



Australian
Human Rights
Commission

Review of Secrecy Offences in Part 5.6 of the *Criminal Code 1995*

Australian Human Rights Commission

Submission to the Independent National Security Legislation
Monitor

8 March 2024

ABN 47 996 232 602
Level 3, 175 Pitt Street, Sydney NSW 2000
GPO Box 5218, Sydney NSW 2001
General enquiries 1300 369 711
Complaints info line 1300 656 419
TTY 1800 620 241

Australian Human Rights Commission
www.humanrights.gov.au

Contents

1	Introduction	3
2	Summary	3
3	Recommendations.....	5
4	Relevant human rights	7
4.1	<i>The right to freedom of expression</i>	7
4.2	<i>The right to presumption of innocence</i>	8
5	Broad scope of secrecy offences	9
5.1	<i>Key definitions</i>	9
5.2	<i>Specific harm as an element of secrecy offences.....</i>	11
5.3	<i>Domestic intelligence agencies</i>	13
5.4	<i>Security classified information.....</i>	15
5.5	<i>'Dealing with' information</i>	16
6	Proposed new general secrecy offence	18
7	Safeguards outside the Criminal Code	21
8	Defences and other issues.....	22
8.1	<i>Journalists' defence</i>	22
8.2	<i>Reverse onus of proof.....</i>	23
8.3	<i>Other defences.....</i>	24
8.4	<i>Role of the Attorney-General.....</i>	25

1 Introduction

1. The Australian Human Rights Commission (Commission) makes this submission to the Independent National Security Legislation Monitor (INSLM) in relation to its *Review of Secrecy Offences in Part 5.6 of the Criminal Code 1995*.
2. The INSLM is required to conduct its review pursuant to s 6(1B)(c) of the *Independent National Security Legislation Monitor Act 2010* (Cth).
3. The secrecy offences were introduced into Schedule 2 of the *Criminal Code Act 1995* (Cth) (Criminal Code), following the passing of the *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018* (Cth) (EFI Act) by Parliament on 28 June 2018. They have now been in force for 5 years.
4. As noted in the INSLM's Issues Paper to this review, there have been several previous independent, parliamentary and government reviews that have considered the Commonwealth secrecy provisions, including the Australian Law Reform Commission's 2009 report *Secrecy Laws and Open Government in Australia* (ALRC 2009 Secrecy Laws Report),¹ and the more recent Attorney General Department's 2023 final report *Review of Secrecy Provisions* (AGD secrecy review).²
5. In general, the Commission supports the framing of general secrecy offences in Commonwealth legislation consistent with the principles outlined in the ALRC 2009 Secrecy Laws Report.
6. The Commission has previously provided a brief submission in relation to the proposed provisions of the EFI Act.³ This submission focuses on a selection of issues contained in the INSLM's Issues Paper concerning the current secrecy provisions, to the extent that those provisions are consistent with Australia's international obligations under the *International Covenant on Civil and Political Rights* (ICCPR).⁴

2 Summary

7. The Commission acknowledges that secrecy offences have a legitimate role to play where the unauthorised disclosure of Commonwealth information may cause harm to essential public interests, such as national security and the safety of the public.
8. The Commission considers, however, that secrecy provisions should only reflect what is necessary and proportionate to achieve their objective and be consistent with Australia's international obligations

under the ICCPR. Specifically, the Commission is concerned that the secrecy provisions in Part 5.6 of the Criminal Code may limit the right to freedom of expression in article 19 of the ICCPR, which includes the right to impart information, to a degree that has not been demonstrated to be necessary and proportionate to a legitimate objective.

9. While the exercise of the right to freedom of expression is subject to certain restrictions, as set out in article 19(3), these restrictions may only be such as are provided by law and are necessary for the respect of the rights or reputations of others, or for the protection of national security, public order, public health or morals.
10. The Commission considers that general secrecy offences that attract criminal sanctions are only warranted when they are necessary and proportionate to protect essential public interests. This is because they have the potential to impinge upon the right to freedom of expression, which includes freedom of the press and freedom of political communication – all vital safeguards to the functioning of Australia's democracy and to accountable government decision-making.
11. The current framing of the general secrecy offences in Part 5.6 of the Criminal Code is overly broad and uncertain in scope. The offences may capture conduct that is not harmful or not sufficiently harmful to warrant criminalisation. The provisions should contain an express requirement of harm, particularly where they concern non-Commonwealth officers, and provide for the protection of narrowly defined categories of information, where the harm to an essential public interest is implicit.
12. The general secrecy provisions in Part 5.6 should clearly identify the conduct they regulate and contain adequate defences and safeguards in order to protect disclosures that are in the public interest.
13. Secrecy offences are a 'last resort option'. Unauthorised disclosures of categories of Commonwealth information that may be 'prejudicial to the effective working of government', are more proportionately dealt with by administrative and disciplinary frameworks, rather than treated as criminal matters.⁵

3 Recommendations

14. The Commission makes the following recommendations:

Recommendation 1

The key terms of ‘inherently harmful information’ and ‘cause harm to Australia’s interests’ should cover a narrowly defined category of information where harm to an essential public interest is necessarily implicit, or protect against harm to the relationship of trust between individuals and the Government integral to the regulatory functions of government. The phrase ‘interfere with’ should be removed from the definition of ‘cause harm to Australia’s interests’ in section 121.1.

Recommendation 2

The Commission’s primary recommendation is that the general secrecy offences in Part 5.6 of the Criminal Code should include an express requirement that, for an offence to be committed, the unauthorised disclosure caused, or was likely or intended to cause, harm to an essential public interest. Those essential public interests should be confined to those identified by the ALRC (referred to at paragraph 38 of this submission).

Recommendation 3

In the absence of an express harm requirement, the general secrecy offences should cover a narrowly defined category of information where the harm to an essential public interest is implicit or the harm is to a relationship of trust between individuals and the Australian Government integral to the regulatory functions of government.

