

ALRC Review of Secrecy Laws: Liberty Victoria's response to DP74¹

In February 2009, Liberty Victoria made a submission to the ALRC following the release of the ALRC's Issues Paper on Australia's Secrecy Laws (IP34). The central tenets of that submission were calls for greater uniformity of offences, penalties and exceptions and a shift towards a system which encouraged more open and accountable governance. The ALRC has now published its Discussion Paper on the same issue (DP74).

On one hand, Liberty believes that the ALRC's proposals reflect a missed opportunity to make fundamental reforms to the laws and systems which govern the control and release of information to the public. A single classification system for all government information (whether secret or not) offers significant advantages (see Liberty's previous submission).

Despite this, Liberty generally supports the proposals made by the ALRC, and notes its efforts in making recommendations which would streamline the current legislative arrangements. Liberty is also of the view that the proposals made by the ALRC, if enacted, would have a substantial impact on the unification of penalties and defences for the provision of greater certainty among Commonwealth employees and the wider public.

In providing our support generally, Liberty takes this opportunity to provide further comment and feedback regarding those proposals which affect the central themes of our Submission to the ALRC:

Proposal 4-1

Liberty agrees that claims for exemption should be considered on a case by case basis rather than through the mechanism of a global exemption for secrecy provisions. As such s38 of the Freedom of Information Act (FOI Act) should be repealed on the basis that the current provision is too broad, and appears inconsistent with open and transparent government. This proposal is consistent with removing exemptions on the basis of categorisation of information, described throughout the report.

Proposal 4-5

Liberty concurs with the view of the ALRC in ALRC 85. Liberty's previous submission argued that the number of exemption categories should be reduced, and that records should be made public after a specified open access period, with periodic review and reclassification. Additionally Liberty stated that non-secret information should be available at any time. This proposal is consistent with our previous submission and with the principles of open and transparent government.

Proposal 6-1

Liberty has consistently advocated a system of penalties based on the risk posed by the information's release, and requiring an element of intention or fault. As such, we welcome the ALRC's proposal for the enactment of a general secrecy law, which includes the harm principle, which aims to bring uniformity to a plethora of secrecy provisions. Further, the

¹ Liberty would like to take thank Nicholas Mann and Rhys Michie for their assistance in preparing this submission.

proposal appears to better balance the principles of open and transparent government with the protection of information.

Proposal 7-1

Liberty's previous submission drew a distinction between NSI information and non-NSI information. Despite this, Liberty accepts the ALRC's preference against penalties based on the categorisation of information in favour of those based on harm or recklessness to harm.

Proposal 7-2

Liberty supports the division of a general offence into tiers, in order to clearly identify the level of seriousness of a particular offence. However, Liberty argues strict liability offences are not appropriate in criminal penalties. However we note the ALRC's proposal that a general criminal offence require harm or the reasonable likelihood of harm as a result of the disclosure as a safeguard to employees who inadvertently release information without a detrimental effect.

Liberty remains of the view that offences such as those described in the "First Tier" would be more appropriately dealt with by administrative, rather than criminal, sanction.

Liberty also takes the opportunity to express concern regarding the inclusion of 'protection of public revenue' and 'criminal offences' as a basis for an offence, particularly a criminal or strict liability offence. The basis for Liberty's concern is the potential of these terms to be interpreted broadly, and so to potentially have the affect of undermining the ALRC's proposal for a tiered system of penalty. Liberty recommends that this element of the proposal be removed from the scheme.

Proposal 7-3:

In relation to Proposal 7-3 Liberty welcomes the inclusion of a defence based on what a Commonwealth officer could prove that he or she neither knew, nor could reasonably be expected to have known, that the disclosure of the information was likely to harm any of the specified public interests. Liberty notes that the mistake of fact defence is best practice and consistent with s 58 of the *Defence Force Discipline Act*.

Additionally, while Liberty maintains some concerns about the ALRC's recommendation of strict liability in some case, we believe that this defence provides some moderation between the ALRC proposal and our stance against strict liability.

