Law Council
OF AUSTRALIA

Review of Secrecy Provisions

Attorney-General's Department

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About the Law Council of Australia

The Law Council of Australia represents the legal profession at the national level, speaks on behalf of its Constituent Bodies on federal, national and international issues, and promotes the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933, and represents its Constituent Bodies: 16 Australian State and Territory law societies and bar associations, and Law Firms Australia. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Law Society of the Australian Capital Territory
- New South Wales Bar Association
- Law Society of New South Wales
- Northern Territory Bar Association
- Law Society Northern Territory
- Bar Association of Queensland
- Queensland Law Society
- South Australian Bar Association
- Law Society of South Australia
- Tasmanian Bar
- Law Society of Tasmania
- The Victorian Bar Incorporated
- Law Institute of Victoria
- Western Australian Bar Association
- Law Society of Western Australia
- Law Firms Australia

Through this representation, the Law Council acts on behalf of more than 90,000 Australian lawyers.

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The Chief Executive Officer of the Law Council is Dr James Popple. The Secretariat serves the Law Council nationally and is based in Canberra.

The Law Council's website is www.lawcouncil.asn.au.

Acknowledgement

The Law Council is appreciative of the contribution of the following bodies to this submission:

- The Law Council's National Criminal Law Committee, National Security Law Working Group and National Human Rights Committee;
- Federal Dispute Resolution Section's Military Justice Committee.

Executive Summary

1. The Law Council is grateful for the opportunity to respond to the Review of Secrecy Provisions (the **Review**) conducted by the Attorney-General's Department.

2. As a general comment, the Law Council maintains its support for the development and amendment of Commonwealth secrecy provisions in a manner consistent with the Australian Law Reform Commission's (**ALRC**) report: Secrecy Laws and Open Government in Australia (**Secrecy Report**).[1] The Law Council considers that full adoption of the measures recommended by the Secrecy Report will ensure that secrecy provisions can be justified within a system of open and accountable government and in a manner consistent with the right to freedom of expression.

3. There must be an appropriate balance between the desirability of open government and the legitimate public interest in protecting some information from disclosure, for reasons including national security, defence, international relations, and privacy considerations.

4. On the one hand, it is critical that Australia's law enforcement and security agencies have access to powers which may, in certain instances, have the effect of curtailing press freedoms in order to allow for the proper investigation of serious offending and the obtaining of intelligence regarding legitimate threats to essential public interests.

5. The Law Council recognises the ramifications of unauthorised disclosure of information subject to secrecy provisions in a radically changing security environment. This includes an environment where, according to security agencies, the 'principal threat' to Australia may be from espionage and foreign interference and the need to prevent the 'damage it inflicts on Australia's security, democracy, sovereignty, economy and social fabric.'[2] In this regard, the Director-General of Security Mike Burgess recently observed:

> *Foreign intelligence services from multiple countries are aggressively seeking secrets about our defence capabilities, government decision-making, political parties, foreign policy, critical infrastructure, space technologies, academic and think tank research, medical advances, key export industries and personal information, especially bulk data.*[3]

6. On the other hand, Australia's democratic values, the rule of law, and human rights considerations require that official secrecy provisions must be tempered by the public's right to accountable government. Therefore, any secrecy should be proportionately confined to information the disclosure of which would undermine national security or endanger citizens.

7. In the time available, the Law Council has selectively addressed several of the questions contained in the Consultation Paper. The Law Council looks forward to continuing to engage with the Attorney-General's Department on this important review in response to further detailed proposals for amendment and reform to Commonwealth Secrecy Provisions.

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[1] Australian Law Reform Commission, Secrecy Laws and Open Government in Australia (Report 112, 11 March 2010). ('***ALRC's Secrecy Report***')
[2] Commonwealth of Australia, Australian Security Intelligence Organisation, Mike Burgess: Annual Threat Assessment (Speech, 21 February 2023).
[3] Ibid.

8. For the reasons set out in this submission, the Law Council makes the following recommendations:

- the general secrecy offences in Division 122 of the *Criminal Code Act 1995* (Cth) (**Criminal Code**) should be amended in a manner consistent with the ALRC's Secrecy report. In particular, there should be the inclusion of an 'express harm' requirement;
- the phrase 'interfering with' should be removed from paragraph 121.1(1)(a) and (b) of the Criminal Code;
- in the absence of an express harm requirement, the offences should cascade in penalty and require that a person knew, or as a lesser offence, was reckless to whether, the protected information fell within a particular category (i.e. security classification or concerns Australia's national security). They should not provide that strict liability applies to that circumstance;
- subparagraph 121.1(b)(ii) of the Criminal Code, which refers to interference or prejudice to the *Proceeds of Crime Act 2002* (Cth), should be deleted;
- consideration be given to legislative amendments to more meaningfully restrict the operation of key definitional concepts such as 'international relations;'
- in consultation with stakeholders, the Australian Government should develop and provide guidance material for journalists, media organisations and public agencies on the practicalities of complying with the provisions in Division 122 of the Criminal Code and other Commonwealth secrecy provisions;
- section 122.5 of the Criminal Code should be amended to include
  - an exception for where the conduct (i.e., communication/dealing withholding/removing) is engaged in for the purpose of obtaining legal advice in relation to the matter which is the subject of the offence; and
  - an exception that offence provisions do not apply if the disclosure was for the purposes of legal proceedings arising out of, or otherwise related to, Division 122 or of any report of such proceedings;
- subsection 122.5(6) of the Criminal Code should be amended to identify factors that may be considered for the purposes of determining whether the dealing with or holding of information may be in the public interest;
- consideration should be given to amending subsections 122.4A(1) and (2) of the Criminal Code to place the onus on the prosecution to establish that the disclosure is not in the public interest, in relation to defendants relying on the defence contained in subparagraph 122.5(6);
- the Attorney-General should consider revoking the direction that ministerial consent be obtained prior to commencing prosecution against journalists for certain offences issued on 19 September 2019 under subsection 8(1) of the *Director of Public Prosecutions Act 1983* (Cth),[4] with a view to respecting and supporting the operational independence of the Australian Federal Police and the Commonwealth Director of Public Prosecutions.

9. Further recommendations of the Law Council, outside the scope of this review, are that:

- the Australian Government should work in consultation with civil society towards developing and implementing a mechanism for the protection and enforcement of human rights in accordance with international human rights

[4] Subsection 8(1) of the *Director of Public Prosecutions Act 1983* (Cth).

obligations and jurisprudence through a comprehensive federal charter of rights;[5] and

- in relation to the whistleblower protection regime and protections for public sector employees, the Australian Government should continue to work towards a comprehensive whistleblower regime and establish a 'Whistleblower Protection Authority.'

Background and scope

10. Attachment B of the Consultation Paper contains a comprehensive list of the general and specific secrecy offences and non-disclosure duties contained in Commonwealth law. That list indicates that, as of January 2023, the landscape of Commonwealth secrecy provisions comprises:[6]

    - 11 general secrecy offences in the *Criminal Code Act 1995* (Cth) (**Criminal Code**);
    - 542 specific secrecy offences in 178 Commonwealth laws;
    - 296 non-disclosure duties in 107 Commonwealth laws that attract criminal liability through the operation of section 122.4 of the Criminal Code; and
    - 21 override provisions in 18 Commonwealth laws that operate to exclude secrecy provisions in other Commonwealth laws.

    For convenience, in this submission, these provisions are collectively referred to as '**Commonwealth Secrecy Provisions**'.

11. The Consultation Paper correctly notes that the Commonwealth Secrecy Provisions interact with a range of other statutory regimes that govern disclosure and protection of government information. However, the Consultation Paper does not provide sufficient discussion of potential areas of interaction to enable informed comment on this aspect of the inquiry.

