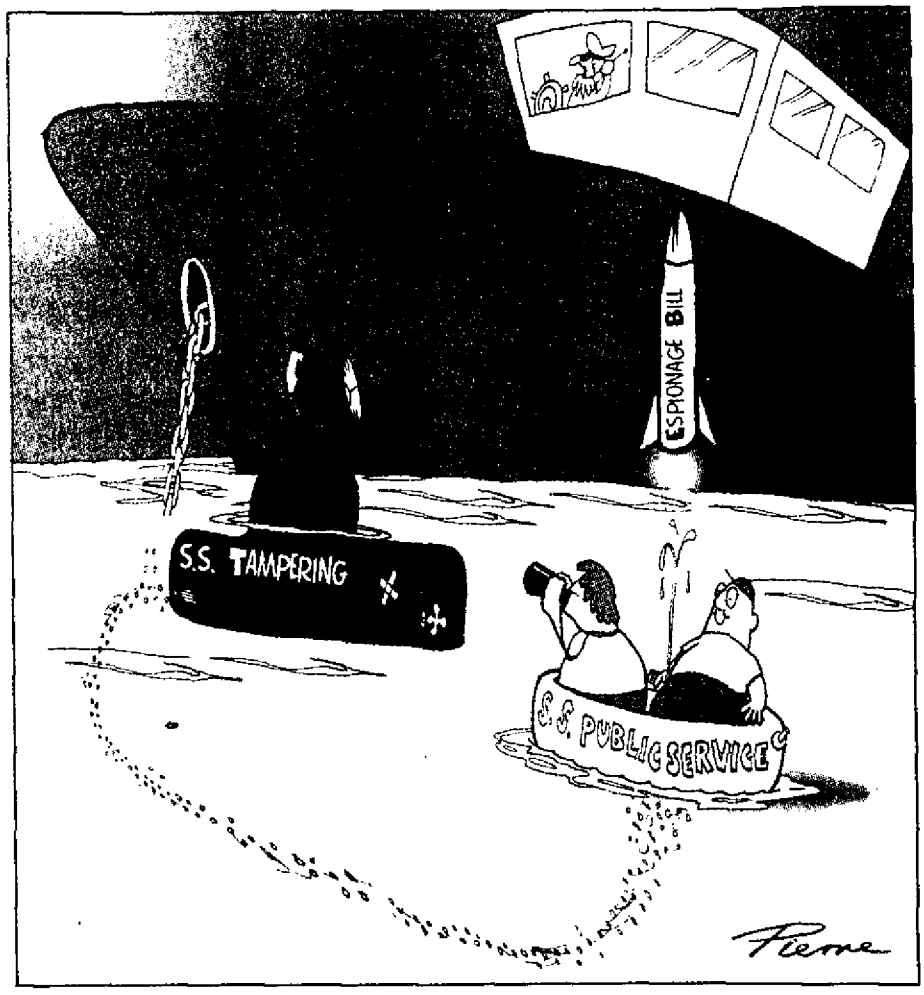
Espionage and Related Offences Bill

Rebecca Sharman examines the rise and fall of controversial provisions of the *Criminal Code Amendment (Espionage and Related Offences) Bill*.

In June 2001, the Government announced its intention to introduce the *Criminal Code Amendment (Espionage and Related Offences) Bill*. The Bill repeals Part VII of the *Crimes Act* and will insert in the *Criminal Code Act 1995* a new Chapter 5 entitled 'The Integrity and Security of the Commonwealth'. The Bill was introduced into Parliament on 27 September 2001. Certain provisions of the Bill were met with immediate criticism from the media and from the Democrats and the Australian Labor Party.

On 13 March 2002, the Government announced that it was abandoning a key provision regarding unauthorised disclosure of information. This article analyses the Bill and the rise and fall of the unauthorised disclosure of information provisions.



THE BILL

(The Bill) covers two broad categories of offences, those relating to espionage, and those relating to official information.

Espionage & Similar Activities

With regard to information concerning Commonwealth security or defence or information concerning the security or defence of another country, it is an offence to:

> *communicate or make available the information with the intent of prejudicing the Commonwealth's security or defence;*[1]
>
> *communicate the information, without authority, with the intention of giving an advantage to another country's security or defence;*[2]
>
> *make, obtain or copy a record of the information with the intention that the record will be delivered to another country or foreign organisation or person acting on their behalf and to prejudice the Commonwealth security or defence;*[3]
>
> *make, obtain or copy a record of the information with the intention that the record will be delivered to another country or foreign organisation or person acting on their behalf and intending to give an advantage to another country's security or defence.*[4]

An important element of the four offences referred to above, is the requirement that the person's actions must result in, or be likely to result in, the information being disclosed to another country or a foreign organisation, or to a person acting on behalf of such a country or organisation. The maximum penalty for these offences under the Bill was raised from 14 years to 25 years imprisonment.[5] The conduct constituting the offence does not have to have occurred within Australia.

