AUSTRALIA'S RIGHT TO KNOW SUBMISSION TO THE INDEPENDENT NATIONAL SECURITY LEGISLATION MONITOR (INSLM) REVIEW OF SECRECY OFFENCES IN PART 5.6 OF THE *CRIMINAL CODE 1995*

4 MARCH 2024

1. Australia's Right to Know coalition of media organisations (**ARTK**) appreciates the opportunity to make submissions to the Independent National Security Monitor (**INSLM**) review (the **INSLM Review**) of the secrecy offences in Part 5.6 of the *Criminal Code 1995* (Cth) (**Criminal Code**).
2. INSLM's current review is the most recent of a significant number of reviews in relation to secrecy and related topics. ARTK has consistently engaged in those consultations and has expressed its preferred outcome to be an exemption for journalism and journalists in relation to these offences. While to date this has not been accepted, it remains ARTK's preferred view. Notwithstanding this, we continue to engage constructively on the development of law reform options in this area.
3. ARTK's submission to the recent Attorney-General's Department Review of Commonwealth Secrecy Provisions (the **AGD Review**) set out a set of principles for reform, and recommended specific, targeted and confined reforms. The procedural and practical application of the existing law to journalists and journalism informed those recommendations. We take the same approach to this submission.

SECTION 1: ARTK'S SUMMARY POSITION

4. It has been a longstanding precept of ARTK, that journalists and those working with them should not be exposed to criminal liability.
5. ARTK's primary concerns with the current legislative regimes were as follows:

    (a) Clear limiting principles in respect of secrecy provisions have not been adopted;

    (b) The excessive and unprincipled use of secrecy provisions has a suppressive effect on the media and transparent government in violation of both principles of open government and the associated freedom of political communication;

    (c) Criminal liability should not be applied to unauthorised dealings with Commonwealth information as a matter of course;

    (d) The current journalism 'defence' (s 122.5(6) of the Criminal Code) is inadequate in that the criminal standards applicable to the defence make it a 'dead letter' in practical terms for any journalist seeking to rely on it. Journalists remain subject to a real and meaningful prospect of being criminally investigated or caught in the investigative process; and

    (e) The essential public interest in being informed about activities of government is not adequately protected.

6. In addition, ARTK promulgated three core principles which should govern whether the secrecy provisions are implemented or otherwise preserved in Australia:

    (a) All non-disclosure/secrecy offences must protect the paramount importance of the Australian people's right to know about the conduct of its own government and its administrative actions. This requires robust journalist protections.

    (b) Any criminal sanction must require an intention to cause harm to a recognisable public interest.

    (c) There must be clear, meaningful and serious harm to a recognisable public interest, and any criminal sanction must be proportional to address that harm

7. Unfortunately the AGD Review in dealing with Part 5.6 did not grapple with our primary concerns or adequately apply the three core principles we proposed. The AGD Review has serious shortcomings beyond this failure to engage, as it merely opts for essentially a replication of the current offences. No concrete recommendations were made in relation to the extension of the existing defences in Part 5.6, nor did it meaningfully address potential reframing of those defences.
8. In relation to the AGD's review of Part 5.6 of the Criminal Code, ARTK's concerns are that the AGD Review:
   (a) failed to state in definitive terms what *specific types* of information should be protected by criminal secrecy provisions;
   (b) did not *identify the specific social or other harm* to the public interest said to be caused by disclosure in those specific circumstances; and
   (c) did not provide principled reasons for why *criminal* sanction, as distinct from other forms of sanction such as disciplinary action, is an appropriate or proportional response in those circumstances.
9. In addition, the AGD Review failed to meaningfully engage with the very practical concerns ARTK expressed in relation to the practical "chilling effects" on public interest journalism under the current legislation.
10. More disturbingly, the AGD Review also proposes legislation that widens potential criminal liability by creating a new offence which criminalises the disclosure of any government information where disclosure would “be prejudicial to the effective workings of government or where the information was communicated … in confidence and the disclosure would breach that confidentiality obligation”. ARTK is deeply concerned with that approach which underlines the need for INSLM to undertake a more analytical approach to Part 5.6.
11. Whilst ARTK acknowledges that the INSLM is limited to Part 5.6, the approach set out below should be adopted across the legislation in dealing with secrecy provisions. At a minimum, any review of Part 5.6 must have regard to the need for:
   (a) certainty of the criminal law;
   (b) a serious, specific and identified harm; and
   (c) compliance with common law or democratic principles including the need for open and transparent government and the right to a fair trial.

12. Based on these concepts, ARTK has the following serious concerns about the operation of the existing Part 5.6:

    (a) The imposition of the current evidential onus places the journalist in an impossible professional and personal position. The onus will in many cases require a journalist to go into evidence to enliven the public interest defence. This, however, risks compromising their sources. As a journalist is unlikely to do this, there is a very real risk that a journalist will not be able to access the defence. The journalist must choose between serious criminal sanctions or sacrificing a source;

    (b) The evidential onus also exposes those working with the journalist to wrongful conviction, as to access the defence they are required to prove the mental state of another person (for example the journalist) when that person may be unavailable or non-cooperative;

    (c) The evidential onus promotes years of investigatory uncertainty because law enforcement will treat the defence as a matter to be raised by the defendant at trial, and will not investigate fully the defence which could otherwise bring investigations to an early close;

    (d) The evidential onus is unnecessary as it does not narrow the issues a prosecutor must address;

    (e) The journalist defence, with the onus issue addressed, should be applied across all secrecy legislation. No principled basis has been put for why journalist protections should not apply to each and every secrecy offence;

    (f) The attachment of a security marking by a public servant to a document should not be used as the criteria to establish criminal liability. Such an approach is contrary to the rule of law; and

    (g) A journalist and those working with them should not be convicted for disclosures which cause only minor, reversible or short term damage.

