

## ALRC REVIEW OF SECRECY LAWS

Liberty Victoria has not addressed each and every question contained in the ALRC’s Issues Paper 34 *Review of Secrecy Laws: Inquiry Snapshot*, hereafter referred to as ‘the Issues Paper’.<sup>1</sup> However, key questions and issues have been addressed and are organised into the following topics:

1. Introduction and Overview .....	2
2. Ambit of Secrecy Provisions .....	3
3. Exceptions and Defences .....	6
Public Interest as an Exception from Criminal Penalty .....	7
4. Penalties .....	8
5. Practical Frameworks .....	10
Classification Framework .....	10
Policies and Guidelines .....	11
ICT Strategies .....	11
Injunctive Relief .....	12
Administrative and Criminal Proceedings .....	12
Oversight .....	12
6. Interaction with Other Laws .....	13
FOI Laws .....	13
Privacy Laws .....	14
Data Matching Laws .....	15
Archive Laws .....	15
7. Conclusion .....	16

---

<sup>1</sup> Liberty would like to thank Nicolas Mann and Georgia King-Siem for their assistance in preparing this submission.

## 1. Introduction and Overview

Liberty Victoria is one of Australia's leading human rights and civil liberties organisations, working to defend and extend human rights and freedoms in Victoria.

Liberty Victoria takes this opportunity to:

- Call for greater consistency and a more balanced set of laws pertaining to handling of information;
- Define terms commonly used in relation to the handling of secret information;
- Recommend that the government adopt information sharing systems which favour the Westminster principles of open and accountable government;
- Propose a penalty scheme which is directed at reducing inconsistency in current information handling legislation;
- Recommend an overhaul of the current exceptions and defences to penalty for handling secret information, with particular focus on protection for whistleblowers.

As a starting point, Liberty Victoria believes that appropriate use and definition of terminology is essential.

Many of the terms used when discussing 'secrecy' laws can be confusing or even misleading. This review and a general understanding of 'secret information' suggest information which is not to be used or disclosed without authorisation. However, the term 'secret information' is defined by the Government's Protective Security Manual (PSM) as 'national security information' which, if compromised, could cause 'serious damage' to national security.<sup>2</sup> Multiple definitions or understandings of the same concept, 'secret information', highlight the confusion currently found in Australia's secrecy laws.

As noted in the Issues Paper it can be more useful to use a vague impression of a term than to try and define it. However, where criminal liability is involved, Liberty Victoria believes it is critical that terms are defined as clearly as possible. Thus in this submission, 'secret' information is used in its most general sense and refers to any information which should not be collected, used or disclosed without authorisation, regardless of its PSM classification or lack thereof. Further, any reference to the 'handling' of information includes the collection, storage, use, or disclosure of that information.

In recognising the broad and often vague use of the term "public interest" it is crucial to define the term, and be prudent its use.

Liberty Victoria understands that the release and retention of government information represents a balancing of interests, and the circumstances in which we, as the public, accede to a shift in that balance in the name of our interest. As noted on Page 19 of the Issues Paper, the real public interest lies in an open and accountable government. It is for this reason that Liberty Victoria takes the opportunity to make the important distinction between the "public interest" in information release

---

<sup>2</sup> It should be noted that the current PSM framework may have changed since the PSM was classified after 1998; the PSM framework used in this review (and submission) is from 1998.

and a competing “national interest” in its retention. In particular, Liberty Victoria advocates a narrow definition of national interest which would restrict the retention of government documents, and a broader definition of public interest facilitating their release in proscribed circumstances.

For instance, information withheld in the national interest may be limited to particular interests such as national security and cabinet-in-confidence. Other ‘national interests’ such as commercial sensitivity or impartiality of the public service will be more circumstantial<sup>3</sup> while others should be excluded entirely.<sup>4</sup>

On the other hand, criminal penalty resulting from handling secret information might be avoided on the basis that the information is in the public interest such as where there exists criminality, fraudulent misconduct, or a danger to health or welfare of a person or persons. An extended public interest or “whistleblowers” exception to penalty is proposed and discussed in greater detail below.

## **2. Ambit of Secrecy Provisions**

Liberty Victoria strongly supports a uniform approach to Australia’s secrecy laws. At present, there is an unfortunate variation within and between Australia’s governments. Government information should be clearly and consistently classified and any penalties imposed on unauthorised handling of information should be commensurate with its potential damage; classification should be directly related to the risk posed by the information. Unfortunately Government agencies have a tendency to over classify information as revealed by the Australian National Audit Office (ANAO).<sup>5</sup> This both increases the amount of classified information and results in the over penalisation of persons who improperly handle that information.