Recommendation 4

At the very least, an express harm requirement should be included in the offences relating to non-Commonwealth officers.

Recommendation 5

The definition of ‘inherently harmful information’ in section 121.1 should be narrower in scope and only apply to disclosures of information that would necessarily cause some specific, identifiable harm to an essential public interest.

Recommendation 6

Strict liability should not apply to the element that a classification is applied in accordance with the policy framework developed by the Commonwealth.

Recommendation 7

The general secrecy offence provisions in Part 5.6 should expressly provide that unsolicited receipt or other unintentional dealings will not be sufficient to reach the threshold of intention required by those provisions.

Recommendation 8

The Commission considers the proposed new general secrecy offence which targets 'unauthorised disclosures' of information by Commonwealth officers is unnecessary and current section 122.4 which it intends to replace, should be permitted to sunset on 29 December 2024.

Recommendation 9

If the proposed new general secrecy offence is introduced, it should be narrowed in scope to capture unauthorised disclosures of information that will result in some specific, identifiable harm to an essential public interest.

Recommendation 10

If the proposed new general secrecy offence is introduced, there should be strengthened protections within the existing frameworks to better protect whistleblowers who make disclosures that are in the public interest.

Recommendation 11

Section 122.5(6) should be amended to clarify the scope of persons 'engaged in the business of reporting news' and the term 'news media'.

Recommendation 12

Section 122.5(6) should be amended to identify factors that may be considered for the purposes of determining whether the dealing with or holding of information may be in the public interest.

Recommendation 13

Section 122.5(6) should be amended to remove the evidential burden on the defendant to establish that the disclosure was in the public interest.

Recommendation 14

Section 122.5 should be amended to include an exception for where the conduct is engaged in for the purpose of obtaining legal advice or if

the disclosure was for the purposes of any legal proceedings concerning the offence.

4 Relevant human rights

4.1 The right to freedom of expression

15. The secrecy offences contained in Part 5.6 of the Criminal Code engage the right to freedom of expression enshrined in article 19 of the *International Covenant on Civil and Political Rights* (ICCPR),⁶ which provides:
 1. Everyone shall have the right to hold opinions without interference.
 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others;
 - (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.
16. As the United Nations Human Rights Committee has observed, freedom of expression is both 'an indispensable condition for the full development of the person' and 'a necessary condition for the realization of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights'.⁷ Article 19 expressly protects both the freedom to impart information and the freedom to seek and receive it.
17. The right to freedom of expression may only permissibly be limited for one of the purposes in article 19(3).⁸ These are where the restrictions in the law are necessary 'for respect of the rights and reputation of others'⁹ and 'for the protection of national security or of public order, or of public health or morals'.¹⁰ Further, any limitation must be:

- *provided by law* — laws limiting the right must be made accessible to the public, and must provide sufficient guidance both to those executing the laws and to those whose conduct is being regulated.¹¹
 - *necessary and proportionate* — to achieve a permissible purpose. At the very least, the law must restrict the right only to the absolute minimum degree necessary to achieve the legitimate purpose for the law.¹²
18. The United Nations Human Rights Committee observed in its commentary on the right to freedom of expression, that:
- Extreme care must be taken by States parties to ensure that treason laws and similar provisions relating to national security, whether described as official secrets or sedition laws or otherwise, are crafted and applied in a manner that conforms to the strict requirements of paragraph 3 [of article 19]. It is not compatible with paragraph 3, for instance, to invoke such laws to suppress or withhold from the public information of legitimate public interest that does not harm national security or to prosecute journalists, researchers, environmental activists, human rights defenders, or others, for having disseminated such information.¹³
19. While national security may justify some secrecy laws,¹⁴ those laws must comply with the general principles above. In particular, adequate safeguards must be put in place. ‘National security’ should not be invoked to prevent merely local or relatively isolated threats to law and order, and provision should be made for whistleblowers – in particular in relation to disclosures of human rights violations.¹⁵

4.2 The right to presumption of innocence

20. Article 14(2) of the ICCPR provides that ‘everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law’.
21. The UN Human Rights Committee has stated that:
- The presumption of innocence, which is fundamental to the protection of human rights, imposes on the prosecution the burden of proving the charge, guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt, ensures that the accused has the benefit of doubt, and requires that persons accused of a criminal act must be treated in accordance with this principle.¹⁶
22. Section 122.5(6) of Part 5.6 of the Criminal Code provides for a defence for a ‘person engaged in the business of reporting news’. Relevantly,

the defence places the evidentiary burden on the defendant to show that they 'reasonably believed' that engaging in the conduct was in the 'public interest'. This reverse onus provision shifts the burden of proof in relation to this element and may engage the right to presumption of innocence under article 14(2).

23. Under international human rights law, a reverse onus provision will not necessarily violate the presumption of innocence if it is shown to be reasonable, necessary and proportionate in pursuit of a legitimate objective. However, claims of greater convenience or ease for the prosecution in proving a case will be insufficient, in and of themselves, to justify a limitation on the defendant's right to be presumed innocent'.¹⁷

5 Broad scope of secrecy offences

5.1 Key definitions

24. Part 5.6 of the Criminal Code contains 11 general secrecy offences: 9 that apply to current and former Commonwealth officers (including contractors) and 2 that apply to non-Commonwealth officers.
25. Sections 122.1 and 122.2 provide for the most serious offences and apply to current and former Commonwealth officers who disclose or otherwise deal with 'inherently harmful information' or where the disclosure or other conduct 'causes harm to Australia's interests'.
26. Section 121.1 defines '**inherently harmful information**' to mean:
 - security classified information;
 - 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;
 - information relating to the operations, capabilities or technologies of, or methods or sources used by, a domestic or foreign law enforcement agency.
27. In the same section, '**cause harm to Australia's interests**' means to:
 - interfere with or prejudice the prevention, detection, investigation, prosecution or punishment of a criminal offence against a law of the Commonwealth; or
 - interfere with or prejudice the performance of functions of the Australian Federal Police under:

- paragraph 8(1)(be) of the *Australian Federal Police Act 1979* (protective and custodial functions); or
 - the *Proceeds of Crime Act 2002*; or
 - harm or prejudice Australia's international relations in relation to information that was communicated in confidence;
 - by, or on behalf of, the government of a foreign country, an authority of the government of a foreign country or an international organisation; and
 - to the Government of the Commonwealth, to an authority of the Commonwealth, or to a person receiving the communication on behalf of the Commonwealth or an authority of the Commonwealth; or
 - harm or prejudice the health or safety of the Australian public or a section of the Australian public; or
 - harm or prejudice the security or defence of Australia.
28. A maximum penalty of 7 years imprisonment applies for a person who intentionally or recklessly communicates 'inherently harmful information' obtained in connection with their work for the Commonwealth, and 3 years for other dealings.¹⁸
29. The Commission considers that the definitions of the key terms 'inherently harmful information' and 'cause harm to Australia's interests' appear to be overly broad and uncertain, in that they may well capture disclosures that are not in fact harmful or are not sufficiently harmful to warrant criminalisation. That is, they are not limited to prohibiting disclosures that are shown to damage the legitimate interests of the Commonwealth.
30. The definition of 'cause harm to Australia's interests' extends beyond damage or prejudice to include 'interference' with the relevant criminal proceeding. The Commission agrees with the Law Council of Australia that 'interference' can be interpreted as a much lower threshold, and may therefore extend to a broad range of conduct, including 'innocuous conduct'.¹⁹ It may also inhibit the legitimate criticism of law enforcement officials who have acted improperly. It is not appropriate for such a low threshold to extend to a criminal proceeding.
31. The definition also extends to include harm to Australia's 'international relations', broadly defined to include 'political, military and economic relations with foreign governments and international organisations'.²⁰ It is unclear to what extent 'economic' relations may also include 'corporate' interests.

32. The secrecy provisions should clearly define the conduct regulated to provide sufficient guidance to those affected, which include journalists, civil society groups and academics, particularly as they extend beyond 'communication' to 'other dealings' and attract serious criminal sanctions.

Recommendation 1

The key terms of 'inherently harmful information' and 'cause harm to Australia's interests' should cover a narrowly defined category of information where harm to an essential public interest is necessarily implicit, or protect against harm to the relationship of trust between individuals and the Government integral to the regulatory functions of government. The phrase 'interfere with' should be removed from the definition of 'cause harm to Australia's interests' in section 121.1.

5.2 Specific harm as an element of secrecy offences

33. As noted in the INSLM's Issues paper, the offences in Part 5.6 do not all contain a specific harm element.
34. Section 122.1(1)(b) does not require proof of an express harm requirement, rather there is deemed harm where a person communicates or deals with certain categories of information that fall within the definition of 'inherently harmful information' in section 121.1. These categories include 'security classified information' and information obtained or generated by a domestic intelligence agency or a foreign intelligence agency.
35. Section 122.2(1)(b) does incorporate an express harm element, requiring that the communication of information or other conduct 'causes harm to Australia's interests', or will or is likely to do so. However, the definition extends beyond the essential public interests identified by the ALRC to warrant criminal sanctions. As previously mentioned, it also includes 'interfering with' the prevention, detention, investigation, prosecution or punishment of a Commonwealth criminal offence.²¹
36. Section 122.4A which applies to disclosures by non-Commonwealth officers, makes it an offence to disclose information that has a security classification of 'secret' or 'top secret' or where the communication interferes with or prejudices any Commonwealth criminal proceeding. The other types of information are consistent with the definition of 'cause harm to Australia's interests' in section 122.2(1)(b).

37. The provisions are clearly wider and contrary to the recommendation in the ALRC 2009 Secrecy Laws Report, that ‘most secrecy offences, and the general secrecy offence in particular, should include an express requirement to establish that an unauthorised disclosure of Commonwealth information caused, or was likely or intended to cause, harm to specified public interests’.
38. The ALRC concluded that this approach ‘balances the need to protect some information by means of the criminal law, with the public interest in open government and the fostering of a pro-disclosure culture in the Australian public sector’.²² The ALRC identified that the essential public interests for general secrecy offences should be limited to ‘authorised disclosures’ that were likely to:
 - damage the security, defence or international relations of the Commonwealth;
 - prejudice the prevention, detection, investigation, prosecution or punishment of criminal offences;
 - endanger the life or physical safety of any person; or
 - prejudice the protection of public safety.²³
39. The AGD secrecy review also recommended that a harms-based approach should be taken in framing secrecy offences and that secrecy provisions should contain an express harm element, cover a narrowly defined category of information and the harm to an essential public interest is implicit, or protect against harm to the relationship of trust between individuals and the Government integral to the regulatory functions of government.²⁴
40. The Commission considers that harm to ‘essential public interests’ is not necessarily implicit in the prescribed categories of information specified by the provisions.
41. The requirement that disclosures should only be prohibited where they will result in some specific, identifiable harm reflects the principle that limitations on the right to freedom of expression are only justified when they are necessary to achieve a legitimate purpose.
42. This is particularly so for disclosures by outsiders, including journalists and whistleblowers. Laws criminalising outsiders have an even greater incentive to contain an express harm requirement.

Recommendation 2

The Commission’s primary recommendation is that the general secrecy offences in Part 5.6 of the Criminal Code should include an express

requirement that, for an offence to be committed, the unauthorised disclosure caused, or was likely or intended to cause, harm to an essential public interest. Those essential public interests should be confined to those identified by the ALRC (referred to at paragraph 38 of this submission).

Recommendation 3

In the absence of an express harm requirement, the general secrecy offences should cover a narrowly defined category of information where the harm to an essential public interest is implicit or the harm is to a relationship of trust between individuals and the Australian Government integral to the regulatory functions of government.

Recommendation 4

At the very least, an express harm requirement should be included in the offences relating to non-Commonwealth officers.

