



Law Council  
OF AUSTRALIA

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

Parliamentary Joint Committee on Intelligence and Security

22 January 2018

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## About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2018 Executive as at 1 January 2018 are:

- Mr Morry Bailes, President
- Mr Arthur Moses SC, President-Elect
- Mr Konrad de Kerloy, Treasurer
- Mr Tass Liveris, Executive Member
- Ms Pauline Wright, Executive Member
- Mr Geoff Bowyer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

## Acknowledgement

The Law Council is grateful for the assistance of its National Criminal Law Committee, Military Justice Committee of the Federal Litigation and Dispute Resolution Section, National Human Rights Committee and National Integrity Working Group in the preparation of this submission.

## Executive Summary

1. The Law Council is pleased to provide this submission to the Parliamentary Joint Committee on Intelligence and Security's (**the Committee**) inquiry into the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017 (**the Bill**).
2. The Bill seeks to amend and introduce a broad range of offences in the *Criminal Code Act 1995* (Cth) (**Criminal Code**) targeting the activities of foreign actors, and those acting on their behalf, who seek to work against Australia's interests through a variety of means, including by obtaining classified information or seeking to influence the outcome of Australia's democratic process. The concerns of the Bill include harm to Australia's national security, military capabilities, alliance relationships, and Australia's economic and political stability.<sup>1</sup>
3. The Bill, if enacted, would make significant changes to a range of Commonwealth criminal offences, including (but not limited to) creating new offences for treason, espionage, foreign interference, sabotage, interference with political rights and duties, damaging Commonwealth property, false or misleading conduct in relation to a security clearance and secrecy contraventions.
4. The Bill follows a classified review of Australia's espionage, sabotage, treason, foreign interference and secrecy offences.<sup>2</sup> The Law Council is concerned that the Bill with such significant implications for a number of Commonwealth offences has been introduced prior to legal professional bodies, law reform agencies or civil liberties organisations having an opportunity to participate in this review.
5. The Law Council has not had sufficient time to comprehensively respond to the Bill given the Committee's inquiry has occurred over the December-January period and when there have been several other national security inquiries. However, this submission expresses the Law Council's views on the Bill to date.
6. The Law Council recognises that the law in many of these areas requires review and updating. The Law Council also supports in-principle the need to ensure that Australia's laws are sufficiently robust to guard against the undermining of Australia's sovereignty and system of government by foreign adversaries. It also supports the move to progressively transfer Commonwealth offences from the *Crimes Act 1914* (Cth) (**Crimes Act**) to the Criminal Code as is proposed in a number of respects by the current Bill. In addition, the Law Council supports some of the proposed measures in the Bill such as the proposed treachery and interference with political rights and duties offences subject to certain limitations regarding the use of force or violence.
7. However, the basic difficulty with the Bill is that many of the offence provisions are broadly drafted to capture a range of benign conduct that may not necessarily amount to harm or prejudice to Australia's interests. Of particular concern to the Law Council is the broad definitions of key terms in the proposed measures. In this respect, the Law Council considers it essential that the measures be certain and

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<sup>1</sup> Explanatory Memorandum, National Security Amendment (Espionage and Foreign Interference) Bill 2017, p. 2.

<sup>2</sup> Malcolm Turnbull, 'Protecting Australia from Foreign Interference' (5 December 2017) <<https://www.pm.gov.au/media/protecting-australia-foreign-interference>>.

well-defined, particularly given the severe criminal sanctions that attach to the proposed offences.

8. The Law Council's *Policy Statement on Rule of Law Principles* assert that 'offence provisions should not be so broadly drafted that they inadvertently capture a wide range of benign conduct'.<sup>3</sup>
9. The potentially broad application of these measures is inconsistent with this principle, and the scope of the Bill should be narrowed considerably both to provide greater certainty, and ensure it is directed primarily towards conduct that would cause harm or be prejudicial to Australia's national security.
10. A narrowing of the provisions and clarity regarding their operation would also assist in ameliorating concerns that some of the provisions are not a necessary or proportionate limitation on freedom of expression or a proportionate infringement on the implied freedom of political communication under the Australian Constitution.
11. The Law Council's primary recommendation is that the Bill not be passed in its current form.
12. In the alternative, should the Bill proceed, the Law Council makes the following recommendations as contained in this submission.

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<sup>3</sup> Law Council of Australia, *Policy Statement on Rule of Law Principles* (2011), available online at <https://www.lawcouncil.asn.au/docs/f13561ed-cb39-e711-93fb-005056be13b5/1103-Policy-Statement-Rule-of-Law-Principles.pdf>, Principle 1, p. 2.

## Recommendations

- The Committee should await an assessment of the Bill for its impact on freedom of speech by the Parliamentary Joint Committee on Human Rights (**PJCHR**) before completing its inquiry and if necessary, extend the opportunity to make submissions in response to the information obtained. Any issues identified by the PJCHR should be addressed prior to enactment.
- The definition of 'national security' extending to the country's political or economic relations with another country or countries should be reconsidered.
- The definition of 'national security' in proposed subsection 90.4(2) should define the terms 'espionage', 'sabotage', 'terrorism', 'political violence' and 'foreign interference'. The terms 'political violence' and 'foreign interference' should be defined in a manner consistent with section 4 of the *Australian Secret Intelligence Organisation Act 1979 (Cth)* (**ASIO Act**).
- A requirement should be inserted into proposed section 93.3 to indicate that a prosecution must not be initiated unless it has been certified by the Attorney-General that it is appropriate that the information concerned Australia's national security at the time of the conduct that is alleged to constitute the offence.
- Proposed section 93.3 should be amended to require the Attorney-General to only certify information or an article as concerning Australia's national security subject to the statutory criteria for 'national security'.
- It is not clear whether the Attorney-General will be able to certify that the information or article concerns Australia's national security for the purposes of the sabotage offences. This should be clarified.
- In relation to the definition of 'public infrastructure', the Law Council considers that there would be benefit in a reference to the *Australian Government Information Security Manual 2016-2017* (for example in the Explanatory Memorandum) and a need to be consistent with the requirements of that key policy document.
- The Explanatory Memorandum to the Bill should provide the demonstrated need to define 'security classified information' by prescription in regulations.
- The type of information which may be prescribed as 'security classified information' should be clearly defined and circumscribed in the Bill, for example, through appropriate criteria to assist in ensuring that the matter would, or would be reasonably likely to, cause harm to or prejudice Australia's national security.
- A requirement similar to that which exists in section 50A of the *Australian Border Force Act 2017 (Cth)* (**the ABF Act**) should be inserted into the Bill to indicate that a prosecution must not be initiated unless it has been certified that it is appropriate that the information had a security classification at the time of the conduct that is alleged to constitute the offence.
- The proposed definition of 'foreign intelligence agency' should be amended to mean (for example) an entity that is directed or controlled by a foreign government or governments that has responsibility for gathering security or



defence intelligence about the capabilities, intentions or activities of people or organisations outside its own territory. If it is thought necessary to extend this definition to non-State actors, a reference could be made to a foreign political organisation. However, there must also be a link to Australia's national security in the offence provisions. More broadly, the definition of 'foreign intelligence' and 'foreign intelligence agency' should be reviewed to ensure consistency across Commonwealth legislation.

