



Law Council
OF AUSTRALIA

Inquiry into the Impact of the Exercise of Law Enforcement and Intelligence Powers on the Freedom of the Press

Parliamentary Joint Committee on Security and Intelligence

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote 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 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

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

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2019 Executive as at 16 September 2019 are:

- Mr Arthur Moses SC, President
- Ms Pauline Wright, President-elect
- Dr Jacoba Brasch QC, Treasurer
- Mr Tass Liveris, Executive Member
- Mr Ross Drinnan, Executive Member
- Executive Member, Vacant

The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council acknowledges the assistance of its National Criminal Law Committee in the preparation of this submission.

Introduction

1. On 14 August 2019 the Law Council of Australia (**Law Council**) appeared before the Parliamentary Joint Committee on Intelligence and Security (**the Committee**) in relation to the inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press (**the Inquiry**).
2. The Law Council accepted a further invitation by the Committee to appear on 20 September 2019.
3. In the course of the September public hearing, the Law Council undertook to take several matters on notice. This additional submission provides responses to those specific matters for the benefit of the Committee, in addition to responses to answers provided by the Attorney-General's Department and the Department of Home Affairs.
4. This submission also briefly addresses the Ministerial Direction issued to the Commonwealth Director of Public Prosecutions on 19 September 2019 by the Attorney-General.¹
5. This submission is ancillary to the Law Council's written submissions to the Inquiry of 7 and 23 August.

Questions on Notice

Question 1: Journalist information warrant process

6. Committee member, the Hon Mark Dreyfus QC MP, inquired whether the Law Council has considered if the journalist information warrant process should be extended to other warrants and coercive investigatory powers under the *Telecommunications (Interception and Access) Act 1979* (Cth) (**TIA Act**) dealing with journalists and media organisations.²
7. The Law Council has recommended throughout the Inquiry that the determination of warrants authorising investigative action of journalists or media organisations would be improved through a three-step approach involving the:
 - (a) introduction of a legislative public interest test similar to the test provided in section 180T of the TIA Act;
 - (b) requirement that an 'issuing officer' is a judge of a superior court of record, rather than that currently provided in section 3C of the *Crimes Act 1914* (Cth) (**Crimes Act**); and
 - (c) adoption of a Public Interest Advocate (**PIA**) or Public Interest Monitor (**PIM**) regime that includes appropriate transparency and accountability mechanisms.³

¹ Attorney-General, 'Ministerial Direction (Commonwealth Director of Public Prosecutions) – *Director of Public Prosecutions Act 1983*' in Commonwealth of Australia, Government Notices Gazette, 19 September 2019.

² Evidence to Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, Canberra, 20 September 2019, 69 (Hon Mark Dreyfus QC MP).

³ Law Council of Australia, Submission No 40 to the 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* (7 August 2019) 34-5; Law Council of Australia, Submission No 40.1 to the Parliamentary Joint

8. Noting the Law Council's earlier concerns with the current PIA scheme as it operates under the TIA Act, the Law Council is of the view that an improved PIA scheme for journalist information warrants under the TIA Act could be adopted for other search warrants relating to journalists.
9. Whether this model should extend to other warrants and coercive investigatory powers dealing with journalists and media organisations under the TIA Act, such as computer access warrant, foreign intelligence warrant or identified persons warrant, would require specific consideration of each power relied upon.
10. However, in principle, the Law Council considers that introducing such a process as outlined above could promote greater scrutiny on the grounds advanced for exercising such powers over journalists and media organisations.

Question 2: Specific intelligence operations offences

11. Committee member, the Hon Mark Dreyfus QC MP, inquired if the Law Council had a view on whether the *Australian Security and Intelligence Organisation Act 1979* (Cth) (**ASIO Act**) should be amended in relation to specific intelligence operations.⁴
12. As noted in the Law Council's earlier submissions to the Committee, the Law Council recommends that section 35P of the ASIO Act should provide protection for those outsiders who, in good faith, make public interest disclosures, as well as those who publish such disclosures in the public interest, about special intelligence operations (**SIOs**), which at the same time ensures that a disclosure that is genuinely likely to result in serious harm to individuals is not publicly disclosed.⁵
13. The Law Council notes the response provided by the Department of Home Affairs (**the Department**) that (in summary):
 - (a) The key policy objective of section 35P of the ASIO Act is to deter the disclosure of information relating to a SIO in order to prevent risk of harm to the safety of participants or to the integrity of a SIO. The offences in section 35P are necessary and appropriate to protect sensitive information about the existence and conduct of SIO.
 - (b) Section 35P does not operate to prohibit all public disclosures which may relate to a SIO. For example, a disclosure concerning potentially illegal conduct by staff of ASIO would not be an offence where the person making the disclosure is unaware of a substantial risk that the information relates to a SIO.
 - (c) Paragraph 35P(3)(f) already provides an exception to section 35P and allows for disclosures in relation to a SIO to an Inspector-General of Intelligence and Security official. This enables any person, including a journalist, lawyer, SIO participant or member of the public to make disclosures to an Inspector-General of Intelligence and Security official, where they become aware of illegal activity, misconduct or corruption in relation to a SIO.

Committee on Intelligence and Security, *Inquiry into the Impact of the Exercise of Law Enforcement and Intelligence Powers on the Freedom of the Press* (23 August 2019) 5 [2].

⁴ Evidence to Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, Canberra, 20 September 2019, 70 (Hon Mark Dreyfus QC MP).

⁵ Law Council of Australia, Submission No 40 to the 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* (7 August 2019) 26.