5.3 Domestic intelligence agencies

43. The definition of ‘inherently harmful information’ in section 121.1 includes any information that was obtained or made by a domestic intelligence agency or a foreign intelligence agency in connection with the agency’s functions.
44. The Commission acknowledges the generally accepted position by the ALRC that harm is implicit in any disclosure of information obtained or generated by intelligence agencies and that specific secrecy offences could be justified in this context.
45. The AGD secrecy review also considered:

[T]he harm to an essential public interest caused by the disclosure of some narrowly defined categories of information can be implied from the inherent sensitivity of these types of information. For example, the harm caused by the disclosure of some types of national security and law enforcement information – including information obtained or generated by intelligence agencies, the disclosure of which could cause grave harm to Australia’s national security and foreign partnerships – can be implied.²⁵
46. However, this does not mean that *all* information obtained by or generated in relation to a domestic intelligence agency in connection with the agency’s functions, as provided for in section 121.1, would cause harm if disclosed publicly.²⁶
47. The INSLM’s Issues paper highlights the potential for broad application:

- to non-intelligence information of agencies in the course of managing their affairs, for example disclosures relating to ‘widespread sexual harassment’, procurement fraud or other maladministration that could be caught as ‘inherently harmful information’ but could be publicly disclosed by other means;²⁷
 - to the expanded functions of domestic intelligence agencies in non-intelligence areas; and
 - notes that the provision is not time limited so disclosures of harmful information in the past are penalised in the same way as present harmful disclosures.
48. The category of ‘information relating to the operations, capabilities or technologies of, or methods or sources used by, a domestic or foreign law enforcement agency’, is similarly broad. It does not follow that all information in this category would cause harm if disclosed publicly.
49. The Commission considers that ‘there is a compelling public interest in the Australian public having at least a general awareness of these matters’²⁸ and that those who work in intelligence agencies are not immune from scrutiny by virtue of their profession:
- The secrecy provisions should not shield them from the same scrutiny as any other government department. Budgets and other administrative matters relating to security and similar agencies are a matter of public interest. The laws should be amended to allow journalists to report on intelligence, security and military misconduct where exposure does not impact on the security of the nation. Enshrining a culture of secrecy over all matters relating to particular organisations can enable wrongdoing to occur unchecked, which itself poses a risk to the national interest.²⁹
50. The Commission considers that criminalising all information made or obtained in connection with a domestic intelligence agency’s functions is neither necessary or proportionate to achieve the legitimate objective of national security.

Recommendation 5

The definition of ‘inherently harmful information’ in section 121.1 should be narrower in scope and only apply to disclosures of information that would necessarily cause some specific, identifiable harm to an essential public interest.

5.4 Security classified information

51. 'Inherently harmful information' includes the category of 'security classified information', defined as information that has a 'security classification' within the meaning of section 90.5 of the Criminal Code. Under that section, 'security classification' means a classification of secret or top secret that is applied in accordance with the policy framework developed by the Commonwealth. Strict liability applies to the element that a security classification is applied in accordance with such policy.³⁰
52. The Commission notes that the ALRC 2009 Secrecy Laws Report did not recommend a secrecy offence to cover 'national security classified information'. It preferred an approach that recognised that particular government agencies that obtain and generate sensitive information of this kind may need an agency-specific secrecy offence. It stated that:
- while a category may be directed to protecting a legitimate public interest, the disclosure of information within that category will not always cause, or be likely to cause, harm. In addition, the ALRC notes the findings of previous reports that the security classification assigned to information is not necessarily an accurate indicator of the harm that could be caused by the unauthorised disclosure of the information.³¹
53. Similar views were reflected by the Parliamentary Joint Committee on Intelligence and Security (PJCIS) in its review of the proposed provisions of the EFI Act. Submitters to the PJCIS noted a number of problems with a broad security classification being the basis for criminal sanctions, including:
- evidence that documents are routinely 'over-classified' or classified incorrectly
 - evidence that classification decisions are not routinely re-evaluated over time
 - the approach of basing liability on the label attaching to a document did not necessarily reflect the harm that would be caused by its release
 - there was no mechanism to test the appropriateness of document classifications.³²
54. For example, the then Inspector General of Intelligence and Security (IGIS) advised the PJCIS that:
- As Inspector-General, I frequently see documents that appear to be overclassified or documents that may have been correctly classified when

created but would now warrant a lower classification because of the passage of time or authorised public disclosure of related information.³³

55. At that time, the IGIS observed that there was a tendency to over-classify documents 'to be safe',³⁴ although the Commission notes the later IGIS report referred to at [2.34] of the INSLM's issues paper that found no evidence of 'systemic issues' related to inappropriate classification of documents from intelligence agencies.
56. Evidence of over-classification and failure to reclassify documents had been given to the ALRC as part of its previous review. A UK White Paper prepared at the time of developing the *Official Secrets Act* was candid about the problems with deeming provisions based on security classifications, saying:

The fact that a document will be classified at a certain grade is not evidence of likely harm; it is only evidence of the view of the person who awarded the classification. Moreover, it is evidence only of the view taken at the time of classification; circumstances may have changed by the date of the disclosure.³⁵
57. While there may be guidelines produced by the Executive from time to time about how such security classifications are to be applied, the Commission considers that it is not appropriate for the 'Protective Security Policy Framework', to be a determinant of an element of a serious offence. Setting the parameters of a criminal offence by reference to policy or guidelines, which can be changed at any time without Parliamentary oversight or a mechanism for disallowance, is inconsistent with Australia's international obligations.³⁶
58. The Commission considers that any criminal offence that is based on the security classification of documents requires a way of ensuring that those classifications were actually applied correctly and are still valid. It is not appropriate in those circumstances for strict liability to apply to that element.

Recommendation 6

Strict liability should not apply to the element that a classification is applied in accordance with the policy framework developed by the Commonwealth.

5.5 'Dealing with' information

59. The offences in sections 122.1(2) and 122.2(2) prohibit 'dealing with' inherently harmful information or information that causes, will cause

or is likely to cause harm to Australia's interests by Commonwealth officers.

