**AUSTRALIA'S RIGHT TO KNOW SUPPLEMENTARY SUBMISSION TO THE INDEPENDENT NATIONAL SECURITY LEGISLATION MONITOR (INSLM) REVIEW OF SECRECY PROVISIONS IN PART 5.6 OF THE CRIMINAL CODE**

**9 APRIL 2024**

Australia's Right to Know coalition of media organisations thanks the Independent National Security Legislation Monitor (**INSLM**) for the opportunity to provide further supplemental submissions to address matters arising from the public hearings of 24 and 25 March 2024.

**An ability to challenge a security classification decision as part of a prosecution would not address ARTK's concerns about the use of a security classification as an element of a criminal offence applying to an "outsider"**

1. ARTK still considers that it is inappropriate to use a security classification as an element of any criminal offence which applies to "outsiders" to government.
2. In our earlier submission at [115] – [127], we gave four reasons for this.
3. *First*, the current classification framework is **non-legislative**. It is constituted by policy documents and is not subject to the usual and essential checks and balances that govern the making of subordinate laws, such as Parliamentary scrutiny of the instrument against recognised scrutiny principles, and the prospect of parliamentary disallowance.[1] The policy framework may radically change tomorrow without any form of Parliamentary oversight or control and remains unconfined to areas where a demonstrable serious harm can be demonstrated.
4. Parliament is and should be the only source of law in our system of representative democracy. Making compliance with executive policy an essential element of a criminal offence fundamentally undermines this principle. The substantive contents of a criminal law obligation would in those circumstances be determined by executive whim and not by Parliament.
5. *Second,* the current "*Secret*" and "*Top Secret*" classifications can be applied to situations where **national security interests are not genuinely engaged** – in particular, to cases where only commercial interests are threatened. This form of harm is not of a nature or degree that warrants criminal sanction.

[1] See, for example, Order 23 of the Senate Standing Orders, and *Legislation Act 2003* (Cth) ss 36 – 48.

6. *Third,* there is no justification for imposing a criminal penalty on an "*outsider*" to government for failing to adhere to a particular **policy** of government. In the absence of some further voluntary act – the acceptance of Commonwealth employment, the signing of documents agreeing to be bound by the applicable policy framework, or so on – there is no public policy justification for imposing a criminalised duty on outsiders to adhere to internal policy requirements.
7. All three concerns remain regardless of whether the underlying classification marking is challengeable in either a Court or Tribunal. The body asked to consider the appropriateness of the marking would still be applying a *policy* instrument made without usual or appropriate Parliamentary oversight, being *policy* which does not currently confine the relevant security markings to areas of serious harm warranting criminal sanction, and being *policy* which could in any case be changed tomorrow to cover additional instances where no serious harm results from disclosure.
8. *Fourth*, that a security marking is **effectively unreviewable** and that this also makes a security marking unfit for use as an element of a criminal offence on basic rule of law grounds. The following expands on why this is so.

***a. The Criminal Code does not currently require a Court trying an offence to assess the correctness or appropriateness of a classification marking***

9. The current "*outsider*" offence in s 122.4A(1)(d) requires the prosecution establish whether "*the information has a security classification of secret or top secret".*
10. Whether a document has a "*security classification*" is ultimately defined by s 90.5. Section 90.5(1) provides that:

> *Security classification means:*
>
> *(a) a classification of secret or top secret that is applied in accordance with the policy framework developed by the Commonwealth for the purpose (or for purposes that include the purpose) of identifying information:*
>
> *(i) for a classification of secret--that, if disclosed in an unauthorised manner, could be expected to cause serious damage to the national interest, organisations or individuals; or*
>
> *(ii) for a classification of top secret--that, if disclosed in an unauthorised manner, could be expected to cause exceptionally grave damage to the national interest; or*
>
> *(b) any equivalent classification or marking prescribed by the regulations."*