12. The Law Council has been particularly constrained in its assessment of one area of interaction, namely the interaction between Commonwealth Secrecy Provisions and the *Public Interest Disclosure Act 2013* (Cth) (**PID Act**). The Public Interest Disclosure Amendment (Review) Bill 2022, which is currently before the Senate, makes modest amendments which seek to implement, in part, recommendations made by Mr Philip Moss AM in 2016[7] and subsequent parliamentary reviews.[8] The Law Council has previously considered this Bill and recommended improvements.[9]

13. The Law Council understands a second consultation process, to take place later this year, will consider more substantial amendments to the PID Act.

14. In the absence of a more detailed indication of the Government's intended approach to reforming the PID Act, the Law Council reiterates its general commitment to measures that would promote open government, simplify legislation governing public-interest disclosures, and enhance whistleblower protections. The Law Council

[5] Law Council of Australia, Policy Position: Federal Human Rights Charter (November 2020).
[6] Commonwealth of Australia, Attorney-General's Department, Review of Secrecy Provisions – Consultation Paper (March 2023). ('***Consultation Paper'***), 7.
[7] P Moss AM, Review of the Public Interest Disclosure Act 2013, 15 July 2016, Canberra, Commonwealth of Australia.
[8] Parliamentary Joint Committee on Corporations and Financial Services, Whistleblower Protections, (September 2017); 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).
[9] Law Council of Australia, Submission to Senate Standing Committee on Legal and Constitutional Affairs, *Public Interest Disclosure Amendment (Review) Bill 2022* (Cth) (14 February 2022).

accordingly supports consideration of the following measures, to complement the examination of Commonwealth Secrecy Provisions, including:[10]

- the consolidation of federal whistleblower laws into a single act that governs public-interest disclosures in both the public and private sector; and
- the establishment of a 'Whistleblower Protection Authority' empowered to oversee the operation and implementation of a comprehensive whistleblowing regime.

The framing of secrecy provisions in Commonwealth law

General principles – framing of general and specific secrecy offences

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?

15. The Law Council reiterates its view that complete adoption of the recommendations contained in the ALRC's Secrecy Report will ensure Commonwealth Secrecy Provisions can be justified within a system of open and accountable government and in a manner consistent with the right to freedom of expression.[11]

16. This section of the submission considers some of the issues that arise in considering the principles governing the framing of Commonwealth Secrecy Offences which include:

- the ALRC's Secrecy Report and the Independent Security Legislation Monitor's (**INSLM's**) ASIO Act Report;[12]
- the public interest in open and accountable government;
- implied freedom of political communication; and
- compliance with international law.

17. This section of the submission also notes that the complex tensions arising from consideration of human rights and public interest considerations can be more coherently navigated through a charter or bill of rights at the federal level.

ALRC's Secrecy Report and INSLM's ASIO Act Report

18. Commonwealth Secrecy Provisions have over time been amended in a piecemeal manner that, on balance, fail to address the principles articulated in the ALRC's

[10] See, for example, Law Council of Australia, Submission to Select Committee on a National Integrity Commission (5 April 2017); Law Council of Australia, Joint Submission to The Treasury – Review of Tax and Corporate Whistleblower Protections in Australia and Parliamentary Joint Committee on Corporations and Financial Services – Whistleblower Protections in the corporate, public and not-for-profit sectors (9 February 2017).

[11] Under Article 19(1) of the *International Covenant on Civil and Political Rights* everyone shall have the right to hold opinions without interference: *International Covenant on Civil and Political Rights*, opened for signature 19 December 1996, 999 UNTS 171 (entered into force 23 March 1976) art 19(1). Furthermore, the constitutionally implied right to freedom of political communication is not amenable to alteration by legislation and, therefore, its ambit must be considered carefully: *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *McCloy v New South Wales* (2015) 257 CLR 178.

[12] The Hon Roger Gyles AO KC, Independent National Security Legislation Monitor, Report on the impact on journalists of section 35P of the ASIO Act (October 2015). ('***INSLM's ASIO Report'***)

Secrecy Report or the INSLM's ASIO Act Report. These areas of partial implementation are analysed in the following section of this submission.

19. The Law Council, in line with the ALRC's Secrecy Report, considers that there is a continuing role for properly framed secrecy offences—both general and specific—in protecting Commonwealth information. The offences must though be framed in a clear and consistent manner, and directed at protecting a narrowly defined list of essential public interests. However, Commonwealth Secrecy Provisions should be considered a last-resort option because administrative and disciplinary frameworks are generally the more proportionate mechanism to ensuring that government information is handled appropriately.[13]

20. The Law Council endorses the terms of reference of this current review conducted by the Attorney-General's Department which directs that regard be had to the principles outlined in the ALRC's Secrecy Report.[14] The Law Council generally supports any amendment to align Commonwealth Secrecy Provisions to better accord with the detailed framework for best practice contained in Recommendation 5–11 of the ALRC's Secrecy Report. In the Secrecy Report, the ALRC generally:

- recommended that a general secrecy offence be established for behaviour that harms, is reasonably likely to harm or intended to harm, essential public interests;
- accepted that harm was implicit in any disclosure of information obtained or generated by intelligence agencies;
- accepted that specific secrecy offences could be justified in this context (the ALRC recommended that many secrecy offences be abolished, in addition to a new general secrecy offence);
- recognised in this context a distinction between secrecy offences directed specifically at insiders (who have special duties to maintain secrecy) and those capable of applying to all persons; and
- recommended that secrecy offences capable of applying to persons other than insiders have an express harm requirement.

21. These principles were affirmed by the then INSLM in his analysis of section 35P of the *Australian Security Intelligence Organisation Act 1979* (Cth) (**ASIO Act**) in the ASIO Act Report.[15]

22. The Law Council considers that, in framing a general secrecy offence, it is critical that the list of protected essential public interests be confined to the list endorsed by the ALRC. The ALRC's Secrecy Report noted that the general secrecy offence should require that the disclosure of Commonwealth information did, or was reasonably likely to, or intended to:[16]

- damage the security, defence or international relations of the Commonwealth;
- prejudice the prevention, detection, investigation, prosecution or punishment of criminal offences;
- endanger the life or physical safety of any person; or

[13] ALRC's Secrecy Report, 23.
[14] Commonwealth of Australia, Department of the Attorney-General, Terms of Reference – Review of Secrecy Provisions (November 2022).
[15] In his report, the then INSLM made recommendations regarding the specific secrecy offence relating to special intelligence operations which were subsequently adopted through amendments to the provision: INSLM's ASIO Report
[16] ALRC's Secrecy Report, Recommendation 5–1 23.

- prejudice the protection of public safety.

23. The overarching tension governing the framing of general and specific secrecy offences is to strike the appropriate balance between the public interest in open and accountable government and the public interest in maintaining the confidentiality of some government information in the context of the four essential matters listed above.[17]

24. Recent constitutional and administrative developments have led to a revaluation of the historical balancing of these competing public interests. In this regard, the ALRC observes:

> *The exposure of state secrets may be seen as falling outside the scope of traditional freedom of speech. However, while the conventions of the Westminster system were once seen to demand official secrecy, secrecy laws may need to be reconsidered in light of principles of open government and accountability—and modern conceptions of the right to freedom of speech.*[18]

The public interest in open and accountable government

25. In the context of its Inquiry into Press Freedom, the Senate Environment and Communications References Committee recently recommended:

> *…the Attorney-General's Department, in its review of the secrecy provisions in Commonwealth law, should aim to build on the work of the Australian Law Reform Commission, by examining how the public interest in a free press and open and accountable government can be better balanced with protection for classified and sensitive government information.*[19]

26. The principle of open government entails accountability of government, public officials and agencies for the 'manner of their stewardship' of public power.[20] In that respect, '(g)overnment is constitutionally obliged to act in the public interest. To the extent that it is given power to do so, it must be allowed to do so. Such is its trust. Accountability provides the test and measure of its trusteeship.'[21]

27. In this section, three aspects of the public interest in open and accountable government are discussed that highlight the need to revisit the traditional boundaries of Commonwealth Secrecy Provisions:

- the development of the Freedom of Information (**FOI**) regime which has challenged the boundaries of government secrecy;
- the increasing importance of transparency in supporting data use and availability; and
- the role of open and accountable government in deterring corruption.