- The proposed defences for public officials should not be available for sabotage, espionage, and foreign interference offences under: proposed subparagraphs 82.3(1)(c)(i),<sup>4</sup> 82.4(1)(c)(i),<sup>5</sup> 82.5(1)(c)(i),<sup>6</sup> 82.6(1)(c)(i),<sup>7</sup> 82.7(1)(d)(i) and (ii),<sup>8</sup> 82.8(1)(d)(i) and (ii),<sup>9</sup> 91.1(1)(c)(i),<sup>10</sup> 91.1(2)(c)(i),<sup>11</sup> 91.8(1)(b)(i),<sup>12</sup> 91.8(2)(b)(i), 92.2(1)(c)(iv) and (d)(ii) and (d)(iii),<sup>13</sup> 92.3(1)(c)(iv) and (d)(ii) and (d)(iii);<sup>14</sup> and proposed subsections 91.2(1) and (2).<sup>15</sup>
- The Committee should inquire into the necessity to permit a public official defence for other sabotage, espionage and foreign interference offences where that conduct is engaged in on behalf of a foreign principal to advantage the national security of a foreign country. In the absence of such evidence, the proposed public officials defence should not proceed.
- The proposed new treason offences should be limited to conduct that will materially assist the enemy to engage in armed conflict against the Commonwealth or the Australian Defence Force (ADF). Similarly, proposed section 80.1AB should provide that the Governor-General may, by Proclamation, declare a party (i.e. a person, body or group of any kind) to be an enemy engaged in armed conflict against the Commonwealth or the ADF.
- The Bill should prescribe certain criteria for when the Governor-General may make a Proclamation under proposed section 80.1AB.
- There should be a requirement of periodic review of such a Proclamation and an ability of revocation when the Governor-General is no longer satisfied that the criteria for making the Proclamation continues to be met.
- There should be a prohibition on the retrospective proclamation of a 'party to be an enemy engaged in armed conflict' under proposed section 80.1AB.
- The treachery offence in proposed 80.1AC should require the fault element of intention where the person engages in conduct involving the use of force or violence.

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<sup>4</sup> Offence of sabotage involving foreign principal with intention as to national security.

<sup>5</sup> Offence of sabotage involving foreign principal reckless as to national security.

<sup>6</sup> Offence of sabotage with intention as to national security.

<sup>7</sup> Offence of sabotage reckless as to national security.

<sup>8</sup> Offence of introducing vulnerability with intention as to national security.

<sup>9</sup> Offence of introducing vulnerability reckless as to national security.

<sup>10</sup> Espionage—dealing with information etc. concerning national security which is or will be made available to foreign principal.

<sup>11</sup> Ibid.

<sup>12</sup> Espionage on behalf of foreign principal.

<sup>13</sup> Offence of intentional foreign interference.

<sup>14</sup> Offence of reckless foreign interference.

<sup>15</sup> Espionage—dealing with information etc. which is or will be made available to foreign principal.

- In light of the Review of Commonwealth Criminal Law: Fifth Interim Report (**the Gibbs Committee Report**), the Law Council encourages the Committee to consider whether the broadening of the sabotage offences in the proposed manner is indeed necessary and justified.
- The extension of the sabotage offence provisions should be reconsidered. If this is not accepted by the Committee, the Law Council recommends that proposed subparagraphs 82.7(1)(d)(ii) and 82.8(d)(ii) of the Bill be amended to reflect the fact that the harm or prejudice to Australia's economic interests should be more than minor or trivial prejudice.
- Proposed section 82.9 'Preparing for or planning sabotage offence' be removed from the Bill. Incitement, conspiracy and attempt provisions in Part 2.4 of the Criminal Code are sufficient to deal with preparatory conduct which has indicated a real intention to carry out the act. If this position is not accepted by the Committee, the Law Council recommends that there be a public review conducted by the Attorney-General's Department which clearly identifies the appropriate criteria which should be used for determining the kinds of criminal conduct that warrant preparatory offences. The review should allow for a public submissions process and the outcomes be used to inform the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers (the Guide)*.
- In the absence of sufficient justification to the contrary, a good faith defence should be available for the proposed sabotage offences.
- The proposed advocating mutiny offence should not proceed. Instead, an updated inciting mutiny offence should be created in the Criminal Code which replaces section 25 of the Crimes Act and is directed at serving ADF members or a defence force of another country that is acting in cooperation with the ADF. Incitement, conspiracy and attempt provisions in Part 2.4 of the Criminal Code are sufficient to deal with the offence of mutiny. If this is not to be accepted, the fault element of intention should apply as to whether the person's words or conduct will cause another person to engage in mutiny. In addition, a good faith defence should be provided to ensure that individuals or groups who in good faith with oppose the actions of the ADF or a defence force of another country that is acting in cooperation with the ADF and/or calls for a laying down of arms is not subject to the offence.
- Consideration should be given to lowering the proposed penalty of 15 years imprisonment under proposed section 83.2 (assisting prisoners of war to escape) in light of the Third Geneva Convention which stipulates that a prisoner of war should not be punished for a successful escape,<sup>16</sup> and that a prisoner of war captured in the process of escaping, if punished, should only be liable to a disciplinary punishment.<sup>17</sup>
- The proposed offence relating to military-style training involving a foreign government principal should be amended to reflect that it is only an offence for a person to undergo such training where the person is specifically undergoing training for the execution of a predetermined hostile act and those training activities are an integral part of that hostile act.

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<sup>16</sup> *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950), Article 91.

<sup>17</sup> *Ibid* Article 93.