13. While our preferred position is an exemption for journalism and journalists, in an attempt to address these serious concerns as to the operation of Part 5.6 of the Criminal Code, ARTK proposes that all of the following are necessary:

    (a) Where a journalist or those working with them is a defendant, any offence should have the further element of only criminalising a disclosure or other dealing which is not in the public interest. The current "defence" under section 122.5(6) is insufficient to protect the public interest in reporting matters of public interest;

    (b) An evidentiary onus of the kind now in section 122.5(6) should not be placed upon journalists or those working with them;

    (c) Principles of accessorial liability should be expressly excluded from application to the offences in Part 5.6; and

    (d) The protections for journalists in Part 5.6, with the modifications above, should extend to all secrecy offences.

14. Adoption of the above proposal is more consistent with the three core principles stated above than a mere extension of the currently unworkable defence.
15. It is critical that all legislation should be amended to ensure journalists and those working with them are not exposed to accessorial liability.
16. Ultimately, it should not be for the media or the public to justify why the public should be able to receive information about its own government free from the risk of criminal sanction. It should instead be for government to justify – clearly and unambiguously – why the public should not receive information about its own government and why the threat of criminal sanction is the only appropriate mechanism to stop the public receiving that information.

SECTION TWO: DETAILED RESPONSES TO INSLM QUESTIONS

Journalists' defence – Discussion Paper Question 30

17. As indicated above, in practice the current defence is a dead letter for journalists and does not conform to the above principles. There are significant problems of *principle* with placing an evidentiary burden of the kind set out in section 122.5(6), but also significant problems regarding its *practical operation* and the "chilling effect" that this has on journalism. In summary, this can be demonstrated by the following:

    (a) the defence places an evidential burden on the journalist which erodes the presumption of innocence;

    (b) the onus requires the journalist to sacrifice their confidential sources to secure an acquittal;

    (c) the onus leads to long running investigations which defer or ignore the issues actually dispositive of criminal liability;

    (d) in practice the onus does not help the prosecution, and

    (e) journalist's coworkers can be convicted despite a reasonable doubt as to their guilt.

18. Each of these is explained in detail below.

A. Evidential burden and onus

19. Normally, the prosecutor must prove all elements of offending beyond a reasonable doubt. This reflects a defendant's right to silence and presumption of innocence.
20. The current defence in section 122.5(6), however, places an evidential burden on the defendant.
21. The effect of this evidential onus is that, before a defendant can access the defence, the defendant must first adduce evidence or point to material in the prosecutor's case to show the "*reasonable possibility*" that they (or sometimes another person) reasonably believed that engaging in the relevant conduct was in the public interest.[1]

[1] Section 13.3 *Criminal Code 1995* (Cth) (**Cth Code**).

22. If the defendant can do this, only then does the onus shift to the prosecution to show that the relevant dealing was either not *believed*, or not *reasonably* believed, to be in the public interest. The prosecution must establish this "negative fact" beyond a reasonable doubt.[2]
23. Any attempt to place an evidential onus on a defendant – which requires a defendant take some active step to establish that they are *not guilty* – erodes a defendant's rights to silence and presumption of innocence. A journalist charged with these offences *"comes before the jury not as a person to be presumed innocent but as a person presumed to have a case to answer."*[3]
24. While concerning from a principles perspective, the placing of the onus raises additional practical problems.

B. An evidentiary onus "defence" requires a journalist sacrifice their confidential sources to secure acquittal

25. The first problem in practice is that, where the defendant is a *journalist,* it is difficult to see how the evidentiary burden would be discharged *other* than by the journalist going into evidence.
26. This is because the "defence" in section 122.5(6) contains both subjective and objective elements, and evidence of what the defendant *subjectively believed* about whether their actions were the public interest will rarely be capable of being inferred from documents or objective circumstances. This means the journalist is unlikely to be able to establish that they *subjectively* believed that their conduct was in the public interest unless they themselves go into evidence.
27. Being required to go into evidence will however put at risk the duties of confidentiality owed by a journalist to the journalist's anonymous sources – because once a defendant goes into evidence, the prosecution may ask any forensically relevant and otherwise fair question on any fact in issue.[4] The source of the information, the reliability of that source, and the motives, if any, of that source would be a central area for the prosecution to test.
28. Only limited protections may prevent a journalist from being compelled to disclose the identity of a source – and the availability of those protections, which are dependent on judicial discretion, cannot be predicted in advance.[5]

[2] Sections 13.1 and 13.2 Cth Code.
[3] *R v Momcilovic* (2010) 25 VR436 at [135].
[4] *Libke v The Queen* (2007) 230 CLR 559.
[5] For example, for criminal proceedings in the Courts of the Australian Capital Territory, see *Evidence Act 2011* (ACT) s 126K.

29. The ability to give a meaningful and binding assurance of confidentiality to a source is fundamental to journalism. Without being able to give a source a meaningful assurance of confidentiality, the journalist can have no expectation of receiving information from the same source or other sources in future, and with that, they have no real ability to carry out journalism.
30. A journalist who 'sacrifices' their source becomes a pariah – or at least, a 'no go' zone. For this reason, protecting the identity of sources has long been regarded as essential to protecting public interest journalism itself. Many journalists have been charged with contempt and have been jailed or fined – and many more have faced the prospect – by refusing to name their sources when compelled to answer questions in civil and criminal proceedings.[6]
31. A defence such as section 122.5(6) therefore places a journalist in an impossible dilemma: either go into evidence and sacrifice their source (who is also at risk of being charged) to secure their own acquittal, or adhere to a professional duty of confidentiality to their source and potentially be convicted of an offence carrying a sentence of 5 years' imprisonment.
32. This raises a real issue of principle. For the reasons given, a journalist is going to be strongly disinclined to take the steps which as a practical matter are necessary to discharge the onus, both out of professional ethical considerations and also out of career considerations. This is unacceptable in a liberal democracy. A defendant is entitled to **both** a fair trial and to continue in their profession.

