



Australian Government
Attorney-General's Department

Senate Legal and Constitutional Affairs Legislation Committee

Inquiry into the Secrecy Provisions Amendment (Repealing Offences) Bill 2026

Attorney-General's Department Submission

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Introduction

The Attorney-General's Department (the department) welcomes the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Legislation Committee (the Committee) on its inquiry into the Secrecy Provisions Amendment (Repealing Offences) Bill 2026 (the Bill).

The Bill would make significant reforms to the Commonwealth's secrecy framework, by amending or repealing secrecy offences in the *Criminal Code Act 1995 (Cth)* (Criminal Code) and in other legislation across the Commonwealth statute book. The amendments are designed to ensure that secrecy offences in Commonwealth legislation are consistent, necessary, fit-for-purpose and provide appropriate protections for press freedom while continuing to protect essential public interests.

The Bill implements recommendations of the 2023 *Review of Secrecy Provisions* conducted by the department (AGD Secrecy Review). The Bill also implements the Government response to recommendations 1, 5 to 12 and 14 of the 2024 Independent National Security Legislation Monitor's *Secrecy Offences: Review of Part 5.6 of the Criminal Code Act 1995* (INSLM Secrecy Review).

Overview of the Bill

In brief, the Bill would amend the Criminal Code and legislation across the Commonwealth secrecy framework to:

- repeal or amend secrecy offences and non-disclosure duties to remove criminal liability from more than a third of secrecy provisions
- introduce a new secrecy offence in the Criminal Code to target improper communication and use of information to obtain a benefit or cause a detriment
- improve protections for press freedom including by introducing a requirement for ministerial consent to the prosecution of a journalist and related administrative staff for any secrecy offences and ensuring the offences that apply to members of the public in the Criminal Code are proportionate
- amend existing secrecy offences in the Criminal Code to ensure the offences are proportionate and consistent with the rule of law and clarify the scope of offences, and
- make other consequential and minor amendments to improve the operation of existing secrecy offences.

The Bill includes measures that would support the repeal of section 122.4 of the Criminal Code, which is currently due to sunset on 29 June 2026. To ensure the Parliament has time to properly consider the reforms proposed by the Bill, including through the Committee process, the Government has also

introduced the Secrecy Provisions Amendment (Sunsetting Provision) Bill 2026 which would extend the sunsetting date of section 122.4 to 29 December 2026.

Repeal and removal of criminal liability from secrecy provisions

The Bill would repeal or remove criminal liability from over 300 secrecy provisions, representing a reduction of more than a third of Commonwealth secrecy provisions that attract criminal liability. This would be achieved through a combination of the repeal of existing section 122.4 of the Criminal Code (Part 1 of Schedule 1), repeal of specific secrecy offences (Part 1 of Schedule 2) or the conversion of specific secrecy offences into non-disclosure duties that do not attract criminal liability (Part 2 of Schedule 2).

Repeal of section 122.4 of the Criminal Code

Part 1 of Schedule 1 of the Bill would repeal existing section 122.4 of the Criminal Code. Section 122.4 currently operates to criminalise breaches of all Commonwealth statutory non-disclosure duties, to the extent the relevant duty covers communication by a current or former Commonwealth officer or person engaged to perform work for a Commonwealth entity. The repeal of existing section 122.4 would therefore have the effect of removing criminal liability from the majority of non-disclosure duties.

The offence at section 122.4 was intended to be time-limited until such time as all non-disclosure duties could be reviewed to determine whether criminal liability could be removed. The department undertook extensive whole-of-government consultation following the release of the AGD Secrecy Review and determined that the criminal liability imposed by existing section 122.4 was unnecessary for most non-disclosure duties. The non-disclosure duties would remain on the statute book following the repeal of section 122.4 and breaches of these duties would be subject to existing civil or administrative sanctions, such as disciplinary proceedings under the APS Code of Conduct. This would provide more appropriate and proportionate protection of relevant information.

