THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: CLC/PuLC:BMvk230224

23 February 2024

Dr James Popple
Chief Executive Officer
Law Council of Australia
PO Box 5350
Braddon ACT 2612

By email: shounok.chatterjee@lawcouncil.au

Dear Dr Popple,

Independent National Security Legislation Monitor Review of Secrecy Offences in Part 5.6 of the *Criminal Code 1995*

Thank you for the opportunity to contribute to a Law Council of Australia submission to the Independent National Security Legislation Monitor (**INSLM**) review of the secrecy offences in Part 5.6 of the *Criminal Code 1995* (Cth) (***Criminal Code***). The Law Society's submission is informed by its Criminal Law and Public Law Committees.

The Law Society has had the opportunity to review the Law Council's previous 2018 and 2023 submissions on the secrecy provisions. We support the Law Council's views and suggest that they be adopted for the purposes of this review. We agree that there is a continuing role for appropriately and proportionately drafted secrecy offences, which, for constitutional and rule of law reasons, must be framed clearly and consistently, and be directed at protecting a narrowly defined list of essential public interests. Further, in our view, the available defences should be amended to require that the prosecution bears the evidentiary burden. We note the Law Council's advice that the *Final Report of the Review of Secrecy Provisions* prepared by the Attorney-General's Department in 2023[1] supported a harms-based approach to the framing of secrecy offences, consistent with the Law Council's view. We also support this position, noting that it is consistent with Australia's international obligations.

We set out in this submission more specific comments on selected issues arising from the INSLM's Issues Paper.[2]

Inherently harmful information

a. Security classified information

We note that [2.25] of the Issues Paper discusses the definition of "security classification", which is defined by reference to "the policy framework developed by the Commonwealth for

[1] Commonwealth Attorney-General's Department, *Review of Secrecy Provisions: Final Report,* 2023, online: https://www.ag.gov.au/sites/default/files/2023-11/secrecy-provisions-review-final-report.pdf (**Final Report of the 2023 AGD review**).
[2] Independent National Security Legislation Monitor, *Review of Secrecy Offences in Part 5.6 of the Criminal Code 1995*: Issues Paper, January 2024, online: https://www.inslm.gov.au/sites/default/files/2024-01/INSLM-issues-paper-secrecy-review.pdf.

that purpose…" (s 90.5(1)(a) of the Criminal Code). We note the concern raised in [2.28] that there is uncertainty as to whether the reference to the policy framework and the policies made under it are those that were in force at a particular point in time, or as in force from time to time. We note also the concern raised in [2.33] that setting the parameters of a criminal offence via an administrative instrument may be inconsistent with Australia's international obligations. In our view, there must be clarity as to which version of the policy framework is intended, and we oppose the approach of reliance on an administrative instrument for the purposes of defining such a key concept, such that relevant aspects of it must be lifted into the legislative framework.

c. Information connected with a domestic or foreign law enforcement agency

As discussed in the Issues Paper at [2.39] – [2.50], the lack of a definition for a 'domestic or foreign law enforcement agency' in the *Criminal Code* creates uncertainty about the scope of the offence for communicating or otherwise dealing with inherently harmful information (s 122.1(1)).

In other parts of the *Criminal Code*, such as Pt 7.8 (causing harm to or obstructing a Commonwealth public official), the term 'Commonwealth law enforcement officer' is defined at s 146.1 as a person who is a member of an exhaustive list of agencies which includes the Australian Federal Police, Australian Criminal Intelligence Commission and the Australian Border Force. At Pt 10.6, a 'law enforcement officer' is defined at s 473.1 to include a broader exhaustive list of agencies (State and Federal agencies such as the Independent Broad-based Anti-corruption Commission, the Independent Commission Against Corruption and the Office of The Director of Public Prosecutions).

However, as [2.51] goes on to say, there are various agencies which operate outside of the typical law enforcement context but have access to coercive powers (such as the Australian Tax Office, the Australian Prudential Regulation Authority, and the Australian Competition and Consumer Commission) and the definition of 'law enforcement' in other statutory contexts can differ.

