AUSTRALIA'S RIGHT TO KNOW COALITION OF MEDIA COMPANIES CALLS ON THE GOVERNMENT TO AMEND LAWS TO PROTECT THE PUBLIC'S RIGHT TO KNOW

1. THE RIGHT TO CONTEST THE APPLICATION FOR WARRANTS FOR JOURNALISTS AND MEDIA ORGANISATIONS

- Applications for the issue of all warrants and compulsory document production powers[1] associated with journalists and media organisations undertaking their professional roles must be contestable. This requires:
  - Applications for all warrants must be made to an independent third party with experience in weighing evidence at the level of a judge of the Supreme Court, Federal Court or High Court. The best outcome is for this to occur in open court in the Supreme Court, Federal Court or High Court.
  - The journalist/media organisation being notified of the application for a warrant
  - The journalist/media organisation being represented at a hearing, presenting the case for the Australian public's right to know including the intrinsic value in confidentiality of journalists' sources and media freedom
  - The independent third party deciding whether to authorise the issuing of a warrant – or not – having considered the positions put by both parties
  - That a warrant can only be authorised if it is necessary for its stated statutory purpose and the material sought cannot be obtained via other means
  - That a warrant can only be authorised if the public interest in accessing the metadata and/or content of a journalist's communication outweighs the public interest in NOT granting access, including, without limitation, the public interest in the public's right to know, the protection of sources including public sector whistle-blowers and media freedom
  - That there be a presumption against allowing access to confidential source material
- The journalist/media organisation has a reasonable period after the warrant is authorised to seek legal recourse including injunctions and judicial review
- A transparency and reporting regime for application of and decisions regarding issuing and authorisation of warrants.

2. JOURNALISTS MUST BE EXEMPTED FROM NATIONAL SECURITY LAWS ENACTED OVER THE LAST SEVEN YEARS – THAT WOULD PUT THEM IN JAIL FOR DOING THEIR JOBS

We have provided detailed analysis regarding the following, including that exemptions for public interest reporting are essential:

- Section 35P of the *ASIO Act*

[1] For example, section 3ZQO of the *Crimes Act 1914* (Cth) empowers the AFP to apply to a Federal Circuit Court judge for a notice requiring the production of travel information, among other documents. This covers a journalist's flight information.

- Journalist Information Warrant Scheme at Division 4C of the *Telecommunications Interception and Access Act*
- *Criminal Code Act, Part 5.2 – Espionage and related offences; Part 5.6 – Secrecy of information,* section 119.7 – Foreign incursions and recruitment; section 80.2C – Advocating terrorism
- *Crimes Act* – sections 15HK and 15HL – Controlled operations, unauthorised disclosure of information; section 3ZZHA – Delayed notification search warrants, unauthorised disclosure of information

3. PUBLIC SECTOR WHISTLE-BLOWERS MUST BE ADEQUATELY PROTECTED – THE CURRENT LAW NEEDS TO CHANGE

- ***Public Interest Disclosures***
  The *Public Interest Disclosure Act* purports to provide protections for public sector whistle-blowers. It falls a long way short of this. Changes required include:
  - 'Protections' in all cases require review, public service whistle-blowing should be encouraged and adequate protections must be provided including protections for external public disclosure
  - Protection for intelligence agency personnel and staff of Members of Parliament
  - Expand the public interest test to remove bias against external disclosure
  - Presumption of criminal liability should not lie against the media for using or disclosing identifying information during the course of news gathering
  - The ability for identifying sources via journalists' communications and metadata (Journalist Information Warrant Scheme) makes a mockery of the shield law that protects the identity of journalists' sources once proceedings have commenced (ARTK submission to be made to PJCIS)

- ***Proposed Commonwealth Integrity Commission***
  The framework for the proposed Commonwealth Integrity Commission should safeguard public broadcasters' role as a provider of public interest journalism. It should ensure confidential sources continue to have confidence to bring allegations of corruption in public service agencies to the attention of public service broadcasters' journalists, without fearing that their documents and/or identity will be revealed, and without public broadcasters' journalists being at risk of being called before a hearing to reveal their sources. Hearings on public sector corruption should be public so that media companies can report on them.