However, the offence at section 122.4 was found to be necessary for 16 non-disclosure duties across 8 Acts. These 16 non-disclosure duties protect sensitive national security, taxation, healthcare, social security and commercial-in-confidence information. Part 1 of Schedule 1 of the Bill contains application and savings provisions to preserve the effect of existing section 122.4 for these 16 duties. Part 3 of Schedule 1 of the Bill will also add notes to these non-disclosure duties to ensure that it is clear on the face of the relevant legislation that criminal liability may still attach to breaches of these duties.

These amendments would implement recommendation 5 of the AGD Secrecy Review, which recommended the repeal of section 122.4 of the Criminal Code. Together with the amendments to repeal or remove criminal liability from additional secrecy provisions in Schedule 2 of the Bill, the repeal of section 122.4 for most non-disclosure duties would also implement recommendation 4 of the AGD

Secrecy Review, which recommended that further work be undertaken to identify additional secrecy provisions that no longer required criminal liability.

Repeal or removal of criminal liability from other secrecy offences

Schedule 2 of the Bill would make amendments to existing Commonwealth secrecy offences and non-disclosure duties in other legislation. It would repeal a number of secrecy offences and non-disclosure duties and convert a range of secrecy offences into non-disclosure duties without criminal liability. Most of these provisions were identified by the AGD Secrecy Review as no longer requiring criminal liability, either because the offences were outdated and no longer required or alternative administrative or civil sanctions were more proportionate to protect the information. Several additional secrecy provisions were also identified through further consultation following the Secrecy Review as no longer requiring criminal liability.

Of the provisions amended by Schedule 2:

- 19 secrecy provisions would be repealed in their entirety (comprising 16 secrecy offences and 3 non-disclosure duties), and
- 12 secrecy offences would be converted to non-disclosure duties that would not attract criminal liability following repeal of section 122.4 of the Criminal Code (in addition to more than 290 existing non-disclosure duties that would have criminal liability removed as a result of the repeal of section 122.4).

These amendments would broadly implement recommendation 2 of the AGD Secrecy Review, which was to repeal the secrecy provisions identified by the AGD Secrecy Review as no longer required. The AGD Secrecy Review developed an indicative list of 168 secrecy provisions no longer requiring criminal liability, which was expressed as subject to change in the course of implementing the recommendations of the AGD Secrecy Review. The Bill would repeal or remove criminal liability from most of the 168 identified provisions, noting 16 provisions have already been repealed in other Acts, as well as a significant number of further secrecy provisions. The Bill would not repeal or remove criminal liability from 23 provisions in 7 Acts that were initially identified by the AGD Secrecy Review. Following further consultation after the AGD Secrecy Review, it was determined that 5 provisions in 3 Acts were subject to broader legislative reviews and would be considered through this process, and 18 provisions in 4 Acts could not be replaced by a civil penalty as envisaged by the AGD Secrecy Review and therefore continued to require the protection of an offence.

The amendments would also implement recommendation 4 of the AGD Secrecy Review, which was to identify further secrecy provisions that could be repealed following the implementation of a new general secrecy offence. The Bill would cumulatively repeal or remove criminal liability from more than 300 secrecy provisions.

New general secrecy offence

Part 1 of Schedule 1 of the Bill would introduce a new secrecy offence in the Criminal Code capturing improper use or communication of Commonwealth information, by certain persons with a relationship to the Commonwealth, with the intention of obtaining, or seeking to obtain, a benefit or causing, or seeking to cause, detriment to a Commonwealth entity or other person. The offence would apply to Commonwealth officers, persons engaged to perform work for a Commonwealth entity and persons providing paid or unpaid services to Commonwealth entities.

The offence would close existing gaps in the Commonwealth secrecy framework that were identified following revelations of the alleged disclosure of Treasury tax policy information by a then partner at PwC, in breach of confidentiality obligations. This type of conduct would not currently be captured by existing offences in the Criminal Code as these offences are broadly targeted at disclosures and dealings with national security and law enforcement information and do not capture all persons who provide services to the Commonwealth. To address these gaps, the new offence would:

- capture a broader range of Commonwealth information, improper communication or use of which could harm the effective working of government, and
- capture persons who provide services to the Commonwealth, including those who provide services on an unpaid or voluntary basis and are not formally engaged on contract.

By capturing ‘improper’ use and communication of information, the offence will ensure Commonwealth officers and others with confidentiality obligations can be held to account when they use information they have been entrusted with inconsistently with the standards expected of them. The offence would not capture communication or use of high-level, general or benign information.

