

# **AJF Submission to the Independent National Security Legislation Monitor's Inquiry into Australia's Espionage, Foreign Interference, sabotage and theft of trade secrets offences.**

## **1. Introduction:**

- 1.1 The Alliance for Journalists' Freedom is an advocacy group established in 2017 to support press freedom in Australia and the Asia Pacific region. In 2019, we published a White Paper on Press Freedom in Australia, updated in 2024, which argued that a slew of national security legislation passed since 9/11 had undermined the ability of journalists to perform their democratic role as watchdogs monitoring state institutions. The AJF has advocated for a Media Freedom Act, that would establish the principles of press freedom in a similar way to a constitutional amendment. We believe this would help create a positive obligation for investigating agencies and the courts to recognise the public interest in the work of legitimate journalism, alongside the far more established public interest in prosecuting the sources of leaked information.
- 1.2 We recognise the need to update Australia's legislation to ensure it can meet the growing threats to national security from malign foreign actors. In his 2025 National Threat Assessment, the Director General of Security Mike Burgess said, "great power competition in our region is driving heightened levels of espionage and foreign interference, while rapid advances in technology are accelerating almost all the trends I'm describing. The result of all this will be a dynamic security environment with an unprecedented number of challenges, and an unprecedented cumulative level of potential harm."<sup>1</sup>
- 1.3 However, a free media is also widely recognised as an essential part of a healthy democracy. Therefore, any national security legislation that undermines or unduly limits journalists from performing their democratic function is harming the very system it claims to protect.

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<sup>1</sup> Mike Burgess, ASIO Annual Threat Assessment 2025, (ONI, 19 February 2025)  
<https://www.oni.gov.au/news/asio-annual-threat-assessment-2025>

Further, the AJF believes that when it is working freely and appropriately, the media helps support national security by holding the system to account, exposing flaws, weaknesses and abuses of authority, and promoting health public debate. In this way, media freedom should be regarded not as a threat to national security, but as part of its architecture.

- 1.4 We are particularly concerned with the potential impact of the sections dealing with espionage and foreign interference. By our reading of the EFI Act, the sections relating to sabotage and the theft of trade secrets have no direct impact on journalism.
- 1.5 With the above in mind, we will limit our comments to those sections of the Act that are directly relevant to our area of interest.

## **2. Part 1. The Threat Environment.**

- 2.1 As we have mentioned, the AJF believes media freedom should be considered as a part of an effective national security strategy. That is why we are particularly concerned about the impact of the EFI Act on the work of journalists, and their relationship to sources.
- 2.2 The issues paper asks for evidence of that impact. However, it is extremely difficult to find evidence of a negative – of stories *not* told or sources who stopped communicating with journalists as a direct result of the Act. A University of Queensland paper agreed that it is hard to find such evidence, but still concluded that, ‘current espionage offences pose a significant risk of criminalising legitimate journalism and that this, in combination with their staggering complexity and uncertain scope, is contributing to the ‘chilling’ of public interest journalism in Australia’.<sup>2</sup>
- 2.3 The paper quoted the ABC’s Director of Editorial Policy, Mark Maley, as saying:

*It’s a real problem and I don’t think there’s any doubt that there’s been stories which could have been told or should have been told which haven’t been told because of a combination of the ASIO Act,*

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<sup>2</sup> Ananian-Welsh, Kendall and Murray, ‘Risk and Uncertainty in Public Interest Journalism: The Impact of Espionage Law on Press Freedom’ (2021) 44(3) Melbourne University Law Review

*the Espionage Bill and metadata laws. That's the chilling effect in practice. The chilling effect is a real thing ... We have killed stories off because of these laws. We're not talking about trivial stories, we're talking about the important stories.*

2.4 In an email exchange for this submission, one of Australia's leading investigative journalists said,

*I can easily see how the broad nature of those offences could be used to criminalise legitimate journalistic acts. For the s91.1 offence, for example, it is easily to see how a journalist reporting on, say, the documents provided by David McBride, could be deemed to have acted recklessly in a way that prejudiced Australia's national security, despite it being a legitimate journalistic exercise.*

2.5 David McBride's case is instructive. He leaked classified SAS field reports from Afghanistan to the ABC. The documents, published as "The Afghan Files"<sup>3</sup>, contained evidence of alleged war crimes by Australian special forces. There has been no suggestion that the ABC published anything that might genuinely harm the operations of the SAS, and widespread acknowledgement that the story was in the public interest. The ABC published the story in 2017, before Parliament passed the EFI Act.