- (d) A broad defence to section 35P that would enable a person to reveal illegal activity, misconduct or corruption that may have occurred in relation to a SIO could have extremely serious consequences for those involved in the SIO, and the ability of the ASIO to collect intelligence if the integrity of the operation is jeopardised.
14. Nonetheless, the Law Council considers that the absence of a public interest defence for outsiders in the ASIO Act creates uncertainty as to what may be published about the activities of ASIO without fear of prosecution. The exceptions in paragraph 35P(3)(f) require the potential discloser to make a subjective assessment as to whether the imputed conduct amounts to illegal activity, misconduct or corruption. While a broader defence to section 35P that would enable a person to reveal illegal activity, misconduct or corruption that may have occurred in relation to a SIO could have extremely serious consequences for those involved in the SIO, the corollary to this argument is that the failure to reveal illegal activity, misconduct or corruption in a timely manner could also have extremely serious consequences.
 15. An additional legislative defence to the SIO offences could provide greater protection for those who, in good faith, make public interest disclosures. It could also serve to preserve public faith that SIOs are being carried out lawfully and with the highest ethical standards.
 16. The Law Council believes the policy objectives of section 35P of the ASIO Act can still be achieved while ensuring the public interest in being able to report on serious instances of misconduct that occurs during a SIO can be reported. The determination of these issues should be done during court proceedings where than be judicial consideration of the merits or otherwise of a public interest defence.
 17. The Law Council considers that an additional legislative defence to the SIO offences could provide greater protection for those outsiders who, in good faith, make public interest disclosures. Such a defence would need to be framed in a manner which provides sufficient clarity, while still ensuring that information which is genuinely likely to result in serious harm to individuals, is not publicly disclosed.
 18. A scheme that exists for dealing with sensitive information, as established by the *National Security Information (Civil and Criminal Proceedings) Act 2004* (Cth) could be utilised to address concerns raised by the Department concerning the revelation of information during litigation that could compromise national security.
 19. There needs to be an allowance for some flexibility to allow the balance between national security interest and the public interest to be achieved and to be able to be maintained into the future.
 20. The Law Council reiterates its support for a comprehensive review of the secrecy provisions that exist within Australia's national security framework. Such a review would build on the Australian Law Reform Commission's (**ALRC**) *Secrecy Laws and Open Government in Australia* report (**Secrecy Report**) and the Independent National Security Legislation Monitor's report *Section 35P of the ASIO Act*.⁶

⁶ Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia* (Report 112, 11 March 2010); Roger Gyles AO QC, Independent National Security Legislation Monitor, *Section 35P of the ASIO Act* (2016).

Question 3: Submissions by the Attorney-General's Department and the Department of Home Affairs

21. Committee member, the Hon Mark Dreyfus QC MP, asked the Law Council to consider and respond to supplementary submissions provided by the Department of Home Affairs and the Attorney-General's Department, specifically responses to suggestions that have been put forward by the Law Council.⁷
22. Responses to further submissions by the Attorney-General's Department (**AGD**) and the Department are provided in turn below.

Attorney-General's Department

The availability of a public interest defence for persons charged under repealed subsection 79(6) of the Crimes Act

23. The Law Council notes the response from the AGD in relation to the proposal that a public interest defence be inserted into the Crimes Act and made available to persons charged under repealed subsection 79(6).⁸
24. The AGD considers that the retrospective application of a defence has the potential to create uncertainty about the scope of application of the criminal law. The AGD suggested that applying a defence to a provision that has been repealed would introduce significant legal complexity, such as specifying an appropriate time period for when the defence would apply. The AGD further states that the impact of retrospective application of a new defence on investigations, prosecution and previous convictions would need to be considered.
25. The Law Council again submits that use of subsection 79(6) for investigative action relating to journalists means the legislative framework applied has not had the benefit of the defences now contained in revised secrecy offences introduced into the *Criminal Code Act 1995 (Cth)* (**Criminal Code**) by the *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018 (Cth)* (**EFI Act**).
26. While section 79 could capture journalists, this provision was never intended to cover journalists. Former Attorney-General the Hon Daryl Williams AM QC MP made this clear in 2003 when the Government pulled a then-proposed amendment to section 79 over fears it would stifle freedom of speech and transparency of Government.⁹
27. If this dated provision is to be relied upon by law enforcement agencies for investigative action and enforcement against journalists, the Law Council considers it is fair that the defences now accepted by Parliament as appropriate to protect freedom of the press are also able to be relied upon.

⁷ Evidence to Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, Canberra, 20 September 2019, 71 (Hon Mark Dreyfus QC MP).

⁸ Attorney-General's Department, Submission No 32.4 to the 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 2019) 1.

⁹ See Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia* (ALRC Report 112, 2010) [3.117], citing Commonwealth, *Parliamentary Debates*, House of Representatives, 13 March 2002, 1111 (Attorney-General the Hon Daryl Williams AM QC MP); Parliament of Australia—Senate Legal and Constitutional Legislation Committee, Provisions of the Criminal Code Amendment (Espionage and Related Offences) Bill 2002 (2002) 1.

28. In principle, the Law Council opposes retrospective application of legislation out of concern that it infringes on rights and liberties of an accused and the Rule of Law, which provides that the law should be knowable and able to be obeyed.
29. In this case, these concerns are ameliorated by the fact that retrospectively extending the defence would not impugn the rights or liberties of an accused. Instead, extending the defence would facilitate the application of a defence to criminal liability, rather than the creation or extension of criminal liability.

