Human Rights Law Centre

Secrecy Provisions Amendment (Repealing Offences) Bill 2026

Submission to the Senate Legal and Constitutional Affairs Legislation Committee

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Human Rights Law Centre

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Human Rights Law Centre

We take fearless human rights action for a fairer future for everyone. We work in partnership with people and communities to advance human rights. We use strategic legal action and advocacy to defend hard-won human rights progress.

In 2023, the Human Rights Law Centre launched the Whistleblower Project, Australia's first dedicated legal service to protect and empower whistleblowers who want to speak up about wrongdoing. We provide legal advice and representation to whistleblowers, as well as continuing our longstanding tradition of advocating for stronger legal protections and an end to the prosecution of whistleblowers. The Human Rights Law Centre is a member of Whistleblowing International Network.

The Human Rights Law Centre acknowledges the Traditional Owners of the lands across Australia, including the lands of the Wurundjeri, Boon Wurrung, Gadigal, Ngunnawal, Cammeraygal, Darug, Wadawurrung, Turrbal and Jagera people where we work from. We pay our respect to Elders past and present. This land always was, and always will be Aboriginal and Torres Strait Islander land. Sovereignty has never been ceded.

We acknowledge the role of the colonial legal system in establishing, entrenching, and continuing the oppression and injustice experienced by First Nations peoples and that we have a responsibility to work in solidarity with Aboriginal and Torres Strait Islander people to undo this. We support the self-determination of Aboriginal and Torres Strait Islander peoples.

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1. Summary

The Human Rights Law Centre's Whistleblower Project is thankful for the opportunity to make a submission to the Committee regarding the proposed reforms within the Secrecy Provisions Amendment (Repealing Offences) Bill 2026 (**the Bill**).

We have previously made submissions to the Attorney-General's Department (**AGD**)[1] and the Independent National Security Legislation Monitor (**INSLM**)[2] regarding their respective reviews into secrecy laws in 2023 and 2024. We are encouraged that the government is acting on recommendations made by both bodies to reduce the extent and severity of Australia's secrecy regime.

The reforms contained in the Bill are a positive step forward. Secrecy laws which are disproportionate and not properly calibrated are bad for Australian democracy and for the rule of law. They operate as a barrier to identifying unlawful and unethical conduct within Australian Government. They discourage and penalise public interest whistleblowing. They interfere with the right to freedom of expression, protected in the International Covenant on Civil and Political Rights, of which Australia is a signatory, and the implied freedom of political communication, found in Australia's *Constitution*. Government transparency and accountability are not nice-to-haves in our democracy; they form part of its foundation.

We are not transparency absolutists. We recognise some secrecy is necessary to protect national security and can also serve other compelling public interests. But a surplus of secrecy insulates government from public scrutiny and hinders oversight. Oppressive secrecy weakens, rather than protects, Australia's national security, by undermining accountable government and sanctioning people who speak up about wrongdoing. Secrecy laws should be approached with the understanding that in most contexts, transparency and accountability strengthen Australia's security and its government, not undermine it. They must be appropriately balanced so that limitations on core values by way of criminal law are no greater than necessary and proportionate to prevent real harm to Australian public interests.

Currently, secrecy laws, in Part 5.6 of the *Criminal Code 1995* (Cth) (**Criminal Code**) and elsewhere, do not strike this balance. The Bill addresses that issue to a considerable extent. Some discrete changes to aspects of the Bill would ensure that it strikes that balance even more effectively.

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[1] Human Rights Law Centre, Griffith University and Transparency International Australia, 'Joint Submission: Secrecy Provisions' (2023): https://www.hrlc.org.au/app/uploads/2025/04/Joint-Submission-Secrecy-Provisions-Human-Rights-Law-Centre-Griffith-University-Transparency-Interna.pdf (**HRLC's AGD submission**)

[2] Human Rights Law Centre, 'Secrecy, Transparency and Proportionality: Reviewing Part 5.6 of the Criminal Code 1995 (Cth) in recognition of the importance of transparency, whistleblowing and press freedom' (2024): https://www.hrlc.org.au/app/uploads/2025/04/SUB_HRLC_INSLM_SecrecyOffences_FINAL.pdf (**HRLC's INSLM submission**)

Our recommendations are:

1. The proposed s 122.4 should be revised so that the offence applies where there is harm (or intended harm) to the public interest, or an essential public interest.

2. The saving provisions in item 2(3) of the Bill should be amended so that they do not preserve the current s 122.4 for certain provisions of eight other Acts. Instead, amendments should be passed so that all applicable secrecy offences are in the text of the current Criminal Code or those eight other relevant Acts.

3. Consideration should be given to whether the amended s 122.4 should have retrospective application.

4. The reforms contained in the Secrecy Provisions Amendment (Repealing Offences) Bill 2026 should be reviewed five years after enactment, to enable the mechanism of Attorney-General consent and its necessity to be assessed.