60. 'Deal' covers a wide range of conduct, including receiving, possessing or otherwise making the secrecy-regulated information available.³⁷
61. The 'dealing with' offence also applies to any person (not just officials) who discloses specified types of information, including information that has a security classification of SECRET or TOP SECRET applied in accordance with a policy framework developed by the Commonwealth.³⁸ Provisions that apply to 'outsiders' require careful consideration of Australia's obligations under the ICCPR. Non-Commonwealth officers have no formal relationship with the Commonwealth and no duty of confidence.³⁹
62. Previous concerns have been raised that the offence of 'dealing with' information has the potential for criminal liability to attach to the 'mere receipt' or possession of information.⁴⁰
63. The AGD Secrecy Review considered that unsolicited receipt or other unwitting dealings will not be sufficient to reach the threshold of intention required by the general secrecy offence provisions in Part 5.6.⁴¹
64. However, the Parliamentary Joint Committee on Human Rights (PJCHR) has noted:

given that 'deals' is defined to include 'receive' there may still be a degree of uncertainty or confusion as to whether a person does or does not have the requisite intention with respect to that conduct (that is, receiving information).⁴²
65. The uncertainty and breadth of the provisions may suggest, in practical terms, that there is an obligation on a person to proactively act to avoid receiving 'classified information'. The Commission considers that this would be inconsistent with the general principles of criminal responsibility and shifts the burden of protecting potentially sensitive Commonwealth information to people who do not work for the Commonwealth.⁴³
66. As illustrated by the raids by the AFP of the home of journalist Annika Smethurst and the Sydney offices of the Australian Broadcasting Corporation, journalists and media organisations can become the subjects of law enforcement and intelligence powers based on the leaking of secret documents. The nature of their work involves the receipt, possession, and dissemination of information, including information that others (including governments) might prefer not to be

disclosed. While journalists may need to make decisions about whether or not to publish material that is provided to them, in light of their assessment of the scope of secrecy offences and available defences, the Commission considers that it would be inappropriate to expose them to criminal sanctions merely for the initial receipt of information.

67. The freedom of the press is guaranteed in article 19 of the ICCPR and it is vital that laws which engage the right are carefully crafted to ensure that they apply only in circumstances where strictly necessary, in pursuit of a compelling public interest, such as the protection of the community or of national security.

Recommendation 7

The general secrecy offence provisions in Part 5.6 should expressly provide that unsolicited receipt or other unintentional dealings will not be sufficient to reach the threshold of intention required by those provisions.

6 Proposed new general secrecy offence

68. Section 122.4 currently provides for a general offence relating to the unauthorised disclosure of information by Commonwealth officers who breach a duty imposed by another law not to disclose the information. This offence is due to sunset on 29 December 2024.⁴⁴
69. The AGD has proposed to replace it with an offence informed by the duty not to disclose information that applies to APS employees under reg 7 of the Public Service Regulations 2023 (Cth), but that is sufficiently broad to capture all individuals providing services to the Commonwealth, whether paid or not.⁴⁵
70. The proposed offence seeks to ensure that Commonwealth officers and contracted service providers do not disclose information obtained in connection with their employment or the provision of the service, where that disclosure would be 'prejudicial to the effective working of government' or where the information was communicated to them in confidence and the disclosure would breach that confidentiality obligation. Embarrassment to the government would not be sufficient to establish prejudice.
71. The AGD suggests that a new general secrecy offence would further support the reduction of specific secrecy offences and is intended to address potential gaps as highlighted by the alleged PwC Australia breach. However, the Commission is concerned that an offence based

on such broad thresholds may be inconsistent with the implied right to freedom of expression in article 19 of the ICCPR.

72. The ALRC did not consider that ‘prejudice to the effective working of government’ was an essential public interest to justify protection by a secrecy offence. Rather, that ‘prejudice to the effective working of government was a suitable statement of harm in the context of administrative disciplinary sanctions’ such as those available under the APS Code of Conduct obligations found in s 13 of the *Public Service Act 1999* (Cth), to which reg 7 of the Public Service Regulations give content.⁴⁶
73. The Commission agrees with the ALRC’s consideration that ‘to warrant a criminal penalty, disclosures must harm more than the effective working of government or commercial or personal interests’.⁴⁷
74. The low thresholds contemplated by the proposed ‘catch all’ offence do not strike the right balance between the public interest in open and accountable government and adequate protection for Commonwealth information that should legitimately be kept confidential. In the absence of tighter framing, the requirement of prejudice to the effective working of government and enforcing the confidentiality obligations of Commonwealth officers when dealing with sensitive information, is more appropriately dealt with by way of administrative and disciplinary frameworks.
75. It is proposed that the new general secrecy offence would not override existing whistleblowing frameworks and individuals could continue to provide information under the *Public Interest Disclosure Act 2013* (Cth) (PID Act) and to integrity bodies. The Commission has highlighted some of the existing deficiencies in the protection of whistleblowers as part of the government’s public sector whistleblowing reforms.⁴⁸ These include the lack of adequate protection for preparatory acts under the PID Act, even if the conduct was in the public interest (as highlighted in the case of Richard Boyle and the ATO’s use of garnishee notices), and the absence of civil actions for compensation for reprisals under the *National Anti-Corruption Commission Act 2022* (Cth).
76. The Commission reiterates that ‘[t]he policy rationale for granting immunities for making a public interest disclosure is that the public benefit of being able to investigate allegations of serious wrongdoing is more important than adherence to a secrecy norm that would have otherwise prevented that alleged wrongdoing from being investigated’.⁴⁹

77. Strengthening protections for whistleblowers who make disclosures that are in the public interest gives effect to the right to freedom of expression and the public's right to know, as established under article 19 of the ICCPR.
78. The Commission considers that a question arises as to whether the proposed, potentially broader general secrecy offence is necessary to replace the 'unauthorised disclosure' of information by Commonwealth officers in section 122.4, noting the ALRC's recommendation that administrative and disciplinary frameworks were more appropriate for these kinds of disclosures.
79. The ALRC has also preferred the approach that 'particular government agencies that obtain and generate sensitive information of this kind may need an agency-specific offence'.
80. The general secrecy offences in sections 122.1 and 122.2 which already apply to Commonwealth Officers and their contractors, aim to capture conduct that is sufficiently serious to warrant criminal penalties.
81. The Commission notes that there does not appear to be a general offence as broad as the one proposed in the other 5-Eyes countries.⁵⁰

Recommendation 8

The Commission considers the proposed new general secrecy offence which targets 'unauthorised disclosures' of information by Commonwealth officers is unnecessary and current section 122.4 which it intends to replace, should be permitted to sunset on 29 December 2024.