The inclusion of an express harm requirement within the secrecy offences at Division 122 of the Criminal Code

30. The Law Council notes the response from the AGD in relation to the Law Council's position that the secrecy offences at Division 122 of the Criminal Code include an express requirement that, for an offence to be committed, the unauthorised disclosure caused, or was likely to cause, harm to an identified essential public interest.¹⁰
31. The view of the AGD is that the framing of the secrecy offences in Division 122 provides a clear link to the harm that would be caused from unauthorised disclosure of that information. It considers that there is an explicit requirement for the prosecution to prove that the information is inherently harmful information or that the communication causes, or is likely to cause, harm to Australia's interests, damage Australian security or defence, prejudice a criminal investigation or harm the health or safety of Australians.
32. While the secrecy offences in Division 122 do include a link to the harm caused, the issue lies with the identified categories of harm. These categories are listed under section 121.1 relating to the definitions of 'cause harm to Australia's interests' and 'inherently harmful information'.
33. The difficulty with such categories is that they extend considerably beyond the essential public interests that the ALRC identified for new general secrecy offences. The ALRC recommended that secrecy offences should be 'reserved for behaviours that harms, is reasonably likely to harm or intended to harm essential public interests'.¹¹ The ALRC noted that the general secrecy offence should be limited to 'unauthorised disclosures' that are likely to:
- (a) damage the security, defence or international relations of the Commonwealth;
 - (b) prejudice the prevention, detection, investigation, prosecution or punishment of criminal offences;
 - (c) endanger the life or physical safety of any person; or
 - (d) prejudice the protection of public safety.
34. In contrast, the general secrecy offence provisions would relate to communications of, or dealings with, information relating to one of the many listed categories in proposed section 121.1 relating to the definitions of 'cause harm to Australia's interests' and 'inherently harmful information'.

¹⁰ Attorney-General's Department, Submission No 32.4 to the 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 2019) 2-3.

¹¹ Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia* (Report 112, 11 March 2010) 23.

35. The likely impact is uncertainty as to how information may be communicated or dealt with without fear of prosecution. The provisions may have a chilling effect on dissemination of material about security with no relevant connection to the categories of information captured by the provisions.
36. The concept of 'harm' in Division 122 must be defined as more than merely embarrassment and reputational damage to government. This would help protect against overuse and misuse of executive power. The Law Council maintains the view that these offences should include an express requirement that the prosecution prove as an element of the offence that the unauthorised disclosure caused, or was likely to cause, harm to an identified essential public interest, which is limited to the categories of harm as identified in the ALRC's Secrecy Report.

Ambiguity in Division 122 of the Criminal Code

37. The Law Council acknowledges the responses from the AGD in relation to the Law Council's assertion that Division 122 of the Criminal Code contains ambiguity and requires clarification to ensure that the innocent receipt of information is not captured by the offence provisions.¹²
38. The position of the AGD is that the offences do not capture the innocent receipt of information. The offences only apply where a person is reckless as to the harm or damage that will result from their actions or the top secret or secret classification of the information.
39. The AGD considers that given the high thresholds required for conviction of the outsider offences and the suite of appropriate defences available, including the specific defence for persons engaged in business of reporting news, clarification to ensure that the innocent receipt of information is not captured by the offence provisions is not required.
40. The explanation of the AGD is not sufficient to allay the Law Council's concerns. The Law Council maintains the view that subparagraphs 122.4A(1)(d)(ii)-(iv) of the Criminal Code lack precision and create an unclear threshold for when this circumstantial element of the offence is made out for the below reasons.
41. The thresholds for conviction should be made expressly clear in the provision itself because, as currently drafted, the thresholds for level or degree of the harm requirement to satisfy paragraph 122.4A(1)(d) are uncertain, for example:
 - (a) 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);
 - (b) 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
 - (c) 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).

¹² Attorney-General's Department, Submission No 32.4 to the 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 2019) 4-5.

42. Further, the Law Council challenges the assertion by the AGD that high thresholds exist for conviction under section 122.4A. The threshold of ‘interference’ under subparagraph 122.4A(d)(ii) is low, and depending on how it is interpreted, may extend to a broad range of conduct, including innocuous conduct. In this regard, the Law Council’s *Policy Statement on Rule of Law Principles* assert that ‘offence provisions should not be so broadly defined that they inadvertently capture a wide range of benign conduct’.¹³
43. In addition, the Law Council challenges the statement that there would be a suite of defences available to a journalist charged under section 122.4A. For example, it is questionable that the defence in subsection 122.5(6) would apply in the circumstances as described in the innocent receipt example provided by the Law Council in its previous submission,¹⁴ as it may not be considered that they dealt with the information in the public interest or in their capacity as a journalist engaged in fair and accurate reporting.
44. Regarding the Law Council’s point that the provisions require clarification to ensure that the innocent receipt of information is not captured by the offence provisions, the AGD considers that secrecy offences in Division 122 would not apply in a situation of a person merely receiving and opening an envelope, or purchasing a filing cabinet, without any knowledge of what might be in it.
45. This is because, in its view, for the offence under section 122.4A to be made out, it would need to be proven beyond reasonable doubt that the person intended to deal with the document – which may include concealing that document – and was reckless as to the harm or damage that would result from their actions or the top secret or secret classification of the information.
46. A question remains as to whether the elements of the offence under subsection 122.4A(1) would be established if journalist, who destroys a document by shredding (which could amount to ‘concealing’ the information and therefore fall within the definition of ‘dealing with’) and is reckless as to the damage that would result from their actions.
47. In its response to the shredder hypothetical example, AGD advised that:
- [A] person who does not know what’s in the envelope or does not know what’s in the filing cabinet will not be able to commit this offence. They will not be reckless as to the specific nature of the information. So, the receipt is one element. All elements and all fault elements must be proved, and that factual scenario just will not satisfy the offence...¹⁵*
48. In its response the AGD expressed the view that if a journalist received and shredded a copy of a security classified document, this would not be caught by section 122.4A of the Criminal Code because the requisite fault elements are not met.
49. The Law Council respectfully disagrees. Subsection 122.4A(2) provides as follows:

¹³ Law Council of Australia, *Policy Statement on Rule of Law Principles* (March 2011) Principle 1 <<http://www.lawcouncil.asn.au/lawcouncil/index.php/divisions/international-division/rule-of-law>>.

¹⁴ A journalist receives an unexpected envelope from a known Commonwealth officer which contains a copy of a security classified document. The content of the document appears to be innocuous and the journalist shreds the document and makes no further use of it.

¹⁵ Attorney-General’s Department, Submission No 32.4 to the 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 2019) 6.