Official Records of Information & Official Information

The Bill also covers offences relating to official records of information and official information. Offences under these provisions are not restricted to disclosure to another country or foreign organisation. This information is defined as including records and information that a person has in their possession or control where:

> *a Commonwealth public official has entrusted it to the person and the person is under a duty to keep it secret;*[6] *or*
>
> *it has been made, obtained or copied by a Commonwealth public official, or by a person who is/has been employed by such a person and who are under a duty to keep the information secret;*[7] *or*
>
> *the person has made, obtained or copied information with the permission of the Minister and the person is under a duty to keep it secret;*[8] *or*

it relates to a prohibited place and the person knows or is reckless to the fact that it should not be communicated or made available.[9]

Information is defined as any information of any kind, whether true or false and whether in a material form or not and includes an opinion and a report or conversation.[10]

If such a person communicates or makes available an official record of information or official information to a person to whom he or she is not authorsied to communicate it, they may face imprisonment for 2 years. Where the information is communicated or made available with the intention of prejudicing the Commonwealths security or defence, the Bill imposes a penalty of 7 years imprisonment. Furthermore, it is an offence for the person to retain an official record of information or official information in his or her possession or control when they have no right to, or where retention is contrary to their duty.[11]

The person who receives official records of information or official information, communicated or made available to them as described above, is also guilty of an offence. The penalties range for 2-7 years imprisonment depending on the intention of the communicator. It is a statutory defence if the defendant can prove that the information was communicated or made available to them contrary to their wishes.

MEDIA CONCERNS

Following the announcement of the Bill, the media expressed outrage over the provisions relating to official information. It was feared that the Bill could be used, not only to jail public servants who leak sensitive information to the media, but to imprison journalists as well. Furthermore, the provisions are not restricted to information that involves the security and defence of the Commonwealth.

Fred Hilmer, Fairfax chief executive officer was quoted as saying:

> *"If it becomes a crime to disclose any unauthorised information, or to receive any such information, this bill, by limiting the coverage of the workings of government, directly hampers and prevents public discussions of the issues of the day, and therefore goes to the heart of the operation of a free press in a democracy".*[12]

Concern was also expressed by the Sydney Morning Herald that:

> *"Such a law would permit politicians to keep telling lies with minimum fear of contradiction from those who know the truth".*[13]

As Tony Harris of the Australian Financial Review summed up:

> *'It doesn't matter that there have been few, if any, criminal charges laid against public officials for unauthorised disclosure of information. The mere presence of these laws intimidates public officials in their communication with members of the public and the media'*[14]

Dr Jean Lennane, national president of Whistleblowers Australia described the jail threats as:

> *"one of the steps between democracy and totalitarianism".*[15]

It is not just the media and consumer bodies that were troubled by the Bill, concern was also expressed by political parties. A representative for Federal Opposition spokesman on Home Affairs said:

> *"The Opposition supports legitimate moves to strengthen national security measures, but we won't support measures which reduce the protection for whistleblowers".*[16]

Similarly, the Democrats supported the ALP stating they *"..are absolutely opposed to any legislation that would bring in jail terms for whistleblowers".*[17]

In response to these concerns, the Federal Attorney General issued a press release on 3 February 2002. It disputed claims that the Government intends to use its espionage legislation to 'plug leaks'. A spokeswoman for the Attorney General denied that the bill encroached on freedom of the press:

> *"The provisions that are receiving media attention are those which are known as the 'official secret' provisions; these provisions are current law contained in the Crimes Act".*[18]

COMPARISON WITH THE CURRENT 'OFFICIAL SECRETS' PROVISIONS

A close examination of the Bill and the *Crimes Act* indicates that the provisions are similar, but not identical.

1) Scope of conduct

The Bill has sought to extend the scope of offences beyond simply communicating the sensitive information to another party, to situations where information is 'made available' and 'access' is permitted to an unauthorised person. Furthermore, the Bill introduces a new offence where a person, with the intention of prejudicing the Commonwealth's security or defence, retains sensitive information where they have no right to do so, or where it is contrary to their duties. This attracts 7 years imprisonment.

2) Intention – 'security' vs 'safety'

The Bill refers to a persons intention to prejudice the Commonwealth's *security* or defence. The current law refers to an intention to prejudice Commonwealth 'safety' or defence. The Explanatory Memorandum to the Bill states:

> *"The change to the term security or defence in the Bill reflects the modern intelligence environment. The term security is intended to capture information about operations, capabilities and technologies, methods and sources of Australian intelligence and security agencies. The term safety is unlikely to include such information."*

3) Disclosure Provisions

As stated above, one of the main criticisms of the Bill is that it introduced provisions making the disclosure to an unauthorised person or receiving of information by that same person an offence, regardless of whether it related to the security or defence of the Commonwealth.[19] The Attorney General, in his news release stated that these provisions *'simply intend to restate the existing provisions under the Crimes Act in more modern language consistent with the language now used in the Code'.*[20]

In the Bill, the disclosure offence is worded in positive language.[21] That is, it is an offence if a person either (a) communicates the information to a person to whom that person is not authorised to communicate it or makes it available; **or** (b) a person communicates the official information or makes it available to a person whom it is, in the interests of the Commonwealth, his or her duty not to communicate it or make it available. A whistleblower will most likely be caught under (a), as a public official will probably not have authorisation to communicate or make

available official information to the media.