- An Australian domestic court is unable to make a finding against a foreign State under the principle of sovereignty at international law. Nonetheless, the Law Council encourages the Committee to inquire into the possible impact at international law as to whether a finding by an Australian court for the purposes of the proposed offence relating to military-style training involving a foreign government principal may amount to *opinio juris* at international law.
- In regards to the interference with political rights and duties offence, the Explanatory Memorandum to the Bill should be amended to make clear that the availability of the offence does not affect the power of Parliament to deal with such conduct as contempt of Parliament, provided that a person may not be punished twice for the one act or omission.
- Clear justification should be given for the maximum term of imprisonment and the increase by seven years for the interference with political rights and duties offence.
- The 'making of threats' in the proposed interference with political rights and duties offence should be limited to threats made in relation to the use of force or violence rather than 'threats of any kind'.
- The proposed new espionage offences in the Bill should not proceed. If this is not to be accepted, the Law Council makes the following recommendations:
  - The proposed new espionage offences should regulate the dealing with 'Commonwealth information' which may be defined as information to which a person has, or had, access by reason of his or her being, or having been, a Commonwealth officer or received from a Commonwealth officer.<sup>18</sup>
  - The proposed new espionage offences should require (as a minimum for 'outsiders') that the dealing with information did, or was reasonably likely to, or intended to prejudice Australia's national security or advantage the national security of a foreign country.
  - In the absence of an express harm requirement, the offences should cascade in penalty and require that a person knew, or as a lesser offence, was reckless as to whether, the protected information falls within a particular category (i.e. security classification or concerns Australia's national security), and should not provide that strict liability applies to that circumstance.<sup>19</sup>
  - Defences should be introduced to capture *bona fide* business dealings and persons acting in good faith. A defence should also be introduced for prior publication where the offences do not apply to a person dealing with the information if:
    - (a) the information has already been (a) communicated, or made available, to the public (the *prior publication*); and

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<sup>18</sup> See e.g. Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009) 255, Recommendation 6-3, p. 10.

<sup>19</sup> National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017, proposed sections 91.1, 91.3, 91.6, 91.11 and 91.12.

- (b) the person was not involved in the prior publication (whether directly or indirectly); and
  - (c) at the time of the disclosure, the person believes that the disclosure:
    - (i) will not endanger the health or safety of any person; and
    - (ii) will not prejudice Australia's national security or advantage the national security of a foreign country; and
  - (d) the person has reasonable grounds for that belief.
- Consideration should be given as to whether the proposed maximum penalties for the espionage offences which range between 15 years to life imprisonment are too high. The necessity of more than doubling the previous maximum term of seven years must be demonstrated to be necessary and proportionate.
- A defence for persons acting in the public interest should be provided for the proposed foreign interference offences in Division 92, Subdivision B.
- The preparing for a foreign interference offence in section 92.4 should not proceed. Instead, the ancillary provisions of the Criminal Code for incitement, conspiracy and attempt should be relied upon.
- The proposed offences in sections 92.7 and 92.8 (relating to support for a foreign intelligence agency) should cascade in penalty and require that the person knew, or as a lesser offence, was reckless as to whether the support or resources would help the organisation to directly or indirectly engage in, preparing, planning, assisting in or fostering an act prejudicial to Australia's security.
- The proposed offences in sections 92.9 and 92.10 (relating to funding or being funded by a foreign intelligence agency) should require that the person is reckless as to whether the funds will be used to facilitate or engage in activities prejudicial to Australia's national security or, in the case of obtaining funds, involve undue influence.
- The Explanatory Memorandum to the Bill should clarify the intersection between the proposed foreign interference offences in the Bill and those in the Foreign Influence Transparency Scheme Bill 2017.
- The proposed offence of theft of trade secrets involving a foreign government principal should not proceed.
- The proposed general secrecy offences in the Bill should be amended in a manner which is consistent with the Australian Law Reform Commission's (ALRC) Report No 122, *Secrecy Laws and Open Government in Australia* (the **Secrecy Report**) and the Independent National Security Legislation Monitor's (the **INSLM**) report *Section 35P of the ASIO Act* (2016) (the **ASIO Act Report**). If this is not to be accepted, the Law Council makes the below recommendations.
  - in the absence of an express harm requirement, the offences should cascade in penalty and require that a person knew, or as a lesser offence, was reckless as to whether, the protected information falls

within a particular category (i.e. security classification or concerns Australia's national security), and should not provide that strict liability applies to that circumstance.

- The secrecy of information offence provisions should be redrafted to treat insiders and outsiders separately to improve the proportionality of the measures.
- The secrecy of information offence provisions should be redrafted to distinguish between intentional and reckless conduct regarding the communication or dealing with inherently harmful information or causing harm to Australia's interests.
- The phrase 'interfering with' should be removed from proposed paragraphs 121.1(a) and (b) of the Bill.
- The phrase 'contravention of a provision, that is subject to a civil penalty, of' should be removed from proposed subparagraph 121.1(1)(a)(ii). As a minimum the provision should be limited to contraventions of serious Commonwealth civil penalty provisions which attract an equivalent civil penalty of 3 years imprisonment.
- The *Proceeds of Crime Act 2002* (Cth) (**POCA**) should be removed from proposed subparagraph 121.1(1)(b)(ii).
- For the purposes of proposed paragraphs 121.1(d) and (e), the Explanatory Memorandum should clarify what may amount to 'intangible damage' and be amended to note a reduction in the '*quantity* or quality of information provided by a foreign government or international organisation' (emphasis added).
- The proposed 'inherently harmful information' criminal offences should not proceed in the absence of sound justification for the proposed categories, noting the previous consideration of the ALRC in its Secrecy Report.
- Provisions relating to foreign intelligence agencies and foreign law enforcement agencies in the definition of 'inherently harmful information' should be redrafted to make it clear that the information would, or would be reasonably likely to, harm one of the four essential public interests identified by the ALRC in its Secrecy Report.
- If conduct relating to 'communication' continues to be regulated, proposed paragraph 121.1(b) of the definition of 'inherently harmful information' should be amended to read 'information the communication of which would, or would be reasonably likely to, damage the security or defence of Australia'.
- The type of information which may be 'proper place of custody' should be more clearly defined and circumscribed in the Bill, for example, through appropriate criteria to assist in ensuring that the matter would, or would be reasonably likely to, cause harm to or prejudice Australia's national security.
- The Committee consider whether the definition of 'Commonwealth officer' for the purposes of proposed subsection 121.1(1) should include the Governor-General.
- Schedule 2 of Part 1 of the Bill (Secrecy of information) should be amended to:

- include a public interest disclosure defence to the secrecy provisions where the disclosure would, on balance, be in the public interest.
- non-exhaustively identify some factors that may be considered for the purposes of determining whether the dealing with or holding of information may be in the public interest for the purpose of the proposed journalist defence. Such factors may include for example:
  - promoting open discussion of public affairs, enhancing government accountability or contributing to positive and informed debate on issues of public importance;
  - informing the public about the policies and practices of agencies in dealing with members of the public;
  - ensuring effective oversight of the expenditure of public funds;
  - the information is personal information of the person to whom it is to be disclosed; and
  - revealing or substantiating that an agency (or a member of an agency) has engaged in misconduct or negligent, improper or unlawful conduct.
- capture in proposed subsection 122.5(4) the dealing with information in order to make the communication in accordance with the *Public Interest Disclosure Act 2013* (Cth) (**PID Act**). The Committee should consider whether disclosures that may be made under private sector whistleblower laws under for example the Corporations Act 2001 (Cth) should also be captured by the defence provisions.
- include an exception for where the conduct (i.e. communication/dealing with/holding/removing) is engaged in for the purpose of obtaining legal advice in relation to the matter the subject of the offence.
- include an exception that offence provisions do not apply if the disclosure was for the purposes of any legal proceedings arising out of or otherwise related to the Division or of any report of any such proceedings.
- extend to where the person has dealt with or held the information (i.e. not just be limited to where they have communicated it) for the proposed defence relating to information that has previously been communicated, or made available, to the public. Similarly, the proposed defences relating to communication to an oversight body, information to a court or tribunal should extend to where the person has dealt with or held the information.
- insert an 'or' after paragraph 122.5(7)(c) and an 'and' after subparagraph 122.5(9)(d)(ii).
- The defence to the proposed secrecy offences that permits disclosure with consent in section 47 of the Bill should be reconsidered.
- A privacy impact assessment (PIA) should be conducted of the proposed secrecy provisions.

- The proposed secrecy provisions should expressly indicate: whether they override the *Freedom of Information Act 1982* (Cth); and how they will interact with obligations under the *Privacy Act 1988* (Cth).
- The proposed aggravated offence for false and misleading conduct in proposed subsection 137.1A(1) should not proceed. Instead, it should be replaced with an offence of failing to disclose defined activities linked to a foreign country/principal in relation to an application for, or the maintenance of, an Australian Government security clearance. Alternatively, the aggravated offence for false and misleading information should be limited to activities linked to a foreign country/principal in relation to an application for, or the maintenance of, an Australian Government security clearance.
- Proposed subparagraph 5D(1)(e)(viii) (aggravated offence for giving false or misleading information) of the *Telecommunications (Interception and Access) Act 1979* (**TIA Act**) should be removed from the Bill so that this offence is not defined as a 'serious offence' for the purposes of the TIA Act. If this is not accepted by the Committee, the Law Council's recommendations regarding the improvement of this offence provision in accordance with the intent of the Bill becomes more acute.
- The presumption against the grant of bail under section 15AA Crimes Act should not be extended to treason, treachery, espionage and foreign interference cases as is proposed by the Bill.
- The INSLM should review the bail and non-parole periods in sections 15AA and 19AG of the Crimes Act, including their impact on children.
- There should be no provision for a grant of bail to be stayed if the prosecution notifies an intention to appeal.
- The mandatory minimum non-parole period for terrorism offences, Division 80 (treachery, treason, urging violence and advocating terrorism or genocide) or 91 (offences relating to espionage and similar activities) under section 19AG should be repealed and not proceed.

## Preliminary comments

13. The Law Council recognises the challenges posed by Australia's security environment. To this end, it acknowledges and accepts that the current threat level 'contemplates it more likely that Australia will face small-scale, low capability terrorist attacks' and that 'we can never rule out the possibility of large-scale coordinated terrorist attacks'.<sup>20</sup> The Law Council also accepts the evidence of the Director-General of Security, Mr Duncan Lewis AO, DSC, CSC that:

*... espionage and foreign interference is an insidious threat. Foreign powers are clandestinely seeking to shape the opinions of members of the Australian public, of our media organisations and our government officials in order to advance their country's own political objectives.*

*ASIO continues to identify and to investigate harmful espionage and foreign interference directed against Australia.*<sup>21</sup>

14. The Law Council has examined the necessity and proportionality of the Bill bearing these matters in mind. Legislation to protect against such threats requires ongoing vigilance and a recognition of the importance of ensuring that there are only necessary and proportionate limitations on traditional rights and freedoms which are a prized element of Australian democracy.

15. The Law Council is of the view that Australia's national security measures must:

- comply with rule of law principles<sup>22</sup> and Australia's international human rights obligations;
- be shown to be necessary to counter the threat posed to the Australian community by foreign actors, and constitute a proportionate response to that threat;
- contain mechanisms for independent, regular and comprehensive review of both the content and the operation of Australia's national security measures;
- contain clearly defined key terms to ensure clarity and certainty, to provide limits on the scope of criminal liability and to avoid arbitrary or inconsistent application; and
- include safeguards to protect against overuse or misuse of executive power.

16. In this light, the Law Council notes, as overarching comments, the following:

- while the proposed offences are generally set out in accordance with the Criminal Code model, there is a need in several aspects of the Bill to tighten the criteria to limit the impact to the Bill's intent; and
- in the absence of such a tightening of the offence provisions, there is potential with certain aspects of the Bill such as the espionage and secrecy offences for undue encroachment on the implied right to freedom of political

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<sup>20</sup> Duncan Lewis, *Senate Legal and Constitutional Affairs Legislation Committee* (24 Oct 2017), available online at <parlinfo.aph.gov.au/parlInfo/download/committees/estimate/420421b5-6149-431f-96e2-06a8423423cf/toc\_pdf/Legal and Constitutional Affairs Legislation Committee\_2017\_10\_24\_5667\_Official.pdf;fileType=application%2Fpdf#search="estimate"> p. 128.

<sup>21</sup> *Ibid* p. 129.

<sup>22</sup> Law Council of Australia, *Policy Statement on Rule of Law Principles* (2011), available online at <https://www.lawcouncil.asn.au/docs/f13561ed-cb39-e711-93fb-005056be13b5/1103-Policy-Statement-Rule-of-Law-Principles.pdf>.



communication in the Australian Constitution and freedom of speech under the *International Covenant on Civil and Political Rights (ICCPR)*.<sup>23</sup>

17. The Law Council therefore urges this Committee to await the PJCHR's assessment of the Bill for its impact on freedom of speech before completing its inquiry and if necessary, extend the opportunity to make submissions in response to the information obtained. Any issues identified by the PJCHR should be addressed prior to enactment.