Other dealings with information

(2) A person commits an offence if:

(a) the person deals with information (other than by communicating it); and

(b) the information was not made or obtained by the person by reason of the person being, or having been, a Commonwealth officer or otherwise engaged to perform work for a Commonwealth entity; and

(c) the information was made or obtained by another person by reason of that other person being, or having been, a Commonwealth officer or otherwise engaged to perform work for a Commonwealth entity; and

(d) any one or more of the following applies:

(i) the information has a security classification of secret or top secret;

(ii) the dealing with the information damages the security or defence of Australia;

(iii) the dealing with the information interferes with or prejudices the prevention, detection, investigation, prosecution or punishment of a criminal offence against of a law of the Commonwealth;

(iv) the dealing with the information harms or prejudices the health or safety of the Australian public or a section of the Australian public.

Note: The fault elements for this offence are intention for paragraph (2)(a) and recklessness for paragraphs (2)(b) to (d) (see section 5.6).

50. In respect of paragraph 122.4A(2)(a), 'the person deals with information (other than by communicating it)', the requisite element is intent to deal with the information. If a person shreds the document, the Law Council argues they demonstrate intention to deal with the information.

51. Paragraph 122.4A(2)(d) is not cumulative. The requisite intention for each subparagraph in paragraph (d) is recklessness. As the AGD noted:

Under section 5.4 of the Criminal Code, establishing recklessness is a high threshold. For a person to be reckless with respect to a circumstance requires that:

- the person is aware of a substantial risk that the circumstance exists or will exist; and

- having regard to the circumstances known to him or her, it is unjustifiable for that person to take the risk.¹⁶

52. There is no requirement in subparagraph (i) as to harm or damage from a person's actions.

¹⁶ Ibid 7.

53. If the document in the envelope is stamped with a classification that is 'secret' or 'top secret', it will be very hard to argue that a person was not 'aware of a substantial risk that the circumstance exists or will exist' that the document is secret or top secret as per subparagraph (d)(i).
54. Therefore, a journalist could in fact be charged under section 124.4A if the requisite elements and intention for those elements in subparagraphs 124.4A(a)(b)(c) and (d)(i) could be established beyond reasonable doubt.
55. At the very least, the Law Council reiterates its recommendation that 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 federal secrecy provisions, in consultation and collaboration with relevant stakeholders.
56. The Law Council would be pleased to work with the Australian Government and other stakeholders to assist in the preparation of this guidance material.

Factors that may be considered for the purposes of determining whether the dealing with or holding of information may be in the public interest

57. The Law Council notes the response provided by the AGD in relation to the Law Council's position that 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.¹⁷
58. The AGD stated that the absence of a definition of public interest is intentional as such an approach allows the term to have its widest meaning, which enables a defendant to point to a broad range of circumstances that could suggest he or she had a reasonable belief that his or her conduct was in the public interest and enables a court to determine the issue in all the relevant circumstances.
59. It follows by stating that while it could be possible to introduce a non-exhaustive list of public interest matters which a court may consider in determining whether the defence has been made out, this risks unintentionally narrowing the scope of the defence and introducing complexity in its application.
60. In response, the Law Council submits that the inclusion of a non-exhaustive list of public interest matters which a court may consider would be helpful in the judicial task of balancing the factors for and against the dealing with or holding of information. This is particularly so as the common law already addresses some considerations regarding the public interest, such as:
 - (a) the question of public interest needs to be assessed having regard to matters specific to the document or information in issue;¹⁸
 - (b) the fact that a section of the public may be interested in an activity does not necessarily establish a public interest;¹⁹

¹⁷ Ibid 9.

¹⁸ *Re Chapman and Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 43 ALD 139

¹⁹ *Re Public Interest Advocacy Centre and Community Services and Health (No 2)* (1991) 23 ALD 714; *Re Angel and Department of Arts, Heritage & Environment* (1985) 9 ALD 113.

- (c) a disclosure that is contrary to the interests of the government does not necessarily mean it will be contrary to the public interest;²⁰ and
- (d) mere exposure to public discussion, review and criticism of government action is not necessarily enough to show a detriment to the government.²¹

61. Not only would a list of factors assist a decision-making when considering whether the offence is established or when reviewing a decision, an absence of factors or criteria which suggest what may amount to the public interest creates uncertainty for journalists in the likely application of the defence provision. A concern therefore remains that this approach may have a chilling effect on fair and accurate reporting.

Onus to establish that a disclosure is not in the public interest

62. The Law Council notes the response provided by the AGD in relation to the Law Council's position that Division 122 of the Criminal Code should be amended so as to place the onus on the prosecution to establish that the disclosure is not in the public interest.²²
63. The AGD comments that if the prosecution were also required to prove, in addition to the harm elements, that the disclosure was not in the public interest this would add significant additional complexity to every case and would reduce the efficacy of the offences. Its view is that the current approach in the offences is consistent with criminal law principles by requiring harm to be proved by the prosecution and provides defences which may be raised by the defendant as appropriate to the individual facts and circumstances of that case.
64. The Law Council remains of the view that subsection 122.5(6) imposes an unacceptable obligation on journalists. In reality, it means that a journalist is charged once publication of material that falls into a certain category occurs. She or he must then lead evidence to satisfy the burden of proof imposed, and secure an acquittal.
65. It is important to distinguish at the outset between the burden of proof and the requisite standard of proof. It is no answer to say that a journalist simply bears an 'evidential burden of proof' as distinct from a 'legal burden of proof' because the descriptors 'evidential' or 'legal' signal different standards of proof. These descriptors do not alter the fact that a burden of proof has nonetheless been imposed upon one party and must be proved to the requisite standard. It is the imposition of this obligation on journalists that concerns the Law Council.
66. It is a 'cardinal principle' or 'golden thread'²³ of our criminal justice system that a person is innocent until proven guilty. The corollary of this principle is a default position where the prosecution bears the burden of proof, and must discharge that burden to the standard of proof 'beyond reasonable doubt'.
67. A government can erode the *Woolmington* presumption of innocence by legislation but this should be done with great caution and never deployed in a manner that undermines the freedom of the press, which is how section 122.5(6) operates.

