



Review of Secrecy Provisions

Terms of Reference

Context

A March 2021 survey of Commonwealth secrecy legislation conducted by the Attorney-General's Department found there are 11 general secrecy offences and 487 specific secrecy offences in Commonwealth legislation. Separately, over 200 non-disclosure duties function as specific secrecy offences because a breach of these duties is criminalised by section 122.4 of the Schedule to the *Criminal Code Act 1995* (Cth) (the Criminal Code). Section 122.4 will sunset on 29 December 2023.

Secrecy offences play a legitimate and important role in circumstances where the unauthorised disclosure of Commonwealth information may cause harm to essential public interests, such as national security and the safety of the public. However multiple reviews, including the 2010 Australian Law Reform Commission (ALRC) report *Secrecy Laws and Open Government in Australia*, have raised concerns about the number, inconsistency, appropriateness and complexity of a range of Commonwealth secrecy offences.

In June 2018, the Parliamentary Joint Committee on Intelligence and Security (the Committee) recommended that, following the enactment of the general secrecy offences in Schedule 2 of the *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018* (the EFI Act), the Attorney-General initiate a review of secrecy offences in other Commonwealth legislation, taking into account the set of principles contained in the ALRC report, *Secrecy Laws and Open Government in Australia*.

In its unanimous and bipartisan report, the Committee noted the "array of specific secrecy offences ... that will continue to exist once the proposed new general offences" were introduced by the EFI Act, and considered it likely that "many of these existing offences will no longer be required, or will require amendment". The Committee recommended that the review of secrecy offences commence as soon as possible. However, no review was formally commenced during the life of the 45th Parliament.

In August 2020, in its *Inquiry into the exercise of law enforcement and intelligence powers on the freedom of the press*, the Committee re-iterated its recommendation for a review of Commonwealth secrecy offences. The Committee recommended that such a review be prioritised for finalisation and report by June 2021, and that the review specifically consider whether relevant Commonwealth legislation adequately protects public interest journalism.

On 15 February 2021, the then-Assistant Minister to the Attorney-General, Senator the Hon Amanda Stoker, approved terms of reference for the Attorney-General's Department to conduct a limited review of Commonwealth secrecy offences with a specific focus on public interest journalism. However, that review was not completed.

On 28 July 2022, the Attorney-General asked the Independent National Security Legislation Monitor (the INSLM) to complete a review into the operation and effectiveness of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (the NSI Act).

Separately, the INSLM has also commenced a review of the EFI Act, including the general secrecy offences introduced by that Act. However, the INSLM is not expected to report until 2024.

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On 11 August 2022, the Interim Report of the Royal Commission into Defence and Veteran Suicide recommended (among other things):

For serving and ex-serving ADF members whose lived experience is intrinsically linked to security classified or operationally sensitive information, the defence available under the Criminal Code section 122.5(5) should be extended to cover information communicated to a Royal Commission. A defence to other secrecy offences will also be needed.

Scope of the Review

Having regard to the context set out above, the Attorney-General's Department will conduct an inquiry and report on:

- any specific secrecy offences in Commonwealth legislation that are no longer required in light of the introduction of the general secrecy offences in the EFI Act;
- the suitability and appropriate framing of the general and specific secrecy offences in Commonwealth legislation, having particular regard to:
 - the principles outlined in the ALRC's report *Secrecy Laws and Open Government in Australia*; and
 - other relevant principles, including but not limited to those set out in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*;
- any amendments to general and specific secrecy offences in Commonwealth legislation that are necessary to adequately protect individuals who provide information to Royal Commissions (balanced against other essential public interests); and
- any amendments that are necessary to adequately protect public interest journalism (balanced against other essential public interests).

The Department's inquiry and report should not include recommendations for amendments to the secrecy offences in the NSI Act, noting that the INSLM is likely to complete a review of those provisions in 2023.

The Department's report should identify and have regard to existing reports and inquiries, including but not limited to the INSLM's report on the impact on journalists of section 35P of the Australian Security Intelligence Organisation Act 1979.

For the purposes of this document, a reference to "specific secrecy offences" includes a reference to the 200 non-disclosure duties that function as specific secrecy offences because a breach of these duties is criminalised by section 122.4 of the Schedule to the Criminal Code.

Timeframe

The Department will work towards providing government with:

- an interim report on any amendments to general and specific secrecy provisions that are necessary to adequately protect individuals who provide information to Royal Commissions by 31 January 2023; and
- a final report by 30 June 2023.

Consultation

The Department should consult widely with Commonwealth departments and agencies, civil society (including media organisations and legal experts) and, for the purposes of the interim report, current royal commissions including the Royal Commission into Defence and Veteran Suicide.