Lawyers for the People
AUSTRALIAN LAWYERS ALLIANCE

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

Submission to Parliamentary Joint Committee on Intelligence and Security

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Protecting and promoting justice, freedom and the rights of the individual

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Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA started in 1994 as the Australian Plaintiff Lawyers Association, when a small group of personal injury lawyers decided to pool their knowledge and resources to secure better outcomes for their clients – victims of negligence. While maintaining our plaintiff common law focus, our advocacy has since expanded to criminal and administrative law, in line with our dedication to justice, freedom and individual rights.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.[1]

[1] www.lawyersalliance.com.au.

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Introduction

1. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input into Parliamentary Joint Committee on Intelligence and Security's inquiry into the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017 (the Bill).

2. The ALA agrees that it is important to update legislation to ensure that Australia is adequately protected from threats from abroad, both those that could undermine Australia's national interest, and those that could advantage the national interest of other countries without adequate disclosure.

3. However, it is essential that these reforms do not go beyond what is necessary to achieve those aims. In this submission, we seek to highlight some key concerns we have with the Bill that we believe could undermine freedoms and the rule of law in Australia.

4. This submission focuses on our main concerns about the Bill. In relation to Schedule 1, we focus on the definitions of national security and foreign political organisation; the expansion of espionage and inchoate offences; the absence of a public interest defence; and concerns relating to the availability of evidentiary certificates. In relation to Schedule 2, we focus on the definitions of 'causing harm to Australia's interests' and 'inherently harmful information'. We also consider proposed defences, and constitutional issues arising from the implied right to freedom of political communication.

Schedule 1: treason, espionage, foreign interference and related offences

Definition of national security

5. Under existing laws, espionage provisions relate to the 'Commonwealth's security or defence'. This is defined in s90.1 of the *Criminal Code Act 1995* (Cth) (Criminal Code) as including 'the operations, capabilities and technologies of, and methods and sources used by, the country's intelligence or security agencies'. Given that these charges are laid so irregularly, there has been little judicial interpretation of

this phrase. It is noted, however, that this phrase was itself controversial when introduced into the legislation, due to the broad nature of this definition.[2]

6. The definition of 'national security' found in proposed s90.4, which relates to espionage and related offences, again dramatically expands the nature of the activities to which the provisions will apply, when compared with the existing rules. In particular, 'the protection of the integrity of the country's territory and borders from serious threats', 'the carrying out of the country's responsibilities to any other country in relation to [border security]' and 'the country's political, military or economic relations with another country or countries' are additions to the existing framework.

7. These phrases all expand national security far beyond the traditional confines of the work of intelligence and security agencies to cover matters that are usually considered squarely within standard government. The ALA questions why the government is seeking to expand this concept so significantly, and is concerned that such an expansion could obscure damaging government practices, including illegal activities and corruption.

8. The ALA is concerned that this expansion would criminalise disclosures made in the public interest that would pose no risk to national security, such as misconduct or corruption. The Nauru Files,[3] for example, could potentially be caught by this expanded definition. These files revealed serious flaws in the way in which an offshore detention centre was being run, putting detainees at serious risk. The publication of these files led to investigation of these conditions, including an inquiry conducted by the Senate Standing Committee on Legal and Constitutional Affairs, and focused the attention of the then-Department of Immigration and Border Protection on ensuring that systems better reflected risks faced by asylum seekers

[2] See Senate Standing Committees on Legal and Constitutional Affairs, *Inquiry into the Provisions of the Criminal Code Amendment (Espionage and Related Offences) Bill 2002*, (2002), [2.4]-[2.15].

[3] The Nauru Files were published by the *Guardian*, following a leak from a worker on Nauru. See https://www.theguardian.com/news/series/nauru-files for full reporting.

and refugees in Nauru.[4] Further, it did nothing to undermine national security (as currently defined) or put the life or health of Australia or its residents at risk.

9. Protecting the safety of individuals does not undermine national security. Rather, ensuring that people under Australia's jurisdiction are safe enhances the safety and security of us all. However, on a broad understanding of this proposed definition, an individual dealing with information that reveals illegal conduct by the government could be in breach of these provisions and liable for severe penalties. The ALA considers this to be an undesirable and dangerous development.

