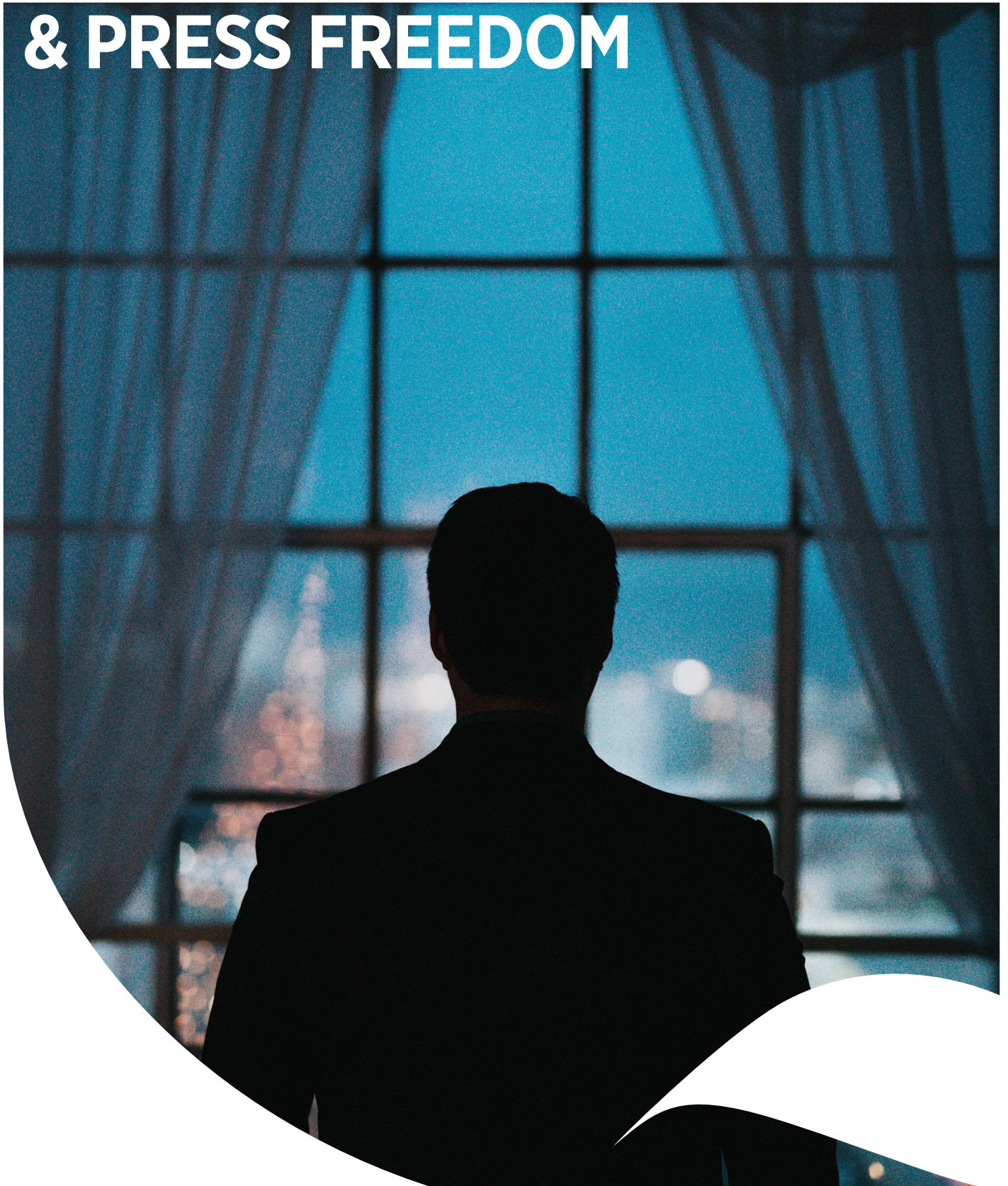




# FOREIGN INTERFERENCE LAW & PRESS FREEDOM



# SUMMARY

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## ➔ KEY POINTS

- The *Espionage and Foreign Interference Act 2018* (Cth) introduced nine novel foreign interference offences into Australian law.
- The laws criminalise two classes of conduct:
  - Covert, deceptive or threatening conduct on behalf of a foreign principal that is meant to influence a political or governmental process or right, support foreign intelligence agencies, or prejudice Australia's national security, and
  - Providing resources, material support or funds to, or receiving funds from, a foreign intelligence agency.
- The laws are drafted in a way that risks criminalising legitimate, good faith journalism.
- The defences to foreign interference do not adequately protect journalists or sources.