**Recommendation:**

- **The Committee should await an assessment of the Bill for its impact on freedom of speech by the PJCHR before completing its inquiry and if necessary, extend the opportunity to make submissions in response to the information obtained. Any issues identified by the PJCHR should be addressed prior to enactment.**

## Definitions

### National security

18. The term 'national security' is used in the following proposed offences:
- section 82.3 – sabotage involving foreign principal with intention as to national security;
  - section 82.4 – sabotage involving foreign principal reckless as to national security;
  - section 82.5 – sabotage with intention as to national security;
  - section 82.6 – sabotage reckless as to national security;
  - section 82.7 – introducing vulnerability with intention as to national security;
  - section 82.8 – introducing vulnerability reckless as to national security;
  - subsections 91.1(1) and (2) – espionage—dealing with information etc. concerning national security which is or will be made available to foreign principal;
  - subsections 91.2(1) and (2) – espionage—dealing with information etc. which is or will be made available to foreign principal;
  - subsection 91.3(1) – espionage—security classified information etc.;
  - subsections 91.8(1) and (2) – espionage on behalf of foreign principal;
  - section 92.2 – intentional foreign interference; and
  - section 92.3 – reckless foreign interference.
19. Proposed section 82.1 defines 'national security' as having the meaning given by proposed section 90.4, namely, that national security of Australia or a foreign country means any of the following:
- the defence of the country;

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<sup>23</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1979).

- the protection of the country or any part of it, or the people of the country or any part of it, from activities covered by proposed subsection 90.4(2);
  - 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 the protection of the integrity of the country's territory and borders from serious threats and the activities covered by proposed subsection 90.4(2); and
  - the country's political, military or economic relations with another country or other countries.
20. The breadth of the expression 'national security' extending to the country's political or economic relations with another country or countries may have a stifling effect on freedom of expression. The proposed offences of sabotage, espionage and foreign interference, coupled with this broad definition may have a chilling effect on the discussion of political and economic ideas.
21. For example, an Australian company that provides information to a foreign country or principal regarding Australia's car industry and possible investments may potentially be caught by the definition and some of the proposed offences. Similarly, an Australian company that provides information to a foreign country tendering for an Australian contract could potentially be caught by the definition. Individuals exercising their implied right to freedom of political communication under the Australian Constitution may also be captured where they engage in discussion of political matters. The Law Council therefore considers that the extension of the term 'national security' to the country's political or economic relations with another country or other countries needs to be reconsidered. If this is not accepted by the Committee, the need to ensure that the offence provisions are tightly confined to the intent of the Bill, that is harm or prejudice to Australia's national security, becomes more acute.
22. There is an element of circularity in the definition which is likely to make the operation of the espionage and sabotage offence provisions unclear and potentially unworkable.
23. That is, some of the proposed sabotage offences require that a person engage in conduct with intention or recklessness as to national security or to create vulnerability with intention or recklessness as to national security. Further, the proposed espionage and foreign interference offences may require intention or recklessness as to national security. However, in determining what amounts to 'national security' the definition provides that it may include 'the protection of the country or any part of it, or the people of the country or any part of it, from activities covered by subsection (2)'.<sup>24</sup> These activities may include espionage, sabotage or foreign interference without these terms being defined. Other activities such as 'political violence' are similarly not defined. They would thus take on their ordinary meaning which may involve some degree of uncertainty for both the prosecution and the defence.
24. Given the possible breadth of the expressions, the Law Council considers that statutory definition would be beneficial. It notes for example that the terms 'politically motivated violence' and 'acts of foreign interference' are defined in section

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<sup>24</sup> National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017, proposed section 90.4(1)(b).

4 of the ASIO Act.<sup>25</sup> These definitions could be appropriately adapted and employed in the current Bill to aid in legislative clarity. The definition of 'acts of foreign interference' in section 4 of the ASIO Act is sufficiently broad to cover for example economic as well as defence interests and other national interests while also appropriately limiting the reach of 'foreign interference'. Similarly, 'political violence' should be limited in a manner consistent with the definition of 'politically motivated violence' in the ASIO Act.

25. In addition, proposed subsection 93.3(1) would allow the Attorney-General to sign a certificate certifying that the information or article concerns Australia's national security or a particular aspect of Australia's national security.
26. The certificate would be *prima facie* evidence of the matters certified in it for proposed offences relating to Division 91 (espionage) and Division 2 (foreign interference). This would give discretion to the Attorney-General as to when to certify information or an article and would in effect allow information or a thing to be certified after the time of the conduct that is alleged to constitute the offence. That is, an element of retrospectivity would potentially occur in relation to the espionage and foreign interference offence provisions. The Law Council considers that a prosecution should not be initiated unless it has been certified that it is appropriate that the information concerned Australia's national security (or part thereof) at the time of the conduct that is alleged to constitute the offence. This would limit potential for retrospective application.
27. Proposed subsection 93.3(1) is also of concern since it is unclear whether there is scope for the Attorney-General to expand the meaning of 'national security' beyond the confines of the proposed statutory definition. The proposed authority should at least be confined to the statutory criteria for 'national security'.
28. In addition, it is not clear whether the Attorney-General will be able to certify that the information or article concerns Australia's national security for the purposes of the sabotage offences. This should be clarified.

**Recommendations:**

- **The definition of 'national security' extending to the country's political or economic relations with another country or countries should be reconsidered.**
- **The definition of 'national security' in proposed subsection 90.4(2) should define the terms 'espionage', 'sabotage', 'terrorism', 'political violence' and 'foreign interference'. The terms 'political violence' and 'foreign interference' should be defined in a manner consistent with section 4 of the ASIO Act.**
- **A requirement should be inserted into proposed section 93.3 to indicate that a prosecution must not be initiated unless it has been certified by the Attorney-General that it is appropriate that the**

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<sup>25</sup> *Australian Secret Intelligence Organisation Act 1979* (Cth), s 4 lists a number of definitions including the definition of 'politically motivated violence' and 'acts of foreign interference'. 'Politically motivated violence' is defined to include four main categories of acts. 'Acts of foreign interference' means activities relating to Australia that are carried on, by or behalf of, are directed or subsidised by or are undertaken in active collaboration with a foreign power and which are clandestine or deceptive or involve a threat to any person.

