ALLIANCE for JOURNALISTS' FREEDOM

Level 26
1 Bligh St
Sydney 2000

Submission to the Attorney-General's Department Review of Secrecy Provisions

The Alliance for Journalists' Freedom (AJF) appreciates the opportunity to make this submission to the Attorney-General's Department Review of Secrecy Provisions.

The AJF promotes media freedom and the right of journalists to report the news in freedom and safety. This includes working with governments to ensure legislation supports media freedom. The AJF was established following the release of Australian journalist Peter Greste from over 400 days imprisonment in Egypt. In the absence of specific constitutional or charter protections, the AJF advocates for a Media Freedom Act to enshrine media freedom in Commonwealth legislation. This would effectively address many of the issues we raise in this submission.

The AJF is incorporated as a public not-for-profit company limited by guarantee and is funded by donations from business and philanthropists. Funding is not sought or received from governments.

1 Overview

- The current regime of secrecy laws undermines Australia's system of representative democracy.
- The system of representative democracy as set out in the Constitution is underpinned by the principle of freedom of political communication.
- Citizens rely on information about the operations of government and about elected representatives in order to cast their votes.
- The media serves the vital function of providing citizens with information about government policies and actions, scrutinising and holding representatives and government officials to account. The media also provides a platform for a range of community views and responses in relation to government policies and operations.
- Government is elected by the people and operates for the people. It follows that government information in essence belongs to the people.
- Laws which restrict access to government information need to be structured to meet a specific requirement to protect an identified public interest. This would include protection of personal information collected by government, material that is commercial in confidence, and the identity of personnel, methods and technologies used by our security and intelligence agencies. The laws need to be proportionate and fit for purpose.

- However, the current secrecy regime in Commonwealth legislation effectively prevents the Australian public from accessing significant information about broad areas of government activity.
- This is inconsistent with the Australian public's "right to know". UNESCO defines this as the right for people to "*participate in an informed way in decisions that affect them, while also holding governments and others accountable".*[1] The "right to know" derives from Article 19 of the Universal Declaration of Human Rights which provides that: "*Everyone has the right to freedom of opinion and expression; this right includes freedom to… seek, receive, and impart information and ideas through any media and regardless of frontiers".* Australia was an original signatory of the Universal Declaration of Human Rights in 1948.
- The current Commonwealth legislative regime privileges secrecy over Australian citizens' right to know. The operation of Australia's existing laws means that access to government actions over and above the proceedings of Parliament is highly restricted except through authorised government disclosures (media releases, published reports, interviews) and limited access allowed under Freedom of Information (FOI) laws. The default is that unauthorised dealings in a broad range of government information are criminalised.
- It is commonly accepted that effective operation of government requires that certain information is kept secret at least for a period. Examples are information about cabinet discussions, aspects of military and security arrangements and operations and the identities of employees of certain security agencies, personal information about individuals and sensitive financial information.
- The current Commonwealth laws do not strike the right balance.
- The secrecy and anti-disclosure laws at the Commonwealth level have two overriding and inter-related characteristics:
  - their sheer numbers, volume and complexity; and
  - their inevitable overreach in restricting access to a broad range of information about the operations of government.
- Criminal liability should not flow from unauthorised disclosures, possession or dealing with government information unless there is an intention and likelihood of causing serious harm to an identified public interest.This applies to both providers of information and journalists.

[1] UNESCO, *Freedom of Information: The Right to know: 2011 p16*

- Journalists should not be exposed to criminal liability for taking everyday actions which they need to perform to fulfil their role in informing the public and holding those who govern us to account.
- The current public interest journalism defence does not work effectively because despite the existence of the defence, journalists still face a meaningful and chilling prospect of being investigated, prosecuted and convicted when reporting on sensitive government matters. An equal risk is that they are caught up in an investigation of a government whistleblower.
- Secrecy laws should not be a shield to conceal criminal activity, corruption, financial mismanagement, incompetence or abuse of office, or to prevent embarrassment to, or criticism of, government and officials.
- Australia is unique amongst comparable democracies in that, other than in the limited case of the implied freedom of political communication, it has no constitutional protection or charter of rights to protect free speech, media freedom or the public's right to know. This means that laws which restrict free speech, media freedom or the public's right to know are not tempered by an overriding constitutional or charter protecting these rights.
- This may explain why Australia's secrecy laws are more extensive than those of other comparable democracies (NZ, UK, Canada, US) in both scale and scope.
- To address this the AJF proposes the introduction of a Media Freedom Act to sit alongside complementary legislative provisions in relation to whistleblower protection, defamation, privacy and freedom of information. Amongst other provisions the Act ought to provide that before new legislation is passed, including new secrecy laws, parliament should be required to assess and report on the impact of any proposed new legislation specifically on the public interest in a free press.

Consultation question 1

What principles should govern the framing of general secrecy offences and specific secrecy offences, including the categories of persons and information to which it is appropriate for each of these types of offences to apply?

The AJF considers that the following principles should govern the framing of secrecy offences:

- The public's interest in being informed about matters of government should be the central overriding principle.
- Protection of government information is not an end in itself.
- The national and public interest in keeping some information secret should be balanced against the public interest of informing the Australian public about government matters.
- Australia's democratic system relies on protection of the public's right to know and this requires protections for public interest journalism.
- Secrecy offences and non-disclosure laws should be narrowly framed.
- Criminal sanctions should not automatically flow from all unauthorised disclosures of government information. Criminal sanctions should only flow when there is an intention to cause harm to a national interest or another recognised public interest.
- The legislative regime governing secrecy and non-disclosure laws should be clear and consistent.

