Secrecy Provisions Review Team
Information Protection Section
National Security Information branch
Attorney-General's Department

12 May 2023

Dear Chair,

The Human Rights Law Centre, Transparency International Australia and the Centre for Governance and Public Policy at Griffith University welcome the opportunity to make this joint submission to the Attorney-General's Department as it reviews secrecy provisions in Australian law. Our respective organisations have a longstanding interest in properly balancing secrecy and transparency in Australian public life. This submission builds on Transparency International Australia and Griffith University's *Australia's National Integrity System: The Blueprint for Action*, a previous submission into press freedom, and prior Human Rights Law Centre submissions to the Parliamentary Joint Committee on Intelligence and Security, including its press freedom inquiry and review of the last phase of secrecy provision reform. It should also be read in conjunction with our joint report *Protecting Australia's Whistleblowers: the Federal Roadmap*.

We would welcome the opportunity to discuss our submission with the Department if helpful. We can be contacted via kieran.pender@hrlc.org.au.

Kind regards,

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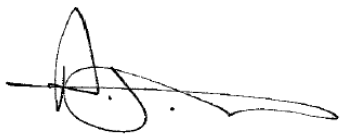

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Human Rights Law Centre

The Human Rights Law Centre uses a strategic combination of legal action, advocacy, research, education and UN engagement to protect and promote human rights in Australia and in Australian activities overseas. Our work includes supporting whistleblowers, who are crucial to shedding light on and ensuring accountability for government and corporate wrongdoing and systemic failures.

Transparency International Australia

Transparency International Australia is the national chapter of Transparency International, a global coalition against corruption operating in over 100 countries. Each chapter is independent and unique, and together we aspire to a unified vision: a world free of corruption. Our mission is to tackle corruption by shining a light on the illegal practices and unfair laws that weaken our democracy, using our evidence-based advocacy to build a better system.

Centre for Governance and Public Policy

The Centre for Governance and Public Policy at Griffith University is an outstanding intellectual environment for world-class research engaging international scholars and government and policy communities. We examine and critique the capacity, accountability and sustainability of the public service and government, providing insights into improved management structures. Working closely with governmental and non-governmental partners, we make a tangible mark on governance research.

Executive Summary

All democracies face a tension between secrecy and transparency in public life. Transparency is a central element of democracy– Australians have the right to know what is done in our name. Without transparency, there can be no accountability. But secrecy is also, at times, a necessary and proper part of democracy. A functioning government relies on certain information remaining confidential, to protect public interests including individual privacy and national security. As Justice Finn famously said in *Bennett v President, Human Rights and Equal Opportunity Commission*, '[o]fficial secrecy has a necessary and proper province in our system of government. A surfeit of secrecy does not.'[1]

Presently, in Australia, the balance between secrecy and transparency is unjustifiably and undemocratically tilted in favour of secrecy. The degradation of the freedom of information regime, insufficient protections for press freedom, inadequate whistleblower protections, laws that undermine open justice and onerous secrecy provisions have, individually and collectively, heightened secrecy in the Australian government and undermined transparency. As much is made evident by the research included in the *Review of Secrecy Provisions – Consultation Paper* (**Consultation Paper**), which identified 11 general secrecy offences, 542 specific secrecy offences and 296 non-disclosure duties attracting criminal liability – 849 secrecy provisions across Australian federal law. The breadth and depth of these provisions create a significant chilling effect. The surfeit of secrecy allows government wrongdoing and human rights violations to go hidden, while brave whistleblowers are punished and even prosecuted for doing the right thing.

Change is needed. We commend the Attorney-General, Mark Dreyfus KC, for undertaking this review and we urge the government to commit to substantial reform to strike a better balance between secrecy and transparency. We recommend:

1. Individual secrecy provisions should be removed with a preference for reliance on general secrecy provisions, except where there are compelling reasons for a standalone regime. Remaining secrecy provisions should be harmonised to the maximum extent possible.

2. Secrecy provisions should include a serious harm requirement, requiring that a disclosure caused serious harm, was likely to cause serious harm or was intended to cause serious harm, to an essential public interest

3. Secrecy provisions should not apply to 'outsiders', ie those who do not receive information in an official government capacity, except in exceptional circumstances.