²⁰ See *Re Bartlett and Department of the Prime Minister and Cabinet* (1987) 12 ALD 659. In *Fisse v Secretary, Dept of the Treasury* (2008) 172 FCR 513, Flick J expressed some reservation as to the conclusion reached in *Re Bartlett and Department of the Prime Minister and Cabinet*.

²¹ *Commonwealth v John Fairfax & Sons Ltd ('Defence Papers case')* (1980) 147 CLR 39, 52 (Mason J).

²² Attorney-General's Department, Submission No 32.4 to the 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 2019) 10-11.

²³ *Woolmington v DPP* [1935] AC 462, 481 (Lord Sankey).

68. Subsection 122.5(6) of the Criminal Code erodes the presumption of innocence by imposing an evidential burden of proof on journalists seeking to rely on the defence for public interest journalism, which must be discharged to the standard of proof set out in section 13.3.
69. Under section 13(2)(c) of the *Interpretation Act 1901* (Cth), headings form part of an Act, and may be used to interpret the meaning of the text of a statute. Section 13.3 of the Criminal Code bears the heading 'Evidential burden of proof – defence'. Subsection 13.3(6) defines 'evidential burden' as follows:

evidential burden, in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.

70. Regardless of the standard of proof required by the subsection, the reality is that this provision erodes the presumption of innocence because a journalist is not automatically presumed to have published in the public interest.
71. Rather, a journalist wishing to rely on the public interest defence must first adduce or point to evidence, possibly in the witness box, to suggest a reasonable possibility the reportage was in the public interest and thus discharge their evidential burden of proof to the standard required by law.
72. Under the Criminal Code, the journalist bears the evidential burden of proof to the standard of 'adducing or pointing to evidence that suggests a *reasonable possibility*' that a matter exists - ie the reporting was in the public interest.
73. It is no answer to say that a journalist bears a lower standard of proof than the prosecution; the Law Council argues a journalist should not bear any burden of proof at all.
74. Regardless of the standard of proof required, this subsection imposes a burden of proof squarely on the journalist and not the prosecution.
75. Lord Hope in the House of Lords' decision of *R v DPP; Ex parte Kebilene*²⁴ explained that an evidential burden requires that:

*the accused must adduce sufficient evidence to raise an issue before it has to be determined as one of the facts in the case. The prosecution does not need to lead any evidence about it, so the accused needs to do this if he wishes to put the point in issue.*²⁵

76. Further, Bell J noted in *R v Momcilovic*²⁶ that:

*Discharge of an evidential burden may require that an accused lead evidence in a defence case. It may be discharged by evidence adduced in cross-examination of witnesses in the prosecution case.*²⁷

77. A further distinction to be noted is the temporal point at which the obligation to discharge their burden is imposed on a journalist. In discharging their evidential burden of proof, this obligation is imposed on a journalist at the time of preparing for court proceedings or in court. A journalist is therefore required to invest time and funds

²⁴ *R v DPP; Ex parte Kebilene* [2000] 2 AC 326.

²⁵ *Ibid* 378–9 (Lord Hope).

²⁶ *Momcilovic v The Queen* (2011) 245 CLR 1.

²⁷ *Ibid* [665] (Bell J).

in seeking legal advice, putting on evidence and attending court. If the onus was on the prosecution instead, this may have the effect of ensuring only those cases where publication was not in the public interest would result in charges being laid and proceed to trial.

78. The Parliamentary Human Rights Committee stated that:

an offence provision which requires the defendant to carry an evidential or legal burden of proof will engage the right to be presumed innocent because a defendant's failure to discharge the burden of proof may permit their conviction despite reasonable doubt as to their guilt...

*Where a statutory exception, defence or excuse to an offence is provided, this must be considered as part of a contextual and substantive assessment of potential limitations on the right to be presumed innocent.*²⁸

79. The Law Council remains of the view that it is inappropriate to place this onus on the defendant. The burden of proof should remain on the prosecution.

80. The Law Council's *Policy Statement on Rule of Law Principles* provides that all people are entitled to the presumption of innocence and to a fair and public trial.²⁹

81. The state should be required to prove, beyond reasonable doubt, every element of a criminal offence, particularly any element of the offence which is central to the question of culpability for the offence.

82. The ALRC noted in its 2016 report *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws (ALRC Report 129)* that:

*placing an evidential burden on an accused can be problematic, 'especially where the reversal applies to a key culpability element of a serious criminal offence'.*³⁰

The need for a comprehensive whistleblower regime and establish a Whistleblower Protection Authority

83. The Law Council notes the response provided by the AGD in relation to the Law Council's recommendation that a comprehensive whistleblower regime be established, together with the creation of a Whistleblower Protection Authority.³¹

84. The Law Council acknowledges the comments from the AGD in respect of the *Public Interest Disclosure Act 2013 (PID Act)* and its protection for current and former public officials who make certain disclosures. The Law Council supports the view of the AGD that there are opportunities to strengthen the PID Act's practical operation and clarity.

85. In relation to the establishment of a Whistleblower Protection Authority, the AGD noted that the independent *Review of the Public Interest Disclosure Act 2013* undertaken by Mr Philip Moss AM in 2016 made 33 recommendations to improve the Public Interest

²⁸ Parliamentary Joint Committee on Human Rights, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011* (14th Report of the 44th Parliament, 2014) [1.176], [1.178].

²⁹ Law Council of Australia, *Policy Statement: Rule of Law Principles* (March 2011), Principle 3.

³⁰ Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws (ALRC Report 129, 2016)* [9.17], citing J Gans, *Submission 2*.

³¹ Attorney-General's Department, *Submission No 32.4 to the 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 2019) 12.

Disclosure Act but made no recommendation relating to the establishment of a Whistleblower Protection Authority.