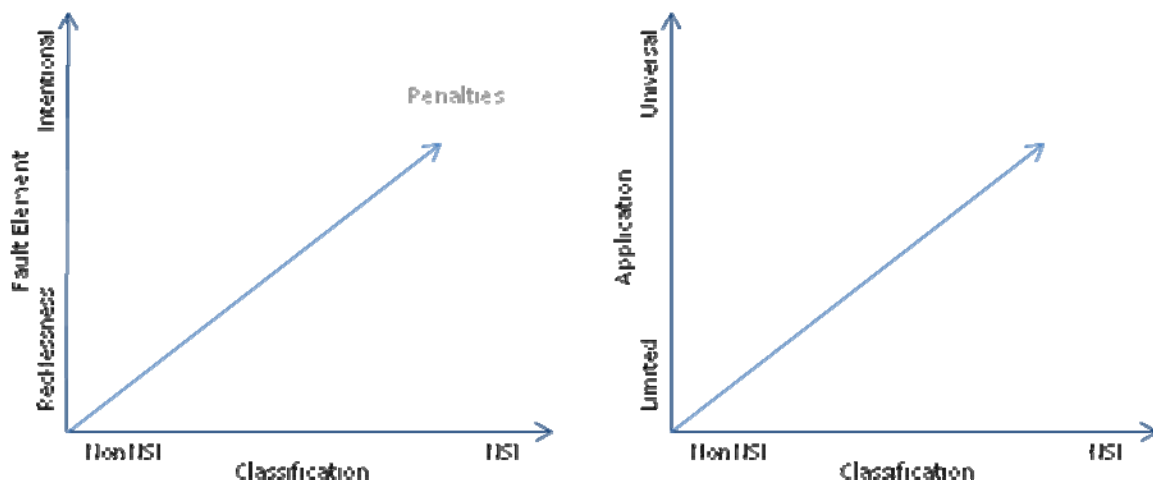
For example, if an employee discloses a particular piece of information which is classified as top secret (but is actually only secret or confidential), he or she would be charged under the provisions intended to punish those who intentionally disclose top secret information – an unintended and egregious result. Thus if penalty correlates to classification, stringent and uniform guidelines must be imposed on the classification of information.

---

<sup>3</sup> For instance, where the disclosure of commercially sensitive information reveals corruption, any ‘public harm’ may be outweighed by the ‘public good’ which results. At best, the ‘public good’ would constitute an exception or a defence to any charge, but at worst, the ‘public good’ must be a relevant factor in sentencing.

<sup>4</sup> It is also noted that some existing offences refer to ‘the Commonwealth or a part of the Queen’s dominions’ (i.e. section 79(2) of the *Crimes Act 1914*). Liberty Victoria considers that all offences should be limited to offences against Australia’s interests.

<sup>5</sup> See paragraph 6.11, ALRC IP 34.



**Figure 1:** Graphs illustrating relationship between classification of information and application of criminal provisions.

It is proposed that only a small fraction of information held by Australian governments would be classified as top secret (top classification for NSI). A far greater proportion of information would be classified as x-in-confidence (lowest classification for Non NSI).



**Figure 2:** Information classification pyramid based on 1999 PSM Guidelines as described in the Issues Paper.

Given the importance of information at the top end of the information spectrum (i.e. top secret), greater care and diligence should be invested in its classification (i.e. greater detail in PSM guidelines).

Any law which prohibits an APS employee from disclosing NSI should similarly prevent a contractor from doing so – any less would be inconsistent. Moreover, the same law should prohibit any other person who knowingly comes into possession of the same NSI from knowingly disclosing it to anyone else – regardless of their position or employment.<sup>6</sup> Such universal application of criminal liability is

<sup>6</sup> This includes both current and past employees or other persons who have legitimately come into possession of secret information.

appropriate for the most secret information (i.e. top secret or secret), but may be less appropriate in the case of less secret information. Liberty Victoria suggests that a sliding scale should be applied whereby criminal liability universally attaches to anyone who knowingly mishandles the most secret of information but only attaches in a limited fashion to information of a less secret nature.

In each case however, Liberty Victoria submits that criminal liability must only attach where the person committing the offence of mishandling the information has the requisite mental element (*mens rea*) to commit the offence.<sup>7</sup> In circumstances where there is no intentional or reckless behaviour, administrative penalties should be used more readily to ensure that unintentional mishandling government information is deterred. This should also ensure any provisions do not offend the Constitution and our implied right to freedom of political communication. It is for this reason that Liberty Victoria proposes a new penalty system based on the premise that all secrecy offences contain:

1. A clearly defined physical element;
2. An intentional or recklessness fault element

Furthermore, Liberty Victoria is strongly opposed to any absolute liability offences and believes strict liability offences should only be used as a last resort. In general, criminal liability should only attach to offences which include either intent or recklessness fault elements<sup>8</sup>. This is an issue which is discussed in detail in the section titled "Penalties" below.

