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# Review of Secrecy Provisions Amendment (Repealing Offences) Bill 2026 *Submission by the Australian Federal Police*

Senate Legal and Constitutional Affairs Committee



# AFP

## Table of contents

<b>Introduction</b>	<b>2</b>
<b>Section 122.4 - Communication or use of information by current and former Commonwealth officers etc.—general offence</b>	<b>2</b>
<b>Security classified information</b>	<b>3</b>
<b>Prioritisation of secrecy investigations</b>	<b>3</b>

## Introduction

1. Thank you for the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Committee Review of the Secrecy Provisions Amendment (Repealing Offences) Bill 2026 (the Bill).
2. The AFP was engaged on the Independent National Security Legislation Monitor (INSLM)'s Review of Part 5.6 of the *Criminal Code Act 1995* and the Attorney-General's Department's Review of Secrecy Provisions, which informed this Bill. A public submission was provided as part of the INSLM review and the AFP gave evidence at a public hearing. The AFP was also consulted on the Bill.
3. The AFP is keenly aware of the importance of the Commonwealth's secrecy framework, both as an investigating agency and an agency which deals with sensitive and security classified information. Secrecy offences play an important role in deterring unauthorised use and disclosure and preventing the harm that can arise from unauthorised use and disclosures, along with training and systems management.
4. In the AFP's experience, investigations into secrecy offences are generally complex and protracted, requiring specialised skills and significant resources for extended periods of time. Common challenges faced by AFP's investigators include ensuring sufficient evidence exists to disprove the defence at section 122.5(1) if raised, and ensuring the prosecution itself does not reveal further sensitive information.
5. The AFP is mindful of the effectiveness of the framework in deterring and managing unauthorised disclosures of sensitive and security classified information. The AFP notes these offences will continue to require extensive legal analysis and evidentiary work with long timeframes for investigations and prosecutions.

## Section 122.4 - Communication or use of information by current and former Commonwealth officers etc.—general offence

6. The Bill replaces the existing offence at section 122.4 of the Criminal Code with a new general secrecy offence. The existing offence at section 122.4 applies criminal liability to all unauthorised use or disclosure provisions in Commonwealth legislation, many of which were not originally intended to have criminal liability. The Bill replaces this offence with an offence that focuses on improper use or disclosure of information by current and former Commonwealth officers where they intend to gain a benefit or cause detriment.
7. The new offence at section 122.4 requires the AFP to collect evidence to prove two additional elements - one relating to the person's intent to obtain a benefit or cause detriment, and the other relating to whether the use or communication might be considered improper. In the AFP's experience, proving a person's motivation for engaging in particular conduct beyond reasonable doubt with admissible evidence can be difficult. In some cases, the intent behind the use or communication may be unclear or it may be for purely ideological reasons; an individual may also cause significant detriment without intending to (in which case the proposed new section 122.4 would not apply).
8. As is currently the case with section 122.4, due to the low maximum penalty (two years) the AFP does not have access to all investigative powers, particularly surveillance powers

under the *Telecommunications (Interception and Access) Act 1979* and the *Surveillance Devices Act 2004*. This can impact the AFP's ability to collect evidence, particularly aspects of the offending that do not take place on Commonwealth-owned systems. These aspects can go to determining the individual's motivation. The limitations in obtaining admissible evidence for an offence also forms part of AFP prioritisation considerations.

## Security classified information

9. The Bill would remove 'security classified information' from the definition of 'inherently harmful information' in Part 5.6. This would narrow the scope of the offences at section 122.1 (which apply to current and former Commonwealth officers) such that they only protect intelligence agency and certain law enforcement agency information.
10. Under the Protective Security Policy Framework, security classification of information, in particular Secret or Top Secret classifications, and additional security caveats (e.g. codewords, handling instructions, storage management) clearly indicate the level of damage to Australia's national interests that can occur if this information is not appropriately handled. This is particularly important because the sensitivity of a document will often not be apparent on its face. Furthermore, while disparate pieces of information disclosed in isolation may not appear harmful, when aggregated, the overall harm can be significant (the 'mosaic effect'). Commonwealth officers who have access to security classified information generally receive training on the importance of handling this information appropriately and the risks associated with inappropriate dealing, including disclosure, as part of their security clearance.
11. The AFP understands the policy intent of this amendment is to ensure the offences are not reliant on a non-legislated policy framework as an element of the offence. The existing offences at section 122.2 (with amendments to the definition of 'cause harm to Australia's interests') and remaining specific secrecy offences may continue to protect some of the security classified information that will now be excluded from the inherently harmful information offence in section 122.1. However, the AFP notes it can be challenging to prove the 'cause harm to Australia's interests' element in section 122.2, particularly where the offending is disrupted before known harm occurs.
12. It is important to note the process to prove that information is 'security classified information' under the existing framework is not without challenges. Among those challenges is the Attorney-General is required to certify the information was appropriately classified at the time of the offending. This must be done individually for each document containing security classified information. The number of documents can be extensive and require significant resources (across investigators, lawyers, prosecutors and staff of the reporting agency) to be diverted, by both the AFP, the reporting agencies and the Attorney-General, to service this requirement.

## Prioritisation of secrecy investigations

13. The AFP's internal governance framework enables decision making regarding allocation of police resources for investigations. This includes the AFP Act, the AFP's Operational Prioritisation Model and the Ministerial Direction.

14. Each report of crime is considered on its own facts, circumstances and critically, the potential harm to individuals, the community, and Australia. Harm is an important consideration in the way the AFP prioritises and investigates Commonwealth offences. In secrecy investigations, the AFP requires the affected Commonwealth entity to provide a harms statement outlining the impact or potential impact of the suspected dealing with information. This is the case regardless of whether there is a "harms" based element in the offence under consideration. With finite resources, the AFP requires detailed information from reporting agencies articulating harm in order to support and prioritise a criminal investigation.
15. Where there is no clear harm, or the agency is unable or declines to provide a statement, the matter is prioritised accordingly and may not meet the threshold for investigations.