
From: Emma Liddle
Sent: Wednesday, 15 November 2017 9:34 AM
To: Andrew Solomon; Rocelle Ago
Subject: RE: National Security Legislation (Espionage and Foreign Interference) Bill 2017: secrecy [DLM=Sensitive:Legal]

Security Classification:
Sensitive:Legal-DLM-ONLY

Dear Andrew and Rocelle

I have had a look at the draft Bill and have the following additional observations.

The Bill inserts a new Part 5.6 dealing with the secrecy of information. The Bill defines the term 'inherently harmful information'. This term includes 'confidential information', which is also defined under the Bill. The definition of 'confidential information' appears to be very broad and would potentially cover information considered as part of an IC review application.

Division 122 of the Bill creates a series of offences relating to the communication, other dealings with and removal of 'inherently harmful information' from a proper place of custody. There is a note in the Bill that refers to 122.4 as providing exceptions to the offences. However, there do not appear to be any exceptions. There are only defences to prosecution for particular offences.

This structure is quite different to the offence provision in the *Australian Information Commissioner Act 2010* (Cth) for unauthorised dealing with information. Under s 29 of the AIC Act, the offence in this section does not apply if the person uses the information in the course of performing their functions and powers for a privacy or FOI function. Division 122 is not structured in this way.

Section 92 provides protection against criminal liability for a Commonwealth officer who provides access to or consults with another person under the FOI Act. I'm unsure if section 92 provides protection against liability for the offences created by Division 122 as these offences deal with 'communication' and 'other dealings' with information, which appear to be quite broad.

I agree with Rocelle that we will need to be consulted further, and in more detail, in regards to the draft Bill as it creates offences that may impact on the conduct of IC reviews.

Kind regards
Emma.

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From: Andrew Solomon
Sent: Tuesday, 14 November 2017 5:07 PM
To: Stephanie Otorespec <stephanie.otorespec@oaic.gov.au>
Cc: Emma Liddle <emma.liddle@oaic.gov.au>; Rocelle Ago <rocelle.ago@oaic.gov.au>; Melanie Drayton <melanie.drayton@oaic.gov.au>; Sarah Ghali <sarah.ghali@oaic.gov.au>
Subject: RE: National Security Legislation (Espionage and Foreign Interference) Bill 2017: secrecy [DLM=Sensitive:Legal]

Stephanie,

I've reviewed the specific removal of 78(1)(a) of the FOI Act in the proposed legislation.

As the change is in our favour as it removes a restriction on our powers of entry for an FOI investigation we wouldn't oppose that specific change. However if its to be replaced as indicated in the drafter's query we might have further to say on the replacement. Happy for you to go back saying that.

I also draw your attention to 122.4(3) on page 12 and wonder whether we should be included as an agency in that 'defences' provision (as we may receive information covered by the offences in the proposed legislation in our IC review role? I don't know the whole context of the proposed legislation but that jumped out at me).

I note though that we haven't looked at any other provision of the proposed legislation so don't know if there are any other issues of a privacy or FOI nature.

Andrew

From: Rocelle Ago
Sent: Tuesday, 14 November 2017 4:40 PM
To: Andrew Solomon <andrew.solomon@oaic.gov.au>; Emma Liddle <emma.liddle@oaic.gov.au>
Subject: FW: National Security Legislation (Espionage and Foreign Interference) Bill 2017: secrecy [DLM=Sensitive:Legal]

Hi Andrew/Emma

Please see Steph's email below.

The proposed change is to repeal para 78(1)(a) of the FOI Act:

78 Information Commissioner investigations—places for which approval required before entry

Specific places and areas

(1) Subsection (2) applies if an authorised person proposes to enter, or carry on an investigation, at any of the following:

(a) a place referred to in paragraph 80(c) of the *Crimes Act 1914*;

(b) a place that is a prohibited area for the purposes of the *Defence (Special Undertakings) Act 1952* because of section 7 of that Act;

(c) an area of land or water or an area of land and water that is declared under section 14 of the *Defence (Special Undertakings) Act 1952* to be a restricted area for the purposes of that Act.