1.1 **The public's interest in being informed about matters of government should be the central overriding principle.**

- The public's right to know about the operations of government should be at the fore in shaping Australia's secrecy laws, tempered only by restriction of government information where there is a clear and identifiable risk in relation to a specific area of concern, in which case secrecy laws should be proportionate and appropriately focussed.
- The public interest is served by the free media. The laws must balance national security and other recognised public interests with the public's right to know. While there is an inevitable tension between the two, media freedom does not undermine national security or good government. Rather it is a cornerstone of both national security and good government. Public confidence in government and in our system of representative democracy is undermined when people are not informed about whole aspects of government operations. The result is a lack of trust by the people in their system of government. This in itself can undermine national security. Secrecy and security laws on the one hand, and the role of the press as the "Fourth Estate" on the other, both work to achieve the same end: to enable, support and protect our democracy. In Australia's representative democracy, the free media enables an informed public to exercise their vote

effectively. This is recognised in the implied constitutional freedom of political communication and by international treaties to which Australia is a party, including the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

- Journalists must be able to receive, investigate and communicate government information in order to inform the public about government activities. Laws which subject journalists to the risk of investigation, prosecution and imprisonment have a 'chilling effect' which discourages journalistic reporting.
- Journalist protections should apply to journalists who subscribe to a recognised code of journalist ethics and are employed by or are members of an organisation that will hold them to account for breaches of the code. Journalist protections should not be limited to professional journalists who are employed by media organisations and publishers. The disruption of the media industry and challenges to traditional media business models caused by digital disruption mean that many journalists work as independent freelancers or hold portfolio careers where revenue from journalism forms only one of their income streams.
- The essential role of media to a healthy democracy is well recognised.
- For instance Madeleine Wall explains the key role that the media plays in a democratic society by reference to the historical origins and development of the term 'Fourth Estate'. Wall considers that the term, Fourth Estate, 'refers to journalism's important role of "watchdog" of the public interest and facilitator of debate'.[2] It is suggested that the media's role, in facilitating debate on important public issues, leads to greater transparency and accountability in government decision making.[3]
- Stephanie Szkilnik cites James Curran to argue that the role of the media in a democratic society is to act as a check on the exercise of the state's power.[4] She explains that the ultimate purpose of the media's role is to facilitate the functioning of democracy by enabling voters to make an informed choice.[5]

[2] Madeleine Wall, 'Data retention and its implications for journalists and their sources: A way forward' (2018) 22 *Media & Arts Law Review* 315, 316-17.

[3] Madeleine Wall, 'Data retention and its implications for journalists and their sources: A way forward' (2018) 22 *Media & Arts Law Review* 315, 317.

[4] Stephanie Szkilnik, 'Secrecy and disclosure: The Australian Border Force Act 2015 (Cth) protecting our borders from free speech' (2016) 21 *Media & Arts Law Review* 64, 79.

[5] Stephanie Szkilnik, 'Secrecy and disclosure: The Australian Border Force Act 2015 (Cth) protecting our borders from free speech' (2016) 21 *Media & Arts Law Review* 64, 79.

- Hannah Ryan explains that the protection of the press is particularly important to ensure that the media can perform its role as a 'watchdog'.[6] In the execution of its role as a 'watchdog':

> The media has a duty to supply the public with information to guard against abuses of power, precisely the information people need to participate meaningfully in democracy.[7]

- Sheila S Coronel discusses the importance of the role of the media as the Fourth Estate and as a forum for public debate. Coronel, recognises that in recent times the media has struggled to live up to these ideals, yet she notes that:

> 'the notion of **the media as watchdog, as guardian of the public interest, and as a conduit between governors and the governed** remains deeply ingrained'.[8]

Coronel considers that the media has acted as an effective watchdog through investigative reporting which has exposed corruption and which has built a culture of transparency that makes democratically elected governments more accountable.[9]

- Rebecca Ananian-Walsh, Sarah Kendall & Richard Murray consider the impact of Australia's espionage offences on press freedom. In 2019, the authors interviewed 20 journalists and senior newsroom figures involved in public interest journalism, espionage laws were identified as a major concern, leading to a chilling effect on public interest journalism.[10] The authors note, that these concerns were not related solely to espionage laws but were expressed in the context of broader changes in laws and the media landscape.[11] The authors conclude that:

> 'the interviews demonstrated that **the chilling effect is real and journalists have been inhibited in their pursuit of public interest journalism by changing legal frameworks**'.[12]

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[6] Hannah Ryan, 'The half-hearted protection of journalists' sources: Judicial interpretation of Australia's shield laws' (2014) 19 *Media & Arts Law Review* 325, 339.

[7] Hannah Ryan, 'The half-hearted protection of journalists' sources: Judicial interpretation of Australia's shield laws' (2014) 19 *Media & Arts Law Review* 325, 339.

[8] Sheila S Coronel, 'The Role of the Media in Deepening Democracy' (2003) NGO Media Outreach 1, 1.

[9] Sheila S Coronel, 'The Role of the Media in Deepening Democracy' (2003) NGO Media Outreach 1, 1, 9-12.

[10] Rebecca Ananian-Walsh, Sarah Kendall & Richard Murray, 'Risk and Uncertainty in Public Interest Journalism: The Impact of Espionage Law on Press Freedom' (2021) 44(3) *Melbourne University Law Review*764, 786.

[11] Rebecca Ananian-Walsh, Sarah Kendall & Richard Murray, 'Risk and Uncertainty in Public Interest Journalism: The Impact of Espionage Law on Press Freedom' (2021) 44(3) *Melbourne University Law Review*764, 787.

[12] Rebecca Ananian-Walsh, Sarah Kendall & Richard Murray, 'Risk and Uncertainty in Public Interest Journalism: The Impact of Espionage Law on Press Freedom' (2021) 44(3) *Melbourne University Law Review*764, 787.

1.2 **Protection of government information is not an end in itself. Australia's democratic system relies on protection of the public's right to know and this requires protections for public interest journalism.**

- The objective of secrecy and non-disclosure laws is to protect the security of the nation and our safe, stable and effectively functioning democratic society. Effective functioning of governments in relation to national security requires some information to be kept secret, at least for a period. This should be the exception rather than the rule. Laws should not be used as a shield to conceal criminal activity, corruption, financial mismanagement, incompetence or abuse of office or to protect government from embarrassment or scrutiny.
- Freedom of the press enables scrutiny of government and its agencies, shining a light on wrongdoing and other mischiefs which place Australian society at risk, and promoting good government by holding those in power to account. Exposure of such matters strengthens government by enabling it to review, reform and improve its policies and operations.
- For the reasons outlined throughout this submission, the AJF believes that the public interest in open and accountable government is not well served by the current regime of Commonwealth secrecy laws.