5. Item 6 of the Bill should be amended so that the definition of 'inherently harmful information' (in subs 121.1(1) of the Criminal Code) covers only sensitive law enforcement or intelligence information where disclosure would evidently cause harm, for instance where an essential public interest would be harmed by disclosure.

6. A definition of 'the defence of Australia' should be inserted in subs 121.1(1) of the Criminal Code or in another suitable Act.

7. Penalties for all offences in Part 5.6 of the Criminal Code should be reduced to an extent that they are proportionate with the seriousness of each offence.

8. Aggravated offences in s 122.3 of the Criminal Code should be abolished. Alternatively, the offences should only apply where the harm has been caused by the commission of the offence.

9. A general public interest defence should be inserted in s 122.5 of the Criminal Code.

10. Reform to the PID Act should progress as a matter of urgency, alongside these reforms.

2. Context

In 2023, the Human Rights Law Centre launched the Whistleblower Project, Australia's first dedicated legal service to protect and empower whistleblowers who have spoken up or want to speak up about wrongdoing. We provide legal advice and representation to current and prospective whistleblowers across all jurisdictions in Australia, as well as advocating for stronger legal protections and an end to the prosecution of whistleblowers. We are a member of the Whistleblowing International Network.

We advise and act for clients under relevant state and Commonwealth public interest disclosure (PID) legislation and sector-specific protections. This often requires advising on the application of secrecy offences. Uncertain and overly broad secrecy laws directly and regularly impact our work and our clients. They are especially impactful on whistleblowers in the national security context who often raise critical issues of international importance, but who are afforded significantly narrower whistleblower protections. We see first-hand in our work that the chilling effect of secrecy offences on whistleblowers is real and significant.

In recent decades, whistleblowers have proven critical to exposing human rights abuses and corruption in Australia and abroad, providing vital checks and balances on Australia's institutions. Their protection is an essential part of the wider human rights framework in this country, and is underpinned by Australia's international obligations. The ability of whistleblowers to speak up, and the public's right to know, is protected under the right to freedom of opinion and expression in international human rights law.

The Bill cannot be assessed in a vacuum. Secrecy offences and PID legislation inform each other – overbearing secrecy offences are especially problematic where PID legislation does not provide accessible, clear pathways for whistleblowing. These offences will regularly apply to potential whistleblowers and considering their reform separately to whistleblowing laws is to fail to contemplate a key part of their context and operation. We address this further at 3.6. below and encourage the Committee to raise the need for reform to the *Public Interest Disclosure Act 2013* (Cth) (**PID Act**), which is currently pending.

3. Recommendations for reform

We consider that the Bill is largely positive, and we are encouraged that the Government is responding to many of the recommendations made by the AGD and INSLM. The reduction in secrecy offences brought about by the Bill will have positive effects for our clients, and for transparency more broadly. We are supportive of the heightened thresholds and narrowing of the remaining offences. For example:

- narrowing the definition of 'deal' in subs 121.1(1) of the Criminal Code and removing 'dealing with' offences for non-Commonwealth persons under s 122.4A are both positive. We have in earlier submissions raised the serious, ongoing concerns this provision causes for us in the operation of our legal services to clients.[3] Under the present s 122.4A and definition of 'deal,' there is a chance that our unwitting receipt of, for instance, intelligence information (despite having public warnings about our inability to receive this information) would constitute an offence. In our view, this potential criminal liability, for mere receipt and internal practice management of information that we take active steps to avoid, is disproportionate and unnecessary.
- we have previously called for and support the reduction in penalties for s 122.4A;[4] and
- removal of security classification from the definition of 'inherently harmful information' is positive.[5]

We consider Part 5.6 of the Criminal Code is currently both too heavy-handed and uncertain in its application. While the Bill assists in resolving that, further amendments could strengthen Part 5.6 on both fronts. Below we provide specific and directed recommendations for achieving that outcome. Subject to those recommendations, we recommend that the Committee endorse the enactment of the Bill.

3.1 The proposed general secrecy offence is uncertain and heavy-handed

The proposed general secrecy offence in s 122.4 improves on what has previously been proposed by the government,[6] but remains too broad to suitably balance secrecy and transparency. Notably, it is not responsive to key recommendations of the AGD and INSLM. Its application is also uncertain.

Our particular concerns include that:

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[3] See recommendation 4 in both HRLC's AGD submission and HRLC's INSLM submission.
[4] HRLC's INSLM submission recommended all penalties within Part 5.6 be reduced – we reiterate that below at 3.4.1.
[5] See HRLC's INSLM submission, recommendation 11
[6] Previously the government proposed that secrecy laws should apply to the disclosure of information that undermines trust in government; See David Crowe, 'New leader, same old secrecy. Didn't Albanese promise to shine a light?' (*The Age,* 24 November 2023): https://www.theage.com.au/politics/federal/new-leader-same-old-secrecy-didn-t-albanese-promise-to-shine-a-light-20231123-p5em94.html

1. the proposed offence does not reflect the 'harm-based approach' that was recommended by both the AGD and INSLM;
2. the proposed offence is not directed towards preventing conduct that is harmful to the public interest, or an essential public interest, as was recommended by both the AGD and INSLM;
3. the proposed offence may be so broad as to criminalise civil society engagement with government, and at the least its ambiguity discourages engagement; and
4. the saving provisions in the Bill criminalise conduct in an unclear way.

