and active in the publication of news” and publishing in “any medium for the dissemination to the public”. It allows court discretion to order refusal to answer questions which might reveal a source. The catch is that the Act only applies to Federal and ACT courts.

Other states differ, with some offering no protection at all. Inconsistencies exist about who is protected and in what circumstances. This confusion across the country does nothing to help journalists, potential sources or the democratic process.
Our lack of explicit free speech mandate means that courts can freely interpret shield laws. Existing laws have been criticised for unequally favouring the judicial process.

The courts do have a difficult job of achieving a balance between the competing public interests in freedom of communication and confidence in the justice system. But they traditionally decline to take journalistic ethical obligations into consideration when finding this balance. Disclosing a source is the clear point of tension between the ethical and legal requirements for journalists.

New Zealand has the one up on Australia when it comes to shield laws. The Evidence Act 2006 (NZ) provides a presumption in favour of non-disclosure. A party must convince the court that the public interest in disclosure outweighs any likely adverse effects to any person and the public interest in the communication of facts.

Our neighbours illustrate that adopting a rebuttable presumption in favour of non-disclosure does not harm the judicial process. The shift in presumption does not alter the underlying balance test. It simply changes which party has the burden of convincing the court.

Resistance to modernising shield laws has made any progress difficult. However, expanding narrow definitions of journalism in current legislation would be a start. An all-encompassing, national shield law would be ideal to mitigate uncertainty and ensure consistent protection.

It came as no surprise when journalists refused to reveal their sources in a 2012 defamation proceeding led by Gina Rhinehart and her company, Hancock Prospecting Pty Ltd. Whilst the saga that is the Rhinehart case may prove entertaining, journalists preferring to be convicted with potential contempt of court over disclosure is telling.

Sadly, the case exemplifies why a rebuttable presumption in favour of non-disclosure is necessary. As surveillance and data retention laws make it increasingly difficult to ensure confidentiality, we should be fighting for journalistic rights and our own democratic rights.

It seems that those we entrust to uphold democratic values of press freedom and access to information are constantly fighting against a brick wall. We should be worried that the only remedy for journalists in Australia to hold onto any trace of confidentiality is contempt of court.

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