C. An evidentiary onus placed on a defendant will lead to long running investigations that defer or ignore the issues actually dispositive of a journalist's criminal culpability

33. The second practical problem from placing an onus on a defendant is the practical, real-world impact this has on the conduct and attitudes of law enforcement and prosecutors.
34. If a "defence" places an evidential onus on a person to establish a particular matter to engage a defence, then police and prosecutors may say: the question of whether the defence is available is a matter for the defendant to raise at trial, and the investigation will proceed based on whether there is an apparent case based on the primary elements of the offence, disregarding

[6] In 1989 Joe Budd (Qld) and Tony Barass (WA) were jailed for refusing to answer a question. In 2007 a judge said he considered jail for Gerard McManus and Michael Harvey but ultimately imposed fines. In 1993 David Hellaby, Chris Nicholls and Deborah Cornwell were respectively fined, jailed and sentenced to community service. In 1994 Madonna King and Paul Whittaker were threatened with the prospect of being asked the questions and jailed when they revealed CCC information. In 2013 journalists Pennells, McKenzie, Darling and Ferguson also faced a similar prospect.

the defence. When contemplating publication of newsworthy material, a journalist therefore faces the "chilling effect" of the prospect of an extended police investigation which will – to a greater of lesser degree – defer consideration of the public interest defence, which is the issue which is *actually dispositive* of the criminal culpability of a journalist.

35. Past history – including both the ABC raids and the Annika Smethurst raid – provide cautionary tales of the financial and emotional impact of drawn-out police investigations carried out into wholly legitimate public interest reporting. The prospect of a repeat will self-evidently stay any journalist's hand in publishing – despite stark u-turns in professed investigatory approach announced by the Australian Federal Police (**AFP**) in new guidance material. Ultimately, what will inform journalists' concerns will be past police behaviour, and not what is published in a guideline from time to time.
36. Commonwealth Director of Public Prosecution Guidelines require a prosecutor to "*have regard to any lines of defence which are plainly open to, or have been indicated by, the alleged offender*" when assessing whether a prosecution has "*reasonable prospects*" of success. However, if the preceding police investigation has not been directed to the issue of whether a journalist protection is available, then a prosecutor will have insufficient material to decide that a prosecution should not proceed. At best – and flagging a matter to be discussed later – the prosecutor, cognisant of their *practical* onus to address pre-emptively in the Crown's case the absence of a journalist "defence", may require police to undertake more comprehensive inquiries to adequately address the existence or non-existence of the defence. But this is not a case when late is better than never. The journalist may have been subjected to the professional and personal strain of a two year investigation by that stage.
37. Similarly, the AFP now publish guidelines requiring investigators "*take into account the importance of a free and open press in Australia's democratic society*". But the Australian Federal Police does not appear to be under a duty to *investigate* the elements of a journalist defence *fully* as part of an investigation, notwithstanding that one of the matters to be considered is whether there are "*potential defences available for the alleged conduct*". Indeed, the AFP may at any given time assert that it has a duty to investigate suspected breaches of the criminal law which is superior to any guideline.
38. Even if a duty to investigate thoroughly any potential defence was provided for by guidelines, such apparent protections would be meaningless. It is besides the point whether such a document would be 'enforceable' as an internal matter – whatever its legal effect, a document

such as this guideline gives no apparent legal basis for a journalist to enforce compliance. Nor, ultimately, is there any guarantee that the guideline is not simply withdrawn tomorrow.

39. Ultimately, what matters is institutional incentives and institutional realities. Past history illustrates that there is a perceived incentive to use investigations into a journalist as a means to locate sources, and while admirable, policy guidance of any sort does not meaningfully blunt that incentive.
40. As such, journalists remain subject to the serious risk of disruptive criminal investigations which defer and delay investigating the *real question governing their personal criminal culpability.* Vindication through an acquittal after a long drawn-out investigation (or through a decision of the Commonwealth DPP not to prosecute at the last minute) is cold comfort.

D. The specific defence pertaining to those working under direction creates an unacceptable risk that defendants who are not the publishing journalist will be convicted despite a reasonable doubt as to their innocence.

41. The "defence" in section 122.5(6)(b) appears unique in that criminal liability depends on the existence of a belief that is subjectively held *not by the defendant but by someone else entirely.*
42. This issue arises because a wide range of those working with journalists or in that processs – including editors, in-house lawyers, and the "*administrative staff*" of a media organisation, may by charged and prosecuted under the substantive offence provisions in the balance of Part 5.6.
43. For that reason, the "defence" is framed to cover any person "*engaged in the business of reporting news, presenting current affairs or expressing editorial or expressing editorial or other content in news media*." The persons "*engaged in the business*" appear to be all editorial and support staff – such as editors, in house lawyers, and others involved in a media enterprise.
44. However, in many cases their defence to a charge under Part 5.6 will be expressed to operate by reference to the subjectively held beliefs of *another person*.
45. This is because a member of the "*administrative staff*" of an organisation may not, and often will not, have any view about the public interest in their dealing with particular information – so they will not have the benefit of being able to establish the defence under section 122.5(6)(a).
46. Instead, they may only have the benefit of the defence in section 122.5(6)(b). This defence requires not only that they acted *"under the direction of a journalist, editor or lawyer who was also a member of staff of the entity"* but also <u>that this person held a particular belief and that it</u>

was reasonably held.[7] But what does a member of the "*administrative staff*" know of the subjective state of mind or even the objective circumstances surrounding the decision of the "*journalist, editor or lawyer"* who may have given them a direction? The defendant – usually a lower-level employee – would have to try to lead evidence about what may have motivated *another person* when publishing a story in whose preparation the defendant *had no substantive involvement whatsoever.* If the person giving the direction dies, becomes incapacitated, or refuses to cooperate (as is foreseeable because cooperation may implicate them criminally), how can a defendant ever actually obtain the evidence needed to properly defend themselves?