It is critical that a clear and robust classification system be developed. If not, information will continue to be over classified with a tendency to over classify information which discredits or embarrasses the government.

One possible safety mechanism is to provide a defence or exception to criminal liability where the alleged conduct can be shown to be in the public interest. Other safety mechanisms in the form of exceptions and defences are discussed further below. Although not ideal, a public interest exception may offer some protection to whistle blowers and other disclosures which are in the interests of open and accountable government.

Another important safety mechanism is the reclassification and/or declassification of information due to the passage of time or events. A rolling review of all classified information would be ideal, but at the very least, Liberty agrees that information should only be protected to the extent that disclosure is likely to injure the public interest.<sup>9</sup>

Because the public's interest may be invoked as an exception to criminal or other sanction, it is important that a clear and robust classification system includes a definition of 'public interest' and

---

<sup>7</sup> This is in accordance with the views of J McGinness, 'Secrecy Provisions in Commonwealth Legislation' (1990) 19 *Federal Law Review* 49, 85 and cited at paragraph 3.31, ALRC IP 34.

<sup>8</sup> I.e. where no fault element exists, there should be parallel civil liability penalties, as per the *Corporations Act 2001*, s1317;

<sup>9</sup> P Finn, *Official Information*, Integrity in Government Project: Interim Report1 (1991), 256 and cited at paragraph 3.23, ALRC IP 34.

‘in Australia’s interest’. Without clear definitions, these terms are likely to be increasingly broadly interpreted and overused. For instance, climate change information could be interpreted as harmful to Australia’s interests if disclosed to the public or another State.<sup>10</sup> It is imperative then that information, which the public has an interest in being released, is not implicitly concomitant with information which the government seeks to retain under the same guise.

### **3. Exceptions and Defences**

In reviewing the parameters in which the government retains and releases information, Liberty Victoria believes that the consideration of exceptions and defences which prevent the penalising of mishandling is significant.

In particular Liberty Victoria believes that whether the government maintains a general criminal offence for the unauthorised handling of information, or adopts an alternative penalty regime, the following should be considered as exceptions<sup>11</sup>:

- Information already in the public domain

Liberty Victoria asserts the need for close to equivalent penalties to apply to both initial and subsequent handling of information, and is of the view that imposing a criminal or other sanction for the disclosure of information may act as a deterrent of subsequent handling

On the other hand, Liberty Victoria opposes any ongoing liability to those who disclose information which is already commonly known or in the public domain. To do otherwise would be both unenforceable and arbitrary.

For instance, while a journalist may be the subject of penalty for subsequent handling of secret information, a member of the public should not be punished for repeating that information once it has been published or otherwise made public.

As a result Liberty Victoria strongly supports an exception from penalty for disclosure of information already in the public domain.

- Information Disclosed as authorised by law

Individuals who disclose information in the course of employment, or are otherwise authorised to handle information, must be excepted from criminal or administrative penalty.

For instance, an individual authorised to release information under Freedom of Information Laws should not be penalised for doing so.

---

<sup>10</sup> Such information could easily impact on land and agricultural export prices.

<sup>11</sup> These should all be framed as exceptions rather than Defences in order to limit the power of the authority to charge someone for handling where criminal liability may not otherwise exist.

- Information disclosed to specific Officeholders

Authorised Officeholders should be nominated clearly in any legislation to avoid discretionary or arbitrary handling of information. For instance, the relevant minister, head of department, or a nominated related government agency may be defined as authorised officeholders to handle specific classes of information. This may facilitate better and more accountable information sharing between government departments, agencies and tiers of government.

Liberty Victoria believes that de-identified personal information and information released to the data subject should not be standalone exceptions to penalty as the information released may still be 'secret' for other reasons. For example, a disclosure of personal information to the owner of that personal information is generally appropriate, but should be precluded where that same personal information is classified for some other reason (i.e. ongoing police investigation). Furthermore, the release of de-identified information in circumstances where the information is re-identifiable should also be prevented.

### **Public Interest as an Exception from Criminal Penalty**

The Commonwealth public interest provision entitled "Protection for whistleblowers" currently provides no protection from criminal liability under secrecy laws. In the interests of open and accountable government and a constitutionally guaranteed freedom of Political Expression, greater protection must be afforded to those releasing information found to be in the public interest.

