THE HON JOSH FRYDENBERG MP
MINISTER FOR THE ENVIRONMENT AND ENERGY

MC18-002087

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
Suite 1.111
Parliament House
CANBERRA ACT 2600

Dear Senator Polley

Thank you for the correspondence on behalf of the Senate Standing Committee for the Scrutiny of Bills (the Committee) drawing my attention to the Committee's *Scrutiny Digest No. 1 of 2018* and seeking further information about the *Great Barrier Reef Marine Park Amendment (Authority Governance and Other Matters) Bill 2017* (the Bill). I offer the following information for the Committee's consideration.

1. **The nature of the technical defect with the zoning plans, plans of management and regulations currently made under the *Great Barrier Reef Marine Park Act 1975* (the Act)**

The amendments now clearly allow for zoning plans and plans of management to refer to and rely on content in regulations and other legislative instruments. The amendments have been made retrospective to ensure the validity of the legislation underpinning the Act is clear.

2. **The issues arising for decision in the High Court Litigation**

There is no High Court litigation currently on foot and I am not aware of any other legal proceedings which would be affected by the amendments made by the Bill. The Bill includes provisions to ensure that it does not affect rights or liabilities of parties to proceedings for which leave to appeal to the High Court has been given before commencement date of the application and transitional provisions. These provisions are consistent with the current treatment in other Bills of this nature to preserve the rights of parties to existing litigation, regardless of whether such litigation is on foot.

3. **Whether there any person or persons who may suffer detriment from the retrospective application of the legislation, and if so, the extent of that detriment**

The retrospective application of the Bill will ensure that persons do not suffer detriment to the extent that they have previously relied on the validity of the current and past Marine Park legislation. In the highly unlikely event that a person would suffer detriment because of the retrospective operation of the Bill, the Bill contains a provision guaranteeing compensation to the extent that the retrospective application of the Bill would result in an acquisition of a person's property otherwise than on just terms.

I appreciate the Committee's consideration of this Bill, and trust this information will be of assistance to the Committee.

Yours sincerely

JOSH FRYDENBERG

The Hon Christian Porter MP
Attorney-General

MS18-000398

14 MAR 2018

Senator Helen Polley
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Dear Chair

Thank you for the Senate Standing Committee for the Scrutiny of Bills' (the Committee's) letter of 8 February 2018 to my office, requesting my response to enquiries of the Committee regarding a number of bills for which I have responsibility.

I have considered the Committee's assessment of the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017, the Foreign Influence Transparency Scheme Bill 2017, and the Foreign Influence Transparency Scheme (Charges Imposition) Bill 2017 (the Espionage and Foreign Interference Bills) as set out in its *Scrutiny Digest No.1 of 2018* and enclose responses to the issues the Committee has raised.

I also enclose a copy of proposed parliamentary amendments to the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017 which I recently provided to the Parliamentary Joint Committee on Intelligence and Security (PJCIS) to assist in its inquiry into that Bill. The proposed parliamentary amendments amend the secrecy offences in Schedule 2 of that Bill to:

- narrow the definitions of inherently harmful information and causes harm to Australia
- create separate offences that apply to non-Commonwealth officers that are narrower in scope than those applying to Commonwealth officers and only apply to the most serious and dangerous conduct, and
- strengthen the defence for journalists at section 122.5(6) by:
    - removing any requirement of journalists to demonstrate that their reporting was 'fair and accurate'
    - ensuring the defence is available where a journalist reasonably believes that their conduct was in the public interest, and
    - clarifying that the defence is available for editorial and support staff as well as journalists themselves.

In addition to these matters, the amendments address the definition of security classification, the breadth of the offence at section 91.3 and the application of strict liability to elements of the offence relating to security classified information.

I am open to considering further amendments to the proposed legislation in the context of the PJCIS report which is due in April 2018.

I trust this information is of assistance to the Committee in finalising its assessment of the Espionage and Foreign Interference Bills.

Thank you again for the opportunity to respond to the Committee's concerns.

Yours sincerely

The Hon Christian Porter MP
Attorney-General

Encl. Response to the Senate Standing Committee for the Scrutiny of Bills Scrutiny Digest No. 1 of 2018 – National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017, Foreign Influence Transparency Scheme Bill 2017 and Foreign Influence Transparency Scheme (Charges Imposition) Bill 2017

Draft parliamentary amendments to the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017

Response to the Senate Standing Committee for the Scrutiny of Bills

Scrutiny Digest 1 of 2018

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

This response to the Senate Standing Committee for the Scrutiny of Bills (the committee's) inquiry into the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017 (the Bill) is informed by a number of amendments I provided to the Parliamentary Joint Committee on Intelligence and Security (PJCIS) on 5 March 2018.

The changes are summarised below.

- The definition of 'inherently harmful information' will be narrowed by:
    - amending the definition of security classification in section 90.5 (at Item 16 of Schedule 1 of the Bill) and section 121.1 (at Item 6 of Schedule 2 of the Bill) to mean a classification of TOP SECRET or SECRET, or any other equivalent classification or marking prescribed by the regulations.
    - removing paragraph (d) applying to information that was provided by a person to the Commonwealth or an authority of the Commonwealth in order to comply with an obligation under a law or otherwise by compulsion of law.
- The definition of 'cause harm to Australia's interests' will be narrowed by removing:
    - subparagraph (a)(ii) – interfere with or prejudice the prevention, detection, investigation, prosecution or punishment of a provision, that is subject to a civil penalty, of a law of the Commonwealth
    - paragraph (d) – harm or prejudice Australia's international relations in any other way, and
    - paragraph (e) – harm or prejudice relations between the Commonwealth and a State or Territory.
- Separate offences will apply to non-Commonwealth officers that are narrower in scope than those applying to Commonwealth officers and only apply where:
    - the information has a security classification of SECRET or TOP SECRET and the person is reckless as to this
    - the communication of the information damages the security or defence of Australia and the person is reckless as to this
    - the communication of the information interferes with or prejudices the prevention, detection, investigation, prosecution or punishment of a criminal offence against a law of the Commonwealth and the person is reckless as to this

- the communication of the information harms or prejudices the health or safety of the Australian public or a section of the Australian public.

- The definition of 'Commonwealth officer' will be amended to explicitly exclude officers or employees of, or persons engaged by, the Australian Broadcasting Corporation or the Special Broadcasting Service Corporation.

- The defence for journalists will be strengthened by:

  - removing any requirement for journalists to demonstrate that their reporting was 'fair and accurate'

  - ensuring the defence is available where a journalist reasonably believes that their conduct was in the public interest, and

  - clarifying that the defence is available for editorial and support staff as well as journalists themselves.

- Strict liability will be removed from elements of the offences relating to information or articles carrying a security classification.

Offence provisions

Committee Comment

1.275 The committee seeks the minister's detailed justification of:

- the breadth of the definitions of 'deal', 'foreign principal', 'national security' and 'inherently harmful information' in the context of the offences in which they apply; and

- the breadth of the offences in proposed sections 91.3 and 122.1.

Response

The Bill inserts a number of exhaustive definitions for the purposes of the offences. These terms were previously undefined in the *Criminal Code Act 1995* (the Criminal Code).

The definition of 'deals' with information

The definition of deals in section 90.1 of the Bill has been broadened to cover the full range of conduct that can constitute secrecy and espionage offences. This is to ensure the offences comprehensively address the full continuum of criminal behaviour that is undertaken in the commission of espionage offences, and to allow authorities to intervene at any stage.