1.3 **Secrecy offences and non-disclosure laws should be narrowly framed. Criminal sanctions should not automatically flow from all unauthorised disclosures of government information. Criminal sanctions should only flow when there is an intention to cause harm to a national interest.**

- Criminal sanctions are warranted only in the most serious of circumstances. Criminal sanctions are not justified unless an unauthorised disclosure could cause serious or grave damage to national interest or to personal safety.
- The secrecy laws make it an offence to disclose or deal with information which has been classified as "Secret" or "Top Secret". These security classifications are set under *Policy 8: Sensitive and classified information* which is the government policy detailing how to correctly assess the sensitivity or security classification of information.
- A defendant may be found guilty of a criminal offence which carries a prison sentence simply because a document has been stamped Secret or Top Secret. However, the framing of the offence should take into account whether the document classification was in fact appropriate. For instance, was there in fact an "actual risk of serious damage to the national interest" (Secret) or an "Exceptionally grave damage to the national interest" (Top Secret) in the circumstances of the case?

1.4 **The legislative regime governing secrecy and non-disclosure laws should be clear and consistent.**

As noted in the Consultation Paper the number, inconsistency and complexity of secrecy offences has caused concern. The AJF shares such concern.

Consultation question 2

Having regard to these principles, are there any general or specific secrecy offences that should be amended or repealed?

a) For any of these offences, are there other forms of action (such as civil or administrative action) that would be more appropriate to protect against unlawful communication or other dealing with the information?

- The protection of national security and the operation of government requires that some information must be kept secret, at least for a period. However, this is not the only interest to be taken into account. The national interest in keeping some information secret should be balanced against the public interest of informing the Australian public about government matters.
- Hiding unnecessarily broad categories of information behind secrecy laws can be as destructive to trust in government as disclosure of some information. This harms the integrity of the safe, open and democratic society we value.
- Secrecy laws which are framed too broadly can capture information which is in fact innocuous. These laws should be amended so that they are more focussed. At the very least, a journalists' exemption should apply so that the disclosure of information in the public interest that is not capable of causing actual harm does not trigger criminal liability. The fault element should be revised to require an intention to cause harm, not mere recklessness.
- Similarly, it is wrong in principle to have a blanket prohibition on disclosure of any and all information relating to a public agency, even if it does deal in sensitive and secret matters. Secrecy rules which criminalise the disclosure of *all* information held by an organisation, including administrative and non-sensitive information, should be amended to apply only to the disclosure of material which could genuinely cause harm. It is worth noting that people who work in the intelligence agencies are as capable as any other of corruption, mismanagement, abuses of power, sexual misconduct, or any other illegal or unethical practices outside of their classified duties, as well as poor implementation of flawed policies. The secrecy provisions should not shield them from the same scrutiny as any other government department. Budgets and other administrative matters relating to security and similar agencies are a matter of public interest. The laws should be amended to allow journalists to report on intelligence, security and military misconduct where exposure does not impact on the security of the nation. Enshrining a culture of secrecy over all matters relating to particular organisations can enable wrongdoing to occur unchecked, which itself poses a risk to the national interest.

2 General Secrecy Offences

2.1 The definition of "Inherently harmful information" is too broad: Criminal Code section 122.1(1)-(4)

- The definition of "Inherently harmful information" in the Criminal Code is too broad.
- The scope of the information covered goes beyond what would reasonably be expected to cause harm to essential public interests of the Commonwealth and includes information which is in essence anodyne.
- For instance the definition of "inherently harmful information" includes:
  - "*security information*", which is in turn defined under section 90.5 of the Criminal Code to include material stamped with a classification of "Secret" or "Top Secret". Not all material is appropriately classified. The reasons for the classification may have lapsed with changing circumstances and the passage of time. Whether the classification is or remains appropriate cannot be tested by the court, nor can the court test whether there is a realistic prospect of actual harm. Under the Protective Security Policy Framework of the Australian Government and The Business Impact Levels tool included as Table 2 in the Framework, the categories of information which might be classified " Secret" or " Top Secret" is very broad including entity operations, capabilities and service delivery, entity assets and finances including operating budgets, information relating to legal compliance, information in relation to policies and legislation and the Australian economy.
  - "*information that was obtained by, or made on behalf of, a domestic intelligence agency or a foreign intelligence agency in connection with the agency's functions*".[13] This captures all information held by such agencies, whether it is sensitive or bland or anodyne.
  - "*information relating to the operations, capabilities or technologies of, or methods or sources used by, a domestic or foreign law enforcement agency*".[14] There is no requirement for the law enforcement agency to have classified the information as Secret or Top Secret. There is no requirement that actual damage is likely to be caused by disclosure of this information.

2.2 The definition of conduct that "causes harm to Australia's interests" is too broad: Criminal Code section 122.2(1)-(4)

- The term "cause harm to Australia's interests" is defined in section 121.1 and includes cases where disclosure may "*harm or prejudice the security or defence of Australia*." The concept of the "*security or defence of Australia*" is in turn defined to include "*the operations, capabilities or technologies, or methods or sources used by, domestic or foreign intelligence agencies*". This

[13] Criminal Code 1995 (Cth), s 121.1(1).

[14] Ibid.

is broad and all-encompassing. There is no carve out for general information which is not strategically sensitive, including budgets and financial matters. Current debates about AUKUS and the purchase of nuclear submarines by Department of Defence demonstrate that public interest discussions in relation to information captured under this broad definition can be had without compromising national security or the integrity of the agency's operations.

2.3 **Dealings with information subject to a "duty not to disclose" – Criminal Code section 122.4**

- The offence under section 122.4 applies whenever there is a "*duty not to disclose the information*" which "*arises under a law of the Commonwealth*". This is extremely broad. There is no requirement that the disclosure will cause or is likely to cause harm to the national interest. This offence should not be reenacted after it sunsets in December 2023.

2.4 **Where the fault element is "recklessness" it should be amended to "intention to cause harm"**

- For the purpose of the Criminal Code, "recklessness" is defined as:[15]

  (1) A person is reckless with respect to a circumstance if:
  (a) he or she is aware of a substantial risk that the circumstance exists or will exists; and
  (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.
  (2) A person is reckless with respect to a result if:
  (a) he or she is aware of a substantial risk that the result will occur; and
  (b) having regard to the circumstances known to him or her, it is unjustified to take the risk.
  (3) The question whether taking the risk is unjustifiable is one of fact.