4. General secrecy provisions should apply only to communication, and not the wider current category of 'dealing with' information.

5. Penalties for contravening secrecy provisions should be reduced to ensure proportionality.

[1] [2003] FCA 1433 [98].

6. There should be a robust exemption for whistleblowers, human rights defenders and journalists communicating information in the public interest.

Adoption of these recommendations would be a significant step forward for democratic accountability, whistleblower protection and press freedom in Australia. However, secrecy reform is only one part of a wider overhaul needed – which includes comprehensive whistleblowing reform, the establishment of a whistleblower protection authority, robust press freedom protections, stronger safeguards for open justice and more funding for freedom of information processing. We look forward to working with the Department, and the Government, as it progresses this wider agenda.

Introduction

Freedom of expression is a fundamental human right, protected in the *Constitution* through the implied freedom of political communication and in international law. Australia is, for example, a signatory to the *International Covenant on Civil and Political Rights* (***ICCPR***), which provides, in Article 19(2), that 'everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds'.

Secrecy provisions inhibit freedom of expression. They also intrude on the values protected by freedom of expression, including self-government and democratic accountability. Article 19 'embraces a right of access to information held by public bodies',[2] which can only be limited where necessary and proportionate and when such limitations are subject to robust safeguards and oversight. As the United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression said in a report to the General Assembly in 2015, '[i]t is not legitimate to limit disclosure in order to protect against embarrassment or exposure of wrongdoing, or to conceal the functioning of an institution.'[3]

The expansion of secrecy provisions in Australian law in recent decades has undermined our democracy and the fundamental rights of all Australians. The failure to address the recommendations of the Australian Law Reform Commission's 2009 report, *Secrecy Laws and Open Government in Australia* (**ALRC Report**), in a timely manner; the 2018 reform contained in the *National Security Legislation Amendment (Espionage and Foreign Interference) Bill* (**2018 Reform**) which increased the coverage of secrecy provisions, failed to provide adequate safeguards and heightened penalties; the 2019 raids on journalist Annika Smethurst and the Australian Broadcasting Corporation (**Press Raids**); and the prosecution of whistleblowers Witness K, Bernard Collaery, David McBride and Richard Boyle, have all contributed to the ascendancy of secrecy in Australia.

The enlargement of the secrecy regime in Australian law is demonstrated by three examples. First, in 2009, 506 secrecy provisions in federal law were identified in the ALRC Report. More than a decade later, the number of provisions, as identified in the Consultation Paper, has expanded significantly – from two general offence provisions to 11, from 506 provisions in total to 553, and, including non-disclosure duties, 849 provisions in total – a 67% increase (although we note that the identification criteria used by the ALRC and the Department were not identical).

Second, the penalties provided for by general secrecy provisions have expanded considerably. The two general secrecy provisions in the *Crimes Act 1914* (Cth), at ss 70 and 79, provided for a maximum term of imprisonment of two years, or, in exceptional cases involving official secrets and an intention to prejudice the security of defence of the Commonwealth, a maximum term of seven years. In contrast, most of the general secrecy provisions in the *Criminal Code Act 1995* (Cth), enacted in the 2018 Reform, increase the maximum term of imprisonment to three years, a 50% increase. Some of these new offence provisions contain a maximum term of imprisonment of seven years, while aggravated offence provisions increase the maximum term to five and 10

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[2] Human Rights Committee, *General Comment No 34: Article 19: Freedoms of Opinion and Expression*, 102nd sess, UN Doc CCPR/C/GC/34 (12 September 2011) [18].

[3] 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].

years respectively. Only two of the 11 general secrecy provisions remain at a maximum term of two years' imprisonment.

Third, the 2018 Reform considerably expanded the conduct and content captured by the general secrecy provisions. The general secrecy provision in section 70 of the *Crimes Act* was, for example, limited to (a) current or former Commonwealth officers who (b) published or communicated information when they were under a duty not to disclose. The 2018 Reform expanded the application of general secrecy provisions to (a) any person (not only current or former Commonwealth Officers) in relation to (b) any dealing with of relevant information (not only publishing or communicating). These expansions, achieved in some cases through vague language and uncertain definitions, compound the chilling effect of secrecy provisions in federal law.