10. Similar concerns arise regarding revelations regarding former Senator Sam Dastyari's alleged inappropriate dealings with Chinese political donors.[5] The revelations – that Dastyari had advised someone connected to the Chinese Communist Party to employ counter-surveillance techniques, and had sought to discourage then Shadow Foreign Minister Tanya Plibersek from meeting with a Chinese pro-democracy activist[6] – may have impacted on Australia's political relations with China. They were also, however, essential in revealing potentially inappropriate influence being exercised between a foreign government and a member of the Australian Parliament.

11. It should not be possible for our government or elected representatives to protect themselves from embarrassment by hiding behind expansive national security provisions. Ultimately, our national security can be enhanced only by ensuring that government is accountable, and that any government misconduct is not hidden from public view.

[4] Paul Farrell and Nick Evershed, 'Border Force admits it failed in its response to Nauru files abuse claims', 2 July 2017, *The Guardian Online*, https://www.theguardian.com/australia-news/2017/jun/02/border-force-admits-it-failed-in-its-response-to-nauru-files-abuse-claims.

[5] Amy Remeikis, 'Sam Dastyari quits as Labor senator over China connections', 12 December 2017, *The Guardian*, https://www.theguardian.com/australia-news/2017/dec/12/sam-dastyari-quits-labor-senator-china-connections.

[6] Quentin McDermott, 'Sam Dastyari "tried to pressure" Tanya Plibersek not to meet with Chinese activist', 11 December 2017, *ABC News*, http://www.abc.net.au/news/2017-12-11/dastyari-tried-to-pressure-plibesek-over-chinese-meeting/9244600.

12. The ALA is not aware of any explanation as to why the government considers it necessary to expand the activities to which the crime of espionage will apply. Such an explanation is essential if we are to be able to assess whether or not the reforms respond appropriately to the need, if a need indeed exists.

13. The ALA believes that any definition of national security should be limited to matters that directly and clearly impact on the life or safety of Australia and the people in Australia. Concepts of espionage and the definitions that underpin it must be limited to the work of intelligence services, and not expanded to allow the traditional operations of government to be obscured. It should never prevent or prohibit exposure of information that reveals wrongdoing, corruption, or other matters of public interest. Revealing such information ultimately strengthens national security, and the legislation should not inhibit it. Government must always be open and accountable, unless there are clear and persuasive arguments for secrecy, and in those cases any secrecy must be limited to those matters for which it is justified and absolutely essential.

Definition of foreign principal and foreign political organisation

14. Many of the provisions in the Bill relate to making information available to or co-operation with a foreign principal, including ss82.3 (sabotage), 91.1, 91.2, 91.3, 91.8 (espionage), 92.2, and 92.3 (foreign interference). A foreign principal is defined as including a foreign government principal and a public international organisation within the meaning of Division 70 of the Criminal Code (which is likely to include the United Nations). A foreign government principal, in turn, is defined as including a 'foreign political organisation', which is defined as 'a foreign political party or a foreign political organisation'. This is not further expanded on in the Explanatory Memorandum, other than to say that it will include political parties in foreign countries. There is no attempt in the Bill or Explanatory Memorandum to define foreign political organisations.

15. The definition of foreign political organisations will accordingly be fundamental in determining whether offences under the proposed reforms have been committed.

16. The ALA is concerned about how this phrase might be interpreted. There are many international organisations, such as companies, news outlets and international non-government organisations, which engage in research, reporting and advocacy

around specific themes.[7] Facebook and Google, for example, made submissions to the ongoing inquiry into public interest journalism.[8] The *Guardian* (a UK-based news outlet) and the *New York Times* (a USA-based news outlet) each have Australian bureaux that regularly report on Australian domestic politics and Australia's place in the world. International human rights organisations, such as Amnesty International and Human Rights Watch, each have an Australian presence and seek to influence Australian government policy, despite operating global funding models independent of governments.[9] The United Nations also regularly comments on Australia's implementation of its obligations under international law.[10] Often these organisations will collect their evidence covertly, where protecting the identity of sources is important or other sensitivities make secrecy preferable.

