



New South Wales
Council for Civil Liberties

NSWCCL SUBMISSION

Australian Border Force Amendment (Protected Information) Bill 2017

28 August 2017

About NSW Council for Civil Liberties

NSWCCL is one of Australia's leading human rights and civil liberties organisations, founded in 1963. We are a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. We also listen to individual complaints and, through volunteer efforts, attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases defending infringements of civil liberties, engage regularly in public debates, produce publications, and conduct many other activities.

CCL is a Non-Government Organisation in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

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The NSW Council for Civil Liberties (NSWCCL) thanks the Senate Legal and Constitutional Affairs Committee (the Committee) for the opportunity to make a submission concerning the Australian Border Force Amendment (Protected Information) Bill 2017 (the Bill).

The NSWCCL commends the Government and the Minister for the relaxation of what were very vexatious and dangerous restrictions on what whistleblowers and others could say about the operations and activities carried out under the aegis of the Department. Nevertheless, there are two matters in the Bill which cause us concern.

The first has also been noted by the Parliament's Scrutiny Committee. The Bill proposes introducing a new definition of information which, if recorded or disclosed, would make a person liable to prosecution. The new definition includes any information that has a security classification. But there is no definition of 'security information', and no defence available if the classification was inappropriately applied. There is also nothing in the proposed legislation as to by whom or how the designation as "security information" was to be determined or applied.

The Bill, in our view, should be amended to deal with this problem, both by inserting a definition of "security information", and by providing for a defence accordingly.

The second concerns the power being given to the Secretary of the Department to determine, by making a legislative instrument, that information is protected (and so revealing it would make a person liable to prosecution), if the Secretary is satisfied that the information would or could reasonably be expected to prejudice the effective working of the Department or harm the public interest.

This power, if granted, is certain to be the subject of another High Court challenge, and, in our view, is unlikely to survive it. Given that the restrictions proposed are in addition to the extensive list already imposed by the Bill (i.e., protecting security, defence, international relations, criminal investigations, civil and criminal court proceedings, public health and safety, confidentiality and competitive fairness), it is hard to see what legitimate purpose it could serve. Instead, it is likely, if not certainly, to be used to cover up wrongdoing, neglect and incompetence, just as the existing restrictions have.

We recommend, then, that proposed paragraph 4(1) f and subsection 4(7) be omitted from the Bill.

We recommend further that a narrow definition be given of 'security information', following the use of the term in proposed subsection 4(5).

This submission was prepared by Dr Martin Bibby on behalf of the NSW Council for Civil Liberties. We hope it is of assistance to the Committee.

Therese Cochrane
Secretary
NSW Council for Civil Liberties