AUSTRALIA'S RIGHT TO KNOW SUBMISSION TO THE SENATE LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE INQUIRY INTO THE *SECRECY PROVISIONS AMENDMENT (REPEALING OFFENCES) BILL 2026*

31 MAY 2026

Australia's Right to Know coalition of media organisations (**ARTK**) welcomes the opportunity to make a further submission to the Senate Legal and Constitutional Affairs Legislation Committee inquiry into the *Secrecy Provisions Amendment (Repealing Offences) Bill 2026* (**the Bill**).

This submission supplements the matters raised in our initial submission of 14 May 2025 (**Initial Submission**).

As noted in the previous submission, the Bill is presented as the outcome of the Attorney-General's Department (AGD) review of Commonwealth secrecy laws and the Independent National Security Legislation Monitor's (INSLM) review of secrecy laws in Part 5.6 of the Criminal Code.

Attached to this Supplementary Submission is a table which summarises ARTK's concerns with the Bill and ARTK's position on the matters raised in the Initial Submission and this Supplementary Submission. It also maps the relevant aspects of the AGD review; the INSLM review and the Government response to that review; and the Bill itself.

It is also important to note here that ARTK has engaged fully in all consultations regarding secrecy laws and has expressed the preferred outcome to be an exemption for journalism and journalists in relation to secrecy offences. Journalists should not have to risk jail time for doing their jobs.

While to date an exemption not been accepted, it remains ARTK's preferred outcome. Notwithstanding this, we have, continue to engage constructively on the development of law reform options in this area. Hence this supplementary submission to the Committee's deliberations regarding the Bill.

To ensure the Committee is fully aware of the ARTK submissions prior to the Bill, those submissions are also attached to this Supplementary Submission.

OVERVIEW OF THIS SUBMISSION

This submission identifies how the Bill deviates from the recommendations of the final reports of the AGD and INSLM reviews of secrecy laws – particularly regarding the appropriate framing of secrecy provisions.

Those reviews were initiated to streamline the statute book and eliminate existing incoherence.

It is therefore of particular concern that the proposed news s122.4 offence introduces further incoherence.

ARTK believes that the following matters are fatal to the legitimacy and enforceability of the proposed offence:

1. The proposed new Criminal Code s122.4 offence applies regardless of whether there is, or likely to be, any harm to any public or national interest from the disclosure of information. AGD's claim to the contrary is incorrect. The unanimous recommendations made over a series of reports in both Australia and the UK and by the AGD, as accepted by both the Government and the INSLM, was that imposing criminal liability is only appropriate where unauthorised disclosure of government information would harm, or is reasonably likely to harm, an essential public interest.

2. Under the proposed new offence in s122.4 the disclosures which form the basis of a prosecution do not need to be harmful at all: they need only be an "*improper*" attempt to "*benefit*" a person (an inherently indeterminate standard without any harm or materiality thresholds). This significantly enlarges the scope of criminal liability compared to the earlier AGD proposal.

3. The new proposal instead introduces an indeterminate quasi-moral standard (an "*improper*" use of information) which is contrary to rule of law and free speech principles.

4. It is likely unconstitutional. It burdens constitutionally protected political communication and is not reasonably appropriate and adapted to the legitimate purposes it seeks to address. The offence extends to a broad range of other disclosures that have nothing to do with the categories of information that could or should legitimately be protected by secrecy laws. It is therefore not a proportionate and targeted legislative response to protecting those essential public interests which, in a liberal democracy, may properly be the subject of a secrecy offence.

5. It duplicates and overlaps with a range of existing offences. This simply creates more confusion and incoherence in the criminal law. That has particular ramifications for public interest journalism as an indeterminate criminal offence with serious penal implications will have an obvious chilling effect on editorial decision making. A legal landscape with 520 + duplicative secrecy offences is impossible to navigate. Government should have used this opportunity to remove many more of the existing, poorly structured standalone secrecy offences which partially or fully overlap with the existing general secrecy offenses in Criminal Code Part 5.6.

As a result, ARTK is of the view that, rather than developing an indeterminate offence of the type now proposed, the current reform process should have instead focused on a targeted new general secrecy

offence focused on a narrow range of harmful disclosure categories to address any clearly identifiable gaps in existing offences.