17. These organisations can be based, or receive funding from, abroad but do not represent the interests of any foreign government or political party.[11] Despite this,

[7] See, for example, Institution for Energy Economics and Financial Analysis, *Submission to the Senate Standing Committees on Economics, Submission #85 to Inquiry into the Governance and Operation of the Northern Australia Infrastructure Facility* (July 2017).

[8] While it was the local branches of these companies that made the submissions, it is difficult to delineate clear state boundaries for them given their global reach.

[9] See, for example, Amnesty International's submission to the UN Human Rights Committee, which seeks to influence Australian politics by making recommendations as to how to improve compliance with international human rights obligations: Amnesty International, *Australia: submission to the United Nations Human Rights Committee* (2017), which can be downloaded from http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fICS%2fAUS%2f28937&Lang=en.

[10] See, for example, reports presented to the UN Human Rights Council in 2017 by the UN Special Rapporteur on the rights of indigenous people, the UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, and the UN Special Rapporteur on the human rights of migrants, which can all be found here: http://www.ohchr.org/EN/Countries/AsiaRegion/Pages/AUIndex.aspx.

[11] The work of the *Guardian*, for example, is guaranteed by the Scott Trust, which was established to secure its financial and editorial independence in perpetuity: https://www.theguardian.com/the-scott-trust/2015/jul/26/the-scott-trust. In the case of Amnesty International, 'The overwhelming majority of our income comes from individuals the world over'. According to its own website, Amnesty International 'neither seek nor accept any funds for human rights research from

however, it is possible for them to be caught up in the offences created by the Bill, due to the broad nature of the definitions. The work of these organisations does not accord with the traditional understanding of sabotage, espionage or foreign political interference. Indeed, much of the work of these organisations contributes to the strength of Australia's democracy, even if they need to use covert methods to gather their information. The ALA believes that it is inappropriate that any definition seeking to prevent sabotage, espionage or foreign interference could be interpreted to include such entities, and that the definitions contained in the Bill should be amended to ensure that this is not possible.

18. For example, the *Guardian Australia*, which is the Australian branch of a global news organisation that was originally based in Manchester, UK, worked with the International Consortium of Investigative Journalists (ICIJ) to report on the Panama Papers and the Paradise Papers in 2016 and 2017. Each of these leaks involved covert journalistic work (another organisation in the ICIJ has refused to reveal its sources) and have led to ongoing investigations by the Australian Taxation Office and prosecutions by the Australian Federal Police.[12] This reporting has thus had a direct positive impact in Australia, one that might have been stifled had the proposed reforms been implemented.

19. The ALA believes that this definition should be more closely aligned with the need to protect Australia's national security, perhaps by limiting the definition of foreign political organisations to foreign governments, foreign political parties and organisations aligned with such governments or parties. Alternatively, drafters could consider adding a clarification that the provisions are not designed to capture the United Nations, media organisations, companies or NGOs that work independently of governments.

governments or political parties': https://www.amnesty.org/en/about-us/how-were-run/finances-and-pay/.

[12] Paul Karp, 'Coalition says Panama Papers sparked action against more than 100 Australian taxpayers', 6 September 2016, *The Guardian*, https://www.theguardian.com/australia-news/2016/sep/06/coalition-says-panama-papers-sparked-action-against-more-than-100-australian-taxpayers.

Expanding espionage offences

20. In addition to introducing broader definitions regarding activities that sabotage, espionage and foreign interference offences would apply to, the Bill also expands the types of activities that would constitute the offence of espionage. When combined with the expanded definitions above, these expanded offences give considerable cause for concern.

21. Currently, Div. 91 of the Criminal Code prohibits communicating or making available information concerning the Commonwealth's security or defence, or that of another country which has been directly or indirectly acquired from the Commonwealth. For the offence to be established, it must be shown that the defendant intended to prejudice the Commonwealth's security or defence and that the act (is likely to) result in the information being communicated or made available to another country or a foreign organisation, or to a person acting on behalf of such a country or organisation.