To address these concerns, we recommend six primary reforms, which are detailed below in turn. These address some, but not all, of the issues raised in the Consultation Paper. We conclude with a section addressing several other distinct questions from the Consultation Paper.

Reduction and Harmonisation of Secrecy Offences

Addressing Questions 2 and 3 in the Consultation Paper

The ALRC Report carefully considered the need for specific secrecy offences to exist alongside general secrecy provisions. It recommended that specific secrecy offences are only warranted where they (a) are necessary and proportionate to the protection of essential public interests of sufficient importance to justify criminal sanctions; and (b) differ in significant and justifiable ways from general secrecy provisions.[4]

The proliferation of specific secrecy provisions across federal law is inconsistent with these recommendations. It surely cannot be the case that there is a need for 542 specific secrecy offences and 296 non-disclosure duties attracting criminal liability, in addition to the already expansive general secrecy provisions. The proliferation of specific secrecy provisions has threefold negative consequences: (a) there is inconsistency in the elements and defences available; (b) the same conduct can be criminalised in multiple, different ways; and (c) the chilling effect of secrecy provisions is compounded by the uncertainty and overlap.

We strongly recommend that the Government take this opportunity to repeal the vast majority of specific secrecy provisions in Australian law, which in most cases cover conduct which is already covered by the general secrecy provisions. Only in contexts where a specific provision differs in significant, justifiable way should it remain intact. However, even specific provisions which remain should be amended in line with the principles set out in this submission, to ensure harmonisation and consistency. It should not be the case, for example, that journalists have a defence under general secrecy provisions but not specific secrecy provisions (except in the rare case where such a discrepancy is justifiable).

> *Recommendation 1: Individual secrecy provisions should be removed with a preference for reliance on general secrecy provisions, except where there are*

[4]Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, ALRC 112, (2009) 307-8.

compelling reasons for a standalone regime. Remaining secrecy provisions should be harmonised to the maximum extent possible.

A Serious Harm Requirement

Addressing Questions 1 and 2 in the Consultation Paper

To appropriately balance the interests of secrecy and transparency in our democracy, secrecy provisions should focus on preventing serious harm. The criminalisation of the disclosure of information is unnecessary where disclosure does not lead to potential or actual significant harm to the public interest. Serious harm is therefore an important threshold upon which provisions should be based.

This accords with Australians international law obligations. The conviction of an individual for breach of a secrecy offence where the relevant disclosure did not and was not likely to cause serious harm is unlikely to be proportionate under Article 19, and therefore may be contrary to the *ICCPR*. The United Nations Human Rights Committee has emphasised that 'it is not compatible with [Article 19], for instance, to invoke such laws to suppress or withhold from the public information of legitimate public interest **that does not harm national security**'.[5] Proportionality in such circumstances, the Committee added, requires 'establishing a direct and immediate connection between the expression and the threat.'[6]

A harm-based requirement was at the heart of the approach recommended by the ALRC Report. It said:

> *The ALRC's key recommendation for reform in the criminal context is that, in most cases, the prosecution should be required to prove that a particular disclosure caused harm, was reasonably likely to cause harm, or was intended to cause harm to specified public interests, such as the security or defence of the Commonwealth. In the absence of any likely, intended or actual harm to an essential public interest, the ALRC has formed the view that the unauthorised disclosure of Commonwealth information is more appropriately dealt with by the imposition of administrative penalties or the pursuit of contractual remedies.*[7]

The breadth and vagueness of many of the general secrecy provisions give insufficient focus to a requirement for actual or potential serious harm to the public interest. For example, anyone who deals with or communicates information with a security classification of 'secret' is liable for an offence – even where there is no actual or potential harm (s 122.4A). Section 122.4 is even more egregious in failing to incorporate a harm requirement – if a Commonwealth official communicates information obtained by reason of their employment, and they are under a duty not to disclose, they face a maximum term of imprisonment of two years. This provision could apply to any form of disclosure of even the most mundane government information – the number of staplers ordered by the Attorney-General's Department, for example. This is entirely disproportionate, especially when other administrative

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[5] Human Rights Committee, *General Comment No 34: Article 19: Freedoms of Opinion and Expression*, 102nd sess, UN Doc CCPR/C/GC/34 (12 September 2011) [30] (emphasis added).