2.6 As the journalist points out, the Act appears to criminalise that kind of reporting. Section 91.1 makes it an offence to 'deal with' information that either has a security classification, or concerns national security, where the person intends it to prejudice Australia's national security, and where it is made available to a foreign principal. Section 91.2 contains the lower threshold of being reckless to Australia's national security. And under sections 91.4 and 91.5, the person does not need to have a particular foreign principal in mind.

2.7 Those sections appear to capture the kind of stories published by the ABC. While it is impossible to know whether sources have been frightened off by the Act, David McBride's conviction and six-year

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<sup>3</sup> Sam Clarke and Dan Oakes, 'The Afghan Files', ABC News Website. (11 July 2017).  
<https://www.abc.net.au/news/2017-07-11/killings-of-unarmed-afghans-by-australian-special-forces/8466642>

sentence have conceivably had a significant deterrent effect on anybody else with evidence of abuses within government.

### **3 Australia's international human rights obligations**

3.1 Australia is a signatory to The International Convention on Civil and Political Rights (ICCPR), which obliges us to respect its articles in legislation. Article 19 states,

*Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his [or her] choice.*

3.2 Further, the Special Rapporteur on freedom of expression has pointed out that any restrictions to Article 19 must be both necessary and proportionate, and the least restrictive means to protect national security. The Rapporteur has also said that any restriction must be subject to independent oversight. The AJF submits that the EFI Act, and the definitions contained within it, are unnecessarily broad, and appear to violate the convention.

3.3 The ABC challenged the warrant the Australian Federal Police used to search for evidence of the source to the Afghan Files Story, using the implied freedom of political communication. The High Court has tended to interpret that not as an individual right, but as a restriction on government legislation that might limit that right.

3.4 That has two consequences.

3.5 First, that the implied freedom does not meet the Article 19 standard of an individual right, and therefore cannot be relied upon to claim compliance with Australia's international obligations.

3.6 Second, that the EFI Act nonetheless violates the implied freedom of political communication by unnecessarily limiting speech. While we acknowledge that most Australians are unlikely to cross that

threshold, the central thesis of this submission is that it imposes an unnecessary and overly restrictive limitation on press freedom.

#### **4. What is 'national security' and who is a 'foreign principal'**

4.1 . 'National security' in the espionage context is defined to encompass defence of the country, protection of its borders from serious threats, and protection of the country and its people from activities such as espionage, terrorism, foreign interference and conduct obstructing operations of the country's defence force. National security further includes the 'carrying out of the country's responsibilities to any other country' and the country's 'political, military or economic relations with another country'. As Ananian-Welsh, Kendal and Murray point out, from a journalist's perspective, this extends the scope of what counts as 'national security' to include Australia's foreign affairs. This covers relatively routine work for any journalist covering those areas.

4.2 Dealing with information, even 'national security' information, is also conduct many people, including journalists, would do on a daily basis, particularly as 'information' includes opinions and summaries. Therefore, the fault element of the offence is a crucial limiting feature. Section 91.1(c), requires the person to have an intention to prejudice national security, or advantage the national security of another country. Most journalism is unlikely to cross that threshold, though Section 91.2 has a much lower fault element of being recklessness to national security.

4.3 Despite the qualifiers in the legislation, the breadth and uncertainty of what constitutes 'national security' makes journalism that covers those areas risky, particularly investigative work that exposes abuses or failures of the system. And even if much of it is unlikely to cross the threshold of 'intent to prejudice' or 'recklessness', the risks of 25 years to life in prison are likely to deter important reporting and frighten off journalists' sources, particularly if they work in sensitive areas of defence, foreign policy or trade.

