Law Council
OF AUSTRALIA

Australian Border Force Amendment (Protected Information) Bill 2017

Senate Legal and Constitutional Affairs Committee

30 August 2017

Telephone +61 2 6246 3788 • *Fax* +61 2 6248 0639
Email mail@lawcouncil.asn.au
GPO Box 1989, Canberra ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612
Law Council of Australia Limited ABN 85 005 260 622
www.lawcouncil.asn.au

Table of Contents

About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2017 Executive as at 1 January 2017 are:

- Ms Fiona McLeod SC, President
- Mr Morry Bailes, President-Elect
- Mr Arthur Moses SC, Treasurer
- Ms Pauline Wright, Executive Member
- Mr Konrad de Kerloy, Executive Member
- Mr Geoff Bowyer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council acknowledges the assistance of it National Criminal Law Committee, Migration Law Committee of the Federal Litigation and Dispute Resolution Section, the New South Wales Bar Association, the Law Society of South Australia, the Law Institute of Victoria and the Law Society of New South Wales in the preparation of this submission.

Executive Summary

1. The Law Council of Australia is grateful for the opportunity to provide the following submission in response to the Senate Legal and Constitutional Affairs Legislation Committee's (**the Committee**) inquiry into the Australian Border Force Amendment (Protected Information) Bill 2017 (**the Bill**).

2. The Bill has been introduced in order to more closely confine the Act's potential impact on the constitutionally protected implied freedom of political communication. It seeks to amend the *Australian Border Force Act 2015* (Cth) to:

   - repeal the definition of 'protected information' in subsection 4(1) of the Act;
   - remove the current requirement for bodies to which information can be disclosed and classes of information to be prescribed in the *Australian Border Force (Secrecy and Disclosure) Rule 2015*; and
   - add new permitted purposes for which 'Immigration and Border Protection information' can be disclosed under the Act such as information relating to inter-country adoption, protection of national security and defence of Australia, and the location of missing persons.

3. In the timeframe for the inquiry, the Law Council has not been able to conduct a comprehensive assessment of the Bill.

4. However, the Law Council welcomes any attempt at ameliorating the secrecy provisions in the Act in order to address concerns over the encroachments on freedom of speech.

5. The principal concern is that the secrecy offence applies to almost all individuals who provide services to Australian Border Force (**ABF**), and to almost all information obtained while providing such services.

6. The Law Council considers that any step taken by the Parliament that might limit the prohibitions on disclosure of information under the existing provisions of the Act should be supported – even if, as is the case with the amendments proposed in the Bill, the limitation is likely to be very modest in practice. A suite of unjustifiably wide-ranging prohibitions on the disclosure of information connected with the activities of the ABF will remain in place.

7. Key recommendations of this submission include:

   - A review of secrecy offences, including the general secrecy offences in sections 70 and 79 of the *Crimes Act 1914* (Cth), as recommended by the Australian Law Reform Commission (**ALRC**) to determine whether they unjustifiably limit freedom of speech should be conducted.
   - The Committee should await an assessment of the Bill for its impact on freedom of speech by the Parliamentary Joint Committee on Human Rights (**PJCHR**) before completing its inquiry and if necessary, extend the opportunity to make submissions in response to the information obtained. Any issues identified by the PJCHR should be addressed prior to enactment.
   - The section 42 offence in the Act should be made an unauthorised disclosure only offence. Consideration should then be given to whether other mechanisms for imposing liability on unauthorised recording of certain

information, such as the removal of a security clearance or a position of authority would be more appropriate. If an offence for such conduct is considered necessary, a separate offence should be created for unauthorised recording of certain information. However, such an offence should be confined to where the unauthorised recording involves or is likely to involve considerable harm to Australia's national security interests.

