Australian Government
Independent National Security Legislation Monitor

Independent National Security Legislation Monitor
3-5 National Circuit
Barton ACT 2600
Tel: (02) 6141 4590

29 April 2026

Senator Jana Stewart
Chair
Senate Legal and Constitutional Affairs Legislation Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Chair

Secrecy Provisions Amendment (Repealing Offences) Bill 2026

1. I welcome the opportunity to make this submission to the Senate Legal and Constitutional Affairs Legislation Committee (the Committee) review of the Secrecy Provisions Amendment (Repealing Offences) Bill 2026 (the Bill).

2. Between December 2023 and June 2024, the Monitor undertook an independent review of the secrecy offences in Part 5.6 of the *Criminal Code Act 1995* (Cth) (*Criminal Code*) as required by statute.[1] In July 2024, the Monitor delivered the final report: *Secrecy Offences – Review of Part 5.6 of the Criminal Code Act 1995* (INSLM Secrecy Review). That report made 15 recommendations, of which Government agreed to, or agreed in principle to, 12 recommendations as set out in its published response (Government Response).[2]

3. The primary purpose of this submission is to assist the Committee by assessing the extent to which those recommendations accepted by Government have been implemented in the Bill, and by identifying areas where the Bill departs from, or only partially reflects, the approach recommended in the INSLM Secrecy Review. I reiterate the rationale for the recommendations that were noted and not agreed in the Government Response without repeating them in this submission.[3]

Overall, the Bill represents a substantial and welcome reform of the Commonwealth secrecy framework.

The Bill repeals a large number of unnecessary secrecy offences, removing security classification as a trigger for criminal liability, narrowing over-broad 'dealing with' offences and better aligning aggravated penalties with culpability. These measures materially improve clarity, proportionality and consistency with the rule of law, and are strongly supported.

[1] *Independent National Security Legislation Monitor Act 2010* (Cth) s 6(1B)(c) as inserted by Item 51 Schedule 1 Part 3 *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018* (Cth).
[2] Australian Government, *Australian Government response to the Independent National Security Legislation Monitor report: Secrecy Offences: Review of Part 5.6 of the Criminal Code Act 1995* (November 2024). ('*Government Response*')
[3] See for example, *Government Response* Recommendation 4.

At the same time, the Bill only partially implements several key recommendations of the Monitor. Most notably, it retains excessively broad deemed-harm offences for intelligence and law-enforcement information, despite the Monitor's conclusion that deemed-harm liability should be confined to information that is always, or almost always, harmful if disclosed. While the Government acknowledged these concerns and foreshadowed further work, the Bill does not narrow these categories nor explain why their continuing breadth is necessary or proportionate.

The Bill also departs from the Monitor's harm-based approach by introducing a new general secrecy offence in s 122.4 that does not require proof of actual or likely harm, and instead turns on whether it would be reasonable to conclude that the use or communication of information was 'improper', thereby expanding criminal liability beyond demonstrable harm to essential public interests.

The Bill requires further justification and refinement in these areas to ensure full alignment with the principles of necessity and proportionality.

Deemed harm offences for Commonwealth officials

4. Deemed-harm secrecy offences are exceptional in character. They do not require proof that disclosure caused, or was likely to cause, harm. Rather, harm is assumed by reference to the nature of the information itself. For that reason, the INSLM Secrecy Review emphasised that such offences should apply only where disclosure will always, or almost always, cause serious harm to a critical national interest, and not as a substitute for properly framed harm-based offences.

5. The current deemed harm offence in s 122.1 of the Criminal Code applies to three broad categories of information:

- any information that has been classified as secret or top secret;
- any information obtained or made by or for one of Australia's 6 main intelligence agencies or any foreign intelligence agency in connection with its functions; and
- any information about the operations, capabilities or technologies of, or methods or sources used by, any domestic or foreign law enforcement agency.

6. The INSLM Secrecy Review found that each of these categories was drafted far more broadly than could be justified on a deemed-harm basis, and that their breadth posed significant rule-of-law and proportionality concerns.[4]

7. The Bill fully addresses one of these concerns by removing security classification markings as a trigger for deemed-harm liability, implementing **Recommendation 1** of the INSLM Secrecy Review.[5] While security classifications appropriately guide administrative handling of information, embedding classification markings as elements of criminal offences creates uncertainty and raises rule of law concerns, as the scope of serious criminal liability would depend on changeable executive policy rather than legislation. These amendments are **strongly supported**.

[4] *INSLM Secrecy Review*, Ch 4, 41-107.

[5] Item 9 of Schedule 4 to the Bill would repeal ss 121.1(1) (definition of 'security classification'); Item 10 repeals ss 121.1(1) (definition of 'security classified information'). *INSLM Secrecy Review*, 73 Recommendation 1.

8. In other respects, the Bill does not address key issues identified by the Monitor concerning the scope of deemed-harm offences for intelligence and law-enforcement information, notwithstanding the Government's acknowledgement that further work was required in these areas.