While the definition of 'deal' captures a range of conduct, a person will only commit an espionage offence where every element of the offence is satisfied. For example, a person will only commit an offence under subsection 91.1(1) where he or she deals with security classified information or information concerning Australia's security, and the person intends for the conduct to prejudice Australia's national security or advantage the national security of a foreign country, and this results or will result in the information being made available to a foreign principal.

The penalties for the secrecy offences are tiered to ensure that penalties are commensurate with the seriousness and culpability of offending. The higher penalty will apply where a person actually communicates information. Offences relating to other dealings with information will carry lower penalties.

In relation to the espionage offences in sections 91.1, 91.2 and 91.3, and the secrecy offences in subsections 122.1(1) 122.1(2), 122.2(1) and 122.2(2), the fault element of intention will apply to the physical element of the offence that a person communicates or deals with the information. Consistent with subsection 5.2(1) of the Criminal Code, this means that the person must have meant to engage in the conduct – mere receipt of information would not satisfy this fault element.

The definition of 'national security'

The definition of 'national security' in section 90.4 of the Bill is exhaustive and has been drafted consistent with definitions in other Commonwealth legislation, to ensure it reflects contemporary matters relevant to a nation's ability to protect itself from threats. This includes the definition of 'security' in section 4 of the *Australian Security Intelligence Organisation Act 1979* (ASIO Act) and the definition of 'national security' in section 8 of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (NSI Act).

Section 8 of the NSI Act defines 'national security' to mean 'Australia's defence, security, international relations or law enforcement interests.' Section 9 of the NSI Act further defines 'security' to have the same meaning as in the ASIO Act. Section 10 of the NSI Act further defines 'international relations' to mean the 'political, military and economic relations with foreign governments and international organisations.'

The reference to 'political, military and economic relations' in section 90.4 of the Bill aligns with the definition of 'international relations' in the NSI Act.

This definition substantially implemented the recommendations of the Australian Law Reform Commission (ALRC) in *Keeping Secrets: The Protection of Classified and Security Sensitive Information* (Report 98, June 2004). This report recommended that 'national security information' be defined by reference to the Commonwealth Protective Security Manual that existed at that time, which included reference to 'international relations' in the same terms as appear in section 10 of the NSI Act (see paragraph 2.7 of the ALRC's Report).

The definition of 'foreign principal'

As the committee notes in paragraph 1.272, 'foreign principal' is defined in section 90.2 of the Bill to include governments of foreign countries, state-owned enterprises, foreign political organisations, public international organisations and terrorist organisations.

It is appropriate and consistent with the definition in section 70.1 of the Criminal Code to define foreign principal to include public international organisations. In relation to the foreign interference offences, a person could equally seek to interfere in Australia's democratic processes or prejudice Australia's national security on behalf of such actors in some circumstances. Similarly, it is important for the espionage offences to apply to information made available to foreign principals, including public international organisations, where the person's conduct prejudices Australia's national security or advantages the national security of another country.

The definition extends to entities that are 'owned, directed or controlled' by other foreign principals to ensure that there are no gaps in coverage that can be exploited by Australia's foreign adversaries. It is important that foreign principals cannot avoid the application of the offences by simply, for example, conducting the harmful conduct through a company that operates at its direction or under its control.

The definition of inherently harmful information

The amendments to the draft Bill will narrow the definition of 'inherently harmful information'.

The definition of security classification in sections 90.5 and 121.1 will be amended to mean a classification of TOP SECRET or SECRET, or any other equivalent classification or marking prescribed by the regulations.

Consistent with the Australian Government's Information Security Management Guidelines (available at www.protectivesecurity.gov.au), information should be classified as TOP SECRET if the unauthorised release of the information could cause exceptionally grave damage to the national interest. Information should be classified as SECRET if the unauthorised release of the information could cause serious damage to the national interest, organisations or individuals.

The new definition will not allow for lower protective markings to be prescribed in the regulations. This will allow flexibility to ensure the definition can be kept up to date if new protective markings of equivalent seriousness are introduced, or to ensure information bearing former protective markings of equivalent seriousness can continue to be protected.

It is worth noting that the proposed amendments also remove the provisions that apply strict liability to information that has a security classification. The effect of these amendments is that, in addition to proving that information or article had a security classification, the prosecution will also have to prove that the defendant was reckless as to the fact that the information or article had a security classification. Consistent with section 5.4 of the Criminal Code, this will require proof that the person was aware of a substantial risk that the information had a security classification and, having regard to the circumstances known to him or her, it was unjustified to take the risk.

Paragraph (d) of the definition of 'inherently harmful information' will be removed. This paragraph applied to information that was provided by a person to the Commonwealth or an authority of the Commonwealth in order to comply with an obligation under a law or otherwise by compulsion of law.

Section 91.3

The proposed amendments to the Bill will narrow the scope of the espionage offence at section 91.3, so that the offence will apply where:

- a person intentionally deals with information or an article
- the person deals with the information or article for the primary purpose of making the information or article available to a foreign principal or a person acting on behalf of a foreign principal
- the person's conduct results or will result in the information being made available to a foreign principal or a person acting on behalf of a foreign principal and the person is reckless as to this element, and

- the information or article has a security classification and the person is reckless as to this element.

These amendments ensure that conduct that results in security classified information being passed to a foreign principal is punishable as an espionage offence where the person's primary purpose in dealing with the information was to make it available to a foreign principal. The inclusion of this additional element ensures that the offence will not inappropriately cover the publication of information by a journalist whose conduct indirectly makes the information available to a foreign principal, but whose primary purpose is to report news or current affairs to the public.

Section 122.1

The proposed amendments to the Bill address the committee's concerns about the application of many of the secrecy offences to both Commonwealth and non-Commonwealth officers.

The amendments create separate offences that apply to non-Commonwealth officers that are narrower in scope than those applying to Commonwealth officers and only apply to the most serious and dangerous conduct. This recognises that secrecy offences should apply differently to Commonwealth and non-Commonwealth officers given that the former have a higher duty to protect such information and are well versed in security procedures.

Sections 122.1 and 122.2 will only apply to a person who made or obtained the information by reason of being, or having been, a Commonwealth officer or otherwise engaged to perform work for a Commonwealth entity.

New offences in section 122.4A will apply to non-Commonwealth officers who communicate or deal with a narrower subset of information than the offences at sections 122.1 and 122.2.

The new offence at subsection 122.4A(1) will apply where:

- a person intentionally communicates information
- the information was not made or obtained by the person by reason of the person being, or having been, a Commonwealth officer or otherwise engaged to perform work for a Commonwealth entity and the person is reckless as to this element
- the information was made or obtained by another person by reason of that other person being, or having been, a Commonwealth officer or otherwise engaged to perform work for a Commonwealth entity and the person is reckless as to this element
- any one or more of the following applies:
    - the information has a security classification of SECRET or TOP SECRET and the person is reckless as to this
    - the communication of the information damages the security or defence of Australia and the person is reckless as to this
    - the communication of the information interferes with or prejudices the prevention, detection, investigation, prosecution or punishment of a criminal offence against a law of the Commonwealth and the person is reckless as to this

- the communication of the information harms or prejudices the health or safety of the Australian public or a section of the Australian public.

This offence will carry a maximum penalty of 10 years imprisonment, which is lower than the penalty applying to the offences relating to communication of information by current or former Commonwealth officers at subsections 122.1(1) and 122.2(1).