47. This creates a real and unacceptable risk that a person otherwise entitled to an acquittal will be convicted because they cannot discharge the evidential onus by leading, or pointing to, evidence about the mental state *of someone else entirely.*

E. An evidentiary onus on a defendant does not actually help the prosecution – it is under a procedural obligation to deal with the public interest defence before the defendant discharges their onus.

48. An evidentiary onus being placed on a defendant does not seem to actually assist the prosecution.
49. This is because of one key principle of criminal procedure: that the Crown must usually run its case before the defendant and must usually lead the whole of its evidence "*fully and fairly*" before the defendant opens his or her case.[8]
50. Thus, a prosecutor is expected to deal with whether or not the defence is available *pre-emptively* in the Crown case. That allows the defendant to then make an election, at the close of the prosecutor's case, to either proceed on the basis of deficiencies in the prosecutor's case, or to forego the defendant's right to silence and lead their own evidence.
51. Prosecutors are generally not allowed to reopen their case after a defendant's case to address matters raised in the defendant's case. The reasons lie in procedural fairness and basic principles of justice – the Crown should not have the advantage of both the first *and* last word before a jury,[9] and a defendant, in order to have a fair opportunity to respond to the

[7] The person giving the direction must have the reasonable belief that engaging in relevant conduct was in the public interest.
[8] *R v Soma* (2003) 212 CLR 299 (***Soma***) at [27].
[9] *R v Killick* (1981) 147 CLR 565 (***Killick***) at 569-571 per Gibbs CJ, Murphy and Aicken, 576-577 per Wilson and Brennan JJ.

prosecutor's case, must be given an adequate opportunity to review the prosecutor's case *in full* to determine the questions to be put in cross-examination, the evidence they may wish to call, and the objections, if any, they may wish to make in relation to the prosecutor's evidence.[10]

52. This means that a very strict approach is taken to prosecutors being able to diverge from this requirement and adduce evidence after a defendant's case. It is only in *"very special or exceptional"* circumstances this is allowed. Usually, "*special or exceptional*" circumstances will not exist where a particular defence is "*reasonably foreseeable*".[11]
53. When criminal proceedings are brought under Part 5.6 against journalists, a public interest defence will almost invariably be "*reasonably foreseeable*".[12] Therefore the prosecution would seek to disprove the public interest defence in its case.
54. This means that the various reasons used to justify the existence of a reverse onus **all** fall away.
55. No time and resources are saved in preparing the prosecution case by imposing an evidentiary onus on the defendant – the prosecution must still go into evidence on the public interest issue. Nor are any issues narrowed – the prosecution must still in *its case* try to deal with any public interest defence it anticipates will be put.
56. However, because the prosecution is unlikely to be able to deal with the *subjective* elements of the defence (i.e. what the defendant *actually* thought about the issue of public interest), the defendant will still often have to go into evidence to formally discharge their onus in order to formally be able to rely on the public interest defence.
57. So this is the worst of both worlds – the prosecutor must proceed on the basis that they must address the public interest defence in its case, but the defendant will often still have to go into evidence (and compromise their sources) to allow them to *technically* engage the defence.
58. This leads to a final point.
59. Under Part 5.6, the exact conduct of a journalist which *is and is not* criminalised is not clear. The yardstick for criminalising behaviour is vague and indeterminate, because non-criminalised behaviour is anything which a defendant reasonably believes to be in the public interest. That

[10] *R v Chin* (1985) 157 CLR 671 (***Chin***) at 685-6.
[11] *Shaw v The Queen* (1952) 85 CLR 365 (***Shaw***) at 379-380.
[12] While defences where a defendant carries a legal burden (e.g. insanity) *may* permit a Crown case in rebuttal, reasonably foreseeable defences which must be disproven by the prosecution once raised only to an evidentiary standard must generally be dealt with by the prosecutor in their case in chief – see *R v Goode* [2004] QCA 211 at [39], [44]; *Shaw* at 379-380; *Killick* at 572; *Chin* at 676-677; *Soma* at [104].

standard tells a potential defendant nothing about whether a *particular proposed* publication is or is not lawful.

60. A defence, by being indeterminant, may make it difficult for the prosecution to establish guilt beyond a reasonable doubt.[13] By creating an indeterminate standard of criminal liability, a prosecutor's job becomes harder because they must ultimately negatise the *multitude* of things that could or may fall within that indeterminate standard which a defendant may choose to rely on in their defence.
61. But this is a difficulty of the State's own making. It has failed to clearly define what conduct is and is not criminalised and so makes its own role in prosecuting more difficult.
62. Placing an evidentiary onus on the accused should not be used to overcome this problem. In the case of the present public interest defence, placing an evidentiary onus on the defendant could potentially allow the prosecution to overcome the difficulty it faces in having to preempt a defendant's formulation of a public interest defence. This would only be in cases where the prosecution stays silent on the issue of public interest in its own case and waits for the defendant to discharge the onus in the defence case. It could then respond to what the defence puts in a case in reply.
63. However, this takes away many of the usual protections that afford an individual a fair trial. The prosecution would have the advantage of both the first *and* last word before the jury. The defendant would not have an adequate opportunity to review the prosecutor's case *in full* to determine the questions for cross-examination, the evidence they may wish to call, and any objections they may wish to make in relation to the prosecutor's evidence. The defendant would not be able to respond to the evidence the prosecutor may lead against them, so any benefit to the prosecutor only comes about by denying the defendant the core rights of a fair trial. This cannot be permitted.
64. Before leaving the topic, it is worth mentioning the treatment of onus in one other defence in Part 5.6.

[13] This is why the Guide to Framing Commonwealth Offences cautions against the use of the defence of "*reasonable excuse*". The Guide states that *"The defence of reasonable excuse is too open-ended. It is difficult to rely on because it is unclear what needs to be established. Equally, it may be difficult for the prosecution to respond to the defence, if raised*" (emphasis added).

