

Threats to Journalists' Confidential Sources Chills Flow of Public Interest Information and Undermines Accountability by Those Who Wield Power

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INTRODUCTION

This talk covers the challenges facing journalists when it comes to reliance on confidential sources. In this talk I focus on Australia, where I come from and where I have been actively researching in this area for some years. I speak in my personal capacity.

Are journalists' confidential sources protected?

Journalism practice codes resoundingly echo the *source protection* or *anonymity* imperative. It is expressed in different forms and in varying extents of detail. They can be found in e.g. the BBC Editorial Guidelines (UK); the IFJ Declaration of Principles on the Conduct of Journalists (international); MEAA Code (Australia); Society of Professional Journalists Code of Ethics (US); New York Times Standards and Ethics (US).

Should journalists' sources be legally protected?

The laws in some countries affirm the protection of sources set out in the ethics and practice codes. Such codes, however, have no legal force per se but many journalists swear by the obligations that such codes impose on them to honour their promise to keep their source confidential. 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 (David Banisar, 2017, p. 30). Without this protective lynchpin 'it is likely that critical information benefiting the public will not be passed on' (Joseph M Fernandez, 2015a, p. 305).

Early attitudes towards the idea of protecting journalists sources or giving the journalists a privilege met with 'universal disgust' – one writer decried it as 'making the most irresponsible tramp reporter a privileged person...the same as doctors and lawyers' (Dean C Smith, 2013, p. 17). This has given way to a greater receptiveness to the idea.

Notwithstanding, the broad acknowledgement of source protection justifications such protection often becomes collateral damage as attacks on the media globally become 'commonplace' (RSF, 2017a). And there is cause for alarm when the leader of a country with a proud First Amendment tradition mounts such attacks. In the U.S. the

media has faced 'repeated diatribes against the Fourth Estate and its representatives' following Donald Trump's election as President (RSF, 2017b). He has threatened to go after 'leakers' (John Wagner, 2017). Threats have been made against 'rats in the ranks' (News Corp, 2017). He has threatened to make it easier to sue for libel:

'I'm going to open up our libel laws so when they (the media) write purposely negative and horrible and false articles, we can sue them and win lots of money.' (Adam Liptak, 2017)

The atmosphere Mr Trump has set is extremely disturbing as it drastically lowers the benchmark for media freedom. There is a danger also that other countries will take the cue from such hostility towards the media. It is safe to say that dictators of the world would be emboldened by Mr Trump's public display of hostility towards the media. The Philippines president Rodrigo Duterte, for instance, whose contempt for journalists is well known, has previously made this bizarre remark.

'Just because you're a journalist, you are not exempted from assassination if you're a son of a bitch.' (Simon Lewis, 2017)

The IFJ has previously identified the Philippines as the world's second most dangerous place in the world for journalists (ABS-CBN News, 2016).

Legislation and journalists' sources

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 (Dean C Smith, 2013, p. 3). About 40 US states have shield laws (Kent R Middleton et al, 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 (Mike Dobbie, 2017, p. 50; Joseph M Fernandez, 2014, pp. 24–29).

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' (Julie 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. 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 (Dean C. Smith, 2013, pp. 3–9). So, this area of protection is not something that should only interest journalists but many others in society. Such people would even occupy high office because they too can be confidential sources to journalists.

SURVEILLANCE IN AN AGE OF ‘TERROR’

In the face of the insidious creep of legislation largely aimed ostensibly at protecting national security pre-existing rights and freedoms in many established democracies are failing to pay adequate heed to the encroachments resulting from legislative side winds.

Time limitations do not permit me to provide a full examination of the global scenario and as such my focus is on Australia. You may be able to relate to these scenarios and you may agree that Australia is not alone in moving down this path. State surveillance on its citizens has swept up in its path those who particularly rely on the sanctity of their communications – journalists, their sources, and whistleblowers, in particular.

While laws established over time paid heed to the lofty ideals captured in national constitutions, and to international instruments such as the International Covenant on Civil and Political Rights (ICCPR), and the Universal Declaration of Human Rights (UDHR), encroachments into long established rights and freedoms are occurring at an alarming pace:

‘We have reached the age of post-truth, propaganda, and suppression of freedoms – especially in democracies.’ (RSF, 2017a)

Against this backdrop, various ‘rights’ legislations are failing to keep up especially in the areas of journalists’ source protection; freedom of information; and whistleblower legislation. Australia is currently moving to force tech companies to break into encrypted communications. The MEAA has said it ‘is particularly concerned that on past experience the government and its agencies have little regard for press freedom and there is every likelihood that the powers being sought by the government over encrypted communications will be misused – either to identify a whistleblower or pursue a journalist for a story the government does not like’ (MEAA, 2017, Media Statement). The MEAA’s CEO Paul Murphy has observed:

‘For more than 15 years now, we have seen government introducing anti-terror laws that erode press freedom, persecute whistleblowers and attack journalists for simply doing their job.’ (MEAA, 2017, Media Statement)

WHISTLEBLOWING

While Australia has legislation providing protection for whistleblowers, these laws are widely seen as inadequate. The whistleblower laws place many restrictions on the act of whistleblowing, while other laws are also used to pursue whistleblowers. The CEO of the MEAA has noted:

‘The parliament has now legitimised the government secretly using metadata to

pursue whistleblowers who reveal government stuff-ups.’ (Paul Murphy, PFR, 2017, p. 3)

This has come about through a law passed recently. It is called section 36P of the ASIO Act. It:

‘...not only targets whistleblowers but also the journalists who work with them. Combined with other amendments to the *ASIO Act* and couple with metadata retention, it enables government agencies to secretly identify journalists’ confidential sources and prosecute both the journalist and the whistleblower for legitimate public interest journalism [and despite a review conducted by the Independent National Security Legislation Monitor] MEAA believes the INSLM’s recommendations are unsatisfactory because the fact remains that s. 35P is still capable of criminalising legitimate journalism in the public interest and is still capable of locking up journalists for years in prison for simply doing their job.’ (PFR, 2017, pp. 16–18)

Similarly, the *Border Force Act 2015* contains ‘tough new secrecy provisions, covering anyone who works for the [immigration] department which could see workers in detention centres jailed for two years if they blow the whistle on what’s happening to asylum seekers’ (Media Watch, 2015). While the real targets are those who carry out work involving Australia’s detention centres journalists ‘may also be in the firing line’ and one journalist told of instances of journalists’ metadata being examined in relation to refugee issues (ibid, Media Watch, 2015).

ANTI-TERROR LAW

In this section I provide an overview of some of the recently introduced laws that impact on journalists and their sources:

‘Australia’s raft of national security laws were created in response to the threat of terrorist incidents. In the process, the laws have been framed to deliberately undermine press freedom in Australia by seeking to control the flow of information, persecute and prosecute whistleblowers, criminalise journalists for their journalism in the public interest, and minimize legitimate scrutiny and reporting of government agencies.’ (Mike Dobbie, 2017, p. 16)

– section 35P, *Australian Security Intelligence Organisation Act (1979)*

The MEAA has described this law as follows:

‘The parliament has also introduced prison terms for reporting on ASIO special intelligence operations...lawmakers’ efforts have focused on criminalising legitimate public interest journalism and going after whistleblowers...’. (Paul Murphy, PFR, 2017, p. 3)

In my interviews for my recent source protection law survey this was one of the views expressed:

'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.' (Mike Dobbie, interview with author)

– Journalist Information Warrants

This law allows for access to a journalist's account details, phone number of the call or SMS, time, date, duration of the calls etc, and for the internet, the following details can be accessed – time, date, sender and recipient of emails, the device used, duration of the connection, IP address etc (PFR, 2017, p. 22). A journalist can never challenge a Journalist Information Warrant – everything about it 'is secret' (Mike Dobbie, 2017, p. 22).

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). A journalist I interviewed, Brendan 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 with author).

– *Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2014 (Data Retention Law)*

Before the recent amendments, in 2013–2014, more than 334,000 authorisations were granted to 77 government agencies allowing them to access telecommunications data (Mike Dobbie, 2017, p. 22).

IMPORTANT FOR MEDIA TO STAY VIGILANT

No government would readily admit to carrying out an open assault on freedom of expression. MEAA CEO Paul Murphy sums it up:

‘Such is the nature of press freedom’s political battleground in Australia: lots of talk about freedom of speech in the midst of an actual legislated assault on press freedom.’ (Paul Murphy, 2017, p. 3)

The challenge in pursuing a workable way forward that adequately safeguards the interests of freedom of expression can be seen in the following passage taken from a UN report a few years ago. In a section entitled ‘Recommendation to States’ the report states as follows:

‘National legal frameworks establishing the right to access information held by public bodies should be aligned with international human rights norms. **Exceptions** to disclosure should be **narrowly defined and clearly provided by law and be necessary and proportionate** to achieve one or more of the above-mentioned **legitimate objectives of protecting the rights or reputations of others, national security, public order, or public health and morals**. Adopt or revise and implement national laws protecting confidentiality of sources.’ (UN General Assembly Paper A/70/361, para 60, emphasis added)

At first glance this passage nicely captures human rights ideals and interests. On closer inspection, however, we can see embedded difficulties. These difficulties arise from the reference to ‘exceptions’. Taken by itself, providing for exceptions that address the competing interests sounds entirely reasonable. It is in the interpretation and application of these exceptions that we face great difficulty. No blanket rule can be made that would service every jurisdiction on every single occasion. When we get into the territory of weighing up competing interests there is great potential for the outcome to be contrary to what freedom of expression advocates would argue for. As UN special rapporteur David Kaye has stated:

‘It’s very common for a state to say ‘this is national security and therefore there’s no right to either publish this information or disclose it’. So both the person who discloses the information and the source can be subject to all sorts of sanctions, sometimes criminal. Those are having a **real chilling effect**, certainly on sources, **and probably** to a certain extent on the journalists as well.’ (David Kaye, p. 4, emphasis added)

David Kaye’s fear of the probability of a chilling effect on journalists is borne out by my own study in this area as Canberra Parliamentary Press Gallery Reporter Nick Butterly told me:

‘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 with author)

Likewise, another Press Gallery reporter, Mark Riley, Political Editor of the Seven Network, based at the Canberra Press Gallery told me:

‘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.’ (interview with author)

The media must remain vigilant to legislative moves that undermine rights and freedoms. In Australia, the media was somewhat slow to react when some of the rights-infringing laws were being passed:

‘...we in the Australian media have been somewhat apathetic on the press freedom front, not vigilant enough or as willing to fight as we should have been’ (Laurie Oakes, 2015).

The world is today grappling with where to fix the fulcrum on the see-saw that balances rights and freedoms with counter-terrorism and national security interests. A former Australian prime minister has stated:

‘Regrettably for some time to come, the delicate balance between freedom and security may have to shift. There may be more restrictions on some, so that there can be more protection for others.’ (Emma Griffiths, 2014)

The challenge for democracy and especially for journalists is to maintain a strong vigil against government attempts to redefine that balance in a manner that is not in effect a devious attempt to entrench power in the hands of a few. This requires not just being alert to such manoeuvres but to also demonstrate perseverance in trying to understand such moves when they involve legislative measures and to show courage in interrogating such moves and educating the public on the significance of such moves. As one commentator has observed:

‘A genuinely “tough” response to terror should be severely to downplay its impact. It bids us to calmly police the domestic soil in which terror takes shallow root...It does not curb liberties or wage wars. Such restraint may not be in the culture of today’s politics...Terrorism is best regarded as a criminal abomination. Only a careless democracy gives it power (Simon Jenkins, 2016).

CONCLUSION

I'd like to end this talk by referring to two developments that are unfolding back in Australia as the anti-terror mantra is once again being actively chanted in the corridors of power.

One, the federal government has proposed a new 'super ministry' or a 'federation of border and security agencies' with expanded powers to be given to the minister (Blaxland, 2017). Yet, the grounds upon which such a move is planned is widely seen as appearing to 'stand on contestable grounds' and as being 'a fraught move' (ibid). The Prime Minister's announcement of the plan at a press conference was itself curious. It was held with 'a backdrop of Australian Defence Force (ADF) Special Operations Command members in full camouflage, wearing gas masks and brandishing automatic weapons' (Sarah Smith, 2017). While some would welcome the proposed moves as capable of reinforcing national security others view it as a 'threat to us all' (Sarah Smith, 2017, citing Queen's Counsel and rights advocate, Julian Burnside).

The other, anti-terror move being proposed is the one coming from the Australian PM who wants to introduce 'new laws to force the providers of encryption services – including Facebook's Messenger app, WhatsApp, Signal, Telegram and others – to co-operate with law enforcement to crack open coded messages of people suspected of major crimes' (Nick Evans, 2017, p. 16). As one commentator observed:

'At best, what Turnbull is doing is theatre. He wants to look tough on terror, and knows this set of reforms will do that and little else. At worst, he will get what he wants. And that could make all of our lives a little less secure.' (Nick Evans, 2017, p. 16)

The media and all who value democracy, openness, transparency and accountability must remain ever vigilant. Journalists' have an important role in informing the public, in exposing lies and theatre, and in staying true to the profession's calling – tell truth to power. It is not the media's job to unilaterally decide whose voices they will communicate and whose they will not. It is not the media's responsibility to censor opinions and information without clear and convincing grounds.

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Short Biography

Associate Professor Joseph M Fernandez heads the Journalism Department at Curtin University, Western Australia, where he has taught tertiary level media law since 1999. Dr Fernandez is the author of *Media Law in Australia —Principles, Pitfalls and Potentials* (372 pages) and other academic works focusing on journalism and the law. He is also an Australian correspondent for Reporters Without Borders (RSF). Prior to joining academia Dr Fernandez was the chief editor of a Malaysian daily newspaper. He holds four tertiary degrees, one in journalism and three in law.

His PhD covered defamation and proposed law reform to make the 'truth defence' more user friendly for media defendants. Another key area of his research focus is the protection of journalists' confidential sources and he has participated actively in law reform in this area. He tweets from DrJM_Fernandez