The new offence at subsection 122.4A(2) will apply where:

- a person intentionally deals with information (other than by communicating it)
- the information was not made or obtained by the person by reason of the person being, or having been, a Commonwealth officer or otherwise engaged to perform work for a Commonwealth entity and the person is reckless as to this element
- the information was made or obtained by another person by reason of that other person being, or having been, a Commonwealth officer or otherwise engaged to perform work for a Commonwealth entity and the person is reckless as to this element
- any one or more of the following applies:
    - the information has a security classification of SECRET or TOP SECRET and the person is reckless as to this
    - the dealing damages the security or defence of Australia and the person is reckless as to this
    - the dealing interferes with or prejudices the prevention, detection, investigation, prosecution or punishment of a criminal offence against a law of the Commonwealth and the person is reckless as to this
    - the dealing harms or prejudices the health or safety of the Australian public or a section of the Australian public.

This offence will carry a maximum penalty of three years imprisonment, which is lower than the penalty applying to the offences relating to dealings with information by current or former Commonwealth officers at subsections 122.1(2) and 122.2(2).

Reversal of evidential burden of proof

Committee Comment

1.286 The committee requests the minister's detailed advice as to:

- the appropriateness of including each of the specified matters as an offence-specific defence, by reference to the principles set out in the *Guide to Framing Commonwealth Offences*;
- whether there are secrecy provisions in other legislation that might prevent public officials from discharging the evidential burden of proof as to whether they were acting in accordance with their statutory duties; and

- the appropriateness of amending the bill to provide that the relevant matters be included as an element of each offence or that, despite section 13.3 of the *Criminal Code*, a defendant does not bear the burden of proof in relying on the offence-specific defences.

Response

It is appropriate and consistent with the principles in the *Guide to Framing Commonwealth Offences* to include offence-specific defences in the Bill.

The *Guide to Framing Commonwealth Offences* acknowledges that it is appropriate to reverse the onus of proof and place a burden on the defendant in certain circumstances. This includes where a matter is peculiarly within the knowledge of the defendant and where it would be significantly more difficult and costly for the prosecution to disprove the matter than for the defendant to establish the matter.

The justification contained in the Explanatory Memorandum for casting lawful authority as a defence for the espionage and foreign interference offences applies equally to the secrecy offences. For example, in relation to the defences in section 91.4 to the espionage offences, paragraphs 709 to 710 of the Explanatory Memorandum states:

> Lawful authority is currently included as a physical element of the existing espionage offences in Division 91 of the Criminal Code where a person communicates, or makes available, information intending to give an advantage [to] another country's security or defence (for example, subparagraph 91.1(2)(b)(i)). This requires the prosecution to prove, beyond a reasonable doubt, that the person did not have lawful authority for their actions. In contrast, subsection 91.4(1) casts the matter of lawful authority as a defence, which has the effect of placing an evidential burden on the defendant.
>
> If lawful authority was an element of the espionage offences in Subdivision A, it would be necessary for the prosecution to prove, beyond a reasonable doubt, that there was no authority in any law or in any aspect of the person's duties that authorised the person to deal with the information or article in the relevant manner. This is a significant barrier to prosecutions.
>
> It is appropriate for the matter of lawful authority to be cast as a defence because the source of the alleged authority for the defendant's actions is peculiarly within the defendant's knowledge. It is significantly more cost-effective for the defendant to assert this matter rather than the prosecution needing to disprove the existence of any authority, from any source.

It would be difficult and more costly for the prosecution to prove, beyond a reasonable doubt, that the person did not have lawful authority. To do this, it would be necessary to negative the fact that there was authority for the person's actions in any law or in any aspect of the person's duty or in any of the instructions given by the person's supervisors (at any level). Conversely, if a Commonwealth officer had a particular reason for thinking that they were acting in accordance with a law, or their duties, it would not be difficult for them to describe where they thought that authority arose. The defendant must discharge an evidential burden of proof, which means pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist (section 13.3 of the Criminal Code).

The prosecution will still be required to prove each element of the offence beyond a reasonable doubt before a defence can be raised by the defendant. Further, if the defendant discharges an evidential burden, the prosecution will also be required to disprove these matters beyond reasonable doubt, consistent with section 13.1 of the Criminal Code.

Amendments to the draft Bill will be developed to ensure Inspector General of Intelligence and Security (IGIS) officials do not bear an evidential burden in relation to the defences in section 122.5 of the Bill. The amendments will also broaden the defences at subsections 122.5(3) and (4) to cover all dealings with information, and clarify that the defences in section 122.5 do not affect any immunities that exist in other legislation.

It would not be appropriate to replace the defences in section 122.5 and instead include additional elements in the secrecy offences. This would mean that in every case the prosecution would need to disprove all of the matters listed in the defences is section 122.5, including for example that:

- the information was not communicated to the IGIS, the Commonwealth Ombudsman or the Law Enforcement Integrity Commissioner
- the information was not communicated in accordance with the *Public Interest Disclosure Act 2013* (PID Act)
- the information was not communicated to a court or tribunal, and
- the person was not engaged in reporting news, presenting current affairs or expressing editorial content in the news media and did not have a reasonable belief that his or her dealing with the information was in the public interest.

Proving all of these matters beyond reasonable doubt would be burdensome and costly when compared to the approach taken in the Bill of providing defences for the defendant to raise, as appropriate and as relevant to the individual facts and circumstances of the particular case.

Treachery offence

Committee Comment

1.290 The committee therefore seeks the minister's detailed justification for making the offence in proposed section 80.1AC subject to a penalty of life imprisonment when the provision does not precisely specify the nature of the offending conduct.

Response

The offence in section 80.1AC criminalises serious conduct. Consistent with the *Guide to Framing Commonwealth Offences*, the maximum penalty must be adequate to deter and punish a worst case offence. The consequences of the commission of this offence may be particularly dangerous or damaging. The penalty is also consistent with the existing treason and treachery offences, and other offences of similar seriousness. A sentencing court will continue to have the discretion to set the penalty at an appropriate level to reflect the relative seriousness of the offence based on the facts and circumstances of the particular case.

The prosecution will need to prove the physical element that the conduct involved force or violence and that the defendant was reckless as to this element. The application of recklessness requires the prosecution to prove that the person was aware of a substantial risk that his or her conduct involved force or violence, and that, having regard to the circumstances known to him or her, it was unjustifiable to take the risk. The prosecution will also need to prove that the person intentionally engaged in the conduct with the intention of overthrowing the Constitution, or the Government of the

Commonwealth, of a State or of a Territory, or the lawful authority of the Government of the Commonwealth.

The offence would not necessarily capture the conduct, described by the committee at paragraph 1.289, of a person with a delusional aim of overthrowing the government where the conduct resulted in minor force being applied to a government building.

The defence of mental impairment in section 7.3 of the Criminal Code provides that a person is not criminally responsible where that person was suffering from a mental impairment that had the effect that the person:

- did not know the nature and quality of the conduct, or
- did not know the conduct was wrong, or
- the person was unable to control the conduct.

Strict liability offences

Committee Comment

1.300 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of applying strict liability to elements of the offences in proposed sections 91.1, 91.3, 91.6, 122.1 and 122.3 (as to whether information or articles have a security classification), particularly given such offences are punishable by terms of imprisonment ranging from 5 years to life imprisonment.

Response

Strict liability will be removed from elements of the offences relating to information or articles carrying a security classification in the proposed amendments to the Bill. This means the prosecution will be required to prove, beyond reasonable doubt, that the information or article had a security classification, and that the defendant was reckless as to whether the information or article had a security classification. Consistent with section 5.4 of the Criminal Code, this means the person will need to be aware of a substantial risk that the information or article carried a security classification and, having regard to the circumstances known to the person, it was unjustifiable to take that risk.