2.5 If a person is convicted of a general secrecy offence, criminal liability along with potential imprisonment for a significant term are the consequences. If a person knows or has grounds to believe that the information is subject to secrecy protections, then the fault element of recklessness is established. This is despite the fact that even though the information there may come within the broad and vague definitions of "*inherently harmful information*" or information which "*causes harms to Australia's interests*" there is in fact no realistic prospect of harm to the national interest arising from the disclosure. The

[15] Criminal Code 1995 (Cth), s 5.4.

standard of fault should be an *intention* to cause harm to a recognized **public interest.**

2.6 Australian Security Intelligence Organisation Act 1979

- Sections 18(2), 18A, 18B, 81 of the ASIO Act protect all information held by ASIO, regardless of whether disclosure or other use may be harmful to investigations or other operations. As stated above, it is wrong in principle to shroud all information relating to a particular agency in secrecy simply because the agency serves a security or intelligence function. The results can sometimes be absurd. For example, ASIO's original submission to the PJCIS Inquiry into Media Freedom was initially branded "Secret" simply because it came from ASIO.
- Section 35P of the ASIO Act creates various offences in relation to the unauthorized disclosure of information that "*relates to* "a special intelligence operation (SIO). Under section 35P (2), a person could be charged if they (a) disclosed information which (b) related to an SIO and (c) the disclosure will endanger the health or safety of any person or prejudice the effective conduct of an SIO. Recklessness is the fault element for (b) and (c). The Penalty is imprisonment for 5 years. This penalty is increased to 10 years if the person intended or knew that the disclosure will endanger the health or safety of any person or prejudice the conduct of an SIO.
- One problem from the perspective of the media is that it is impossible for a person who is a bystander to know that an SIO is underway, so that Section 35P is enlivened to criminalise any reporting. An SIO may involve a range of activities or events in public which would be newsworthy. These could include everything from shootouts or hostage situations to road closures. If the circumstances are such that it is reasonable observer might consider it as a possible or likely that ASIO might be undertaking an operation, the person may be found to have been reckless if they report on the events.
- The next problem is the breadth of the information in relation to the SIO which may not be reported. Section 35P applies to any information which "*relates to*" the SIO. Merely mentioning any aspect of the event comes within this broad scope.
- It is also very difficult for a person to know if the publication of the relevant information could "*prejudice the effective conduct of an SIO*". Without knowing the objective, strategy and tactics of the SIO, how can a bystander work out what reportage could prejudice the effective conduct of the SIO?
- SIOs by their nature will not be announced or officially disclosed. There is also negligible information available about the processing of classifying activities of the agency as an SIO. Can the status be conferred retrospectively?
- The risks to media are intensified as any disclosure of the information is criminalised, not just publication as part of a media report. A journalist who

checks with their editor or producer or any other colleague in the editorial chain of command could be jailed for responsibly doing their job.

- The uncertainty and degree of risk triggered by section 35P engender an extreme chilling effect in relation to reportage on security and intelligence matters.
- Whistleblowers who may wish to expose abuses of power or other wrongdoing arising in relation to security or intelligence agencies are also discouraged as the Public Interest Disclosure Act in its current form does not provide clear protections.

Other Commonwealth Legislation

- Legislation creating specific secrecy offences should be reviewed to assess whether it imposes excessively broad restrictions which prevent the reporting of broad swathes of information which is in the public interest. AJF has identified a sample of such provisions.[16]
- In summary, the AJF submits that specific secrecy offences should be narrowed in scope to circumstances where there is a meaningful prospect of harm to a recognized national interest, including securing the country's economic well-being, sociocultural values, international policy goal, environmental protections and safety. A public interest journalist protection should apply to all secrecy offences to remove journalism in the public interest from the scope of the offence. Legal interventions are not the only way to achieve a better balance between national security and media freedom.
- The AJF also supports the implementation of Recommendation 8 of the Parliamentary Joint Committee on Intelligence and Security Inquiry into the impact of Law Enforcement and Intelligence Powers on the Freedom of the Press:

  The Committee recommends that the Australian Government give consideration to the formulation of a mechanism to allow for journalists and media organisations, in the act of public interest journalism, to consult with the originating agency of national security classified information without the threat of investigation or prosecution.

  Additionally, the Committee recommends that all intelligence and law enforcement agencies prioritise the creation of a media disclosure liaison unit to facilitate this formal consultation[17]

[16] Australian Border Force Act 2015 (Cth), s 42; Australian Federal Police Act 1979 (Cth), ss 40ZA, 60A; Crimes Act 1914 (Cth), s 15HK; Criminal Code 1995 (Cth), Sched 1 s 91.1(2); Defence Act 1903 (Cth), ss 73A and 90; Inspector-General of Intelligence and Security Act 1986 (Cth), s 34; Intelligence Services Act 2001 (Cth), ss 39-41B and Sched 1 item 9; National Anti-Corruption Commission Act 2022 (Cth); Office of National Intelligence Act 2018 (Cth), ss 42 and 44.

[17] Report: Parliamentary Joint Committee on Intelligence and Security, Inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press. August 2020, page xx, Parliament of the Commonwealth of Australia.

- Implementation of Recommendation 8 would be a significant step to promote greater trust between security agencies and media to achieve a better balance between protecting national security interests and the public's right to know.
- Over many years there has been useful dialogue between security officials and producers and editors of media organisations that has led to considered outcomes. Journalists and editors have demonstrated over time that such matters can be approached in a reasoned and responsible manner. We hold that this approach should continue to be preferred over attempts to codify news reporting and criminalise journalists for doing their jobs.

Consultation question 3

Are there circumstances in which it is appropriate for a specific secrecy offence to prohibit conduct that is also prohibited by a general secrecy offence?

