



Australian Government
Attorney-General's Department

Secretary

9 March 2011

Ms Julie Dennett
Committee Secretary
Senate Standing Committee on
Legal and Constitutional Affairs
Parliament House
CANBERRA ACT 2600

Dear Ms Dennett

Follow-up information from Estimates hearing on 22 February 2011

I am writing to provide further information following on from the Additional Estimates hearing on 22 February 2011.

In an exchange about whether the Department had given any advice to government about the legality or otherwise of the conduct of Mr Assange or Wikileaks, I answered that I did not know of any such advice being given to anyone on legality and said that I was happy to make further inquiries of my officers (page 104 transcript).

Having undertaken those further inquiries, I can confirm that the Department has not provided advice on whether an offence had been committed. As we stated during the hearing (page 104 transcript), advice on that issue is quite properly a matter for the Australian Federal Police. As part of the Department's normal role in administering secrecy provisions, however, we have provided general briefings on the nature of these laws and on the range of potential offences. I have attached the material the Department provided for the Committee's information.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Roger Wilkins AO', with a long, sweeping flourish extending to the right.

Roger Wilkins AO

Ministers' Office Brief—Office of the Attorney-General**Wikileaks and the publication of classified documents relating to the war in Afghanistan****Issue**

In July 2010, the media reported the leak of over 90,000 classified United States military, intelligence and diplomatic documents relating to the war in Afghanistan, to the whistleblowing website, wikileaks. The wikileaks website was founded by Australian citizen Julian Assange.

Talking points

- **I understand that the Australian Government Department of Defence has formed a special task force to assess whether the leak of the classified information will impact on the safety of Australian Defence Force personnel serving in Afghanistan.**

The Department of Defence has also been reviewing the Wikileaks material to ascertain whether any material released on the website might be damaging to Australian interests.

Are there any criminal offences that could apply for the unauthorised release of official Government information?

- **There are Commonwealth criminal offences that could apply if relevant Commonwealth Government information is disclosed or if Australian persons are involved in the unlawful disclosure of official Government information.**
- **It is a matter for relevant law enforcement agencies to consider whether any offence under Australian law may have been committed.**

Background

Issue raised by: Extensive media coverage in July 2010.

In July 2010, the media reported the leak of over 90,000 classified United States military, intelligence and diplomatic documents relating to the war in Afghanistan, to the whistleblowing website, wikileaks. The wikileaks website was founded by Australian citizen Julian Assange.

The classified information contains sensitive information relating to the war in Afghanistan. The Australian Government Department of Defence has formed a special task force to assess whether the leak will impact on the safety of Australian Defence Force (ADF) troops serving in Afghanistan. The Department of Defence has also been reviewing the leaked material to ascertain whether any of the material released on to the wikileaks website may be prejudicial to Australian interests.

Commonwealth offences relating to unauthorised disclosure of information

Section 79 of the Crimes Act 1914 contains a series of offences relating to the unauthorised use and disclosure of official Commonwealth information.

These offences carry penalties ranging from six months to seven years imprisonment.

Section 80.1 of the Criminal Code Act 1995 also provides for an offence of treason where a person engages in conduct that assists another country or organisation that is engaged in armed hostilities against the Australian Defence Force.

This offence carries a penalty of imprisonment for life.

Section 91.1 of the Criminal Code may also be relevant, as it contains a series of offences relating to espionage and similar activities which may prejudice the security or defence of the Commonwealth, and which result in, or are likely to result in, information being communicated to another country.

These offences carry penalties of 25 years imprisonment.

Offences under section 79 of the Crimes Act and sections 80.1 and 91.1 of the Criminal Code apply to the conduct of persons both within and outside of Australia.

Cleared by: Laura Munsie, Acting Assistant Secretary, Security Law Branch

Action Officer: Teneille Steptoe

Date Created: 20 September 2010

Date Reviewed:

Munsie, Laura

From: Munsie, Laura
Sent: Friday, 10 December 2010 9:51 am
To: Siddique, Adam
Cc: Lowe, Jamie
Subject: TRIM: RE: Oz fp - WikiLeaks acts 'illegal': Gillard government [SEC=UNCLASSIFIED]

TRIM Record Number: 10#1185051DOC

Security Classification: UNCLASSIFIED

UNCLASSIFIED

Hi Adam,

There are a number of non-disclosure laws that could apply if information was being removed or disclosed by an Australian officer.