65. Section 122.5(1) provides a defence, relevantly, where a person "*was exercising a power, or performing a duty, in the person's capacity as a public official or who is otherwise engaged to perform work for a Commonwealth entity*".
66. The note to this section states that a defendant may bear an evidential onus on this question. The apparent exception to this is for *certain* named officeholders and their staff – relevantly the Inspector-General of Intelligence and Security, the Commonwealth Ombudsman, and the National Anti-Corruption Commissioner (although not the Inspector of the National Anti-Corruption Commissioner, which is an anomaly).[14] It is unclear why *these* officers and their staff are afforded the normal rights of a criminal accused in relation to onus – although it appears to be a partial response to broader concerns of the Scrutiny of Bills Committee.[15]
67. In any case, for all other public servants, an evidentiary onus must be discharged to enliven this defence.[16]
68. It is again difficult to see how all the prosecution *would not* be required to deal with the questions that are the subject of the evidentiary onus preemptively, at least in most cases involving a public servant whose disclosure bore some relationship to the possible performance of their work duties. Again, that raises the question of what practical assistance the evidential onus actually provides the prosecution.
69. But the onus placed upon a defendant in this instance risks real injustice too. The information relevant to this defence and to discharging the onus – which in substance asks whether a Commonwealth officer was acting within the scope of their employment – is primarily held by the Commonwealth, not the defendant. It is the Commonwealth that holds the records about delegations, internal authorisation and work duties, and it is the Commonwealth's own employees who are able to give testimony on what verbal directions may or may not have been given to the defendant setting the scope of their duties. There is no guarantee that access would be granted to these materials to enable a defence to raise any evidence in answer to the charges and to discharge their evidential onus. This means there is a real risk of convicting persons in whose favour a reasonable doubt exists – or even an objectively innocent person.

[14] s 122.5(12)(a).
[15] Digest 4/18 at [2.35] – [2.54], particularly [2.50] – [2.51].
[16] s 13.3(3).

70. This underscores the fact that the mere existence of other evidentiary onus defences is no justification for retaining an evidentiary onus in the defence covering journalists or other media workers.

Providing certainty moving forward

71. Ultimately, the current difficulties with the public interest defence have as their root cause the fundamental indeterminacy of what may be a recognisable public interest and the basis for a reasonable belief in that public interest. What a journalist can and cannot publish is never clear in advance, because the law does not specify the precise dealings which will and will not attract criminal sanction.
72. This is contrary to principle. A fundamental principle is that the criminal law must be certain. Those subject to the laws, ahead of action that may constitute a breach, must know with precision what they can and cannot do.
73. A properly framed offence which clearly delineates the conduct that is criminalised would operate as an adjunct to all other Part 5.6 offences and provide that, where the defendant is a journalist or other media worker, a disclosure is *only* criminalised in a small number of specific scenarios that Parliament deems will not be in the public interest when a disclosure is made by a journalist. Some specific matters are currently set out in section 122.5(7), but these are themselves too broad. However, we do not see how this more principled approach can now credibly be progressed, as the recent AGD Review did not articulate the specific circumstances where, in the Department's view, a disclosure by a journalist would be improper and should be criminalised.
74. Whilst, as stated in Section 1, ARTK primary contention has been, and is, for an exemption, a provision that is capable of being implemented immediately to address some of the issues could take the following broad form: where a journalist or a media worker is a defendant under Part 5.6 or any other secrecy provision, the offence would have the further element of only criminalising a disclosure or other dealing which *was not* in the public interest.
75. The defendant could raise as a defence either a reasonable belief that their conduct was in the public interest, or a reasonable belief that they were acting under the direction or with the authority of another person.
76. While this suggested approach does not remove all current problems, it at least mitigates many.

Reframing the offence

77. ARTK believes that Part 5.6 could be reframed by reference to specific and identified matters:
    (a) any offence should have the further element of only criminalising a disclosure or other dealing which *is not* in the public interest;
    (b) the Crown should bear the onus of establishing why the disclosure was contrary to the public interest in a particular respect; and
    (c) a defence should be retained that the defendant had a reasonable belief that the conduct was in the public interest.
78. The recast offence would create a negative element that requires the prosecution to establish, in its case in chief, that the particular dealing with information was *not* in the public interest.
79. This accords with the basic liberal democratic principle that it is for the State to clearly establish why the public *should not* be told matters relating to the affairs of its own government and that otherwise there is a presumption that the public *should and must be told*. A journalist should not be presumptively criminalised, unless and until the journalist justifies *their belief* that the public *should have been told,* as is currently the case.
80. The prosecution would instead need to articulate clearly, based on evidence and argument, **why** the defendant's actions harmed or were contrary to the public interest in a particularised respect. What is and is not in the public interest would ultimately be treated as questions of fact and would be an essentially objective and factual question that has nothing to do with the subjective belief or motivations of the journalist or any other defendant (which may, for example in the case of a defendant who is a lawyer, have nothing in fact to do with the public interest in the public disclosure of the information as a means of informing the public about its own government). Nor would the simple fact that the disclosure was contrary to an existing offence provision said to reflect a relevant public interest be sufficient.
81. What is and is not in the public interest is a matter the Crown can and should be able to clearly articulate based on information held by it and the resources of government – it is therefore a matter properly within its normal onus which it can and should address in its case.
82. Unlike the current defence, the prosecution would not in this aspect of the case be leading a case in chief based on attempting to pre-empt and rebut a formulation of the public interest *subjectively* held by the journalist or other defendant. Instead, the prosecution would be

framed in terms of identifying the actual harm from the particular dealing. This accords with the Department's own proposed "*harms-based approach"* for the framing of these offences.