Paragraph 80(c) of the Crimes Act provides:

80 Prohibited places

The following places shall be prohibited places:

(a) any work of defence, arsenal, factory, dockyard, aerodrome, camp, ship, aircraft, telegraph or signal station, or office, belonging to the Queen or the Commonwealth, and any other place belonging to the Queen or the Commonwealth used for the purpose of building, repairing, making, obtaining or storing any ship, aircraft, arms, or materials or instruments for use in time of war, or any plans or documents relating thereto;

(aa) any camp, barracks or place where prisoners of war, internees or members of the Defence Force are detained;

(b) any place not belonging to the Queen or the Commonwealth where any ship, aircraft, arms, or materials or instruments of use in time of war, or any plans or documents relating thereto, are being made, repaired, obtained, tested or stored under contract with, or with any person on behalf of, the Queen or the Commonwealth;

(c) any place belonging to the Queen or the Commonwealth which is for the time being declared by the Governor-General to be a prohibited place for the purposes of this Part on the ground that information with respect thereto, or damage thereto, would be useful to an enemy or to a foreign power; and

At this stage, I agree with what Steph proposes below (noting the tight time frame, it would also be open to us to say we haven't had the opportunity to review in the given timeframe, but could we be kept in the loop).

Thanks
Rocelle

From: scrutiny

Sent: Tuesday, 14 November 2017 12:36 PM

To: Rocelle Ago <rocelle.ago@oaic.gov.au>

Cc: Sarah Ghali <sarah.ghali@oaic.gov.au>; Steven Robertson <steven.robertson@oaic.gov.au>

Subject: FW: National Security Legislation (Espionage and Foreign Interference) Bill 2017: secrecy [DLM=Sensitive:Legal]

Hi Rocelle

We've received this bill for comment by tomorrow morning and I thought I should forward on as there is an amendment to s78 of the FOI Act included (see p 19). Happy to pass on any comments you wish to make, noting the tight time frame, it would also be open to us to say we haven't had the opportunity to review in the given timeframe, but could we be kept in the loop.

Thanks and happy to discuss

Steph

Stephanie Otorepec

Assistant Director | Regulation and Strategy Branch

P: [REDACTED] E: stephanie.otorepec@oaic.gov.au

Office of the Australian Information Commissioner

From: Andrew Solomon
Sent: Wednesday, 15 November 2017 1:52 PM
To: Stephanie Otorepec
Cc: Emma Liddle; Rocelle Ago; Sarah Ghali; Madolyn Smith; Steven Robertson; Melanie Drayton
Subject: RE: National Security Legislation (Espionage and Foreign Interference) Bill 2017: secrecy [DLM=Sensitive:Legal]

Security Classification:
Sensitive:Legal-DLM-ONLY

I would appreciate that response going back.

From: Stephanie Otorepec
Sent: Wednesday, 15 November 2017 1:44 PM
To: Andrew Solomon <andrew.solomon@oaic.gov.au>
Cc: Emma Liddle <emma.liddle@oaic.gov.au>; Rocelle Ago <rocelle.ago@oaic.gov.au>; Sarah Ghali <sarah.ghali@oaic.gov.au>; Madolyn Smith <madolyn.smith@oaic.gov.au>; Steven Robertson <steven.robertson@oaic.gov.au>; Melanie Drayton <melanie.drayton@oaic.gov.au>
Subject: RE: National Security Legislation (Espionage and Foreign Interference) Bill 2017: secrecy [DLM=Sensitive:Legal]

Hi all

Thanks for your consideration - I've spoken with Emma and then with AGD to raise the issues below.

AGD have confirmed this Bill doesn't appear to have specific implications for the OAIC. 

As the deadline was 11am, AGD have already gone back to the drafters on this Bill. AGD mentioned they could still send on further additional comments on our behalf if we want to. **Andrew/Emma**, can you please let me know if you would like me to go back with this sentence below? I've added in something about the issue above for abundance of clarity.

"The OAIC notes the proposed amendment to s 78(1)(a) of the *Freedom of Information Act* in the Bill, and the drafter's comment in this regard. If further amendments are to be made to this provision, the OAIC would appreciate being consulted on those changes.

The OAIC also notes that the Bill's definition of 'inherently harmful information' appears to be very broad and some of the offence provisions would potentially cover the disclosure of a wide range of Australian Government information, including information considered as part of an Information Commissioner review application. In this regard the OAIC suggests that the Explanatory Memorandum to the Bill should clarify the operation of the relevant defences contained in the Bill, for example in @122.4(1) of the Bill."