11. This definition does not in terms require a classification be **correctly** applied in accordance with the policy framework – only that the classification **is in fact** applied in accordance with the policy framework.
12. The Commonwealth is likely to argue that this definition is satisfied whenever a public servant **purports** to apply a security mark pursuant to a policy **purporting** to be a document directed to either of the "*purposes*" in s 90.5(1)(a)(i),(ii).
13. While this is likely to be the better view, ARTK does not believe that a Court considering whether a classification is correctly applied is appropriate in any event.
14. If such a power is taken as enabling a Court to investigate the **appropriateness** of a security marking, the Court would not be exercising a usual or customary judicial function. Specifically, the Court **would not** be assessing whether a particular decision-maker within executive government had acted within the boundaries of a lawful discretion when making a classification decision for the simple reason that there is no legal standard to apply and no identified decision-maker.
15. Instead, the Court would be exercising in substance a **merits** review function. That is, in asking whether a classification decision is made "*in accordance*" with existing policy instruments under this broader view

of the provision, the Court **would be deciding for itself** what kind classification decision *should* be made given current policy material and the evidence as led by the prosecution on relevant national security issues.

16. However, this goes beyond the customary judicial role, which is to ask whether a person in the **executive** has acted within the boundaries of their lawful authority. Asking whether or not particular information should be classified under national security policy based on national security evidence is instead an inherent function of **executive government.** This is not an appropriate function for **judicial officers** to perform.

***b. The Criminal Code does not currently require a Court trying an offence to assess whether current classification policy actually aligns with the matters that are meant to be the subject of "Secret" and "Top Secret" classification policies as set out in the Criminal Code***

17. As just discussed, the current "*outsider*" offence in s 122.4A(1)(d) requires the prosecution establish whether "*the information has a security classification of secret or top secret".* Whether a document has a "*security classification*" is ultimately determined by the definition in s 90.5.
18. The definition in s 90.5(1) refers to certain classifications that are "*applied in accordance with the policy framework developed by the Commonwealth <u>for the purpose (or for purposes that include the purpose) of identifying</u>"* certain information. That information is, relevantly, information "*that, if disclosed in an unauthorised manner, could be expected to cause serious damage to the national interest, organisations or individuals*" and information "*that, if disclosed in an unauthorised manner, could be expected to cause exceptionally grave damage to the national interest*."
19. This statutory wording does not require a Court to assess whether the policy itself is confined to classifying information "*that, if disclosed in an unauthorised manner, could be expected to cause serious damage to the national interest, organisations or individuals*" and information "*that, if disclosed in an unauthorised manner, could be expected to cause exceptionally grave damage to the national interest*."
20. The Court is instead limited to reviewing the "*purpose*" of the policy (understood as its intention or aim) and whether the "*purpose*" of the policy aligns with these matters. The Court is not asked to assess whether the policy **in fact** aligns with the matters listed in the section.
21. This means that the section does not operate to protect a criminal defendant. A Court is not asked to assess, in the course of a criminal trial, whether or not the current policy framework actually and objectively achieves the stated objects set out in s 90.5(1)(a)(i),(ii) and so is properly targeted and confined. Instead, the Court's role is to ask whether the policy is **ostensibly directed** to those aims. Which the relevant policies appear to be.
22. Nor is the Commonwealth ever likely to accept the view that the current provisions give a Court the power to assess whether current security classification policy **objectively** satisfies the requirements in s 90.5(1)(a)(i),(ii). This would require the Court assess whether the existing classification framework is 'fit for purpose'.
23. To this objection we can add the likely objections of a defendant – *how is a defendant ever able to fairly engage with the issue of whether the current security classifications are 'fit for purpose'? How would a defendant even go about doing this?*
24. These objections mean that s 90.5(1) would not be read so as to give the Court the power to **objectively** assess whether current Commonwealth polices are directed to identifying information "*that, if disclosed in an unauthorised manner, could be expected to cause serious damage to the national interest, organisations or individuals*" and information "*that, if disclosed in an unauthorised manner, could be expected to cause exceptionally grave damage to the national interest*.

