



Law Council
OF AUSTRALIA

Office of the President

13 March 2018

Mr Andrew Hastie MP
Chair
Parliamentary Joint Committee on Intelligence and Security
PO Box 6021
Parliament House
Canberra ACT 2600

By email: pjicis@aph.gov.au

Dear Mr Hastie

Proposed amendments to the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017 (EFI Bill)

1. Thank you for the opportunity for the Law Council to provide an additional written submission to the Parliamentary Joint Committee on Intelligence and Security's (**the Committee**) review of the EFI Bill.
2. The Attorney-General provided the Committee with a range of proposed amendments to the EFI Bill. In summary, the amendments:
 - create separate secrecy offences that apply to non-Commonwealth officers and are narrower in scope than those applying to Commonwealth officers;
 - narrow the definitions of 'inherently harmful information' and 'causes harm to Australia's interests', which form part of the proposed secrecy offences applying to Commonwealth officers;
 - strengthen the defence for journalists at proposed section 122.5(6);
 - limit the definition of 'security classification' to secret and top secret, and remove strict liability for a number of offences;
 - limit the proposed espionage offence at section 91.3 to security classified information that is dealt with for the primary purpose of making it available to a foreign principal.
3. There are 39 amendments in total. This submission makes the following comments on the amendments of substance.

Preliminary comments

4. Many of the amendments appear to pick up points raised by the Law Council in its initial submission to the Committee dated 22 January 2018 on the secrecy offences in the EFI Bill. While this is welcome, the Law Council emphasises the need for improvements to be made to the EFI Bill on a broad range of other proposed offences,

and particularly in relation to the extension of the definition of 'national security' beyond the security and defence of Australia and to include Australia's political and economic relations with other countries.

5. While the amendments to the secrecy offences appropriately distinguish between 'insiders' and 'outsiders' consistent with the Law Council's previous recommendation to the Committee, the amendments do not fully accord with the Australian Law Reform Commission's (**ALRC**) Report No 122, *Secrecy Laws and Open Government in Australia (the Secrecy Report)* that there be an express harm requirement. The categories of 'inherently harmful information' and 'causing harm to Australia's interests' also do not accord with the harmful behaviour identified by the ALRC. Hence the Law Council reiterates its view that it is preferable for the offences to be framed in a manner consistent with the ALRC's Secrecy Report. In the absence of an express harm requirement, the offences should cascade in penalty and require that a person knew, or as a lesser offence, was reckless as to whether, the protected information falls within a particular category (i.e. security classification or concerns Australia's national security with the narrow definition).
6. In the absence of a public interest defence (the preferred position), the broadening of the 'journalist' defence is welcome, although the meaning of the term 'news media' is uncertain. A person who supplied information (e.g. about malpractice in the prosecution process) to a journalist would have no defence but the person who reported it in the news media would have a defence. The policy of punishing those who deal with such information outside the news media also requires justification.
7. Amendments are still required to the secrecy offences to broaden the defences/exceptions for legal advice, legal proceedings and the dealing with information not simply the communication of it, as outlined in the Law Council's initial written submission to the Committee.
8. The provisions also require clarification to ensure that the innocent receipt of information (e.g. in a filing cabinet) is not captured by the offence provisions. The fault element of intention applies to the communicating or dealing with 'information'. This need not necessarily be interpreted to mean the information that falls within one of the prescribed categories. The link between the defendant's intention and the harmful behaviours targeted requires further precision. The limited news media exception may not be made out as it would be difficult for a defendant to demonstrate there was a reasonable belief in the public interest where they are in receipt of the information but have not had the opportunity to consider its contents.

Definition of security classification and espionage offences

9. Proposed subsection 90.5(1) the definition of security classification would be tightened to refer only to Secret and Top Secret classifications or equivalent classifications made by regulations. Subject to advice about the plasticity of those two classifications, this amendment seems acceptable. This would impact on both the proposed espionage and secrecy offences in the Bill.
10. Amendment No. 2 would remove proposed section 91.1(3) to remove strict liability with respect to the requirement that the document have a security classification for the espionage offences. The same proposition in relation to proposed subparagraph

(2)(b)(i). This appears to be consistent with the Law Council's initial written submission to the Committee and should be accepted.