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[17] ALRC's Secrecy Report, 62 [2.80].
[18] Australian Law Reform Commission, Traditional Rights and Freedoms—Encroachments by Commonwealth Laws (Report 129, 2 March 2016) 98 [4.107].
[19] Senate Environment and Communications References Committee, Inquiry into Press Freedom (19 May 2021) Recommendation 1. ('**Senate Press Freedom 2021 Report**')
[20] ALRC's Secrecy Report 44 [2.13], citing Report of the Royal Commission into Commercial Activities of Government and Other Matters.
[21] Ibid.

FOI regime

28. The development of the principle of open and accountable government was accelerated in Australia by the enactment of the *Freedom of Information Act 1982* (Cth) (**FOI Act**) which brought about a fundamental change in the law relating to access to government-held information and challenged the boundaries of government secrecy.

29. The ALRC in its report, *Open Government: a review of the federal Freedom of Information Act 1982*,[22] noted the objectives of the FOI Act in both improving the quality of agency decision making and, thereby, enabling citizens to be informed of the functioning of the decision-making process as it affects them and enhancing the 'quality of political democracy.' The ALRC noted that increasing access to information enhanced representative democracy because: '*representative democracy depends on the people being able to scrutinise, discuss and contribute to government decision making. To do this, they need information'*.[23] Subsequent parliamentary reviews have reinforced the importance of these objectives for the FOI regime.[24]

30. More recently, civil society groups have criticised the FOI regime with particular reference to inadequate resourcing, increases in the backlog of FOI requests and delays, the approach of government agencies in prolonging legal disputes in relation to FOI requests, and the public service culture integral to the operation of the FOI regime.[25] Distinguished legal practitioners with expertise in these areas have raised similar concerns.[26] The Law Council has supported recent changes that partly redress these constraints[27] and will be contributing to the current Senate Standing Committee on Legal and Constitutional Affairs inquiry into the operation of Commonwealth FOI laws, which will examine delays in the review of FOI appeals and resourcing for responding to FOI applications and reviews.

Digitisation, data use and availability

31. Many Commonwealth Secrecy Provisions were developed prior to the sweeping effects of digitisation. This means that provisions often fail to take into account the benefits of increasing data use and availability and may stymy the scheme established under the *Data Availability and Transparency Act 2022* (Cth) (**DAT Act**), which is directed to promoting better availability and use of public sector data. The Productivity Commission has emphasised that improved data access and use can enable new products and services that transform everyday life, drive efficiency and safety, create productivity gains and allow better decision making by increasing the

[22] Australian Law Reform Commission and Administrative Review Council, Open Government: A Review of the Federal Freedom of Information Act 1982, ALRC 77 (1995). ('**ALRC's Open Government Report**')
[23] ALRC's Open Government Report, [2.3].
[24] Senate Legal and Constitutional Affairs Legislation Committee, Freedom of Information Legislation Amendment (Improving Access and Transparency) Bill 2018 (November 2018).
[25] See generally, Bill Browne, Discussion Paper: Nothing to see here – Australia's broken freedom of information system (March 2023); The Centre for Public Integrity, Briefing Paper: The Australia Institute; Delay and Decay: Australia's Freedom of Information Crisis (August 2022).
[26] Bret Walker SC described 'the need to require our elected representatives and especially their executive delegates in the Ministry and Cabinet, to allow us sufficient information to check them, test them, and remind them of their representative capacity.' Bret Walker SC, 'The Information That Democracy Needs' (Speech, Western Sydney University Whitlam Oration, June 2018).
[27] Law Council of Australia, Media Release: Appointment of Freedom of Information Commissioner (23 March 2022).

evidence-bank for policy evaluation.[28] In this regard, the Productivity Commission found:[29]

> *A wide range of more than 500 secrecy provisions in Commonwealth legislation plus other policies and guidelines impose considerable limitations on the availability and use of identifiable data. While some may remain valid, they are rarely reviewed or modified. Many would no longer be fit for purpose. Incremental change to data management frameworks is unlikely to be effective or timely, given the proliferation of these restrictions.*

32. In this context, the Productivity Commission noted that Commonwealth Secrecy Provisions may have limited effectiveness as a specific deterrence, noting 'creating new offences cannot prevent human error; nor are they likely to dissuade criminal intent.'[30] Additionally, these provisions may have a chilling effect on testing of the robustness of de-identification approaches and security measures. Insofar as these secrecy provisions 'inflame the risk aversion of data custodians, they would represent a setback in Australia's data sharing and release efforts.'[31]

33. The DAT Act authorises collection and use of data provided it is in line with the Privacy Act and overrides some secrecy offences that would otherwise prevent sharing of data under the DATA scheme.[32] The secrecy override provision in the DAT Act is subject to some exceptions in circumstances where secrecy provisions protect highly sensitive data collected by the Commonwealth.[33] The Law Council supports further consideration of narrowing these exceptions, in line with the framework described in the ALRC's Secrecy Report. This is discussed further in the following section.

34. The Law Council supports the removal of unnecessary barriers to government data sharing and the development of a single, unified approach to data sharing to improve the fragmented and often unclear approach that currently exists.[34] However, the Law Council also affirms the need for considered, robust and properly resourced oversight mechanisms and safeguards with regard to data sharing in order to uphold the rule of law, protect privacy and human rights. These would also ensure that data is shared responsibly with due regard to Australia's defence and security interests. The Law Council has previously extensively considered these issues in the context of Australia's data availability and transparency framework.[35]

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[28] Productivity Commission, Productivity Commission Inquiry Report – Overview and Recommendations, Data Availability and Use, No. 82 (March 2017).
[29] Ibid, 33 Finding 3.2.
[30] Productivity Commission, Productivity Commission Inquiry Report – Overview and Recommendations, Data Availability and Use, No. 82 (March 2017), 11.
[31] Ibid.
[32] As noted by the Discussion Paper – some Commonwealth entities are excluded from the scheme for national security and other reasons and are referred to as excluded entities under section 11(3) of the DAT Act. This includes NIC agencies.
[33] DAT Act, section 23.
[34] Law Council of Australia, Submission to Senate Finance and Public Administration Legislation Committee, Data Availability and Transparency Bill 2020 and Data Availability and Transparency (Consequential Amendments) Bill 2020 (17 March 2021) 7 [13].
[35] Ibid.

Deterring corruption

35. Open and accountable government also enhances the checks and balances that disincentivise corruption and misconduct in public office.[36] In this regard, the House of Lords in *R v Shayler* observed:

> *…The business of government is not an activity about which only those professionally engaged are entitled to receive information and express opinions. It is, or should be, a participatory process. But there can be no assurance that government is carried out for the people unless the facts are made known, the issues publicly ventilated. Sometimes, inevitably, those involved in the conduct of government, as in any other walk of life, are guilty of error, incompetence, misbehaviour, dereliction of duty, even dishonesty and malpractice. Those concerned may very strongly wish that the facts relating to such matters are not made public. Publicity may reflect discredit on them or their predecessors. It may embarrass the authorities. It may impede the process of administration. Experience however shows, in this country and elsewhere, that publicity is a powerful disinfectant.*[37]

Constitutional limits – implied freedom of political communication

36. The above remarks on open and accountable government overlap with the rationale underpinning the implied freedom of political communication,[38] which operates as a 'qualified limitation on legislative power implied in order to ensure that the people of the Commonwealth may exercise a free and informed choice as electors.'[39]