- The Act should be amended to provide a clear exception to the section 42 secrecy offence which would permit a person to make a record of, or disclose, information for the purpose of obtaining legal advice in relation to 'Immigration and Border Protection Information' (should the Bill be enacted) or for the purposes of any legal proceedings in the absence of an order or direction of a court or tribunal.[1]
- The defence of 'disclosure of publicly available information' in section 49 of the Act ought to make it clear that the person was not involved in the prior publication (whether directly or indirectly).
- The Act should be amended to include an appropriate definition of what constitutes information that has a security classification noting that it is defined in the Explanatory Memorandum to the Bill.
- If information from intelligence agencies is to be retained, the provision should be more narrowly confined to make clear that the information came to the knowledge or possession of the entrusted person from the intelligence agency or a third party where the person was aware that there was a substantial risk that the information was received by the third party from an intelligence agency.
- The Committee should inquire into the necessity of paragraph 4(1)(e) relating to prohibiting information, the disclosure of which would or could reasonably be expected to cause competitive detriment to a person. The Law Council questions whether this provision aims to protect or criminalise criticism of detention centre providers. The Law Council considers that this provision may be an unjustifiable encroachment on freedom of speech and should be removed.
- The types of information which, if recorded or disclosed, would result in the commission of an offence (subject to two years imprisonment), should be provided in the primary legislation. As a minimum, the approval of each House of the Parliament should be required before the legislative instrument could come into effect.
- A privacy impact assessment should be conducted of the secrecy provisions.
- The proposed secrecy provisions should expressly indicate: whether they override the *Freedom of Information Act 1982* (Cth); and how they will interact with the obligations under the *Privacy Act 1988* (Cth).

[1] *Australian Border Force Act 2015* (Cth), s 42(2)(d) provides that the making of the record or disclosure is required by an order or direction of a court or tribunal.

Background

8. The Act came into force on 1 July 2015. Part 6 of the Act deals with 'secrecy and disclosure provisions'. Section 42 of the Act makes it an offence punishable by 2 years' imprisonment for an 'entrusted person' to 'make a record of, or disclose' protected information. 'Protected information' means information that was obtained by a person in the person's capacity as an entrusted person.[2]

9. 'Entrusted person' is defined in section 4 to include various officials in the ABF, as well as people who are 'Immigration and Border Protection workers'. That class is broadly defined to include *inter alia* people who are engaged as consultants or contractors to perform services for the Department of Immigration and Border Protection, and who are designated in writing by the Secretary of the Department or the ABF Commissioner.

10. Section 42 is subject to a number of exceptions in sections 43 to 49 of the Act, including disclosures to an authorised person under sections 44 and 45 for purposes relating to *inter alia*:

    - the protection of public health, or the prevention or elimination of risks to the life or safety of an individual or a group of individuals: paragraph 46(d) of the Act, and

    - the provision of services to persons who are not Australian citizens: paragraph 46(j) of the Act.

11. Section 48 permits an entrusted person to disclose protected information if:

    - the entrusted person reasonably believes that the disclosure is necessary to prevent or lessen a serious threat to the life or health of an individual; and

    - the disclosure is for the purposes of preventing or lessening that threat.

12. The exception in section 48, however, only applies where an entrusted person is subject to a statutory or general law obligation or authority to record or disclose protected information.[3]

13. The Bill proposes replacing the current definition of 'protected information' in the Act with a new definition of 'Immigration and Border Protection Information'. This new definition seeks to narrow the type of information which, if recorded or disclosed, would make a person liable to prosecution under section 42 of the Act.

14. 'Immigration and Border Protection information' means information of any of the following kinds that was obtained by a person in the person's capacity as an 'entrusted person':

    (a) information the disclosure of which would or could reasonably be expected to prejudice the security, defence or international relations of Australia;
    (b) information the disclosure of which would or could reasonably be expected to prejudice the prevention, detection or investigation of, or the conduct of proceedings relating to, an offence or a contravention of a civil penalty provision;

[2] *Australian Border Force Act 2015* (Cth, as defined in section 4.
[3] Ibid, s 42(2)(c).

(c) information the disclosure of which would or could reasonably be expected to prejudice the protection of public health, or endanger the life or safety of an individual or group of individuals;
(d) information the disclosure of which would or could reasonably be expected to found an action by a person (other than the Commonwealth) for breach of a duty of confidence;
(e) information the disclosure of which would or could reasonably be expected to cause competitive detriment to a person;
(f) information of a kind prescribed in an instrument under subsection (7).[4]

15. 'Duty of confidence' means any duty or obligation arising under the common law or at equity pursuant to which a person is obliged not to disclose information.[5]

16. New subsection 42(1A) states that the fault element in paragraph 42(1)(c) is taken to be satisfied if the person who records or discloses the information is reckless as to whether or not:

- the information has a security classification;
- the information originated with, or was received from, an intelligence agency;
- the information was provided to the Commonwealth pursuant to a statutory obligation or otherwise by compulsion of law.