22. Similar offences exist where the individual does not have lawful authority to communicate, make, obtain or copy the information, and they do so with the intent of advantaging another country. Defences to these offences exist where the information has previously been communicated, made available, or made, obtained or copied with the authority of the Commonwealth.

23. The existing law is limited in the types of activities that will give rise to liability to communicating, making available, making, obtaining or copying a record. The information that is relevant is limited to that concerning the Commonwealth's security or defence (as defined above) or the security or defence of another country where that information was acquired from the Commonwealth.

24. The focus on intention and specific physical acts in the existing provisions is appropriate, given the seriousness of the offence in question.

25. The Bill, however, expands the mental element of the offence to include recklessness. Similarly, the Bill includes much broader physical acts in its definition of 'deal' (proposed s90.1(1)), which includes receiving, collecting or possessing information or an article. When combined with the dramatically expanded definitions of national security, these broader mental and physical elements are an additional cause for concern. It is quite possible that the types of information that

would be captured by these provisions would clearly be in the national interest to reveal, such as the examples provided above in relation to the Panama and Paradise Papers, and the Nauru Files.

Expanding preparatory offences

26. Proposed ss82.9, 91.12 and 92.4 seek to expand the preparatory offences relating to sabotage, espionage and foreign interference offences, including engaging in conduct with the intention of preparing for, or planning, offences against those Divisions.

27. Under s11.1(1) of Criminal Code, attempting to commit a crime can give rise to the same penalties as actually committing it. However, for attempt to be proved, it is necessary that the person's conduct be more than merely preparatory. Courts have been restrictive in how they have interpreted the offence. The types of activities that have led to convictions for attempt have been imminently connected to the underlying crime. For example, preparatory actions that have not been considered sufficient to demonstrate attempt in other countries include making an impression of an ignition key (which was not sufficient to demonstrate attempted car theft[13]) and soaking the walls and floor of a house with petrol (which was not sufficient to demonstrate attempted arson[14]). Cases where attempt has been proven include attempted breaking by putting a lever under a window but not applying force,[15] and attempted obtaining by false pretences by depositing a cheque belonging to another person into a bank account but not withdrawing the money.[16]

28. Compared with such cases, this change would dramatically expand the preliminary activities that would be criminalised, including circumstances in which the accused could reasonably change their mind before the offence was committed. The ALA is not aware of any argument justifying this dramatic expansion, and is concerned that it could result in the prosecution of people who posed no genuine threat. While

[13] Canadian case *R v Lobreau* (1988) 67 CR (3d) 74 (ABCA).

[14] *R v Chellingworth* [1954] QWN 35 (QSC).

[15] *R v Page* [1933] VLR 351 (FC).

[16] *O'Connor v Killian* (1984) 38 SASR 327; 15 A Crim R 353.

governments have sought to justify expanding inchoate offences in relation to terrorism offences on the basis that even early preparatory acts pose an unacceptable risk to the community,[17] no such community risk is posed by the proposed espionage offences. In such matters, it is the sharing of the information that poses the risk, not the preparations to do so. Such prosecutions would have devastating ramifications not only for the individuals concerned, but also for their families, dependants and broader communities, which could feel unfairly targeted.

29. The ALA believes that the existing attempt provision in s11.1(1) of the Criminal Code is adequate, and that proposed ss82.9, 91.12 and 92.4 should be removed from the Bill.

Defences

30. It is a defence to most of the proposed offences contained in the Bill if the person dealt with the information in accordance with a law of the Commonwealth, in accordance with an agreement with the Commonwealth in the person's capacity as a public official, or if the information has been publicised with the authority of the Commonwealth.

31. Given the breadth of the definitions discussed above, the absence of any defence of public interest is concerning, and is likely to stifle essential public interest disclosures if not incorporated.

Evidentiary certificates

32. The ALA is particularly concerned by proposed s93.3, which would allow the federal Attorney-General to sign a certificate stating that particular information or an article that it concerns Australia's national security.

33. It is always within the power of the court to hold a hearing in camera and otherwise manage affairs so that there is no threat of revealing information that should be kept confidential.