Proposal 8-3

The Liberty submission supported comparable initial and subsequent disclosure offences, equivalence of penalties and advocated the deterrent effect of such an offence. Liberty maintains the importance of equity in penalising initial and subsequent disclosure. Additionally the ALRC's focus on disclosure of information appears more appropriate than current legislation which regulates "handling" and could include receipt or possession.

Proposal 8-4

While the ALRC's proposal is generally consistent with Liberty's previous submission, the qualification of lawful disclosure may be overly restrictive or onerous on the person subsequently disclosing information.

There may be practical difficulties with a proposal that seeks to punish subsequent disclosure of information which is already public. For instance, if the information is already in the public domain (whether legally or illegally) it may be difficult attempt to restrict members of the public from repeating that disclosure. Liberty also believes that the ALRC's proposal may reduce certainty regarding the legality of subsequent disclosure in certain circumstances, for instance, where the precise circumstances (and the legality) on the initial disclosure may unknown to the subsequent discloser.

Liberty submits that if it is evident from the nature of the information that it is true and a disclosure is in the public interest, then there should be no onus of proof of the legality of the initial disclosure on the part of the subsequent discloser.

Proposal 8-5

Liberty believes that criminal liability must only attach where there is the requisite mental element. As such Liberty endorses a general secrecy offence which requires the intentional disclosure of Commonwealth information.

Proposal 8-6

Liberty agrees that such a proposal allows for a Commonwealth officer to continue participating in public life and debate, and clarifies the expectations of disclosure for both past and present Commonwealth officers.

Proposal 9-1

Liberty generally agrees with the ALRC's proposal to provide exceptions rather than defences in the situations discussed. Allowing the disclosure of information in these circumstances provides some protection to those parties disclosing information made in the interests of open and transparent government.

Liberty maintains its concerns regarding the ALRC's qualification that subsequent disclosure must be founded on an initial lawful disclosure.

Proposal 9-2

Liberty previously made several recommendations regarding a public disclosure exception to penalty for information disclosure. As such, Liberty supports a proposal to incorporate revised public interest disclosure legislation into revised secrecy offence legislation. Liberty also believes the enactment of such a proposal would enhance clarity and certainty for Commonwealth officers and those considering or making public interest disclosures.

Proposal 9-3

Liberty supports the ALRC's recommendations in order to provide more clear and consistent penalties for the unauthorised disclosure of information; however reiterates concerns raised in response to Proposal 7-1 regarding the appropriateness of strict liability.

Proposal 9-4 and Proposal 9-5

As noted above, Liberty supports the appropriate use of criminal penalties in situations where there exists an intention or other mental element. This is particularly important in situations where the information has the potential to prejudice law enforcement, endanger life or threaten public safety.

Liberty again cautions against the possible interpretation of “national security” as that which simply embarrasses or discredits the Commonwealth.

Proposal 9–6

Liberty supports the use of injunctive relief as a preventative measure in stemming the unauthorised disclosure of information.

Proposal 10–1

Liberty recognises that the limitations of an offence of general application and the necessity of the proposed specific secrecy offence model to operate in situations where there is a clear countervailing national interest in the protection of information. Streamlining the plethora of specific secrecy offences is welcomed by Liberty Victoria. In our previous submission, we advocated for a narrow definition of national interest to which this offence applies.

Liberty welcomes the ALRC’s proposal model for the enactment of specific secrecy laws, which includes the harm principle, requires an element of intention or fault and which aims to bring system of penalties based on the risk posed by the information’s release. Further, the proposal appears to better balance the principles of open and transparent government with the protection of information.

Proposal 10–2

Liberty agrees that recklessness should be the fault element however our position remains that strict liability offences are not appropriate in criminal penalties.

Proposal 10–3

Liberty agrees that in light of the subsequent disclosure offence it is appropriate to review existing offences with a view to restricting their application to Commonwealth officers.

Proposal 10–4

Liberty Victoria supports the application of secrecy offences to former Commonwealth officers as stated in our previous submission.

Proposal 10–5

The ALRC’s focus on disclosure of information is appropriate and supported by Liberty Victoria.

Proposal 10–6

In Liberty’s previous submission we stated that criminal liability must only attach where there is the requisite mental element.