83. There would be no apparent procedural unfairness to the defendant – they are entitled to particulars and would be allowed to view and consider the Crown's case in full on the matter which is fundamentally determinative of criminal liability before calling or giving evidence or making other key forensic decisions. There are limited prospects of the 'real' trial taking place in a case in reply and reduced prospects of a journalist defendant being required (as opposed to having the choice) to take the stand in their own defence to respond to the prosecution's formulation of public interest (and so compromise their sources).
84. In addition, because harm to the public interest is a key integer of the offence, police investigatory action will clearly be directed to addressing that key issue, and investigations will be brought to a prompt end unless there is clear and cogent evidence for suggesting why the relevant dealing was not in fact in the public interest.

Reframing the defence

85. The first limb of the proposed defence is a reasonable belief that their conduct was in the public interest.
86. Reframing the offence does not obviate the need for such a defence. Offences and defences often follow a standard pattern where the law criminalises an activity that causes social or other harm, but allows the defendant to avoid criminal responsibility if they can establish an honestly held but still reasonable belief that the activity causing the harm did not in fact occur.
87. As noted, an evidentiary onus on this defence may serve no purpose for the prosecutor because the prosecutor is likely to be under a procedural duty to deal with the question of reasonable belief in his or her case in chief *regardless* of where the onus sits. For that reason, the placing of an evidential onus on the defendant in relation to the proposed defence serves no purpose in limiting the issues in dispute or serve any other legitimate purpose.
88. In terms of protection of confidential sources, the arrangements proposed (reframing of offence, coupled with this defence) would give the defendant at least the opportunity to assess, by the close of the prosecution case, whether a reasonable doubt exists as about whether the defendant held the relevant reasonable belief in public interest based on the totality of the evidence led by the prosecutor.

89. The defendant may, based on a full evaluation of the completed prosecution case in chief, then seek to engage the defence by tendering or leading evidence from persons *other* than a journalist or other defendant with first hand knowledge of a journalist's source in his or her own case (although this would be rare).
90. The second limb of the proposed defence is that the defendant had the reasonable belief that they were acting under the direction or with the authority of another person. This is to encompass the position of lower-level employees of media companies, who themselves are unlikely to form views on the "*public interest*" in their dealings with particular information. For the reasons given, there is basic unfairness in making the success or failure of that person's defence depend on establishing the state of mind of *another* person, so that aspect of the current section 122.5(6)(b)(ii) should be dropped.

Across the board application of journalist protections to all other secrecy provisions

91. Although a matter potentially outside the remit of this current inquiry, we again emphasise the need for journalist protections to apply across the statute book. The recent AGD Review has requested other departments consider whether a public interest journalism defence would be appropriate for any specific secrecy offences they administer – but regrettably has not given guidance or direction. To date, no policy arguments have been advanced for why *any* existing secrecy offence should remain without journalist protections.

Attorney-General consent to prosecution – Discussion Paper Question 33

92. The need for the consent of the Attorney-General to a prosecution under Part 5.6 is an appropriate further protection. However, it is no substitute for an appropriately framed criminal offence/defence structured in such a way as to ensure fairness is afforded to an accused.
93. However, the current requirements for Attorney-General consent should be enhanced.
94. First, section 123.5(1)(a) is potentially unclear in its application to proceedings which do not require a committal – the provision appears to exclude summary offences. While the offences in Part 5.6 are all indictable (see *Crimes Act 1914* (Cth) (**Crimes Act**), s 4G), these offences may proceed summarily in certain circumstances (Crimes Act s 4J). The consent requirement should clearly apply in all cases where a prosecution is brought for a Part 5.6 offence.

95. Secondly, the risk in this provision is delay and uncertainty between the point in time when the Attorney-General is *requested* to make a decision and the time the Attorney-General *makes* the decision. This period may be very lengthy and has no fixed end date – and delay, particularly in any case that may require oral testimony that is dependent on human memory – can work potential injustice to both the Crown and an accused.
96. For these reasons, a time limit should be applied that requires the Attorney-General make a decision on whether to grant or withhold consent under the section within a specified, reasonable timeframe. A failure to make a decision within that timeframe should result in a deemed refusal to give consent.
97. Thirdly, section 123.5(4) requires the Attorney-General to consider whether the "*conduct might be authorised in a way mentioned in section 122.5*." That would require the Attorney-General to consider the potential application of the journalist defence in section 122.5(6).
98. However, this in substance only replicates the existing function of the Commonwealth Director of Public Prosecutions under policy materials – and as discussed above, neither the Commonwealth Director of Public Prosecutions nor the Attorney-General would necessarily be furnished with a full suite of relevant information under the defence provision as *currently* framed because the police investigation may ignore information relating to a defence.
99. A more appropriate formulation may be the formulation now found in existing shield laws – relevantly, the case of potential defendants who are media workers, the Attorney General must consider the public interest in the communication of facts and opinion to the public by the news media and, accordingly also, on the news media's ability to access sources of facts. That avoids a situation of the Attorney-General having to prognosticate the outcome of a prosecution which will at that stage be uncertain.

Attorney-General's certification of national security markings – Discussion Paper Question 34

100. Broader concerns in relation to the role of security markings as a critical integer to determining criminal liability are discussed below.
101. For present purposes, there is a major flaw in section 123.5 that must be addressed if the provision is retained and is to apply to "outsiders".

102. Currently, what is criminalised in the case of "outsiders" to government is the publication of information "*that has a security classification of secret or top secret*."[17] Section 123.5, however, only requires the Attorney-General to be satisfied "*at the time of the conduct that is alleged to constitute the offence, it was appropriate that the information had a security classification*" (our emphasis).

103. We understand that the security markings scheme ranges from "*Official: Sensitive",* "*Protected*", "*Secret*" to "*Top Secret*". These markings can, between the four of them, theoretically apply to a very large number of Commonwealth records. So as drafted, the Attorney-General is required to certify, in respect of a prosecution that requires a document be marked a "*Secret*" or "*Top Secret*", not that the markings of either "*Secret*" or "*Top Secret*" were appropriate at the time of the alleged offending, but that *any marking whatsoever* would have been appropriate, including a mark that could *not* be used as the basis for a prosecution under the relevant offence. This means the apparent protections of the section are illusory as the Attorney-General is not certifying that the information was correctly classified with the *relevant* marking.