Issues previously raised with section 42 of the Act

17. The Law Council has previously expressed concern in relation to Part 6 of the Act. It stated that 'criminal sanctions for disclosure of information should only be used when strictly required for the effective functioning of government'.[6]

18. In particular, the ability of an 'entrusted person' to lawfully report publicly on conditions in detention and regional processing centres was said to be limited as the exception in section 48 does not cover the disclosure of protected information to the public, and therefore 'in most cases, public disclosure of information relating to those conditions will amount to an offence' under section 42.[7]

19. On 29 June 2015, the Secretary made a Determination to exclude 'health practitioners' from certain provisions of the Act, such that health professionals became exempt from prosecution under section 42. [8] This Determination was issued

[4] See item 1 of the Bill, definition of 'Immigration and Border Protection information'.
[5] Ibid.
[6] Law Council of Australia, *Submission to the Senate Legal and Constitutional Affairs References Committee on the Australian Border Force Bill 2015*, 10 November 2016, [58]; See also the Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009).
[7] Law Council of Australia, *Submission to the Senate Legal and Constitutional Affairs References Committee on the Australian Border Force Bill 2015*, 10 November 2016, [60]. The Law Council also submitted that public disclosures in compliance with the *Public Interest Disclosure Act 2013* (Cth) was a lengthy process that afforded no certainty of outcome.
[8] *Determination of Immigration and Border Protection Workers 2015* (Cth) para D, as amended by *Determination of Immigration and Border Protection Workers — Amendment No. 1 2016* (Cth).

following the commencement of a constitutional challenge to Part 6 of the Act by Doctors for Refugees. [9]

20. The UN Special Rapporteur said in respect of Part 6 of the Act that:

I urge the Government to urgently review the Border Force Act's provisions that seem to be in contravention with human rights principles, including those related to the freedom of expression, and substantially strengthen the Public Interest Disclosure framework to ensure effective protection to whistleblowers.[10]

21. Nicola Brevitt was of the view that the Act:

… heavily burdens the implied freedom of political communication because it quells the disclosure of information that is directly relevant to the informed, direct choice of Australian electors. The provisions go far beyond what is reasonably appropriate and adapted to the legitimate end of protecting confidential information or maintaining the effective working of government. The ABF Act is disproportionate because it prohibits the disclosure of information even when it is unlikely to cause harm to national security, diplomatic relations, the safety of individuals and other essential public interests. In addition, the current breadth of the secrecy provisions is not necessary. Less restrictive alternatives exist in the form of two compelling amendments to the ABF Act that would achieve the Government's legitimate purposes without restricting such a large amount of information.[11]

Secrecy laws

22. Secrecy laws and the need to protect sensitive government information must be balanced with freedom of speech and the constitutional implied freedom of political communication.

23. The Law Council considers that there must be some balance between the desirability of open government and the legitimate public interest in protecting some information from disclosure, for reasons including national security, defence, international relations, and privacy considerations.

24. However, criminal sanctions for disclosure of information should only be used when strictly required for the effective functioning of government.[12]

25. In this regard, the Bill has been introduced in the context of concerns about the current provisions in the Act unjustifiably encroach on freedom of speech because they are overly broad in their potential application as well as explained in the Explanatory Memorandum ensuring open and accountable government.

26. The Law Council welcomes any attempt at ameliorating the secrecy provisions in the Act in order to address the above concerns over the encroachments on freedom of speech.

---

[9] Claudia Fatone, 'Doctors for Refugees', *Fitzroy Legal Centre*, 27 July 2016 <http://www.fitzroy-legal.org.au/doctors_for_refugees>
[10] End of Mission Statement by Michel Forst, United Nations Special Rapporteur on the Situation of Human Rights Defenders, Visit to Australia, 18 October 2016.
[11] Bevitt, Nicola, 'The Australian Border Force Act 2015 (Cth) Secrecy Provisions - Borderline Unconstitutional' (2017) 39(2) *Sydney Law Review* 257 at 275.
[12] Law Council of Australia, *Submission to the Australian Law Reform Commission, Secrecy Laws and Open Government in Australia*, 27 February 2009, [3-4].