Presumption against bail

Committee Comment

1.305 The committee requests the minister's detailed justification as to the appropriateness of imposing a presumption against bail and why it is necessary to create a presumption against bail rather than specifying the relevant matters a bail authority or court must have regard to in exercising their discretion whether to grant bail.

Response

A presumption against bail is appropriate for the offences in Division 80 and 91 of the Criminal Code and the foreign interference offences in subsections 92.2(1) and 92.3(1) where it is alleged that the defendant's conduct involved making a threat to cause serious harm or a demand with menaces. The offences that are subject to a presumption against bail are very serious offences. The presumption

against bail will limit the possibility of further harmful offending, the communication of information within the knowledge or possession of the accused, interference with evidence and flight out of the jurisdiction. Communication with others is particularly concerning in the context of the conduct targeted by these offences.

The existing espionage, treason and treachery offences are currently listed in subparagraph 15AA(2)(c) of the *Crimes Act 1914* (Crimes Act) – inclusion of offences in Division 80 and 91 merely updates subparagraph 15AA(2)(c) given that the existing offences are being repealed. For these offences, it is important to note that, consistent with subparagraphs 15AA(2)(c)(i) and (ii), the presumption against bail will only apply if the person's conduct is alleged to have caused the death of a person or carried a substantial risk of causing the death of a person.

For the foreign interference offences in sections 92 and 93, the presumption against bail will only apply where it is alleged that any part of the conduct the defendant engaged in involved making a threat to cause serious harm or a demand with menaces. This limitation recognises the significant consequences for an individual's personal safety and mental health if the conduct involves serious harm (consistent with the definition of 'serious harm' in the Dictionary to the Criminal Code) or making a 'demand with menaces' (as defined in section 138.2 of the Criminal Code).

For offences subject to a presumption against bail the accused will nevertheless be afforded to opportunity to rebut the presumption. Further, the granting or refusing of bail will always be at the discretion of the judge hearing the matter.

Incorporation of external material into the law

Committee Comment

1.312 The committee requests the minister's advice as to whether, at a minimum, the bill can be amended to insert a statutory requirement that the relevant documents to be incorporated will be made freely and readily available to all persons in agencies subject to those policies and procedures.

Response

The Bill could be amended to include a statutory requirement similar to that suggested by the committee.

Response to the Senate Standing Committee for the Scrutiny of Bills

Scrutiny Digest No. 1 of 2018

Foreign Influence Transparency Scheme Bill 2017

Reversal of evidential burden of proof: offence-specific defences

Committee comment

1.221 The committee requests the Attorney-General's detailed justification as to the appropriateness of including each of the specified matters as an offence-specific defence, by reference to the principles set out in the *Guide to Framing Commonwealth Offences.*

1.222 The committee also seeks the Attorney-General's advice as to the appropriateness of amending the bill to provide that the relevant matters are included as an element of the offence or that, despite section 13.3 of the *Criminal Code*, a defendant does not bear the burden of proof in relying on the offence-specific defences.

Response

The committee notes that offence-specific defences interfere with the common law duty of the prosecution to prove all elements of an offence. The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (the Guide) acknowledges that offence-specific defences are appropriate in certain circumstances. This includes where a matter is peculiarly within the knowledge of the defendant and where it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.[1] The Guide also states that offence-specific defences can be more readily justified if:

- the matter in question is not central to the question of culpability for the offence
- the offence carries a relatively low penalty, or
- the conduct proscribed by the offences poses a grave danger to public health or safety.[2]

The committee notes that the Foreign Influence Transparency Scheme Bill 2017 (the Bill) establishes offence-specific defences in sections 59 and 60 and in relation to section 58.

Section 58: Failure to fulfil responsibilities under the scheme

Section 58 is a strict liability offence for 'failure to fulfil responsibilities under the scheme'. The offence at section 58 applies where a person fails to fulfil the requirements set out at section 34 in relation to reporting material changes in circumstances. Subsection 34(5) provides a person does not need to report material changes in circumstances if the information has been included in a notice given under section 36 or section 37 of the Bill, which impose particular reporting requirements during voting periods. Consistent with the note under subsection 34(5), the defendant bears an evidential burden in relation to these matters.

Imposing an evidential burden on the defendant is consistent with principles set out in the Guide. The Guide states a defendant will usually bear an evidential burden for defences, which can include 'words of exception, exemption, excuse, qualification or justification.'[3] The Guide also highlights that imposing an evidential burden does not displace the prosecutor's burden, but merely defers it.[4]

[1] Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, page 50.
[2] Ibid.
[3] Ibid, page 51.
[4] Ibid.

Imposing an evidential burden on the defendant is appropriate because the matters set out at subsection 34(5) are matters that are peculiarly within the knowledge of the defendant. An example is as follows:

> Person A is registered with the Scheme with relation to activities undertaken on behalf of Foreign Government B. A voting period begins for a federal election and Person A provides the Secretary with a notice under section 36, advising that he or she will undertake a new registrable activity of distributing information and materials on behalf of Foreign Government B. The Secretary subsequently contacts Person A when it is discovered that he or she is also managing a social media campaign for Foreign Government B and states that Person A should have reported this in accordance with section 34, 'reporting material changes in circumstances.'
>
> In response, Person A advises that this had been reported as part of the notice provided to the Secretary under section 36, in which it was described, at a high-level, as 'distributing information and materials.' The way in which Person A conceives of and describes his or her registrable activities is peculiarly within the mind of Person A. Person A is best placed to demonstrate that he or she has not contravened section 34 and has in fact already provided the information in question, as per section 36. This information is peculiarly within the mind of the Person A, and aligns with the principles in the Guide that support the establishment of offence-specific defences.

Section 59: Failure to comply with notice requiring information

The committee also notes that the offence at section 59 for 'failure to comply with notice requiring information' contains an offence-specific defence at subsection 59(2). It is a defence to the offence at subsection 59(1) if the person:

(a) fails to comply with the notice because he or she did not provide the information or a document within the applicable period
(b) took all reasonable steps to provide the information or document with that period, and
(c) provides the information or document as soon as practicable after the end of that period.

This defence is consistent with the principles set out in the Guide. The notions of 'reasonable steps' in paragraph 59(2)(b) and 'as soon as practicable' in paragraph 59(2)(c) rely on assessments of the unique circumstances of the defendant. For example, in relation to 'reasonable steps', a person who does not have access to the internet will take different steps to provide the information or document to a person that does, and an assessment of whether those steps are reasonable would be different in each of those scenarios. In relation to 'as soon as practicable', a person who is very unwell may not be able to provide the information or document for an extended period of time, while a fit and healthy person may be able to provide the information or document much sooner. An assessment of whether that time period is 'as soon as practicable' would be different in each of those scenarios.

It would be significantly more difficult and costly for prosecution to go behind the individual circumstances of a defendant to understand what does and does not constitute reasonable steps, and to prove this beyond reasonable doubt as an element of an offence. This information is peculiarly within the mind of the defendant and therefore aligns with the principles set out in the Guide that supports the establishment of offence-specific defences. For example, if a person was unwell and unable to meet the applicable timeframe, they will be able to point to evidence of this very easily, whereas the Commonwealth would not necessarily be able to even identify that the person was unwell, let alone to know that this was the reason why they had failed to meet the applicable timeframe. It would be significantly more difficult and costly for prosecution to go behind the individual circumstances of a defendant to understand whether the person took all reasonable steps to provide the information or document within the applicable period, and whether the person provides the information or document as soon as practicable.

