



*Australian Council
for Civil Liberties*

***PJCIS Inquiry into the National
Security Legislation Amendment
(Espionage and Foreign Interference)
Bill 2017***

***Supplementary Submission relating
to AG's amendments to EF&I Bill***

A joint submission from:
NSW Council for Civil Liberties
Liberty Victoria
Queensland Council for Civil Liberties
South Australian Council for Civil Liberties
Australian Council for Civil Liberties

12/3/2018

1. This supplementary submission from the Joint Councils of Civil Liberties¹ (CCLs) is in response to the release by the Commonwealth Attorney-General (AG) on the 2nd March 2018 of 39 amendments to the Espionage and Foreign Intervention Bill 2017. These amendments have been provided to the PJCIS as a supplementary submission.²
2. The CCLs included a brief comment on the initial media statement of the AG presaging these amendments in its submission to the PJCIS³. We welcome the opportunity to revisit and expand on those preliminary comments to the PJCIS now the actual amendments to the Bill are available.

General Comment

3. Having examined the AG's amendments, the CCLs maintain their initial view that they are significant steps in the right direction and improve some of the most dangerous aspects of the Bill. However, we also maintain our view that the problems with the secrecy offences go beyond the issues identified by the AG.
4. There are also significant issues relating to the offences in schedule 1 of the Bill which are not addressed at all by these amendments.
5. The redrafting of parts of the Bill before the PJCIS has completed its inquiry is, in our experience, unusual. The AG's intervention, while welcome and positive, does raise concerns as to the PJCIS consultation process.
6. The AG seemed to be of the view that the changes he proposed to aspects of the secrecy offences in schedule 2 and the Espionage offence in schedule 1 would solve all the major problems with the Bill-or at least the secrecy provisions within the Bill. The CCLs do not consider this to be the case for reasons we flagged in our preliminary comments⁴ and will outline in more detail in this supplementary submission.
7. Our concern in relation to process is that most interested people will not have had a chance to consider the amendments as reported in the media in the context of the existing Bill. It is difficult to assess the implications of amendments to amendments without this context – especially with such a long and complex Bill.
8. The CCLs note that the PJCIS will now present its report in April 2018. The CCLs urge that a reasonable time after its release is allowed for its consideration by the interested public and that an updated version of the Bill incorporating the AG's amendments is made available.

Detailed comment

9. The AG's amendments to the secrecy offences are substantial and will:

¹ (New South Wales Council for Civil Liberties, Liberty Victoria, Queensland Council for Civil Liberties, South Australia Council for Civil Liberties and the Australian Council for Civil Liberties)

² AG's Submissions 40 and 40.1

³ Joint Councils for Civil Liberties Submission to PJCIS Inquiry into the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017 14/2/2018. Submission 31: 'Stop Press-Secrecy of Information Offences' p3.

⁴ Ibid p3

- i. narrow the definitions of ‘inherently harmful information’ and ‘causes harm to Australia’s interests’
- ii. removes the reference to security classification as a trigger for the Aggravated Offence 122.3
- iii. create separate offences for non-Commonwealth officers that are narrower in scope than those applying to Commonwealth officers and only apply to the most serious and dangerous conduct’
- iv. strengthen the defence for journalists by:
 - removing any requirement for journalists to demonstrate that their reporting was ‘fair and accurate’
 - ensuring the defence is available where a journalist reasonably believes their conduct was in the public interest
 - clarifying that the defence is available for editorial and support staff as well as journalists
- v. clarify and narrow the definition of ‘security classification’ and remove the ‘strict liability’ requirement from elements of the offence relating to security classified information - including in the Espionage secrecy offence at s91.3
- vi. exclude ABC and SBS staff from the category of Commonwealth officers in recognition of their general engagement in reporting news etc.⁵

10. These amendments are an improvement in that they strengthen protections for journalists and editorial/support staff, lessen some of the alarming overreach in some parts of the Bill and reverse the unexplained and inappropriate inclusion of non-Commonwealth officers in offences that should only have applied to Commonwealth officers.

11. They are consistent with recommendations made by the CCLs in our submission—though not always with the preferred and most effective recommendation.

12. The continued application – albeit separately - of a general secrecy offence applicable to ‘outsiders’ or non-Commonwealth officers in a new secrecy offence: ‘*Communicating and dealing with information by non-Commonwealth officers etc*’⁶ does however greatly extend the coverage of non- Commonwealth officers compared with the current general secrecy offences in the Crimes Act.