So much was recommended, as a matter of general approach, by the AGD in its 2023 review. So much was also recommended by the INSLM review. The INSLM review also provided a constructive and principled roadmap to guide that exercise. The Government itself committed, in principle, to implementing the INSLM's recommended approach in its response to the INSLM review. The proposed offence fails, without explanation, to adopt that approach.

ARTK endorses the position of the Law Council submission on the general issue of exceptions vs defences (see Law Council Submission at [89]). The current journalist defence in Criminal Code s 122.5(6) should accordingly be recast as an exception. The INSLM recommended that consideration be given to this issue (INSLM Recommendation 14). ARTK is of the view that the onus of proof must be addressed at the same time as the need for an exception.

1. THE PROPOSED NEW s122.4 INSIDER OFFENCE SHOULD BE REMOVED

Bill: Schedule 1, Item 1

1.1 The lack of any harm element in the proposed s122.4 offence is fatal to the legitimacy of this proposed offence

The proposed new Criminal Code s122.4 offence applies regardless of whether there is, or likely to be, any harm to any public or national interest from the disclosure of information.[1] The claim by AGD that the offence "*would not capture communication or use of high-level, general or benign information*" is not correct.[2]

This failure defies the seemingly unanimous recommendations of the law reform community made over a series of reports in both Australia and the UK.[3] It also defies the earlier recommendation of AGD itself. AGD's 2023 *Review of Secrecy Provisions: Final Report* clearly stated that imposing criminal liability is only appropriate where unauthorised disclosure of government information would harm, or is reasonably likely to harm, an essential public interest.[4] This has now been adopted as the guiding principle for the development of all Commonwealth secrecy offences.[5]

In its 2023 report, AGD sought to apply this principle to formulate a proposed new secrecy offence which would target disclosures "*prejudicial to the effective workings of government*" or disclosures of information

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1 The reasons for this are explained in our Initial Submission at [1.2]. Other submitters reach the same conclusion – see Human Rights Law Centre Submission to the Inquiry at pp 8 -10; INSLM Submission to the Inquiry at [18] – [20] – see Submissions – Parliament of Australia

2 See AGD Submission to the Inquiry at p. 6 – see Submissions – Parliament of Australia. The AGD Submission may assume that some kind of harm or materiality requirement is implied by the requirement that a relevant use of information will satisfy the offence where it is "*reasonable to conclude that the use or communication of information is improper*". That is not supported by either the wording of the proposed section or its proposed legislative context and simply underscores the unacceptable indeterminacy of the proposed offence – see Initial Submission at [1.3].

3 The INSLM Secrecy Review gives a concise overview at [7.60] – see Secrecy Offences – Review of Part 5.6 of the Criminal Code Act 1995 | INSLM. A useful summary is at the INSLM Submission to this Inquiry at [18] – [21].

4 AGD Review of Secrecy Provisions: Final Report at [45] – [50] – see Review of Secrecy – Provisions Final Report

5 See Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers – in particular [11.2] A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers

"*communicated in confidence [where] the disclosure would breach that confidence."*[6] That proposal had significant flaws, as recognised and explained by the INSLM.[7] It was however an *attempt* to create an offence targeted to preventing harms to *asserted* essential public interests.

The proposed new offence in s122.4 however significantly enlarges the scope of criminal liability compared to the earlier AGD proposal. The disclosures which form the basis of a prosecution do not need to be harmful at all: they need only be an "*improper*" attempt to "*benefit*" a person (an inherently indeterminate standard without any harm or materiality thresholds and any need to establish improper motive on the part of the accused). For this reason, the current proposal does not "*broadly*" implement the AGD's earlier recommendations, as now asserted by AGD.[8] The initial AGD proposal with a *poorly conceived* harm element has been substituted by a proposed new offence with no harm element at all.

There are very good reasons for the consensus view that secrecy offences should only target disclosures of government information where:

- some form of clear harm has or is likely to result from disclosure;
- that harm is to a clearly definable public interest (i.e. nation security etc);
- that harm of a type or gravity which warrants criminal sanction (the most serious punishment available) and not some lesser sanction (i.e. there is serious harm).