The key provision under Australian law is **section 70 of the Crimes Act**. This makes it an offence for a Commonwealth officer or former Commonwealth officer to publish or communicate, without authorisation, a fact of document which the person has by virtue of their position as a Commonwealth officer and which it is his or her duty not to disclose.

There are other potentially relevant offences in **section 79 of the Crimes Act**, which cover a range of conduct, including unauthorised disclosure and permitting other persons to access certain official secrets with the intention of prejudicing the security or defence of the Commonwealth. These offences are quite antiquated and difficult to prosecute.

There are also the espionage offences in section 91.1 of the Criminal Code, which require proof of intention to prejudice Australia's security or defence or give advantage to the security or defence of another country. These are pretty serious offences and the required intention is not easy to prove.

There are other **specific secrecy provisions** that can apply to specific agencies or specific information. For example, the ASIO Act and Intelligence Services Act contain offences for the unauthorised disclosure by officers of those agencies of information obtained or prepared by the agency in its functions or information about the performance of the agency's functions. Law enforcement, regulatory agencies, human services agencies and others all have provisions to protect certain information, such as personal or commercial in confidence information that may be obtained in the course of their functions.

The **Public Service Regulations** also place a duty on all public servants not to disclose information that the employee obtains or generates in connection with their employment if it is reasonably foreseeable that the disclosure could be prejudicial to the effective working of government, including the formulation or implementation of policies or programs. They also cover information that was or is to be communicated in confidence within the government or was received in confidence by the government from a person or persons outside the government. Breach of this requirement can amount to a breach of the Public Service Code of Conduct. For more serious breaches, breach of this provision could be considered to constitute breach of duty not to disclose information for the purpose of the secrecy offence in section 70 of the Crimes Act above.

Under the Criminal Code, it is also an offence to aid or abet, incite or conspire to commit a crime.

Talking points

- Australia has a number of laws dealing with the unauthorised disclosure of certain official information by Commonwealth officers and other persons who have a duty not to disclose information obtained in the course of their official duties.

- These include the secrecy offence in section 70 of the Crimes Act, as well as some agency specific offences.
- Additionally, Australian Public Service employees are bound by the Public Service Code of Conduct. Among other things, public servants are required to protect certain information where disclosure would be prejudicial to the effective working of government or was communicated in confidence.
- These laws recognise that there are legitimate reasons for some official information to be held in confidence by governments, to ensure that government agencies can effectively do their jobs.

If asked: is there an offence for disclosing classified information

- While there is not an offence for specifically disclosing classified information, the fact that information is classified should provide a prima facie indication that the nature of the information is such that the person is under a duty not to disclose it to persons who are not authorised.

If asked: is all this secrecy just designed to cover up embarrassing material or hide corruption

- Secrecy laws are targeted to protect against the harm that could be caused by unauthorised disclosure of certain information.
- The laws are not absolute, and are balanced by strong Freedom of Information laws and avenues for whistleblowers to raise concerns, which can be properly investigated.

Laura,

From: Siddique, Adam
Sent: Friday, 10 December 2010 8:51 am
To: Munsie, Laura
Subject: Fw: Oz fp - WikiLeaks acts 'illegal': Gillard government [SEC=UNCLASSIFIED]

Classification: UNCLASSIFIED

Laura,

As discussed, can I get a quick summary of laws that would apply to this material being removed by an Australian officer.

Thanks
A

From: Liddell, Ryan
To: RBM (AG)
Cc: Pike, Layton; Siddique, Adam
Sent: Fri Dec 10 06:55:35 2010
Subject: FW: Oz fp - WikiLeaks acts 'illegal': Gillard government [SEC=UNCLASSIFIED]

UNCLASSIFIED

FYI

From: Casey, Sam [mailto:Sam.Casey@pm.gov.au]
Sent: Friday, 10 December 2010 5:13 AM
To: PMO - RTW; Liddell, Ryan
Subject: Oz fp - WikiLeaks acts 'illegal': Gillard government [SEC=UNCLASSIFIED]

WikiLeaks acts 'illegal': Gillard government

- Brendan Nicholson, Defence editor
- From: *The Australian*
- December 10, 2010 12:00AM

THE Gillard government has hardened its position on the WikiLeaks expose, saying it is illegal in Australia to obtain - or distribute - classified documents.