4. A NEW REGIME THAT LIMITS WHICH DOCUMENTS CAN BE STAMPED SECRET

Legal experts such as Bret Walker SC, who previously held the Commonwealth role of Independent National Security Legislation Monitor (INSLM), have recommended 'new overarching legislation that defines in a restrictive fashion what information must be kept secret'. We support this. It must include a transparency requirement via auditing and reporting requirements

5. A PROPERLY FUNCTIONING FOI REGIME

The Government can also shut down reporting through the FOI process. FOI laws require meaningful attention and improvement in all aspects. A review of FOI laws must include a panel of FOI 'user' experts and this must include specialist journalist representatives.

6. DEFAMATION LAW REFORM

We are actively involved in the current Council of Attorney's General review of the unified defamation law. We have asked for the following:

- Update the law to be fit-for-purpose for digital news reporting
- Fix the aspects of the law which do not operate as intended
- Ensure the Commonwealth is a signatory to the Intergovernmental Agreement (and consequential amendments to the *Federal Court Act*) so that defamation law and procedures is aligned across all jurisdictions, including in the Federal Court

WHY IS THIS NECESSARY?

A free media is of utmost public importance
We believe a key issue to explore is the importance of a free media to ensure that the public's right to be informed of the actions taken by Government in their name is sufficiently protected. It is important to recognise the breadth of this, that it is not limited to 'national security' matters.

The rising tide of secrecy
In recent years many legal provisions that undermine and threaten the Australian public's right to know have been passed by the Federal Parliament under the guise of various national security concerns and national security legislation. The culture of secrecy arising from these legal provisions that unnecessarily restrict Australia's right to know has permeated attitudes and processes more broadly. We have tackled some of these issues on a legislative amendment by legislative amendment basis and provided submissions and evidence to Parliamentary inquiries. But with each of these laws the tide of secrecy rises. This is deeply disturbing in a modern and robust democracy. The tool that is used – laws that are designed to put journalists in jail for doing their jobs – has a chilling effect on reporting.

The stories at risk of not being told, of us all not being informed about, are about the things that affect ordinary Australians every day like the quality of aged care and how our tax dollars are being spent. It's about ensuring the media can effectively play its part in holding governments to account on behalf of all Australians.

The myth of 'balancing' media freedom and national security
The right to free speech, a free media and access to information – in service of the public's right to know – are fundamental to Australia's modern democratic society: a society that prides itself on openness, responsibility and accountability. However, unlike some comparable modern democracies – such as the US and UK – Australia has no national laws enshrining these rights.

The absence of such an explicit right in Australia means that every law that restricts the public's right to know challenges the fundamental principles that are the foundation of a modern, liberal democratic society.

ARTK proposal for law reform – putting the' balance' in balancing-act
As it stands, the current so-called balancing act between the public's right to know and the objective of controlling Government information is not a balance at all. Law reform is necessary and urgent. The objective of our law reform proposal is to bring the public's right to know up-front, as an active consideration – the balance in the balancing act – at the beginning of the process.

The combined effect of almost two decades of laws that expose journalists to the threat of criminal charges for simply reporting uncomfortable or unpleasant realities is now a matter of serious national concern. For the most part, these laws have very little to do with national security and everything to do with the exercise of power and the desire to avoid scrutiny. We have proposed legislative reforms that directly address the main issues. This is not a menu or a wish list. These are reforms that can and should be implemented immediately, and will go some way to providing the 'better balance' that the public demands.

Recap: our law reform proposal
- The right to contest the application for warrants for journalists and media organisations;
- Exemptions for journalists from laws that would put them in jail for doing their jobs, including security laws enacted over the last seven years;
- Public sector whistle-blowers must be adequately protected – the current law needs to change;
- A new regime that limits which documents can be stamped secret;
- A properly functioning freedom of information (FOI) regime; and
- Defamation law reform.