In addition to the exceptions proposed above, Liberty Victoria strongly supports a revision of the legislative protections afforded for "whistle blowers". Further it agrees substantially with the private members Bill of Senator Andrew Murray in 2007 that a public official who makes a public interest disclosure should not be subject to liability<sup>12</sup> for making the disclosure. However in order to protect non employees and journalists from penalty for bringing a matter of public interest to the public, the words "a public official" may be replaced with "any person"<sup>13</sup>.

Liberty Victoria believes that it is important to clearly communicate that certain acts and omissions are outside the purview of the laws which criminalise unauthorised handling. On the other hand, any public interest protection, whether framed as an exception or as a defence, would carry an evidentiary burden for the Defendant. As a result, Liberty Victoria does not prefer one style of protection over another, but stresses the importance of the substance of any protection which should be provided to whistleblowers.

If a true exception or defence to penalty on the basis of public interest is to exist, the definition of public interest is also important. Liberty Victoria supports the definition of "public interest" as per 1994 Report of the Senate Select Committee: Criminal (or other) sanction should not apply where information discloses (or person reasonably believes that it will show) non NSI regarding:

1. Illegality, ultra vires, fraudulent or corrupt conduct;

---

<sup>12</sup> Whether they are criminal, civil or administrative.

<sup>13</sup> As per the Victorian *Whistleblowers Protection Act*.

2. Substantial misconduct, mismanagement, or maladministration, gross or substantial waste of public funds or resources; or
3. Endangering public health or safety, or a danger to the environment.

Liberty Victoria would also seek to add a Public Interest exception or defence in situations where the disclosure is:

4. Necessary to avert or reduce/credible threat of a serious and imminent threat to health, life or welfare of a person<sup>14</sup>.

In recognition of the importance of retaining some NSI to the national interest, public disclosure of such information should only exist as an exception or defence where disclosure is to the appropriate designated authority, such as in UK legislation<sup>15</sup>.

#### **4. Penalties**

It is essential that that information both deliberately and accidentally mishandled is appropriately penalised. As a general response to questions 5-17 of the Issues Paper, Liberty Victoria advocates the broader use of criminal and administrative penalties in order to ensure that the mishandling of information is adequately discouraged.

A civil penalty for the deliberate mishandling of non NSI for significant gain may be an insufficient deterrent. This is particularly so where the maximum civil penalty is outweighed by a substantial commercial benefit.

However, care must be taken when framing criminal offences to ensure that the provisions only penalise intentional (or reckless) behaviour in specific situations. While criminal sanction may be appropriate in punishing misuse of the most secret information, administrative penalties should be considered more appropriate in the handling of less secret information, where there exists no intention or reckless fault element.

Liberty Victoria, therefore, submits an appropriate penalty regime must require the physical element of the handling be established. Following this, the type of penalty should then be determined by answering a threshold question relating to the intent of the person accused of unauthorised handling:

*Was there intent to handle information without authorisation, or a recklessness as to the unauthorised handling?*

If there was intent to mishandle the information, a criminal penalty should be applied. Liberty Victoria submits that this should be on a sliding scale of punishment applied by the courts based on a

---

<sup>14</sup> As per the *Customs Administration Act* and the *Child Support Act*.

<sup>15</sup> Official Secrets Act, 1989 (UK) s2(2)(a)



number of factors including the classification of the information, and whether or not the conduct was intended to cause harm to the “national interest”, a term which has been defined above.

If there was no intent to mishandle the information, legislation should be in place to ensure government employees are subject to administrative penalties which mirror the criminal penalties as described above. As noted on pp 183 of the issues paper, whether such a penalty is applicable will depend on whether an employee is engaged under the *Public Services Act 2004* (Cth) or another statutory regime. In any case, the effectiveness of an administrative penalty as a deterrent should be considered. As noted in the Issues Paper discussion of the Ayers and Braithwaite “Enforcement Pyramid”, administrative sanctions such as disciplinary action may have a greater deterrent effect than a civil sanction in certain circumstances.

However Liberty Victoria believes that former employees or members of the private sector who mishandle information without intent or recklessness should not be subject to criminal or civil penalties.

Under the current regime, there is significant risk of overlap between criminal and administrative penalties. An advantage of the system proposed by Liberty Victoria is that it narrows the scope of agency discretion, especially where the unauthorised handling occurs in an agency within arms length of the administrative arbiter, or where referring the matter to the DPP may embarrass or otherwise run contrary to the interests of the agency. The proposed system also overcomes the practical difficulties of concurrent criminal and disciplinary proceedings (as discussed on pp203 of the Issues Paper) in that it helps to avoid the issue of one proceeding being stayed while another proceeds.