Recommendation 9

If the proposed new general secrecy offence is introduced, it should be narrowed in scope to capture unauthorised disclosures of information that will result in some specific, identifiable harm to an essential public interest.

Recommendation 10

If the proposed new general secrecy offence is introduced, there should be strengthened protections within the existing frameworks to better protect whistleblowers who make disclosures that are in the public interest.

7 Safeguards outside the Criminal Code

82. Safeguards that exist outside of the Criminal Code, which are intended to ensure any investigations and prosecutions for a suspected breach of the Criminal Code are in the public interest, include the:
- AFP's 'Operational Prioritisation Model' – informs decisions on operational priorities and requires consideration of the potential harm to individuals, the community or Australia
 - AFP National Guideline on sensitive investigations – extends to any investigation of a 'professional journalist or news media organisation' that is of significant interest to the Australian community. Provides additional scrutiny through senior staff involvement, regular review, wider consultation and escalation of matters to the Sensitive Investigations Oversight Board.
 - Ministerial Direction from the Attorney-General issued to the AFP – who expects that the AFP considers the importance of a free and open press and the broader public interest implications before considering investigative action involving a professional journalist or news media organisation.
83. The 'Prosecution Policy of the Commonwealth' also requires that before the CDPP prosecute the case, it must be evident from the facts of the case, and all the surrounding circumstances, that the prosecution would be in the public interest. The CDPP considers a range of factors in assessing the 'public interest', including actual or potential harm, alternatives such as disciplinary proceedings and possible defences.
84. While these policies provide some protection and oversight, the decisions that are made in accordance with those policies, are not reviewable. They can also be subject to change at any time with no broader oversight. These factors limit their meaningful protection.
85. The Commission considers that ultimately, policies and guidelines do not replace the need for more tightly framed secrecy provisions in Part 5.6. of the Criminal Code, that are aimed at targeting disclosures that harm essential public interests.

8 Defences and other issues

8.1 Journalists' defence

86. Section 122.5(6) provides that it is a defence to a prosecution for a general secrecy offence if the person communicated, removed, held or otherwise dealt with relevant information:
- in their capacity as a person engaged in the business of reporting news, presenting current affairs or expressing editorial or other content in news media, and
 - at the time, the person reasonably believed that engaging in that conduct was in the public interest.
87. The scope of the journalists' defence creates uncertainty in identifying who is 'engaged in the business of reporting news'. As noted by the Law Council of Australia, 'the arbitrary definition of journalist or a person engaged in "news media" is an insufficiently precise criterion to condition criminal liability and is likely to produce unjustifiable discrepancies'. For example:
- A person who supplied information (e.g. about malpractice in the prosecution process) to a journalist would have no defence but the person who reported it in the news media would have a defence. The policy of punishing those who deal with such information outside the news media also requires justification.⁵¹
88. Further, it is unclear whether the defence applies more broadly to other persons who are not strictly speaking, in the 'business' of reporting news such as 'freelance or self-employed commentators including internet bloggers, who may be remunerated for intermittent reporting work'.⁵²
89. Part of the difficulty is that the term 'public interest' is not defined in the defence. There are some matters that are specified as *not* in the public interest (such as the dealing with or holding of information that would publish the identity of an intelligence officer, contravene witness protection laws or harm/prejudice the health or safety of the public), however no guidance is provided for factors that 'favour allowing the dealing with or holding of information' in the public interest:
- The determination will therefore rely on judicial interpretation under the common law. In the absence of factors or criteria which suggests what may amount to the public interest, there may be uncertainty for

journalists in the likely application of the defence provision. This may have a chilling effect on fair and accurate reporting.⁵³

90. The Commission agrees with the Law Council of Australia that there would be value in amending the journalists' defence to non-exhaustively identify factors that may be considered for the purposes of determining whether the dealing with or holding of information may be in the public interest.

Recommendation 11

Section 122.5(6) should be amended to clarify the scope of persons 'engaged in the business of reporting news' and the term 'news media'.

Recommendation 12

Section 122.5(6) should be amended to identify factors that may be considered for the purposes of determining whether the dealing with or holding of information may be in the public interest.

8.2 Reverse onus of proof

91. Section 122.5 places the evidentiary burden on the defendant to require them to present evidence showing that they 'reasonably believed' that engaging in the conduct such as publishing the information, was in the 'public interest'. Once the defendant's evidential burden is discharged, the prosecution must prove beyond a reasonable doubt that the person did not hold or deal with the information in the public interest.
92. The Commission acknowledges that it is a general principle of criminal law that a defendant bears the onus of proving a defence where the matter is peculiarly within the defendant's knowledge.⁵⁴
93. The AGD review considered that the evidential burden 'strikes an appropriate balance' and that 'journalists should readily be able to point to evidence that there is a reasonable possibility that their conduct was in the public interest'.⁵⁵
94. The PJCHR has observed however that:
- The justification for reversing the evidential burden of proof is generally that the defendant 'should be readily able to point to' the relevant evidence or the defendant is 'best placed' to know of the relevant evidence. However, this does not appear to be sufficient to constitute a proportionate limitation on human rights. It was unclear that reversing the evidential burden is necessary as opposed to including additional elements within the offence provisions themselves.⁵⁶