**information concerned Australia’s national security at the time of the conduct that is alleged to constitute the offence.**

- **Proposed section 93.3 should be amended to require the Attorney-General to only certify information or an article as concerning Australia’s national security subject to the statutory criteria for ‘national security’.**
- **It is not clear whether the Attorney-General will be able to certify that the information or article concerns Australia’s national security for the purposes of the sabotage offences. This should be clarified.**

## Public infrastructure

29. A range of the proposed sabotage offences will apply where a person ‘damages public infrastructure’ with an intention to,<sup>26</sup> or reckless as to,<sup>27</sup> whether the damage will prejudice Australia’s ‘national security’ or ‘advantage the national security of a foreign country’. The Law Council is concerned about the breadth of this provision in conjunction with the broad definition of ‘national security’ where that term can extend to political or economic relations with another country.
30. The terms ‘damage to public infrastructure’ and ‘public infrastructure’ are broadly defined in proposed section 82.1 of the Bill. Damage to public infrastructure occurs where the conduct:
- (a) destroys it or results in its destruction;
  - (b) involves interfering with it, or abandoning it, resulting in it being lost or rendered unserviceable;
  - (c) results in it suffering a loss of function or becoming unsafe or unfit for its purpose;
  - (d) limits or prevents access to it or any part of it by persons who are ordinarily entitled to access it or that part of it;
  - (e) results in it or any part of it becoming defective or being contaminated;
  - (f) significantly degrades its quality; or
  - (g) if it is an electronic system—the conduct seriously disrupts it.<sup>28</sup>
31. The broad range of public infrastructure with the potential to be captured by the offences includes:
- (a) any infrastructure, facility, premises, network or electronic system that belongs to the Commonwealth;
  - (b) defence premises within the meaning of Part VIA of the *Defence Act 1903*;

<sup>26</sup> National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017, proposed sections 82.3, 82.5, 82.7.

<sup>27</sup> Ibid proposed sections 82.4, 82.6, 82.8.

<sup>28</sup> Ibid proposed section 82.1.

- (c) service property, and service land, within the meaning of the *Defence Force Discipline Act 1982*;
- (d) any part of the infrastructure of a telecommunications network within the meaning of the *Telecommunications Act 1997*;
- (e) any infrastructure, facility, premises, network or electronic system (including an information, telecommunications or financial system) that:
  - (i) provides or relates to providing the public with utilities or services (including transport of people or goods) of any kind; and
  - (ii) is located in Australia; and
  - (iii) belongs to or is operated by a constitutional corporation or is used to facilitate constitutional trade and commerce.<sup>29</sup>

32. In relation to the definition of 'public infrastructure', the Law Council considers that there would be benefit in a reference to the *Australian Government Information Security Manual 2016-2017* (for example, in the Explanatory Memorandum) and a need to be consistent with the requirements of that key policy document. The *Australian Government Information Security Manual 2016-2017* is produced by the Australian Signals Directorate as the standard which governs the security of government information and communication technology systems.

**Recommendation:**

- **In relation to the definition of 'public infrastructure', the Law Council considers that there would be benefit in a reference to the *Australian Government Information Security Manual 2016-2017* (for example in the Explanatory Memorandum) and a need to be consistent with the requirements of that key policy document.**

## Security classified information

33. Two categories of offences concern 'security classified information': the proposed secrecy offences under Division 121 of the Bill and the proposed espionage offences under Division 91 of the Bill.<sup>30</sup>
34. Proposed new offence provisions relating to 'inherently harmful information' in proposed paragraph 122.1(a) provides that 'security classified information' is a category of 'inherently harmful information'. 'Security classified information' is defined in proposed section 121.1 as information that has a security classification, within the meaning of proposed section 90.5 of the Criminal Code. That subsection would provide that 'security classification' has the meaning prescribed by the regulations.
35. The Law Council notes that the ALRC did not recommend a secrecy offence to cover 'national security classified information', preferring instead an approach that recognises that particular government agencies that obtain and generate sensitive information of this kind may need an agency-specific secrecy offence. The ALRC

<sup>29</sup> Ibid proposed section 82.2.

<sup>30</sup> See in particular proposed section 91.3 'Espionage – security classified information etc.'

reached this conclusion on the basis that 'while a category may be directed to protecting a legitimate public interest, the disclosure of information within that category will not always cause, or be likely to cause, harm'.<sup>31</sup> In addition, the ALRC noted the findings of previous reports that the 'security classification assigned to information is not necessarily an accurate indicator of the harm that could be caused by the unauthorised disclosure of the information'.<sup>32</sup> The Law Council agrees with the assessment by the ALRC.

36. Part 2.3.4 of the Guide provides that the content of an offence should only be delegated to another instrument where there is a demonstrated need to do so.<sup>33</sup>
37. The Explanatory Memorandum to the Bill does not appear to provide the demonstrated need to define 'security classified information' by prescription in the regulations.
38. In addition, proposed subsection 90.5(2) requires the Minister to be satisfied that the regulations are not inconsistent with the policies of the Government of the Commonwealth in relation to protective security before the Governor-General makes regulations. However, the type of information which may be prescribed as 'security classified information' is not clearly defined and circumscribed in the Bill.<sup>34</sup>
39. This is particularly problematic as significant matters, such as what constitutes the type of information which would result in the commission of an offence (subject to up to 15 – 20 years imprisonment) is not included in the primary legislation.
40. In addition, proposed subsection 90.5(3) of the Bill seeks to provide a contrary intention as per subsection 14(2) of the *Legislation Act 2003* (Cth) and permit the regulations to apply, adopt or incorporate any matter contained in an instrument or other writing as in force or existing from time to time.
41. The type of information which may be 'security classified information' should be more clearly defined and circumscribed in the Bill, for example, by the inclusion of appropriate criteria to assist in ensuring that the matter would, or would be reasonably likely to, cause harm to or prejudice Australia's national security. Low level security classifications are required for a wide range of people, including law firms providing services to government, or government advisory committees. The potential breadth of coverage of 'security classified information' and the absence of the definition containing criteria tying the definition to the broad purposes of the legislation is of considerable concern. Further, the Law Council notes that under proposed subsection 121.3(1) the Attorney-General may sign a certificate certifying

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<sup>31</sup> Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009) 255, [8.61].

<sup>32</sup> *Ibid.*

<sup>33</sup> Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011), available online at <https://www.ag.gov.au/Publications/Documents/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers/A%20Guide%20to%20Framing%20Cth%20Offences.pdf>, p. 26.