Thanks
Steph

From: Andrew Solomon
Sent: Wednesday, 15 November 2017 12:33 PM
To: Stephanie Otorepec <stephanie.otorepec@oaic.gov.au>

Cc: Emma Liddle <emma.liddle@oaic.gov.au>; Rocelle Ago <rocelle.ago@oaic.gov.au>; Melanie Drayton <melanie.drayton@oaic.gov.au>; Sarah Ghali <sarah.ghali@oaic.gov.au>
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See email from Emma which I passed on. Can we raise the question with AGD please (whether they believe the Bill affects our IC review powers in any way ...)

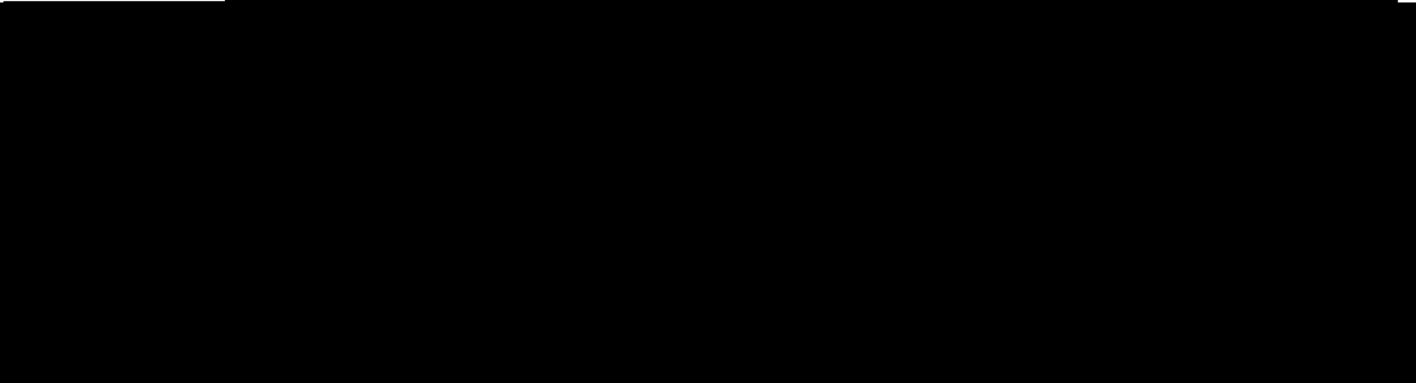
From: Stephanie Otorepec
Sent: Wednesday, 15 November 2017 12:20 PM
To: Andrew Solomon <andrew.solomon@oaic.gov.au>
Cc: Emma Liddle <emma.liddle@oaic.gov.au>; Rocelle Ago <rocelle.ago@oaic.gov.au>; Melanie Drayton <melanie.drayton@oaic.gov.au>; Sarah Ghali <sarah.ghali@oaic.gov.au>
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Thanks very much Andrew. I will include a comment back to AGD along the following lines:

“We note the proposed amendment to s 78(1)(a) of the *Freedom of Information Act* in the Bill and the drafter’s comment in this regard. If further amendments are to be made to this provision, the OAIC would appreciate being consulted on those changes.”

Thanks for drawing attention to the other provision on page 12. We’ve reviewed and suggest we make no comment, however – as I believe another defence would cover disclosures to our office (person was exercising a power, or performing a function or duty, in the person’s capacity as a Commonwealth officer – on p 12).

Thanks
Steph



From: scrutiny [mailto:scrutiny@oaic.gov.au]
Sent: Wednesday, 15 November 2017 2:00 PM
To: Information Law Scrutiny
Cc: Gallagher, Mark; Madolyn Smith
Subject: RE: National Security Legislation (Espionage and Foreign Interference) Bill 2017: secrecy [DLM=Sensitive:Legal]


Hi Mark

Thanks for sending this through, and apologies for the late response – as discussed, there are in fact a few short comments we would be pleased to add (I was going to send them through directly but am aware we don't usually do that, so have sent to you to forward, I hope that's OK).

“The OAIC notes the proposed amendment to s 78(1)(a) of the *Freedom of Information Act* in the Bill, and the drafter's comment in this regard. If further amendments are to be made to this provision, the OAIC would appreciate being consulted on those changes.

The OAIC also notes that the Bill's definition of 'inherently harmful information' appears to be very broad and some of the offence provisions would potentially cover the disclosure of a wide range of Australian Government information, including information considered as part of an Information Commissioner review application. In this regard the OAIC suggests that the Explanatory Memorandum to the Bill should clarify the operation of the relevant defences contained in the Bill, for example in @122.4(1) of the Bill.”

Kind regards
Steph

Stephanie Otorepec
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