The current proposed offence does not align with the aims described in the Bill's explanatory memorandum. It does not appear to capture conduct in which there is a 'genuine need for criminal consequences.' Much to the contrary; it may capture benign and common conduct.

We encourage the Committee to recommend the government, in creating a general offence, consider the conduct for which there is a genuine need for criminalisation – as distinct from conduct for which civil or administrative measures, including seeking contractual remedies, are adequate – and do so with reference to essential public interests that must be protected and the harm caused (or intended to be caused) to those interests.[7]

We elaborate on our concerns as follows.

3.1.1 The offence does not reflect a 'harm-based approach' protecting only essential public interest

In the AGD's *Review of Secrecy Provisions: Final Report*, it recommended that secrecy offences in the Criminal Code should:

1. contain an express harm element (e.g. that a person knew, intended, or was reckless as to whether the conduct would cause harm to an essential public interest);
2. cover a narrowly defined category of information where the harm to an essential public interest is implicit; or
3. protect against harm to the relationship of trust between individuals and the Government integral to the regulatory functions of government.[8]

The INSLM in *Secrecy Offences: Review of Part 5.6 of the Criminal Code Act 1995* recommended that a new general offence in particular should be 'harm-based and should relate to essential public interests.'[9] We also note that in 2009, the ALRC recommended that secrecy offences should require

[7] See INSLM, 'Secrecy Offences: Review of Part 5.6 of the *Criminal Code Act 1995*' (2024): https://www.inslm.gov.au/system/files/2024-06/inslm-review-of-part-5-6-of-the-criminal-code-act-1995.pdf, [7.59] (**INSLM Review**)
[8] AGD, 'Review of Secrecy Provisions: Final Report' (2023): https://www.ag.gov.au/sites/default/files/2023-11/secrecy-provisions-review-final-report.pdf (**AGD Review**)
[9] INSLM Review, [7.58]

prosecutors to prove that a particular disclosure caused harm and to avoid deemed harm offences altogether.[10]

The proposed s 122.4 will apply wherever a person intends to obtain, or seeks to obtain, a 'benefit' or causes or seeks to cause a 'detriment' to any person, and where it would be reasonable to conclude that the use or communication of the information is 'improper.' The Bill also provides that intended benefit or detriment to any person is sufficient. 'Benefit' and 'detriment' are defined in the Criminal Code as any advantage (not limited to property) or disadvantage (not limited to personal injury or loss of or damage to property) respectively.[11]

Consequently, the proposed offence criminalises any and all use or communication of information which results in minor, peripheral, or inconsequential benefits or detriments to any person. It does not criminalise conduct that causes harm. It does not direct itself to protecting the public interest – let alone essential public interests – but rather the interests of any person.

It is unclear what necessitates the threat of criminal prosecution and sanction in such a broad range of circumstances. We understand the government considers the PwC tax scandal proves the necessity of this offence.[12] We understand the government's desire to prevent such misconduct. However, we query the suitability of tailoring a criminal offence to retrospectively address a single incident, and whether the potential for remedies outside of criminal law, such as in contract, would be sufficient to deter such misconduct. If there is a genuine need for a criminal offence to apply in circumstances such as the PwC tax scandal, we suggest that this proposed offence at present applies in a far broader and more benign range of circumstances and should therefore be narrowed.

Further, it is not necessary to prove that the person in fact caused a benefit or detriment. We accept there are difficulties in doing so where adducing evidence to prove certain benefits or detriments may be impractical or impossible. However, this increases the necessity of the offence being directed toward preventing actual harm.

We recognise the requirement that the use or communication of information is (reasonably concluded to be) 'improper' may guard to a limited extent against the broadest applications of this offence. However, 'improper' is not defined. We query the suitability of incorporating an element of 'impropriety' into a criminal offence, given its definitional uncertainty. Further, 'improper' is likely a lower threshold for criminal liability than a requirement for conduct to cause harm (or damage).

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[10]Australian Law Reform Commission, 'Secrecy Laws and Open Government in Australia: Report' (Report No 112, 2009), 99-100

[11] Criminal Code, Dictionary

[12] The 'PwC tax scandal' involved former PwC partner Peter Collins sharing confidential government briefings from Treasury, the Tax Office and the Board of Taxation to colleagues and other clients to obtain commercial advantage: see Neil Chenoweth, 'PwC partner leaked government tax plans to clients' (*Australian Financial Review,* 23 January 2023): https://www.afr.com/companies/financial-services/pwc-partner-leaked-government-tax-plans-to-clients-20230120-p5ceaz

The sum effect of this provision is that the proposed offence will apply to a broader range of conduct than recommended as suitable – where harm is not intended or has not occurred – and is uncertain in its application. Arguably, much routine engagement with government has the potential to result in some form of advantage for some, or disadvantage to others (whether material or otherwise). This is especially concerning given what we discuss at 3.1.2 below.