27. However, the Law Council supports a review of secrecy offences, including the general secrecy offences in sections 70 and 79 of the *Crimes Act 1914* (Cth), as recommended by the ALRC to determine whether they unjustifiably limit freedom of speech. The PJCHR has also supported such a review.[13]

28. A review is necessary to also ensure that the protection of sensitive information is treated consistently across all areas of government. This avoids potential allegations that individuals are being treated disproportionately or inequitably.

29. Given the history of these secrecy provisions in the Act, the Law Council urges this Committee to await the PJCHR's assessment of the Bill for its impact on freedom of speech before completing its inquiry and if necessary, extend the opportunity to make submissions in response to the information obtained. Any issues identified by the PJCHR should be addressed prior to enactment.

Clarity of current offence provision

30. The Law Council considers that the current section 42 Act offence is unclear and framed in some cases in a manner inconsistent with other Commonwealth secrecy provisions. The Bill does not rectify this lack of clarity or inconsistency.

Unauthorised recording of certain information

31. It is not clear why some secrecy offence provisions such as those in the ASIO Act[14] have separate offences for unauthorized recording of information and unauthorized disclosures whereas section 42 of the Act seeks to conflate these two forms of prohibited conduct.

32. The risk with such a conflation is that neither form of the prohibited conduct is clearly articulated to ensure individuals understand their rights and obligations.

33. The Law Council recommends that the section 42 offence should be made an unauthorised disclosure only offence. Consideration should then be given to whether other mechanisms for imposing liability on unauthorised recording of certain information, such as the removal of a security clearance or a position of authority would be more appropriate. If an offence for such conduct is considered necessary, a separate offence should be created for unauthorised recording of certain information. However, such an offence should be confined to where the unauthorised recording involves or is likely to involve considerable harm to Australia's national security interests. That is, a sufficient nexus must be established in the offence between the conduct and any potential risk to compromising Australia's national security interests.

34. Any unauthorised recording of certain information offence should not capture conduct of an employee or entrusted person who during a meeting takes notes (for example) to simply understand the issues better in order to more fully participate in the meetings to which s/he was invited to attend.

Exception and defence provisions

35. The exception and defence provisions to the section 42 offence need in some cases further clarity and in others to be more tightly confined.

---

[13] Parliamentary Joint Committee on Human Rights, *Freedom of Speech in Australia* (2017) [5.25].
[14] *Australian Security Intelligence Organisation Act 1979* (Cth), ss 18B and 35P.

36. For example, it is not clear that exceptions would apply for the purpose of obtaining legal advice in relation to 'protected information' (as the Act currently stands) or in relation to 'Immigration and Border Protection Information' (should the Bill be enacted) or for the purposes of any legal proceedings in the absence of an order or direction of a court or tribunal.[15]

37. Further, the defence of 'disclosure of publicly available information' in section 49 of the Act ought to make it clear that the person was not involved in the prior publication (whether directly or indirectly).

The Bill's measures

38. The breadth and uncertainty of some of the Bill's measures may arguably be a disproportionate burden on the freedom of speech and raise constitutional validity concerns. In this regard, it is notable that the Bill appears to anticipate potential unconstitutional features by the reading down provision in proposed section 57A (Act not to apply so as to exceed Commonwealth power).

Security classification

39. Proposed subsection 4(5) provides that the kind of information which prejudices security, defence or international relations, includes 'information that has a security classification'.[16]

40. 'Security classification' is not defined in the Bill.

41. The Explanatory Memorandum explains that it is intended to pick up:

> *… the Australian Government's Protective Security Policy Framework' and the security classifications 'reflect the level of damage done to the national interest, organisations and individuals, of unauthorised disclosure, or compromise of the confidentiality, of information' the Australian Government's Protective Security Policy Framework (the Framework). The Framework sets out the system for identifying official information whose compromise could have a business impact level of high or above for the Australian Government. It is the mechanism for protecting the confidentiality of information generated by the Government or provided to it by other governments and private entities. The security classifications reflect the level of damage done to the national interest, organisations and individuals, of unauthorised disclosure, or compromise of the confidentiality, of information.*[17]

42. The Explanatory Memorandum also notes that information that has a security classification includes:

- new policy proposals and associated costing information marked as Protected or Cabinet-in-Confidence;
- other Cabinet documents, including Cabinet decisions;

[15] *Australian Border Force Act 2015* (Cth), s 42(2)(d) provides that the making of the record or disclosure is required by an order or direction of a court or tribunal.
[16] See item 5 of the Bill, proposed paragraph 4(5)(a).
[17] Explanatory Memorandum to the *Australian Border Force Amendment (Protected Information) Bill 2017* [48].