Security classification and strict liability 90.5(1)

13. Disclosure of ‘security classified’ information is criminal conduct within several of the secrecy offences in the Bill. This was inappropriate for these serious offences as much classified information is not significant to Australia’s national security or essential interests and the classification system itself is subject to strong criticism as to its reliability and consistency.

14. The AG’s amendment specifies that ‘security classified’ means the top two categories of classification – ‘Top Secret’ and ‘Secret’ or equivalent. These are meant to capture information, the unauthorised disclosure of which would cause ‘*exceptionally grave*

⁵ AGs submission to PJCIS : submission 40 p1 and 40.1

⁶ AG amendment: (35) s122.4A.

damage to the national interest' or 'serious damage to the national interest, organisations or individuals'.⁷

15. This amendment is positive in that it tightens the loose references to information with a 'security classification' in several offences⁸.
16. The application of strict liability in relation to this element is removed in these offences. This is clearly a positive.
17. Notwithstanding the restriction of the security classification to the two highest levels, the CCLs retain some uncertainty as to the robustness and reliability of the classification system even at this level.

Espionage offence: security classified information etc. 91.3

18. As drafted this serious offence had extraordinarily low thresholds regarding conduct and intention.
19. A person committed this espionage offence if they handled information or an article with a security classification and this resulted in **it being made available** to a foreign principal or a person acting on behalf of a foreign principal.
20. Strict liability applied to the security classification of the information or article notwithstanding the acknowledged unreliability of the classification system.
21. There was no requirement for the person to have intended to cause harm and no requirement for the conduct to have caused harm. The penalty is 20 years imprisonment.
22. Not surprisingly, this proposal caused alarm - especially among journalists. With this draconian law in place one would have to be recklessly brave to publish any non-official information on security issues.
23. The AG's amendment requires intention: i.e. the person dealt with the information for '*the primary purpose*' of making it available to a foreign principal.⁹
24. It also tightens the definition of security classification and removes strict liability in relation to the security classification.
25. These changes are a significant improvement.

Journalists: definition and defences

26. As drafted in the Bill, the public interest defence for journalists was very weak.¹⁰ It was limited by a narrow definition of 'journalist' and a requirement that the journalist was able to demonstrate the reporting was '*fair and accurate*'.

⁷ *Ibid* (1) ss90.5(1)

⁸ Espionage Offence s91.3, Inherently harmful information offence s122.1, Causing Harm to Australia's interests offence, 122.3(3), and Communicating and dealing with information by non-Commonwealth officers 122.4A(1)(d)(i).

⁹ AG's amendment (3) 91.3(1)(aa)

27. The AG's amendment opens the defence to a broader category of persons '*engaged in reporting news, presenting current affairs or expressing editorial content in news media.*'¹¹ This allows support and editorial staff to be covered by the defence.
28. It also deletes the subjective and controversial '*fair and accurate reporting*' requirement. The defence is now available if: '*at that time, the person reasonably believed that dealing with or holding the information was in the public interest.*'¹²
29. There are still constraints on this defence, including that the person cannot hold this reasonable belief if the conduct is: likely to result in the death of, or serious harm to a person; or is likely to harm or prejudice the health and safety of the Australian public or the purpose is to assist a foreign intelligence agency or a foreign military organisation.¹³
30. Nonetheless, these changes significantly improve the utility of the defence for journalists.
31. They are not, however, adequate to counteract the negative impact on the media of the (still) greatly expanded scope of general secrecy offences which criminalise previously lawful journalistic reporting and apply significant and unjustified increases in penalties.
32. The AG's amendments do not explicitly cover persons engaged in contemporary and rapidly expanding forms of digital journalism and news reporting. The CCLs strongly advocate that a more contemporary definition of 'journalist' and 'journalism and news reporting' be explicitly included in the Bill or at least the Explanatory Memorandum.
33. If not, this defence will likely be unavailable to persons engaged in increasingly significant and 'mainstream' forms of digital journalism and news reporting.¹⁴ Such an outcome would not be in the public interest.
34. They do not provide protections for non-public sector whistle-blowers or others (academics, medical professionals, civil liberties advocates etc) likely to be caught up in legitimate public interest disclosures in breach of these expansive offences.¹⁵
35. It seems clear that the Government is resistant to any 'carve out' for journalists. Strong defences are better than weak ones- but uncertainty as to whether or not one will face prosecution will remain a major inhibitor for journalists and others wanting to disclose information in the public interest.
36. The CCLs consider nothing short of a broad public interest exception will provide adequate protection for a robust free media and the public scrutiny of Government activity so important to a functioning democracy. **(see Recommendation 9 JCCLs submission)**

¹⁰ E&FI Bill 2017 s122.5(6)(7).