In the wake of the furore that followed Julia Gillard's claim that the website's release of thousands of secret US cables was illegal, Attorney-General Robert McClelland sought advice on whether WikiLeaks founder Julian Assange had broken any law. Yesterday, Mr McClelland said obtaining classified information without authority was an offence under Australian law.

"If you look at the fact that this information was held . . . on any description . . . on a secure and highly sensitive and classified database, which was clearly the property of the US, that information has apparently been accessed in an unauthorised manner, and has been provided, again presumably without authorisation, far and wide, then you would have to assume that there is a reasonable case that the act of sourcing the information did involve illegal events," Mr McClelland said.

"I mean, if you were looking at that scenario in respect to Australian law, there would be any number of Australian laws that would be applicable to such a classified database that exists in Australia. "You would have to assume, and I'm clearly not an expert on United States law, but you would have to assume similar laws would be in place there."

Writing exclusively in *The Australian* this week, Mr Assange accused the Gillard government, including Mr McClelland, of "trying to shoot the messenger because it doesn't want the truth revealed, including information about its own diplomatic and political dealings".

"Has there been any response from the Australian government to the numerous public threats of violence against me and other WikiLeaks personnel?" Mr Assange wrote.

"One might have thought an Australian Prime Minister would be defending her citizens against such things, but there have only been wholly unsubstantiated claims of illegality. The Prime Minister and especially the Attorney-General are meant to carry out their duties with dignity and above the fray. Rest assured, these two mean to save their own skins. They will not."

An expert on whistleblowing, AJ Brown of Griffith Law School, said the episode raised serious questions about whether the Australian or US governments would have been so quick to suggest that the proprietors or editors of major newspapers should be prosecuted for publishing such material.

Mr McClelland's spokesman said later there was a distinction between WikiLeaks, which obtained and distributed the information, and media outlets that then reported the material.

"Publishers are not under investigation," the Attorney-General's spokesman said.

Professor Brown warned the government not to turn Mr Assange into a martyr. It would be counter-productive to "shoot the messenger", he said.

Mr McClelland said the leaking of cables that said senator Mark Arbib had given US officials information about the government and the ALP had not damaged the government "in any way, shape or form".

Willing, Annette

From: Willing, Annette
Sent: Monday, 29 November 2010 1:30 pm
To: Siddique, Adam
Cc: Harvey, Tamsyn; rachel.noble@pmc.gov.au
Subject: Wikileaks - AFP action [SEC=UNCLASSIFIED]
Attachments: Section 79 summary.pdf; Section 79 provisions.pdf

Importance: High

Security Classification: UNCLASSIFIED

UNCLASSIFIED

Adam,

As discussed, I think something like this for now, under Govt response, would be OK (have not been able to get AFP or PM&C OK but will keep trying):

In addition, the AFP is examining whether any offences may have been committed under Australian law.

Most relevant potential offences are in s.79 Crimes Act – summary of the provisions, and the provisions themselves, are attached.

Annette

Section 79 Crimes Act

Section 79 deals with the disclosure of 'official secrets'. It creates a number of offences relating to the use and disclosure of 'official information'.

The relevant 'official information' is defined in s.79(1) as any document or information obtained:

- as a result of an unlawful disclosure under s.79
- from a Commonwealth officer (or a person holding office under the Queen) where the person obtaining it has a duty to treat it as secret
- by a person by virtue of his/her position as, among other things, a Commonwealth officer, where (by reason of the nature of the information or the circumstances in which it was obtained) he/she has a duty to treat the information as secret, or
- by a person who knows, or ought to know, that information relating to a prohibited place or anything in a prohibited place should not be communicated to a person not authorised to receive it (prohibited places are defined in s.80 to include things like defence facilities).

There are a range of offences in s.79 relating to the use and handling of such information.