Liberty Victoria strongly opposes mandatory minimum penalties on the basis that they detract from the discretion of Courts to impose a penalty based on individual circumstances. The present sentencing options available to the Courts include the option to dismiss charges, discharge the offender with guilt but no conviction, convict the offender but release with no sentence (with conditions) or release offender on their own recognizance (suspended sentence). Mandatory minimum sentences would strip the judiciary of these options in certain circumstances, and may lead to punishments which are both arbitrary and inappropriate.

Liberty Victoria agrees with the Attorney General’s Department that minimum penalties may also undermine confidence in the enforcement where less serious cases do not result in lesser penalties.<sup>16</sup>

In relation to maximum penalties Liberty Victoria agrees with IP34 that the current legislation is in need of review, in order to enable a consistent approach and certainty. Inconsistent maximum penalties, or the inconsistent application and enforcement of those penalties is contrary to the Rule of Law.

---

<sup>16</sup> Australian Government, Attorney-General’s Department (2007) Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers, Interim Edition, p40.

For example, the Issues Paper correctly cites that the maximum penalty for handling information under the *Aboriginal and Torres Strait Islander Act 2005* is half of that for handling information under the *Pooled Development Funds Act 2002*. This clearly creates the undesirable and possibly unwarranted impression that the government values the proper handling of financial information more highly than the proper handling of information as it pertains to indigenous Australians.

It is desirable that any maximum penalty instead be reflective of an appropriate broad and transparent classification of the level of secrecy attaching to the information.

If penalties are to apply equally to initial and subsequent unauthorised handling of information (as recommended above by Liberty) it is essential that maximum penalties be consistent for both the initial and subsequent handling of the information. Deterrence is one of the stated aims of penalty provisions in overhauling Secrecy legislation<sup>17</sup> In order to attempt to achieve this aim, appropriate penalties must be applied consistently to both initial and subsequent handlers of information.

As stated in the Issues Paper, the degree of harm to the national interest would also be a relevant factor in sentencing (rather than in a threshold test of whether criminal liability exists). Liberty Victoria understands the need for secrecy legislation to adequately protect 'secret' information, and as such repeats the call for a broad classification of information which is applied by courts in order to determine the severity of penalties existing on a sliding scale.

## 5. Practical Frameworks

As noted in the issues paper, government information protection strategies go well beyond mere secrecy laws and include Government policies/ guidelines and Information and Communications Technology (ICT) infrastructure.<sup>18</sup> Indeed, a great deal of information collected, used and sometimes disclosed by Government is not 'secret' in the ordinary sense of the word, but is worthy of some level of protection. For instance, a person's tax file number (TFN) is not secret information, but is considered confidential and its use regulated by various pieces of legislation.

### Classification Framework

The Government's Protective Security Manual (PSM) provides a useful framework for classifying Government information. Specifically, the classification of information as either 'national' or 'non national' security information is an important distinction. However, the over classification of information remains an issue; particularly where criminal liability attaches to unauthorised disclosures.<sup>19</sup>

Liberty Victoria agrees with the ALRC 98 recommendations that the PSM should provide explicit classification guidance and information should only be classified (at any level) where there is a clear

---

<sup>17</sup> ALRC IP 34 pp 130, Discussion Paper and Disclosure Provisions

<sup>18</sup> Although ALRC IP 34 lists 'awareness' as a separate strategy (par 6.2), 'awareness' is the result of properly implemented policies/guidelines and is considered a subcomponent by Liberty Victoria Victoria.

<sup>19</sup> Over classification of information could result in disproportionate and inappropriate sentences being imposed on persons who improperly handle information (i.e. collect, use or disclose).

and justifiable reason for doing so.<sup>20</sup> The later classification of the PSM is an ironic example of over classification; one which illustrates the absurdity of creating a system which is inaccessible by either its intended or potential users.<sup>21</sup>

## **Policies and Guidelines**

Broadly speaking, agency policies and guidelines should be consistent with any secrecy classification system (i.e. PSM).<sup>22</sup> Liberty Victoria further recommends that all levels of Government coordinate to ensure a consistent and uniform approach is taken to agency policies and guidelines.<sup>23</sup> While the result may not always be the same, the process for developing and applying policies and guidelines should be.

In some instances, conflict between agency policies and guidelines and legislated requirements place government officers in an impossible position. Moreover, there is a worrying trend to oblige advisors to provide verbal and not written advice to Government. Such a measure is clearly aimed at avoiding accountability and is at odds with good government.