[17] Although note that the ALA has equally considered such expansion in the terrorism field to be problematic.

34. These evidentiary certificates would reverse the onus of proof.[18] Thus, if an evidentiary certificate were issued by the Attorney-General to say that a particular matter is related to national security, it would then be up to the defendant to disprove that contention. This places an impossible burden on defendants. Often, in such circumstances, the evidence and associated information will be restricted, for the same national security reasons. Thus, defendants could find themselves facing accusations regarding documents that they will not have access to, and either be required to prove that they in fact do not relate to national security, or have not dealt with them in a prohibited fashion. If they are unable to do so, severe penalties could ensue. While the Explanatory Memorandum states that the use of evidentiary certificates will not have 'a detrimental effect on the defendant's right to a fair trial',[19] the ALA questions how such an effect could be avoided, given the concerns expressed above.

35. Given the severe penalties that stem from an item being found to concern Australia's national security, we believe that it is more appropriate for a court, rather than the Attorney-General, to be empowered to rule on this matter.

Schedule 2: Secrecy

36. This Bill also seeks to add a new Part 5.6 to the Criminal Code relating to secrecy of information. Again, the ALA is concerned about the broad definitions employed in this proposed reform, and the weakness of the proposed defences.

37. Many of the reforms proposed in the new Part 5.6 relate to causing harm to Australia's interests and inherently harmful information. The definitions of these terms are so broad that they could include almost anything.

Definitions

38. The phrase 'cause harm to Australia's interests' is defined as including 'interfer[ing] with or prejudice[ing] the prevention, detection, investigation, prosecution or punishment of' criminal offences or contraventions of civil penalty provisions;

[18] Explanatory Memorandum, [11.64].

[19] Ibid, at [11.66].

'harm[ing] or prejudice[ing] Australia's international relations in any other way'; or 'harm[ing] or prejudice[ing] relations between the Commonwealth and a State or Territory'. Conduct causing harm to Australia's interests, or likely to cause such harm, can give rise to prison sentences of up to 15 years: proposed s122.2.

39. The ALA believes that the breadth of this provision is unmanageable: it appears to make virtually any communication of information created by a Commonwealth worker or contractor an offence. There is significant public interest in having an open government. The ALA prefers a default position where all information about and by government should be public, unless a clear reason for its secrecy exists. There are also numerous circumstances in which the public interest will be enhanced by revealing just the kind of information caught by this definition. The examples given above at [8] and [18] are just two of many.

40. 'Inherently harmful information' is also a key phrase in the proposed Part. Information would fit within this definition if it 'would, or could reasonably be expected to, damage the security or defence of Australia'; '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'; or related 'to the operations, capabilities or technologies of, or methods or sources used by, a domestic or foreign law enforcement agency'. Communicating or dealing with inherently harmful information could give rise to imprisonment for up to 15 years: proposed s122.1.

41. Within inherently harmful information, the 'security or defence of Australia' is also defined in line with the existing definition in the Criminal Code, to include 'the operations, capabilities or technologies of, or methods or sources used by, domestic intelligence agencies or foreign intelligence agencies'. We query why the existing definition is retained in relation to secrecy, but expanded in relation to sabotage, espionage and foreign interference.

Defences

42. There are defences to these offences found in proposed s122.5 of the Bill, including where the information:

    a. is disclosed in accordance with the *Public Interest Disclosure Act 2013* (PIDA);

b. is in the public interest (which is defined to exclude 'dealing with or holding information that will or is likely to harm or prejudice the health or safety of the public or a section of the public': proposed s122.5(7)(d)), and is dealt with or held by a journalist for the purposes of fair and accurate reporting; or

c. has not come from the person's involvement as a Commonwealth employee or similar, it has previously been published without the person's involvement and the person reasonably 'believes that the communication will not cause harm to Australia's interests or the security or defence of Australia'.

43. Defendants bear the burden of demonstrating that the defence exists.

Public Interest Disclosure Act

44. It is positive to see that there is some acknowledgement that whistleblowing under the PIDA could offer a defence to these secrecy provisions. The ALA does not believe, however, that these defences are sufficient to protect disclosure of information that does not give rise to any harm to national security and is in the public's interest to know.