In liberal democracies which respect the rule of law, all criminal laws must be targeted to conduct which causes (or is likely to cause) some clear harm to either the legitimate interests of the State, the community or other individuals. As said by John Stuart Mills in *On Liberty*:

> *"That the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others."*[9]

This is how the law maintains its legitimacy. Unlike other legal and political systems, by only criminalising conduct which causes actual or likely serious harm to some clearly defined public or other relevant interest, the Australian criminal law does not (or at least should not) imprison people:

- for perceived immorality, religious or political non-conformity or simple social difference;
- for challenging or disrespecting current political authority (i.e. *lèse majesté*); or
- where their conduct, while harmful at some level, is of a type or severity that can be effectively dealt with by a lesser sanction than imprisonment (i.e. balance and proportionality are key values and imprisonment is a last resort appropriate only when all other lesser sanctions are established to be ineffective).

These principles have key implications for the current Bill.

1.1.1 While the proposed new offence may protect against harms to certain public interests that may appropriately be the subject of secrecy or misconduct offences, it is not confined to such cases

6 AGD Review of Secrecy Provisions: Final Report at [141] – [151]
7 INSLM Secrecy Review at [7.12] – [7.62]
8 AGD Submissions to the Inquiry at p. 6
9 Mill, John Stuart. *On Liberty*. London: John W. Parker and Son, 1859.

(a) Harms already recognised by the law reform community as appropriate for inclusion in secrecy laws

To ensure the effective functioning of a national government, it may be appropriate for *certain* information held by government to be kept confidential by secrecy laws *in some circumstances* for *some appropriate period of time*.

A series of law reform reports in both Australian and the UK have, over several decades, identified the governmental and other interests which may legitimately be protected by these kinds of secrecy laws in a mature liberal democracy. These include interests such as national security and defence, international relations, law enforcement and public safety, the need to protect the personal privacy of members of the community and, in limited cases, the need to protect certain commercial and financial interests.[10]

It appears, given its sweeping breadth, that the new s122.4 may apply to protect information falling within some or all of these recognised categories. For example, disclosure of information that damages national security with the intention to "*benefit*" a journalist or the public at large through publication by the journalist may satisfy the new offence through the disclosure of such information being regarded as "*improper*".[11]

This being said, most of the information falling within these legitimate, recognised categories are already protected by the existing general offences in Criminal Code s122.1, 122.2 and 122.4A (these provisions were drafted in part to reflect the recommendations of the ALRC, which captured the current state of law reform thinking on the issues of what interests were and were not appropriate to protect through criminal laws). This means the proposed offence will simply introduce further incoherence in the criminal law by creating a new offence that duplicates offences already on the statute book.

The critical point, however, is that the proposed new offence in s122.4 is not limited to protecting information falling within the categories of information that the law reform community agrees could or should properly be protected by secrecy laws. The new offence instead extends to a broad range of other disclosures that have nothing to do with these topics. It is therefore not a proportionate and targeted legislative response to protecting those essential recognised public interests (such as national security, protection of public health and safety etc) which, in a liberal democracy, may properly be the subject of a secrecy offence.

(b) Harms caused to the integrity of government by the misconduct of public officials and others in positions of trust

It may also be accepted that, to function effectively as a national government, the Commonwealth may need to be able to criminally punish politicians, public servants and others involved in government for serious misconduct that constitutes an abuse of public trust.[12] Serious misconduct undermines the integrity of

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10 See Australian Law Reform Commission, Secrecy Laws and Open Government in Australia – Report 112, particularly from p.119.

11 We say "may" be treated as satisfying the defence because the element of the offence is fundamentally indeterminate, for the reasons we give in our Initial Submission at [1.3]. We do not accept the EM's assertions of what will satisfy the offence are correct.

12 The common law has long recognised this through the development of the common law offence of wilful misconduct in public office – see *Obeid v The King* [2026] HCA 1 at [14] - [15] per Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ.

government and the public's confidence in the integrity of government, its prevention is therefore a legitimate aim of the criminal law.