104. The provision, if retained, requires amendment to ensure that, where a prosecution involves establishing that information had a security classification of "*Secret*" or "*Top Secret*", the thing the Attorney-General is required to certify that *either of those two classifications* would be appropriate at the time of the alleged offending.

105. Lastly, ARTK continues to hold concerns regarding document classification more generally, including the breadth of documents stamped secret and top secret across all of the Australian government. While we acknowledge the INSLM review is narrowly cast to Part 5.6 of the Criminal Code, further work in this area is warranted.

"Outsider" offence in section 122.4 – Discussion Paper Questions 27 – 29

106. What the criminal law seeks to determine is *criminal culpability* in relation to an end result, rather than assigning sanction or punishment based simply on the occurrence of an end result.

107. What we mean by this is that the same act – for example, the ending of another human life – leads to *multiple* potential criminal law responses based on degrees and variations in the *criminal culpability* of an accused that have been developed and recognised over centuries of judicial and legislative development. So, in the example of the ending of another human life,

[17] Criminal Code s 122.4A(d)(i).

the law recognises in respect to that one result a full range of different graduated legal responses based on the circumstances of offending and the circumstances of the offender, informed by the community's interest in ensuring both specific and general deterrence to future offending and the legitimate interests of victims and their families in obtaining meaningful redress.

108. At one end of the extreme, a person of full mental capacity with an intention to kill is guilty of murder and sentenced to either life imprisonment or a lengthy jail sentence, often for decades. The responses are then graduated, taking into account recklessness, provocation, impairment by reason of mental illness, self defence and a person's age. Our law therefore involves the making of nuanced and graduated distinctions about criminal *culpability* that are ultimately directed to working out the justice of the individual case, with one of the key determinants being the circumstances of the offender and of their offending.
109. This is why, ultimately, we now have a journalist protection in the first place, alongside the other "defences" in section 122.5. They all recognise that certain dealings with information are not *criminally culpable* in certain circumstances, notwithstanding some actual or apparent harm from a disclosure to some underlying and recognised public interest.
110. The concept of criminal culpability is critical to distinguishing the position of government "outsiders" and "insiders" when considering potential criminal liability.

No accessorial liability for "outsiders" for facilitating an "insider" offence

111. The very point of currently having different insider and outsider offences is to reflect the different degrees of criminal culpability for those "insiders" subject to the offences in ss 122.1, 122.2, 122.3 and 112.4 and the "outsiders" subject to section 122.4A. The current law reflects – imperfectly – the recognition that an "outsider" such a journalist, an academic, or other interested member of civil society should only be criminally liable in a much more limited set of circumstances than public servants and other "insiders". This is for a range of reasons including the fact that they are not employed by the Commonwealth, have not made commitments of confidentiality to it or agreed to abide by its policies.
112. However, it is inherent in the very act of journalism that a journalist may be taken to be a person who "*aids, abets, counsels or procures*" the commission of an offence by an "insider." This is because the very act of receiving information from a government source is likely to result in a source contravening any of sections 122.1, 122.2, 122.3 or 122.4. The journalist will accordingly

be taken to have committed the *insider* offence and be punished accordingly, provided certain intention and other requirements for accessorial liability are met.[18]

113. To permit the operation of an insider offence, with its much stricter requirements, to an outsider renders pointless the attempt to create two separate legal regimes for insiders and outsiders in Part 5.6. Journalists will, essentially automatically, be investigated and tried as "insiders". The effect is that a much broader range of conduct is opened up to criminal investigation, with the accompanying 'chilling effect' and adverse impact on investigative reporting outlined above.
114. It is therefore not appropriate to apply principles of accessorial liability to journalists or other media workers in connection with Part 5.6 offences by "insiders".

No use of security marks as an integer of offending by an "outsider"

115. The current section 122.4A criminalises the activities of an "outsider" where he or she "*communicates*" information and where "*the information has a security classification of secret or top secret*".
116. The framework dealing with the attachment of security classifications is often unclear, at least to "outsiders" in civil society.
117. *Firstly*, there is no apparent *legislative* basis to the scheme. There is instead a broad range of policy materials, including "*Policy 8: Classification System*". As policy documents, these are not subordinate legislative instruments subject to tabling or disallowance by Parliament, and are not subject to any formal review by the Scrutiny of Delegated Legislation Committee against scrutiny standards designed to ensure clarity in operation and compliance with human rights norms.[19] The real point is that these documents are *polices,* not *laws.* They are not made as laws and none of the oversight mechanisms that apply to making subordinate laws apply.
118. *Secondly*, the policies themselves contemplate the application of even the most serious marks of "*Secret*" and "*Top Secret*" to scenarios which do not include objectively serious damage to the national interest or security interests. A mark of "*Secret*" may currently be applied where there is "*serious damage to the national interest, organisations or individuals*".[20] Permitted applications of this mark however extend to cases where there is a "*severe degradation in, or*

[18] Criminal Code s 11.2.
[19] Senate Standing Orders Order 23.
[20] *Policy 8: Classification System*.

loss of, organisational capability to an extent and duration that the entity cannot perform any of its functions", "*a severe degradation in development or operation of multiple major policies to an extent and duration that the policies can no longer be delivere*d", and "*undermining the financial viability of an Australian industry sector (multiple major organisations in the same sector)*".[21] While these scenarios may be serious and may warrant confidentiality being maintained, these particular scenarios will often involve disclosures which only have a *commercial impact,* and potentially a fairly confined commercial impact. So, while matters of national interest and security interest may be engaged when the marking is affixed, there is no guarantee of this.