- budget related material, including budget related material from other Government departments; and

- adverse security assessments and qualified adverse security assessments of individuals from other agencies, including an individual whose citizenship may potentially cease in accordance with section 35 of the Australian Citizenship Act (which deals with cessation of a person's citizenship on the basis of their service outside Australia in the armed forces of an enemy country or declared terrorist organisation).[18]

43. New section 50A would provide that, if, an offence against section 42 related to information that has a security classification, proceedings for the offence must not be initiated unless the Secretary has certified that it is appropriate that the information had a security classification **at the time of the conduct** that is alleged to constitute the offence (emphasis added). The Explanatory Memorandum states that this provision 'ensures that a person cannot be prosecuted where, at the time of disclosure, it was not appropriate that the information had a security classification'.[19]

44. The Secretary's certificate is not an evidentiary certificate.

45. The Law Council is concerned that there does not appear to be any way for a court to review the appropriateness or otherwise of a security classification.

46. The Australian Government's *Information Security Management Guidelines* provide that:

> *When information is created, the originator is required to assess the consequences of damage from unauthorised compromise or misuse of the information. If adverse consequences from compromise of confidentiality could occur or the agency is legally required to protect the information it is to be given a protective marking.*
>
> *If information is created outside the Australian Government the person working for the government actioning this information is to determine whether it needs a protective marking. Markings suggested by outside organisations or people should not automatically be accepted by Australian Government agencies unless there has been a prior agreement. The impact that protective marking may have on information sharing should also be considered*.[20]

47. In this context, the Law Council notes that the Secretary may be making a certification on the basis of an initial protective marking by a contractor or consultant working for the Australian Government.

48. The Act should be amended to include an appropriate definition of what constitutes information that has a security classification noting that it is defined in the Explanatory Memorandum to the Bill.

---

[18] Ibid, [49].
[19] Ibid, [66].
[20] Australian Government, Information Security Management Guidelines, Australian Government Security Classification System, version 2.2, approved November 2014, amended April 2015, 4 [28]-[29] at https://www.protectivesecurity.gov.au/informationsecurity/Documents/INFOSECGuidelinesAustralianGovernmentSecurityClassificationSystem.pdf

Information that has originated with, or been received from, an intelligence agency

49. Proposed subsection 4(5) of the Act provides that the kind of information which prejudices security, defence or international relations, includes 'information that has originated with, or been received from, an intelligence agency'.[21]

50. The Explanatory Memorandum states:

> *The protection of information that has originated with, or has been received from, an intelligence agency recognises the sensitivity of the information given to the Department by domestic and foreign intelligence agencies, and the higher duties of secrecy associated with the work of these agencies. It recognises that the nature of intelligence information held by domestic and foreign intelligence agencies means that its disclosure could cause serious damage to Australia's security.*
>
> *The kinds of information that may originate with, or be received from, an intelligence agency include:*
>
> - *intelligence information provided by domestic and international intelligence agencies, including signals intelligence and other intelligence derived from technological means;*
> - *information about specific intelligence products and the capabilities of such products, which, if disclosed, may pose a direct threat to intelligence sources*.[22]

51. The Law Council is concerned how, as a question of fact, information will be determined to have originated with, or been received from, an intelligence agency.

52. Of course, intelligence is collected by intelligence agencies. That intelligence may, however, be known to persons through a variety of sources other than the intelligence agency.

53. This may prove difficult for the prosecution to establish. Additionally, it may be a disproportionate burden on the freedom of speech to limit disclosures on intelligence which may come from a variety of sources. If this kind of information is to be retained, the provision should be more narrowly confined to make clear that the information came to the knowledge or possession of the person from the intelligence agency or a third party where the person was aware that there was a substantial risk that the information was received by the third party from an intelligence agency.