## ➔ REFORM CONSIDERATIONS

- Introduce a **journalism-based exemption from criminality** to protect legitimate, good faith journalism.
- **Narrow the scope** of the offences by:
  - Removing the fault element of 'prejudice to Australia's national security',
  - Removing recklessness as a fault element, and
  - Requiring the covert/deceptive element to be linked to committing foreign interference.
- Ensure **general inchoate liability does not apply to the Preparatory Offence**.



# FOREIGN INTERFERENCE LAW AND PRESS FREEDOM

Reform Briefing 1/2022

In this Policy Paper, I provide an overview of Australia's foreign interference laws and explain their impact on the media – particularly foreign media organisations and journalists. I then make recommendations for law reform to protect national security without unduly undermining press freedom.



In the lead up to the 2020 US election, foreign interference was in the global spotlight. Russia was reported to be employing a variety of means to influence the electoral outcome. Social media accounts spread false information about Joe Biden and Donald Trump. Hackers gained unauthorised access to online information. YouTube videos and memes were used to spread propaganda.<sup>1</sup> The aim of such conduct was to influence voters and their turnout at elections, manipulate the information environment and diminish public trust in democratic processes.<sup>2</sup>

All of these actions amounted to ‘foreign interference’ – actions taken to *covertly* shape decision-making to the advantage of a foreign power. ASIO defines foreign interference as ‘**actions – that are directed by, on behalf of, or in collaboration with a foreign power – that either involve a threat to any person, or are covert, deceptive and detrimental to Australia’s interests**’.<sup>3</sup> This differs from foreign *influence*, which occurs in an open and transparent manner, and is a usual and acceptable part of diplomacy.

The problem of foreign interference is certainly not limited to the global North. In 2019, then Director-General of ASIO, Duncan Lewis, stressed that acts of foreign interference were occurring on a daily basis in Australia with ‘unprecedented scale and sophistication’.<sup>4</sup> In 2021 the current Director-General, Mike Burgess, warned that ‘over the last three years, ASIO has seen espionage and foreign interference attempts against all levels of Australian politics, and in every single state and territory’.<sup>5</sup>

To combat this threat, in 2018 the Australian government introduced new national security laws targeting the actions of foreign powers. These laws include novel criminal offences for foreign interference, modernised espionage laws (examined in [Press Freedom Policy Paper 1/2020](#) ‘Espionage and Press Freedom in Australia’), and the Foreign Influence Transparency Scheme (which requires foreign entities or individuals to register certain activities if these are undertaken on behalf of a foreign principal).<sup>6</sup>

## The 2018 Foreign Interference Legislative Overhaul

Foreign interference was **criminalised for the first time** in Australia in 2018, when the *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018* (Cth) (*‘Espionage and Foreign Interference Act’*) introduced offences into the Commonwealth *Criminal Code*. To date, Australia is one of the only Western liberal democracies to have made foreign interference a crime.

Since the laws were introduced in 2018, **one person has been charged** with a foreign interference offence.<sup>7</sup> This may not seem like a lot, however, it stands in stark contrast to the espionage laws which were overhauled alongside foreign interference and which have supported only one prosecution since 1914.

Nine foreign interference offences were introduced by the *Espionage and Foreign Interference Act*, with penalties ranging from 10 to 20 years in prison. These consist of five ‘Foreign Interference’ offences (including a preparatory offence), summarised in Table 1; and four ‘Foreign Intelligence Agency’ offences, summarised in Table 2.