[6] Ibid [35].

[7] ALRC Report, above n 4, 99-100.

remedies are available. To ensure consistency with Australia's international law obligations all general secrecy provisions should be revised to exclude an explicit serious harm requirement.

> *Recommendation 2: Secrecy provisions should include a serious harm requirement, requiring that a disclosure caused serious harm, was likely to cause serious harm or was intended to cause serious harm, to an essential public interest*

Exclusion of Outsiders

Addressing Questions 1 and 2 in the Consultation Paper

Secrecy obligations imposed on Commonwealth officials are justified, in part, because of the role of those subject to the obligations – public servants who have contractual, statutory and equitable duties to their employer, the Commonwealth. Public servants are in a special relationship of trust with the Commonwealth, and can therefore be held to certain standards in relation to the protection of information.

This rationale is not applicable to 'outsiders' – ordinary citizens, including journalists and human rights defenders, who do not have a special relationship with the Commonwealth. It is for this reason that myriad reviews in this context, including the ALRC Report, the Gibbs Review into Commonwealth Criminal Law and the Independent National Security Legislation Monitor's review into the *ASIO Act* and Press Freedom,[8] have suggested that outsiders should not be subject to the same offences and penalties as government insiders. Secrecy provisions dealing with 'outsiders' must be strictly calibrated, in light of the distinct context.

The current 'outsider' offences in the general secrecy provisions, s 122.4A(1) and (2), are too broad. Section 122.4A(1) applies to any person, other than a Commonwealth official, who communicates information obtained by another person who was a Commonwealth official, and that has a secret or top secret security classification, causes harm to Australia's security or defence or the Australian public or interferes with a criminal process. The offence requires intent for the communication and recklessness as to the other elements. It contains a maximum penalty of five years.

This provision is extremely wide. While its effect is somewhat mitigated by the available defences, its scope goes beyond what is justifiable to impose on 'outsiders'. We would recommend that the provision be recast to require intent as to the harm caused by the communication, and those categories of harm be narrowed. The maximum term should also be reduced, to reflect the fact that it applies to Australians at large rather than a defined category with pre-existing confidentiality obligations.

Section 122.4A(2) is even more problematic. It applies in relation to the same elements, but for dealing with information, rather than communicating it, with a maximum penalty of two years. The lack of clarity around the breadth of 'deals with information' means that it is possible that the receipt of information, even unsolicited,

[8] ALRC Report, recommendations 6-6 and 6-7; H Gibbs, R Watson and A Menzies, *Review of Commonwealth Criminal Law: Final Report* (1991) 323; Independent National Security Legislation Monitor, *Report on the Impact on Journalists of Section 35P of the ASIO Act* (October 2015).

could give rise to criminal liability. We would recommend that s 122.4A(2) be repealed in its entirety.

> *Recommendation 3: Secrecy provisions should not apply to 'outsiders', ie those who do not receive information in an official government capacity, except in exceptional circumstances.*

Exclusion of Non-Communicative Conduct

Addressing Questions 1 and 2 in the Consultation Paper

The primary general secrecy provision in the *Crimes Act*, at s 70, focused on conduct of disclosure – 'publishes or communicates'. The 2018 Reform significantly expanded the scope of the general secrecy provisions, with numerous provisions now criminalising 'other dealings with information'. The breadth of these provisions is extraordinary, vastly expanding the criminalisation of conduct. The ALRC Report recommended that general secrecy provisions be limited to 'disclosure', given the heightened harm caused by disclosure. The ALRC noted that 'in some contexts, such as national security, offences that cover conduct other than disclosure may be necessary … These are context-specific provisions, however, and this approach is not appropriate in general provisions applying to all Commonwealth information.'[9]

We echo this view. The harm of breaches of secrecy provisions crystalises in the disclosure of the confidential information. Non-communicative conduct may warrant administrative sanction, or, in particular contexts (such as national security), may warrant a lesser criminal offence provision. But it is unnecessary and disproportionate, and out of step with Australia's international obligations, to persist with such sweeping secrecy provisions.