Competitive detriment

54. At subsection 4(1) the definition of 'Immigration and Border Protection information' is included as

> *means information of any of the following kinds that was obtained by a person in the person's capacity as an entrusted person:*
>
> *……*

[21] See item 5 of the Bill, proposed paragraph 4(5)(a).
[22] Explanatory Memorandum to the *Australian Border Force Amendment (Protected Information) Bill 2017* [50]-[51].

(e) information of the disclosure of which would or could reasonably be expected to cause competitive detriment to a person

55. The Law Council questions whether this provision aims to protect or criminalise criticism of detention centre providers. The Law Council considers that this provision may be an unjustifiable encroachment on freedom of speech and should be removed.

Significant matter in delegated legislation

56. Proposed subsection 4(7) provides that the Secretary may make a legislative instrument prescribing information if satisfied that disclosure of the information would or could reasonably be expected to 'prejudice the effective working of the Department' or 'otherwise harm the public interest'.

57. The Senate Standing Committee for the Scrutiny of Bills has stated that:

… significant matters, such as what constitutes the type of information which, if recorded or disclosed, would result to the commission of an offence (subject to two years imprisonment), should be included in primary legislation unless a sound justification for the use of delegated legislation is provided.

…

The Committee notes that the explanatory memorandum does not The committee notes that the explanatory memorandum does not provide any examples of the types or categories of information that may need to be captured by this provision. Rather, it gives a broad power to enable the Secretary to prescribe information in delegated legislation. An entrusted person who makes a record of or discloses such information would then be liable for an offence under section 42 of the Act. The committee considers that matters that go to whether a person has committed an offence are more appropriately matters for parliamentary enactment. The committee notes that a legislative instrument made by the executive, is not subject to the full range of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill. While the committee appreciates that making amendments to primary legislation can take longer than making a legislative instrument (which can take effect on the day that the instrument is registered), the committee notes that in urgent situations Parliament has passed legislation in as little as two sitting days.

If such matters are to remain in delegated legislation, the committee considers parliamentary scrutiny over such significant matters could be increased by requiring the positive approval of each House of the Parliament before the instrument could come into effect.[23]

58. The Law Council shares the Scrutiny Committee's concerns with these features of the Bill which align with the Law Council's Rule of Law Principles, particularly those relating to the need for effective oversight of the use of executive power.

Retrospective operation

59. Part 1 of Schedule 1 to the Bill will have retrospective application, backdated to 1 July 2015. The Explanatory Memorandum states that the 'retrospectivity clarifies that only information which could cause an identifiable harm (if disclosed) is to be protected

[23] Senate Standing Committee on the Scrutiny of Bills, *Scrutiny Digest 9 of 2017* (16 August 2017) [1.8]-[1.10].

under the ABF Act'.[24] The Law Council notes that the retrospective operation of the amended description of information is subject to limitations upon disclosure. Since the amending Act will also provide (see Item 24 of the Bill) that nothing in the amendments attaches a liability if none existed under the present definitions, it appears to be the case that the retrospectivity is intended to lift some of the previously applicable prohibitions for disclosures that may already have been made.

Privacy and freedom of information

60. The Law Council previously suggested that a privacy impact assessment of the secrecy provisions should be conducted.[25] The Law Council continues to support the need for a privacy and personal information security impact assessment of the proposed provisions. Such an assessment should be open, independent and subject to wide consultation, particularly given the proposed amendments to sections 45 and 46 of the Act. We note that clause 31 of Schedule 1 of the Bill would insert three new permitted purposes for which 'Immigration and Border Protection information' that contains personal information can be lawfully disclosed.

61. The Law Council also reiterates its view for the need for the provisions to indicate whether they override the *Freedom of Information Act 1982* (Cth) and how they will interact with obligations under the *Privacy Act 1988* (Cth).[26]

[24] Explanatory Memorandum to the *Australian Border Force Amendment (Protected Information) Bill 2017*, 5.
[25] Law Council of Australia, *Submission to the Senate Legal and Constitutional Affairs References Committee on the Australian Border Force Bill 2015*, 10 November 2016, 13.
[26] Ibid, 14.