This issue could be addressed by incorporating harm thresholds present elsewhere in the Bill, for instance, the 'serious damage' threshold in s 122.4A. The Committee should recommend that, if the government considers there is a gap in the law which results in those who communicate or use information gaining a benefit to themselves or others – without causing harm – such that there must be a 'benefit' aspect to the offence, the offence should be refined to apply only where significant advantage is attained, rather than any advantage whatsoever.

3.1.2 The offence risks chilling civil society and other voluntary engagement with government

At present, the proposed offence is broad enough to capture those who provide any form of service (paid or unpaid) to the Commonwealth. In addition to applying to a broad range of persons, there is no limitation on the subject matter of 'information' to which offence applies. It will apply beyond matters of national security, such as where civil society engages with the Commonwealth in law reform processes.

The provision as drafted risks raising a spectre of criminal liability in civil society engagement and government consultation processes and as a result risks that persons will be discouraged from or altogether stop engaging with the Commonwealth, particularly on a voluntary basis.

To provide an example, civil society organisations (including the Human Rights Law Centre) are at times provided with confidential drafts of legislation and exposure drafts and asked to provide feedback, sometimes on short time frames. This legislation often does not address matters of national security. It appears plausible that the proposed offence could potentially have application in such circumstances.

This risk is heightened by the proposed offence applying where a person intended to obtain a benefit or detriment, for any person. The proposed offence creates too low and uncertain a threshold for potential criminal liability.

If it is necessary to create an offence which applies to all who engage with government on any topic, the argument for an increased harm threshold, and a pointed focus on protecting essential public interests, becomes even stronger.

Recommendation 1: The proposed s 122.4 should be revised so that the offence applies where there is harm (or intended harm) to the public interest, or an essential public interest.

3.1.3 The saving provisions criminalise conduct in an unclear way

The effect of the saving provisions in the Bill (Item 2(3)) is that the former s 122.4 offence will continue to apply for provisions in eight specified Acts. Without the effect of these saving provisions preserving

the old Criminal Code only in relation to those provisions, criminal liability would be stripped from the specified provisions in those Acts. This is signposted in a Note in each of the relevant provisions.

We consider this to be an unsatisfactory and unclear drafting mechanism. It effectively criminalises conduct via an otherwise repealed law and signposts that in a note which does not form part of the law. Criminal laws should be clear and easily accessible. If criminal liability is to continue to exist in relation to those specified provisions, this should be made clear by direct amendments to those Acts or incorporation of those offences into the Criminal Code that is substantively in operation.

We also submit that the Committee should consider whether the amended s 122.4 should have retrospective application – that is, whether the former s 122.4 should not continue to apply to communication or use before the amendments came into effect. We suggest this because the Bill represents recognition that the current secrecy offences within the Criminal Code did not strike an appropriate balance. We query whether maintaining criminal liability for past conduct under those laws is suitable.

Recommendation 2: The saving provisions in item 2(3) of the Bill should be amended so that they do not preserve the current s 122.4 for certain provisions of eight other Acts. Instead, amendments should be passed so that all applicable secrecy offences are in the text of the current Criminal Code or those eight other relevant Acts.

Recommendation 3: Consideration should be given to whether the amended s 122.4 should have retrospective application.

3.2 Requirement for Attorney-General's consent to prosecute not preferable in principle, but ultimately unobjectionable as a matter of practice

The Bill requires the Attorney-General's consent for commencement of proceedings against journalists (and related administrative staff) for all Commonwealth secrecy offences and for all proceedings under Part 5.6 of the Criminal Code.[13]

As stated in our prior submissions to the AGD and INSLM, the Human Rights Law Centre considers any requirement for the Attorney-General to consent to prosecution unsatisfactory as a matter of principle. Politicians should never be final arbiters in the functions of our criminal justice system, and this mechanism will always carry with it some risk of politicisation.

However, on balance, we consider this mechanism desirable in practice, in the absence of stronger protections against unjust prosecutions under secrecy laws, such as a general public interest defence and well-tailored PID laws. It may safeguard against some prosecutions under secrecy laws that would otherwise proceed contrary to the public interest.

[13] See proposed ss 123.6(1) and 123.5(1)

We highlight that well-balanced secrecy laws would negate any need for the Attorney-General to act as a final safeguard and would reduce risk of politicisation in the criminal justice process.

We suggest the Committee recommends a review of these reforms in 5 years' time to enable this mechanism, and its necessity, to be assessed.