95. The uncertainty of ‘public interest’ factors does not instil confidence that a matter would be ‘peculiarly within the knowledge of the defendant’. It does not appear that journalists would be better placed than the prosecution to assess what factors would be in the public interest for the purposes of the defence in section 122.5(6). It may mean that journalists are not readily able to discharge their evidential burden and lead to a chilling effect. The reverse onus does not appear to be a proportionate limitation on the rights to be presumed innocent.
96. The Commission considers that the current onus on the defendant imposes an unreasonable burden on the freedom of expression and risks interfering with the right to be presumed innocent until proven guilty according to law as provided for in article 14(2) of the ICCPR.
97. The AGD considered that:

If the evidential burden were reversed, it would be very difficult for the prosecution to prove beyond a reasonable doubt that a journalist’s conduct was not in the public interest, given the concept of public interest is very broad. This would undermine the ability to prosecute the general secrecy offences, and their overall deterrent effect.⁵⁷
98. The Commission takes the view however that this highlights the support for guidance concerning favourable public interest factors and that a high bar for the prosecution of very serious secrecy offences is necessary to protect the legitimate work of journalists and civil society groups.

Recommendation 13

Section 122.5(6) should be amended to remove the evidential burden on the defendant to establish that the disclosure was in the public interest.

8.3 Other defences

99. Section 122.5 also sets out other defences to the general secrecy offences, including where information is communicated for the purpose of obtaining or providing legal advice, and where the information is communicated to a court or tribunal.
100. The Commission agrees with the Law Council of Australia’s recommendation that these defences require reconsideration and should be reframed as exceptions in Part 5.6:

There is an important distinction between an ‘exception’, which limits the scope of conduct proscribed by a secrecy offence, and a ‘defence’, which

may be relied on to excuse conduct that is prohibited by a secrecy offence. Such an exception (as opposed to a defence) would be in line with other secrecy offences such as paragraph 35P(3)(e) of the ASIO Act. This is particularly important given the definition of ‘causing harm to Australia’s interests’ in paragraph 121.1(c) includes ‘harm or prejudice Australia’s international relations in relation to information that was communicated in confidence’. This would potentially capture a lawyer engaged to represent a government, authority or organisation, who communicates or receives information on behalf of their client.⁵⁸

Recommendation 14

Section 122.5 should be amended to include an exception for where the conduct is engaged in for the purpose of obtaining legal advice or if the disclosure was for the purposes of any legal proceedings concerning the offence.

8.4 Role of the Attorney-General

101. Section 123.5 requires that the written consent of the Attorney-General is obtained before committing a person for trial for an offence against Part 5.6. For proceedings that relate to security classified information, a further requirement that the Attorney-General certify the appropriateness of the security classification applies.⁵⁹
102. In considering the EFI Bill, the PJCIS considered that, due to the broad scope of the proposed secrecy offences and ‘the potential for highly sensitive cases to arise, including in relation to journalists and national security matters’, it was appropriate that the Bill be amended so that the Attorney-General be required to consent to any prosecution and be required to consider applicable defences.⁶⁰
103. While the consent of the Attorney-General to prosecute may provide an additional safeguard to protect public interest journalism, that discretion rests within the executive arm of government and introduces a political element to prosecutions.
104. The Commission considers, however, that it remains appropriate to retain the requirement in light of the additional safeguard it provides against inappropriate prosecutions. The requirement for consent provides an additional opportunity for scrutiny of processes, in recognition of the public interest served by journalism. The requirement for certification may also provide ‘a safeguard against over-classification of information and in recognition that the sensitivity of information can change over time’.⁶¹

105. These measures work alongside the independence of the CDPP to decide whether to prosecute secrecy offences under Part 5.6 while also promoting the right to liberty in article 9(1) of the ICCPR by requiring the Attorney-General to 'consider whether the conduct was authorised and therefore whether the accused has a defence available'.⁶²
106. The types of matters that the Attorney-General should have regard to in providing consent should be closely tied to the public interest in the particular matter being reported on and the overall public interest in transparency and accountability of government. The AGD has noted that for other offences in the Criminal Code that affect Australia's international relations or national security, the requirement for consent, 'allows the Attorney-General to have regard to considerations beyond those which the CDPP considers in deciding whether to prosecute, such as international law, practice and comity, international relations and other public interest considerations'.⁶³
107. Relevantly, the Commission considers that tighter framed secrecy provisions that more accurately target disclosures resulting in a specific harm to an essential public interest, is an essential precursor to protect individual rights.