37. By restricting Commonwealth officers and others from communicating government information, Commonwealth Secrecy Provisions necessarily burdens freedom of expression and, potentially, the ability of Commonwealth officers, journalists and citizens to take part in political discussion. However, it is important to note that the constitutional principle of the implied freedom of political communication has a confined ambit and is 'limited to what is necessary for the effective operation of that system of representative and responsible government provided for by the Constitution.'[40] This principle operates as a 'limitation or confinement of laws' that gives rise to an 'immunity' on the part of the citizen from being 'adversely affected' by such laws rather than a right.[41]

38. An 'ongoing majority'[42] of the Australian High Court has adopted a 'structured proportionality' test to guide consideration of whether a law exceeds the implied freedom of political communication:[43]

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[36] ALRC's Secrecy Report, 46 [2.19].
[37] *R v Shayler* [2002] UKHL 11 cited in ALRC's Secrecy Report, 46 [2.19].
[38] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *McCloy v New South Wales* (2015) 257 CLR 178.
[39] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 560; *McCloy v New South Wales* (2015) 257 CLR 178, 193-195 [2].
[40] *Lange v Australian Broadcasting Corporation* (1997) 145 ALR 96, 112.
[41] *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104,168 (Deane J).
[42] *Burton v Director of Public Prosecutions* [2022] NSWCA 242, [15] (Kirk JA, Bell CJ and Leeming JA agreeing).
[43] *McCloy v New South Wales* (2015) 257 CLR 178, 193-195 [2] and, recently, *Farm Transparency International Ltd v New South Wales* [2022] HCA 23, [29] (Kiefel CJ and Keane J), [250] (Edelman J), [269] (Steward J), [271] (Gleeson J).

- Does the law effectively burden the freedom in its terms, operation or effect?
- If there is a burden, is the purpose of the law and the means adopted to achieve that purpose legitimate, in the sense that they are compatible with the maintenance of the constitutionally prescribed system of representative government?
- If there is a legitimate purpose, is the law reasonably appropriate and adapted to advance that legitimate object? This question involves proportionality testing to determine whether the restriction is:
  - **suitable** — as having a rational connection to the purpose of the provision
  - **necessary** — in the sense that there is no obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom; and
  - **adequate in its balance** — a criterion requiring a value judgment, consistent with the limits of the judicial function. This describes the balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom.

39. In the context of laws addressing national security and public order, there may be legitimate countervailing interests which require the imposition of reasonable and proportionate limitations upon the implied freedom of political communication. It can be challenging to make an independent and rigorous proportionality assessment of a secrecy measure where key aspects of the justification by intelligence and security agencies (even where these materials include a Statement of Compatibility with Human Rights) may be unable to be disclosed in public.

40. More generally, the Law Council has previously submitted that there are often deficiencies in the Explanatory Memorandum accompanying legislation, which in many instances are simply a verbatim repetition of the provision, and therefore, provide little assistance when interpreting and scrutinizing the legislation.[44]

41. Even without detailed evidence regarding proportionality, it is likely that 'catch-all' secrecy offences, that fail to distinguish between categories of information, categories of persons and fails to specify a harm requirement, will not meet the standard of justification set out above. In this regard, the ALRC noted:

> *…there is also an argument to be made that a law that imposes criminal liability on all Commonwealth officers for unauthorised disclosure of any official information—and does not differentiate between the types of information protected or the consequences of disclosure—does not sit comfortably with the implied constitutional freedom of communication about government and political matters, or with Australia's international human rights obligations.*[45]

Compliance with international law

42. As a general principle, the rule of law requires that states must comply with their international legal obligations whether created by treaty or arising under customary international law.[46] Furthermore, the Law Council endorses an approach, consistent

[44] Law Council of Australia, Review of the Legislation Act 2003 (Cth) (10 December 2021).
[45] ALRC's Secrecy Report, 137 [4.151].
[46] Law Council of Australia, Policy Statement: Rule of Law Principles (March 2011); Law Council of Australia, 'Human Rights and the Legal Profession' (Policy Statement, May 2017).

with international law and practice, to the domestic implementation of international human rights in Australia which recognises three types or levels of obligations on states to respect, to protect and to fulfil human rights.[47]

43. The right to freedom of opinion and expression is enshrined in article 19 of the *International Covenant on Civil and Political Rights*[48] (**ICCPR**) and includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of a person's choice. Paragraph 3 of Article 19 permits lawful restriction of this freedom insofar as it is necessary for, relevantly, the protection of national security or of public order, or of public health or morals.

44. The United Nations Human Rights Committee (**UNHRC**) *General Comment 34* states that any restrictions must be 'necessary' for a legitimate purpose and must not be 'overbroad'. As to the latter, restrictive measures must:[49]

- conform to the principle of proportionality;
- be appropriate to achieve their protective function;
- be the least intrusive instrument amongst those which might achieve their protective function; and
- be proportionate to the interest to be protected.

45. The UNHRC has specified that for secrecy provisions to be compatible with the criteria set out in Paragraph 3 of Article 19 of the ICCPR, some real prejudice or harm to national security is required:

> *Extreme care must be taken by States parties to ensure that treason laws and similar provisions relating to national security, whether described as official secrets or sedition laws or otherwise, are crafted and applied in a manner that conforms to the strict requirements of paragraph 3. It is not compatible with paragraph 3, for instance, to invoke such laws to suppress or withhold from the public information of legitimate public interest that does not harm national security or to prosecute journalists, researchers, environmental activists, human rights defenders, or others, for having disseminated such information.*[50]

46. A legitimate restriction, under Paragraph 3 of Article 19, based on a harm to a permitted public interest must be material and not merely to protect against embarrassment. In this regard, the Special Rapporteur has observed:

> *…to be necessary, a restriction must protect a specific legitimate interest from actual or threatened harm that would otherwise result. As a result,*

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[47] Law Council of Australia, 'Human Rights and the Legal Profession' (Policy Statement, May 2017).

[48] International Covenant on Civil and Political Rights, opened for signature 19 December 1996, 999 UNTS 171 (entered into force 23 March 1976) art 19(1).

[49] UNHRC, General Comment 34: Article 19: Freedoms of Opinion and Expression, 102nd sess, Un Doc CCPR/C/GC/34 (12 September 2011) [33]-[34]. ('***General Comment 34***') See more generally, United Nations Commission on Human Rights, The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights which provide that any limitations on the ICCPR must be –

- recognised by the relevant article of the ICCPR;
- respond to a pressing public or social need; and
- pursue a legitimate aim; and be proportionate to that aim.

These principles were developed by a group of experts for consideration by the United Nations Commission on Human Rights and the UNHRC. United Nations Commission on Human Rights: The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, E/CN.4/1985/4 (1984).

[50] General Comment 34, [30].

> *general or vague assertions that a restriction is necessary are inconsistent with article 19. However legitimate a particular interest may be in principle, the categories themselves are widely relied upon to shield information that the public has a right to know. It is not legitimate to limit disclosure in order to protect against embarrassment or exposure of wrongdoing, or to conceal the functioning of an institution.*[51]

47. Moreover, the scope of matters included in Paragraph 3 should not be over-extended to matters of commercial sensitivity. In this regard, the UNHRC note generally categories of information such as those relating to the commercial sector, banking and scientific progress do not warrant protection by secrecy provisions.[52]

Freedom of the press and other media

48. In its General Comment 34, the UNHRC states in relation to freedom of expression and the media that 'a free, uncensored and unhindered press or other media is essential in any society to ensure freedom of opinion and expression' and that 'free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential' and 'implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion.'[53]

49. According to General Comment 34, the ICCPR embraces 'a right whereby the media may receive information on the basis of which it can carry out its function' as well as a corresponding right for 'the public… to receive media output'.[54] An element of the right of freedom of expression is the limited journalistic privilege not to disclose information sources.[55]

50. In particular, the penalisation of a media outlet, publishers or journalists solely for being critical of the government or the political social system espoused by the government can never be considered to be a necessary restriction of freedom of expression.[56]

Absence of human rights framework

51. From a broader perspective, the Law Council considers that human rights and fundamental freedoms in Australia should be protected and balanced against other public interest considerations in a coherent legal framework that promotes the understanding that human rights are 'universal, indivisible and interdependent and interrelated' – and that any restrictions upon particular rights and freedoms must be in accordance with international human rights jurisprudence.[57]

52. There persists a fundamental disconnect between Australia's obligations at international law, and their translation into Australian domestic legislation. Accordingly, the Law Council continues to advocate for a charter of rights at the federal level. The Law Council looks forward to raising these concerns in response to the Parliamentary Joint Committee on Human Rights Inquiry into Australia's Human Rights Framework which will examine the scope and effectiveness of

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[51] David Kaye, Special Rapporteur, Promotion and Protection of the Right to Freedom of Opinion and Expression, 70th sess, UN Doc A/70/361 (8 September 2015) 5 [8]
[52] Ibid.
[53] General Comment 34, [13].
[54] Ibid, [18].
[55] Ibid, [45].
[56] Ibid, [42].
[57] [57] Law Council of Australia, Policy Position: Federal Human Rights Charter (November 2020).

