

22 January 2018

Parliamentary Joint Committee on Intelligence and Security
PO Box 6021
Parliament House
CANBERRA ACT 2600

By email: picis@aph.gov.au

Dear Committee Secretary,

The Joint Media Organisations appreciate the opportunity to make a submission to the Parliamentary Joint Committee on Intelligence and Security regarding the *National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017* (the Bill).

The organisations that make up the Joint Media Organisations are AAP, ABC, Australian Subscription Television and Radio Association, Bauer Media Group, Commercial Radio Australia, Community Broadcasting Association of Australia, Fairfax Media, Free TV Australia, HT&E, MEAA, News Corp Australia, NewsMediaWorks, SBS and The West Australian.

The Joint Media Organisations have serious concerns regarding elements in the Bill pertaining to both the secrecy and espionage offences of the Bill.

We note at the outset of this submission that national security amendment laws continue to undermine the ability of the news media to report in the public interest and keep Australians informed about their environment and communities. This Bill is the latest national security Bill that does this and we again bring these important issues to the attention of the Committee.

The proposed legislation criminalises all steps of news reporting, from gathering and researching of information to publication/communication, and applies criminal risk to journalists, other editorial staff and support staff that knows of the information that is now an offence to 'deal' with, hold and communicate.

The Bill is a significant step beyond the existing legislation that applies to Commonwealth officers. This is particularly when it has not been demonstrated that there are 'problems' that need to be 'fixed'. The result is that fair scrutiny and public interest reporting is increasingly difficult and there is a real risk that journalists could go to jail for doing their jobs.

We recommend that a general public interest/news reporting defence be available for all of the relevant provisions in both the secrecy and espionage elements of the Bill. This is the only way to ensure public interest reporting can continue and Australians are informed of what is going on in their country.

Detailed analysis of these serious issues follows.

SECRECY

The Bill establishes a range of new secrecy provisions via new definitions (s90.1(1)) and a new Part 5.6 to be inserted into the *Criminal Code Act*.

These new offences replace current crimes under section 70 (disclosure of information by Commonwealth officers) and section 79 (official secrets) of the *Crimes Act 1914*.

The issues detailed below – individually and in aggregate – continue to undermine news and public interest reporting.

– **Division 121 – Preliminary (predominantly definitions)**

The news offences apply to *all* persons, not just Commonwealth officers

The Bill applies disclosure offences to all persons, not just Commonwealth officers. This is a significant broadening of the application of the law beyond that encompassed in the legislation that the Bill replaces.

Anyone who ‘*communicates*’ or ‘*deals*’ with certain information provided by a Commonwealth officer will be in breach of the legislation.

‘Deals’ with information is unnecessarily broad – particularly when applied to the news media

Furthermore, ‘deals’ includes receives information, possesses information, communicates information or ‘*makes a record of it*’¹.

The expansion of the Bill means that journalists, editorial and support staff – for example legal advisers – that communicate or otherwise ‘deal’ with the information are now at significant risk of jail time as a result of merely having certain information in their possession in the course of news reporting and informing the Australian public of matters of public interest.

For example, a journalist receiving unsolicited information would be in automatic breach, with the Commonwealth noting that ‘*receives...would include a person being given a classified document by another person*’².

Expanding on that, if the journalist received such information, how could the journalist determine whether the material is in breach without possessing, communicating, and otherwise dealing with it? A mere discussion of unsighted material might place journalists in breach, notwithstanding that they may then ask others about the information – with or without being in possession of a document.

We note that the Australian Law Reform Commission, in its report *Secrecy Laws and Open Government in Australia* stated ‘*the mere receipt or possession of information should not be covered in the general secrecy offence or the subsequent disclosure offences*’.³

The forms of information are far broader than previously state in legislation

The current legislation applies to disclosure by a Commonwealth official of a ‘*fact or document*’ that is subject to a pre-existing duty of confidence.

The Bill applies to ‘*information of any kind, whether true or false and whether in a material form or not, and includes (a) an opinion; and (b) a report of a conversation*’⁴.

Again this is very broad and a barrier to public interest reporting.