***c. Even if a Court trying an accused could assess the correctness and appropriateness of the security classification, that does not actually protect the accused***

25. This point is best illustrated with an example.
26. Take a document disclosing that an ASIS officer used taxpayer funds to procure drugs and prostitutes on an overseas posting. That document is marked "*top secret*" as it discloses the identity of an ASIS officer and details of their overseas positing.
27. Assume however that the information within that document is published without any identifying details of the ASIS officer or their posting.
28. Under the "*outsider*" offence in s 122.4A, the Court is required to evaluate whether the "*information*" that is communicated or otherwise dealt with has a security classification of "*secret*" or "*top secret*". Under a broad reading of s 90.5(1), the Court would be required to assess whether information was correctly and appropriately classified at the secret or top secret level.
29. However, under existing policy settings, all information within a document is given a **blanket classification** based **on some or all** of the information that exists within the document. So wholly innocuous information is classified as "*top secret*" because *other* information in the same document justifies that classification. So, returning to the example of the document about the ASIS officer, the Court would be required to ask, in relation of *any* information in the document whether a top secret classification was justified. In this case, the Court will likely be required to conclude that a top secret classification that applies to *all of the information* was in fact appropriate, given the name of the ASIS officer is in the document.
30. Yet the fact that **some** information in the document justified classifying the document as "*secret*" or "*top secret*" is irrelevant – because the accused **may not have actually received or communicated** any of that highly sensitive information. This information may have been redacted by the source.
31. So the Court would actually be asking itself the wrong question – it would be asking whether the classification given **to the document as a whole, and to all the information contained within it**, was appropriate. The Court however would not be asking the relevant question – which is whether the information which the defendant **actually received and actually published** was appropriately the subject of a "*secret*" or "*top secret*" security classification. A person may be sentenced to 5 years in prison because the Court considers that information the accused may never actually have received or never actually published justified imposing a security classification. This task would be at best misdirected and at worst dangerously misdirected.

**The fact that a prosecution may need to lead its case first does not address concerns about the current evidential onus placed on an accused**

32. ARTK understands the question raised by the inquiry to be this: does the fact that the prosecution must put its case before the defendant's case means that the evidential burden can be discharged by a defendant simply by pointing to evidence led in the earlier Crown case or by cross-examining Crown witnesses? If the defendant could discharge the onus in this way, this would eliminate the need for the defendant to themselves go into evidence and risk compromising their sources.
33. This question assumes that the Crown must, under the current offence provision, open its case first and *pre-emptively* assert an *absence* of a journalist defence in its case in chief *before* the defendant opens his or her case.

34. For the reasons given at [48] – [70] of our initial submission, that appears the better view. However, no evidence has been led from the Office of the Commonwealth Director of Public Prosecution to confirm and clarify its position.
35. ARTK has already dealt at length with the fundamental risks to a fair trial that would arise if our view of the law was mistaken, and that in fact the Crown was not required to pre-empt the journalist defence in its case in chief.
36. However, assuming, as this question does, that the Crown must in fact attempt to pre-empt in its case in chief a public interest defence, this does not address ARTK's concerns and is practically misconceived.

***a. There will likely be an absence of coherent evidence about the subjective intentions of a defendant in the Crown's case***

37. The defence in s 122.5(6) has both subjective and objective elements – the prosecution must seek to disprove that the defendant or other relevant person *believed* that their conduct was in the public interest and that this belief *was reasonable*.
38. It may well be that in some cases the Crown case may disclose enough material in the Crown case that discharges the evidential burden by operation of law (see s 13.2(4)), provided such evidence suggests a "*reasonable possibility*" that both the subjective and objective elements of the current defence exist.[2] But for the reasons given below, that will not be so in many and potentially the majority of prosecutions. This cannot be predicted in advance either now or at the time a journalist publishes and takes pre-publication legal advice. That in and off itself creates a 'chilling effect' on public interest journalism because there will always be a **very credible prospect** that a journalist must go into evidence and so compromise a source whenever they publish material in the public interest. The mere prospect that the prosecution might at trial present evidence the defendant might rely on still leaves the journalist exposed.
39. Unless there is a fortuitous document trail indicating the defendant (or other relevant person's) subjective state of mind that neatly evidences why they were "*dealing*" with or "*communicating*" relevant information, then the prosecution is unlikely to have access to *any meaningful* information that would go to establishing that state of mind. The Crown is unlikely to have any documentary record that evidences the defendant's (or other relevant person's intentions), nor is any Crown witness likely to be able to speak to what the defendant or other relevant person was *actually thinking.*
40. The Crown's case would inevitably be built on inference and conjecture.
41. It is therefore unlikely, at least in a substantial number of cases, that there would be sufficient evidence led in the Crown case (or extracted from Crown witnesses in cross-examination) that speaks in any coherent way to the subjective intentions of the accused or other relevant person. As such, there would be nothing in the Crown case to discharge the evidential onus particularly as it relates to the subjective holding of belief.
42. More importantly, to the extent that the prosecution *can* lead evidence of the subjective motivations of the defendant or other relevant person, such evidence would be led with a view to *disproving* the defence – i.e. the purpose of the evidence will be to establish that the defendant or other relevant person *did not subjectively believe* that their conduct was in the public interest and that that such a belief, if held, was not *reasonably* held.
43. Evidence which the prosecution would lead is therefore unlikely to speak to factors which suggest the defendant *actually held* the belief that publication was in the public interest or that such a belief was reasonable – that is, the kinds of evidence which a defendant could point to discharge the evidential onus.