Australia's 2010 Human Rights Framework and the National Human Rights Action Plan.

Recommendation

- **The Australian Government should work in consultation with civil society towards developing and implementing a mechanism for the protection and enforcement of human rights in accordance with international human rights obligations and jurisprudence through a comprehensive federal charter of rights.**

Categories of persons – insiders vs outsiders

53. The Law Council supports retaining the distinction between secrecy offences directed specifically at insiders (who have special duties to maintain secrecy) and those capable of applying to all persons. The INSLM's ASIO Act Review observed: '(a)n outsider has no direct means of knowledge and owes no duty of confidence.'[58] This distinction should be expressed by differentiated treatment including in relation to culpability, penalty and framing of the offence.

54. There is compelling weight of reasoning, across multiple reviews, in support of maintaining this distinction. In this regard, the INSLM's ASIO Act Review cited the Gibbs Committee review which stated:

> *Undoubtedly, a member of the intelligence and security services stands in a special position and it is not unreasonable, in the opinion of the Review Committee, that he or she should be subject to a lifelong duty of secrecy as regards information obtained by virtue of his or her position. Subject to the very important proviso that satisfactory procedures are established by which complaints or allegations by such a person as to illegality, misconduct or improper activities of those services or persons employed in them are received, investigated and dealt with (see Chapter 32), the Review Committee is satisfied that disclosures by such persons should be prohibited by criminal sanctions without proof of harm.*[59]

Amendments – general or specific secrecy offences

Question 2: Having regard to these principles, are there any general or specific secrecy offences that should be amended or repealed?

Amendments to the general secrecy offences contained in Division 122

55. In 2018, the *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018* (Cth) (**EFI Act**) introduced important reforms to general secrecy provisions. The EFI Act properly implemented the ALRC's recommendation to distinguish between 'insiders' and 'outsiders'. However as set out below, the Law Council remains concerned that Division 122 of the Criminal Code does not provide for an express harm requirement and a public interest exception.

[58] INSLM's ASIO Act Review, 23 [43].
[59] INSLM's ASIO Act Review, 22-23 [42].

56. The Law Council has previously extensively considered the changes contained in the EFI Act[60] and wider amendments to general or specific secrecy offences.[61]

Express harm requirement

57. The general secrecy offences contained in Division 122 of the Criminal Code assume that harm is implicit in communication or dealing with certain categories of information. These categories are listed under section 121.1 of the Criminal Code relating to the definitions of 'cause harm to Australia's interests' and 'inherently harmful information'.

58. The challenge with both these categories is that they extend considerably beyond the essential public interests that the ALRC identified for new general secrecy offences, being 'unauthorised disclosures' that are likely to:

- damage the security, defence or international relations of the Commonwealth;
- prejudice the prevention, detection, investigation, prosecution or punishment of criminal offences;
- endanger the life or physical safety of any person; or
- prejudice the protection of public safety.

59. This approach is problematic because the harm to the above essential public interests is not necessarily implicit in the prescribed categories of information.

60. The Senate Press Freedom 2021 Report generally agreed that this overextension of some of the offences in Division 122 beyond the framework of the ALRC's Secrecy Report carries the risk of over-use. That report focussed in particular on the risk that the broad interpretation of 'dealing with' in the context of offences such as Section 122.4A may apply to cases where there is no real harm to an essential public interest, noting:

> *The committee is firmly of the view that the general secrecy offence provisions in the Criminal Code should include an express harm requirement, as recommended by the ALRC. Without such a requirement, the provisions would be susceptible to overuse, misuse or even abuse. In particular, the absence of an express harm requirement can lead to circumstances where a journalist is prosecuted for a very minor or trivial 'dealing' with classified information.*[62]

61. Another example of this problem of overextension is the application of general secrecy offences to a mere 'interference' rather than damage or prejudice. Section 121.1 of the Criminal Code defines '*cause harm to Australia's interests*' to mean:

- interfere with or prejudice the prevention, detection, investigation, prosecution or punishment of a criminal offence against a law of the Commonwealth; or
- interfere with or prejudice the performance of functions of the Australian Federal Police under:

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[60] Law Council of Australia, Submission No 5 to the Parliamentary Joint Committee on Security and Intelligence, National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017 (22 January 2018). ('**Law Council EFI Bill 2018 Submission**')
[61] Law Council of Australia, Submission to Senate Standing Reference Committee on Environment and Communications, Inquiry into the Adequacy of Commonwealth Laws and Frameworks Covering the Disclosure and Reporting of Sensitive and Classified Information (23 August 2019). ('**Law Council 2019 Secrecy Sub**').
[62] Senate Press Freedom 2021 Report, 35 [3.19]

- paragraph 8(1)(be) of the *Australian Federal Police Act 1979* (protective and custodial functions); or

- the Proceeds of Crime Act 2002; …

62. The Law Council maintains its view that an 'interference' can be interpreted as a much lower threshold, and may therefore extend to a broad range of conduct, including innocuous conduct.[63] In this regard, the Law Council's Policy Statement on Rule of Law Principles asserts that 'offence provisions should not be so broadly defined that they inadvertently capture a wide range of benign conduct'.[64]

63. If the analysis above is correct that the categories listed under section 121.1 of the Criminal Code relating to the definitions of 'cause harm to Australia's interests' and 'inherently harmful information' are too broad and liable to capture a range of conduct with varying culpability, then consideration must be given to greater differentiation of intention requirements to establish criminal liability and appropriate distinctions in penalty.

64. The Law Council acknowledges that, to some extent, differentiation in penalty is captured by the differentiated requirements for the general offences contained in Division 122 and the aggravated offence contained in subsection 122.3. However, the circumstances listed in paragraph 122.3(1)(b) are not primarily directed at the state of mind of the defendant.

65. The Law Council maintains its view that in the absence of strict adherence to the definition of essential public interests as set out in the ALRC's Secrecy Report, the offences contained in Division 122 should cascade in penalty. That is, they should require that a person knew, or as a lesser offence, was reckless to whether, the protected information falls within a particular category (i.e. security classification or concerns Australia's national security) and should not provide that strict liability applies to that circumstance.[65] By way of illustration, the serious offence of communication of inherently harmful information by a Commonwealth officer contained in subsection 122.1 only requires intention in relation to the act of communication. However, recklessness is sufficient in relation to the information being 'inherently harmful information' and the information being made or obtained by that person by virtue of being a Commonwealth officer.

Proceeds of crime legislation

66. In line with the view of the ALRC, the Law Council does not consider the current definition of 'cause harm to Australia's interests,' which includes 'interference' or 'prejudice' to the performance of functions of the Australian Federal Police under the *Proceeds of Crime Act 2002* (Cth), to be a proportionate inclusion in a general secrecy offence.