As such, we suggest that the meaning of 'domestic and foreign law enforcement agency' should be clarified, preferably with an exhaustive definition (like in pt 7.8 and 10.6) to ensure the correct categories of information are captured.

e. Information relating to the operations, capabilities or technologies of, or methods or sources used by, a domestic or foreign law enforcement agency

We query whether the terms 'operations, capabilities or technologies of, or methods or sources used by…' a domestic or foreign law enforcement agency adequately captures all possible types of information that could be harmful to national security and defence if disclosed. For example, it may be arguable that evidence obtained in an investigation, or the address of an office location, are not captured in circumstances where, if disclosed, they could be harmful. We note for domestic and foreign intelligence agencies, 'inherently harmful information' seems to capture any information they obtain or make.

'Dealing with' offences

We note the lack of clarity in respect of what it means to 'deal with' inherently harmful information. While mere receipt of information may in some circumstances be an offence under s 122.4A(2), and under s 90.1(1)(a) 'deal' includes to *receive* information, the Issues Paper notes at [2.72] the AGD's view is that 'unsolicited receipt or other unwitting dealings' will not be sufficient to reach the threshold of intention. Given the potential breadth of this offence for a very wide range of actors, including legal advisers, journalists and civil society groups, (and

the fact that the defence provisions reverse the evidentiary burden) in our view the threshold for these offences should be clarified.

New general offence

As a starting point, it is difficult to comment on a new proposed s 122.4 without draft text being available.

We are concerned that the proposed test of 'prejudicial to the effective working of government' (see [2.83]) is very broad, and lacks sufficient certainty. While this concept is not unfamiliar in other areas of law, in our view it is an overly broad and ambiguous concept to import into the criminal context.

The second proposed test of 'where disclosure was communicated to them in confidence and disclosure would breach a confidential obligation' is cast in broad terms, and its operation is potentially ambiguous. The defences, (discussed in more detail below), are difficult to make out. For example, s 122.5(2) provides that it is a defence that the relevant information has already been communicated or made available to the public with the authority of the Commonwealth. However, if, for example, a person disclosed information that had already appeared in a mainstream media report, it may be difficult to establish whether the Government had authorised the initial public communication.

We query what the applicable fault element would be for the new general offence. While recklessness would be a usual threshold in this context, we suggest that this may be an inappropriately low threshold for this offence.

We also have some reservations about the proposed offence being tied specifically to the duty to not disclose information under s 7 of the *Public Service Regulations 2023* (Cth). This would not capture employees who have access to information but are not employed by the *Public Service Act 1999* (Cth) (such as members of the Australian Federal Police, Ministers, and Ministerial staff).

Constitutionality

We support the Law Council's view set out in [2.118] that 'it is likely that "catch-all" secrecy offences, that fail to distinguish between categories of information, categories of persons and fails to specify a harm requirement, will not meet the standard of justification' set out in *McCloy.'* We reiterate the need for a clear and narrow approach to drafting secrecy offences that:

- contain an express harm element;
- cover a narrowly defined category of information and the harm to an essential public interest is implicit, and
- protect against harm to the relationship of trust between individuals and the Government integral to the regulatory functions of government.[3]

Defences

The Law Society is concerned that the defence provisions in s 122.5 do not provide genuine protection if defendants bear the evidential burden. Our members advise that it would generally be difficult for defendants to meet the evidentiary requirements of the defences as, in practice, the prosecution generally holds the information required. In our view, the ordinary requirement

[3] Law Council memorandum, *INSLM review of secrecy offences in Part 5.6 of the Criminal Code*, 2 February 2024, 2 citing the recommendations of the Final Report of the 2023 AGD review.

for prosecutors to raise and establish elements of the offence beyond reasonable doubt should apply to the secrecy offences.

Technical matters

We suggest that s 122.5(4) should be expanded to include any law of the Commonwealth, rather than identify specific legislation.

Thank you for the opportunity to contribute. Questions at first instance may be directed to Vicky Kuek, Head of Social Justice and Public Law Reform, at victoria.kuek@lawsociety.com.au or 02 9926 0354.

Yours sincerely,

Brett McGrath
President