We also note that the Bill expressly allows pre-prosecution measures to take place against journalists, including arrest, charge, and remand in custody,[14] and those measures do not appear to be precluded in relation to other offences under Part 5.6 of the Criminal Code. The availability of these measures will continue to have a chilling effect on public interest reporting. The amendments also will not prevent other measures that operate as deterrents to public interest reporting, such as the risk of raids by the Australian Federal Police, or the looming threat of prosecution following a politician's approval.[15]

Recommendation 4: The reforms contained in the Secrecy Provisions Amendment (Repealing Offences) Bill 2026 should be reviewed five years after enactment, to enable the mechanism of Attorney-General consent and its necessity to be assessed.

3.3 Definitions within Part 5.6 should be further refined

We are supportive of the Bill's implementation of many changes to definitions in accordance with INSLM recommendations. Further amendments would strengthen the Bill and ensure the Government is fully acting on commitments made in its response to the INSLM Review (the **INSLM Response**).[16]

3.3.1 The definition of 'inherently harmful information' should be refined

We are supportive of removing security classified information from the definition of 'inherently harmful information' within the Criminal Code. The effect of the Bill is that 'inherently harmful information' would be defined in the Criminal Code as:

[14] See proposed s 123.6(2)
[15] We refer the Commission to the raid conducted by the Australian Federal Police conducted at ABC's Ultimo headquarters in June 2019, and the three years that ABC journalist Dan Oakes had to wait to receive confirmation that charges would not be pursued against him for articles about potential war crimes committed by Australian soldiers in Afghanistan, after the AFP recommended charges be laid against him. We accept that since these events the AFP has published a National Guideline on investigative action involving journalists. However, without legislative reform, risks remain that guidelines will change or not be followed. See Lorna Knowles, Elise Worthington and Clare Blumer, 'ABC raid: AFP leave Ultimo building with files after hours-long raid over Afghan Files stories' (*ABC News,* 5 June 2019): https://www.abc.net.au/news/2019-06-05/abc-raided-by-australian-federal-police-afghan-files-stories/11181162; ABC News, 'ABC journalist Dan Oakes will not be prosecuted over Afghan Files leak' (15 October 2020): https://www.abc.net.au/news/2020-10-15/dan-oakes-afghan-files-prosecution-decision/12771304
[16] 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), https://www.ag.gov.au/crime/publications/government-response-independent-national-security-legislation-monitor-secrecy-review

> *(c) information that was obtained by, or made by or on behalf of, a domestic intelligence agency or a foreign intelligence agency in connection with the agency's functions;*
>
> *(e) information relating to the operations, capabilities or technologies of, or methods or sources used by, a domestic or foreign law enforcement agency*

We encourage the Committee to recommend that this definition be refined further, to reflect that a narrower category of information than this is in fact 'inherently harmful.' We reiterate the recommendations of the AGD and INSLM regarding the need to direct a criminal offence towards actual harm and protecting essential public interests, raised at 3.1. above in the context of the proposed s 122.4 offence.

The Government stated in its INSLM Response that it would develop legislation to 'confine the categories of law enforcement information covered by s 122.1' – that is, the categories of law enforcement information that is 'inherently harmful information' – 'to information in which there is an essential public interest that needs to be protected by the application of criminal sanctions.'[17] It has not done so. As a result, the 'law enforcement' limb of the definition remains especially broad, and s 122.1 criminalises disclosure of information that is not harmful to the functions of law enforcement. We have in the past demonstrated this issue, admittedly crudely, using the 'stapler procurement corruption' problem.[18] Under this current definition communicating or dealing with information entirely unrelated to the law enforcement context – say corruption in the procurement of staplers – is arguably criminalised,[19] as it is information which relates to the 'operations' of a law enforcement agency.

We also note that the INSLM recommended narrowing the other remaining limb of the definition of 'inherently harmful information' – relating to information 'obtained by, or made by or on behalf of, a domestic intelligence agency or a foreign intelligence agency in connection with the agency's functions.'[20] We agree with that recommendation on the basis that the current definition may criminalise disclosure beyond that which is in fact harmful to intelligence functions. We urge the Committee to recommend narrowing this category of information also.

The law enforcement and intelligence context undoubtedly requires special care and consideration, and we are not suggesting that the definition of 'inherently harmful information' be removed entirely. However, it needs to be refined. Section 122.1 criminalises conduct without referring to actual harm caused. As a result, the applicable definition of 'inherently harmful information' is crucial. It must be tailored to apply only where harm is so likely as to be deemed to occur. A broad definition is not appropriately calibrated to addressing real risks of harm in the law enforcement and intelligence context.