Section 79(2): Offence to communicate or retain official information with the intention of prejudicing the security or defence of the C'th (punishable by 7 years imprisonment).

Section 79(3): Offence to communicate official information in an unauthorised manner (punishable by 2 years imprisonment)

To commit the offence, A would have to:

- (a) communicate the information to a person other than:
 - (i) a person to whom he/she is authorised to communicate it; or
 - (ii) a person to whom it is in the interest of the Commonwealth his/her duty to communicate it;or
- (b) permit a person (other than those in (i) or (ii)) to have access to it.

Sections 79(4) – (6): Offences relating to the unauthorised retention and receipt of official information (penalties range from 6 months to 7 years)

To commit the offence in **s.79(4)**, A would have to:

- (a) retain the information in his/her possession or control when he/she has no right to retain it or when it is contrary to his/her duty to retain it; or

- (b) fail to comply with a direction given by lawful authority with respect to the retention or disposal of the information; or
- (c) fail to take reasonable care of the information, or to ensure that it is not communicated to a person not authorised to receive it or so conducts himself/herself as to endanger its safety.

(punishable by 6 months imprisonment)

To commit the offence in s.79(5), A would have to:

- (a) receive the information
- (b) knowing or having reasonable ground to believe, at the time he/she receives, that it is communicated to him/her in contravention of s.91.1 Criminal Code (espionage offence) or s.79(2) (intention of prejudicing security or defence).

If A proved the communication was contrary to his/her desire, the offence would not be committed.

(punishable by 7 years imprisonment)

To commit the offence in s.79(6), A would have to:

- (a) receive the information
- (b) knowing, or having reasonable ground to believe, at the time when he/she receives it, that it is communicated to him/her in contravention of s.79(3) (communication of official information in unauthorised manner).

If A proved the communication was contrary to his/her desire, the offence would not be committed.

(punishable by 2 years imprisonment)

- (5) This Part applies to and in relation to a sketch, plan, photograph, model, cipher, note, document or article by whomsoever it is made and whatsoever information it contains.

79 Official secrets

- (1) For the purposes of this section, a sketch, plan, photograph, model, cipher, note, document, or article is a prescribed sketch, plan, photograph, model, cipher, note, document or article in relation to a person, and information is prescribed information in relation to a person, if the person has it in his possession or control and:
- (a) it has been made or obtained in contravention of this Part or in contravention of section 91.1 of the *Criminal Code*;
 - (b) it has been entrusted to the person by a Commonwealth officer or a person holding office under the Queen or he has made or obtained it owing to his position as a person:
 - (i) who is or has been a Commonwealth officer;
 - (ii) who holds or has held office under the Queen;
 - (iii) who holds or has held a contract made on behalf of the Queen or the Commonwealth;
 - (iv) who is or has been employed by or under a person to whom a preceding subparagraph applies; or
 - (v) acting with the permission of a Minister;and, by reason of its nature or the circumstances under which it was entrusted to him or it was made or obtained by him or for any other reason, it is his duty to treat it as secret; or
 - (c) it relates to a prohibited place or anything in a prohibited place and:
 - (i) he knows; or
 - (ii) by reason of its nature or the circumstances under which it came into his possession or control or for any other reason, he ought to know; that it should not be communicated to a person not authorized to receive it.
- (2) If a person with the intention of prejudicing the security or defence of the Commonwealth or a part of the Queen's dominions:
- (a) communicates a prescribed sketch, plan, photograph, model, cipher, note, document or article, or prescribed information, to a person, other than:
 - (i) a person to whom he is authorized to communicate it; or
 - (ii) a person to whom it is, in the interest of the Commonwealth or a part of the Queen's dominions, his duty to communicate it;or permits a person, other than a person referred to in subparagraph (i) or (ii), to have access to it;
 - (b) retains a prescribed sketch, plan, photograph, model, cipher, note, document or article in his possession or control when he has no right to retain it or when it is contrary to his duty to retain it; or
 - (c) fails to comply with a direction given by lawful authority with respect to the retention or disposal of a prescribed sketch, plan, photograph, model, cipher, note, document or article;
- he shall be guilty of an indictable offence.

Penalty: Imprisonment for 7 years.