67. In this regard, the ALRC found:

> *The general criminal offence should not extend to unauthorised disclosures of information that would prejudice the enforcement of laws relating to the confiscation of the proceeds of crime, or the protection of the public revenue. Taxation legislation and proceeds of crime legislation*

[63] Law Council EFI Bill 2018 Submission 60 [205].
[64] Law Council of Australia, Policy Statement on Rule of Law Principles (March 2011) Principle 1, p. 2.
[65] Law Council EFI Bill 2018 Submission, 57 [193].

already contain specific secrecy offences targeting Commonwealth information in those contexts.[66]

68. More generally, the Law Council supports the ALRC's position on how the general secrecy offence should be limited and confined. If disclosures that breach a civil law statute are serious enough to warrant the protection of the criminal law, specific offences should be introduced to proscribe this conduct. This principle implies that the general secrecy offence should not extend to:

- unauthorised disclosures of information that would prejudice the enforcement of laws relating to the confiscation of the proceeds of crime, or the protection of the public revenue. This is because taxation law and proceeds of crime legislation already contain specific secrecy offences targeting the protection of Commonwealth information in those contexts; and
- unauthorised disclosures of information that would prejudice the prevention, detection, investigation, prosecution or punishment of a breach of a law imposing penalties or sanctions that are not criminal. This is because it would be excessive to impose criminal sanctions in the general secrecy offence for disclosures of information that threaten civil or administrative processes.[67]

Definition of key terms

69. The Law Council expresses caution that the wide breadth of key definitional concepts that set the scene for the ambit of Division 122 have the potential to undermine certainty.

70. By way of illustration, the definition of 'cause harm to Australia's interests' in Section 121.1 of the Criminal Code refers to 'harm or prejudice Australia's international relations.' The term 'international relations' is defined by reference to the definition provided in Section 10 of the *National Security Information (Criminal and Civil Proceedings) Act* (Cth), that is, 'political, military and economic relations with foreign governments and international organisations'. This means that the provision will be limited to unauthorised disclosures that damage, or are likely or intended to damage, Australia's political, military or economic relations with other countries or international organisations.

71. The Law Council is concerned that the breadth of matters encompassed by 'political, military and economic relations with foreign governments and international organisations' is unlikely to provide determinate guidance to Commonwealth officials, journalists and civil society actors potentially affected by these offences. In this regard, the ALRC noted 'this provision has the potential to be interpreted quite broadly'[68] and concluded that:

> *…the protection of Australia's international relations is necessary to ensure that Australian society continues to function in the global environment, but a disclosure that merely embarrasses the Australian Government, without threatening real damage to international relations, is unlikely to meet the requirements of art 19 of the ICCPR.*[69]

72. The Law Council has previously highlighted concerns that uncertainty as to the ambit of secrecy provisions may discourage whistleblowers from speaking out

[66] ALRC Secrecy Report, 157-158 [5.63].

[68] ALRC's Secrecy Report, 153 5.44.
[69] ALRC's Secrecy Report,

publicly.[70] The likely impact is uncertainty as to how information may be communicated or dealt with, without fear of prosecution. The Law Council is concerned that the provisions may have a chilling effect on the dissemination of material about security with no relevant connection to the categories of information captured by the provisions.[71]

73. For similar reasons, the Law Council has previously raised concerns regarding the broad reach of the definition of 'national security.' These concerns apply particularly in relation to the extension of the definition of 'national security' beyond the security and defence of Australia, and which include, Australia's political and economic relations with other countries.[72]

74. The Law Council recommends further consideration be given, in consultation with stakeholders, to legislative amendments to restrict the operation of these key definitional concepts.

Ambiguity in definition of threshold of prejudice

75. The Law Council reiterates its concerns [73] that subparagraphs 122.4A(1)(d)(ii)-(iv) of the Criminal Code lack precision. This leads to the establishment of an unclear threshold for when the offence is triggered. In this regard, the Law Council suggests further consideration be given to:

- the level or degree to which 'the communication of the information' must damage the security or defence of Australia in order to satisfy subparagraph 122.4A(1)(d)(ii);
- the level or degree to which the communication of the information must interfere with, or prejudice, the prevention, detection, investigation, prosecution or punishment of a criminal offence in order to satisfy subparagraph 122.4A(1)(d)(iii); and
- the level or degree, as well as nature, of harm or prejudice to the health or safety of the Australia in order to satisfy subparagraph 122.4A(1)(d)(iv).

76. Consideration should be given to specifying the level or degree of the relevant prejudice in legislation. Additionally, these matters may be partly addressed by provide guidance material for journalists, media organisations and public agencies on the practicalities of complying with the provisions in Division 122 and other Commonwealth Secrecy Provisions.

77. In line with the Law Council's view, the Senate Environment and Communications References Committee recommended the Australian Government, in consultation with relevant stakeholders, develop guidance material to assist journalists and media organisations to comply with secrecy and unauthorised disclosure provisions in Commonwealth law. This would include the identification of classified information and information related to Special Intelligence Operations.[74]

Recommendations:

[70] Law Council EFI Bill 2018 Submission 67 [140].
[71] Law Council EFI Bill 2018 Submission 59 [199].
[72] Law Council of Australia, Submission to PJCIS review of the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017 (EFI Bill), Letter to Andrew Hastie MP (13 March 2018) [4].
[73] Law Council 2019 Secrecy Sub 21-22.
[74] Senate Press Freedom 2021 Report, Recommendation 5.

- **The general secrecy offences in Division 122 of the Criminal Code should be amended in a manner consistent with the ALRC report Secrecy Laws and Open Government in Australia. In particular, they should include an express harm requirement that for an offence to be committed, the unauthorised disclosure caused, or was likely or intended to cause, harm to an identified essential public interest.**
- **The phrase 'interfering with' should be removed from paragraphs 121.1(1)(a) and (b) of the Criminal Code;**
- **In the absence of an express harm requirement, the offences should cascade in penalty and require that a person knew, or as a lesser offence, was reckless to whether, the protected information fell within a particular category (i.e., security classification or concerns Australia's national security), and should not provide that strict liability applies to that circumstance;**
- **Subparagraph 121.1(b)(ii) of the Criminal Code, which refers to interference or prejudice to the *Proceeds of Crime Act 2002* (Cth), should be deleted;**
- **Consideration should be given to legislative amendments that can be deployed to meaningfully restrict the operation of key definitional concepts such as 'international relations;' and**
- **In consultation with stakeholders, the Australian Government should develop and provide guidance material for journalists, media organisations and public agencies on the practicalities of complying with the provisions in Division 122 of the Criminal Code and other Commonwealth Secrecy Provisions.**

Overlap between general or specific secrecy offences

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?

78. As a general principle, within the Australian criminal justice system, like cases should be treated alike.[75] The rule of law requires that the law be applied to all people equally and not discriminate between people on arbitrary or irrational grounds.[76] For example, it would be an arbitrary distinction for different elements of offending, defences and penalties to arise, in relation to substantially similar conduct, from the discretionary decision to lay specific rather than general secrecy charges.

79. Specific secrecy offences should be tailored to meet special circumstances not covered by the general secrecy offence—for example, where there is a need to protect an essential public interest that is not protected by the latter. In this context, the ALRC's Secrecy Report recommended:

> *Specific secrecy offences should differ in significant and justifiable ways from the recommended general secrecy offence.*[77]

[75] Australian Law Reform Commission, Same Crime, Same Time: Sentencing of Federal Offenders (Report No 103, 2006).
[76] Law Council of Australia, Policy Statement: Rule of Law Principles (March 2011).
[77] ALRC's Secrecy Report, Recommendation 8–3.

80. As a general proposition, the Law Council considers, in line with the ALRC Secrecy Report, that to warrant a criminal penalty, disclosures must harm more than the effective working of government or commercial or personal interests.

81. More broadly, the Law Council endorses Recommendation 8–1 and 8–2 of the ALRC's Secrecy Report which provide an appropriate framework for determining when a specific secrecy offence is warranted.

