Secrecy Provisions Amendment Repealing Offences Bill 2026

Senate Standing Committees on Legal and Constitutional Affairs

Submitter:

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[redacted]

Introduction

I welcome the opportunity to make a submission on the Secrecy Provisions Amendment Repealing Offences Bill 2026.

This submission applies a good public purpose filter. A secrecy framework serves good public purpose when it protects genuinely sensitive public functions, personal privacy, national security, and legitimate commercial confidences, while also preserving democratic scrutiny, press freedom, protected disclosure, and practical access to justice. It fails that test when secrecy becomes an institutional shield for insiders, a deterrent to accountability, or a weapon that can be used more effectively by the powerful than answered by the under resourced.

The bill contains real improvements. It would remove criminal liability from more than 300 secrecy provisions, repeal the present section 122.4 catch all model, replace it with a narrower targeted offence, and make a range of Part 5.6 amendments said to improve proportionality, clarity, and consistency with the rule of law. Those are serious changes and, in broad direction, they are preferable to leaving the present patchwork untouched.

But the bill does not yet satisfy the full good public purpose test. It addresses some forms of secrecy misuse after the event more seriously than secrecy risk before the event. It gives the media a procedural safeguard without providing a robust substantive safeguard. It modestly improves the position of whistleblowers who stay inside approved channels while still privileging controlled disclosure over genuine

accountability. It reduces criminal overreach in some areas while saying nothing about equality of arms when an individual or entity lacks the means to defend itself. Most importantly, it recognises one symptom of the revolving door while leaving the underlying architecture largely intact.

The bill moves in the right direction but remains incomplete

The strongest feature of the bill is its rejection of a broader and more dangerous secrecy model. The Government expressly says it considered whether to create a wider general offence based on disclosures prejudicial to the working of government and decided against doing so. That restraint is important. A democracy should not criminalise disclosure by reference to vague discomfort to government operations. It should criminalise only what truly requires criminal consequence.

The bill also usefully prunes an overgrown secrecy framework. The repeal or removal of criminal liability from more than 300 secrecy provisions should reduce ambient overcriminalisation, lower unnecessary chilling effects, and make it harder for institutions to invoke criminal sanction where administrative, civil, contractual, or disciplinary mechanisms would suffice. That is a genuine public good.

But pruning excess is not the same as building a sound architecture. The bill is still an executive centric secrecy package. It tidies doctrine, reduces clutter, and plugs some obvious gaps. It is much less willing to confront the structural conditions in which secrecy can be exploited by the powerful. That is where the bill remains weak.

A secret is not whatever government wishes to hide

A secret should not mean whatever the executive prefers to keep from scrutiny. It should mean information whose disclosure would cause identifiable harm to a legitimate public interest recognised by law, such as national security, intelligence capabilities, law enforcement methods, personal privacy, or genuinely sensitive commercial information. If secrecy is allowed to mean little more than politically inconvenient material, it ceases to be a public protection and becomes an executive convenience.

In this respect the bill does make an important improvement. It moves away from treating executive classification, by itself, as enough to trigger criminal liability. For officials, information is no longer to be treated as inherently harmful merely because it bears a Secret or Top-Secret marking. For non-officials, communication is no longer criminal merely because the material is classified Secret or Top Secret. The Explanatory Memorandum makes clear that this change was driven in part by rule of law concerns, including the problem that policy frameworks can be changed at any time. That is sound. Criminal liability should not depend on executive labelling alone.

But the deeper risk does not disappear. Governments still control much of the initial secrecy machinery. They still classify, withhold, and characterise harm. The deeper question is therefore not only whether this bill improves the legal trigger, which in some respects it does, but whether the wider secrecy architecture contains sufficient independent safeguards against over classification, executive overreach, and the use of secrecy to suppress embarrassment rather than protect the public interest. On that broader question, the bill remains incomplete.

The revolving door problem is central, not incidental

The most revealing feature of the bill is what it quietly concedes about the revolving door. The Explanatory Memorandum says the new targeted offence was designed to address issues raised by the alleged disclosure of Treasury information by a former consulting firm partner. The bill text then extends the new section 122.4 offence to current and former Commonwealth officers, persons engaged to perform work for a Part 5.6 Commonwealth entity, and persons who provide or have provided services, whether paid or unpaid, to such an entity. That is an implicit legislative admission that secrecy risk does not end when formal office ends. It persists after separation and sits precisely where revolving door traffic is most sensitive.