11. Amendment No. 3 would insert a new fault element that being an intention that the information or article has a primary purpose of making that information available to a foreign principal or a person acting on behalf of a foreign principal for the proposed espionage security classification offence. This would still leave a person providing information about oil and gas negotiations with East Timor to the Timorese Government or a United Nations Agency liable to the offence. However, the following amendment, amendment No. 4 has the additional requirement that the article has to have a security classification. By the definition this would be classification of Secret or Top Secret. It may be that as a practical matter, negotiations about oil and gas rights would not attract those classifications. Again, it would be prudent for the Committee to receive advice about how liberally those classifications are imposed. There is no journalist or public interest defence for this espionage offence. However, the information with a Top Secret or Secret classification would most inevitably have to come from Government. That overcomes the earlier problem that just any information may be caught. Moreover, the requirement that the information concerns Australia's national security has been deleted which is positive.
12. Amendment No. 5 is inconsequential as is Amendment No. 6.
13. Amendment No. 7 deletes proposed subsection 91.6(B)(1) as that subsection becomes redundant with the change in definition of security classifications.
14. Amendment No. 8 would remove strict liability in regard to the proposed aggravated espionage offence of dealing with five or more records with security classification. Again, this appears to be consistent with the Law Council's initial written submission and should be accepted.

Secrecy offence amendments

15. The balance of the amendments deals with the secrecy provisions.
16. Amendments No. 9, 10 and 11 deal with amendments to the definition of 'cause harm to Australia's interests'. A civil contravention would be removed from the definition in proposed paragraph 121.1(1)(a) and limited to criminal offences. While this is positive and consistent with the Law Council's initial written submission, the definition particularly due to the maintenance of the phrase 'interfere with' remains very broad and may well stifle criticism of police, security or prosecution officials who have acted improperly or negligently.
17. Amendment No. 10 would remove paragraph 121.1(1)(d) and (e) which involved 'harm or prejudice to Australia's international relations in any other way' and 'harm or prejudice relations between the Commonwealth and a State or Territory'. These amendments are welcome. However, the Law Council reiterates its concerns about proceeds of crime matters which are civil proceedings still falling within the proposed definition and the uses of the broad term 'interferes with'.
18. The Law Council supports the move to clarify that 'public' in the definition means the 'Australian public' as per Amendment No. 11.
19. Amendment No. 14 would change the definition of 'Commonwealth Officer' in subsection 121.1(1) to exclude officers and employees engaged by the Australian

Broadcasting Corporation or the Special Broadcasting Service Corporation. This is positive and is consistent with the Law Council's submission to differentiate between current and former public servants and other people.