4.4 The distinguishing feature between secrecy offences and those contained in the EFI Act, is the involvement of a 'foreign principal'. The Act makes it clear that foreign principals are regarded as uniquely

dangerous and threatening to Australian sovereignty and security, and elevates penalties appropriately. Being found guilty of acting with intent to prejudice Australian national security on behalf of a foreign principal comes with sentence of life, while being reckless to national security on behalf of a foreign principal comes with a sentence of 25 years.

4.5 Thus, the definition of 'foreign principal' is particularly pertinent to the discussion. In the EFI Act, it is disturbingly broad and difficult for journalists to identify. The Act includes everything from a 'foreign government principal, to government agencies, political organisations, 'public international' organisations, terrorist organisations, or organisations 'owned, directed or controlled' by foreign principals.

4.6 'Public international organisations' have the meaning within Division 70, which captures the United Nations and its agencies. Similarly, the definition appears to include international civil society and human rights groups such as Human Rights Watch or Amnesty international which routinely work with journalists to on a host of issues, including exposing abuses of authority, alleged breaches of international law, and so on.

4.7 'Foreign government principal' is further defined to cover a foreign government or part of a foreign government (including regional and local governments), or any entity owned, directed or controlled by a foreign government. That appears to include academic and research institutions funded by or connected to foreign governments, or international news organisations such as the Qatar-owned Al Jazeera, Germany's Deutsche Welle, Radio New Zealand, or the Voice of America, all of whom have legitimate and respected correspondents or freelance stringers working in Australia.

4.8 In all cases, for espionage to have occurred, the Act requires a person to communicate the information or article to a foreign principal or a person acting on their behalf. For journalists the issue is further complicated by Sub sections 91.1 (4) and (5) which state that the person need not have a particular foreign principal in mind. That appears to suggest that the normal act of publishing a story risks

breaching the Act. A journalist working for an established Australian news organisation on a story exposing Australian misconduct in trade negotiations risks 25 years to life in prison by simply posting it online.

4.9 The Act includes several important terms that may, in practice, limit the exposure of journalists to the risk of prosecution. For example, under Section 91.1(1), the prosecution must show an *intention* to *prejudice* national security – a threshold that legitimate journalism is unlikely to cross. Similarly, 91.1(2) requires the prosecution to show that a person was *reckless* as to whether their action will prejudice national security. While that threshold is lower, there appears to be a body of case law and jurisprudence related to these terms (albeit in other parts of the Criminal Code) that could limit the practical consequences for journalists publishing potentially damaging material.

However, the relatively broad and vague terms still pose serious risks for legitimate journalists and their sources. The sheer complexity and breadth of the Act, combined with the extraordinarily serious sentences, mean a lot of important journalistic investigations and reporting remains extremely risky and is likely to be shut down.

## **5 Security Classification**

5.1 Section 91.3 specifically makes it an offence to communicate or make available to a foreign principal information that has a security classification on it. Additionally, S 9.3(3) adds strict liability to dealing with anything that has a security classification.

5.2 As the INSLM already noted in the review of secrecy laws, relying on security classification is problematic for several reasons.

5.2.1 Not all information that carries a security classification would be genuinely damaging to national security if it was disclosed.

5.2.2 Some information that carries a security classification might contain details of illegal, unethical or inappropriate activity.

5.2.3 The rules around security classification are determined by administrative policy that can be changed from time to time. It is dangerous to apply serious criminal sanctions for breaching laws that can be changed without parliamentary oversight.

5.3 When it published the Afghan Files story in 2017 (before the EFI Act came into force), the ABC relied on leaked field reports from the SAS to expose evidence of alleged war crimes. Those reports were security classified, yet there has been no suggestion that the ABC's report genuinely damaged national security.

5.4 Given the ABC's experience, it is reasonable to argue that security classification is an inappropriate tool to determine whether making information available is prejudicial or reckless to national security, particularly when strict liability applies.