That same logic should also force attention to the risk created when federal politicians leave public office and go to work for the very corporations, industries, lobby groups, advisory firms, or peak bodies they previously regulated, funded, contracted with, or politically oversaw. The danger is not confined to a crude handover of a marked document. The most valuable transfer is often tacit knowledge, internal timing, Cabinet and departmental priorities, regulatory appetite, procurement intentions, strategic vulnerability, policy direction, institutional culture, and knowledge of where resistance is weak and which arguments will find traction inside government. That kind of transfer is difficult to detect, difficult to prove, and often impossible to reconstruct after the fact. A secrecy framework that waits for provable misuse before taking the problem seriously is already too late. The bill creates an after the event offence. It does not create an upstream governance regime.

If Parliament is serious about secrecy, it should not treat revolving door risk as a side issue. It should manage it directly. At minimum, the legislative response should be accompanied by statutory controls for persons leaving sensitive Commonwealth roles, including ministers, ministerial staff, senior advisers, and senior officials, and moving into materially related commercial or lobbying roles. That should include cooling off periods for high-risk roles of at least one full federal parliamentary term calculated from the date the person leaves office, together with mandatory notification of relevant transitions, certification of continuing confidentiality obligations, a public register for senior movements into adjacent industries, and tighter restrictions where a person had

access to Cabinet, market sensitive, procurement, taxation, competition, or regulatory information. Anything less risks turning public office into a staging ground for private monetisation of insider knowledge, access, influence, and regulatory familiarity. Without that, the bill punishes some provable misconduct while leaving the deeper systemic risk substantially untouched.

The new targeted offence is preferable to the old catch all model, but still raises concerns

The new section 122.4 is narrower than the existing model and, in principle, that is an improvement. It requires use or communication of information obtained through a Commonwealth role or service, intention to obtain a benefit or cause detriment, and conduct that it would be reasonable to conclude was improper. The penalty is 2 years imprisonment. That is far better than a blanket criminal attachment to the whole field of statutory nondisclosure duties.

Even so, Parliament should look hard at the breadth of the concepts doing the work. The term improper is not defined and the memorandum says the alleged offender's subjective belief about propriety is irrelevant. The prosecution need only prove that a reasonable person would consider the conduct improper. That may be workable in obvious abuse cases, but where serious liberty, livelihood, and reputation interests are in issue, Parliament should be cautious about leaving the key boundary of criminality at that level of abstraction.

The bill is therefore right to reject a wider prejudice to government offence, but Parliament should still ensure that the targeted offence remains tightly anchored to conduct that is clearly and materially wrongful, not merely conduct that an institution later characterises as inconsistent with expectation.

Press freedom is improved, but remains incomplete

The bill does contain meaningful improvements for the media. It requires Attorney General consent before prosecuting a journalist or relevant administrative staff member for a secrecy offence, and it ensures that ABC and SBS staff are not inadvertently treated as Commonwealth officials for these purposes. Those changes should be acknowledged and retained.

But the overall protection remains incomplete. The Government has expressly declined to create broader public interest journalism defences outside the existing Criminal Code settings, taking the view that where secrecy offences could apply to journalists, the information protected was generally too sensitive or already subject to tailored disclosure pathways. That leaves the media with a procedural filter rather than a meaningful substantive expansion of protection. The result is still a secrecy framework that is more comfortable with controlled permission than with independent scrutiny.

Attorney General control is not an independent safeguard

The more serious weakness is the institutional design of the safeguard itself. The bill treats Attorney General consent as a protection for press freedom, but that protection remains controlled by the executive. Where the state seeks to prosecute journalists for secrecy offences, the question is not only whether an additional gate exists. It is who controls that gate. Vesting that power in the Attorney General leaves press freedom partly dependent on executive permission in matters where the executive's own secrecy interests may be directly engaged. That is a legitimate structural concern even if the officeholder acts conscientiously in any given case.