– **Section 122.1 – inherently harmful information**

¹ Inserted into s.90.1(1) of the *Criminal Code Act 1995* by Schedule 1, Part 1, provision 10 of the *National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017*

² *National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017 Explanatory Memorandum*, para 544

³ *Secrecy Laws and Open Government in Australia, Report 112, December 2009, Australian Law Reform Commission*, para 6.82

⁴ The new ‘information’ definition has been drawn from the *Crimes Act* part VII that deals with ‘official secrets and unlawful soundings’, and which s.79 references

Strict liability applies for communication of dealing in ‘security classified information’

This means the prosecution does not have to prove the information was ‘inherently harmful’.

We do not support the application of strict liability for security classified information.

We also question whether ‘inherently harmful information’ canvassed by subsection (d) *information that was provided by a person to the Commonwealth or an authority of the Commonwealth in order to comply with an obligation under a law or otherwise by compulsion of law;* and (e) *information relating to the operations, capabilities or technologies of, or methods or sources used by, a domestic or foreign law enforcement agency* are excessive (see examples in para 1327 of Explanatory Memorandum).

– **Section 122.2 – Conduct causing harm to Australia’s interests**

A number of categories of information are excessive and/or unwarranted

Section 122.1 – Inherently harmful information – ‘cause harm to Australia’s interests’

Matters that are specified to ‘*cause harm to Australia’s interests*’ include interfering with any process concerning breaking of a Commonwealth law that has a civil penalty, interfering or prejudicing the performance of functions of the AFP, and harming or prejudicing relations between the Commonwealth and a State or territory.

Overall, the ability of the media to report on what may be classified information and/or national security concerns will be more difficult – particularly under the catch-all phrase of ‘harm to Australia’s interests’.

- Section 122.2(a)(ii) – *interfere with or prejudice the prevention, detection, investigation, prosecution or punishment of... (ii) a contravention of a provision, that is subject to a civil penalty of a law of the Commonwealth*

The Explanatory Memorandum of the Bill admits that the ‘civil penalty’ provision under (a)(ii) goes beyond recommendations made by the ALRC in their 2010 report. It is justified by: *‘the use of official information to interfere with or prejudice the effective enforcement of a civil penalty provision involves a serious interference with the administration of justice, as well as an improper use of official information that is likely to undermine public confidence in the effective administration of justice’.*

However, the ALRC rejected such an inclusion, stating: *‘the general criminal offence should not cover unauthorised disclosures of information that would prejudice the prevention, detection, investigation, prosecution or punishment of a breach of a law imposing penalties or sanctions that are not criminal. It would be excessive to impose criminal sanctions in the general secrecy offence for disclosures of information that threatened civil or administrative processes’⁵.*

We suggest this provision be reconsidered in light of the ALRC assessment and lack of evidence of a problem requiring the provision.

- Section 122.2(d) – harm or prejudice Australia’s international relations in any other way

⁵ *Ibid*, para 5.64

We draw attention here to the reporting on international trade. Arguably, that could be a news report that is adverse to any aspect of a particular country or a nation's political figures.

- Section 122.2(e) – harm or prejudice relations between the Commonwealth and a State or Territory

We also draw attention to reporting on Commonwealth and State/territory matters, for example but not limited to GST distributions. Arguably, that could be an article that is adverse, or conversely supportive, of a Commonwealth or State/territory position over the other.

The Explanatory Memorandum cites '*loss of confidence or trust*' in the Commonwealth Government by a State or Territory Government as one example of conduct '*having the effect of diminishing the capacity of the Commonwealth Government, or State or Territory Government, to function within Australia's federal structure*'⁶.

However, the ALRC roundly rejected such an inclusion, stating: '*...the general secrecy offence should not include protected categories of information, such as information communicated in confidence. While the ALRC acknowledges that information damaging to relations between the Commonwealth and the states and territories requires protection, unauthorised disclosure of this kind of information should be addressed through intergovernmental arrangements, the imposition of administrative sanctions, or the pursuit of general law remedies. Where such information is sensitive for other reasons—for example, because it relates to national security, the enforcement of the criminal law, or public safety—unauthorised disclosures may be caught by other elements of the general secrecy offence*'⁷.

We recommend the Committee reconsider this provision.

– **Division 122.4 – unauthorised disclosure of information by Commonwealth officers and former Commonwealth officers**

The existence of this Division is concerning as it this seems to undermine the claim the Bill repeals existing s.70 of the Crimes Act. In effect section 122.4 retains those and adds to them.