- It has not been possible for the AJF to review each specific secrecy offences identified in the Consultation Paper within the time frame for this Review.
- In principle, the general secrecy offences should be able to cover the field but the risk is that the necessarily general nature of such offences have the potential to cover a wider range of acts that is warranted and create uncertainty.
- The current "octopus" of legislation does not promote understanding or compliance with secrecy laws. The resulting uncertainty inevitably risks unwarranted self-censorship in reporting government matters.
- It is particularly confusing when one disclosure seems to be covered by a number of legislative provisions, especially when there is inconsistency. In principle, if specific conduct is covered by a general secrecy offence, it is unnecessary to create a duplicate specific offence.
- The incoherent, confused array of legislation indicates a lack of principled consideration of the need for secrecy in relation to government information in a range of contexts. The inevitable suspicion is that secrecy of government information seems to be viewed as an end in itself.
- A streamlined set of general offences based on principles with overarching exemptions for journalist, support staff, whistleblowers and those giving and receiving legal advice is the better approach. A fundamental overhaul of secrecy legislation is necessary to achieve this.
- The AJF notes that the Australian Law Reform Commission (ALRC) considers that general secrecy offences should not be the only criminal provisions regulating the unauthorised disclosure of government information. There is still a need for specific

secrecy offences tailored to the needs of particular agencies or to the protection of certain kinds of information.[18]

- The ALRC recommends that in the interests of consistency and simplification:

> *a set of principles to guide the creation of new offences and the review of existing offences. The key principle is that specific secrecy offences should only be enacted where necessary to protect a public interest of sufficient importance to justify the imposition of a criminal sanction. As a general rule, the ALRC considers that the best way to ensure this is to include an express requirement that the unauthorised disclosure of caused, or was likely or intended to cause, harm to a specified public interest.* [19]

- The AJF endorses this approach.
- The AJF also agrees with the ALRC's statement that

> … **in very limited cases**, *and where the* ***category of information protected is narrowly defined****, regulatory agencies—such as taxation and social security, and corporate regulators—may also be able to justify specific secrecy offences that do not include an express harm requirement. This is because the public interest harmed by the unauthorised disclosure of information held by such agencies—that is, harm to the relationship of trust between the government and individuals that is integral to effective regulatory systems and the provision of government services—is not concrete enough to prove beyond reasonable doubt in a criminal prosecution."*[20] (emphasis added)

- The AJF is concerned that the constrained approach recommended by the ALRC has not been the basis for the enactment of the current complex regime of specific security offences.

Consultation question 4

Are the current defences for general secrecy offences available under section 122.5 of the Criminal Code appropriately framed? Are there any amendments or additions to these defences that should be considered?

- The purpose of the AJF is to protect the right of journalists to report the news in freedom and safety. Accordingly this answer addresses only those defences of most relevance to this purpose.
- Section 122.5(6) of the Criminal Code, which establishes a journalists' public interest defence, is discussed in more detail in our response to Question 7. For the reasons outlined there, the AJF considers that exemptions from prosecution for acts undertaken

[18] ALRC Report 112: Secrecy Laws and Open Government in Australia (2009) p 25.

[19] Ibid

[20] ibid

in the course of journalism, rather than defences, are the appropriate form of protection to enable journalism to best serve the public's right to know.

- The Attorney-General's Department argues that there is no difference in the legal effect whether a protection for journalists is classed as a defence or an exemption[21]. They state that the same evidential burden needs to be discharged and there is no procedural difference.
- The ALRC makes the point that an exemption limits the scope of conduct prohibited by an offence whereas a defence may be relied on to excuse conduct which is prohibited by an offence[22].
- The way in which legislation is cast can have a significant effect. When considering whether to investigate or prosecute, investigators and prosecutors need to consider whether the defendant's conduct falls within any exemption.
- The investigators and prosecutors would have an onus to consider these matters upfront, rather than waiting for the defendant to raise a defence in the course of proceedings.
- Considering these matters upfront would mean that some prosecutions might not proceed thus avoiding unnecessary costs, time and stress to the individuals involved and unnecessary and costly use of state resources.
- In relation to the Attorney-General's Department's observation that the defendant bears the evidentiary burden in relation to both exemptions and defences, this onus could be changed in relation to exemptions by legislation. It is the AJF"s position that the journalist should not carry the evidentiary burden whether the journalists' protection is cast as either a defence or an exemption, Moreover, it does not negate the points above about the instigation of unnecessary and ultimately unsuccessful prosecutions.
- Section 122.5(4) of the Criminal Code establishes a defence that applies where relevant information is dealt with for the purposes of communicating it in accordance with the *Public Interest Disclosure Act 2013* (Cth) (**PID Act**).
- The interaction between section 122.5(4) of the Criminal Code and the provisions of the PID ACT is unclear. The AJF understands that a review of the PID Act is underway. The AJF welcomes this review. Suffice to say that neither section 122.5(4) nor the PID Act seems to provide effective protection for bona fide whistleblowers who have allegedly disclosed government information in good faith for the purposes of making public interest disclosures. In the AJF's opinion the ongoing prosecutions of Richard Boyle and David McBride demonstrate this.
- 122.5(5A) of the Criminal Code establishes a defence concerning disclosures for the purpose of providing or receiving legal advice in good faith. This defence should apply

[21] Referring to section 13.3 of the Criminal Code. Attorney General's Department *Consultation Paper Review of Secrecy Provisions page 9*

[22] ALRC Report 112 *Secrecy Laws and Open Government in Australia (2009) para 3.73 page 82, also para 7.2*

to all Commonwealth disclosure offences. There is no principled justification as to why this defence should be restricted to the general offences in the Criminal Code and not apply in other contexts.

Consultation question 5

Are there any defences that should generally be available for specific secrecy offences? Are there amendments or additions to defences for specific secrecy offences that should be considered?

- It has not been possible for the AJF to review each specific secrecy offence identified in the Consultation Paper within the time frame for this Review.
- As indicated elsewhere in this submission, the current complex regime of secrecy laws is in need of urgent and fundamental reform. This should eliminate the need for many of the current specific secrecy offences.
- The AJF believes that a public interest journalist protection amended in line with our response to Question 7 should apply to each specific secrecy offence, along with consistent protections for support staff, whistleblowers and those giving and receiving legal advice.