¹¹ AG's amendment: (36) s125.5(6)(a)

¹² Ibid: (37) s 125.5(6)(b)

¹³ Ibid: (38) 122.5(7)(d)

¹⁴ This emerging issue was recognized by the INSLM in his: Report on the impact on journalists of section 35P of the ASIO Act 2015 p.8

¹⁵ There is a separate defence for outsiders for 'Information that has been previously communicated' – but this is dependent on some prior disclosure such as by a whistle-blower or accidental disclosure. E&FI Bill s122.5(8)

Secrecy Offence: ‘inherently harmful information’

37. The Bill introduced controversial new secrecy offences relating to ‘inherently harmful information.’ They had no express harm element requirement, an overly expansive definition of ‘inherently harmful information’ and an unexplained increase in penalty from a maximum of 7 years to 15 years imprisonment.
38. The AG’s amendment narrows the scope of the offence in an important and significant way by removing outsiders (non-Commonwealth officers) as potential offenders. This is consistent with the ALRC recommendations in relation to general secrecy offences.
39. The AG’s amendment also narrows the scope of the information categories by removing one of the five categories of ‘inherently harmful information’. This was a category which seems to capture all information any person was required to provide to any Government agency.¹⁶ The CCLs recommended its deletion.
40. This is an improvement in that it removes a category which would capture much information that was of no, or little, relevance to national security and was not ‘inherently harmful’.
41. The AG’s amendment also tightened the definition of another category of information in this offence- ‘security classified information’ – and removed the strict liability requirement for this element. (see earlier comment)
42. These changes are both improvements.
43. The offence still does not expressly require any harm effect. Instead it relies on the contentious assumption that harm can be assumed because a category of information is defined as ‘inherently harmful’. Yet it is obvious - and widely acknowledged - that not all information from within a category of information will always cause harm to Australia’s security or essential interests.

This is especially pertinent for a general secrecy offence – as distinct from a specific secrecy offence relating to a specific agency. **(See Recommendation 2 JCCLs submission)**

44. More generally, considering the scope of the other secrecy offences in the Bill, the CCLs consider this offence to be redundant and recommend it be deleted from the Bill. **(see Recommendation 1 JCCLs submission)**

Secrecy offence: ‘conduct causing harm to Australia’s interests’ s122.2

45. This offence occurs when a person communicates information which causes harm to Australia’s interests. The scope of information defined as ‘causing harm to Australia’s interests’ is inappropriately broad.

¹⁶ E&FI Bill 2017 s122.1(d)

46. The AG's amendment removes three of the most inappropriate categories of information from the list:
- information which will interfere or prejudice the investigation, prosecution etc of a contravention of a commonwealth law subject to a civil penalty; (122.2(1)(a)(ii))
 - information which will 'harm or prejudice Australia's international relations in any other way' (122.2(1)(d))and
 - information which will 'harm or prejudice relations between the Commonwealth and a State or Territory'. (122.2(1)(e))
47. These deletions lessen the overreach of the offence and are a significant improvement. There deletions were recommended by the JCCs. **(See Recommendation 3(i) JCCLs submission).**
48. However, a further amendment is desirable to align this offence more fully with The Australian Law Reform Commission's (ALRC) recommendation that it be limited to information that would cause harm to:
- security, defence or international relations
 - the investigation and prosecution etc of criminal offences
 - the life or physical safety of any person and
 - the protection of public safety.
49. The AG's amendment narrows the scope of the offence in an important and significant way by removing outsiders (non-Commonwealth officers) as potential offenders. This is consistent with the ALRC recommendations in relation to general secrecy offences.
50. The penalty for this offence is excessive and should be reduced to 7 years as recommended by the ALRC. **(See Recommendation 3 (ii) JCCLs submission)**

Communicating and dealing with information by non-Commonwealth officers etc. (122.4A)

51. The AG's amendment introduces a new 'non-Commonwealth officer' offence:
*Communicating and dealing with information by non-Commonwealth officers etc.*¹⁷
52. The person commits this offence if the information communicated or dealt with fits any one of four categories. These categories are drawn from both the 'inherently harmful information' and the 'causing harm to Australia's interests' offences:

¹⁷ AG's amendment: (35) (122.4A)

- i) the information has a security classification of secret or top secret –(from the ‘inherently harmful information’ offence)
- ii) the communication of the information damages the security or defence of Australia - (from the ‘inherently harmful information’ offence)
- iii) the communication of the information interferes with or prejudices the prevention, detection, investigation, prosecution or punishment of a criminal offence against a law of the Commonwealth – (from the ‘causing harm’ offence)
- iv) the communication of the information harms or prejudices the health or safety of the Australian public or a section of the Australian public - (from the ‘causing harm’ offence)

The penalty for ‘communicating’ this information is 10 years (compared with 15 years for Commonwealth officers) and for ‘dealing’ is 3 years.