- (3) If a person communicates a prescribed sketch, plan, photograph, model, cipher, note, document or article, or prescribed information, to a person, other than:

- (a) a person to whom he is authorized to communicate it; or
- (b) a person to whom it is, in the interest of the Commonwealth or a part of the Queen's dominions, his duty to communicate it;

or permits a person, other than a person referred to in paragraph (a) or (b), to have access to it, he shall be guilty of an offence.

Penalty: Imprisonment for 2 years.

(4) If a person:

- (a) retains a prescribed sketch, plan, photograph, model, cipher, note, document or article in his possession or control when he has no right to retain it or when it is contrary to his duty to retain it;
- (b) fails to comply with a direction given by lawful authority with respect to the retention or disposal of a prescribed sketch, plan, photograph, model, cipher, note, document or article; or
- (c) fails to take reasonable care of a prescribed sketch, plan, photograph, model, cipher, note, document or article, or prescribed information, or to ensure that it is not communicated to a person not authorized to receive it or so conducts himself as to endanger its safety;

he shall be guilty of an offence.

Penalty: Imprisonment for 6 months.

- (5) If a person receives any sketch, plan, photograph, model, cipher, note, document, article or information, knowing or having reasonable ground to believe, at the time when he receives it, that it is communicated to him in contravention of section 91.1 of the *Criminal Code* or subsection (2) of this section, he shall be guilty of an indictable offence unless he proves that the communication was contrary to his desire.

Penalty: Imprisonment for 7 years.

- (6) If a person receives any sketch, plan, photograph, model, cipher, note, document, article or information, knowing, or having reasonable ground to believe, at the time when he receives it, that it is communicated to him in contravention of subsection (3), he shall be guilty of an offence unless he proves that the communication was contrary to his desire.

Penalty: Imprisonment for 2 years.

- (7) On a prosecution under subsection (2) it is not necessary to show that the accused person was guilty of a particular act tending to show an intention to prejudice the security or defence of the Commonwealth or a part of the Queen's dominions and, notwithstanding that such an act is not proved against him, he may be convicted if, from the circumstances of the case, from his conduct or from his known character as proved, it appears that his intention was to prejudice the security or defence of the Commonwealth or a part of the Queen's dominions.

- (8) On a prosecution under this section, evidence is not admissible by virtue of subsection (7) if the magistrate exercising jurisdiction with respect to the examination and commitment for trial of the defendant, or the judge presiding at the trial, as the case may be, is of the opinion that that evidence, if admitted:

- (a) would not tend to show that the defendant intended to prejudice the security or defence of the Commonwealth or a part of the Queen's dominions; or

- (b) would, having regard to all the circumstances of the case and notwithstanding subsection (9), prejudice the fair trial of the defendant.
- (9) If evidence referred to in subsection (8) is admitted at the trial, the judge shall direct the jury that the evidence may be taken into account by the jury only on the question whether the defendant intended to prejudice the security or defence of the Commonwealth or a part of the Queen's dominions and must be disregarded by the jury in relation to any other question.
- (10) A person charged with an offence against subsection (2) may be found guilty of an offence against subsection (3) or (4) and a person charged with an offence against subsection (5) may be found guilty of an offence against subsection (6).

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
- (d) any railway, road, way, or channel, or other means of communication by land or water (including any works or structures being part thereof or connected therewith), or any place used for gas, water, electricity works or other works for purposes of a public character, or any place 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 otherwise than on behalf of the Queen or the Commonwealth, which is for the time being declared by the Governor-General by proclamation to be a prohibited place for the purposes of this Part, on the ground that information with respect thereto, or the destruction or obstruction thereof, or interference therewith, would be useful to an enemy or to a foreign power.

83 Unlawful soundings

- (1) Any person who in the Commonwealth or in any Territory:
 - (a) takes any unlawful soundings;
 - (b) makes any record of any unlawful soundings;
 - (c) intentionally has in possession any record of unlawful soundings;

Non-disclosure offences - overview

There are a number of non-disclosure laws in Commonwealth laws that apply to the unauthorised disclosure of certain information. The application of any of these laws will be dependent upon the information they cover, the individuals to whom the provision applies, and the facts and circumstances of the particular case.