We ask the Committee to consider a sunset provision so that the 'review' is not allowed to go on indefinitely.

– **Division 122.5 – defences**

Multiple issues that undermine the ability to report in the public interest

- *Section 122.5(2) – information that is already public*

This defence relies on the information being authorised by the Government.

We are of the view that it should be a defence that the information has already been communicated or made available to the public – regardless of the status of the Commonwealth's authorisation of that information.

⁶ *Ibid*, para 1300

⁷ *Secrecy Laws and Open Government in Australia, Report 112, December 2009, Australian Law Reform Commission., para 5.109.*

- *Section 122.5(4) – information communicated in accordance with the Public Interest Disclosure Act 2013*

The *Public Interest Disclosure Act 2013* (PID Act) is available to Commonwealth public servant whistle-blowers. As we have articulated in previous submissions regarding the PID Act, it favours internal disclosure and investigation away from media scrutiny.

If a Commonwealth public servant pursues external disclosure then the defence at s.122.5(6) would apply.

- *News reporting defence – Section 122.5(6) – information dealt with or held for the purposes of fair and accurate reporting*

This defence is narrow and subjective, particularly the matters of ‘public interest’ and ‘fair and accurate reporting’ – independently and in aggregate.

Also, the defence does not reference the Division as a whole but specifies the defence applies to offences ‘*relating to the dealing with or holding of information*’. While ‘*deals*’ is broadly defined, there should be no ambiguity that the defence applies to all offences, including the ‘*communication*’ offences under s.122.1(1), and s.122.2(2).

- *‘Public interest’*

We hold serious concerns about paragraphs 1637 to 1642 (inclusive) of the Explanatory Memorandum.

We are particularly alarmed by paragraph 1638 that provides a framework or elements of what would constitute ‘fair and accurate public interest journalism’.

We are particularly vexed with the inclusion of the suggestion that ‘the extension for the defence to a person who holds information is intended to enable journalists to perform the important function of ‘filtering’ stories that are contrary to public interest’.

We also note that discharging this public interest defence – in addition to discharging the limb of fair and accurate reporting –

- *‘In the person’s capacity as a journalist engaged in fair and accurate reporting’*

- *Definition of journalist*

The EM refers to the Macquarie and Oxford English dictionary definitions of ‘journalist’.

We note that there are various definitions of ‘journalist’ in Commonwealth legislation including s.126J of the *Evidence Act 1995*:

- ‘*journalist*’ means a person who is engaged and active in the publication of news and who may be given information by an informant in the expectation that the information may be published in a news medium; and
- ‘*news medium*’ means any medium for the dissemination to the public or a section of the public of news and observations on news.

We encourage the Committee to recommend the use of consistent of definitions, and support the definitions in the *Evidence Act* being used in the Bill.

We note however that the definitions of journalist referenced by the Bill (and the definitions in the *Evidence Act*) do not provide a defence for support staff who may also ‘deal’ with the information in the course of communication. This should be addressed.

- *Fair and accurate reporting – highly subjective*

The term ‘fair and accurate’ is highly subjective. The Explanatory Memorandum references notes that the intention is to exclude persons who ‘*merely publish documents or information without engaging in fair and accurate reporting*’, and ‘*use information or documents to produce false or distorted reporting*’⁸.

In a world where charges of ‘fake news’ are made without justification and quite often because what reported is not to someone’s liking, we recommend the Government re-consider this as a matter of utmost importance.

Additionally, we draw the Committee’s attention to the manner in which some Australian courts have been assessing the conduct of journalists – and expecting nothing less than ‘perfect’ conduct before giving considering the manner in which fairness and accuracy can be ascertained – for example how a journalist acted or steps taken to research and communicate a report.

- Intersection of this defence with the protection of sources

We note that it is possible that journalists may be placed in the position of having to prove the evidentiary burden of s.122.5(6) – both public interest and working as a journalist – while being unable to identify how they came to ‘deal’ with and/or ‘hold’ the information. This would make it extremely difficult to discharge the burden of proof in this defence.