The new secrecy offence would broadly implement recommendation 3 of the AGD Secrecy Review, which recommended the department develop a new general secrecy offence that criminalised disclosures prejudicial to the effective working of government or where information was communicated in confidence. This was also expected to address scenarios akin to the PwC incident.

In response to stakeholder feedback, the new offence would be a more targeted general secrecy offence than originally recommended by the AGD Secrecy Review. During consultation, it was identified that an offence adopting the terminology of the AGD Secrecy Review would unnecessarily increase the information captured by criminal offences without allowing for any significant reduction in specific secrecy offences. This would not have met the principles of the AGD Secrecy Review, nor would it be consistent with stakeholder feedback that any new offence should be as narrow as possible. The new offence responds to this feedback by targeting known gaps in the Commonwealth’s secrecy framework, while supporting the removal of criminal liability from more than 300 secrecy provisions.

The new secrecy offence would also implement the Government response to recommendation 11 of the INSLM Secrecy Review which set out a range of principles that should be adopted by the new offence.

The offence is consistent with the principles as it protects against harm to the essential public interest in government's ability to appropriately handle sensitive information and deliver commitments, does not use language such as 'functioning of government', is not protected by existing remedies, and captures current and former Commonwealth officials and others who perform work for a Commonwealth entity.

Part 2 of Schedule 1 of the Bill would make a range of consequential amendments to the Criminal Code to ensure that the existing general secrecy offences in the Code capture the same categories of persons, including those who provide paid or unpaid services to the Commonwealth, as the new general secrecy offence.

Measures related to press freedom

Requirement for ministerial consent

Schedule 3 of the Bill would introduce a new requirement for the Attorney-General to consent to the prosecution of a journalist or administrative staff member of an entity in the business of reporting news for secrecy offences.

The inclusion of a consent to prosecute requirement would ensure an enhanced level of scrutiny of any prosecution of a journalist for a secrecy offence, before the prosecution proceeds. It would operate as a broad additional safeguard to enhance protections for press freedom and support a strong and independent media. It would not provide a power for the Attorney-General to initiate or otherwise direct a prosecution.

Since 2014, previous Attorneys-General have issued directions to the Commonwealth Director of Public Prosecutions to require ministerial consent to prosecute journalists for up to 8 national security secrecy offences. The new requirement would embed the existing directions in law and expand it to apply to secrecy offences across all Commonwealth laws. It would also complement the requirement under the *Prosecution Policy of the Commonwealth* for the CDPP to assess whether a prosecution is in the public interest.

The new requirement would provide that proceedings for an alleged offence must not be commenced without the Attorney-General's written consent if:

- the alleged offence is a contravention of a secrecy provision that is an offence against a law of the Commonwealth
- the alleged offence otherwise does not require Ministerial consent to prosecute, and
- a reasonable person would consider that the conduct of the person (the accused) who is alleged to have committed the offence was engaged in by the accused in the accused's professional journalistic capacity, or in the accused's capacity as a member of the administrative staff of an

entity that was engaged in the business of reporting news, presenting current affairs or expressing editorial or other content in news media.

The provision is intended to capture bona fide journalists, including freelancers, as well as administrative staff members who are closely involved in the news and current affairs process, such as persons involved in digital, editorial or legal roles. It is not, however, intended to capture persons who merely purport to be journalists but are not doing so in a professional capacity, nor to apply to journalists acting in their personal capacity.

Certain secrecy offences or categories of offences would be able to be carved out of the consent to prosecute requirement by regulations. While it is not anticipated that any significant number of offences will be prescribed in regulations, this would provide a mechanism to exclude certain offences should it be determined that an offence is not appropriately subject to a requirement for ministerial consent.

Other amendments supporting press freedom

In addition to introducing a requirement for ministerial consent to prosecute a journalist, the Bill would support press freedom by amending the secrecy offences in the Criminal Code to ensure that members of the public, including journalists, are subject to a higher threshold for criminal culpability than Commonwealth officials and ensuring ABC and SBS staff and contractors are not inadvertently covered by the offences for Commonwealth officials. These measures are outlined further below.