Deemed harm offences: Intelligence information

9. The INSLM Secrecy Review recommended narrowing the category of intelligence information subject to deemed-harm secrecy offences (INSLM Secrecy Review, **Recommendation 2**). Although the Government did not accept the new category proposed in the INSLM Secrecy Review, it acknowledged that not all intelligence-agency information is inherently sensitive and indicated that further work would be undertaken to assess the feasibility of a narrower definition:

> *The Government will undertake further work to assess the feasibility of legislating an alternative, narrower definition of the intelligence agency limb of 'inherently harmful information' in section 122.1.*[6]

10. The Bill does not implement any narrowing of the intelligence-agency limb of s 122.1.

11. Relatedly, the Bill requires the Director of the Defence Intelligence Organisation (DIO) to publish the DIO mandate, making an administrative description of DIO's functions publicly accessible.[7] Although agreed in principle by the Government Response,[8] this change does not fully implement **Recommendation 5** of the INSLM Secrecy Review. The Monitor's recommendation was directed at the rule-of-law concern that DIO functions—on which serious criminal offences depend—can be altered through non-legislative policy without parliamentary oversight. By retaining that framework and introducing only a publication requirement, the Bill leaves unchanged the executive discretion the Monitor considered incompatible with Parliament's role in setting the boundaries of serious criminal liability. Consistency with the Monitor's **Recommendation 5** would require DIO's functions to be placed on a statutory footing.[9]

Deemed harm offences: Law enforcement information

12. The Monitor recommended that the law-enforcement limb of the deemed-harm offence in s 122.1 be confined to information relating to the technologies, capabilities and methods used to exercise special electronic surveillance powers, on the basis that only this narrow class of information is inherently harmful if disclosed (INSLM Secrecy Review, **Recommendation 3**).[10] The Government agreed to this recommendation in principle but stated that sensitive law-enforcement capabilities and methodologies extend beyond electronic surveillance, and that further work was required to frame the provision appropriately:

> *The Government will develop legislation to confine the categories of law enforcement information covered by section 122.1 to information in which there is an essential public interest that needs to be protected by the application of criminal sanctions.*[11]

13. The Bill does not implement any narrowing of the law-enforcement category and retains the existing broad formulation of law-enforcement information. No reason is provided why the continued breadth of the deemed-harm offence is necessary or proportionate.

---

[6] *Government Response*, 3.
[7] Item 46 of Schedule 4 to the Bill inserting new s 41D *Intelligence Services Act 2001* (Cth).
[8] *Government Response*, 4.
[9] *INSLM Secrecy Review*, 107 [4.246] – [4.249] and Recommendation 5.
[10] *INSLM Secrecy Review*, 95 [4.198].
[11] *Government Response*, 3.

Harm-based offence for Commonwealth officials

14. The Monitor recommended that s 122.2 operate as a genuinely harm-based secrecy offence, applying only where disclosure causes, or is likely to cause, harm to clearly defined essential public interests, and functioning as a residual safeguard where narrow deemed-harm offences do not apply. The Government agreed to this recommendation in principle, but rejected proposals to narrow certain protected interests, particularly in relation to law-enforcement and criminal justice processes. The Bill partially implements this approach by retaining s 122.2 as a harm-based offence and making some definitional refinements; however, it does not define 'defence', instead relying on its ordinary meaning.[12] The INSLM Secrecy Review recommended introducing a definition of 'defence' using as a starting point the recommended approach in a previous review of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth).[13] The Government Response indicated that there is ongoing work that might inform a definition:

> *The Government will consider if and how to define 'defence' in the context of consideration of reforms to Defence legislation.*[14]

Dealing with offences

15. INSLM Secrecy Review, **Recommendations 7** and **8** are implemented in substance and represent a significant improvement to the secrecy offence framework. The Monitor identified serious proportionality concerns arising from the breadth of the 'dealing with' offences, particularly the inclusion of mere receipt and their overlap with communication offences, which risked criminalising conduct incidental to disclosure and posed a chilling effect on journalistic newsgathering. The Bill gives effect to these recommendations by removing 'receives or obtains' from the definition of 'deal' with and repealing the offence of dealing with information by non-officials, thereby confining criminal liability to active handling or disclosure and appropriately recognising the different position of journalists and other non-officials.[15] These amendments materially improve clarity and proportionality, and ensure that secrecy offences do not unnecessarily intrude into routine professional or media activities absent disclosure or harm.

Proper place of custody offences

16. INSLM Secrecy Review, **Recommendation 9** is implemented in full. The Bill repeals the 'proper place of custody' offences in ss 122.1(3) and 122.2(3), removing provisions that were effectively inoperative in the absence of regulations and which the Monitor identified as unnecessary and confusing within the secrecy offence framework.