Table 1: The Foreign Interference Offences

Foreign Interference Offences	Section	Maximum Penalty
<b>Intentional Foreign Interference</b> – engaging in covert, deceptive or threatening conduct on behalf of a foreign principal, intending to: <ul style="list-style-type: none"> <li>(i) influence an Australian political or governmental process or right,</li> <li>(ii) support a foreign intelligence agency, or</li> <li>(iii) prejudice Australia’s national security.</li> </ul>	92.2(1)	20 years
<b>Reckless Foreign Interference</b> – engaging in covert, deceptive or threatening conduct on behalf of a foreign principal, reckless as to whether the conduct will: <ul style="list-style-type: none"> <li>(i) influence an Australian political or governmental process or right,</li> <li>(ii) support a foreign intelligence agency, or</li> <li>(iii) prejudice Australia’s national security.</li> </ul>	92.3(1)	15 years
<b>Intentional Foreign Interference Involving a Target</b> - engaging in covert or deceptive conduct on behalf of a foreign principal, intending to influence a target in relation to an Australian political or governmental process or right.	92.2(2)	20 years
<b>Reckless Foreign Interference Involving a Target</b> - engaging in covert or deceptive conduct on behalf of a foreign principal, reckless as to whether the conduct will influence a target in relation to an Australian political or governmental process or right.	92.3(2)	15 years
<b>Preparatory Offence</b> – intending to prepare for or plan a Foreign Interference offence.	92.4	10 years



Table 2: The Foreign Intelligence Agency Offences

Foreign Intelligence Agency Offences	Section	Maximum Penalty
<b>Knowing Support of Foreign Intelligence Agency</b> – providing resources or material support to an organisation, knowing it is a foreign intelligence agency.	92.7	15 years
<b>Reckless Support of Foreign Intelligence Agency</b> – providing resources or material support to an organisation, reckless as to whether it is a foreign intelligence agency	92.8	10 years
<b>Knowing Funding of / Being Funded by Foreign Intelligence Agency</b> – receiving, obtaining, collecting or making available funds to an organisation, knowing it is a foreign intelligence agency.	92.9	15 years
<b>Reckless Funding of / Being Funded by Foreign Intelligence Agency</b> – receiving, obtaining, collecting or making available funds to an organisation, reckless as to whether it is a foreign intelligence agency.	92.10	10 years

The Foreign Interference offences do not just apply to conduct within Australia. They also apply where the mere results of conduct occur in Australia, as well as when the conduct occurs outside Australia and the person was an Australia citizen or resident (or the body corporate was incorporated under a Commonwealth, State or Territory law) at the time of the offence.<sup>8</sup>

The Foreign Intelligence Agency offences apply where the conduct or results of the conduct occur in Australia.<sup>9</sup>

These offences therefore have potential repercussions for journalists and media organisations around the world because the nature of modern digital journalism means that the ‘results’ of journalism occur in Australia too, whether or not the journalist is located in Australia.



## Implications for Press Freedom

### Foreign Interference Offences

The four Foreign Interference offences criminalise engaging in **covert, deceptive or threatening** conduct on behalf of, in collaboration with, or where directed, funded or supervised by a **foreign principal**. For Intentional and Reckless Foreign Interference Involving a Target, such conduct must be in relation to another person (the ‘target’).

For all four offences, the prosecution must prove that the person intended to (or was reckless as to whether) their conduct would influence an Australian political or governmental process or right, or – for Intentional or Reckless Foreign Interference only – support a foreign intelligence agency, or **prejudice national security**.

The term **‘foreign principal’** applies to any entity that is owned or controlled by a foreign government, so it could encompass media organisations. Because the Foreign Interference offences criminalise conduct on behalf of or in collaboration with foreign principals, **they could apply to journalists, editors, and other staff members who work for or collaborate with foreign-controlled media organisations**. They could even apply to sources who collaborate with or are paid by these media organisations.<sup>10</sup>

To be Foreign Interference, however, the person’s conduct must be **covert** or involve **deception**.<sup>11</sup> For Intentional and Reckless Foreign Interference Involving a Target, the deception refers to the person concealing from the target that they are acting on behalf of a foreign principal.<sup>12</sup>

For Intentional and Reckless Foreign Interference, *any part* of the person’s conduct could be covert or deceptive – it does not need to be related to the elements of a Foreign Interference offence. So, the deception could be unrelated to the person’s relationship with a foreign principal or their intentions (for example, to influence a governmental process).