Consultation question 6

What principles should determine how the public interest journalism defence to the general secrecy offences in Part 5.6 of the Criminal Code is framed?

- As set out in our response to Question 1, it is AJF's position that the public's interest in being informed about matters of government should be central to framing both secrecy offences and the public interest journalism defence. The public interest journalism defence should generally apply to all Commonwealth secrecy offences, not just the general secrecy offences in Part 5.6 of the Criminal Code. The same policy principles which underpin section 122.5(6) are applicable across all secrecy offences. There is no logical reason why the defence should apply to one set of secrecy offences and not to all.

2.7 Principles

- The AJF submits that the following fundamental principles should determine how the public interest journalism defence is framed. The AJF considers that these principles are essential to underpin the interrelationship between Australia's national security laws and freedom of the media.
    - Freedom of the media is a cornerstone of national security, and the maintenance of our peaceful, prosperous and free society underpinned by the operation of efficient, effective and accountable government.
    - Our democratic system relies on protection of the public's right to know.

- The law must balance the protection of national security and other government information with the democratic principles which underpin Australian society. These principles include the public's right to know.

Freedom of the media is a cornerstone of national security and our peaceful, prosperous and free society

- The role of government is to maintain our peaceful, prosperous and free society. Protecting the health, safety and wellbeing of Australian citizens is paramount. This relies of good, efficient and effective government. A robust democratic system is essential to Australia's national security, and having a free media capable of keeping watch over the inner workings of government is an essential component of that democratic system. Without it, abuses of power, wrongdoing, and flawed policies relating to national security can flourish unchecked, exposing us all to risk.
- Public accountability should not be seen in opposition to national security, but rather as an underlying principle of our security, especially when it creates an environment of safety and integrity that supports effective government. As ARTK stated in their Submission,[23] "An informed Australia is a safer Australia." The AJF endorses this statement.
- Trust between citizen and government is a prerequisite for a safe, stable and peaceful society. Australians need to be confident that the government is acting in their best interests. Unless people feel appropriately informed about government policies and action they cannot trust government. If people believe that their government is hiding information from them, this creates the climate for distrust and agitation which undermines national security. It is well understood that some information in relation to national security must be kept secret – for instance, the information specified in section 122.5(7). However, the principle of open and accountable government requires that this is an exception rather than the default. Unnecessary suppression of government information undermines trust and thereby national security.
- Australia's system of representative democracy relies on open and accountable government. This underpins the concept of "the public's right to know". A free media supports the public interest by serving the public's right to know.The starting point should be that government information is broadly available to the community. Government, including ministers, departments and agencies, should not operate in secret unless there is a compelling reason to do so. Secrecy laws covering government information should only be enacted to protect an identified public interest, and such laws should be focussed and proportionate.

[23] Australia's Right to Know, Submission No 23 to Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the impact of the exercise of law enforcement and intelligence powers on freedom of the press* (20 October 2019) 3.

- The media disseminates information to the community about government policies and activities. The community should be able to freely discuss and criticise government. This is recognised in the implied freedom of political communication in the Australian Constitution[24] and in international treaties and covenants to which Australia is a member.
- Journalism protections should be framed to enable the media to carry out their role without fear of criminal liability. Even before a journalist is charged, the risk of raids and investigations by the authorities is intimidating, as is the risk that the identity of confidential sources may be uncovered in the course of these investigative processes. Government whistleblowers who have attempted to raise their concerns through authorised channels will often approach the media. The operation of the Public Interest Disclosure Act is the subject of a separate review, but for the purpose of this Review of Secrecy Provisions, it is relevant that a journalist may be exposed to the risk of criminal liability from the very earliest stages of being contacted by government whistleblowers. This is sufficient to deter even embarking on further investigation and means that matters of corruption, wrongdoing, flawed policy implementation and other harms are less likely to come to light. This is not in the public interest. Journalists cannot properly fulfil their function as an essential part of a democratic society if their capacity to investigate the inner workings of government and to protect their sources is unnecessarily limited by the threat of legal action. The public interest journalist protection in relation to secrecy laws should be framed to avoid this outcome.

2.8 **The law must balance the protection of national security and other potentially sensitive government information with the democratic principles which underpin Australian society. These principles include the public's right to know.**

- The AJF endorses the updating of secrecy laws to give our security agencies the capacity to deal with evolving threats. That is clearly necessary. We believe, however, that if secrecy laws either explicitly or implicitly undermine one of our key democratic pillars, then good government is undermined and the public interest is not served. A better balance needs to be found. The public interest journalism defence can play an important role in enabling an appropriate balance to be struck between enabling security agencies to deal with important threats and protecting Australia's democratic society.
- When the legal framework creates a risk that journalists will be jailed for doing their job, there is a chilling effect on reporting. It is not far-fetched to

[24] The High Court has acknowledged the implied freedom of political communication in *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 211; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Coleman v Power* (2004) 220 CLR 1.

conclude that the impact of the execution by the Australian Federal Police of warrants on ABC and News Ltd journalists and the approach the Government has taken to the fate of the journalists that are the subject of those search warrants, is intimidatory.[25] This is one of the reasons AJF submits that journalists engaged in legitimate journalism should be exempt from prosecution, as outlined above, rather than having to rely on a defence.

- The Consultation Paper refers to Australia's national interest in protecting disclosure of secret government information and states that: "*This interest needs to be considered alongside appropriate oversight and accountability mechanisms in the area of national security including for wrongdoing, corruption or maladministration. The department notes the role of oversight mechanisms such as the Inspector-General of Intelligence and Security and the National Anti-Corruption Commission".*[26]
- The operations of the Inspector-General of Intelligence and Security and of the National Anti-Corruption Commission are no substitute for appropriate scrutiny by the media. The processes of the Inspector-General of Intelligence and Security are kept secret. They are conducted away from public, so there is no public awareness and therefore little public confidence in the system. It is not yet known how the National Anti-Corruption Commission will conduct its hearings. The public's right to know should not be left to a discretion exercised by a Commissioner.
- The remits of both the Inspector-General of Intelligence and Security, and of the National Anti-Corruption Commission are relatively narrow. For instance, former intelligence analyst with the (then) Office of National Assessments and now member of parliament, Andrew Wilkie, spoke to the media about misrepresentation of evidence collected by Australian intelligence agencies in relation to Iraq's possession of weapons of mass destruction. This matter fell outside the narrow scope of the Inspector-General of Intelligence and Security's remit.