45. The PIDA is complicated legislation that was examined in 2017 as a part of the Parliamentary Joint Committee on Corporations and Financial Services' inquiry into Whistleblower Protections. In that inquiry, it was recommended that the PIDA be amended to clarify disclosure rights, and existing protections expanded to include former public officials as well as existing ones.[20] As such, the defence of disclosure in line with the PIDA in this Bill does not yet meet with what has been recommended as best practice, and is therefore inadequate.

46. In its submission to the inquiry, the Law Council of Australia noted the lack of protection available relating to disclosures regarding wrongdoing by intelligence agencies.[21] This submission quoted Wolfe et al with approval:

[20] Parliamentary Joint Committee on Corporations and Financial Services, *Whistleblower Protections*, (September 2017), recommendations 6.1, 8.5.

[21] Parliamentary Joint Committee on Corporations and Financial Services, *Whistleblower Protections*, (September 2017), [3.7].

> 'In Australia's Public Interest Disclosure Act 2013, there is a large carve-out, under which protections do not apply to wrongdoing disclosed externally (such as to the media) which involves any wrongdoing in or by an intelligence agency; information coming from an intelligence agency; or other intelligence-related material. The implications of this carve-out are likely to become worse as penalties are made heavier for unauthorised disclosure of intelligence-related information by anyone, including non-public servants, as currently proposed. The carve-out also includes certain sensitive law enforcement information. This is problematic as these sectors, like any others, are not immune from corruption and other wrongdoing.'[22]

47. The ALA agrees with these sentiments, and notes that this Bill would exacerbate this problem by carving out even greater information for protection from scrutiny. We therefore believe that any disclosure that does not put Australia's security or defence (as currently defined) at risk should not be prohibited.

Public interest reporting

48. In relation to the defence for journalists, the ALA is concerned that this defence is excessively circumscribed. It also does not provide sufficient protection for journalists' sources, which is essential if this defence is to be meaningful.

49. The Explanatory Memorandum defines 'journalist' broadly, to include people who self-publish news or news analysis. 'Fair and accurate reporting', in turn, is explained with reference to the defence that is found in s18D of the *Racial Discrimination Act 1975* (Cth).

50. The ALA is concerned that requiring an assessment that dealing with or holding the information was not likely to harm or prejudice the health or safety of the public or a section of the public (in proposed s122.5(7)(d)) poses an excessive burden on the defendant. As with all defences, the defendant will have to provide evidence to support the defence. In this case, the defendant will be required to provide evidence of a negative, something that is notoriously difficult to do. Even if such harm did not eventuate, having to prove that such an eventuality was not likely if the prosecution alleged that it was, would be tricky.

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[22] Simon Wolfe, Mark Worth, Suelette Dreyfus, AJ Brown, *Breaking the Silence: Strengths & Weaknesses in G20 Whistleblower Protection Laws*, p27.

51. We also believe that there is a need for greater protection for journalists' sources. This could be achieved by including a further paragraph in the proposed section that stated that, where the defence in this subsection is made out, a journalist will not be required to provide any further information to investigators in relation to the offence.

52. The ALA supports a public interest reporting defence, but believes that as it is currently drafted, this exception is too narrow. It must be much broader to ensure that journalists and their sources considering revealing corrupt or illegal conduct of intelligence agencies are clearer regarding what is permitted.

Information that has previously been communicated

53. This defence requires the defendant to show that, 'at the time of the communication, the person believes that the communication will not cause harm to Australia's interests or the security or defence of Australia [and] the person has reasonable grounds for that belief'.

54. This is an extraordinarily high bar for a defendant to reach in seeking to defend their actions. Usually, it would be expected that the prosecution would be required to show that the communication would cause harm, or there was reason to believe that harm would be caused. In this Bill, however, the onus is shifted to the defendant to show that (a) they had considered whether harm would come to Australia's interests; (b) they had come to the view that no harm would arise; and (c) this view was reasonable.