This element may appear to exclude legitimate journalistic activities, but that is not the case.

Whenever journalists liaise with confidential sources (such as whistleblowers) or use encrypted technologies (such as Signal) to communicate with sources and maintain the secrecy of certain documents, this could be covert conduct. **A journalist could also be acting covertly or deceptively when they use hidden cameras or engage in undercover work**. Across liberal democracies, protections for journalist-source confidentiality recognise the critical importance of journalistic confidentiality to press freedom.

The *Criminal Code* defines **‘foreign principal’** to include:

- foreign governments and their authorities
- foreign political organisations
- terrorist organisations
- public international organisations
- foreign public enterprises (companies, bodies or associations that enjoy special legal rights or benefits because of their relationship with the foreign government and are owned or controlled by that government), and
- entities or organisations ‘owned, directed or controlled by’ a foreign principal.<sup>13</sup>



If the above physical elements are satisfied, the journalist, source or other media organisation staff member will have committed Foreign Interference, provided that one of the fault elements can be proved. These elements include that the person intended to or was reckless as to whether their conduct would:

- (a) Influence an Australian political or governmental process or right;
- (b) Support intelligence activities of a foreign principal; or
- (c) **Prejudice Australia's national security.**



**National security** has been defined broadly in the *Criminal Code*. It includes defence of the country and protection of the country from serious threats as well as the country's 'political, military or economic relations with another country'.<sup>14</sup> This essentially draws international relations within the meaning of national security.

While there are few circumstances where a journalist engaged in legitimate activities would intentionally (or recklessly) support intelligence activities of a foreign principal, at times **a journalist may intend to influence a political or governmental process or right**. For example, a journalist engaged in legitimate reporting might advocate for electoral law reform, encourage Australians to vote against a political party which has been engaged in corruption, or urge the public to oppose questionable governmental policies.

**Journalists might also be reckless as to whether they would be prejudicing Australia's national security or international relations.** Prejudice could mean anything from harming Australia to making Australia look bad (beyond mere embarrassment) on the international stage.<sup>15</sup> So, a journalist could recklessly prejudice national security when they publish a story that reveals war crimes by members of the Australian Defence Force, or that Five Eyes nations' intelligence agencies have been misusing their surveillance powers. This fault element broadens the scope of the Foreign Interference offences beyond interference to more general harms to Australia's national security.

Ultimately, a wide range of legitimate (covert) journalistic activities may involve intentional or reckless political influence or prejudice to Australia's national security. As such, **journalists or sources engaged in legitimate, good faith reporting could face up to 20 years in prison.**



## The Preparatory Offence

The Preparatory Offence criminalises engaging in any conduct where the person has the intention of preparing for or planning a Foreign Interference offence. Because the offence applies regardless of the type of conduct engaged in, it is limited entirely by its fault element.

This offence has the capacity to capture the **earliest stages of investigative reporting**, including liaising with sources, doing preliminary research, or drafting a potential article. The prosecution must prove that the journalist or source intended to prepare for an offence, but **intention could be established through the surrounding circumstances** of the case (especially where the journalist works for a foreign media organisation and is preparing a story on Australian politics, national security or international relations).

The Preparatory Offence further attracts **general inchoate liability**, creating 'pre-pre-crimes'. For example, it is a crime to conspire to prepare for foreign interference – an offence that could arise where a journalist and source have merely discussed pursuing a story on Australian politics.





## The Foreign Intelligence Agency Offences

The four Foreign Intelligence Agency offences are not restricted to conduct on behalf of a foreign principal, so could **apply to any media organisation** and their journalists, staff and sources.

However, they apply to a narrower scope of conduct than the Foreign Interference offences, criminalising the provision of resources, material support or funds to, or receiving, collecting or obtaining funds from, a foreign intelligence agency or person acting on its behalf. The person must know that or be reckless as to whether the organisation is a foreign intelligence agency.

**Media organisations provide resources, material support or funds to their sources and journalists.** If these sources or journalists are acting on behalf of a foreign intelligence agency (even if they are not intelligence agents per se), the media organisation could be committing an offence, **especially if the organisation is reckless** as to this fact.

## Summary

Australia's foreign interference offences have the capacity to **criminalise legitimate journalism**.