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[17] INSLM Response, 3
[18] Human Rights Law Centre, Transparency International Australia and Griffith University, 'Exposure Draft: Public Interest Disclosure and Other Legislation Amendment (Whistleblower Protections) Bill' (2 October 2025): https://www.hrlc.org.au/app/uploads/2025/10/Joint-Submission-HRLC-TIA-Griffith-University-PID-Bill-2025-2-October-2025.pdf, 35
[19] Unless a person can call on a defence in s 122.5.
[20] INSLM Review, 89

Recommendation 5: Item 6 of the Bill should be amended so that the definition of 'inherently harmful information' (in subs 121.1(1) of the Criminal Code) covers only sensitive law enforcement or intelligence information where disclosure would evidently cause harm, for instance where an essential public interest would be harmed by disclosure.

3.3.2 Define 'the defence of Australia'

The Bill will have the effect of leaving 'the defence of Australia' undefined within the Criminal Code. We note that the Government's INSLM Response stated it would consider if and how to define 'defence' in the context of consideration of reforms to defence legislation.[21] We encourage the Committee to recommend the Government does so, as at present the Bill creates uncertainty as to the application of the offence created by the proposed s 122.4A.

Recommendation 6: A definition of 'the defence of Australia' should be inserted in subs 121.1(1) of the Criminal Code or in another suitable Act.

3.4 Penalties should be proportionate

3.4.1 All penalties in Part 5.6 of the Criminal Code should be reduced

We note that aside from the proposed amendments to s 122.4A, all penalties for offences under Part 5.6 of the Criminal Code remain unchanged. The Committee should recommend that maximum penalties are proportionate to the relative seriousness of each offence. This is especially necessary where offences continue to have limited, or no, reference to harm or damage caused or intended to be caused.

Recommendation 7: Penalties for all offences in Part 5.6 of the Criminal Code should be reduced to an extent that they are proportionate with the seriousness of each offence.

3.4.2 Aggravated offences should be abolished

The aggravated offences within s 122.3 of the Criminal Code increase already-high penalties – for serious offences in ss 122.1 and 122.2 from seven years to ten years, and for smaller offences in these sections from three to five years. Although the aggravated offences in the Bill are narrower than those that currently exist in the Criminal Code, we note that they continue to apply without reference to harm caused. The Committee should recommend that these offences are either abolished or reformed to reflect an element of harm or increased harm.

[21] INSLM response, 5

Recommendation 8: Aggravated offences in s 122.3 of the Criminal Code should be abolished. Alternatively, the offences should only apply where the harm has been caused by the commission of the offence.

3.5 A general public interest defence is necessary

As in prior submissions, we recommend the adoption of a general public interest defence, available where information was communicated or otherwise dealt with in the public interest, but where some other defence or exemption is not available.

Such a defence would be particularly crucial where a person makes a disclosure in the public interest but for whatever reason:

- the technical requirements of defences have not have been met; or
- the *PID Act* or other PID scheme is not engaged – say because the individual is not covered by the relevant scheme (in circumstances where a non-official is prosecuted under third-party secrecy offences) or the scheme's preconditions have not been satisfied.

3.5.1 PID laws are not sufficient to negate a need for a general public interest defence

A common reason for a view against a general public interest defence is that it would undermine Parliament's intention for lawful pathways for disclosing in public interest (i.e. under the PID Act, or to the National Anti-Corruption Commission).[22] We also note that the explanatory memorandum to the Bill considers that remaining offences in Part 5.6 of the Criminal Code may be justified by it being inappropriate to disclose certain information outside of established whistleblowing channels.

In our view, this reasoning requires that PID laws effectively protect potential whistleblowers. In our experience, they do not. We note that reform to the PID Act is ongoing (see 3.6. below) and we point to our earlier submissions made in response to proposed reforms, which highlight the key issues that exist in the legal framework currently.[23] In the absence of PID Act reform, a public interest defence becomes more important.

The Samuels and Codd inquiry into alleged wrongdoing at the Australian Secret Intelligence Service also considered a public interest defence remained necessary despite availability of PID laws:

> *Allowance must be made for the possibility that a person, having information of the kind to which the whistle-blower scheme will apply, concerning for example serious illegality or gross*

[22] AGD Review, [191]; INSLM Review. [9.75]
[23] See Human Rights Law Centre, Transparency International Australia and Griffith University, 'Exposure Draft: Public Interest Disclosure and Other Legislation Amendment (Whistleblower Protections) Bill' (2 October 2025): https://www.hrlc.org.au/submissions/submission-to-pid-reform-2025/; Human Rights Law Centre, Transparency International Australia and Griffith University, 'Inquiry into the Whistleblower Protection Authority Bill 2025' (7 July 2025): https://www.hrlc.org.au/submissions/submission-to-inquiry-into-the-whistleblower-protection-authority-bill-2025/

> *mismanagement, will disclose that information publicly. Such disclosure might be made in ignorance of the existence of the whistle-blower scheme; it might be made by a person who was concerned that an investigation by the Ombudsman or (in the case of ASIS) the Inspector-General [of Intelligence and Security] would not be sufficiently rigorous; or it might reflect dissatisfaction with an investigation which the Ombudsman or [Inspector-General] had already carried out. We think that a defendant, in those circumstances, should be entitled to call in aid a defence of public interest.*[24]