Section 60: False or misleading information or documents

The committee further notes that the offence at section 60 relating to 'false or misleading information or documents' contains offence-specific defences at subsections 60(2) – 60(6).

The defences at subsection 60(2) and 60(3) apply where the information or document, provided in accordance with section 45 or 46, is not false or misleading in a material particular or does not omit any matter without which the information is misleading in a material particular. Whether something is false or misleading in a material particular is peculiarly within the mind of the defendant because only the registrant will know the nature of their activities and how they align with the direction or wishes of the foreign principal. An example is as follows:

> Person X is engaged by Foreign Business Y to undertake parliamentary lobbying and communications activities on its behalf. Person X completes and submits a registration under the scheme but omits information about some of the activities he or she will undertake on behalf of Foreign Business Y. The Secretary gives Person X a notice under section 46 of the Act requesting further information and documents about Person X's relationship with Foreign Business Y, including the nature of activities undertaken on behalf of Foreign Business Y. Person X receives the notice and responds by providing information about the parliamentary lobbying activities he or she is undertaking on behalf of Foreign Business Y, but omits information about distributing communications materials on behalf of Foreign Business Y, which has the effect of making the information provided misleading. However, Person X knows that the information omitted relates to activity that is exempt under the Scheme because of the news media exemption at section 28 because the communications materials are distributed solely for the purposes of reporting news.

In this example, it is Person X's unique and peculiar knowledge of its registrable arrangement with Foreign Business Y that makes Person X best-placed to raise the defence at subsection 60(3). Person X will be able to point to evidence that shows the omission does not render the information misleading in a material particular, because the information omitted is exempt under section 28 of the Bill. This information is peculiarly within the mind of Person X and is consistent with the principles set out in the Guide relating to offence-specific defences. The Commonwealth may not have the unique knowledge and expertise to make this assessment.

The defences at subsection 60(4) – 60(5) are consistent with the defence to the equivalent Criminal Code offence at section 137.1, relating to giving false or misleading information. Subsection 137.1(5) of the Criminal Code provides an offence-specific defence where 'the second person did not take reasonable steps to inform the first person of the existence of the offence against subsection (1)'.

Similarly, the defence at subsection 60(6) is consistent with the defence to the equivalent Criminal Code offence at section 137.2 relating to producing false or misleading documents. Subsection 137.2(3) of the Criminal Code provides an offence-specific defence where a person produces a signed written statement stating that the document is false or misleading and setting out the material particular in which the document is false or misleading.

The defence at subsection 137.1(5) of the Criminal Code was included in response to a recommendation by the Standing Committee on Legal and Constitutional Affairs in its advisory report of the inquiry into the Criminal Code Amendments (Theft Fraud, Bribery and Related Offences) Bill 1999. This defence was suggested as a measure that would limit the offence at section 137.1 of false and misleading information, while ensuring the offence remained robust and able to meet its policy objective.

Significant matters in delegated legislation

Committee comment

1.230 The committee's view is that significant matters, such as the disclosure of information about a foreign principal (with non-compliance as an offence) and the purposes for which Scheme information can be communicated, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided.

1.231 In this regard, the committee requests the Attorney-General's detailed advice as to:

- why it is considered necessary and appropriate to leave these significant aspects of the Scheme to delegated legislation; and
- why it is appropriate to include these matters in rules rather than regulations; and
- with respect to table 4 of subclause 53(1):
    - what circumstances it is envisaged it may be necessary to expand the purposes for which Scheme information can be communicated; and
    - the appropriateness of amending the bill so as to require the minister to consider any comments made by the Information Commissioner prior to making any rules.

Response

The committee's report raises concerns that the Bill contains a number of provisions that allow particular matters to be set out in delegated legislation. The committee draws attention to:

- subsection 38(2) which sets out a range of matters that may be prescribed by rules that will guide the specifics of disclosures required by subsection 38(1), and
- subsection 53(1) which provides that the Secretary may communicate Scheme information for a purpose, and to a person, prescribed by the rules.

Section 38 – disclosure in communications activity

Achieving the Scheme's transparency objective requires that disclosures be made in communications activity so that Australian decision-makers and the public can make informed assessments about the forms and sources of foreign influence that may be represented in particular information and materials. The provision for matters to be prescribed in rules under subsection 38(2) seeks to provide flexibility about particular matters relating to disclosures in communications activity. Examples of the types of matters that might be prescribed by rules in accordance with subsection 38(2) could include:

- the specific words that must be included in disclosures,
- the font size of written disclosures,
- the placement of written disclosures,
- the length of time for which television disclosures must be displayed, and
- any accessibility requirements.

Matters such as these are detailed and technical and not appropriate for inclusion in the primary Act.

Prescription in delegated legislation is also necessary because of the changing nature of matters that will be prescribed in accordance with subsection 38(2). It will be necessary for the rules relating to disclosures to keep abreast of changes in communications technologies and methods, and of community expectations about the transparency of communications activity. It is appropriate that the matters specified at subsection 38(2) be prescribed by rules so that they are responsive and adaptive to these changes.

Section 53 – Authorisation – other purposes

Subsection 53(1) allows the Secretary to communicate Scheme information for any of the listed purposes. These purposes are:

- to an enforcement body for the purpose of an enforcement related activity (within the meaning of the *Privacy Act 1988*)
- to a department, agency or authority of the Commonwealth, a stater or a territory or an Australian police force for:
    - the protection of public revenue, or
    - the protection of security within the meaning of the *Australian Security Intelligence Organisation Act 1979*.

In addition to these purposes, Scheme information will be able to be shared with a person prescribed by the rules for a purpose prescribed by the rules. This provision is appropriate and necessary so that Scheme information can be communicated in circumstances that were not foreshadowed at the time of establishment of the Scheme. As noted in paragraph 107 of the Explanatory Memorandum, it is possible that there may be additional purposes for which Scheme information may need to be disclosed once the Scheme is established. It is intended that any additional purposes and/or persons would be kept narrow and that any request for scheme information would need to justify how the information relates to the purpose as prescribed in the rules.

An example of when a rule under Item 4 of subsection 53(1) might be made could be where a Commonwealth agency identifies a need to access Scheme information in order to carry out their functions. Depending on the information sought and the purpose for seeking that information, it might fall outside the criteria for sharing Scheme information as set out at Items 1-3 of subsection 53(1). In such a situation, the Commonwealth agency might make a request that it be prescribed as an agency with which the Secretary may share Scheme information, to support the agency in fulfilling its functions. The Minister may then consider making a rule in accordance with Item 4 of subsection 53(1). This would only be done in consultation with the Information Commissioner, as required by subsection 53(2) of the Bill.

Any rules made in accordance with subsection 38(2) or 53(1) will be legislative instruments under the *Legislation Act 2003* and would be subject to the normal disallowance processes under that Act. Any rules will also comply with the *Privacy Act 1988*, and will be guided by the Australian Privacy Principles. The Minister would consult with and consider the views of the Information Commissioner and relevant stakeholders in the development of rules, as is required under subsection 53(2) for rules made under Item 4 of the table in subsection 53(1). The legislation does not specify that the Minister must consider any comments of the Information Commissioner because the term 'consult' at subsection 53(2) implicitly encompasses both seeking and considering the views of the Information Commissioner.