86. The Law Council again notes that the 2017 Parliamentary Joint Committee on Corporations and Financial Services recommended the establishment of a Whistleblower Protection Authority and highlighted the need for such a body that can support whistleblowers, assess and prioritise the treatment of whistleblowing allegations, conduct investigations of reprisals, and oversee the implementation of the whistleblower regime for both the public and private sectors.
87. The Law Council looks forward to working with the Australian Government to continue to improve whistleblower protections and work towards a comprehensive whistleblower regime in Australia.

Department of Home Affairs

Inclusion of a public interest defence in the ASIO Act

88. The Law Council addresses this response at paragraphs 11 to 20, above.

Definition of 'National Security' in the Criminal Code

89. The Law Council notes the response by the Department in relation to its recommendation to reconsider the definition of 'national security' for espionage, foreign interference and sabotage offences in the Criminal Code as they extend to the country's political or economic relations with another country.³²
90. The Department responded that the existing definition of 'national security' is sufficient and adequately balances the rule of law, press freedoms and the protection of Australia's national security.
91. The Law Council notes that the ALRC did not recommend that 'national security' be defined to include political and economic relations with another country for the purposes of espionage, sabotage and foreign interference offences.³³ Additionally, the Law Council has previously submitted that the espionage offences in Division 91, with the economic and political elements of the definition of national security, would seem to cover the sort of information that well-informed journalists, academics and consultants of all sorts routinely have access to.³⁴ Whistleblowers or journalists revealing, for example, harmful conditions in detention centres, misconduct or corruption or reporting on politics or economics, could potentially be captured by the espionage offences in Division 91.
92. The Law Council notes that Department does not engage with the specific questions posed by the Committee about the consequences of the change in the definition. Rather the Department stated that in general terms that:

The definition covers a broad range of possible prejudice to Australia's national security, such as damage to Australia's international relations, economic wellbeing and Australia's political process and system that requires

³² Ibid 16.

³³ Australian Law Reform Commission, *Keeping Secrets: The Protection of Classified and Security Sensitive Information* (Report 98, June 2004).

³⁴ 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) 47 [144].

*protection from the threat of espionage, sabotage and foreign interference from foreign countries.*³⁵

93. In the absence of additional safeguards (which were also recommended by the ALRC) such as a requirement of harm and application only to all Commonwealth officers, where a broad concept of 'national security' is employed, the Law Council remains concerned about the inappropriate reference to political and economic relations with another country.

A public interest exception to offences of espionage

94. The Law Council notes the Department's response to the Law Council's view that that the Criminal Code should be amended to introduce a public interest exception to offences of espionage in Division 91 and foreign interference in Subdivision B of Division 92.³⁶
95. The Department responded that it is difficult to conceive of a circumstance where an individual's conduct could be in the public interest where the conduct that is necessarily captured by the espionage offences requires the individual to intentionally or recklessly prejudice Australia's national security or advantage the national security of a foreign country, and, that the AGD has previously advised the Committee that, if an individual's conduct is in the public interest, it is unlikely to fall within the scope of the foreign interference offences.
96. While circumstances of investigative journalism on behalf of or in collaboration with a foreign principal or person acting on behalf of a foreign principal may in practice be scarce, the Law Council nevertheless considers that such circumstances are increasingly possible in the global media landscape where investigative journalists can potentially collaborate on both sides of a geopolitical dispute. As such, there should be a defence available for such persons in the event that those circumstances occur.
97. The Department cites previous advice from the AGD that if an individual's conduct is in the public interest it is unlikely to fall within the scope of the foreign interference offences. However, the Law Council considers this reasoning reveals the problem with the provisions that they leave open the possibility of a person being charged with these offences where they have been acting in the public interest, and the availability of an explicit defence grounded in public interest is warranted.

A good faith defence for the sabotage offences

98. The Law Council notes the response provided by the Department in relation to the Law Council's assertion that there should be a good faith defence framed in the terms of repealed subsection 24F(2) of the Crimes Act available for the sabotage offences in Division 82 of the Criminal Code.
99. The Department's response is that, given the severity of the conduct necessarily captured by the sabotage offences, it would not be appropriate to introduce a good faith defence and that for offences with an applicable fault element of recklessness, an individual's genuine good faith would be likely to preclude recklessness being made out.

³⁵ Department of Home Affairs, Submission No 32.5 to the 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* (28 August 2019) 16.

³⁶ *Ibid* 17-8.

100. The Law Council considers that a ‘good faith’ defence to a charge of sabotage would protect to some extent legitimate political communication. The absence of such a defence has the potential to stifle media outlets from publishing information relating to Australia’s national security. The need to prove an element of recklessness does not necessarily preclude conduct carried out in ‘good faith’ from satisfying that fault element. In fact, the question whether taking a risk is unjustifiable is one of fact³⁷, precluding the accused from relying on a subjective assessment that their conduct was carried out in ‘good faith’.
101. In terms of precedent, it is noted that before the reforms introduced by the EFI Act, subsection 24F(2) of the Crimes Act provided a ‘good faith’ defence to a charge of sabotage, which was directed at protecting political communication.