The key provision under Commonwealth law is section 70 of the Crimes Act. This makes it an offence for a Commonwealth officer or former Commonwealth officer to publish or communicate, without authorisation, a fact of document which the person has by virtue of their position as a Commonwealth officer and which it is his or her duty not to disclose.

Other non-disclosure offences are found in section 79 of the Crimes Act, which cover a range of conduct, including unauthorised disclosure and permitting other persons to access certain official secrets with the intention of prejudicing the security or defence of the Commonwealth. These offences are quite antiquated and difficult to prosecute.

There are also the espionage offences in section 91.1 of the Criminal Code, which require proof of intention to prejudice Australia's security or defence or give advantage to the security or defence of another country.

There are other specific secrecy provisions that can apply to specific agencies or specific types of information. The Australian Law Reform Commission has identified over 500 specific secrecy offences throughout Commonwealth legislation. Some examples include the ASIO Act and Intelligence Services Act, which contain offences for the unauthorised disclosure by officers of those agencies of information obtained or prepared by the agency in its functions or information about the performance of the agency's functions. Law enforcement, regulatory agencies, human services agencies and others all have provisions to protect certain information, such as personal or commercial in confidence information that may be obtained in the course of their functions.

The Public Service Regulations also place a duty on all public servants not to disclose information that the employee obtains or generates in connection with their employment if it is reasonably foreseeable that the disclosure could be prejudicial to the effective working of government, including the formulation or implementation of policies or programs. They also cover information that was or is to be communicated in confidence within the government or was received in confidence by the government from a person or persons outside the government. Breach of this requirement can amount to a breach of the Public Service Code of Conduct, and in serious cases could be considered to constitute breach of duty not to disclose information for the purpose of the secrecy offence in section 70 of the Crimes Act.

Under the Criminal Code, it is also an offence to aid or abet, incite or conspire to commit a crime.

General secrecy offence (s 70 Crimes Act)

Commonwealth officer/ former Commonwealth officer publishes or communicates any fact or document which he or she has by virtue of being a Commonwealth officer;

Except to some person to whom he or she is authorised to publish or communicate;

It is his or her duty not to disclose that fact or document.

Penalty: Imprisonment for 2 years.

Commentary

Applies to Commonwealth officers and former Commonwealth officers.

The circumstances where a person is under a duty not to disclose are not set out in section 70, but may be found in other legislation, or may be based on common law principles.

Whether the person is authorised to communicate the fact or document will depend on the circumstances – an authorisation may be provided by legislation, or by a person such as a Minister or senior officer who is able to give such authorisation. Authorisation to communicate to a person may also be implied by the nature of a person's duties.

The Crimes Act applies throughout the whole of the Commonwealth and the Territories and also applies beyond the Commonwealth and the Territories.

Non-disclosure of official secrets (s79 Crimes Act)

Applies to the disclosure of certain official secrets ("prescribed information"). It covers a sketch, plan, photograph, model, cipher, note, document or article or information in relation to a person if the person has it in his or her possession and control:

- as a result of an unlawful disclosure under s 79;
- from a Commonwealth officer or person holding office under the Queen, where the person obtaining it has a duty to treat it as secret;
- by a person by virtue of his/her position as, among other things, a commonwealth officer, where (by reason of the nature of the information or circumstances it was obtained) he/she has a duty to treat the information as secret; or
- by a person who knows, or ought to know, that the information relating to a prohibited place or anything in a prohibited place should not be communicated to a person not authorised to receive it (prohibited places are defined and include things like defence facilities)

s 79(2) Crimes Act – Communicate/retain official information with intention of prejudicing Commonwealth's security/defence

A person communicates /permits access to prescribed information where:

- he or she is not authorised to communicate it to that person; or
- it is not communicated in accordance with his or her duty to communicate it in the interests of the Commonwealth;

With the intention of prejudicing security/defence of the Commonwealth or a part of the Queens dominions; or

A person retains prescribed information in his or her possession or control when:

- he or she has no right to retain it; or
- when it is contrary to his/her duty to retain it;

With the intention of prejudicing security/defence of the Commonwealth or a part of the Queens dominions; or

A person to comply with a direction by a lawful authority with respect to retention or disposal of prescribed information;

With the intention of prejudicing security/defence of the Commonwealth or a part of the Queens dominions.

