A CHILLING EFFECT

SUBMISSION OF THE MEDIA, ENTERTAINMENT AND ARTS ALLIANCE TO THE INSLM REVIEW OF SECRECY OFFENCES IN PART 5.6 OF THE *CRIMINAL CODE 1995*.

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Introduction

MEAA welcomes the opportunity to make a submission to the review of secrecy offences in Part 5.6 of the *Criminal Code 1995*. This section of the law includes "offences that apply to Commonwealth officials (including contractors) who disclose or otherwise deal with what is defined as 'inherently harmful information' or information that falls into a category defined as 'causing harm to Australia's interests'".[1] Journalists are implicated in this law as potential conduits of information flowing from disclosure to the public.

This submission relates to the terms of reference of the review of secrecy offences in *Part 5.6 of the Criminal Code 1995*, specifically questions 1 through 4. In particular, this submission responds to the definitions of 'inherent harm' and 'deals with information', as well as the operation of the public interest defence.

MEAA is the largest and most established union and industry advocate for workers in the creative and cultural industries, with a history going back more than 110 years. This submission is directed at the media sector, where MEAA has more than 5,000 members. Our members in these industry areas include journalists and media workers.

Public interest journalism is critical for a well-functioning democracy. It can expose corruption, support transparency of government, inform the community, and contribute to public debate.[2] Prominent cases in recent years, such as the Afghan files, the Timor spying scandal, or the Signals Directorate leak, are stories that were enabled by whistleblowers working with journalists to produce public interest journalism. There is no doubt the publication of information in these instances served the public interest, exposing as they did poor behaviour that could undermine the safety of Australians. They might have been embarrassing to Australia, but it was crucial to the public interest that these matters came to light.

The media's role in such cases is to act in the public interest: to question, to challenge, and to seek answers on behalf of citizens and taxpayers. While MEAA recognises that some information should be withheld where there are genuine risks to national security, this should not automatically override transparency and public interest journalism.

Transparency is crucial for Australians to have faith and confidence in our national security agencies, systems, and processes. These provisions in the Criminal Code – and the hundreds of other secrecy clauses across federal legislation – undermine the public's right to know.

In Australia, public interest journalism is under threat. The existence of Part 5.6 has severely curbed the legitimate work of journalists. This legislation, with its broad definitions, is deliberately designed to shut down legitimate media inquiry.

[1] INSLM (2024) *INSLM review of secrecy offences in Part 5.6 of the Criminal Code 1995: Issues Paper*, https://www.inslm.gov.au/node/268

[2] Sweet et al (2020) 'Converging crises: public interest journalism, the pandemic and public health', *Public Health Research and Practice*, p 1, https://www.phrp.com.au/wp-content/uploads/2020/12/PHRP3042029.pdf

The general secrecy provisions are so poorly defined that they could lead to the perverse outcome whereby anyone who deals with information that has been classified as 'secret' or 'top secret' has potentially committed an offence, regardless of the potential for, or cause of, any harm.

These provisions, combined with other limitations and restrictions on reporting in the public interest compound to produce a chilling effect on the important role of the media in holding power to account. This is having a real impact on public interest journalism in Australia. According to widely accepted measures, press freedom in Australia has suffered setbacks in recent years[3] whilst perceptions of corruption have increased.[4] These are two sides of the same coin – an erosion of transparency and accountability and a reduced commitment to media freedoms within governments.

MEAA is concerned at the inability of media organisations and journalists to challenge the decisions made that affect their work, in the name of national security. More weight needs to be given to the public interest in the disclosure of information. Journalists and media agencies must have the right to argue in front of a judge or other judicial officer as to why something is in the public interest. It should not be up to governments, security or intelligence agencies, or the public service in general to decide what is in the public interest.

There should be no blanket bans or provisions that prevent disclosure forever. Restrictions should only be made in the narrowest of terms, with time limits, automatic review provisions, and mechanisms to challenge in the public interest. These processes should also be transparent, as much as possible, to restore faith in the system.