[2] Criminal Code s 13.2(1),(6)

This means that the Crown case, in many and potentially the majority of cases, will not contain the kinds of evidence that will satisfy the evidential onus. This means that the defendant themselves will likely be required to go into evidence, potentially compromising their sources.

**b.** ***Shield laws do not provide meaningful protection for sources in the context of criminal trials where the identity of the source will be a central issue***

44. On this last issue of the need to disclose sources if a journalist goes into evidence, some suggestions have been made about the likely application of journalist shield laws to protect the disclosure of sources during a criminal prosecution.
45. Current shield laws are not nationally consistent.[3] However to take as one example the ACT legislation, there is a clear mechanism for judicial override of the protection – a Court may order the disclosure of the source if satisfied that the public interest in disclosure outweighs countervailing factors.
46. A prosecutor may legitimately take the forensic view that the identification of the source is central to establishing the non-availability of the defence and establishing the Crown's case – particularly as it relates to negating the reasonableness of the belief that the relevant dealing was in the public interest, which the identity of a source is likely to be central to. Where and how the journalist found the information is a central issue in assessing whether their dealing was motivated by an objectively reasonable belief that the dealing was in the public interest.
47. A prosecutor with that genuinely held belief will strongly contest the application of the shield law. Given that the issue of the source's identity is now central to the resolution of the key issue in a serious criminal trial where national security is engaged, the Court is likely to agree with the prosecutor and conclude that the need to ensure a fair trial to the prosecution and the effective administration of the criminal law justifies the disclosure of a source. Thus the journalist is again exposed.
48. As far as any chilling effect on public interest journalism is concerned, the effect is no different than if no journalist shield law existed at all – at the time of publication, the journalist must work on the assumption that not only will they likely be required to give evidence, in doing so they are likely to be questioned about their source, and in many, if not most cases, will be required to disclose the identity of that source and face contempt proceedings for refusing to do so on professional ethical grounds.

**There are broader principles based reasons for why an evidentiary onus is inappropriate – no evidence given before this inquiry justifies the retention of the existing evidential onus provisions**

49. It is a basic feature of a criminal trial that the Crown bears the onus of proving beyond a reasonable doubt all substantive elements that establish criminality. It is only in limited circumstances, and only with clear and compelling reasons, that the imposition of an onus of any sort on a defendant is ever justified.
50. No good reasons have been given in relation to any of the current journalist defence.
51. In particular, no principled or coherent reason has been given to justify why the journalist defence in s 122.5(6) should remain subject to an evidential onus imposed on the accused, while the analogous and more recent protections in ss 80.2H and 474(2),(2A) are not.
52. The apparent suggestion is that the existence of evidential onuses in most of the other defences in s 122.5, which principally relate to "insiders", somehow justifies an evidentiary onus in relation to an "outsider" defence. This is unsound. When the current provisions were considered by the Scrutiny of

[3] see *Evidence Act 1995* (Cth) s 126K, *Evidence Act 2005* (NSW) s 126K, *Evidence Act 1929* (SA) s 72B, *Evidence (National Uniform Legislation) Act 2011* (NT) s 127A, *Evidence Act 2011* (ACT) s 126K, *Evidence Act 1906 (WA)* s 201, *Evidence Act 2001* (Tas) s 126B, *Evidence Act 2009* (Vic) s 126K

Bills Committee, the concerns around the placement of an evidential onus were expressed not in relation to journalist defendants but in relation to public servants. The fact that the fundamental rights of other classes of defendant may have also been improperly abrogated at the same time as the rights of journalists, despite Scrutiny Committee concerns, is no justification for continuing to abrogate the rights of journalists and those who work with them.

