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National security laws should not unduly limit free press, says Law Council

Disclosure of classified intelligence information by journalists and whistleblowers should only be criminalised if it can be proven there is a real threat to national security, says the Law Council of Australia.

In its [submission to the Parliamentary Joint Committee on Intelligence and Security's \(PJCIS\) press freedoms inquiry](#), the Law Council said currently there was a broad scope of journalistic conduct that may be innocuous but could be caught under espionage, sabotage and foreign interference laws.

President, Arthur Moses SC, said post-9/11, Australia's secrecy provisions had developed inconsistently, in an environment of ever-increasing powers to intercept and access data.

He said national security measures should be proportionate to any threat posed and should not unduly impinge freedom of expression, human rights or rule of law principles.

The recent directive to the Australian Federal Police (AFP) by Home Affairs Minister Peter Dutton to take into account "the importance of a free and open press" before launching investigations into journalists was a positive step. However, this will require the AFP to make a difficult determinations about what constitutes a free press. These freedoms should be protected by the laws enacted by our Parliament. It is clear more remains to be done, Mr Moses SC said.

"Recent events have shone a spotlight on the extent to which the powers of security and law enforcement agencies potentially surpass legitimate aims of safety and national security and enter the realm of stifling democratic freedoms and liberties," Mr Moses SC said.

"This is a balancing act and one we must get right. Press freedom and freedom of expression are central to the Australian ethos and must be fiercely protected. While the Law Council recognises strong national security protections are essential for the safety of Australians, disclosure of classified information should only be criminalised if it can be proven to have posed real harm to national security.

"For this reason, the concept of 'harm' must be clearly defined and it must be more than merely embarrassment and reputational damage to government. This would help protect against overuse and misuse of executive power.

Mr Moses SC said the Law Council had consistently supported the development and amendment of secrecy provisions in line with the Australian Law Reform Commission's (ALRC) [Secrecy Laws and Open Government in Australia Report](#) (2010).

While some of the report's recommendations had been implemented, adoption of an express harm requirement and public interest exception had not.

"We believe the inclusion of an express harm requirement in the Criminal Code, clarifying what constitutes an offence and clearly defines 'public interest' is vital," Mr Moses SC said.

"The Criminal Code should also be amended to place onus on the prosecution to establish a disclosure made by a journalist was not in the public interest."

Law Council representatives will appear before the PJCIS press freedom hearing at 4pm today.

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