119. *Thirdly*, the manner in which marks are affixed to documents bears no relationship to the standard ways in which administrative decisions are made. For a classification decision, there is no named decision-maker who takes formal legal ownership of a particular classification decision, nor are any reasons for decision given. There is no available judicial or merits review – there is, ultimately, no *legal* standard for a court exercising a judicial review function to assess compliance with.
120. So, the stamp may be affixed in honest error but under some fundamental mistake of fact. It may be affixed based on a misunderstanding of the policy. It may be affixed in a deliberate attempt to conceal and restrict the circulation of information deemed embarrassing to government or some faction within it. The point is there is no way to know, and no way to have that fact established independently.
121. *Fourthly*, and even assuming a stamp was affixed correctly at the time, there is no reason to think, with respect to document holdings potentially in the millions of records, that any aspiration by government to re-assess and reclassify a document in light of changed circumstances will be realized – so there is no reason to think that any stamp affixed to any given document is *still current* in light of contemporary facts and circumstances.
122. These matters have serious implications for using the existence of a stamp of "*Secret*" or "*Top Secret*" as a critical integer to establish the criminal liability of an "outsider".
123. *First*, there is no necessary or actual harm to any recognisable national security or other governmental interest from disclosure of material with a "*Secret*" or "*Top Secret*" stamp. At best, all that the affixing of the mark shows is that *at some* point *some* public servant, who may

[21] *Policy 8: Classification System.*

have been laboring under key mistakes of fact, may have misunderstood the policy, or who even held nefarious motivations, affixed the stamp. Even a stamp applied correctly in good faith may not be current.

124. *Secondly,* to the extent that there can be said to be some recognisable harm to the notional integrity to the classification system from disclosure of documents with a security classification, even for public servants and other insiders such harm would not warrant a criminal penalty and potential imprisonment – non-compliance with a *policy instrument* is a disciplinary matter, and the existence of potential criminal charges will often delay and complicate any internal disciplinary proceeding, potentially leaving more information vulnerable to disclosure in the meantime.[22]

125. For an "outsider", the arguments against using security marks as an integer for establishing criminal liability are even clearer. An outsider does not agree to be bound by the policies of the Commonwealth as they apply from time to time, voluntarily sign confidentiality agreements or agree to abide by information management restrictions, or otherwise take the contemporary steps summed up historically in the concept of "*signing the Official Secrets Act.*" There is no principled reason to say that an average Australian, under threat of 5 years' imprisonment, must adhere not just to the *internal policies* of the Commonwealth concerning the confidentiality of its own records (which can change radically from time to time), but must adhere *also* to any and all "decisions" of anonymous public servants who apply those policies to any given document when giving it a classification. That is particularly so given that current policy extends to the protection of purely commercial information, and that any "decision" to affix the stamp may have been factually wrong, may have misinterpreted the policy, may have been motivated by an improper purpose, or may have been correct when made but is no longer appropriate given changed circumstances. Nothing in these circumstances suggests *criminal culpability* for any "outsider" in failing to comply with the Commonwealth's policy framework for securing its own documents.

126. *Thirdly,* in no other context would it even be suggested that the effectively unreviewable, non-statutory decisions of unknown public servants could be used as the critical integer of a criminal offence. It offends basic concepts of the rule of law.

[22] For example, because an internal disciplinary investigation is not allowed to proceed as it may interfere with the integrity of evidence needed for a criminal investigation.

127. Where some form of valid official action of government is made an integer of an offence, at a bare minimum there must be the ability to *challenge* or *collaterally review* that official action to distinguish valid and effectual acts from others. So, an offence of entering a designated security area may not on its true construction be an offence of entering any area the Crown asserts is a designated security area but an offence for entering any area that is validly and effectually designated as a designated security area under relevant legislation. However, there is currently no realistic prospect for either judicial review or collateral review of the marking regime applying to a "decision" to attach a security mark – particularly given the prospect of public interest immunity claims.[23] This inability to meaningfully and fairly test in an independent Court to legal basis for the marks means a mark cannot be used as an integer of a criminal offence.

Only disclosures which cause real and meaningful harm should result in criminal sanction under an "outsiders" offence

128. The current section 122.4A criminalizes the activities of an "outsider" where the person "*communicates*" information where "*the communication damages the security or defence of Australia*", "*the communication of the information interferes with or prejudices the prevention, detection, investigation, prosecution or punishment of a criminal offence against a law of the Commonwealth*", and "*the communication of the information harms or prejudices the health or safety of the Australian public or a section of the Australian public.*"
129. None of these scenarios involves proof of meaningful or sustained harm – any impact, no matter how slight, fleeting, or otherwise insubstantial, may engage the offence and lead to a 5 year jail term. For broadly similar reasons to those canvassed above, it is not appropriate to subject "outsiders" to such an offence – "outsiders" do not commit to the government to refrain from actions with such a fleeting, insubstantial or transient effect, nor is it appropriate or proportionate to inflict such serious penalties for impacts which are marginal, superficial, fleeting or completely reversable.

Proposed new insider offence

130. For the reasons dealt with at length, a provision that criminalised most if not all disclosures by public servants is inconsistent with basic liberal democratic values. No harm *justifying criminal*

[23] I.e. the Commonwealth would object to the disclosure of information relevant to why the marking was affixed.

sanction has been identified for what is essentially breach of commercial and contractual duties of confidence owed by public servants and others to the Commonwealth. Common law precepts require that criminality is attached to culpability for a clear and identified wrong. The idea that there should be a new offence that merely attaches to disclosing confidential information or is prejudicial to the effective workings of government is misconceived. Further, assertions that the disclosure of material, regardless of who discloses it, will harm the public interest or be prejudicial to effective government seems to be focused on maintaining secrecy as a goal in itself. In any event, it should be incumbent on government and agencies to establish a superior and definable public interest. That onus on justifying such restrictions on the flow of information from the Australian government to the Australian public should be inherently substantial and onerous.