3.5.2 A public interest defence does not have to be uncertain or difficult to apply

A general public interest defence need not be uncertain or difficult to apply. We appreciate this is a common concern; in addition to being raised by INSLM, the UK Law Commission commenced its review on the protection of official data[25] with the provisional view that the advantages of a general public interest defence to secrecy offences were outweighed by disadvantages. This was in part because of 'the inherently uncertain nature of the concept of public interest, which has the potential to impact on the criminal justice system as a whole, including by encouraging disclosures that are wrongly believed to be in the public interest.'[26] However, it ultimately identified a need for a public interest defence. Many of the reasons are applicable to present circumstances.

The first is that the concept of the public interest is familiar in Australian law and to Australian courts. To the extent that the Government is concerned about broad or unintended interpretations, it can be defined or limited through legislation.

Concerns that a general public interest defence would encourage widespread proliferation of secret information for unjustified reasons and in an unregulated manner are likely overstated. This has not been the case in other jurisdictions with a general public interest defence in secrecy laws.[27] Additionally, people place themselves at significant risk and may experience significant hardship in making unauthorised disclosures. The Whistleblower Project works with clients who can attest that even disclosing through existing PID pathways can risk a person's livelihood, reputation, and personal wellbeing. To go outside that framework and in doing so risk a criminal conviction adds a further weight to that decision. As the Law Commission concluded, '[t]he decision to disclose information without authorisation and in contravention of the criminal law is unlikely to be one that is made lightly.'[28] The availability of a defence is unlikely to change that determination for many people, but it will provide a safeguard against the few who communicate or deal with information and in doing so serve the public interest.

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[24] Gordon Samuels and Michael Codd, *Commission of Inquiry into the Australian Secret Intelligence Service* (Final Report, March 1995), [13.39]–[13.40]
[25] Law Commission, 'Protection of Official Data Report' (Law Com No 395, 1 September 2020), https://cdn.websitebuilder.service.justice.gov.uk/uploads/sites/54/2026/04/Protection-of-Official-Data-Report-web.pdf (**Law Commission Report**)
[26] Law Commission Report, 173
[27] Laws in Canada and Denmark both provide for a public interest defence. The Law Commission found the (albeit limited) evidence provided no indication of proliferation in either jurisdiction.
[28] Law Commission Report, 186

Recommendation 9: A general public interest defence should be inserted in s 122.5 of the Criminal Code.

3.6 Reform to the PID Act must come alongside this Bill

We note that there has, to date, been no update from the government on the progress of its consultation into a comprehensive overhaul of the PID Act following publication of a consultation paper in November 2023. It is our firm belief that secrecy offences must be reformed in tandem with the PID Act. It is not possible to ensure secrecy provisions are effective and appropriately balanced without creating robust, effective whistleblowing pathways and mechanisms that adequately protect whistleblowers. As we have raised in prior submissions, making change to secrecy offences without fixing inadequate whistleblowing laws is to put the cart before the horse.[29]

The PID Act provides a pathway to immunity from criminal liability, including liability that arises under Part 5.6 of the Criminal Code. However, the PID Act is currently not fit for purpose. It has been regularly criticised for failing to protect disclosures that have genuinely served the public interest, and for general lack of clarity. The Whistleblower Project and our clients contend with these shortfalls routinely.

The PID Act and Part 5.6 of the Criminal Code are responsive to each other. Inadequate whistleblowing laws increase the risk of overbearing and harsh secrecy provisions on those who make disclosures in the public interest but do not qualify for PID Act protections. This state of affairs poses a significant risk to transparent and accountable government by discouraging and potentially penalising public interest disclosures. Conversely, it may be that with a more robust PID Act, more stringent secrecy provisions could be justified. In the current context, this is not the case. The Bill, while broadly positive, does not (and could not on its own) sufficiently change the current outlook for whistleblowers: uncertain, at times overbearing, secrecy offences under which they may be prosecuted, and a fraught, overly-complex and limited path to protection from them.

PID Act reform becomes, in our view, especially crucial where there is no general public interest defence in the Bill.

Recommendation 10: Reform to the PID Act should progress as a matter of urgency, alongside these reforms.

4. The need for a Human Rights Act

Secrecy offences that are unbalanced or disproportionately protective of government information run the risk of encroaching on fundamental human rights recognised within the international human rights framework and domestic law, particularly freedom of expression and rights to information. Our

[29] HRLC's INSLM submission, 4

recommendations propose ways in which the Bill can, in recognition of those rights and in pursuit of transparent government, strike a suitable balance.