53. It is also unclear why all defences in s 122.5 must be treated the same in terms of the evidential onus. There are compelling arguments for treating a journalist protection as a negative element in all prosecutions. Different arguments may support doing the same with other defences. No coherent arguments have been put in relation to why creating a journalist protection as a negative fact would be impractical or unworkable.

**Assertions around current AFP investigatory practices support rather than undermine the argument that the law should be amended to align with asserted practice**

54. Evidence before the review indicates that the Australian Federal Police currently consider the existence of a defence as well as the substantive elements of an offence when investigating at offence at the earliest stages.
55. This is welcomed. It is however unclear whether this simply reflects the expectation of senior command or is instead an embedded practice. No further evidence was given to substantiate the position such as policies, case reviews or audits.
56. In any case, this evidence simply confirms the need for legislative change. If the Australian Federal Police are investigating **today, under current policy settings and administrative expectations**, the current "outsider" offences *as if* the offence was drafted to contain a negative element which had to be addressed proactively and early in an investigation, then there can be no objection to reframing the legislation to reflect that administrative reality.

**Section 80.2H of the Criminal Code provides a useful legislative model in certain respects but not others**

57. In broad terms, ARTK agrees with this model in so far as it places the onus of proof on the prosecution to establish the absence of the journalist protection as a negative fact in all cases. The reasons for our support for that approach have been extensively canvassed.
58. However it is difficult for ARTK to give any definitive view on the appropriateness of s 80.2H as a legislative model.
59. Criminal laws need to be clear and simply written. The principles which govern issues such as intention, burden and onus of proof, attempt, and aiding and abetting all presuppose *simple and clear* underlying criminal offences with simple, easily understood elements that do not rely on evaluative judgements.
60. Section 80.2H falls short of these standards because of its convoluted and complex drafting. This is in and of itself makes the broader provision as currently framed inapposite as a legislative template.
61. To the best that ARTK understands the operation of this offence provision, s 80.2H(1)(d) and (9) create a "*negative fact*" that must be disproved by the prosecution in all prosecutions. That "*negative fact*" is that the relevant conduct would not be considered by a reasonable person to be engaged in for the purposes of making a news report or a current affairs report that is *in the public interest* and is made by a person working *in a professional journalistic capacity*.
62. It is this specific framing of the specific journalist protection which makes s 80.2H an unsuitable model, however, for two reasons.
63. *First*, the provision makes no reference to non-journalists who are engaged by media companies. It is however clear that in the case of an "*outsider*" offence significant potential criminal liability attaches to

those facilitating public interest journalism who are not persons "*working in a professional journalistic capacity*." It is therefore clear that this protection is too narrow.