Consideration was also given to whether there were other secrecy offences to which a public interest journalism defence could appropriately be applied. This was in response to recommendation 8 of the AGD Secrecy Review, which recommended that further work be undertaken to apply a public interest journalism defence to additional appropriate secrecy offences.

The department reviewed all specific secrecy offences in consultation with relevant departments and agencies to determine whether a public interest journalism defence could appropriately be applied. The review determined the majority of secrecy offences do not apply to journalists, as they apply specifically to Commonwealth officials or people working with the Commonwealth. For the remaining offences that could apply to journalists, these protect sensitive information such as law enforcement, national security, sensitive health and commercial-in-confidence information, and it would rarely be appropriate for such information to be disclosed outside of established whistleblower frameworks.

The Bill would not alter the existing public interest journalism defence in subsection 122.5(6) of the Criminal Code that currently applies to all the general secrecy offences. Public interest journalism defences are also considered as a matter of course for all new secrecy offences. The department scrutinises all new and amended secrecy offences for consistency with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (the Guide). As part of this process, the department advocates for the inclusion of a public interest journalism defence, where appropriate, for any offences that apply to third parties (consistent with principle 11 of the Guide).

Amendments related to the Government response to the Independent National Security Legislation Monitor Secrecy Review

Schedule 4 of the Bill would amend the secrecy offences in the Criminal Code and provisions of the *Intelligence Services Act 2001 (Cth)* to implement the Government response to recommendations 1, 5-12 and 14 of the INSLM Secrecy Review.

The INSLM was required to undertake a review of the secrecy offences at Part 5.6 of the Criminal Code under subsection 6(1B) of the *Independent National Security Legislation Monitor Act 2010*. The AGD Secrecy Review also recommended the Government request the INSLM to consider, as part of the INSLM Secrecy Review, the appropriateness of the definitions of ‘inherently harmful information’ and ‘cause harm to Australia’s interests’ contained in Part 5.6 of the Criminal Code (recommendation 11).

Consistent with the Government response to the INSLM Secrecy Review, amendments in Schedule 4 would ensure that secrecy offences are proportionate and consistent with the rule of law, clarify the scope of existing offences and limit the application of offences to non-officials.

Commonwealth officials

The Bill would amend the general secrecy offences in the Criminal Code that apply to Commonwealth officials to establish a single material threshold of harm for disclosures that cause harm to Australia’s interests, clarify key definitions, and ensure an official is only subject to an aggravated offence where their conduct could cause a higher level of harm or their personal circumstances increase their culpability.

Harm threshold for offences at section 122.2

The Bill would amend the definition of ‘cause harm to Australia’s interests’ that applies to the secrecy offences for Commonwealth officials in section 122.2 of the Criminal Code for communications or dealings that cause harm to Australia’s interests. The definition would be amended to adopt a single, clear threshold of ‘prejudice’ for most types of harm covered by the definition. This would ensure the secrecy offences at section 122.2 applying to Commonwealth officials are proportionate and clear. As a result of the amendments, the offences in section 122.2 would be enlivened by conduct that would ‘prejudice’ the AFP’s performance of functions under the *Australian Federal Police Act 1979* or *Proceeds of Crimes Act 2002*, international relations, health or safety of the Australian public or a section of the Australian public, security or the defence of Australia.

The exception is the aspect of the definition of ‘cause harm to Australia’s interests’ related to the prevention, detection, investigation, prosecution or punishment of a Commonwealth criminal offence, which would retain its existing threshold of ‘interfere or prejudice’. This framing is necessary to protect essential public interests in the integrity of criminal justice processes.

These amendments implement the Government response to recommendation 6 of the INSLM Secrecy Review. The Government agreed in principle that the secrecy offences in section 122.2 of the Criminal Code should contain a single material harm threshold for most categories of information covered by the definition of ‘cause harm to Australia’s interests’.

Offences for dealing with information

The Bill would amend the definition of ‘deal’, which applies to the offences for dealing with inherently harmful information or information that causes harm to Australia’s interests at subsections 122.1(2) and 122.2(2), to:

- ensure that mere receipt of information is not captured by the offences, but that actions relating to the subsequent treatment of information continue to be captured, and
- remove references in the definition to communicating, publishing and making information available, as this conduct is already captured by offences for communicating information at subsections 122.1(1) and 122.2(2).