The weakness is compounded by timing. The Explanatory Memorandum makes clear that arrest, charge, and remand can still occur before consent is obtained. In practical terms, that means the coercive burden of the criminal process may still be imposed before the safeguard bites in any meaningful way. Process itself can therefore become punishment, and the supposed protection comes too late to prevent much of the chilling effect. The safeguard is weakened further by the bill's provision allowing offences to be excluded from the consent requirement by regulation. A safeguard that can be bypassed by subordinate legislation is not a deeply rooted protection.

This concern also sits uneasily with the Attorney General's own public guidance on fair trial and fair hearing rights. That guidance states that the right applies in both criminal and civil proceedings and that equality of arms requires all parties to have a reasonable opportunity to present their case under conditions that do not disadvantage them against other parties. A press freedom safeguard that leaves the executive as the effective gatekeeper in prosecutions affecting scrutiny of the executive is an awkward fit with that broader commitment to procedural fairness and institutional independence.

A more satisfactory model would place the safeguard on an independent footing. Rather than requiring Attorney General consent, the bill should require prior leave of a judge of the Federal Court before any prosecution, arrest, charge, or remand of a journalist or relevant media staff member for a secrecy offence. The court should be satisfied that the case is exceptional, that there is a compelling public interest in prosecution, that the alleged conduct caused or was likely to cause serious harm of the relevant kind, and that the public interest in prosecution outweighs the public interest in press freedom, accountability, and the exposure of official wrongdoing. That would place the safeguard outside the executive rather than leaving independent journalism contingent on ministerial grace.

Whistleblowers are still expected to stay inside approved channels

The bill contains one real improvement for whistleblowers. The amendment to section 122.5 corrects the integrity agency defence so it works through the relevant persons within those agencies. That is not cosmetic. It helps ensure the defence functions in the real institutional world rather than only on a formalistic reading.

There is also a broader gain from reducing the criminal secrecy footprint across the statute book. In principle, that should lessen some of the legal fog and overbreadth that can chill disclosure of wrongdoing.

But the bill still treats whistleblowing as something that should occur, if at all, through approved channels. The memorandum is explicit that for secrecy offences that could apply to journalists, disclosure would rarely be appropriate outside established whistleblower frameworks. That statement reveals the underlying policy stance. The system is willing to tolerate controlled disclosure. It is much less willing to tolerate disclosure when internal or approved channels are compromised, captured, delayed, or structurally ineffective.

That is not enough. Some of the most serious wrongdoing occurs precisely where internal pathways fail. A secrecy framework that protects channel integrity while ignoring channel failure is incomplete. Good public purpose requires a credible route for disclosure when authorised pathways are exhausted, plainly compromised, or could not reasonably be expected to act effectively. Parliament should therefore consider a stronger public interest disclosure defence for whistleblowers where disclosures concern serious misconduct, corruption, illegality, or grave danger and where controlled channels have failed in substance.

Individual privacy and personal information should not be treated lightly

The Government argues that where criminal liability is removed from secrecy provisions protecting personal information, those interests remain protected through other frameworks, including the Privacy Act, disciplinary mechanisms, contractual obligations, and duties of confidence. That may be true in some cases. It may not be true in all.

From the point of view of the individual, the downgrading of a protection from criminal to civil or administrative status is not necessarily neutral. In some domains, especially health, financial, commercial, or identity related information, the practical deterrent value of criminal liability may still matter. Parliament should be cautious about assuming that substitute frameworks always provide an equivalent real-world deterrent simply because they exist on paper.

The bill is justified in removing obsolete, marginal, or duplicative secrecy offences. But where the information at stake is highly sensitive and the likely harm from disclosure is

serious, Parliament should require periodic review of whether the substitute protections are actually working. Good public purpose is not served by reducing criminal overreach in one direction if the practical result is under deterrence in another.

Equality of arms is the missing justice question

The bill is also silent on one of the most serious justice issues raised by secrecy and related proceedings, namely equality of arms. That is not a rhetorical flourish. The Attorney General's own public sector guidance on fair trial and fair hearing rights states that article 14 fairness applies in both criminal and civil proceedings and that the principle of equality of arms requires all parties to have a reasonable opportunity to present their case under conditions that do not disadvantage them against other parties. Where an individual or entity is falsely accused and must defend itself in court without the means to do so properly, that standard is not met. There is then only formal process and practical punishment.