Proposal 10–7

Liberty Victoria’s position is that strict liability offences are not appropriate in criminal penalties and supports the review with a view to removing such provisions.

Proposal 10–8

With the inclusion of the requirement to prove harm Liberty’s position is that this proposal is acceptable.

Proposal 11–1

Liberty agrees that it would be prudent to review the existing defences and frame legislation so that legitimate activities are not caught by the provision.

Proposal 11–2

Simplifying permissible disclosures would seem to be best practice and would enable Commonwealth officers to better understand when a disclosure is appropriate and acceptable. This would be more consistent with the principles of open and transparent government and is supported by Liberty.

Proposal 11–3

As discussed in our response to proposal 9-2, Liberty supports a proposal to incorporate revised public interest disclosure legislation into revised secrecy offence legislation.

Proposal 11–4

In our previous submission, Liberty strongly supports uniformity of penalties. As a result we support the proposal and believe that this reform will promote compliance, increase certainty and that it represents best practice.

Proposal 11–5

As noted above, Liberty supports the consistency of penalties for specific secrecy offences with the general secrecy offence and the subsequent disclosure offence.

Proposal 11–6

The Liberty submission supported comparable initial and subsequent disclosure offences, equivalence of penalties and advocated the deterrent effect of such an offence. Liberty maintains the importance of an offence which provides equity for initial and subsequent disclosure.

Proposal 11–7

Liberty Victoria agrees that guidance on benchmark penalties should be incorporated into the Attorney-General's Department's *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*.

Proposal 11–8

Liberty agrees that this is an appropriate penalty.

Proposal 11–9

Liberty agrees that with intention or recklessness and the identified public interests as elements this proposal is appropriate. The proposed penalties would bring uniformity to specific secrecy offences and is supported by Liberty Victoria.

Proposal 11–10

Liberty reiterates the concern expressed at 7-2, regarding the potential impact of the inclusion of protection of public revenue and criminal offences as part of a general offence. Liberty again calls for this element of the proposal to be removed from the scheme.

Proposal 11–11

Liberty Victoria advocates that Criminal penalties for disclosure of Commonwealth information should be reserved for serious offences, especially given that there are a range of

other mechanisms in place to protect Commonwealth information, including administrative sanctions, contractual obligations and the general law. As such we support this proposal.

Proposal 12–1

Liberty Victoria agrees that where Commonwealth secrecy offences are substantially replicated by the proposed general secrecy offence they should be repealed. Where this cannot be achieved and it is necessary for a specific secrecy offence, the proposed model (except for the identified problems) would appear an appropriate model to follow. We believe that this is would greatly simplify the secrecy regime, make the application of secrecy laws uniform and is consistent with open and transparent government.

Proposal 12–2

Liberty’s previous submission indicated that information concerning the Commonwealth’s security or defence should be afforded the greatest protection. This proposal incorporates the elements of intention or recklessness, the harm principle and a penalty that is consistent with other provisions. However, Liberty notes that existing provisions provide equivalent or greater protection than the proposed security offence and thus the creation of the new offence is unnecessary.

Proposal 12–3

Liberty supports consolidating retained secrecy provisions as it would not only be best practice, but would make their application by Commonwealth officers more practicable and therefore increase compliance.

Proposal 12–4

Liberty supports the consistency of penalties for retained specific secrecy offences with the general secrecy offence and the subsequent disclosure offence.

Proposal 12–5

Liberty agrees that guidance on the circumstances in which the enactment of a specific secrecy offence may be justified and advice on drafting principles that are consistent with the general secrecy offence should be incorporated into the Attorney-General’s Department’s *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*.

Conclusion

Liberty Victoria believes the ALRC review of Australia’s secrecy laws is a necessary and important step toward more open and accountable government. The plethora of anti-terrorism and security legislation in recent years has led to many inconsistencies and done significant damage to Australia’s civil liberties and its democratic foundations.

While Liberty believes the ALRC’s has missed an opportunity to suggest more fundamental reforms to Australia’s secrecy laws, we generally endorse the proposals put forward. It is hoped that the Commonwealth will accept and implement the ALRC’s proposals and initiate further reviews in future years.