However, it is clear from the EM that it is at least intended that the proposed new offence goes far beyond serious misconduct and abuses of public trust. The EM asserts at [25] that the offence would "*plainly capture disclosures of confidential information where the parties to the information [sic] did not provide consent to disclosure*". This is an apparent attempt to recriminalise all existing statutory non-disclosure duties and therefore in substance reinstate the *sunsetting* version of s122.4. Simply disclosing *"confidential information"*, when all or most information within government can be described that way, is on no view serious misconduct and an abuse of public trust. It is at best regarded as a disciplinary matter.

In addition, the offence extends to a vast range of people in contractual or even voluntary relationships with the Commonwealth government. The proposed offence covers current and former "*Commonwealth officers*" and people who are or have been engaged to perform work for, or who have provided services to, any Commonwealth entity apart from the ABC or SBS. This means the offence is not targeted to people who are necessarily in any meaningful position of public trust. An offence that is designed to guard against *abuses of public trust* can self-evidently only apply to people *in positions of public trust.* The INSLM reasoned along similar lines, concluding: *"care should be taken [in extending criminal liability to non-officials] to ensure that [criminal liability] is only extended as far as is clearly necessary and that the class of people covered by the 'officials' offences continues to be those with a contract or some relationship of trust or duty with the Commonwealth*".[13]

The new offence is not limited to impropriety of people in a position of public trust. This is because, as explained in our Initial Submission at [1.4.1], the concept of intending to "*benefit*" any person goes beyond situations where a person *dishonestly* or *corruptly* seeks to confer a benefit for either *personal gain* or the *corrupt advantage* of a third party. The EM is explicit on this point, stating at [22]: "*The reference to a benefit is intended to encompass any material benefit*".

The *corrupt* or *dishonest* conduct that could properly be the subject of the new offence is, however, already dealt with by existing offences, including Criminal Code s142.2(1). Section 142.2(1) criminalises the *dishonest* use of information by public servants and government contractors to obtain a benefit or cause a detriment. The proposed s122.4 offence, therefore, simply introduces further incoherence in the criminal law by partially duplicating an offence already on the statute book. The legitimate use the new s122.4 serves is therefore unclear.

(c) Harms caused to the efficiency and neutrality of the public service

There may also be a public interest in ensuring an apolitical, impartial and efficient public service that is capable of loyally serving governments of different political persuasions.[14] The need to protect this public interest from harm, however, cannot justify a criminal law of the type now proposed.

The public interest in ensuring an apolitical, impartial and efficient public service is also of a nature that would justify *disciplinary sanctions* such as termination of employment, but not criminal sanction and imprisonment. This particular public interest is sufficiently protected by ensuring that those engaged in

13 INSLM Review at [7.48]

14 *Comcare v Banerji* (2019) 267 CLR 373 at [30] – [31] per Kiefel CJ, Bell, Keane and Nettle JJ.

activity that undermines an apolitical, impartial or efficient public service are *separated* from the public service. *Jailing* these people is obviously disproportionate in a legal system where imprisonment must be treated as the last resort.

Finally, protecting this particular public interest from harm could only justify restrictions on the current cohort of professional public servant employed under APS legislation, or persons who stand in as effective substitutes to the professional APS under labour hire arrangements. The proposed offence however extends much further. It covers current and former "*Commonwealth officers*" and people who are or have been engaged to perform work for, or who have provided services to, any Commonwealth entity apart from the ABC or SBS. This includes former public servants, whose conduct cannot credibly be taken to undermine the efficiency or apolitical running of the current APS. It also covers a vast number of people who in no way form part of the apolitical APS, including current and former Ministers, political staffers, and a vast and unclearly defined number of arms-length contractors and volunteers. The new offence, for this reason, is in no way *targeted* to protecting and maintaining an apolitical, skilled and efficient public service.

(d) Government secrecy for its own sake is never a legitimate object of the criminal law

Finally, it needs to be said categorically that a law that criminalises the disclosures by a vast number of Australians of information about their own government can never be justified when the law they are tried under does not use criteria tied to circumstances where disclosure does or could cause harm to the kinds of legitimate public interests that justify criminal law protections. A law that simply criminalises "*improper*" behaviour by public servants and a wide range of other persons involved in providing services to the Commonwealth is simply a law that criminalises people for disclosing potentially innocuous information (or more accurately, information which is only embarrassing or inconvenient to the government of the day or senior bureaucrats). This is particularly so if, as asserted in the EM, the existence of a duty of confidentiality arbitrarily imposed at the election of the government itself will render a person "*plainly*" liable to such an offence.

