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There's need for secrecy — it's a question of balance

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As the blacked-out front pages of Monday's newspapers reminded us, a free press is the foundation of liberty. In a world in which the abuse of power comes as no surprise, its vigilance helps to expose injustice, deter those who would perpetrate it and ensure governments are held to account.

That the press often falls far short of its lofty ideals is certainly true; but no matter how imperfect it may be, analysis and experience show that where it is muzzled, corruption flourishes, rights are ignored and democracy atrophies.

It is, however, no coincidence that when America's founding fathers entrenched free speech in the first amendment to the US constitution, they also provided, in article one of the constitution itself, for the houses of congress to shield from the public matters "as may in their Judgment require Secrecy".

Initially, those powers were primarily used to allow treaties to be negotiated, but as the functions of government expanded they were increasingly relied on to protect the confidentiality of its inner workings.

Obviously, the need to do so was most acute where internal and external security were involved. However, the pressures to extend the scope of confidentiality were also closely bound up with the transition, in almost every advanced democracy, from a public service

based on political patronage to a permanent service whose members were expected to faithfully serve governments of sharply differing persuasions.

Shorn of the power to hand-pick their advisers, ministers wanted to be sure they could consider politically contentious options without that mere fact being used against them.

And they also demanded the assurance that the choices they made would not be undermined by their public service advisers, either through those advisers' public commentary or by hostile briefings to the press.

The resulting, often severe, restrictions on what public servants were allowed to disclose have formed an indispensable part of the service's neutrality.

As Britain's 1915 Royal Commission on the Civil Service influentially argued, relaxing those restrictions would lead "Ministers to select for positions of confidence only those whose sentiments were known to be in political sympathy with their own; the Civil Service would cease to be in fact an impartial body; and the result would be destructive of what undoubtedly is one of the greatest advantages of our administrative system and one of the most honourable traditions of our public life."

Out of those considerations evolved two interrelated sets of constraints. The first was the classification system, which determined the information to be withheld from the public; the second was the complex of legal rules that prohibited those who had access to that information from making it publicly available and imposed at times draconian penalties for unauthorised disclosure.

No one could seriously contend that those constraints are inherently illegitimate or necessarily incompatible with the system of responsible and representative government that our constitution mandates. Rather, as a unanimous High Court recently reaffirmed in its Banerji decision, the very preservation of that system justifies imposing what can be far-reaching limitations on political communication, particularly by public servants.

But it is also undeniable that governments can be unduly restrictive, preventing access to

information voters deserve to know. And when that occurs, those who have access to that information may quite properly feel a moral obligation to "blow the whistle" on what could be serious abuses of public power.

Australia has comprehensive protections in those respects through Freedom of Information legislation and through legislation designed to shield whistleblowers.

In practice, those frameworks compare relatively favourably with similar measures in the other advanced democracies. However, it is apparent that there is scope for improvement.

There is, in particular, a widespread tendency to over-classify material, undermining the Freedom of Information provisions and impeding public scrutiny. As for the whistleblower legislation, it seems to mainly benefit public servants who bear a grudge against their department or simply disagree with the government, rather than effectively disclosing instances of grievous misconduct.

Finally, adding to the problems, the courts, especially in Victoria, ever more frequently issue blanket suppression orders with little regard to the public interest in the transparency of judicial processes.

In a country where the reach of the public sector seems only to grow, addressing those concerns should be a high priority. However, that ought not to be at the expense of the restrictions that are necessary for domestic security and for effective and efficient government.

The prohibitions on leaks are a case in point. The reality is that the overwhelming majority of public servants scrupulously protect confidentiality. And the public service as a whole has an abiding interest in preventing unauthorised disclosures, as they destroy the bonds between ministers and officials, encouraging ministers to rely even more heavily on political appointees.

Hindering the prosecution of leaks therefore does the cause of a neutral, nonpartisan, public service no favours.

That means proposals that would allow journalists to cultivate and then protect sources of leaked material should be viewed with the utmost caution. Public servants who maliciously disclose confidential information that belongs to their ministerial clients are no different from lawyers who — like "Lawyer X" in Victoria — use the material they have obtained from those they purport to serve to harm them.

The presumption should therefore be that identifying the sources of illegal disclosures is in the public interest — just as is the effective prosecution of illegal conduct generally. Yet several commentators have suggested that the government, when it seeks a warrant against a journalist who has obtained what amounts to stolen goods, should bear the burden of showing that it is in the public interest that the source be exposed.

It would instead seem more reasonable for the public interest in disclosure and in press freedom to be a factor that must be taken into account by the courts in any proceedings the execution of those warrants gives rise to.

Ultimately, no government can exist in a goldfish bowl; but neither can democracy survive if government is shrouded in secrecy.

The less people know about how coercive powers are being used, the less they will trust those who have power in their hands. And the more trust erodes, the harder it becomes to convince voters to bear the risks of new policies, to tolerate occasional mistakes and to grant governments the room they need to operate. The politics of distrust can be the politics only of a stagnant society.

The best cure for that is, and has always been, transparency. How that should be balanced with the legitimate requirements of confidentiality is inevitably contentious. What is not is that the balance needs to be revisited, and the sooner the better.