Every rule should have an exception.

Further, MEAA has real concerns that the sacrosanct obligation for journalists to protect a source has been eroded in several ways – by legislation, technology, and authorities wanting to avoid scrutiny.

MEAA recommends:

Recommendation 1: That journalists' obligations to protect sources be a consideration in disclosure provisions.

Recommendation 2: That the definition of 'inherently harmful' be amended to that which presents a clear, present, and serious danger to the public good.

Recommendation 3: Secrecy provisions be amended to require that a serious harm is identified with the decision to protect information. That a transparent framework be adopted to guide the decision-making process when determining whether to protect information from being released is in the public interest.

[3] Reporters Without Borders (2023) *World Press Freedom Index*, https://rsf.org/en/country/australia
[4] Transparency International (2023) *Australia profile*, https://www.transparency.org/en/countries/australia

Recommendation 4: Secrecy provisions should be amended to place reasonable time limits on the protection of information from release. Disclosure restrictions should be applied narrowly and only as absolutely necessary.

Recommendation 5: Secrecy provisions be amended to enable journalists, media agencies, and other public interest actors, such as human rights defenders, to contest the classification of protected government information. That this process is facilitated by a transparent framework that includes timely communication between government and the challenger.

Recommendation 6: That classification provisions be regularly reviewed, that there are few blanket classifications and only in the narrowest of circumstances for the truly sensitive information within a document.

Recommendation 7: Amend secrecy provisions to exclude journalists from criminal liability for merely receiving or handling information.

Recommendation 8: That the evidentiary burden of the public interest defence be reversed so that the onus is on the Commonwealth to establish that the information's handling or release was not in the public interest.

Restrictions on current journalistic practices

Journalists already work in a challenging information landscape. While it's not the scope of this review, it's important to have a complete picture of the ways in which government policies and practices outside of national security affect public interest journalism.

Existing Freedom of Information (FOI) processes are subject to frequent delays and backlogs and are administrated by often-unresponsive public services. At all levels of government, MEAA members experience major hurdles in what is an increasingly dysfunctional system. This makes the jobs of journalists more difficult and undermines public confidence in the transparency and accountability of government.

Australia's defamation landscape, which has been characterised as one of the most litigious in the world, adds to the difficulties journalists face.[5] The system is stacked against journalists, sending the message that the right to reputation is more important than the right to freedom of expression and the public's right to know. Media organisations simply do not have the money or human resources to withstand long and drawn-out legal proceedings. This means that, rather than guaranteeing fairness, these laws are being used as a weapon to threaten and attack legitimate reporting.[6]

The prosecutions of whistleblowers have a further 'chilling effect' on journalism. The prominent and public prosecutions of whistleblowers are a deterrent for others. The prosecutions of David McBride, Richard Boyle, and Bernard Collaery for instance, are all emblematic of government's desire to quash whistleblowing by making an example out of those who speak out.

[5] See Louisa Lim (2019) 'How Australia Became the Defamation Capital of the World', *The New York Times*, https://www.nytimes.com/2019/03/05/opinion/australia-defamation-laws.html

As one journalist member of MEAA put it: “We are blocked”. Whether it is accessing documents through FOI, backgrounding through the public service or communicating with ministers, departments, or agencies – information is becoming more difficult to obtain. At a time of stretched budgets at media organisations, pursuing so-called ‘unproductive’ journalism (that is, journalism that does not have clear and obvious outcomes) is increasingly hard to justify, and fewer organisations are doing it. It’s important to note that in a media industry as concentrated as Australia’s this has an amplified effect on small agencies. It is almost impossible for small media organisations or freelance journalists to navigate the legal complexity of some of these laws and regulations, which further threatens the public’s right to know.

The effect of these provisions in the Criminal Code, and the myriad other laws and regulations within the legislation, is to shut down legitimate media inquiries in the name of national security. MEAA members have told us that laws such as this have significantly reduced the amount of information that is being “leaked” or provided to journalists in the public interest. One noted that “what this regime does is put up an impenetrable wall of uncertainty” for journalists.

