

Opening Statement



16 March 2018

Opening Statement to Parliamentary Joint Committee on Intelligence and Security Hearing on:

Review of the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017

Morry Bailes, President, Law Council of Australia, 16 March 2018

Opening Statement – Mr Morry Bailes

1. My name is Morry Bailes and I am the President of the Law Council of Australia. As the Committee would be aware, the Law Council is the peak national body representing the legal profession in Australia.
2. I would like to thank the Committee for the opportunity to provide further evidence to its inquiry on the proposed amendments to the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017.
3. The Law Council welcomes many of the amendments to the Bill, which appear to pick up points raised by the Law Council in its initial submission to the Committee on 22 January 2018.
4. These amendments include:
 - amendments to the secrecy offences to introduce a division between communications coming from current or former Commonwealth Officers from those of persons other than Commonwealth Officers;
 - the broadening of the journalist defence;
 - the tightened definition of 'security classification' to Secret and Top Secret classifications or equivalent classifications made by regulations; and
 - the removal of strict liability for certain offences.
5. While these amendments are welcome, the Law Council wishes to emphasise the need for further improvements to be made on a broad range of other proposed offences. I wish to highlight a few of these recommendations:
 - The Law Council remains concerned about the definition of 'national security' in the Bill, as going beyond the security and defence of Australia to include Australia's political and economic relations with other countries.

The Law Council of Australia is the national voice of the legal profession, promoting justice and the rule of law.

- The categories of ‘inherently harmful information’ and ‘causing harm to Australia’s interests’ in the proposed secrecy offences do not accord with the Australian Law Reform Commission’s recommendation in the Secrecy Laws and Open Government in Australia Report for an express harm requirement. 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. 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.
 - The term ‘news media’ under the broadened ‘journalist’ defence requires further clarification. A person who supplied information to a journalist would have no defence but the person who reported it in the news media would have a defence.
 - Amendments are still required to the secrecy offences to broaden the defences and exceptions for legal advice, legal proceedings, and the dealing with information, not simply the communication of it.
 - Amendments are required to ensure that the innocent receipt of information, for example in a filing cabinet, is not captured by the offence provisions. The fault element of intention that applies to the communicating or dealing with ‘information’ cannot 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 in the Bill.
 - The Law Council welcomes amendments 9, 10 and 11 to remove civil contraventions from the definition of ‘cause harm to Australia’s interests’. However, the maintenance of the phrase ‘interferes with’ remains very broad and may well stifle criticism of police, security, or prosecution officials who have acted improperly or negligently.
 - While the new exception for the news media which applies to people who are working in the capacity as person engaged in reporting news, presenting current affairs or expressing editorial content in the new media is defined more widely than journalism, the Law Council remains opposed to the notion that the public interest exception should only be available to journalists or the news media. For example, it is unclear if it would pick up an individual blogger.
6. The Law Council has also made a range of other specific recommendations – the detail of which is provided in our written submission.
7. My colleagues and I are happy to answer any questions the Committee may have.

Thank you.

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