64. *Second,* s 80.2H(9) appears to conflate two issues which ARTK considers are in fact separate, and appears to deal inadequately with both issues.
65. The first issue is whether the disclosure is in the public interest.
66. For the reasons given in our initial submission at [77] – [84], it is appropriate to require the prosecution establish that a dealing is *not* in the public interest (i.e. that the dealing is *contrary* to the public interest) as an element of the offence. This is appropriate because activity should only criminalised where there is meaningful harm to a recognised public interest, and so the offence itself needs to use an objective public interest criteria to establish whether a dealing with information by a journalist is to be criminalised. Having said that, the preferable course would be to clearly define *in the offence itself* the *specific* circumstances where a journalist can and cannot publish which reflect a legislative judgement of where publication will and will not be in the public interest. That does not appear a realistic option at this point, however.
67. Section 80.2H(9) does not however require the prosecution prove that the publication was not in the public interest. It appears to instead require the prosecution establish only that a *reasonable person* would **not** have considered the conduct in the public interest (the number of conceptual and grammatical double negatives in the provisions makes this at best a tentative view as to how this provision is to be read).
68. This means that the Crown does not need to prove that the dealing was objectively damaging to any recognizable public interest. It is not clear to ARTK what the Crown must prove instead. That is, it is not clear what facts, matters or circumstances go towards establishing a "*reasonable person's*" view of whether the disclosure was in the public interest and whether the test is intended to be more permissive and favourable to a defendant (i.e. something may not be in the public interest but may be seen by a reasonable person as being in the public interest) or narrower (i.e. something may be in the public interest but not be regarded as such by a "*reasonable person*", or a "*reasonable person*" would construe "*public interest*" as X but not Y).
69. This level of ambiguity and complexity is unacceptable for a criminal offence. It remains unclear what this hypothetical reasonable person is meant to be assessing and on what basis a jury would be instructed to establish this limb of the offence. It remains unclear what the prosecutor is actually meant to prove – is the Crown's case to be directed to the harm from the apparent disclosure, the absence of some broader public interest in informing the public that may have justified that harm, both of those things, or none of those things?
70. The second issue to consider when evaluating criminal responsibility is what the defendant **believed** about their own conduct.
71. A disclosure may in fact be contrary to the public interest (in particular, because of facts unknown to a defendant), but the holding of a *reasonable belief* that conduct *was* in the public interest is now recognised under Part 5.6 as an exonerating circumstance that absolves a journalist of criminal liability. However, s 80.2H(9) does not appear to require the prosecution disprove the existence of a reasonable and subjectively held belief by a defendant about their conduct being in the public interest.
72. Instead, the defence is determined by an indeterminate and wholly objective standard (i.e. a belief of a "*reasonable person*" that the conduct was in the public interest).
73. This is problematic from a criminal law perspective because most defences operate as a combination of subjective and objective factors (an actual belief that is reasonably held, a subjective loss of control which would have induced an ordinary person in the position of the accused to have lost control, etc). ARTK

does not understand why a wholly objective test is used and why the current approach in Part 5.6 of a mixed subjective/objective approach has been rejected. Without a clear understanding of this, it is difficult to see what advantages s 80.2H(9) has over the current s 122.5(6).

74. In particular, it seems open on this provision for a person to be convicted even though they subjectively held a belief that their conduct was in the public interest, in circumstances where such a belief was reasonably held. That is unacceptable from a public policy standpoint.

**Section 14R of the Evidence Act 1977 (Qld) may be unsuitable as a legislative model for defining who is a "journalist"**

75. ARTK has concerns about the use of the definition of "*journalist*" in this section when used in a criminal context.
76. This is because s 14R includes a broad discretionary power of a "*court*" to determine who is and who is not a journalist in s 14R(2). It is unclear how this power relates back to s 14R(1) – for example, can a person fall within s 14R(1) but nonetheless be excluded as a "*journalis*t" because of how the "*court*" applies the factors in s 14R(2)?
77. In any case, it is inappropriate for an element of a *criminal* offence to rely on a judicial discretion to determine whether or not it applies. The criminal law must be certain and its application and must be knowable in advance. Any person who is engaging in the business of reporting news should be able to know clearly and in advance whether a journalist protection will or will not apply. That would appear not to be the case if a definition such as s 14R was adopted.
78. It would also be unclear, if the discretionary matters in the current s 14R(2) were adopted in a criminal offence, how a jury would be instructed. It seems that the matters in s 14R(2) would be left to a jury rather than a judge, but that would significantly complicate a trial and open up further complex factual questions without any obvious benefit.
79. In addition, s 14R lacks a clear definition of related media worker (a person staffing presses is not "*engaged and active*" in preparing the information for publication, for example). That absence of a broad definition for those assisting journalists is understandable given that the section is drafted to address the confined case of persons giving evidence in proceedings and claiming journalist privilege (i.e. confined to cases where a person is likely to know the identity of a source). Ultimately, s 14R is not drafted to form the basis of a defence to serious criminal offences that apply both to journalists and those assisting them.
80. On the broader question of who should in fact be encompassed by a journalism protection, ARTK considers the current approach in Part 5.6 is broadly appropriate.

**Confining the offence to disclosures and not other "dealings"**

81. ARTK agrees that the concept of "*dealing with*" information is too broad and unclear.
82. ARTK's position is that only *disclosures* of information should be criminalised because it is only *disclosure* of information that risks meaningful damage to essential public interests.
83. To the extent that there may be a legitimate need to criminalise activity that takes place at an anterior stage as a preparatory act to disclosure, the Crown already has the law of attempt – which criminalises certain acts taken in an attempt to commit an offence.[4] This would include preparatory acts to an act of "*communication*" now criminalised in s 122.4A(1). It adds incoherence to the law to add what is in substance an "*attempt*" offence in s 122.4A(2) by criminalising activity which is preparatory to the "*communication*" of information and so already criminalised by s 122.4A(1).