However the current provision in the Crimes Act is worded in the negative.[22] Under this provision it is an offence to communicate a prescribed sketch, plan, photograph, model, cipher, note, document or article or prescribed information, or to permit access to such things, unless the communication or access is to either (a) a person to whom he is authorised to communicate it; or (b) a person to whom it is in the interest of the Commonwealth or part of the Queen's dominions, his duty to communicate it. Therefore, as a whistleblower who discloses 'secret' information to the media can argue that it was their duty to do so in the interest of the Commonwealth, they have not committed an offence under current law.

This raises the question of whether there is an error in drafting in relation to the Bill, or if there is a change of intention on behalf of the Government. The EM does not indicate an intention to criminalise behaviour or limit freedom of press. This clearly illustrates the dangers involved in re-drafting provisions. As of March 13, the disclosure provisions has been excised from the Bill.

4) Receiving Information

With regard to the offence of 'receiving' information, the Bill does differ to the Crimes Act. The current law prescribes that the defendant must have known or had reasonable grounds to believe at the time when they receive the information, that it is in contravention of the legislation. Under the proposed Bill the mere possession of such information brings you within the scope of the provisions. Therefore, an offence under the Crimes Act for 'receiving' information is narrower.

CONCLUSION

It is clear from the above analysis that the Bill did impose penalties both on whistleblowers who divulged government secrets and upon unauthorised recipients of such information. Given the crisis faced by the Government over the past few years, including the tampa crisis, the Collin class submarine project disclosure and the attempts by Mr Wispelaere who stole and planned to sell hundreds of top-secret US documents provided to Australia under defence agreements, it is not surprising that they Government may have wanted to restrict the flow of government information. However, any restriction on the ability of the press to scrutinise the government on matters that do not prejudice security or defence, chips away at the democratic foundations our society is built on. For these reasons it is the authors conclusion that the objections to the Bill were well-founded and that the unauthorised disclosure offence was correctly removed.

1 Clause 81.1(1)

2 Clause 81.1(2)

3 Clause 81.1(3)

4 Clause 81.1(4)

5 See above clauses

6 Clause 82.1(1)(b)

7 Clause 82.1(1)(c)

8 Clause 82.1(1)(d)

9 Clause 82.2(1)(e)

10 Clause 80.1(1)

11 6 months imprisonment

12 The Age; Media Chief Takes Aim At Howard on Several Fronts, Annabel Crabb, 28/2/02

13 Sydney Morning Herald: Gags Go On: Expose A Porky, Go Directly To Jail, Richard Ackland, 22/2/02

14 Australian Financial Review, Gagging Communication, Tony Harris 12/2/02

15 Sydney Morning Herald: Spy bill to go under the spotlight; Andrew Stevenson, 4/2/02

16 ibid

17 ibid: citing Democrat's Law and Justice Spokesman, Senator Brian Greig.

18 The Age; Media Chief Takes Aim At Howard on Several Fronts, Annabel Crabb, 28/2/02

19 see: 82.3(1)(a) and 82.4(3) of the Bill.

20 Attorney-General News Release Government Gets Tough on Spies – Not Freedom of Speech 3/2/02

20 Clause 82.3(1)

20 s79(3)

The views expressed in this article are those of the author and not necessarily those of the firm or its clients.

Rebecca Sharman is a solicitor in the Information, Communications and Technology Practice at PricewaterhouseCoopers Legal, Sydney Office.

Gutnick Goes to the High Court

Glen Sauer analyses the recent Gutnick case dealing with internet defamation.

This year, the High Court will consider jurisdictional issues that arise when material that is placed on the internet overseas is read by people in Australia. Dow Jones has obtained special leave to appeal to the High Court in relation to the Supreme Court of Victoria's decision that in Gutnick + Dow Jones Inc [2001] USC (**Gutnick**) material placed on the internet in the US and read in Victoria was published, and is therefore actionable, in Victoria.

The case is a timely reminder that people who publish on the internet overseas may find themselves liable under Australian law for material that would not be actionable in the jurisdiction in which it was posted. In particular, people who post defamatory material in the US, where libel laws are more favourable to publishers, could well find themselves liable for publication of the material in Australia. This risk will be particularly great if the person who publishes the material has assets or does business in Australia and the person defamed lives or is known in Australia.

THE PROCEEDINGS

Dow Jones was the publisher of *Barron's Magazine*. *Barron's Magazine* published an article entitled "*Unholy Gains*" (the **article**) which described the plaintiff, Joseph Gutnick as the biggest customer of Nachum Goldberg, a gaoled money launderer and tax evader.

A very small number of print copies of *Barron's Magazine* were sold in Victoria. The article was also published on the Internet in *Barron's Online*, a website operated by Dow Jones on a web server in New Jersey. A number of subscribers to the website downloaded and read the article in Victoria.

Gutnick commenced defamation proceedings in the Supreme Court of