Liberty Victoria recommends the Government initiate a whole of government approach to the development of its policies and guidelines with special emphasis on ensuring consistency and accountability.<sup>24</sup> It is also recommended that all government MOUs (inter-agency or otherwise) comply with relevant information laws (e.g. secrecy, privacy, archives and FOI).

Liberty Victoria supports thorough and ongoing training of all officers in the responsible handling of government information.<sup>25</sup> Whilst the breach of oaths, affirmations or acknowledgements of secrecy may have little legal consequence, they remain an important psychological tool.

## **ICT Strategies**

ICT strategies are an important element of protecting secret information. Well intended ICT strategies can be counterproductive. The requirement that passwords be changed every month and may not resemble previous passwords often results in passwords being written down in a top drawer. The use of physical RSA key tokens provides a better solution, but one which is not

---

<sup>20</sup> Recommendations 4-5, ALRC 98 and cited at paragraph 6.12, ALRC IP 34.

<sup>21</sup> See paragraph 6.13, ALRC IP 34. A fundamental of good government is open access to the laws which affects one. Since criminal liability attaches to improper use of classified information, it follows that anyone likely to come into contact with classified information should have access to a means of identifying it. In practice, this includes the general public who may (and do) come into possession of highly classified information from time to time.

<sup>22</sup> As noted at paragraph 6.17, agency policies and guidelines are not generally publicly available and thus Liberty Victoria relies on the information provided in ALRC IP 34.

<sup>23</sup> Including codes of conduct and disciplinary procedures.

<sup>24</sup> In the hope of avoiding or at least making accountable, agencies and officers who demonstrate partiality in the execution of their duties (i.e. police raid on Philip Dorling or the prosecution and immigration handling of Mohamed Haneef).

<sup>25</sup> The absurdity of the current classified classification system suggests officers will 'be alarmed, not alert' when coming into contact with information classified above their own level of clearance.

universally adopted by Government. A centralised approach to ICT strategies is only effective when it includes input from all stakeholders.

## **Injunctive Relief**

The use of injunctive relief should be confined to NSI. An overly zealous approach to secrecy is counter to good government. Good government requires openness and transparency. Information which reveals corruption, arbitrariness, or other social ills is often secreted away by governments – whether by implicated persons or those who seek to ‘protect’ the government. While beneficial to government in the short term, in the long term, it erodes our democratic values and beliefs and is against the public interest<sup>26</sup>.

Draconian secrecy laws, over classification of information, inconsistent police investigations, use of injunctive relief to prevent disclosures of lower spectrum secret information are all indicative of bad government. Liberty Victoria believes that each of these (and others outlined in this submission) must be resisted by government.

## **Administrative and Criminal Proceedings**

The right to silence is a fundamental part of our criminal justice system but one which is increasingly dispensed with in administrative proceedings. Where self incriminating information might be critical to Australia’s security, it is important that an administrative proceeding is not stayed pending the outcome of a criminal proceeding (where the privilege against self incrimination may prevent critical information from coming to light). However, where there is no bar to an admission in an administrative proceeding being used against an accused in a criminal proceeding, an accused may refuse to provide information critical to Australia’s security. It is therefore in Australia’s interests to ensure self incriminating information obtained in an administrative proceeding is not used against the same accused in a criminal proceeding.

## **Oversight**

Independent and effective oversight bodies are an essential element of good government. Independent statutory officers (ISOs) such as the ombudsmen and commissioners are generally empowered to investigate and report on alleged misconduct by government officers. It is important that:

- each and every agency or department falls within the purview of at least one ISO;
- all ISOs are empowered to initiate their own investigations;
- ISOs have sufficient powers to undertake investigations effectively;
- ISOs have sufficient funding to fulfil their functions;
- annual and summary reports from ISOs be tabled in Parliament;
- only the detail of classified investigations be withheld from public disclosure, not the findings;

---

<sup>26</sup> As discussed by Liberty Victoria above.

Although statutory officers are independent, they are reliant on government funding. Unfortunately there is sometimes a tendency by government to provide insufficient funds for the statutory officer to fully execute their duties. Well funded and empowered independent statutory officers are necessary to ensure good government practices are adhered to by agencies and their officers.

Finally, statutory officers such as the Inspector-General of Intelligence and Security (IGIS) should not take the place of judicial oversight. Liberty Victoria strongly advocates that the courts, with suitable safeguards, should provide judicial oversight and have unfettered access to classified information where required.<sup>27</sup>

## **6. Interaction with Other Laws**

As noted in the Issues Paper, Australia's secrecy laws necessarily interact with other laws including Freedom of Information (FOI), privacy, data matching, archives and law enforcement. It is a difficult and iterative process finding the right balance between protecting information (for various reasons) and promoting an open and accountable government. Liberty Victoria argues that the right balance lies toward open and accountable government where information is only withheld where its disclosure would prejudice Australia's national security, the functioning of executive government, or overly infringe another civil liberty.