<sup>34</sup> The Guide also notes that, 'When the content of an offence is delegated to a subordinate instrument, safeguards should be put in place to ensure that the types of matters that can be delegated are clear and that those who are subject to the offence can readily ascertain their obligations.... The following principles should be applied in developing appropriate safeguards for offences containing content delegated to a subordinate instrument: The content that may be delegated to the subordinate instrument should be clearly defined and circumscribed in the Act', pp. 28-29.

that the information or thing has, or had at a specified time, a security classification or a specified level of security classification.<sup>35</sup>

42. The certificate would be *prima facie* evidence of the matters certified in it. This would give discretion to the Attorney-General as to when to certify information or a thing and would in effect allow information or a thing to be classified *after* the time of the conduct that is alleged to constitute the offence. That is, an element of retrospectivity would potentially occur in relation to the offence provision. This provision is of particular concern since there is scope for the Attorney-General to expand the meaning of 'security classified information', given the provision does not contain any criteria to limit the Attorney-General's powers under this provision. The proposed authority should at least be confined to the statutory criteria for 'security classified information'.
43. In contrast, section 50A of the ABF Act provides that a prosecution *must not be initiated* unless it has been certified that it is appropriate that the information had a security classification *at the time of the conduct that is alleged to constitute the offence*.
44. The Law Council considers that the wording of section 50A of the ABF Act is more appropriate than proposed section 121.3 as it:
  - seeks to avoid the situation of a prosecution proceeding being commenced where it was not appropriate that the information had a security classification (for example, where a contractor or consultant working for the Australian Government made an initial protective marking as permitted by the Information Security Management Guidelines),<sup>36</sup> and
  - limits potential for retrospective application.
45. The concerns about defining 'security classification' via regulations without any criteria are exacerbated given that strict liability applies to elements of the proposed offences of espionage and secrecy. The prosecution does not have to prove that the person knew that the information had a security classification, either by the context of the information or by the fact that it was stamped. For espionage offences, these elements include that the information or thing dealt with has a security classification. For secrecy offences, strict liability applies to the element that the information disclosed or communicated is inherently harmful information to the extent that the information is security classified information. For aggravated espionage and secrecy offences the element that a person dealt with five or more documents or things each of which has a security classification is also subject to strict liability. The Law Council opposes these strict liability provisions which are at the heart of such serious offences.
46. The Explanatory Memorandum to the Bill justifies strict liability in these circumstances on the basis that:

*For the elements relevant to information or articles carrying a security classification, this is appropriate because such information or articles are clearly marked with the security classification and any person who has*

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<sup>35</sup> National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017, proposed section 93.3.

<sup>36</sup> Australian Government, *Information Security Management Guidelines, Australian Government Security Classification System* (April 2015), available online at <https://www.protectivesecurity.gov.au/informationsecurity/Documents/INFOSECGuidelinesAustralianGovernmentSecurityClassificationSystem.pdf>, p. 4 [28] – [29].

*access to security classified information should easily be able to identify as such.*

...

*The application of strict liability is also necessary to ensure that a person cannot avoid criminal responsibility because they were unaware of certain circumstances for example that information was security classified information. Consistent with the Guide to Framing Commonwealth Offences, requiring knowledge of such an element in these circumstances would undermine deterrence of the offence. There are also legitimate grounds for penalising a person's lacking 'fault' in these circumstances because, with an offence of espionage for example, the person still engaged in conduct with the intention to, or reckless as to whether, that conduct would prejudice Australia's national security or advantage the national security of a foreign country.<sup>37</sup>*

47. However, a document may be altered by one person so that the security classification is removed. The person that is subject to the charge may not be aware that the document therefore had a security classification. While the defence of mistake of fact may be available, without knowing the criteria to which a document may receive a security classification and in circumstances where the Attorney-General may make a retrospective determination it is difficult to know how likely it is that reasonable and non-intentional errors may be made or the extent to which it is reasonable to expect individuals to put in place systems that can effectively minimise the risk of contravention. This makes the Law Council's recommendations below all the more pertinent.

**Recommendations:**

- **The Explanatory Memorandum to the Bill should provide the demonstrated need to define 'security classified information' by prescription in regulations.**
- **The type of information which may be prescribed as 'security classified information' should be clearly defined and circumscribed in the Bill, for example, through appropriate criteria to assist in ensuring that the matter would, or would be reasonably likely to, cause harm to or prejudice Australia's national security.**
- **A requirement similar to that which exists in section 50A of the *Australian Border Force Act 2017* (Cth) should be inserted into the Bill to indicate that a prosecution must not be initiated unless it has been certified that it is appropriate that the information had a security classification at the time of the conduct that is alleged to constitute the offence.**

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<sup>37</sup> Explanatory Memorandum, National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017, [74], [76].



## Foreign intelligence agency

48. The proposed new aggravated espionage offence, foreign interference offences involving foreign intelligence agencies and the definition of inherently harmful information for the purposes of the secrecy offences all rely on the proposed definition of a 'foreign intelligence agency' to be inserted into the Dictionary of the Criminal Code.<sup>38</sup>
49. A 'foreign intelligence agency' is proposed to mean 'an intelligence or security service (however described) of a foreign country'. The term foreign country is defined in the Dictionary to the Criminal Code as including a colony or overseas territory, and a territory outside Australia, where a foreign country is to any extent responsible for the international relations of the territory, and a territory outside Australia that is to some extent self-governing, but that is not recognised as an independent sovereign state by Australia.
50. The Law Council is concerned that the proposed definition of a 'foreign intelligence agency' does not sufficiently define by criteria what may amount to an intelligence or security service of a foreign country. For example, it is not clear whether a foreign trade or economics agency may be considered an intelligence or security service (however described) of a foreign country. This is because such agencies deal with information and may gather information regarding the trade or economic interests of the country. In this context, the Law Council reiterates its concerns (noted above) with regard to the Bill's definition of 'national security' which contemplates the inclusion of economic relations. Further, it is not clear whether the agency must be an entity that is directed or controlled by a foreign government or governments and if so, why trading entities and those associated with them should be subject to national security offences.
51. The Law Council notes that it is proposed that whether a foreign intelligence agency has such a character must be proved by evidence at trial. However, there does not appear to be guidance by way of criteria to a court as to the kind of evidence necessary to adduce that an agency is a foreign intelligence agency. In turn there is no requirement for the Minister to be satisfied on reasonable grounds that an agency is a foreign intelligence agency before proceedings are instituted. This is in contrast to requirements in the Criminal Code regarding a terrorist organisation.<sup>39</sup>
52. The Law Council supports a judicial process in determining a foreign intelligence agency which does not necessarily involve a highly politicised decision more appropriately left to the Executive. However, because of potential difficulties posed in the interpretation of a foreign intelligence agency as part of the judicial process, the Law Council considers that the Bill should be amended to provide for clarity regarding what may constitute a 'foreign intelligence agency'.
53. Current Commonwealth laws may aid in developing this criteria. For example, section 4 of the ASIO Act provides that 'foreign intelligence' means 'intelligence about the capabilities, intentions or activities of people or organisations outside Australia'. A 'foreign intelligence agency' is defined for the purposes of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) to mean 'a government body that has responsibility for: intelligence gathering for a foreign country; or the security of a foreign country'.