82. The Law Council agrees with the ALRC's finding that:

> *Where there is no express requirement of harm to an essential public interest, or the secrecy offence is not necessary to protect the regulatory functions of government or other essential public interests, it may indicate that the specific secrecy offence is not directed to protecting against harms of the kind that warrant the imposition of criminal sanctions on the individual who discloses that information. Specific secrecy offences of this kind should be considered for repeal.*[78]

Other defences

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?

83. The defences contained in section 122.5 are directed to a number of matters including, for example, where a disclosure is made in relation to:

- a person's powers, functions and duties as a public official;[79]
- information that is already public;[80]
- information communicated to an integrity agency;[81]
- in accordance with the *Public Interest Disclosure Act 2013* (Cth) or the *Freedom of Information Act 1982* (Cth);[82]
- information communicated for the purpose of reporting offences and maladministration;[83]
- in relation to information communicated to a court or tribunal;[84] and
- information communicated for the purpose of obtaining or providing legal advice.[85]

84. In this submission, the Law Council does not make detailed comment on the appropriate framing of all the defences contained in subsection 122.5. However, it has previously considered many of these matters in the context of the EFI Act.[86] One area of continuing concern for the Law Council is the need to reframe the

[78] ALRC's Secrecy Report, 8.147.
[79] Subsection 122.5(1) of the Criminal Code.
[80] Subsection 122.5(2) of the Criminal Code.
[81] Subsection 122.5(3) of the Criminal Code.
[82] Subsection 122.5(4) of the Criminal Code.
[83] Subsection 122.5(4A) of the Criminal Code.
[84] Subsection 122.5(5) of the Criminal Code.
[85] Subsection 122.5(5A) of the Criminal Code.
[86] Law Council EFI Bill 2018 Submission, 66-70.

defence contained in subsection 122.5(5A) regarding information communicated for the purposes of obtaining legal advice.[87]

85. The Law Council maintains that the defence contained in subsection 122.5(5A) regarding information communicated for the purposes of obtaining legal advice requires reconsideration and should be reframed as an exception.[88] There is an important distinction between an 'exception', which limits the scope of conduct proscribed by a secrecy offence, and a 'defence', which may be relied on to excuse conduct that is prohibited by a secrecy offence.[89] Such an exception (as opposed to a defence) would be in line with other secrecy offences such as paragraph 35P(3)(e) of the ASIO Act.[90] This is particularly important given the definition of 'causing harm to Australia's interests' in paragraph 121.1(c) includes 'harm or prejudice Australia's international relations in relation to information that was communicated in confidence'. This would potentially capture a lawyer engaged to represent a government, authority or organisation, who communicates or receives information on behalf of their client.

86. For similar reasons, subsection 122.5(5), which provides a defence for information communicated to a court or tribunal, should be reconsidered in line with analogous exceptions for sensitive information.[91] For example, paragraph 35P(3)(b) of the ASIO Act provides that the offence provisions do not apply if the disclosure was for the purposes of any legal proceedings arising out of or otherwise related to the Division or of any report of any such proceedings. Such an exception should be included.

Recommendation

Section 122.5 should be amended to include:

- **an exception for where the conduct (i.e., communication/dealing with/holding/removing) is engaged in for the purpose of obtaining legal advice in relation to the matter the subject of the offence; and**
- **an exception that offence provisions do not apply if the disclosure was for the purposes of any legal proceedings arising out of or otherwise related to the Division or of any report of any such proceedings.**

Public interest journalism defences

Public interest journalism defence

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?

[87] Law Council of Australia, Submission to PJCIS review of the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017 (EFI Bill), Letter to Andrew Hastie MP (13 March 2018) [7].
[88] Law Council EFI Bill 2018 Submission, 69 [250]
[89] ALRC's Secrecy Report, [7.2].
[90] Sub-paragraph 35P(3)(e) of the *ASIO Act 1979* (Cth).
[91] Law Council EFI Bill 2018 Submission, 69 [251]

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

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?

87. Section 122.5 of the Criminal Code sets out various defences to prosecutions under Division 122 of Part 5.6. In particular, subsection 122.5(6) provides a defence for people engaged in the business of reporting news, presenting current affairs or expressing editorial or other content in news media (which is described in the Consultation Paper as the 'public interest journalism defence').

88. As a general comment, the Law Council maintains its support for consideration of a more broadly framed public interest disclosure defence to the secrecy provisions where the disclosure would, on balance, be in the public interest.[92] The existing defence for journalists alone is unduly restrictive. In this regard, the Law Council has previously noted that the arbitrary definition of journalist or a person engaged in 'news media' is an insufficiently precise criterion to condition criminal liability and is likely to produce unjustifiable discrepancies, for instance:

> *In the absence of a public interest defence (the preferred position), the broadening of the 'journalist' defence is welcome, although the meaning of the term 'news media' is uncertain. A person who supplied information (e.g. about malpractice in the prosecution process) to a journalist would have no defence but the person who reported it in the news media would have a defence. The policy of punishing those who deal with such information outside the news media also requires justification.*[93]

89. The Law Council is concerned that the heightened secrecy provisions may discourage legitimate whistleblowers from speaking out publicly. There is no proposed defence for whistleblowers such as staff and contractors or others that speak out publicly in the public interest. The intent is instead that such persons use formal channels such as the PID Act. Recent parliamentary reviews have emphasised 'recognised deficiencies' observed in relation to the existing legislative protections for disclosers.[94]

90. The Law Council recommends this Review consider the need for a broader public interest disclosure defence alongside regimes for whistleblowers in the public and private sector, for example, the *Corporations Act 2001* (Cth).

91. In this regard, the Law Council specifically endorses Recommendation 7–3 of the ALRC's Secrecy Report which recommended:[95]

> *In developing public interest disclosure legislation the Australian Government should ensure that the legislation protects:*
>
> - *individuals subject to the general secrecy offence;*

[92] Law Council EFI Bill 2018 Submission, 66 [238].
[93] Law Council of Australia, Submission to PJCIS review of the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017 (EFI Bill), Letter to Andrew Hastie MP (13 March 2018) [6].
[94] Senate Press Freedom 2021 Report, Recommendation 10.
[95] ALRC's Secrecy Report, Recommendation 7–3.

- *individuals who subsequently disclose Commonwealth information received by way of a protected public interest disclosure; and*

- *individuals subject to the subsequent disclosure offence for the unauthorised disclosure of information received from a Commonwealth officer on terms requiring it to be held in confidence.*

92. Subsection 122.5(6) of the Criminal Code provides a defence to prosecutions under the secrecy provisions in Division 122 of the Criminal Code for public interest reporting.

93. The Law Council welcomed the public interest journalism defence when it was introduced in the EFI Act.[96] However, the Law Council maintains support for improvements to:

- clarify the application of this defence in respect of freelance or self-employed commentators including internet bloggers, who may be remunerated for intermittent reporting work; and
- provide greater guidance on the matters that should be taken into account in determining 'public interest'.[97]

94. The Law Council has previously submitted that the term 'public interest' is not defined. However, subsection 122.5(7) sets out several matters that are not in the public interest, such as the dealing or holding of information that would publish the identity of an intelligence officer, contravene witness protection laws or 'will or is likely to harm or prejudice the health or safety of the public or a section of the public'. The determination therefore relies on judicial interpretation under the common law. In the absence of factors or criteria which suggest what may amount to the public interest, there may be uncertainty for journalists in the likely application of the defence provision. This may have a chilling effect on fair and accurate reporting.

95. The Law Council reiterates its previous support[98] for amendments to 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 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.

[96] Law Council EFI Bill 2018 Submission.
[97] Law Council 2019 Secrecy Sub 27-30.