Aggravated circumstances

17. The Monitor found that the existing aggravated circumstances attached to secrecy offences were overbroad and poorly aligned with culpability, and that several aggravating circumstances (including those based on security classification, or volume of records) did not reliably correspond with increased harm or moral blameworthiness. The Monitor recommended that aggravated penalties be confined to circumstances where an offender held the highest level of security clearance or intended or knew their

---

[12] EM, 48 [250].
[13] *INSLM Secrecy Review*, 125 -126 [5.82] – [5.83] Recommendation 6. Grant Donaldson, INSLM (former), *Review into the operation and effectiveness of the National Security Information (Criminal and Civil Proceedings) Act 2004* (Report, 30 October 2023) 110, Recommendation 2.
[14] *Government Response*, 5.
[15] Item 4 of Schedule 4 to the Bill inserts new s 121.1(1) of the *Criminal Code* (definition of 'deal').

conduct would cause harm. The Bill gives effect to this approach by ensuring aggravating circumstances reflect increased culpability or harm.[16] These amendments are **supported**.

New general offence in s 122.4

18. At the time the Secrecy Review was finalised, the Monitor was not considering a settled legislative proposal for a replacement offence, but was addressing whether there was a gap in the criminal law and articulating guiding principles for any new general secrecy offence that might be developed. Against that background, **Recommendation 11** was necessarily framed at a high level, and the Bill departs in material respects from the Monitor's harm-based approach.

19. Drawing on the Australian Law Reform Commission's analysis, the Monitor emphasised that general secrecy offences should be harm-based and directed to essential public interests, rather than operating as broad standards of conduct. The Monitor observed that the core public interests identified by the ALRC—'primarily security, defence, international relations and law enforcement'—were already addressed by the existing general offences in Part 5.6, particularly as refined by the recommendations in the INSLM Secrecy Review.[17]

20. The Monitor emphasised that if additional gaps were identified, 'these should be described clearly', and that criminal sanctions should be limited to disclosures that cannot be adequately addressed through contractual, administrative or other non-criminal mechanisms. Consistently, the Monitor stated that any new offence 'should be harms-based', and that any deemed-harm element should be 'limited to a very narrow category of information the disclosure of which will always, or almost always, result in a significant harm to an essential public interest.'[18]

21. The new general secrecy offence in s 122.4 does not incorporate the Monitor's recommendation that secrecy offences should be harm based. Instead, the new offence turns on whether a use or communication of information would be considered 'improper' and intended to obtain a benefit or cause detriment.

Non-official offences

22. **Recommendation 12** is partially implemented, consistently with the Government Response. The Monitor recommended that liability for non-officials under s 122.4A be strictly harm-based, confined to serious harm to clearly defined public interests, and—so far as law-enforcement information is concerned—limited to disclosures that seriously undermine the use of special statutory powers, coupled with reduced penalties and clear exclusions for media workers.[19] The Bill implements several elements of this recommendation by removing security classification as an element, repealing the offence of dealing with information by non-officials, reducing maximum penalties, and ensuring ABC and SBS staff are not treated as officials. However, consistent with the Government Response, the Bill does not narrow s 122.4A as it applies to disclosures that prejudice the prevention, detection, investigation, prosecution or punishment of Commonwealth criminal offences, with the Government taking the position that the existing framing is necessary to protect sensitive law-enforcement capabilities, methodologies and the integrity of criminal justice processes.

---

[16] Item 20 of Schedule 4 to the Bill inserts new paragraph 122.3(1)(b)(i)-(iii) of the *Criminal Code* establishing circumstances in which a person commits an aggravated secrecy offence.
[17] *INSLM Secrecy Review*, 165 [7.58]. See more generally, Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia* (Report No 112, December 2009).
[18] *INSLM Secrecy Review*, 165 [7.60].
[19] *INSLM Secrecy Review*, Recommendation 12 read alongside Recommendations 3, 4 and 6.

Safeguards for journalists

23. While the Monitor did not recommend a journalist-specific consent regime, the introduction of new s 123.6 reflects the Monitor's view that Attorney-General consent operates as an important but limited executive-level safeguard, particularly where secrecy offences may engage press freedom. The Monitor cautioned that consent requirements cannot cure over-broad offences or eliminate the chilling effect arising from the prospect of prosecution, but recognised their role in providing an additional check on the commencement of proceedings that is warranted given the sensitivity of these types of prosecutions.

Attorney-General's consent

24. INSLM Secrecy Review, **Recommendation 14** is implemented in substance. The Bill addresses the gap identified in the INSLM Secrecy Review by clarifying that Attorney-General consent is required before proceedings are commenced, whether summarily or on indictment, ensuring the safeguard does not depend on mode of prosecution. As the Explanatory Memorandum explains, this ensures consent applies at commencement 'regardless of whether the proceedings are summary or indictable', while preserving the ability to take preliminary steps prior to consent.[20]

Repealing unnecessary specific secrecy offences

25. The Bill gives repeals a large number of unnecessary and duplicative secrecy offences scattered across Commonwealth legislation.[21] The Monitor supports reducing reliance on Act-specific secrecy offences and moving toward a more coherent framework of general offences in the *Criminal Code*, with bespoke offences retained only where clearly justified.

26. I would be happy to provide any further information if required. The best point of contact for my Office is [redacted]

Yours sincerely

[redacted]

David Bahlen
For/on behalf of
Jake Blight
Independent National Security Legislation Monitor

[20] EM, 63 [368].
[21] Schedule 2 of the Bill; *INSLM Secrecy Review*, 6 [1.20].