## **6 Preparatory offences**

6.1 Sections 91.11 and 91.12 contain provisions that make an offence of planning or preparing for an act of espionage.

6.2 Section 91.11 makes it an offence to engage with another person with intent to get information or an article that would amount to espionage, while section 92.12 makes an offence out of any other form of preparation or planning for espionage.

6.3 Part of the routine work of journalists is to cultivate sources with knowledge of the inner workings of government. This helps journalists understand and analyse policy decisions, and report on government actions. It also establishes relationships that may support legitimate whistleblowing.

6.4 Under those circumstances, a journalist inviting a potential contact in the Department of Foreign Affairs to a coffee may be guilty of soliciting or procuring an espionage offence under S 91.11. That risk is significantly heightened if the journalist works for a foreign news organisation such as Al Jazeera.

6.5 As with Section 91.2, it is still an offence to solicit information that might be made available to a foreign principal, even without having a foreign principal in mind. That means in theory, *any* journalist publishing stories online – thus making it available to anyone including unidentified foreign principals – is potentially at risk, regardless of their employer.



## **5. Defences**

6.1 Of the defences available regarding espionage it would appear only S 91.4 (3)(d) and (e) might apply to journalists. Those subsections refer to the prior publication of classified information. This effectively concerns information already in the public domain, and is available if the journalist was not involved in prior publication, and that they did not believe that dealing with the information would prejudice Australia's national security.

6.2 Given that by nature, original journalism often involves information that is new and not already in the public domain, this defence is likely to have limited practical use.

6.3 There is no public interest defence for journalists or their sources, including those who might be reasonably considered to be whistleblowers.

## **7 A Media Freedom Act**

7.1 The Alliance for Journalists' Freedom believes a Media Freedom Act is an elegant solution to many of the issues related to media reporting on issues related to the security and secrecy of government information.

7.2 The AJF's model would establish the principles of media freedom in Australian statutes in a similar way to a constitutional amendment. It would create a positive obligation for parliament to consider the impact of laws on media freedom, including national security laws such as the EOI Act. This would create a more robust obligation to protect media freedom as an essential part of our democracy than currently exists.

7.3 The Media Freedom Act would also create a positive obligation for investigating agencies and the courts to weigh the public interest in media reporting, against the already established public interest in

prosecuting those who deal with sensitive or secret government information.

7.4 Such an act would not privilege media freedom over national security. Rather, it would recognise that when information is handled with care and sensitivity (that is, not recklessly) so that it does not cause harm to national security, and when it raises issues that are genuinely in the public interest, it deserves to be published.

7.5 We attach our draft Media Freedom Bill and policy document to this submission as an example of how such legislation could work.

## **8 Recommendations**

- 8.1 Redefine 'deals' to avoid criminalising mere receipt of security classified material, particularly where journalists are involved. It should not be an offence for journalists to receive material from whistleblowers, even if they include classified documents.
- 8.2 In espionage offences in Division 91, introduce an element of secrecy to information 'communicated and made available' to a foreign principal. Espionage is necessarily a covert exercise, and it should not be an offence for journalists to publish material in the public interest.
- 8.3 Pass a Media Freedom Act that introduces a positive obligation to weigh the public interest in journalism, alongside the established public interest in prosecuting those involved in leaking sensitive information. Such an Act should cover all national security acts, including the EFI Act.
- 8.4 If a Media Freedom Act is not accepted, introduce a public interest defence for journalism carried out in the public interest.
- 8.5 Introduce a proof of harm test. It should not be assumed that simply dealing with security classified documents will prejudice national security. The prosecution should be required to show that



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harm has occurred or is likely to occur because of the disclosure of national security information.

- 8.6 Repeal Section 91.3 'Espionage – security classified information' and replace it with a narrower and more specific reference to information that exposes the equipment, materials, methods, practices and personnel involved in maintaining national security. It should only be an offence to communicate information that explicitly prejudices national security.

Sincerely,

Peter Greste  
AJF Executive Director