1.1.2 The failure to confine the operation of the law to dealing with harms to certain public interests that may appropriately be the subject of secrecy or misconduct offences means it is unconstitutional.

These policy concerns have a constitutional dimension. A Commonwealth law will be constitutionally invalid when:

- the law burdens political communication; and
- the law does not have a legitimate purpose (in the sense of being compatible with the maintenance of the constitutionally prescribed system of representative and responsible government); or
- the law has a legitimate purpose, but the law is not reasonably appropriate and adapted to advance that legitimate purpose in a manner compatible with the maintenance of the constitutionally prescribed system of representative government.[15]

The proposed new offence burdens constitutionally protected political communication. This is because the wide range of persons directly covered by the offence will be subject to prosecution when disclosing information when seeking to *inform* the public about the actions of its own government for the purposes of

15 *Clubb v Edwards* (2019) 93 ALJR 448 at [5] per Kiefel CJ, Bell and Keane JJ.

allowing the public to form views on the actions of its own government. Journalists, civil society actors, trade unions, academics and others who receive such information with a view to using that information to inform the community about the actions of its own government will also potentially be captured by the offence under the principles of extended criminal liability.[16] To this extent, the law burdens political communication.[17]

There may be constitutionally legitimate purposes served by the new offence, but for the reasons also just given, the new offence is in no defensible way targeted to or limited to giving effect to those legitimate purposes. It is therefore not "*reasonably appropriate and adapted*" to advancing any constitutionally legitimate purpose.

To the extent the law in its current broad operation can be said to have a purpose at all, that purpose appears to be the promotion of government secrecy and confidentiality as an end in itself. That is a fundamentally illegitimate purpose.

For these reasons, this law is likely unconstitutional.

1.1.3 Only offences with targeted harm elements can legitimately criminalise ideologically or public interest motivated offending

Criminal laws, to maintain their legitimacy, need fault elements. A fault element is a mental state held by the accused at the time they committed the physical elements of the offence. The need to satisfy a fault element when establishing criminal guilt ensures that people are not held criminally liable for conduct which is inadvertent, accidental, or which otherwise occurs in circumstances where the internal mental state of the defendant means that, in fairness, they should be excused from criminal liability.[18]

As recognised by the ALRC, when a secrecy offence contains a harm element, it is uncontroversial and logical to require as an associated fault element that the defendant:

- *knew* that such harm would result;
- *intended* such harm to result; or
- was *reckless* as to whether such harm would result.

A "guilty mind" may exist in these situations because of the relevantly significant appreciation by the defendant that their conduct may cause the very harm that is serious enough to warrant criminal sanction in the first place.[19] In contrast, an offence that contains no harm element and which instead makes criminal

16 The principles are explained in our Initial Submission at [5].

17 There may be cases where the offence applies to defendants who are not engaged in political communication. For example, defendants who dishonestly attempts to use government information for private commercial gain, without any public disclosure of the information, would not be engaging in political communication and so in any prosecution would not be able to raise issues about the validity of the law on freedom of information grounds. However, the offence is not confined to such cases and instead covers a much wider range of innocuous and legitimate public disclosures. The reasons for this are outlined in our Initial Submission at [1.2] – [1.4].

18 Certain defences like diminished responsibility or insanity also play a role.

19 The existence of this state is a necessary but not sufficient state of mind to impose criminal liability. The defences in Criminal Code s122.5 already reflect the fact that there are multiple situations (provision of information to lawyers to obtain legal advice, etc) where, notwithstanding the existence of a relevant appreciation of likely harm from a disclosure, criminal liability is nonetheless inappropriate.

liability depend on satisfaction of an indeterminate quasi-moral standard (relevantly the existence of an "*improper*" dealing with information) will authorise the prosecution of conduct which:

- causes no harm to anyone or anything;
- was not intended to cause harm;
- was not undertaken with reckless disregard of the possibility of causing harm; and
- was driven by what the defendant perceived to be a subjectively proper purpose.