[25] Submission to Parliamentary Joint Committee on Intelligence and Security Inquiry into the Impact of the Exercise of Law Enforcement and Intelligence Powers on Freedom of the Press, Submission 23, (31 July 2019), p 2.

[26] Attorney-General's Department, Australian Government, *Review of Secrecy Provisions* (Consultation Paper, March 2023) 17.

Consultation question 7

Having regard to those principles, is the current public interest journalism defence in Part 5.6 of the Criminal Code appropriately framed? If not, what amendments should be considered?

- The AJF welcomes the intention behind the creation of the current public interest journalism defence set out in section 122.5(6) of the Criminal Code. However, it is our view that this defence is not appropriately framed and should be amended.
- Section 122.5(6) provides that it is a defence to a prosecution for a secrecy offence in Division 122 of Part 5.6 of the Criminal Code 1995 if the person communicated, removed, held or otherwise dealt with the relevant information in the person's capacity as "a person engaged in the business of reporting the news, presenting current affairs or expressing editorial or other content in news media" if at the time the person "reasonably believed that engaging in that conduct was in the public interest". The defence also applies to a person who was at the time a member of the administrative staff of an entity that was engaged in the business and the person acted under the direction of a journalist, editor or lawyer who was also a member of the staff of the entity, and reasonably believed that engaging in that conduct was in the public interest.
- Section 122.5(7) provides that a person may not reasonably believe that engaging in conduct is in the public interest if it:
    - would lead to the identification of an ASIO employee, a staff member of ASIS or a person in a Witness Protection Scheme; or
    - was engaged in for the purpose of directly or indirectly assisting a foreign intelligence agency or foreign military organisation.
- AJF considers that amendments are required to section 122.5(6) to address concerns in relation the following:
    1. The fact that the provision is in the form of a defence not an exemption; and
    2. The requirement for "reasonable belief" in relation to the public interest.

7.1 Exemption not defence

- The AJF considers that the current defence set out in section 122.5(6) in relation prosecution for acts undertaken in the course of journalism should be framed as an exemption from the offence, rather than a defence to the offence.
- As noted above, the ALRC makes the point that an exemption limits the scope of conduct prohibited by an offence whereas a defence may be relied on to excuse conduct which is prohibited by an offence.[27]

[27] Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia* (Report No 112, December 2009) 82 [3.73] & 383 [10.123].

- The Attorney-General's Department states that there is no difference in the legal effect whether a protection for journalists is classed as a defence or an exemption.[28] They state that the same evidential burden needs to be discharged and there is no procedural difference.
- Even though there is no procedural difference if a protection for journalists is classed as a defence or an exemption, the way in which legislation is cast can have a significant effect both on those potentially covered by the provision, and on investigators/prosecutors.
- The uncertainty and risk regarding possible charges for journalists and associates creates a chilling effect on public interest journalism.[29]
- This uncertainty and risk are not allayed when journalists and publishers are faced with the prospect that they may be prosecuted and forced to defend each of the steps they needed to take to investigate and publish a public interest story. The potential risk includes risks to the protection of the identity of confidential sources which may arise in litigation. The risk assessment and psychological impact is different if these actions are carved out from the scope of the offence. It is clear that the work of the journalist is lawful, rather than a potentially criminal activity which may result in prosecution and would then need to be successfully defended to avoid a jail sentence.
- When considering whether to investigate or prosecute an offence, investigators and prosecutors need to determine whether a person's conduct falls within the scope of the offence. This requires them to consider whether any exemption applies as a crucial preliminary matter. Investigators and prosecutors will only proceed when they are confident that an exemption does not apply.
- The Commonwealth Guidelines for the Making of Decisions in the Prosecution Process require a prosecutor to "*have regard*" to any lines of defence which are "*plainly open or have been indicated by the alleged offender*" when considering whether a prosecution has a reasonable prospect of success[30].
- "Having regard" to potential defences requires a different level of consideration compared to determining with confidence that the elements

[28] Attorney-General's Department, Australian Government, *Review of Secrecy Provisions* (Consultation Paper, March 2023) 9.

[29] James Meehan, 'Protecting public interest journalism in Australia: A defence to information secrecy offences' (2020) 23 *Media & Arts Law Review* 347, 348 & 359; Rebecca Ananian-Walsh, Sarah Kendall & Richard Murray, 'Risk and Uncertainty in Public Interest Journalism: The Impact of Espionage Law on Press Freedom' (2021) 44(3) *Melbourne University Law Review*764, 786-791.

[30] . Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth: Guidelines for the Making of Decisions in the Prosecution Process* (July 2021), accessible at https://www.cdpp.gov.au/sites/default/files/Prosecution%20Policy%20of%20the%20Commonwealth%20as%20updated%2019%20July%202021.pdf

of an offence are made out. When the onus of proof on establishing a defence is on the defendant, it would be natural for a prosecutor to focus most on the elements of a prosecution which they have the onus to prove, and leaving the elements of potential defences as a matter for the defendant to establish during the course of the trial.

- In addition, the Guidelines merely provide guidance. They are not binding and may be amended at any time by an administrative update.
- Requiring a prosecutor to consider whether a matter falls within or outside the scope of an offence as an issue of prime importance at the very beginning of the prosecution process would mean that some prosecutions might not proceed thus avoiding unnecessary costs, time and stress to the individuals involved and unnecessary and costly use of state resources.

7.2 Section 474.47 of the Criminal Code

- The AJF recommends the approach adopted in section 474.47 of the Criminal Code relating to using a carriage service to incite property damage or theft on agricultural land. This section provides that the offence "*does not apply to material if the material relates to a news report or current affairs report that is in the public interest and made by a person working in a professional capacity as a journalist.*"
- This carves out public interest reports by journalists from the scope of the offence. This dilutes the chilling effect. Journalists' work is not criminalised.
- Journalists who subscribe to a recognised code of journalistic ethics and who work for or are employed by an organisation that will hold them to account for breaches of that code should be covered by the protection.
- However, AJF does not recommend that the protection should apply only to "professional journalists". The media industry and its business models have been disrupted by technology with the result that fewer journalists are employed as professional journalists by media organisations. More journalists are freelancers who earn revenue from other pursuits in addition to journalism. This may pose obstacles for bona fide journalists to prove that they are "professional journalists".