Journalists (and sources) are at risk of committing a Foreign Interference offence if they: work for or with foreign state-controlled media organisations; engage in any kind of covert or deceptive conduct; and report on matters relating to Australian politics, national security or international relations (especially if they seek to influence the public in some way). Preparations for this kind of conduct may also be a crime.

Media organisations may also be at risk of committing a Foreign Intelligence Agency offence.



## Recommendations for Reform

To ensure national security is protected without unduly undermining press freedom, several reforms should be implemented.

### 1. Narrow the scope of the Foreign Interference offences.

To narrow the scope of the Foreign Interference offences, the recklessness fault element should be removed as this criminalises people with a much lower level of personal culpability (including journalists).

Furthermore, the fault element of ‘prejudice to Australia’s national security’ should be removed. This element does not relate to foreign interference and unnecessarily broadens the scope of the offences.

Additionally, the covert/deceptive element should be linked to the foreign interference, rather than applying to any part of the person’s conduct.

### 2. Ensure general inchoate liability provisions do not apply to the Preparatory Offence.

This especially includes provisions relating to conspiracy. These ‘pre-pre-crimes’ are too wide-reaching.

### 3. Introduce a journalism-based exemption from criminality.

Currently, only one defence exists to a foreign interference charge, but this is of limited use for journalists and sources.<sup>16</sup>

A journalism-based exemption would operate to protect legitimate, good faith journalism, while ensuring genuine acts of foreign interference are criminalised. This exemption could be modelled after a defence to the General Secrecy Offence (located in section 122.4A of the *Criminal Code*), which protects professional *and* non-professional journalists reporting on matters of public interest (although not where this is done to assist foreign intelligence agencies or military organisations).<sup>17</sup>

#### Further Reading:

- ④ Sarah Kendall, ‘How Australia’s Foreign Interference Laws Undermine Press Freedom’ (2022) 47(2) *Alternative Law Journal* 124.
- ④ Rebecca Ananian-Welsh and Sarah Kendall, ‘Crimes of Communication: The Implications of Australian Espionage Law for Global Media’ (2022) 27(1) *Communication Law and Policy* 3.

## About the Author



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Sarah Kendall is a PhD candidate and Sessional Academic at UQ Law. She is an interdisciplinary scholar who researches in the areas of national security, evidence law and criminal law and procedure. Her doctoral research concerns non-fatal strangulation prosecutions and how victims of that crime – who may be suffering from brain injuries or trauma – give evidence in court. It is supported by an Australian Government Research Training Program (RTP) Scholarship.

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- 5 ASIO, *Director-General's Annual Threat Assessment* (Speech, 17 March 2021) <<https://www.google.com/search?q=asio+annual+threat+assessment+2021&oq=asio+annual+threat+assessment&aqs=chrome.0.35i39j46i275i512j0i22i30.3790j0j4&sourceid=chrome&ie=UTF-8>>.
- 6 See *Criminal Code Act 1995* (Cth) divs 91, 92, 92A ('*Criminal Code*'); *Foreign Influence Transparency Scheme Act 2018* (Cth).
- 7 Matthew Doran and Stephen Dziedzic, 'Melbourne Man Becomes First Charged Under Foreign Interference Laws', *ABC News* (online, 5 November 2020) <<https://www.abc.net.au/news/2020-11-05/first-person-charged-foreign-interference-laws/12852974>>.
- 8 *Criminal Code* ss 92.6, 15.2.
- 9 *Ibid* s 14.1.
- 10 For a detailed analysis of how the foreign interference laws impact press freedom see Sarah Kendall, 'How Australia's Foreign Interference Laws Undermine Press Freedom' (2022) 47(2) *Alternative Law Journal* 124.
- 11 *Criminal Code* ss 92.1 (definition of 'deception').
- 12 *Ibid* ss 92.2(2)(d), 92.3(2)(d).
- 13 *Ibid* ss 90.2, 90.3.
- 14 *Ibid* s 90.4.
- 15 *Ibid* s 90.1(1) (definition of 'prejudice').
- 16 *Ibid* ss 92.5, 92.11.
- 17 *Ibid* s 122.5(6).





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