### **FOI Laws**

Existing secrecy provisions and other exemptions inappropriately prevent disclosures of information under FOI requests.<sup>28</sup>

Openness in government is largely achieved under Australia's freedom of information (FOI) legislation. Although wide ranging when enacted, the last few decades have seen our FOI laws restricted and 'legitimate claims for protection' expanded to the point the point where our FOI laws no longer effectively ensure 'open' government. It is hoped that the federal government will deliver on its most recent promises to reinvigorate the FOI Act.<sup>29</sup>

At present, entire agencies are exempt from FOI laws. The FOI Act further exempts any document generated by those agencies and any information which is subject to a secrecy provision. Notably, the secrecy exemption does not apply to secret information if that information is also the FOI applicant's personal information. The existing provision that prevents a person from being prosecuted if the disclosure occurs in good faith, under a proper FOI request is entirely in keeping with the proposal that all secrecy offences require a mental fault element.

---

<sup>27</sup> Safeguards might include the use of judges and legal practitioners who also hold appropriate security clearances and controlled access to highly classified information (i.e. NSI).

<sup>28</sup> In answer to questions posed at paragraph 7.29, ALRC IP 34.

<sup>29</sup> There is a distressing tendency by successive governments to announce reviews, but fail to implement ensuing recommendations.

A more consistent and principled approach is to have all of government subject to FOI laws and only certain types of information exempt from production on request.<sup>30</sup> A clear, robust and uniform information classification system would facilitate the easy identification of exempt information whilst promoting the proper production of information which is not exempt.<sup>31</sup> Ideally all existing FOI exemptions (personal information, national security and defence, secrecy exemption, etc) would be repealed and a single exemption provision inserted based upon the classification system. For instance, any document or information:

- classified as NSI would be exempt;
- classified as Non-NSI would be exempt except to the extent it relates to the FOI applicant;
- not classified would be, prima facie, producible to the FOI applicant.

## Privacy Laws

Australia's privacy laws do not adequately protect our privacy. The federal Privacy Act covers the federal public sector (through the IPPs), large organisations within the private sector (through the NPPs) and contains numerous exemptions (intelligence agencies, political parties, employee records, etc). State and Territory privacy laws range from less than ideal to non-existent. Moreover, the definition of 'personal information' varies significantly.<sup>32</sup> Finally, none regulate the handling of personal information by individuals<sup>33</sup> and most importantly, none grant a right to privacy.

Liberty Victoria believes privacy is a human right which should be protected by a general actionable right to privacy. But like other human rights, it is not an absolute right.<sup>34</sup> Rather, it must be weighed against other human rights and competing public interests.

At present, Australia's secrecy laws override privacy laws.<sup>35</sup> Information privacy is generally viewed by government as an impediment to its effective operation. An alternative view is that information privacy is a lower order form of secret information. Under a clear and robust classification system, personal information would be classed as 'personal information' within the greater class of Non NSI.

Ideally the government would recognise a broad actionable right to privacy that would allow individuals to take action against those who unduly infringe their privacy without legitimate excuse. Additionally, 'personal information' would be given its widest meaning.<sup>36</sup> This would provide the

---

<sup>30</sup> Truly open government requires open access to information. National, democratic and civil liberties then provide an overlay which exempts only that information which would prejudice those interests.

<sup>31</sup> It is suggested that a proper classification system would go beyond the 1998 PSM classifications (i.e. include cabinet in confidence, personal information and other relevant categories).

<sup>32</sup> Liberty Victoria argues that 'personal information' should remain limited to individuals and should not include bodies corporate or other legal entities.

<sup>33</sup> Unless those individuals are primarily in the business of handling personal information.

<sup>34</sup> Except the right to life and freedom of belief which are absolute.

<sup>35</sup> By 'authorising' what would be infringing conduct.

<sup>36</sup> Including health information as a distinct subset of personal information.

most comprehensive and flexible approach to privacy protection. Legitimate excuse would include the proper handling of personal information by government.

As is currently the case, legislation would authorise agencies to handle personal information to the extent required to fulfil their functions. The classification of the information would then dictate the appropriate handling standards and penalties for breaches.<sup>37</sup> For instance, the Australian Tax Office (ATO) would be authorised to collect, store, use and disclose personal information in a variety of ways.<sup>38</sup> Secrecy laws would then oblige the ATO and its officers to deal with the information they handle according to its classification. In the case of personal information, that would broadly accord with the current Information Privacy Principles (IPPs).