The Bill would also make other consequential amendments to remove any overlap in references to communicating or dealing with information.

These amendments implement the Government response to recommendation 7 of the INSLM Secrecy Review. The Government agreed in principle to amend the term ‘deal’ to exclude receipt of information, and to ensure the secrecy offences for ‘dealing with’ information for Commonwealth officials do not overlap with offences for ‘communicating’ information.

Aggravated offence

The Bill would amend the aggravated offence at section 122.3 of the Criminal Code to ensure that a secrecy offence is only aggravated where a person has the highest level of security clearance or had the higher fault element of knowledge of, or intention to cause, harm covered by the underlying offence.

Section 122.3 of the Criminal Code currently establishes an aggravated offence where a Commonwealth official commits a secrecy offence where the relevant record is marked with a codeword, the conduct involves 5 or more records that have a security classification, the conduct involves altering a record to remove or conceal a security classification, or the person held a security clearance allowing access to secret information or above. The INSLM noted that these aggravating circumstances were uncertain, arbitrary, or were part of the aggravating circumstances already considering as part of sentencing. The amendments would ensure that the aggravated offence is more appropriate and proportionate, by providing that an offence is only aggravated where a person has been entrusted with highly privileged access to information where a breach would cause significant harm to the Commonwealth, or has a higher level of culpability.

The amendments would implement recommendation 10 of the INSLM Secrecy Review, which recommended that the only aggravating factors should be that the person held the highest level of Australian Government security clearance, or the person intended or knew their conduct would or was likely to cause a type of harm covered by the underlying offence.

Members of the public

Offence for dealing with information

The Bill would repeal the offence for members of the public ‘dealing’ with information under subsection 122.4A(2) Criminal Code.

Members of the public do not generally have the same level of awareness or training in information security, including the potential consequences of dealing with sensitive information, as Commonwealth officials. As such, it is appropriate that secrecy obligations for members of the public apply to narrower categories of conduct than for Commonwealth or former Commonwealth officials. Repealing the offence for ‘dealing’ with information would ensure that the offences that apply to members of the public are proportionate to their level of criminal culpability and understanding of the harm their conduct may cause.

The amendments would implement the Government response to recommendation 8 of the INSLM Secrecy Review, which agreed to repeal the offence at subsection 122.4A(2).

Offence for communicating information

The Bill would amend the remaining secrecy offence at subsection 122.4A(1), that applies to communication of information by members of the public, to ensure the offence applying to members of the public is proportionate to their level of criminal culpability.

The amendments to subsection 122.4A(1) would:

- require serious damage to security, defence of Australia, or intelligence activities and capabilities as an alternative to other harm thresholds, and
- reduce the maximum penalty from 5 to 3 years imprisonment.

The Bill would also make amendments to ensure that the staff and contractors of the ABC and SBS are only covered by the offence at subsection 122.4A(1) for members of the public and are not inadvertently captured by the offences for Commonwealth officials. This would be achieved by including a new definition of a ‘Part 5.6 Commonwealth entity’, which excludes the ABC and SBS, and picking up this definition throughout the secrecy offences.

These amendments ensure that the offence that applies to members of the public, including all journalists, is more proportionate, noting members of the public do not take on the same duties as Commonwealth officials to protect Commonwealth information and cannot reasonably be expected to have the same knowledge of likely harm from disclosure.

The amendments would implement the Government response to recommendation 12 of the INSLM Secrecy Review, which agreed in principle to modify the offence at section 122.4A. The Government response committed to provide that the offence applies to serious damage to the security or defence of Australia, provide that the offence has a maximum penalty of half the 7-year penalty for a comparable communication by an official, and ensure the ABC and SBS are only captured by offences for members of the public.