This is illegitimate. It impermissibly imports a moral standard into the criminal law where there is no actual harm caused or threatened by breach of that moral standard. It risks criminalising ideologically motivated behaviour which is otherwise innocuous (or more accurately, it risks criminalising behaviour which is only embarrassing or inconvenient to the government of the day or senior bureaucrats). It allows the State to prosecute individuals for political opposition to the government of the day or for opposition to the policies of the bureaucracy.

1.1.4 Conclusion on absence of harm-elements and whether amendments should now attempt to address these deficiencies

ARTK concern is, ultimately, that the unacceptable indeterminacy of the offence makes it impossible to be clear about what is and is not criminalised. Our reasons for this are dealt with extensively in our Initial Submission at [1.3].

For the reasons just given, to the extent that certain matters appear to be criminalised by the new offence and are in fact appropriate to criminalise, the new offence is not appropriately targeted or limited to dealing with those matters. This is of significant concern from a policy standpoint given that criminal laws must be targeted to preventing real harms and must otherwise be proportionate in order to secure public legitimacy and acceptance.

In addition, many of the matters which are in fact appropriate to criminalise and which may be covered by the new offence are in fact already criminalised elsewhere in the Commonwealth statute book. This means that new offence just creates greater incoherence to the criminal law. This is despite the fact that the ostensible purpose of this very reform exercise was to reduce existing incoherence.

Rather than drafting an indeterminate offence of the type now proposed, the current reform process should have instead focused on developing a far better targeted offence focused on a narrow range of further harmful disclosure categories to address any clearly identifiable gaps in existing offences. So much was recommended, as a matter of general approach, by the AGD in its 2023 review and by the INSLM, who provided a constructive and principled roadmap to guide that exercise. The Government itself committed, in principle, to implementing the INSLM's recommended approach in its response to the INSLM review.[20]

Having inexplicably changed course by introducing a fundamentally different kind of offence, ARTK would be concerned by any attempt, at this extremely late stage, to attempt to now reformulate the new offence along more principled lines. The exercise requires care and extensive public consultation given the very broad range of persons potentially affected. Rushed changes will lead only to further error.

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20 Australian Government response to the Independent National Security Legislation Monitor report at p.11

2. THE NEW CATEGORY OF OFFENDING INTRODUCED INTO THE S 122.4A OUTSIDER OFFENCE RELATING TO THE INTERESTS OF DOMESTIC AND FOREIGN INTELLIGENCE AGENCIES SHOULD BE REMOVED

Bill: Sched 4 items 11, 22.

The offence in Criminal Code s 122.4A applies to 'outsiders' to government such as journalists, academics and other legitimate civil society actors.

This offence currently applies to disclosures which will "*damage*" the "*security or defence*" of Australia (current s 122.4A(1)(d)(ii)). Under the current Criminal Code, the concept of "*security*" is undefined, save for an unacceptable deeming provision that expands the concept of "*security or defence of Australia*" to "*include the operations, capabilities or technologies of, or methods and sources used by, domestic intelligence agencies or foreign intelligence agencies"* (see Criminal Code s 121.1).

As amended, the offence will instead apply, relevantly, to "*serious damage to the security (within the meaning of the Australian Security Intelligence Organisation Act 1979 (Cth*)."

This change reflects INSLM recommendations 6 and 12.

In formulating these recommendations, INSLM rejected the existing approach in the Criminal Code to defining "*security*" as "*unacceptably vague*", "*unclear*" and "*unnecessary*". He did so after having noted the concerns of civil society groups that the deeming provision would cover information unrelated to actual intelligence activities (budgets, etc) and that such information, if disclosed, would not actually cause any actual harm to these organisations.[21]

He proposed instead the adoption of the definition of "*security*" linked to the definition of "*security*" in the ASIO Act. Under the INSLM's approach, to the extent that disclosure of information about domestic or foreign intelligence agencies in a particular case could meaningfully damage the security interests of Australia (for example, because it compromises intelligence sharing), such a disclosure would be covered by the ASIO Act definition of "*security*" and so would be covered by the offence. However, a disclosure about the capabilities of the security services of the *Russian Federation* would not be covered by the offence if no harm or damage to Australia could be established.

The Bill made the INSLM's recommended changes to the definition of "*security*", including the removal of the problematic deeming provision (Bill Sched 4 items 11, 22).