A stronger human rights framework at the federal level in Australia would provide a more robust and comprehensive foundation for adequately striking that balance. Importantly, the Parliamentary Joint Committee on Human Rights Inquiry into Australia's Human Rights Framework recommended that the government establish a Human Rights Act to 'comprehensively and effectively protect human rights.'[30] The proposed Bill protects 'freedom of expression, which includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of borders, whether orally, in writing or in print, by way of art, or in another form or medium of the person's choice.'[31] Enacting a Human Rights Act in the terms proposed by the Parliamentary Joint Committee on Human Rights would not prevent secrecy offences from existing; it would, however, ensure secrecy offences are 'demonstrably justified in a free and democratic society based on human dignity, equality and freedom.'[32] In so doing, a Human Rights Act could underpin and guarantee the delicate balancing of secrecy and transparency that Part 5.6 of the Criminal Code must achieve, to the benefit of all Australians and our democracy.

5. Conclusion

Australia has no place being the 'most secretive democracy in the world.'[33] Transparency is crucial to ensuring government accountability, and laws which prevent transparency in a broad range of contexts by threat of criminal prosecution do not reflect core Australian values, our *Constitution*, or our international human rights obligations.

We are supportive of the Bill and consider it is a positive step forward for transparency and government accountability in Australia. However, the Bill remains overly broad and unclear in the discrete ways that we have outlined above. There remains an opportunity to better tailor the Bill, respond to the considered recommendations of INSLM and the AGD and enact legislation that best serves the public interest.

Proportionate secrecy laws recognise that lack of transparency and a proliferation of secrecy can be as much a threat to good government and national security as proliferation of sensitive information. To be effective, the reformed secrecy laws must balance the needs for transparency and accountability alongside the need for secrecy in discrete contexts. Crucially, the government should not be shielded from scrutiny by operation of secrecy offences; secrecy offences must only criminalise disclosure in

[30] Parliamentary Joint Committee on Human Rights, 'Inquiry into Australia's Human Rights Framework' (Report, May 2024), https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/HumanRightsFramework/Report (**Human Rights Inquiry Report**)

[31] Human Rights Inquiry Report, Appendix 5, s 24(2)

[32] Human Rights Inquiry Report, Appendix 5, s 12(1)

[33] Damian Cave, 'Australia May Well Be the World's Most Secretive Democracy' (*The New York Times*, 5 June 2019), https://www.nytimes.com/2019/06/05/world/australia/journalist-raids.html

circumstances where doing so weakens or damages national security or other core public interests. Criminalising disclosure in other circumstances weakens government and is contrary to core principles of our democracy.

In the words of the INSLM:

> *In the face of growing threats from espionage and foreign interference and perhaps a resurgence of terrorism driven by on-line radicalisation, it is tempting to think we need to 'strengthen' our laws: instead we need to strengthen our democracy including by ensuring our laws are clear, certain, necessary and proportionate. Intelligence and law enforcement agencies do important work, but we must always be careful that the secrecy and other laws relating to these agencies do not undermine the very democracy and rule of law that we want them to protect.*[34]

We encourage the Committee to consider the recommendations described above and summarised below.

[34] 'Secrecy offences: finding the right balance' (17 October 2024), https://www.inslm.gov.au/news/monitor-spoke-australia-institute-transparency-summit

6. List of recommendations

The Human Rights Law Centre makes the following recommendations in relation to the Committee's consideration of the Bill:

Recommendation 1: The proposed s 122.4 should be revised so that the offence applies where there is harm (or intended harm) to the public interest, or an essential public interest.

Recommendation 2: The saving provisions in item 2(3) of the Bill should be amended so that they do not preserve the current s 122.4 for certain provisions of eight other Acts. Instead, amendments should be passed so that all applicable secrecy offences are in the text of the current Criminal Code or those eight other relevant Acts.

Recommendation 3: Consideration should be given to whether the amended s 122.4 should have retrospective application.

Recommendation 4: The reforms contained in the Secrecy Provisions Amendment (Repealing Offences) Bill 2026 should be reviewed five years after enactment, to enable the mechanism of Attorney-General consent and its necessity to be assessed.

Recommendation 5: Item 6 of the Bill should be amended so that the definition of 'inherently harmful information' (in subs 121.1(1) of the Criminal Code) covers only sensitive law enforcement or intelligence information where disclosure would evidently cause harm, for instance where an essential public interest would be harmed by disclosure.

Recommendation 6: A definition of 'the defence of Australia' should be inserted in subs 121.1(1) of the Criminal Code or in another suitable Act.

Recommendation 7: Penalties for all offences in Part 5.6 of the Criminal Code should be reduced to an extent that they are proportionate with the seriousness of each offence.

Recommendation 8: Aggravated offences in s 122.3 of the Criminal Code should be abolished. Alternatively, the offences should only apply where the harm has been caused by the commission of the offence.

Recommendation 9: A general public interest defence should be inserted in s 122.5 of the Criminal Code.

Recommendation 10: Reform to the PID Act should progress as a matter of urgency, alongside these reforms.