Other amendments

Security classified information

The Bill would make amendments to the definition of ‘inherently harmful information’, which is picked up in the offence for Commonwealth officials at section 122.1, and the offence for members of the public at section 122.4A, to remove references to information being security classified. This would have the effect of ensuring that the mere fact that information was classified Secret or Top Secret is not sufficient to trigger the secrecy offences in the Criminal Code. This would provide certainty and clarity on the face of the offence, noting the INSLM found that the decision to classify a document is made under a policy framework that can be changed at any time and was not an appropriate element of an offence. A person’s knowledge that information was security classified would continue to be relevant to assessing recklessness for the purpose of the secrecy offences in the Criminal Code.

The amendments would implement the Government response to recommendation 1 of the INSLM Secrecy Review, which agreed to amend the Criminal Code to ensure the secrecy offences did not have elements that were reliant on security classification under a policy framework.

Proper place of custody offences

The Bill would repeal the proper place of custody offences in sections 122.1(3) and 122.2(3) of the Criminal Code, which provide that it is an offence to remove information or hold information outside of a proper place of custody, as defined by regulations. These offences are no longer required as the other secrecy offences in the Criminal Code provide sufficient coverage of this type of information. The offences are also not operative as regulations defining a ‘proper place of custody’ have never been made.

These amendments would implement recommendation 6 of the AGD Secrecy Review and recommendation 9 of the INSLM Secrecy Review, both of which recommended the repeal of the proper place of custody offences.

Defence Intelligence Organisation mandate

The Bill would amend the *Intelligence Services Act 2001 (Cth)* to require the Defence Intelligence Organisation (DIO) Mandate, which includes DIO’s functions, to be made public.

Requiring publication of the mandate would ensure the DIO's functions are publicly available and known, ensuring that affected persons will be able to understand how secrecy offences related to the DIO's functions apply to them in practice.

This amendment would implement the Government response to recommendation 5 of the INSLM Secrecy Review, which agreed in principle to the recommendation that the functions of DIO be set out in legislation or a legislative instrument. The Government response committed to legislative amendments to require that the functions of the DIO be made public. This is consistent with longstanding practice of not legislating the functions of departments of state.

Consent to prosecute requirement

The Bill would amend the existing requirement at section 123.5 of the Criminal Code that the Attorney-General consent to any prosecution of a secrecy offence under Part 5.6, to clarify that this requirement applies to all prosecutions whether they are committed to trial or are tried summarily.

This amendment would implement the Government response to recommendation 4 of the INSLM Secrecy Review, which agreed to make updates to ensure section 123.5 applies to any prosecutions under Part 5.6.

Technical and minor amendments

Schedule 5 of the Bill would make other minor amendments to various secrecy provisions, including technical amendments to improve consistency and enforcement of existing provisions. These amendments would attach a penalty to the secrecy offence at section 62M of the *Business Names Registration Act 2011* (Cth). The amendments would also amend the Criminal Code to improve readability and ensure that defences related to integrity officials in subsection 122.5(12) operate consistently and effectively.

Consultation

The department consulted widely across the Commonwealth on this Bill, including with:

- all Commonwealth departments that administer Commonwealth secrecy offences, and
- the National Intelligence Community, including the Australian Criminal Intelligence Commission; Australian Geospatial-Intelligence Organisation; Australian Federal Police; Australian Signals Directorate; Australian Security Intelligence Organisation; Australian Secret Intelligence Service; Australian Transactions Reports and Analysis Centre (AUSTRAC); Defence Intelligence Organisation; and the Office of National Intelligence.

The approach to implementation of the AGD Secrecy Review and INSLM Secrecy Review recommendations were refined in response to this feedback. This included refining the approach to the

new general secrecy offence, which was targeted and narrowed in response to stakeholder feedback, and working with departments to significantly increase the number of secrecy provisions that could be repealed or have criminal liability removed while ensuring there were no unintended gaps in protection of information.

The AGD Secrecy Review and INSLM Secrecy Review also had public consultation processes which informed the recommendations that would be implemented by the Bill. This included receipt of submissions from civil society, media and academic stakeholders.

Conclusion

The department thanks the Committee for the opportunity to make a submission to its review of the Bill. Secrecy offences play a legitimate and important role in protecting the confidentiality of national security and law enforcement material, as well as personal and commercial information that is entrusted to government, and ensure that government can operate effectively in the public interest. This protection of information must be balanced with the public interest in open, transparent and accountable government and access to information. The Bill strikes an appropriate balance between these key public interests.