20. Amendments No. 15 and No. 16 would change the definition of 'deal' to pick up the definition in proposed subsection 90.1(2) as well as 90.1(1) to ensure that the secrecy offences relating to the dealing with information will cover:
 - a) dealing with all or part of the information or article; and
 - b) dealing only with the substance, effect or description of the information or article.
21. This appears to be a technical amendment.
22. Amendment No. 17 would insert a definition of 'foreign military organisation' for the purposes of the secrecy offences. The proposed definition would include Government agencies for a foreign country which have responsibility for the 'defence of the country'. This appears vague and the Committee may wish to seek clarification from the Attorney-General's Department.
23. Amendment No. 18 would delete information provided by a person to the Commonwealth under obligation of law from the definition of inherently harmful information in proposed subsection 121.1(1). The Law Council does not oppose this amendment but would be grateful for further clarification from the Attorney-General's Department as to its purpose.
24. Amendments No. 19 and 20 are consequential on the change in the definition of security classification.
25. Amendment No. 21 is the first of a series of amendments which would introduce a division between communications coming from current or former Commonwealth Officers from those of persons other than Commonwealth Officers. In principle, these amendments are to be commended as a significant improvement to the EFI Bill secrecy offences and are consistent with the Law Council's initial written submission to the Committee. However, these offences carry up to 15 year maximum terms for widely defined harms/inherently harmful information and interact with whistleblower legislation, as recognised in the defence provided in proposed subsection 122.5(4). In effect, failure to comply with the *Public Interest Disclosure Act 2013* (Cth) could result in an offence carrying a 15 year maximum penalty. The interaction between these two areas – government security and exposure of malpractice – requires further explanation.
26. Amendment No. 22 would remove from proposed paragraph 121.1(1)(c) to information obtained by that person and deletes the phrase 'or any other' person. This occurs throughout these offences and is consequential to the amendments applying to the differentiation of Commonwealth officers and others.
27. Amendment No. 27 would continue with the vague offence of 'Conduct Causing Harm to Australia's Interests' but limit it to current and former Commonwealth Officers. As indicated above, while the definition of 'causing harm to Australia's interests' has been improved by the proposed amendments, they do not go far enough as the definition is still defined broadly in relation to the 'interference' with the performance or functions of the Australian Federal Police in respect of some of its functions, prejudice to

- Australia's international relations in relation to confidential information by foreign governments or international organisations, or information provided to the Government. Confidential information could be inconsequential.
28. Amendment No. 35 would create two new offences in proposed subsections 122.4A(1) and (2) by non-Commonwealth officers. The proposed offence in subsection 122.4A(1) would be restricted to the communication of information which had been made or obtained by another person who had been a Commonwealth officer or engaged to work for a Commonwealth entity and any one of four criteria applies:
- (i) The information has a security classification of Secret or Top Secret;
 - (ii) The communication of the information damages the security or defence of Australia. The broader definition of national security is not employed here which is welcome and should be agreed to;
 - (iii) The communication interferes with or prejudices the prevention detection investigation prosecution or punishment criminal offence against the law of the Commonwealth. Criticisms of that provision have already been outlined.
 - (iv) The communication of the information harms or prejudices the safety of the Australian public or a section of the Australian public.
29. The main offence carries a prison term of 10 years. There is a subsidiary offence in subsection 2 of other dealings with information. It appears to parallel the more serious offence but is restricted to dealing with information rather than communicating.
30. Amendment No. 36 contains a new exception for the news media. It applies to people who are working in the capacity as a person engaged in reporting news, presenting current affairs or expressing editorial content in the news media. A person has to have a reasonable belief that the information was in the public interest. The Law Council remains opposed to the notion that the public interest exception should only be available to journalists or the news media. This is not a proper criterion for criminal liability. The exception is now defined more widely than journalism but just who the target is remains unclear. The defence refers to news media but it is not clear that it would pick up an individual blogging for example. Further, a person who obtained police information from a current or former government officer (e.g. about police malpractice in a prosecution) supplied that information to a journalist who then published it, that person would not have the defence. The journalist would have a defence.
31. Amendment No. 37 would clarify that a person may not reasonably believe that dealing with or holding information is in the public interest if it relates to the publication of the identity of an ASIO employee or ASIO affiliate, *Intelligence Services Act 2001* (Cth) (publication of identity of staff or would be an offence under section 22, 22A or 22B of the *Witness Protection Act 1994* (Cth)).
32. Amendment No. 38 would mean that a person may be outside the public interest defence if, for example, the information is likely to result in the death or serious injury to a person or to prejudice the health and safety of the Australian public or a section of it.
33. Amendment No. 39 would add dealing with or holding information for the purposes of directly or indirectly assisting a foreign intelligence agency or a foreign military organisation. The Law Council reiterates its concerns regarding the definition of

foreign intelligence agency as outlined in its initial written submission to the Committee.

Thank you for the opportunity to provide a supplementary submission on these matters.

Please contact Dr Natasha Molt, Deputy Director of Policy, Policy Division [REDACTED] [REDACTED] in the first instance, if you require further information or clarification.

Yours sincerely

Morry Bailes
President