[4] Criminal Code s 11.1

84. The same concern would exist if s 122.4A(1) were narrowed and covered only the retention of documents where retention was unreasonable. Either retaining documents provided by a third party will be a breach of the s 122.4A(1) communication offence on the basis of the principles of attempt or it will not be. If it is not, it is likely to do with the fact that the journalist did not have any intention to publish and took no preparatory steps to publish. ARTK sees no policy justification for criminalising behaviour in those circumstance. The creation of an intermediate offence based on the unreasonable withholding of documents (conduct that will be covered both by s 122.4A(1), when read with s 11.1 and an amended s 122.4A(2)) will simply create a confusing overlap of offences which risks criminalising a journalist who does not publish and takes no steps to publish. It is also an indeterminate legal standard – is it "*reasonable*" to retain **all** information for the purposes of a future story of public interest or potential public interest? If so, ARTK would have less concerns. It is doubtful however that that is an interpretation that the Commonwealth would accept, however.
85. The concern justifying this new proposed offence appears to be the risk that hostile actors may access documents proverbially "left out on the desk" by a journalist. Three points can be made to address that concern.
86. *First*, this proceeds on a fundamental misunderstanding of journalistic practice and the sophistication with which confidential source derived material is handled. No evidence supports the suggestion that material provided by sources is unsafe or at risk of unlawful access by any hostile actor.
87. *Second,* if journalists are targets of foreign intelligence agencies, the solution is for the intelligence services to work with the media on a harm minimisation framework designed to ensure that journalists are otherwise aware of behaviour which may indicate that they are being cultivated by foreign intelligence agencies. Rather than threatening journalists for doing their jobs or suggesting they form a duped 'fifth column' for foreign interference, intelligence services need to find a constructive approach to working with the media that respects the media's right to publish in the public interest.
88. *Third,* in our system of law, we do not criminalise conduct based on the *suspicion* that harm may be caused *not by the defendant but by the further criminal act of some third party*.
89. The security agencies may take the view that harm may result from the aggressive and criminal actions of a third party hostile to the interests of the nation when a foreign intelligence agency seeks to exfiltrate data from a media organisation or physically penetrates a media company's business premises. However, it is an unacceptable extension of the principles of criminal liability to suggest that someone should be jailed for 2 years because there is a theoretical risk that they themselves may be the victim of a crime. The focus of law enforcement and security agencies needs to be on the perpetrator.

**Potential enhancements to ensure timely decisions for the giving of Attorney-General consent**

90. A framework for setting a time limit on the decision of the Attorney-General to consent to a prosecution under s 123.5 could take the following form:
    a) The CDPP would be under a statutory duty to serve notice on the Attorney-General which indicates an intention to prosecute, to be served on the defendant and the Attorney-General;
    b) A statutory time frame for the Attorney-General's consideration would run from the date of that notice – 60 days would seem a reasonable timeframe;
    c) At the expiry of the time period, a decision to <u>refuse</u> consent to prosecute should be deemed to be made by law. For the avoidance of doubt, the legislation would state that from that point in time the Attorney-General is functus officio – i.e. incapable of exercising the power to consent to prosecute unless and until a new notice is issued by the CDPP;

d) Any decision to prosecute made within the 60 day period would not be subject to merits review under the *Administrative Appeals Tribunal Act 1975* (Cth) but would be reviewable under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) and would be subject to a statutory right to reasons under that Act.

e) In the event that a deemed or actual decision not to prosecute is made, if significant fresh and compelling material which was not reasonably available at the time of the initial notice comes to light, the CDPP could issue a further notice of intention to prosecute. Time would run in the normal manner from the issue of that second notice. Whether there is or is not significant fresh and compelling material which was not reasonably available at the time of the initial notice would be a matter which could be reviewed as objective jurisdictional facts under the *Administrative Decisions (Judicial Review Act 1977* (Cth). There would also be a statutory right to reasons from any decision of the CDPP to issue a new notice.