- Intersection with the *Telecommunications (Interception and Access) Act* – Journalist Information Warrant Scheme

It is quite possible the powers under the TIA Act to access the metadata of journalists to identify a source or a whistle-blower – in contravention of the journalist’s obligation to protect the identity of a confidential source – may be used to identify sources in these circumstances.

Separately we urge the Committee to review the Journalist Information Warrant Scheme thoroughly and make amendments to improve it’s functioning and ensure the media’s role in Australia’s democracy.

- *News reporting defence – Section 122.5(7) – information dealt with or held for the purposes of fair and accurate reporting*

⁸ *Ibid*, para 1640

This section is encumbered with a requirement at subsection (d) that the information cannot *'harm or prejudice the health or safety of the public or a section of the public.'*

There are no definitions of harm or what qualifies as a section of the public. The provision is unclear and should be deleted.

- *Section 122.5(8) – information that has been previously communicated*

Similar to the defence at s.122.5(2), however this defence contains additional limbs.

This defence adds the requirements at s.122.5(d) that at the time of communication the person believed the communication would not harm Australia's interests or the security or defence of Australia, and s.1225.8(e) and that belief was reasonable.

This outcome undermines the public interest significantly, and restricts the media from reporting material already in the public domain.

The outcome of the s.122.5(8) defence of prior publication is to intimidate news organisations from being the first to publish by placing all of the burdens on them – leading to a substantial chilling of public interest journalism.

Rather – as in s.1225.8(2) above, it should be a defence that the information has already been communicated or made available to the public – regardless of the status of the Commonwealth's authorisation of that information.

Should the Government want to address unauthorised information that is already public it is quite possible that the media could be restricted from reporting on the Government's subsequent communication in these circumstances.

- **The offences carry substantially longer penalties, and there is a very real risk of jailing journalists for doing their jobs**

Offences of 'communication' carry a penalty of 15 years imprisonment. Offences of 'deals' (other than by communicating) carry a penalty of five (5) years imprisonment.

These can also be found to be *'aggravated offences'*, meaning a five (5) year increase in the penalty, if the information has received certain security classification.

The current penalty for breach of s.70 is two (2) years imprisonment, with a various breaches of s.79 attracting six (6) months to seven (7) years.

We note that the ALRC report recommended (Recommendations 7-4 and 7-5) both secrecy and 'subsequent disclosure' offences both attract a maximum penalty of 7 years imprisonment, given *'the level of culpability and potential harm encompassed by the subsequent disclosure offences is of a similar order to that reflected in the recommended general secrecy offence'*.

ESPIONAGE

- **Section 91.1 – dealing with information etc concerning national security which is or will be available to foreign principal**

Section 91.1(2) provides the offence for recklessly dealing with information prejudicial to Australia's national security in a way that makes it available to a foreign power. It would be the case that

communicating such information online, in print, or by broadcast would breach the provision. Further, to breach this section a journalist or media organisation would not need to have a foreign power in mind.

We note that the only applicable defence is that the information was already in the public domain with the authority of the Commonwealth.

As with the defence provisions regarding the secrecy section of the Bill, we recommend that it should be a defence that the information has already been communicated or made available to the public – regardless of the status of the Commonwealth’s authorisation of that information. We note that the penalty is 15 years jail. Once again we note that the risk is that a journalist could go to jail for doing their job is very real, and as a result of reporting in the public interest.

– **Sections 92.7 and 92.8 – foreign interference involving foreign intelligence agencies**

The Explanatory Memorandum states that ‘*support*’ in these sections is not defined but is to have its ordinary meaning, namely (according to the Oxford Dictionary) ‘*to give help or encouragement or approval to*’.

We are concerned that any communication – online, in print or by broadcast – that positively reports about a foreign intelligence agency would breach these sections.

We bring to the attention of the Committee a not dissimilar issue that the *Wall Street Journal* recently encountered, where a journalist wrote an article about all sides of conflict in a region, including interviewing and reporting the views of the PKK. Because the reporter gave the PKK a voice at all, the article was regarded as terrorist propaganda. Similarly, if any foreign intelligence agency was using a local digital platform and a journalist reported on it, that journalist and the media company would very likely breach the provision.

We reiterate at the conclusion of this submission the necessity for a robust general public interest/news reporting defence for both the secrecy and espionage elements of the Bill. We also put that without a robust public interest /news reporting defence we do not support the passage of the Bill.