It is considered appropriate that these matters be dealt with in 'rules' rather than 'regulations'. The Office of Parliamentary Counsel takes as its starting point the principle that 'subordinate instruments should be made in the form of legislative instruments (as distinct from regulations) unless there is good reason not to do so'.[5] Further guidance is provided on the material that should be included in regulations rather than other instruments. These matters include offence provisions. Paragraph 71(2)(a) of the Bill specifically prevents rules from creating an offence or civil penalty.

The Bill's approach of using rules to prescribe the matters mentioned in subclause 38(2), as well as various other matters, has a number of advantages, including:

- facilitating the use of a single type of legislative instrument for the Bill, thereby reducing the complexity otherwise imposed on the regulated community if these matters were to be prescribed across a number of different types of instruments;
- simplifying the language and structure of the provisions in the Bill that provide the authority for the legislative instruments; and
- shortening the Bill.

[5] Office of Parliamentary Counsel, *Drafting Direction No. 3.8: Subordinate Legislation*, 2017, page 3.

Importantly, the rules will be subject to a level of parliamentary scrutiny identical to that of regulations. Section 71 of the Bill makes it clear that the rules are a legislative instrument for the purposes of the *Legislation Act 2003*. Under sections 38 and 39 of that Act, all legislative instruments and their explanatory statements must be tabled in both Houses of the Parliament within six sitting days of the date of registration of the instrument on the Federal Register of Legislation. Once tabled, the rules will be subject to the same level of Parliamentary scrutiny as regulations (including consideration by the Senate Standing Committee on Regulations and Ordinances), and a motion to disallow the rules may be moved in either House of the Parliament within 15 sitting days of the date the rules are tabled (see section 42 of the *Legislation Act 2003*).

Significant penalties

Committee comment

1.240 It is not apparent to the committee that the penalties in proposed section 57 of the bill are appropriate by reference to the comparable Commonwealth offences and the requirements in the *Guide to Framing Commonwealth Offences.*

1.241 The committee therefore seeks the Attorney-General's detailed advice as to the justification for the significant custodial penalties proposed by clause 57, in the context of the breadth of the requirement to register under the scheme. In particular the committee seeks the Attorney-General's advice as to specific examples of applicable penalties for comparable offences in other Commonwealth legislation.

Response

The maximum penalties proposed in section 57 of the Bill have been set in accordance with the principles set out in the Guide, including that:

- penalties have a single maximum penalty that is adequate to deter and punish a worst case offence, and
- penalties are set consistent with penalties for existing offences of a similar kind or of a similar level of seriousness.[6]

The penalties in section 57 contain single maximum penalties consistent with the Guide and are adequate to respond to the 'worst case' conduct that is punishable under section 57. The penalties in section 57 are intended to address the most serious of conduct, intentionally committed in contravention of requirements under the Scheme, and recognise the high level of culpability of the offender.

In setting the penalties for the offences in section 57 of the Bill, consideration was given to the level of harm to Australia and Australia's political and governmental processes that may result from a person or entity failing to apply for, or maintain, registration under the scheme. As an example, significant adverse consequences meriting a substantial term of imprisonment could flow from a deliberate failure to register an arrangement with a foreign principal to undertake public relations and communications activities on their behalf. An arrangement stipulating that the activities are to commence when a federal election is called, and to target a vulnerable sector of the community in marginal electorates where it is likely that voters will change their vote if influenced by the activities, could have an appreciable impact on the outcome of a democratic process. A seven year penalty is appropriate when the person knows they are required to register but does not do so and undertakes the activities. Failure to register deprives the public of the opportunity to know the foreign influence being brought to bear in respect of their vote in the federal election. The maximum penalties in section 57 seek to deter such serious conduct.

[6] Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, page 40.

Consideration was also given to the penalties for offences that support the United States' (US) equivalent scheme, established under the *Foreign Agents Registration Act 1938.* Section 951 of the US Code (agents of foreign governments) attracts a maximum penalty of ten years imprisonment.

The US offence applies where a person acts as an agent of a foreign government in the US without prior notification to the Attorney-General, other than a diplomatic or consular officer. The types of activities that constitute 'acting as an agent of a foreign government' are not defined except that they must be undertaken at 'the direction or control of a foreign government or official'. The US offence requires that a person intentionally acts on behalf of a foreign principal without prior notification and could apply to the same activities that are considered registrable activities in sections 20 – 23 of the Bill. The offence at section 57 applies where a person deliberately fails to register under the Scheme and goes on to engage in registrable activities. This conduct is equivalent to acting as a foreign agent and would constitute an offence under section 951 of the US Code.

Absolute liability offences

Committee comment

1.248 The committee requests a detailed justification from the Attorney-General for the application of absolute liability to an element of the offence under clause 61 with reference to the principles set out in the *Guide to Framing Commonwealth Offences.*

Response

Subsection 61(2) applies absolute liability to the element of the offence in paragraph 61(1)(a), that a registrant is required to keep records under section 40 of the Scheme. The Guide sets out the circumstances in which absolute liability can be applied to a particular physical element of an offence. Absolute liability may be applied where:

> requiring proof of fault of the particular element to which strict or absolute liability applies would undermine deterrence, and there are legitimate grounds for penalising persons lacking 'fault' in respect of that element. In the case of absolute liability, there should also be legitimate grounds for penalising a person who made a reasonable mistake of fact in respect of that element.[7]

If absolute liability did not apply to paragraph 61(1)(a), recklessness would be the default fault element. Requiring proof of this fault element is unnecessary given the fault elements attached to paragraphs 61(1)(b), 61(1)(c) and 61(1)(d), which state:

> (b) the person (whether or not the registrant) does an act, or omits to do an act; and
>
> (c) the person does the act, or omits to do the act, with the intention of avoiding or defeating the object of this Act or an element of the scheme; and
>
> (d) the act or omission results in:
>
> (i) damage to, or the destruction of a scheme record; or
>
> (ii) the concealment of a scheme record; or
>
> (iii) the registrant being prevented from keeping scheme records.

It is not necessary for the person to have 'fault' for paragraph 61(1)(a) because the person's culpability must otherwise be clearly established for the remaining elements of the offence. This is particularly the case for paragraph 61(1)(c), which carries the fault element of 'intent'. To establish the offence, prosecution must prove this intention beyond a reasonable doubt.

[7] Ibid, at page 23.

It is also not appropriate that a defendant be able to avail themselves of the defence of reasonable and honest mistake of fact for this element of the offence at section 61. Applying strict liability to this element of the offence would undermine the deterrent effect of the offence.

Broad delegation of administrative powers

Committee comment

1.253 The committee requests the Attorney-General's detailed advice as to why it is considered necessary to allow for the delegation of any or all of the secretary's functions or powers to Executive Level 2 employees, and the appropriateness of amending the bill so as to, at a minimum, limit the delegation of coercive information gathering powers and the communication of scheme information to Senior Executive Service employees.

Response

As the committee notes, section 67 would allow the delegation of powers granted to the Secretary under the Bill to Senior Executive Service (SES) employees of the department, or to Australian Public Service employees of the department in an Executive Level 2 or equivalent position. The purpose of this delegation is to provide flexibility and timeliness in dealing with matters within the department, to ensure the Scheme is administered efficiently.

The application of the delegation power extends only to SES employees and/or APS officers at the Executive level 2 level to ensure that the powers and functions of the Act are only exercisable by senior officers with experience and judgement in matters of public administration.

It is not practical or feasible to require the Secretary to personally exercise the powers and functions of the Scheme. This would be counterproductive and would lead to delays in processing matters under the Scheme. Section 67(2) provides that the delegate must comply with any written directions of the Secretary when performing delegated functions or exercising delegated powers under the Act. This ensures the delegates are undertaking duties directly at the request of the Secretary, in compliance with the Secretary's directions and consistent with the objective of the Scheme in ensuring its efficient administration. Delegation to the level of Executive Level 2 employees is consistent with delegations in comparable pieces of Commonwealth legislation, for example the *AusCheck Act 2007*.