Public interest requirements

102. The Law Council notes the response provided by the Department in relation to the Law Council’s proposal that a public interest requirement be applied when determining whether to issue a warrant in relation to journalists and media organisations, either as the suspect of an offence or as a third party in possession of information relevant to an investigation.³⁸
103. The Department’s position is that the existing warrant frameworks that underpin the use of powers by law enforcement and national security agencies are supported by robust decision-making criteria and safeguards to ensure that any intrusive powers are used in limited circumstances, only when required.³⁹ It is further argued that the protection provided by the journalist information warrant scheme as applies to accessing information under the telecommunications data retention provisions of the Telecommunications Act have only ‘modernised this pre-existing power by allowing law enforcement agencies to remotely – but still overtly- collect evidence using specialist equipment, consistent with current forensic best practices’.⁴⁰
104. However, the Law Council considers that there is a need for improved safeguards in relation to warrants authorising investigative action, noting in particular the prominent public interest considerations that exist in relation to warrants concerning journalists and media organisations. Notwithstanding that the Department argues that the ‘Assistance and Access Act amendments to section 3F do not allow agencies to actively sidestep the journalist information warrant framework’,⁴¹ the ways the laws operate nonetheless leave open that they *can* be sidestepped because the reality is a journalists telecommunications data can be seized under a warrant issued by the Registrar of a small Local Court, applying a different criteria (which does not include a public interest component) and is a different type of issuing authority that can issue a journalist information warrant under section 180H of the TIA. That the data can be obtained from the journalist’s computer, as opposed to a telecommunications provider is beside the point. It is not where the information is obtained from, it is the inconsistency in the threshold to be authorised to gather it in the first place.
105. While the Department argues that ‘it would be apparent to the issuing authority if an agency was attempting to use amended section 3F inappropriately to avoid compliance with the journalist information warrant regime’, the Law Council considers

³⁷ *Criminal Code Act 1995* (Cth) s 5.4(3).

³⁸ Department of Home Affairs, Submission No 32.5 to the 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* (28 August 2019) 20-1.

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ *Ibid* 21.

that this is an assumption that can't be justified, particularly where the issuing authority could be a Justice of the Peace in a busy regional country courthouse.

106. Furthermore, the Law Council considers that the Minister's issuance of a Ministerial Direction to the Australian Federal Police following significant public scrutiny demonstrates that the framework pointed to in the Department's response was not operating effectively.⁴² Legislative change, perhaps in the form of a mandated public interest requirement, may go some way to addressing this issue.

Contested warrants

107. The Law Council acknowledges the response provided by the Department in relation to the Law Council's proposal regarding the introduction of a contested warrant process, and that 'there is a small but significant risk that a Public Interest Advocate regime could cause delays to investigations unrelated to whistleblowing'.⁴³
108. However, the Law Council is of the view that the benefits of such a scheme outweigh this risk and that the risk can be mitigated.
109. The Law Council again submits that the introduction of a PIA or PIM regime could serve to promote an adversarial process in a manner similar to what occurs under the TIA Act for journalists in terms of applications for warrants under the mandatory data retention regime. There is a benefit in having a consistent, uniform approach in relation to how applications by law enforcement to obtain journalist's information are dealt with by law, and how the protection of the public interest can be consistently and adequately approached by the laws governing the use of coercive powers by law enforcement on journalists and media organisations. The benefit of the PIA scheme is that it can be valuable in assisting the decision maker to review the information contained in warrant application in a careful, considered manner and given the opportunity to hear other competing arguments that is lacking in the current process.
110. The establishment of a warrant application process which involves the participation of a PIA or PIM seeks to take a reasonable and considered approach to creating a more adversarial environment in which a greater degree of scrutiny is brought to bear on the grounds for seeking a warrant at the point of issue. The proposal is aimed at providing a means by which the competing interests of law enforcement and press freedom have a practical system for considered and informed debate, and which can help to restore public trust in the use of coercive powers by law enforcement agencies as applied against journalists and media organisations.
111. In terms of addressing the Department's concern that a PIA or PIM process may cause some inevitable short delay, the Law Council notes the importance of investing properly in the proposed framework to avoid undue delays. It is also noteworthy that in relation to recent investigative action against journalists, warrants were obtained several months after the alleged conduct.

Access to Telecommunications Data

112. The Law Council notes the response provided by the Department in relation to the Law Council's recommendation that, just as there is a requirement for a warrant to be

⁴² Attorney-General, 'Ministerial Direction (Commonwealth Director of Public Prosecutions) – *Director of Public Prosecutions Act 1983*' in Commonwealth of Australia, Government Notices Gazette, 19 September 2019.

⁴³ Department of Home Affairs, Submission No 32.5 to the 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* (28 August 2019) 23.

issued before access can be permitted to the telecommunications data of a journalist, the same requirement for a warrant should apply in relation to accessing the metadata of all members of the Australian community.⁴⁴

113. The Department's response was mostly concerned that:
- (a) a warrant regime for the access to telecommunications data generally (and not only when required under the journalist information warrant framework) may impact on effectiveness and timeliness of agencies' ability to investigate serious criminal activity and national security threats;
 - (b) an agency's ability to access critical evidence by introducing a requirement to obtain a warrant may seriously harm investigative outcomes – in circumstances where the existing authorisations framework (and journalist information warrant framework) already requires decision-makers to balance the public interest in detecting and addressing serious criminal activity, against the public interest in ensuring Australians can conduct their lives free from unnecessary intrusion of their privacy and to account for these decisions through appropriate oversight arrangements; and
 - (c) section 180F of the TIA Act requires authorised officers to consider the right to privacy before issuing an authorisation for access to telecommunications data. This provision is designed to protect the public interest by ensuring that intrusive evidence and intelligence gathering powers are only used where strictly necessary for the purposes of investigating serious criminal conduct or in the interests of national security.
114. The Law Council notes that the concerns identified by the Parliamentary Joint Committee on Human Rights about the chilling effect of access to telecommunications data by government agencies in freedom of expression⁴⁵ have equal application to both journalists as well as other members of the community who may provide the information to a journalist or engage in other acts of disclosure considered to be in the public interest.
115. The Law Council continues to submit that this potential consequence must continue to be balanced against the need for a robust legislative regime for access to telecommunications data, noting the intrusive nature of such actions.
116. The Law Council's submissions are therefore proposed with the view to ensuring access is only permitted when the public interest in detecting and addressing serious criminal activity outweighs the public interest in ensuring Australians can conduct their lives free from unnecessary intrusion of their privacy.