Like x-in-confidence and other lower order classes of information, the subject of the information would have a right of access. Conversely, individuals would not have a right of access to information classified as NSI or any other class which limits access to those with the appropriate clearance and authorisation.

### **Data Matching Laws**

Secrecy provisions currently limit data matching activities by various agencies. It is recognised that data matching can be an invaluable tool if used correctly.<sup>39</sup> Unfortunately there is a tendency in government to obtain as much data as possible without prior critical analysis to determine what information is required and for what purpose. Once obtained, information is sometimes poorly handled and ends up being disclosed to other agencies, organisations and even the public.

The Federal Privacy Commissioner's concerns<sup>40</sup> apply equally to other types of secret information. Wherever information is collected into vast data sets, there will be a correspondingly increased risk of inappropriate, unauthorised or illegal handling of that information.

Liberty Victoria believes that data matching should only occur after thorough risk and cost/benefit analyses have been done. Moreover, where data from two or more classes is combined, the highest classification standard should apply. If implemented correctly, data matching and secrecy provisions should work together to ensure only necessary data matching is undertaken with appropriate safeguards.

### **Archive Laws**

Under Australia's archives laws, agencies are obliged to keep written records which, after specified periods, are available to the public. Such laws promote open and accountable government. We

---

<sup>37</sup> This should include subclasses such as personal health or financial information.

<sup>38</sup> Legislation or regulations should define exactly what information may be collected and how it may be used or disclosed.

<sup>39</sup> When used indiscriminately, it becomes the hallmark of an oppressive surveillance society which assumes guilt and poses a security risk to all.

<sup>40</sup> Paragraph 7.72, ALRC IP 34.

agree that the number of exemption categories under the Archives Act should be reduced<sup>41</sup> (ALRC Report 85).

Liberty Victoria believes that non-secret information should be available to the public on demand at any time.<sup>42</sup> Rather than exempt secret information from archives laws, information should be reviewed and reclassified periodically. Top level information (i.e. NSI - top secret) may cease to be classified at all 50 years later while low level information (i.e. personal information) will remain classified as such for the lifetime of the person. Where strongly in the public interest to do so, classified information may be released.<sup>43</sup>

This approach largely accords with existing exemptions since and provides a more uniform approach, particularly when transitioning information from current to archival.

## 7. Conclusion

Open and accountable government is fundamental to protecting civil liberties – even where those civil liberties are not enshrined in law.<sup>44</sup> However, this must be balanced against competing interests such as national security. Ideally, all information held by government would be accessible by the public where it does not impinge on another’s civil liberties (i.e. privacy) or in clearly and narrowly defined exceptions (i.e. national security). Insofar as this review is concerned, Liberty makes the following recommendations:

1. **Uniformity.** Liberty Victoria strongly supports a uniform approach to Australia’s secrecy laws. Currently secrecy provisions are found in over 90 pieces of legislation, at both federal and state levels, and suffer from inconsistent penalties and an inconsistent application of those penalties.
2. **Classification framework.** Liberty believes the classification of information should be directly related to the risk posed by the information. A uniform classification system should be developed and publicly available. Penalties must correlate to the specific classification of the information and, therefore, stringent and uniform guidelines must be used to classify information.
3. **Penalties.** Criminal liability should universally apply to anyone who knowingly mishandles the most secret of information. This should be followed on a sliding scale such that penalties are more limited regarding information of a less secret nature. Criminal liability should never attach to anyone who accidentally or unknowingly mishandles secret information. The penalty system requires:
  - a. A clearly defined physical element

---

<sup>41</sup> ALRC Report 85 and cited at paragraph 7.82, ALRC IP 34.

<sup>42</sup> By the most cost effective and efficient means and where the request is reasonable and in good faith.

<sup>43</sup> In the same way that currently ‘secret’ information can be authorised for public disclosure.

<sup>44</sup> i.e. right to privacy.



- b. An intentional or recklessness fault element
4. **Liability.** Liberty Victoria is strongly opposed to any absolute liability offences.
  5. **Exceptions and Defences.** Liberty Victoria recommends that greater protection in the form of exceptions and defences be afforded to those handling information in certain circumstances, particularly for whistleblowers.
  6. **Review.** Liberty believes that all secret information should be declassified where assessed as no longer requiring protection. Ideally this would be achieved through rolling reviews which would discourage over classification and encourage a more open approach to the release of information. Even 'top secret' information should be publicly released when of no further probative value.