The committee enquires whether Government would amend the Bill to limit the delegation of powers to SES employees, at least with relation to coercive powers and the communication of scheme information. The Government considers that this would be an appropriate amendment that ensures that information-gathering powers are limited only to more senior officers within the department.

Response to the Senate Standing Committee for the Scrutiny of Bills

Scrutiny Digest No. 1 of 2018

Foreign Influence Transparency Scheme (Charges Imposition) Bill 2017

Charges in delegated legislation

Committee comment

1.258 The committee requests the Attorney-General's advice as to why there are no limits on the charge specified in primary legislation and whether guidance is relation to the method of calculation of the charge and/or a maximum charge can be specifically included in the bill.

Response

A statutory limit for charges for applications for registration and renewal of registration under the Foreign Influence Transparency Scheme (the Scheme) is not specified in the Foreign Influence Transparency Scheme (Charges Imposition) Bill 2017 (the Bill) to provide for flexibility in the operation of the Scheme and because the amount to be charged will be subject to established principles, oversight and scrutiny.

The calculation of charges will be in accordance with the Australian Government's decision to partially cost recover the Scheme, and will adhere to the Australian Government Cost Recovery Guidelines (the Guidelines).[8] Under the Guidelines, each cost recovered activity must ensure that there is an alignment between the expense incurred and income generated through charges for that activity.

The Guidelines also require that Government entities consult with the Department of Finance to develop a Cost Recovery Impact Statement (CRIS). The CRIS must be:

- certified by the accountable authority of the entity
- approved by the responsible minister, and
- agreed for release by the Finance Minister, if the cost recovery risk rating is 'high'.[9]

The Guidelines further require regular reporting on cost recovery, requiring an entity to report on cost recovery at both the aggregate level in the entity's annual financial statements, in accordance with the financial reporting rules, and at the cost recovered activity level on the entity's website as part of the CRIS.[10]

Additionally, the CRIS must be made publicly available before any charging activity begins. This means that the method of calculation of the charges will be publicly available in advance of any charging regime being implemented.

The Australian Government's decision to partially, rather than fully, cost recover reflects the Government's commitment to upholding the transparency objective of the Scheme by ensuring registration and compliance is not discouraged by prohibitive fees. The Government has stated that

[8] Australian Government Department of Finance, *Australian Government Cost Recovery Guidelines: Resource Management Guide No. 304,* Third edition, 2014.
[9] Ibid, page 16.
[10] Ibid, page 50.

the amount that will be charged in connection with the Scheme will be less than fees charged under the United States (US) equivalent *Foreign Agents Registration Act* (FARA). The fees under FARA are set at approximately US$305 for the initial filing and then for each mandatory six-monthly supplemental statement.

The committee's report characterises the charges in the Bill as taxation, and states at paragraph 1.256 that '[o]ne of the most fundamental functions of the Parliament is to impose taxation (including duties of customs and excise). The committee's consistent scrutiny view is that it is for the Parliament, rather than makers of delegated legislation, to set a rate of tax.'

The approach taken in subsection 6(2) of the Bill is consistent with guidance from the Office of Parliamentary Counsel that the imposition of taxes should be included in regulations rather than another type of legislation.[11] Regulations are subject to parliamentary oversight, including disallowance processes. Parliament therefore has the ability to oversee the charges and play a role in setting the tax.

Subsection 6(2) allows the amount of charges to remain responsive and adaptive to circumstances not foreseen at the time of the establishment of the Scheme. This could include with relation to the estimated number of registrants, and the estimated cost to administer the Scheme. Charges established by regulations in accordance with subsection (6)(a) will be legislative instruments under the *Legislation Act 2003* and would be subject to the normal disallowance processes.

The committee has also enquired whether the Bill could be amended to include guidance on the method of calculation of the charge and/or the maximum charge. Government is open to considering amendments to the Bill to establish a maximum charge.

[11] Office of Parliamentary Counsel, *Drafting Direction No. 3.8: Subordinate Legislation*, 2017, page 3.

2016-2017-2018

The Parliament of the
Commonwealth of Australia

HOUSE OF REPRESENTATIVES

OPC drafter to complete	
1. Do any of these amendments need a message? (See H of R Practice, sixth ed, pp. 423-427, and OGC advice.) If yes: • List relevant amendments— • Prepare message advice (see DD 4.9) • Give a copy of the amendments and the message advice to the Legislation area.	No
2. Are these amendments for consideration by the Senate? If yes, go on to question 3.	No
3. Should any of these amendments be moved in the Senate as requests? (See OGC advice) If yes: • List relevant amendments— • Prepare section 53 advice and fax to relevant Ministers, the PLO in the Senate and the PLO in the House of Reps (see DD 4.9); • Give a copy of the request advice to the Legislation area with the copy of the amendments (see question 1).	No

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

(Government)

(1) Schedule 1, item 16, page 22 (lines 9 and 10), omit subsection 90.5(1), substitute:

(1) ***Security classification*** means:

(a) a classification of secret or top secret; or

(b) any other equivalent classification or marking prescribed by the regulations.

[definition of security classification]

(2) Schedule 1, item 17, page 23 (lines 25 and 26), omit subsection 91.1(3).

[strict liability]

(3) Schedule 1, item 17, page 25 (after line 3), after paragraph 91.3(1)(a), insert:

(aa) the person deals with the information or article for the primary purpose of making the information or article available to a foreign principal or a person acting on behalf of a foreign principal; and

[primary purpose of dealing]

(4) Schedule 1, item 17, page 25 (lines 7 to 9), omit paragraph 91.3(1)(c), substitute:

(c) the information or article has a security classification.

[dealing with security classified information]

(5) Schedule 1, item 17, page 25 (lines 11 to 14), omit subsection 91.3(2), substitute:

(2) For the purposes of paragraphs (1)(aa) and (b), the person must intend the information or article to be made available to a foreign principal or a person acting on behalf of a foreign principal, even if:

(a) the person does not have in mind any particular foreign principal; or

(b) the person has in mind more than one foreign principal.

[primary purpose of dealing]

(6) Schedule 1, item 17, page 25 (line 15), omit subsection 91.3(3).

[strict liability]

(7) Schedule 1, item 17, page 26 (lines 19 and 20), omit subparagraph 91.6(1)(b)(i).

[security classification]

(8) Schedule 1, item 17, page 27 (line 4), omit subsection 91.6(3).

[strict liability]

(9) Schedule 2, item 6, page 50 (lines 1 to 6), omit paragraph (a) of the definition of ***cause harm to Australia's interests*** in subsection 121.1(1), substitute:

(a) interfere with or prejudice the prevention, detection, investigation, prosecution or punishment of a criminal offence against a law of the Commonwealth; or

[cause harm to Australia's interests]

(10) Schedule 2, item 6, page 50 (lines 22 to 25), omit paragraphs (d) and (e) of the definition of ***cause harm to Australia's interests*** in subsection 121.1(1).

[cause harm to Australia's interests]

(11) Schedule 2, item 6, page 50 (line 26), omit "the public", substitute "the Australian public".

[cause harm to Australia's interests]

(12) Schedule 2, item 6, page 50 (line 27), omit "the public", substitute "the Australian public".

[cause harm to Australia's interests]

(13) Schedule 2, item 6, page 51 (line 4), omit "contract.", substitute "contract;".