Reforms to the TIA Act

117. The Law Council notes the response provided by the Department in relation to the Law Council's recommendation that the TIA Act should be amended so that a computer access warrant, foreign intelligence warrant or identified persons warrant allow the interception of a communication passing over a telecommunications system only be authorised by the Attorney-General if the Attorney-General is satisfied that the

⁴⁴ Ibid 25-6.

⁴⁵ Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Telecommunications (Interception and Access) Bill 2014* (Fifteenth Report of the 44th Parliament, November 2014) 1-70.

telecommunications service is being or is likely to be used for purposes prejudicial to security.⁴⁶

118. In response, the Department argues that terrorists and other serious criminals rely on mobile devices to communicate and undertake their illegal activities, that lawfully accessing such devices is important to ensuring law enforcement and national security agencies are able to protect the community from malicious actors, often it will be necessary for a law enforcement or intelligence agency to intercept communications for the purpose of executing a warrant that authorises computer access.
119. The Law Council recognises the important public safety objective in law enforcement and national security agencies having interception capabilities to enable access to devices.⁴⁷ However, the Law Council remains concerned that the reforms introduced by the *Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018* (Cth) (**Assistance and Access Act**) have lowered the threshold for interception of communications passing over a telecommunications system from matters that are 'prejudicial to security' to 'a matter is important in relation to security'. The response by the Department does not adequately justify the lowering of this threshold.
120. The Law Council reiterates its view that this threshold for communications interception through a computer access warrant is unacceptably low and for this reason recommends that the TIA be amended so that this threshold is restored to that which existed prior to the reforms introduced by the Assistance and Access Act.

Ministerial Direction to the Commonwealth Director of Public Prosecutions

121. The Law Council takes the opportunity to note that the Attorney-General issued a Ministerial Direction to the CDPP on 19 September 2019.⁴⁸ The previous Ministerial Direction issued by the former Attorney-General stated that the CDPP:

... must not proceed with a prosecution of a person for alleged contravention of the following sections without the written consent of the Attorney-General:

- (a) section 35P of the Australian Security Intelligence Organisation Act 1979;*
- (b) section 15HK of the Crimes Act 1914;*
- (c) section 15HL of the Crimes Act 1914; or*
- (d) section 3ZZHA of the Crimes Act 1914*

*where the person is a journalist and the facts constituting the alleged offence relate to the work of the person in a professional capacity as a journalist.*⁴⁹

⁴⁶ Department of Home Affairs, Submission No 32.5 to the 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* (28 August 2019) 27-8.

⁴⁷ Ibid 28.

⁴⁸ Attorney-General, 'Ministerial Direction (Commonwealth Director of Public Prosecutions) – *Director of Public Prosecutions Act 1983*' in Commonwealth of Australia, Government Notices Gazette, 19 September 2019.

⁴⁹ Attorney-General, 'Ministerial Direction (Commonwealth Director of Public Prosecutions) - *Director of Public Prosecutions Act 1983* in Commonwealth of Australia, Government Notices Gazette, 30 October 2014.

122. The new Direction issued by the current Attorney-General continues to include the above provisions and adds the following offences:
- (a) section 70 of the Crimes Act;
 - (b) section 131.1 and 132.1 of the Criminal Code (Theft and Receiving); and
 - (c) section 73A of the *Defence Act 1903* (Cth) (Unlawfully giving or obtaining information as to defences).
123. The Law Council considers that a requirement to obtain the agreement of the Federal Attorney-General for a prosecution of a journalist under the offences as listed above is not sufficient to ameliorate the concerns that have been raised by the Law Council in its submissions to this Inquiry. This position is consistent with the Law Council's submissions on the reforms introduced by the EFI Act.⁵⁰ The ALRC in its Secrecy Report noted that:
- The Attorney-General, as a political figure, might be perceived to agree more readily to prosecution of certain individuals - such as those that criticise government policy or are unpopular with the electorate.*⁵¹
124. Requiring the consent of the Attorney-General is not a sufficient safeguard to improve press freedom.
125. No Attorney-General should be required to make a judgment as to whether a journalist should be prosecuted or whether publishing material was in the public interest. Such decision-making fundamentally undermines the appearance of the Attorney-General's independence and calls into question the First Law Officer's own motives.
126. The Law Council has no doubt that the Attorney-General would act in good faith. However, the appearance of independence is as important as actual independence itself.
127. The media should never have to rely on a member of the Executive to determine if there was a public interest in publishing material. This would have the effect of making the media – the fourth estate – impermissibly beholden to a member of the Executive to determine whether a journalist should be charged with a criminal offence based on what the Attorney thinks is in the public interest.
128. This is not appropriate. It is not only inconsistent with longheld principles of the separation of powers and freedom of the press, it also places both an Attorney-General and the media in a very difficult and fraught position.
129. There may be circumstances where the published material in question may relate to matters that are embarrassing to an Attorney-General or the leader of his Government. In such a scenario, the defence in its current form would create further

⁵⁰ Law Council of Australia, Submission No 5 to the Parliamentary Joint Committee on Security and Intelligence, *Review of the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017* (22 January 2018) 47 [147]. In that submission, the Law Council noted that the requirement in section 93.1 of the EFI Act to obtain the consent of the Attorney-General prior to the institution of the proceedings against a person for an offence against espionage and related offences' in Part 5.2 of the Criminal Code was not a sufficient check and balance to allay its concerns relating to the provisions: see 45-9.

⁵¹ Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia* (Report 112, 11 March 2010) 266.

complications as this may give rise to an apprehension of bias that an Attorney-General could not fairly or impartially decide the matter.

130. These are all concerns that must be delicately calibrated, and considerations that point to the need for a careful, considered review of our laws, for the benefit of journalists, Attorneys-General and the Australian public alike.

131. An improved warrants authorisation process, as detailed in the Law Council's submissions to this Inquiry, would provide a considered, reasonable and effective approach to improving safeguards for journalists and media organisations, especially the involvement of a PIA or PIM to provide greater transparency and accountability to search warrants relating to journalists.