We don’t know what we don’t know, and the current setup ensures that we can’t know.

Protecting sources

A key tenet of MEAA’s Journalist Code of Ethics is to protect sources. The cases referred to above have struck a blow to this important principle. In these instances, the security agencies went to great lengths, publicly and prominently, to find sources and to seek out whistleblowers. In at least one instance – the case of the Afghan files – the source was already known to authorities.

Protecting sources is harder than ever in the digital age where technology has the ability to track the flow of information. MEAA is concerned that the culture of avoiding scrutiny that has been enabled by secrecy laws and legislation generally is making it exceedingly difficult for journalists to meet their ethical obligations to sources in the context of these technological changes.

Definition of ‘inherently harmful’

MEAA is concerned that the definition of ‘inherently harmful’ in section 122.1 is extremely broad. It captures all operational information and any document that is classified ‘secret’ or ‘top secret’. It arguably spans information that poses no harm to the Australian community. The test of harm seems to be a subjective one that is applied by law enforcement authorities.

MEAA submit that the risk of ‘harm’ must be objectively credible (i.e., real) and the law should not provide such an elaborate shield against the disclosure of information that is in the public interest.

Overreach on classification

MEAA is also concerned that classifying documents ‘top secret’ or ‘secret’ is a convenient (or default) means of ensuring that information is suppressed, or its communications are subject to heavy sanction.

It's important to note that journalists would in many (or most) instances be unaware that documents had been classified as secret or top secret. One journalist told us "they'll slap a 'top secret' on anything", noting that classified documents often feature only brief amounts of truly sensitive information, yet the entire document is subject to the classification. There must be provisions to differentiate what is truly sensitive and what is not. As well MEAA would argue there should be the ability to review a document's status and that documents should not be given a permanent non-disclosure classification. Third parties, such as journalists and media agencies, should have the right to challenge the blanket provisions preventing disclosure of some documents.

Recommendation 1: That journalists' obligations to protect sources be a consideration in disclosure provisions.

Recommendation 2: That the definition of 'inherently harmful' be amended to that which presents a clear, present and serious danger to the public good.

Recommendation 3: Secrecy provisions be amended to require that a serious harm is identified with the decision to protect information. That a transparent framework be adopted to guide the decision-making process when determining whether to protect information from being released is in the public interest.

Recommendation 4: Secrecy provisions should be amended to place reasonable time limits on the protection of information from release. Disclosure restrictions should be applied narrowly and only as absolutely necessary.

Recommendation 5: Secrecy provisions be amended to enable journalists, media agencies, and other public interest actors, such as human rights defenders, to contest the classification of protected government information. That this process is facilitated by a transparent framework that includes timely communication between government and the challenger.

Recommendation 6: That classification provisions be regularly reviewed, that there are few blanket classifications and only in the narrowest of circumstances for the truly sensitive information within a document.

Definition of 'deals with information'

The definition of 'deal' in section 122.4 is that a person deals with information if they do any of the following: (a) receive or obtain it; (b) collect it; (c) possess it; (d) make a record of it; (e) copy, alter; (f) conceal; (g) communicate it; (h) publish it; or (i) make it available. It is extremely broad and criminalises the mere handling and/or exchange of information, much less its publication.