[reporting news etc.]

(14) Schedule 2, item 6, page 51 (line 4), at the end of the definition of ***Commonwealth officer*** in subsection 121.1(1), add:

; but does not include an officer or employee of, or a person engaged by, the Australian Broadcasting Corporation or the Special Broadcasting Service Corporation.

[reporting news etc.]

(15) Schedule 2, item 6, page 51 (line 5), omit "the meaning given by subsection 90.1(1)", substitute "the same meaning as in Part 5.2".

[definition of deal]

(16) Schedule 2, item 6, page 51 (after line 5), at the end of the definition of ***deal*** in subsection 121.1(1), add:

Note: For the definition of ***deal*** in that Part, see subsections 90.1(1) and (2).

[definition of deal]

(17) Schedule 2, item 6, page 51 (after line 12), after the definition of ***domestic intelligence agency*** in subsection 121.1(1), insert:

foreign military organisation means:

(a) the armed forces of the government of a foreign country; or

(b) the civilian component of:

(i) the Department of State of a foreign country; or

(ii) a government agency in a foreign country;

that is responsible for the defence of the country.

[reporting news etc.]

(18) Schedule 2, item 6, page 51 (lines 23 to 26), omit paragraph (d) of the definition of ***inherently harmful information*** in subsection 121.1(1).

[inherently harmful information]

(19) Schedule 2, item 6, page 52 (after line 2), after the definition of ***Regulatory Powers Act*** in subsection 121.1(1), insert:

security classification has the meaning given by section 90.5.

[definition of security classification]

(20) Schedule 2, item 6, page 52 (line 4), omit "(within the meaning of section 90.4)".

[definition of security classification]

(21) Schedule 2, item 6, page 53 (line 2), omit the heading to section 122.1, substitute:

122.1 Communication and other dealings with inherently harmful information by current and former Commonwealth officers etc.

[offences by current and former Commonwealth officers etc.]

(22) Schedule 2, item 6, page 53 (line 7), omit "or any other".

[offences by current and former Commonwealth officers etc.]

(23) Schedule 2, item 6, page 53 (line 18), omit "or any other".

[offences by current and former Commonwealth officers etc.]

(24) Schedule 2, item 6, page 54 (line 1), omit "or any other".

[offences by current and former Commonwealth officers etc.]

(25) Schedule 2, item 6, page 54 (line 13), omit "or any other".

[offences by current and former Commonwealth officers etc.]

(26) Schedule 2, item 6, page 54 (lines 18 and 19), omit subsection 122.1(5).

[strict liability]

(27) Schedule 2, item 6, page 54 (line 20), omit the heading to section 122.2, substitute:

122.2 Conduct by current and former Commonwealth officers etc. causing harm to Australia's interests

[offences by current and former Commonwealth officers etc.]

(28) Schedule 2, item 6, page 54 (line 29), omit "or any other".

[offences by current and former Commonwealth officers etc.]

(29) Schedule 2, item 6, page 55 (line 13), omit "or any other".

[offences by current and former Commonwealth officers etc.]

(30) Schedule 2, item 6, page 55 (line 31), omit "or any other".

[offences by current and former Commonwealth officers etc.]

(31) Schedule 2, item 6, page 56 (line 13), omit "or any other".

[offences by current and former Commonwealth officers etc.]

(32) Schedule 2, item 6, page 56 (lines 24 to 26), omit subparagraph 122.3(1)(b)(i).

[security classification]

(33) Schedule 2, item 6, page 57 (line 15), omit subsection 122.3(3).

[strict liability]

(34) Schedule 2, item 6, page 57 (lines 23 and 24), omit the heading to section 122.4, substitute:

122.4 Unauthorised disclosure of information by current and former Commonwealth officers etc.

[offences by current and former Commonwealth officers etc.]

(35) Schedule 2, item 6, page 58 (after line 1), after section 122.4, insert:

122.4A Communicating and dealing with information by non-Commonwealth officers etc.

Communication of information

(1) A person commits an offence if:

(a) the person communicates information; and

(b) the information was not made or obtained by the person by reason of the person being, or having been, a Commonwealth officer or otherwise engaged to perform work for a Commonwealth entity; and

(c) the information was made or obtained by another person by reason of that other person being, or having been, a Commonwealth officer or otherwise engaged to perform work for a Commonwealth entity; and

(d) any one or more of the following applies:

(i) the information has a security classification of secret or top secret;

(ii) the communication of the information damages the security or defence of Australia;

(iii) the communication of the information interferes with or prejudices the prevention, detection, investigation, prosecution or punishment of a criminal offence against a law of the Commonwealth;

(iv) the communication of the information harms or prejudices the health or safety of the Australian public or a section of the Australian public.

Note: For exceptions to the offences in this section, see section 122.5.

Penalty: Imprisonment for 10 years.

Other dealings with information

(2) A person commits an offence if:

(a) the person deals with information (other than by communicating it); and

(b) the information was not made or obtained by the person by reason of the person being, or having been, a Commonwealth officer or otherwise engaged to perform work for a Commonwealth entity; and

(c) the information was made or obtained by another person by reason of that other person being, or having been, a Commonwealth officer or otherwise engaged to perform work for a Commonwealth entity; and

(d) any one or more of the following applies:

(i) the information has a security classification of secret or top secret;

(ii) the dealing with the information damages the security or defence of Australia;

(iii) the dealing with the information interferes with or prejudices the prevention, detection, investigation, prosecution or punishment of a criminal offence against of a law of the Commonwealth;

(iv) the dealing with the information harms or prejudices the health or safety of the Australian public or a section of the Australian public.

Penalty: Imprisonment for 3 years.

Proof of identity not required

(3) In proceedings for an offence against this section, the prosecution is not required to prove the identity of the other person referred to in paragraph (1)(c) or (2)(c).

[offences by others]

(36) Schedule 2, item 6, page 60 (lines 1 to 10), omit subsection 122.5(6), substitute:

Information dealt with or held by persons engaged in reporting news etc.

(6) It is a defence to a prosecution for an offence by a person against this Division relating to the dealing with or holding of information that:

(a) the person dealt with or held the information in the person's capacity as a person engaged in reporting news, presenting current affairs or expressing editorial content in news media; and

(b) at that time, the person reasonably believed that dealing with or holding the information was in the public interest (see subsection (7)).

Note: A defendant bears an evidential burden in relation to the matters in this subsection (see subsection 13.3(3)).

[reporting news etc.]

(37) Schedule 2, item 6, page 60 (lines 11 and 12), omit "paragraph (6)(a), dealing with or holding information is not", substitute "paragraph (6)(b), a person may not reasonably believe that dealing with or holding information is".

[reporting news etc.]

(38) Schedule 2, item 6, page 60 (lines 25 to 27), omit paragraph 122.5(7)(d), substitute:

(d) either:

(i) in relation to an offence against subsection 122.4A(1) or (2) that applies because of subparagraph 122.4A(1)(d)(iv) or (2)(d)(iv)—dealing with or holding information that, at that time, will or is likely to result in the death of, or serious harm to, a person; or

(ii) otherwise—dealing with or holding information that, at that time, will or is likely to harm or prejudice the health or safety of the Australian public or a section of the Australian public;

[reporting news etc.]

(39) Schedule 2, item 6, page 60 (after line 27), at the end of subsection 122.5(7), add:

(e) dealing with or holding information for the purpose of directly or indirectly assisting a foreign intelligence agency or a foreign military organisation.

[reporting news etc.]