Consultation question 8

Should the public interest journalism defence to the general secrecy offences in Part 5.6 of the Criminal Code identify factors that may be considered for the purposes of determining whether the communication or other dealing with the information may be in the public interest?

- It is the AJF's view that it would not be constructive to identify such factors. As outlined by Erwin G Krasnow and Jack N. Goodman in their paper titled "The 'Public Interest'

Standard: The Search for the Holy Grail,"[31] "the genius of the public interest standard is its breadth and flexibility".[32] Introducing a list of factors that may be considered for the purpose of determining whether dealing with information in a particular way is in the public interest carries the risk of constraining this breadth and flexibility.

- Media defendants in defamation proceedings who have attempted to rely on public interest and qualified privilege defences have historically confronted difficulties due to the narrow interpretation of the concept of "public interest". In defamation cases, the exercise has become one of assessing the methodology and processes involved in the production of the story measured against a standard of professional perfection. This has effectively rendered public interest defamation defences of narrow practical application. In the context of Australia's secrecy laws, if a court considers that a journalist has not measured up to the standards imposed by the public interest defence, the stakes are high because the penalty is imprisonment. For this reason the AJF would be cautious to recommend that a list of factors for consideration should be identified as this might simply narrow the scope of the defence.
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- The AJF notes that during the passage of legislation to introduce the current Division 122 of the Criminal Code, the Attorney-General's Department considered a recommendation by the Law Council of Australia that the Bill:

  non-exhaustively identify some factors that may be considered for the purposes of determining whether the dealing with or holding of information may be in the public interest for the purpose of the proposed journalist defence. Such factors may include for example:

  - *promoting open discussion of public affairs, enhancing government accountability or contributing to positive and informed debate on issues of public importance;*
  - *informing the public about the policies and practices of agencies in dealing with members of the public;*
  - *ensuring effective oversight of the expenditure of public funds;*
  - *the information is personal information of the person to whom it is to be disclosed; and*
  - *revealing or substantiating that an agency (or a member of an agency) has engaged in misconduct or negligent, improper or unlawful conduct.*[33]

[31] Erwin G Krasnow and Jack N. Goodman, "The 'Public Interest' Standard: The Search for the Holy Grail," *Federal Communications Law Journal*: Vol. 50 : Iss. 3 , Article 5 (1998), p 605, https://www.repository.law.indiana.edu/fclj/vol50/iss3/5.

[32] Ibid, p 630.

[33] Parliament of Australia, Advisory Report on the National Security Legislation Amendment (Espionage and Foreign Interference Bill 2007', at 5.38,

- Responding to this suggestion, the Attorney-General's Department advised that the list of exclusions listed in subsection 122.5(7) was sufficient. This allows the defendant to adduce or point to evidence to meet the requirements in relation to public interest in the current version of the public interest journalism defence.[34]
- One danger of identifying a list of factors to be taken into account is that the court is drawn to consider the list. If the circumstances of the case in question cannot be shoehorned into one of the factors on the list, the defence fails. A broad and flexible approach to assessing the public interest is to be preferred. If a list of factors is to be considered it must be framed in broad terms and focus on the nature of the conduct disclosed rather than the methodology and processes of the journalism.

Consultation question 9

Should a public interest journalism defence modelled on subsection 122.5(6) of the Criminal Code be considered for the specific secrecy offences, and for which offences would it be an appropriate defence?

- Yes. A journalist protection, modified as outlined in this submission, should apply to both general secrecy offences and specific secrecy offences in all other Commonwealth legislation? The policy reasons for a protection for public interest journalism apply with the same force as a matter of principle no matter which statute creates the offence.

Consultation question 10

Should the requirement for the Attorney General's consent to prosecute a journalist for certain offences, which is currently imposed by a ministerial direction, be maintained? If so, should this requirement be legislated?

- The requirement for the Attorney General's consent to prosecute a journalist arguably makes prosecution of journalists a political matter. The AJF considers that the better approach is to enshrine exemptions from prosecution in legislation rather than relying on an individual's discretion. As with any statutory discretion given to a politician, the exercise of the discretion would potentially expose the Attorney General to allegations of political bias. There may be circumstances where the Attorney General, their staff, their political colleagues, friends or associates are being investigated, giving rise to actual or perceived conflict of interest issues.
- The ministerial direction (Direction) provides for an unfettered discretion which is not subject to judicial review. There are no requirements on the Attorney General to

https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/EspionageFInterference/Report/section?id=committees%2Freportjnt%2F024152%2F25710#footnote38target.

[34] Parliament of Australia, Advisory Report on the National Security Legislation Amendment (Espionage and Foreign Interference Bill 2007', at 5.39, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/EspionageFInterference/Report/section?id=committees%2Freportjnt%2F024152%2F25710#footnote38target.

consider specific material or issues, including the public interest in the particular matter being reported on, nor the overall public interest in transparency of government.

- In 2019 Arthur Moses SC, then President of the Law Council, raised concerns that the Direction requiring consent from the Attorney General to prosecute a journalist, undermines the independence of the Commonwealth Director of Public Prosecutions (CDPP). He argued that such a requirement is not only inconsistent with the long-held principle of the independence of the CPDD but places both the politician and the media in a very difficult position:

  "I have no doubt that the Attorney General would act in good faith. But it puts the Attorney General in the position of authorising prosecutions of journalists in situations where they may have written stories critical of the government.

  This creates an apprehension on the part of journalists that they will need to curry favour with government in order to avoid prosecution. The media must be able to lawfully report on matters of public interest without fear or favour".[35]

- The AJF considers that these arguments are compelling. The terms of the Direction do not safeguard media freedom, but merely politicise it.

[35] Press Freedom should not be by consent of Attorney-General, 30 September 2019, Law Council of Australia, https://www.lawcouncil.asn.au Accessed on 1 May 2023