Endnotes

- ¹ Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (December 2009) ('ALRC 2009 Secrecy Laws Report'), available at: <https://www.alrc.gov.au/wp-content/uploads/2019/08/ALRC112.pdf>.
- ² Attorney-General's Department, *Review of Secrecy Provisions*, Final Report (21 November 2023) ('AGD Secrecy Review'), available at: <https://www.ag.gov.au/sites/default/files/2023-11/secrecy-provisions-review-final-report.pdf>.
- ³ Australian Human Rights Commission, *Submission No 17 to the PJCIS Inquiry into the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017* (24 January 2018), available at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/EspionageInterference/Submissions
- ⁴ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
- ⁵ ALRC 2009 Secrecy Laws Report, at [5.92].
- ⁶ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
- ⁷ UN Human Rights Committee, *General Comment 34: Article 19: Freedoms of opinion and expression*, 102nd Sess, (12 September 2011), UN Doc. CCPR/C/GC/34, [2]-[3].
- ⁸ UN Human Rights Committee, *General Comment 34: Article 19: Freedoms of opinion and expression*, 102nd Sess, (12 September 2011), UN Doc. CCPR/C/GC/34, [22].
- ⁹ *International Covenant on Civil and Political Rights*, article 19(3)(a).
- ¹⁰ *International Covenant on Civil and Political Rights*, article 19(3)(b).
- ¹¹ UN Human Rights Committee, *General Comment 34: Article 19: Freedoms of opinion and expression*, 102nd Sess, (12 September 2011), UN Doc. CCPR/C/GC/34, [25].
- ¹² UN Human Rights Committee, *General Comment 34: Article 19: Freedoms of opinion and expression*, 102nd Sess, (12 September 2011), UN Doc. CCPR/C/GC/34, [34].
- ¹³ UN Human Rights Committee, *General Comment 34: Article 19: Freedoms of opinion and expression*, 102nd Sess, (12 September 2011), UN Doc. CCPR/C/GC/34, [30].
- ¹⁴ Explanatory Memorandum to the *National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017*, [40], [42].
- ¹⁵ Australian Human Rights Commission, *Submission No 17 to the PJCIS Inquiry into the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017* (24 January 2018), p 3.
- ¹⁶ UN Human Rights Committee, *General Comment No. 32: Article 14: Right to equality before courts and tribunals and to a fair trial*, 19th Sess, (23 August 2007), UN Doc. CCPR/C/GC/32, [30].
- ¹⁷ Parliamentary Joint Committee on Human Rights, *Guidance Note 2 – Offence provisions, civil penalties and human rights* (December 2014, p 2, available at https://www.aph.gov.au/-/media/Committees/Senate/committee/humanrights_ctte/guidance_notes/guidance_note_2/guidance_note_2.pdf?la=en&hash=7D924E6F330668005C288BCDCDAC6ADE1719502D
- ¹⁸ Section 122.3 provides for aggravated offences which attract the maximum penalty of 10 years imprisonment for conduct involving communication and 5 years for other dealings.
- ¹⁹ Law Council of Australia, *Submission to the AGD Review of Secrecy Provisions* (22 May 2023), [62].

- ²⁰ 'International relations' has the meaning given by s 10 of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth).
- ²¹ Criminal Code, s 121.1(1)(a).
- ²² ALRC 2009 *Secrecy Laws Report*, at [4.168].
- ²³ ALRC 2009 *Secrecy Laws Report*, p 23-34.
- ²⁴ AGD *Secrecy Review*, at [62].
- ²⁵ AGD *Secrecy Review*, at [65].
- ²⁶ ALRC 2009 *Secrecy Laws Report*, at [4.167].
- ²⁷ Independent National Security Legislation Monitor, Issues paper in relation to the Review of secrecy offences in Part 5.6 of the *Criminal Code 1995* (January 2024), [2.46].
- ²⁸ Australia's Right to Know, *Submission to the AGD Review of Secrecy Provisions* (5 May 2023), [2.1(c)].
- ²⁹ Alliance for Journalists Freedom, *Submission to the AGD Review of Secrecy Provisions* (10 May 2023), p 8.
- ³⁰ *Criminal Code* (Cth), s 90.5(1A).
- ³¹ ALRC 2009 *Secrecy Laws Report*, at [8.61].
- ³² Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017*, (2018) at [3.110]ff.
- ³³ Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017*, (2018) at [3.114].
- ³⁴ Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017*, (2018) at [3.115].
- ³⁵ ALRC 2009 *Secrecy Laws Report*, at [8.51] and reports cited in that paragraph.
- ³⁶ Independent National Security Legislation Monitor, Additional Information – Secrecy Review, *Academic Roundtable on Part 5.6* (1 February 2024), p 2.
- ³⁷ *Criminal Code* (Cth), Part 5.2.
- ³⁸ *Criminal Code* (Cth), s 122.4A.
- ³⁹ Independent National Security Legislation Monitor, *Report on the impact on journalists of section 35P of the ASIO Act* (October 2015), at [43]
- ⁴⁰ *Criminal Code* (Cth), s 90.1.
- ⁴¹ AGD *Secrecy Review*, at [161].
- ⁴² Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017* (2018), [2.305] – [2.306].
- ⁴³ Independent National Security Legislation Monitor, Issues paper in relation to the Review of secrecy offences in Part 5.6 of the *Criminal Code 1995* (January 2024), Issue 27.
- ⁴⁴ *Criminal Code* (Cth), s 122.4(3).
- ⁴⁵ AGD *Secrecy Review*, [141]–[151].
- ⁴⁶ ALRC 2009 *Secrecy Laws Report*, at [12.52].
- ⁴⁷ ALRC 2009 *Secrecy Laws Report*, at [8.5].
- ⁴⁸ Australian Human Rights Commission, *Submission to the AGD in relation to the Public sector whistleblowing reforms – stage 2* (22 December 2023), at [111] – [132].
- ⁴⁹ Australian Human Rights Commission, *submission to the AGD in relation to the Public sector whistleblowing reforms – stage 2* (22 December 2023), at [115].
- ⁵⁰ Independent National Security Legislation Monitor, Issues paper in relation to the Review of secrecy offences in Part 5.6 of the *Criminal Code 1995* (January 2024), at [2.88].
- ⁵¹ Law Council of Australia, *Submission to the AGD Review of Secrecy Provisions* (22 May 2023), [88].

⁵² Law Council of Australia, *Submission to the AGD Review of Secrecy Provisions* (22 May 2023), [93].

⁵³ Law Council of Australia, *Submission to the AGD Review of Secrecy Provisions* (22 May 2023), [94].

⁵⁴ Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011), at [4.3.1]; *Criminal Code* (Cth), s 13.3(3).

⁵⁵ *AGD Secrecy Review*, at [212].

⁵⁶ Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report*, Report 2 of 2018 (13 February 2018), at [1.53]

⁵⁷ *AGD Secrecy Review*, at [212].

⁵⁸ Law Council of Australia, *Submission to the AGD Review of Secrecy Provisions* (22 May 2023), [85].

⁵⁹ *Criminal Code* (Cth), s 123.5.

⁶⁰ Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017* (2018), at [5.140].

⁶¹ *AGD Secrecy Review*, at [226], [168]

⁶² Revised Explanatory Memorandum to the *National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017*, at [24].

⁶³ *AGD Secrecy Review*, at [223].