Penalty: Imprisonment for 7 years.

Commentary

Need to show Commonwealth nexus in relation to the information and how it was obtained.

Whether the person is authorised to communicate the fact or document will depend on the circumstances – an authorisation may be provided by legislation, or by a person such as a Minister or senior officer who is able to give such authorisation. Authorisation to communicate to a person may also be implied by the nature of a person's duties.

The Crimes Act applies throughout the whole of the Commonwealth and the Territories and also applies beyond the Commonwealth and the Territories.

s 79(3) Crimes Act – Communicate official information in unauthorised manner

A person communicates /permits access to prescribed information where:

- he or she is not authorised to communicate it to that person; or
- it is not communicated in accordance with his or her duty to communicate it in the interests of the Commonwealth.

Penalty: Imprisonment for 2 years.

Commentary

Need to show Commonwealth nexus in relation to the information and how it was obtained.

Whether the person is authorised to communicate the fact or document will depend on the circumstances – an authorisation may be provided by legislation, or by a person such as a Minister or senior officer who is able to give such authorisation. Authorisation to communicate to a person may also be implied by the nature of a person's duties.

The Crimes Act applies throughout the whole of the Commonwealth and the Territories and also applies beyond the Commonwealth and the Territories.

Requires consent of the Attorney-General to prosecute.

s 79(4) Crimes Act – unauthorised retention etc of official information

A person retains prescribed information in his/her possession or control when:

- he or she has no right to retain it; or

- it is contrary it is to duty to retain it; or

A person fails to comply with a direction given by a lawful authority with respect to retention or disposal of prescribed information; or

A person fails to take reasonable care of prescribed information or fails to ensure that it is not communicated to a person not authorised to receive it.

Penalty: Imprisonment for 6 months.

Commentary

Need to show Commonwealth nexus in relation to the information and how it was obtained.

In relation the offence of failing to take reasonable care of the information, a court could read this provision down and require prosecution to establish that the person was under a duty to take reasonable care of the information. Otherwise the application of this provision would be exceptionally broad. This is a controversial provision, criticised by the ALRC, for imposing an offence on what is essentially a standard of negligence.

The Crimes Act applies throughout the whole of the Commonwealth and the Territories and also applies beyond the Commonwealth and the Territories.

Requires consent of the Attorney-General to prosecute.

s 79(5) – receipt of information knowing it to be in contravention of certain laws

A person receives prescribed information;

Knowing or having reasonable grounds to believe, at the time it is received, that it is communicated in contravention of s91.1 of the Criminal Code (espionage offences) or s79(2) of the Crimes Act (i.e. with intent to prejudice security/defence of the Cth);

Unless the person can show that the communication was contrary to his or her desire.

Penalty: Imprisonment for 7 years.

Commentary

Need to show Commonwealth nexus in relation to the information and how it was obtained.

This is a controversial provision as it criminalises the mere receipt of information and places the burden of proof on the defendant to prove that the information was not solicited.

The Crimes Act applies throughout the whole of the Commonwealth and the Territories and also applies beyond the Commonwealth and the Territories.

Requires consent of the Attorney-General to prosecute.

s 79(6) – receipt of information knowing it to be in contravention of certain laws

A person receives prescribed information;

Knowing or having reasonable ground to believe, at the time it is received, that it is communicated in contravention of subsection 79(3) Crimes Act (unauthorised communication of prescribed information);

Unless the person can show that the communication was contrary to his or her desire.

Penalty: Imprisonment for 2 years.

Commentary

Need to show Commonwealth nexus in relation to the information and how it was obtained.

This is a controversial provision as it criminalises the mere receipt of information and places the burden of proof on the defendant to prove that the information was not solicited.

The Crimes Act applies throughout the whole of the Commonwealth and the Territories and also applies beyond the Commonwealth and the Territories.

Requires consent of the Attorney-General to prosecute.