53. These four categories of information are appropriate for a serious secrecy offence relating to unauthorised disclosure of Commonwealth government information – (with the caveat as to a remaining uncertainty about the robustness of the secrecy classifications process.)

54. Two of the categories ((i) and (ii)) are drawn from the ‘inherently harmful information’ offence and two ((iii) and (iv)) are drawn from the ‘causing harm to Australia’s interests offence’.

55. This new offence captures a narrower range of secret information than the AG’s proposed narrower categories for the Commonwealth officers’ offence. This reflects the AG’s intention of limiting the scope of the offence and ensuring it only applies ‘*to the most serious and dangerous conduct*’.¹⁸

56. The categories of information excluded from the ‘outsiders’ offence, but which remain in the AG’s proposed ‘Inherently harmful information’ applying to Commonwealth officers offence, are:

(c) 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 and

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

57. As noted earlier the CCLs are not convinced that (e) is necessary as it is an explicit subsection of (b) ‘security or defence of Australia.

58. The one category of information excluded from the ‘outsiders’ offence, but which remain in the AG’s proposed ‘conduct causing harm to Australia’s interests’ offence applying to Commonwealth officers, is :

(c) harm or prejudice Australia’s international relations in relation to information that was communicated in confidence:

¹⁸ AGs submission 40 p1.

- (i) *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*
- (ii) *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;*

59. The narrowing of the scope and the reduced penalty for the non-Commonwealth officers' secrecy offence – both as compared with the original offences affecting them in the Bill and with the revised offences applying only to Commonwealth officers- are obviously welcome improvements.
60. Notwithstanding these AG's amendments, this new offence still represents a significant expansion of the current exposure of persons other than Commonwealth officers to serious criminal conduct under the general secrecy offences. The rationale for this expansion has not been adequately explained.

General observations and recommendations

61. The AG's amendments will still leave the Bill with three separate general secrecy offences for Commonwealth officers. They overlap and duplicate each other. They seem to be designed to capture different ways of securing prosecutions for disclosure (or dealing with etc) of essentially similar sets of information.
62. The pared back categories for the new outsider's general secrecy offence are now consistent with appropriate criteria for a reformed **Commonwealth officers'** general secrecy offence. Other less serious, unauthorised disclosures should be dealt with by disciplinary procedures at the administrative level.
63. The CCLs reaffirm their recommendation that the (now) Commonwealth officers offences be consolidated into a single general secrecy offence in addition to the new outsiders offence. **(See Recommendations 1,7 and 3 JCLs submission)**
64. We note that other matters relating to the secrecy offences requiring further consideration include the large and unjustified increases in penalties for some of the offences.
65. The CCLs considers there are still significant issues with the thresholds that trigger the aggravated offence s122.3 that need reconsideration.
66. We have some concern that while the understandable focus of attention has been on the secrecy offences, there are many issues relating to the offences in schedule 2 of this Bill.

Recommendation 1

67. **The CCLs** urge that a reasonable time is allowed for public consideration of the PJCIS report on the Espionage and Foreign Interference Bill so that the detailed impact of the Attorney-General's amendments can be assessed.

Recommendation 2

68. While appreciating the inclusion of editorial and support staff within the journalists defence, the CCLs strongly advocate that a more contemporary definition of 'journalist' and 'journalism and news reporting' be explicitly included in the Bill - or at least in the Explanatory Memorandum.

Recommendation 3

69. The CCLs reaffirm their support for a broad public interest exception to provide adequate protection for a robust free media and the public scrutiny of Government activity so important to a functioning democracy.

Recommendation 4

70. The CCLs reaffirm their recommendation that the general secrecy offences in schedule 2 for Commonwealths officers are combined into a single offence and that less serious unauthorized disclosures are managed by administrative disciplinary processes.

Concluding comment

71. The joint CCLs trust that these comments will be of assistance to the PJCIS in its assessment of the *National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017*.
72. This submission was written by Dr Lesley Lynch, Vice President of the NSW Council for Civil Liberties on behalf of the joint CCLs with significant input by the executive members of the joint CCLs.

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