55. This reversal of the onus of proof effectively shifts too much of the prosecutor's role of proving a crime beyond a reasonable doubt on to the defendant. The ALA believes that, rather than requiring defendants to show that they had considered the impact of a communication on Australia's interests, security or defence, it must be up to the prosecution to show that the defendant had intended to cause harm.

Freedom of political communication

56. The ALA is particularly concerned about the ramifications that this Bill would have for freedom of speech in Australia. While we do not have a freestanding right to

freedom of speech in this country,[23] we do enjoy an implied constitutional protection of freedom of political communication. This constitutional protection imposes a limit on legislators, preventing them from passing laws that burden communication about matters relevant to politics. Where a law is found to impose on the freedom of political communication, courts will consider whether the imposition is compatible with 'the maintenance of the constitutionally prescribed system of government', and 'reasonably appropriate and adapted to advance [the purpose of the law] in a manner compatible with the maintenance of the constitutionally prescribed system of government'.[24]

57. It is entirely possible that the court would find that the provisions contained in this Bill that relate to inhibiting communication or dealing with information conflict with the freedom of political communication. However, for such a finding to be made, a challenge would be required. Establishing standing in constitutional cases can be complicated[25] and, as far as the ALA is aware, is yet to be explored by the High Court with respect to counter-terrorism and other security-related matters. To this end, the Australian Law Reform Commission has noted the risk posed to freedom of expression by counter-terrorism legislation, and has recommended a review of such laws be conducted.[26] As such, it is entirely possible that, if enacted, the reforms contained in this Bill may conflict with constitutional requirements, but continue to have a chilling effect on communications in the absence of any challenge.

[23] Note that Australia is obliged to protect freedom of speech in accordance with its international obligations: *International Covenant on Civil and Political Rights* (1966), article 19. This right can be curtailed only in limited circumstances. In relation to national security, any curtailment must be necessary to protect national security, and proportionate to the threat faced.

[24] *Brown v Tasmania* [2017] HCA 43, per Gagler J, [156].

[25] Simon Evans, "Standing To Raise Constitutional Issues", (2010) 22(3) *Bond Law Review* 38.

[26] Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws (ALRC Report 129)*, 2016, [4.7], and chapter 4 generally.

Recommendations

The ALA makes the following recommendations:

- The definition of national security should be limited to the current definition found in the Criminal Code;
- The definition of 'foreign principal' and 'foreign political organisation' should be clarified to ensure that they do not apply to companies, media organisations, or non-governmental organisations that report on or seek to influence government policy if they are not connected to any foreign government or political party;
- Preparatory offences should be limited to those currently provided for in Div. 11 of the Criminal Code;
- Evidentiary certificates should not be available to allow prosecutors to avoid having to prove all elements of a crime. Where national security requires that evidence should not be presented in court, the court's discretion in how proceedings are run should be relied on;
- Concepts of espionage and the definitions that underpin it must be limited to the work of intelligence services, and not expanded to allow the traditional operations of government to be obscured. It should never prevent dealing with information that reveals wrongdoing, corruption, or other matters of public interest;
- The definition of 'national security' should be limited to matters that directly and clearly impact on the life or safety of Australia and the people in Australia;
- The definition of 'foreign principal' should be amended to align more closely with the need to protect Australia's national security, perhaps by limiting the definition of foreign political organisations to foreign governments, foreign political parties and organisations aligned with such governments or parties.
- If the definitions of 'national security' and 'foreign principal' are not amended as recommended, a public interest defence should be included in Schedule 1;
- The principle of open government should underpin all secrecy reforms;
- Definitions of 'causing harm to Australia's interests' and 'inherently harmful information' should be limited to ensure that they do not criminalise the releasing of information regarding illegal or corrupt conduct on the part of the Commonwealth, its security agencies or its workers;
- Defences under Schedule 2 should be expanded to ensure that whistleblowers are able to disclose wrongdoing without risking severe criminal sanctions;
- Given the challenges in mounting constitutional challenges in defence of the freedom of political communication, the Bill should be reformed to ensure that all communication of a political nature, including that which might be embarrassing for the government or MPs, is not prohibited by its proposed provisions.