Espionage offences (s 91.1 Criminal Code)

s91.1(1) Criminal Code – intention to prejudice Commonwealth’s security/defence

A person communicates / makes available information concerning the Commonwealth’s security and defence/or the security or defence of another country;

Does so intending the prejudice Commonwealth’s security and defence;

Results / likely to result in information being communicated or made available to another country or foreign organisation.

It is a defence if the information the person communicates or makes available has already been communicated or made available to the public with the authority of the Commonwealth.

Penalty: Imprisonment for 25 years.

Commentary

Proving the person had the requisite intention to prejudice Australia’s security or defence or give advantage to another country can be challenging. Intention may be ascertained from a person’s conduct and the surrounding circumstances, even if the person claims not to have had such an intent.

Extended geographical jurisdiction (category D) applies, meaning the offence has a wide extra-territorial application.

Requires consent of the Attorney-General to prosecute.

s 91.1(2) Criminal Code – intention to give advantage to another country’s security/defence

A person communicates / makes available information concerning the Commonwealth’s security and defence/or another country;

Does so without lawful authority and intending to give an advantage to another country’s security or defence;

Results / likely to result in information being communicated or made available to another country or foreign organisation.

It is a defence if the information the person communicates or makes available has already been communicated or made available to the public with the authority of the Commonwealth.

Penalty: Imprisonment for 25 years.

Commentary

Proving the person had the requisite intention to prejudice Australia's security or defence or give advantage to another country can be challenging. Intention may be ascertained from a person's conduct and the surrounding circumstances, even if the person claims not to have had such an intent.

Extended geographical jurisdiction (category D) applies, meaning the offence has a wide extra-territorial application.

Requires consent of the Attorney-General to prosecute.

s 91.1(3) Criminal Code – making/obtaining records – intention to prejudice Commonwealth's security/defence

A person makes/ obtains/ copies a record of information concerning the Commonwealth's security and defence/or another country;

Does so intending the record will or may be delivered to another country or foreign organisation, and intending to prejudice the Commonwealth's security or defence.

It is a defence if the record of information is information that has already been communicated or made available to the public with the authority of the Commonwealth.

Penalty: Imprisonment for 25 years.

Commentary

Proving the person had the requisite intention to prejudice Australia's security or defence or give advantage to another country can be challenging. Intention may be ascertained from a person's conduct and the surrounding circumstances, even if the person claims not to have had such an intent.

Extended geographical jurisdiction (category D) applies, meaning the offence has a wide extra-territorial application.

Requires consent of the Attorney-General to prosecute.

s 91.1(4) Criminal Code – making/obtaining records – intending to give advantage to another country’s security/defence

A person makes/ obtains/ copies a record of information concerning the Commonwealth’s security and defence/or another country;

Does so without lawful authority, and intending the record will or may be delivered to another country or foreign organisation, and intending to give an advantage to another country’s security or defence.

It is a defence if the record of information is information that has already been communicated or made available to the public with the authority of the Commonwealth.

Penalty: Imprisonment for 25 years.

Commentary

Proving the person had the requisite intention to prejudice Australia’s security or defence or give advantage to another country can be challenging. Intention may be ascertained from a person’s conduct and the surrounding circumstances, even if the person claims not to have had such an intent.

Extended geographical jurisdiction (category D) applies, meaning the offence has a wide extra-territorial application.

Requires consent of the Attorney-General to prosecute.

Aiding and abetting/incitement/conspiracy espionage or other offences – Criminal Code

s 11.2 Criminal Code – Complicity/ aiding and abetting

Aid, abet, counsels or procures the commission of an offence by another person;

Conduct must have in fact aided, abetted etc, and the offence must have been committed by the other person, and must have intended or been reckless that conduct would aid, abet etc.

Does not matter if the person committing the offence cannot be charged.

s 11.4 Criminal Code – incitement/urging commission of an offence

Urges the commission of an offence, intending the offence to be committed.

Does not matter if the person committing the offence cannot be charged.

Defences etc that apply to the offence also apply to incitement.

s 11.5 Criminal Code – Conspiracy

Conspire with another person to commit an offence punishable by more than 12 months imprisonment.

Must have entered into agreement with one or more persons to commit an offence;

The person and at least one other of the persons must have intended that the offence would be committed under the agreement;

The person or at least one other party must have committed an overt act pursuant to the agreement.