MEAA disagrees with the views contained in the final report of the Review of Secrecy Provisions which stated that "unsolicited receipt or other unwitting dealings will not be sufficient to reach the threshold of intention required by sections 122.1(2), 122.2(2) and 122.4A(2)".[6]

[6] Attorney General's Department (2023) *Final Report, Review of Secrecy Provisions,* https://www.ag.gov.au/sites/default/files/2023-11/secrecy-provisions-review-final-report.pdf

As noted by the Human Rights Law Centre, Transparency International Australia and the Centre for Governance and Public Policy, Griffith University in their joint submission to the Secrecy Provisions Review: "The lack of clarity around the breadth of 'deals with information' means that it is possible that the receipt of information, even unsolicited, could give rise to criminal liability. We would recommend that s 122.4A(2) be repealed in its entirety."[7]

It should be remembered that following the raids on the ABC and News Corp's Annika Smethurst, then-Attorney General Christian Porter issued a direction under the Commonwealth Director of Public Prosecutions Act 1983 requiring the Attorney-General's consent to the prosecution of journalists for national security offences, "as a separate and additional safeguard" to the CDPP believing it is in the public interest to prosecute. While this provides an added layer of scrutiny, it is extremely narrow in scope.

Recommendation 7: Amend secrecy provisions to exclude journalists from criminal liability for merely receiving or handling information.

The public interest defence

Part 5.6 of the Criminal Code includes a defence for public interest journalism. This provides a defence in the case that "the person communicated, removed, held, or otherwise dealt with the relevant information in the person's capacity as a person engaged in the business of reporting news, presenting current affairs, or expressing editorial or other content in news media", and at the time, "the person reasonably believed that engaging in that conduct was in the public interest".[8]

The public interest is something journalists intrinsically know, as they are on the frontline of the community and are experiencing and reading community responses and attitudes. Information about the actions of our security forces and intelligence agencies is in the public interest: it helps people to fully understand the policies, programs and processes that are being done with their money and in their name. However, it is not easy nor useful to define public interest, as it changes from day to day, year to year. It cannot and should not be subject to a black-and-white definition.

MEAA is concerned that when a journalist seeks to rely on the public interest defence, that person bears the evidential burden (as well as the cost and stress) of establishing that the handling or dissemination of the information was in the public interest. Therefore, a journalist is required to present evidence showing that they reasonably believed that engaging in the conduct was in the public interest. This is the reverse of the usual practice in criminal law, where the onus is on the prosecution. MEAA believes that the evidentiary burden should be reversed, and that the Commonwealth should be compelled to establish that the information's handling or release was not in the public interest. Alternatively, the offence provision could stipulate that the handling or

[7] Human Rights Law Centre, Transparency International Australia and the Centre for Governance and Public Policy, Griffith University (2023) *Joint submission to Secrecy Provisions Review,* https://consultations.ag.gov.au/crime/review-secrecy-provisions/consultation/view_respondent?uuId=638488631

[8] INSLM (2024) *INSLM review of secrecy offences in Part 5.6 of the Criminal Code 1995: Issues Paper*, https://www.inslm.gov.au/node/268

disclosure of information was not in the public interest. If this were the case, the prosecution would bear the evidentiary onus.

Recommendation 8: That the evidentiary burden of the public interest defence be reversed so that the onus is on the Commonwealth to establish that the information's handling or release was not in the public interest.

Politicisation

MEAA notes that the Attorney-General's written consent is required for prosecution under the general secrecy offences in Part 5.6. This legislative requirement is described as providing "an additional layer of scrutiny"[9], however, it risks politicising the process. Ministerial discretion should be viewed with scepticism and caution. In a legislative framework that incorporates greater protections for journalists and whistleblowers, this power would ideally be unnecessary, but given current constraints is a pragmatic safeguard.

Conclusion – call for further reform

Combined with the other restrictions and limitations on the work of journalists – limited FOI laws, broad defamation laws, the use of court suppressions and non-publication orders, and the severe control of official information channels – these laws are a significant impediment to public interest journalism.

Consistent with previous inquiries, MEAA reiterates our call for comprehensive reform of secrecy provisions, which would address the right to contest the application of warrants for journalists and media organisations, safeguard adequate protections for whistleblowers, ensure a properly functioning FOI regime, and reform defamation law.

[9] Attorney General's Department (2023) *Review of Secrecy Provisions, consultation paper,* https://consultations.ag.gov.au/crime/review-secrecy-provisions/user_uploads/review-secrecy-provisions-consultation-paper.pdf