> *Recommendation 4: General secrecy provisions should apply only to communication, and not the wider current category of 'dealing with' information.*

Proportionate Penalties

Addressing Question 1 in the Consultation Paper

As highlighted above, the 2018 Reform significantly increased penalties for general secrecy provisions. No compelling rationale was presented for these increases. There remains no evidence of a pressing need for dramatically increased maximum imprisonment terms. In most cases, we consider that administrative sanctions are sufficient to manage contraventions of secrecy obligations – such as investigation and possible dismissal under the APS Code of Conduct. In exceptional cases, where criminal prosecution is warranted, we consider that the prior maximum term of imprisonment of two years (in the s 70 general secrecy provision in the *Crimes Act*) was proportionate. In cases with aggravating factors, a heightened penalty may be warranted. The ALRC Report recommended a maximum term of seven years[10] – we

[9] ALRC Report, above n 4, 203.

[10] Ibid 262.

consider that to be the outermost limit of what might be considered proportionate for even the most serious of aggravated offences.

There has not been a single prosecution under the 2018 Reform provisions. Nonetheless, the heightened penalties send a chilling message to whistleblowers, journalist and human rights defenders. Reducing the maximum penalties to ensure proportionality would be an important step towards mitigating the impact of the general secrecy obligations on transparency and press freedom in Australia.

> *Recommendation 5: Penalties for contravening secrecy provisions should be reduced to ensure proportionality.*

Exemptions for Whistleblowers, Human Rights Defenders and Journalists

Addressing Questions 4 and 5 in the Consultation Paper

Disclosure of government wrongdoing should not be prevented by secrecy provisions. That is why it is essential that whistleblowers, human rights defenders and journalists be excluded from these laws. Presently, in theory, whistleblowers from within the Commonwealth public sector can access defences under ss 122.5(4) and (4A), provided they complied with the *Public Interest Disclosure Act 2013* (Cth) (***PID Act***) or blew the whistle to the appropriate agency. Similarly, journalists can, in theory, avail themselves of a defence provided they reasonably believed they were engaging in conduct in the public interest: s 122.5(6).

These are important attempts to support whistleblowing and press freedom. However, operating as defences, they still place the burden on whistleblowers and journalists to prove the defence (bearing the evidential burden), and bearing the cost and stress of a prosecution. The Press Raids demonstrated how damaging police investigations can be to press freedom. The whistleblower defence, in particular, is undermined by serious weaknesses in the *PID Act*, and gaps and inconsistencies applying to any whistleblowers outside the *PID Act* regime (e.g. in the corporate or not-for-profit sectors). These problems will not be fully remedied until comprehensive reform is enacted, as outlined in our joint report *Protecting Australia's Whistleblowers: The Federal Roadmap*.

There is also a gap for people other than whistleblowers and journalists, such as human rights defenders, who wish to disclose wrongdoing in other scenarios, such as reporting of human rights abuses to international watchdogs and to not-for-profit organisations.

Accordingly, to ensure these disclosure protections are made real, we recommend the general secrecy provisions should be amended to include an **exemption** for whistleblowers and journalists, rather than being framed as defences. We also recommend the insertion of a new exemption for those exposing serious government wrongdoing, including human rights abuses, even if they are not whistleblowers or journalists.

Additionally, but crucially, we would recommend a fail-safe general public interest defence for use where the information of wrongdoing is in the public interest but, for whatever reason, other defences/exemptions were not available. This is due to the difficulties sometimes faced by those exposing wrongdoing in meeting the technical

requirements of defences and protection provisions because they fall into an unanticipated category of disclosure.