This matters directly in secrecy related contexts because these matters often involve acute informational asymmetry, reputational harm, institutional plaintiffs or defendants, and heavy front-loaded cost. They are therefore precisely the kind of proceedings in which formal access to a court can coexist with substantive inequality inside it. A false accusation can destroy a weaker party long before final adjudication, not because the case is sound, but because the weaker party cannot fund disclosure fights, interlocutory contests, expert evidence, and sustained representation on anything approaching equal terms. The memorandum's statement that the bill has no financial impact on Government expenditure or revenue is therefore revealing. It confirms that the reform has been designed as a doctrinal secrecy package, not as a justice package.

That is a serious omission. A secrecy framework that can be invoked by better resourced institutions against under resourced individuals, small entities, publishers, or service providers without any meaningful structural counterweight does not satisfy good public purpose. If Parliament is going to retain, recalibrate, or modernise secrecy offences, it should also confront the procedural fairness consequences of doing so. At minimum, secrecy reform should be paired with mechanisms for early dismissal of weak or abusive claims, stronger indemnity cost consequences for baseless proceedings, enforceable early disclosure obligations, and access to targeted public defence assistance or cost protection where a proceeding raises serious public interest concerns and the defendant lacks the means to defend itself adequately. Otherwise, the law may become formally fair while remaining practically unequal.

Transparency gains should be acknowledged, but not overstated

There are narrower improvements that deserve acknowledgment. The bill requires publication of the Defence Intelligence Organisation Mandate, which is a modest but

genuine increase in transparency. It also narrows some of the non-official secrecy settings and reduces the penalty for non-officials, including journalists, by making them subject to a higher threshold of criminal culpability than Commonwealth officials. Those changes are welcome.

But they should not be overstated. These are corrections within a secrecy regime. They do not amount to a deep rebalancing of the relationship between secrecy and accountability.

Conclusion

This bill is better than the status quo in important respects. The reduction of criminal overreach is welcome. The narrower targeted offence is preferable to a broader prejudice to government model. The correction for integrity agency disclosures is sensible. The publication requirement for the Defence Intelligence Organisation Mandate is useful. The media consent mechanism is better than nothing.

But the bill still reflects an executive centric conception of secrecy. It is concerned with pruning excess, tidying doctrine, and plugging a few obvious gaps. It is far less willing to confront the structural conditions in which secrecy can be exploited by the powerful. It leaves the revolving door largely unmanaged, including the acute secrecy and integrity risk created when federal politicians, ministers, ministerial staff, senior advisers, and senior officials leave public office and go to work for the corporations, industries, lobby groups, advisory firms, or peak bodies they previously regulated, funded, contracted with, or politically oversaw. It leaves the media subject to an executive gatekeeper model in which the Attorney General remains the practical controller of whether secrecy prosecutions against journalists may proceed, rather than placing that safeguard on an independent judicial footing. It keeps whistleblowers largely confined to approved channels. It assumes substitute protections will suffice for individuals without requiring much proof. It says nothing about equality of arms for those who cannot afford to answer accusation with defence.

For those reasons, the bill should not simply be endorsed as balanced. It should be strengthened. A secrecy framework worthy of support must do more than protect information after misuse can be proved. It must reduce the structural conditions in which misuse is invited, concealed, and privately monetised. That means managing the revolving door before damage occurs, not merely punishing a fraction of misconduct after the fact. It means ensuring that a secret is defined by identifiable public harm rather than executive preference. It means protecting the Commonwealth from exploitation by insiders and former insiders. It means protecting the public from secrecy being used as a shield against scrutiny. It means protecting whistleblowers when official channels fail. It means protecting the media from executive leverage. It means

protecting under resourced defendants from being destroyed by process before truth can be tested.

On a good public purpose test, the bill is a serious start but not yet a sufficient settlement. Parliament should strengthen it so that secrecy law protects not only confidentiality where genuinely required, but also the democratic, institutional, and procedural conditions that make confidentiality legitimate in the first place.