At the same time, however, it introduced a completely new category of criminalised disclosures that was not recommended by the INSLM for inclusion in the outsider offence in s 122.4A (see INSLM recommendation 12). This is the category of "*information [that] causes serious damage to the operations, capabilities or technologies of, or methods or sources used by, a domestic intelligence agency or foreign intelligence agency*".

No recommendation from any expert body supports this extension of criminal liability. What this amendment seeks to do is reintroduce, de facto, the previous deeming element of the current definition of

[21] INSLM Review at [5.72] – [5.83]

"*security*" at s 121.1 which the INSLM recommended be repealed. The provision is self-evidently unfit for inclusion in an Australian criminal offence that applies to government outsiders as it applies where there is no actual harm to the security interests of Australia.

3. THE BILL MAKES ONLY THE MOST MINIMAL CHANGES TO THE EXISTING SECRECY LAW REGIME

Bill: Sch 1 Parts 1-3, Sched 2

The EM and SoC state that the Bill will "*remove criminal liability from more than 300 secrecy offences*". This is said to be achieved through "*a combination of repeals and amendments to specific legislation, as well as repealing existing section 122.4 of the Criminal Code which currently attaches criminal liability to breaches of all non-disclosure duties*."[22]

The actual position appears to be this:

The Bill will repeal, relevantly, *one* key offence – being the offence in Criminal Code s122.4. That offence currently applies where a person is under "*a duty not to disclose information*" and "*the duty arises under a law of the Commonwealth*". According to AGD, there are currently 295 non-disclosure duties imposed by 102 Commonwealth laws (AGD Review at [6]).

The Bill will however maintain the operation of the existing s122.4 under a savings provision to 11 discrete non-disclosure duties. Therefore, the proposed repeal of Criminal Code s122.4 will have the net effect of removing criminal liability from 284 non-disclosure duties.

It is important to note that these 284 duties were never meant to be criminalised for the long-term. They were criminalised on a strictly transitional basis when the current suite of general secrecy offences in Criminal Code Part 5.6 was introduced in 2019. That period has now belatedly limped on to close to 7 years after multiple extensions.

Currently, the sunset date for these offences for the criminalisation of these non-disclosure duties is 29 June 2026 – i.e. one month from now. Proposed amendments will extend that date to 29 December 2026.

Therefore, the effect of the Bill is simply to *bring forward* the sunset date.

For those non-disclosure duties for which decriminalisation will be brought forward, the EM makes some concerning statements. It asserts, in the discussion of what would be regarded as "*improper*" under the proposed new s122.4 offence, that the new offence will "*plainly capture disclosures of confidential information where the parties to the information [sic] did not provide consent to disclosure.*" The 284 non-disclosure duties that are *notionally* decriminalised by bringing forward the sunset date of the existing s122.4 will simply be recriminalized, *de facto*, by the new offence, at least on the view of the legislation put forward in the EM.

The Bill will, in addition, remove criminal liability from what appears to be approximately 36 additional existing criminal offences (some of which are converted to non-disclosure duties). On the figures provided by

[22] EM General Outline para [5]

the AGD, which state a total number of 569 specific secrecy offences, this will leave approximately 533 secrecy offences on the statute book.

A legal landscape with so many inconsistent and overlapping offences is simple impossible for journalists to navigate.

4. THE BILL SHOULD CHANGE THE CURRENT JOURNALIST DEFENCE TO AN EXCEPTION

ARTK has forensically and consistently submitted to the AGD Review and the INSLM secrecy reviews that the preferred outcome is an exemption for journalism and journalists in relation to secrecy offences. ARTK continues to hold that as the primary position.

To that end ARTK endorses the position of the Law Council on the general issue of exceptions vs defences (see Law Council Submission at [89]). The current journalist defence in Criminal Code s 122.5(6) should accordingly be recast as an exception. The INSLM recommended that consideration be given to this issue (INSLM Recommendation 14).

We note that, under the Criminal Code, whether a journalist protection is framed as a "*defence*" or "*exception*" does not impact the issue of onus of proof.[23] The question of onus of proof is a separate question which we have addressed in the Initial Submission. ARTK believes that the onus of proof must be addressed at the same time as the need for an exception.

[23] Criminal Code s 13.3(3)