96. The Law Council recognises that determination of the public interest requires a careful balancing of these factors against the public interest protected by secrecy, for instance, in a national security context consideration should be given to the nature of the information and adverse impact on security agencies. In this regard, determination of the public interest should be carefully weighed where disclosure relates to information which has a security classification of secret or top secret,[99]caveated information, or the communication of the information damages the security or defence of Australia.[100] Section 121.1 defines 'security or defence of Australia' to include 'the operations, capabilities or technologies of, or methods or sources used by, domestic intelligence agencies or foreign intelligence agencies.'[101]

97. Some of these adverse impacts from disclosure that must be considered in a public interest context are set out below. In this respect, the Director-General of Security Mike Burgess recently identified three qualifications to the importance of transparency from the perspective of security agencies which include:

- the need to protect people – including employees and sources of security agencies;
- the need to protect capabilities – by protecting tools, techniques and technologies that enable security agencies to fulfill their statutory functions; and
- the need to protect operations – where disclosure will tip off targets and potentially reveal people and capabilities.[102]

Recommendation

- **Section 122.5(6) of the Criminal Code should be amended to identify factors that may be considered for the purposes of determining whether the dealing with or holding of information may be in the public interest.**

Evidential onus

98. Division 122 of the Criminal Code should be amended to place the onus on the prosecution to establish that the disclosure is not in the public interest. This is because maintaining an evidential onus on the defendant imposes an unreasonable burden on freedom of expression and media freedom.

99. The Law Council acknowledges that, as a general principle, a defendant will usually only bear an evidential burden in relation to the proof of a defence, unless the law expresses otherwise.[103] However, regard should be had to the fact that Commonwealth law does not adequately recognise and protect press freedom in Australia, unlike other countries where there are explicit constitutional and human rights protections for press freedom.[104] This context, and the international human rights law principles articulated in this submission mean that the usual evidential rule regarding proof of a defence would be disproportionate.

[99]As in sub-paragraph 122.4A(2)(d)(1) of the Criminal Code.
[100] As in sub-paragraph 122.4A(2)(d)(2) of the Criminal Code.
[101] Section 121.1 of the Criminal Code.
[102] Commonwealth of Australia, Australian Security Intelligence Organisation, Mike Burgess: Annual Threat Assessment (Speech, 21 February 2023).
[103] Commonwealth of Australia, Attorney-General's Department, A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers (September 2011) 51 4.3.2
[104] Senate Press Freedom 2021 Report, 46 [3.69].

100. The imposition of an evidential burden on journalists to show why a disclosure was in the public interest may have an unacceptable chilling effect on media freedom. In this regard, the Law Council's former President, Mr Arthur Moses SC, in evidence before the Committee noted:[105]

> *It should not be the journalist's responsibility to show why it was in the public interest. Presently, if charged with a secrecy offence under division 122 of the Criminal Code, a journalist must discharge what is known as an evidential burden of proof. The journalist must provide evidence, possibly in the witness box, that they reasonably believed their story was in the public interest. It is no answer to say, as the government has attempted to do, that the standard of proof a journalist must meet is lower than the standard of proof the prosecution must meet to prove guilt beyond reasonable doubt. It is clearly a burden of proof a journalist should not bear at all for what appears to be a key component of criminal liability.*

101. Notably, the Senate Environment and Communications References Committee agreed with the Law Council's view and noted:[106]

> *The committee notes that removing the onus that is currently placed on a journalist defendant would be consistent with the approach taken by the government in the recent changes contained in the Criminal Code Amendment (Agricultural Protection) Bill 2019. The committee notes that the government has not explained adequately why such a change is undesirable. (Citations omitted)*

Recommendation

- **Consideration should be given to amendments to subsections 122.4A(1) and (2) of the Criminal Code so as to place the onus on the prosecution to establish that the disclosure is not in the public interest in relation to defendants relying on the defence contained in subparagraph 122.5(6).**

Public interest journalism defence for specific secrecy offences

Question 9: Should a public interest journalism defence modelled on subsection 122.5(6) of the Criminal Code be considered for specific secrecy offences, and for which offences would it be an appropriate defence?

102. The Law Council generally supports consideration of extending a public interest journalism defence in respect of all Commonwealth Secrecy Provisions, including specific secrecy offences.

103. The Senate Environment and Communications Reference Committee endorsed the rationale for extending the public interest journalism defence to other secrecy provisions, particularly in the context of national security:

> *The committee considers that journalists should be able to undertake public interest journalism without fear of reprisal and the protection afforded to journalists and media organisations by the existing public interest defence for general secrecy offences should be extended to*

[105] Senate Press Freedom 2021 Report, 42 [3.55].
[106] Senate Press Freedom 2021 Report, 46 [3.72].

other secrecy and unauthorised disclosure offences in national security law. [107]

Ensuring that these defences are expressed in a consistent manner across Commonwealth law may also have an important function in ensuring clear and precise messaging can occur to educate journalists, members of civil society and the public on the ambit of these defences.

Attorney-General's consent

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?

104. The Attorney-General's direction that ministerial consent be obtained prior to commencing prosecution against journalists for certain offences, including secrecy offences, is not an appropriate safeguard for press freedom, as it introduces a significant element of executive or political influence.

105. Ministerial accountability, and ultimate responsibility, for the prosecution of Commonwealth criminal offences remains with the Attorney-General. In practice, the Office of the Commonwealth Director of Public Prosecutions operates independently of the Attorney-General and the political process.

106. The Law Council has previously raised concerns that although the Attorney-General is the first law officer of Australia their ministerial and parliamentary office may create the perception that the decision to provide consent to prosecution of journalists for contraventions of Commonwealth Secrecy Provisions could be influenced by political considerations, particularly in high-profile cases.

107. The Attorney-General's direction to the Commonwealth Director of Public Prosecutions that extended the list of offences for which the Attorney-General's consent must first be obtained was issued in September 2019. In response, the Law Council expressed concern that this direction failed to allay important concerns about press freedoms in Australia sparked by recent police raids on journalists and media organisations.[108]

108. The apprehension of bias, by journalists, as to whether an Attorney-General will exercise discretion favourably may lead to a chilling effect on reporting. In this regard, then President of the Law Council, Arthur Moses SC, observed:

> *I have grave concerns that this sort of direction undermines the independence of the CDPP by requiring her to obtain the consent of the Attorney-General before prosecuting an offence… I have no doubt the Attorney-General would act in good faith. But it puts the Attorney-General – a politician – in the position of authorising prosecutions of journalists in situations where they may have written stories critical of his government. It creates an apprehension on the part of journalists that they will need to curry favour with the government in order to avoid prosecution. The media must be able to lawfully report on matters of public interest without fear or favour.*[109]

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[107] Senate Press Freedom 2021 Report, 47 [3.75].
[108] Law Council of Australia, Media Release, Press freedom should not be by consent of Attorney-General, (30 September 2019).
[109] Ibid.

109. The existence of a discretion specifically in relation to journalists is compounded by the uncertainty around the definition of journalism. In this regard, the former INSLM, the Hon Roger Gyles AO KC, observed:[110]

> *While these measures should give some comfort to journalists, they are after the event of publication and depend on the exercise of a discretion. They do not provide a defence, or a legal guarantee of immunity from prosecution. The rest of the community, including those affected by ASIO operations and commentators of all kinds, such as academics and bloggers, are subject to the same impact as journalists. The question of whether a person is a 'journalist' only becomes critical when there are special rules or procedures applicable in relation to 'journalists'.*

110. The Law Council was pleased that the Senate agreed with its view and made recommendations to this effect.[111]

Recommendation

- **the Attorney-General should consider revoking the Direction issued on 19 September 2019 under subsection 8(1) of the *Director of Public Prosecutions Act 1983*, with a view to respecting the operational independence of the Australian Federal Police and the Commonwealth Director of Public Prosecutions.**

[110] INSLM's ASIO Report, 16 [27].
[111] Senate Press Freedom 2021 Report, Recommendation 9 49 [3.87].