We note the approach adopted by Zoe Daniel MP in her proposed amendment to the *PID Act*, which would provide whistleblower protection for external and emergency disclosures even where the existing requirements for protection are not met, in circumstances where 'the disclosure is otherwise reasonable and in the public interest, having regard to all of the circumstances.' This would empower a judge or jury to make a holistic assessment of the public interest in the disclosure of wrongdoing and whether it overrides any interest in secrecy in a particular case, as a last resort.

> *Recommendation 6: There should be a robust exemption for journalists, whistleblowers and human rights defenders communicating information in the public interest.*

Responses to Consultation Questions

Question 9

The public interest journalist defence in s 122.5(6) is a positive step forward in protecting press freedom in Australia. Subject to what we say above about the desirability of these being exemptions rather than defences, we would encourage the introduction of a generalised public interest journalism defence applicable to most, if not all, specified secrecy offences in federal law.

Question 10

Section 123.5 of the *Criminal Code* presently requires the Attorney-General to consent to any prosecution under the general secrecy provisions. Additionally, the Attorney-General has issued a direction under the *Director of Public Prosecutions Act 1983* (Cth) requiring the Attorney-General's consent to the prosecution of a journalist in certain circumstances.

We recognise the need for strong safeguards to prevent unjustified prosecutions of whistleblowers, journalists and human rights defenders. The requirement for the Attorney-General's consent is, at this stage, better than nothing, but it is not the preferable approach to safeguarding press freedom.

Australia's criminal justice system is predicated on an independent prosecutorial process. It is contrary to this principle to require the Attorney-General's consent. For the reasons set out in the ALRC Report,[11] we consider the consent requirement to be undesirable. As the Attorney-General retains discretion, at common law and in the *Judiciary Act 1903* (Cth) to discontinue a prosecution, which represents a safeguard of last resort, the front-end consent requirement is in some respects unnecessary.

However, the current requirement does go some way to alleviating the risk to press freedom and whistleblowers posed by the general secrecy provisions. By placing ultimate political accountability on the Attorney-General, the requirement imposes a high-order level of consideration of these wider democratic principles. This is the case even though the Attorney-General retains the power to discontinue a prosecution,

[11] ALRC Report, above n 4, 266.

given the damage that can be done to press freedom and whistleblower protections through the commencement of a prosecution, even if discontinued.

In a better system, with properly calibrated secrecy offences, robust whistleblower protections and warrant protections for journalists,[12] the Attorney-General's consent would not be required – and, indeed, would be undesirable, in light of the underlying principles. However, until that point, we consider that on balance the status quo remains a pragmatic safeguard against further threats to transparency in Australia.

Moving forward, one way in which the proper institutional roles could be respected would be for the Attorney-General to issue guidance to the Commonwealth Director of Public Prosecutions in relation to the considerations to be taken into account in considering whether to prosecute whistleblowers or journalists.

Conclusion

In the Human Rights Law Centre's submission to the review of the 2018 Reform by the Parliamentary Joint Committee on Intelligence and Security, we remarked:

> *This type of legislation has no place in a healthy democracy, in which open government and the freedom to scrutinise government must be maintained, and those who expose wrongdoing must be supported and protected.*[13]

Before it was enacted, the 2018 Reform was slightly improved following the Committee's recommendations. But these changes did not go far enough. Australia's secrecy laws, underpinned by the general secrecy provisions, are excessively broad, cover an unnecessary wide variety of conduct, fail to adopt a proper serious harm-based approach and contain disproportionate penalties. These provisions, even as improved prior to becoming law, still have no place in a healthy democracy.

We commend the Department for undertaking this review. We urge swift reform to better reconcile the tension between secrecy and transparency in this country. A transparent Australia is a better Australia.

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[12] See Rebecca Ananian-Welsh and Jason Bosland, 'Protecting the Press from Search and Seizure: Comparative Lessons for the Australian Reform Agenda' (2023) 46(3) *Melbourne University Law Review* (forthcoming).

[13] Human Rights Law Centre, 'Secrecy offences: the wrong approach to necessary reform', submission to the Inquiry into the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017, Parliamentary Joint Committee on Intelligence and Security, i.