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<sup>38</sup> National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017, proposed Item 24 of Schedule 1.

<sup>39</sup> *Criminal Code Act 1995* (Cth), s 102.1(1).

54. Drawing such elements together, the Law Council considers that a 'foreign intelligence agency' should be defined to mean (for example) an entity that is directed or controlled by a foreign government or governments that has responsibility for: intelligence about the capabilities, intentions or activities of people or organisations outside Australia; or the security of a foreign country. If it is thought necessary to extend this definition to non-State actors, a reference could be made to a foreign political organisation. However, there must also be a link to harm or prejudice to Australia's national security in the offence provisions (discussed below).
55. More broadly, the definition of 'foreign intelligence' and 'foreign intelligence agency' should be reviewed to ensure consistency across Commonwealth legislation.

**Recommendations:**

- **The proposed definition of 'foreign intelligence agency' should be amended to mean (for example) an entity that is directed or controlled by a foreign government or governments that has responsibility for gathering security or defence intelligence about the capabilities, intentions or activities of people or organisations outside its own territory. If it is thought necessary to extend this definition to non-State actors, a reference could be made to a foreign political organisation. However, there must also be a link to Australia's national security in the offence provisions. More broadly, the definition of 'foreign intelligence' and 'foreign intelligence agency' should be reviewed to ensure consistency across Commonwealth legislation.**

## Defences for public officials

56. The Bill would allow a defence for where the person engaged in conduct in the person's capacity as a public official for the following:
- proposed sabotage offences in Part 5.1, Division 82 of the Criminal Code;
  - proposed espionage offences in Part 5.2, Division 91, Subdivisions A, B and C of the Criminal Code; and
  - proposed foreign interference offences in Part 5.2, Division 92, Subdivisions B and C of the Criminal Code.
57. Such offences include those that require an individual to intend, or be reckless, as to whether their conduct will prejudice Australia's national security.
58. The Law Council considers that a person acting in their capacity as a public official should not be permitted to act with the intention of, or be reckless as to, prejudicing Australia's national security. Such a defence for public officials appears antithetical to the very intent of the Bill, namely, to protect Australia against acts of sabotage, espionage and foreign interference. Furthermore, such a defence would in practice be unnecessary in circumstances where a court may consider that the requisite fault elements once proven by the prosecution are inconsistent with a public official acting in their capacity.
59. This difficulty does not arise for those offences where it may reasonably be envisaged that a public official may be requested to engage in certain conduct such as intending to advantage the national security of a foreign country (such as an ally).

60. The following examples may assist to demonstrate this issue:

- Proposed section 82.3 would provide an offence for where a person engages in conduct resulting in damage to public infrastructure *intending* that the conduct will prejudice Australia's national security. The conduct must be engaged in on behalf of, or in collaboration with, a foreign principal or a person acting on behalf of a foreign principal. Alternatively, the conduct must be directed, funded or supervised by a foreign principal or a person acting on behalf of a foreign principal. Proposed section 82.10 would provide a defence for a person who accessed or used a computer or other electronic system and they engaged in the conduct in their capacity as a public official. However, the Law Council submits that a person acting in their capacity as a public official would not intend to prejudice Australia's national security. The defence is unnecessary.
- Proposed subsection 91.1 would provide an espionage offence for where a person deals with information or an article that has a security classification or concerns Australia's national security and the person *intends* that the person's conduct will prejudice Australia's national security. The conduct is required to result or will result in the information or article being made available to a foreign principal or a person acting on behalf of a foreign principal. Proposed paragraph 91.4(1)(c) would provide a defence for a public official acting in their capacity as such. Again, it does not seem justified that a public official acting in their capacity would intend to prejudice Australia's national security rendering the defence unnecessary.
- Proposed section 92.3 would provide an offence where a person, who engages in conduct on behalf of a foreign principal, is reckless as to whether their conduct will support the intelligence activities of a foreign principal or prejudice Australia's national security. Any part of the conduct is required to be covert or deceptive or making a threat to cause serious harm or making a demand with menaces. There is a public official defence in proposed section 92.5. It is not clear why a public official should be exempt where they intend to prejudice Australia's national security and for example make threats to cause serious harm.
- Proposed section 92.3 would also provide an offence for example where a person, who engages in conduct on behalf of a foreign principal, is reckless as to whether their conduct will influence the political or governmental processes of the Commonwealth or a State or Territory or the exercise of an Australian democratic or political right or duty. The offence only requires that the conduct be partly covert or deceptive or involve the making of a threat to cause serious harm or making a demand with menaces. The proposed section 92.5 defence for persons engaging in their capacity as public official can also apply. It is not clear why public officials should be permitted to engage in such conduct, including threats to cause serious harm or make a demand with menaces. The Explanatory Memorandum to the Bill does not explain why such a defence is necessary or appropriate.

**Recommendations:**

- **The proposed defences for public officials should not be available for sabotage, espionage, and foreign interference offences under: proposed subparagraphs 82.3(1)(c)(i),<sup>40</sup> 82.4(1)(c)(i),<sup>41</sup> 82.5(1)(c)(i),<sup>42</sup> 82.6(1)(c)(i),<sup>43</sup> 82.7(1)(d)(i) and (ii),<sup>44</sup> 82.8(1)(d)(i) and (ii),<sup>45</sup> 91.1(1)(c)(i),<sup>46</sup> 91.1(2)(c)(i),<sup>47</sup> 91.8(1)(b)(i),<sup>48</sup> 91.8(2)(b)(i), 92.2(1)(c)(iv) and (d)(ii) and (d)(iii),<sup>49</sup> 92.3(1)(c)(iv) and (d)(ii) and (d)(iii);<sup>50</sup> and proposed subsections 91.2(1) and (2).<sup>51</sup>**
- **The Committee should inquire into the necessity to permit a public official defence for other sabotage, espionage and foreign interference offences where that conduct is engaged in on behalf of a foreign principal to advantage the national security of a foreign country. In the absence of such evidence, the proposed public officials defence should not proceed.**

## Treason

61. The current treason offence in section 80.1AA of the Criminal Code makes it an offence if the Commonwealth is 'at war with an enemy', the 'enemy is specified, by Proclamation', and the person engages in conduct intending that the conduct will 'materially assist the enemy to engage in war with the Commonwealth' and 'the conduct in fact assists the enemy to engage in war with the Commonwealth'. In addition, at the time of committing the offence the person is required to be an Australian citizen, a resident of Australia, or has voluntarily put themselves under the protection of the Commonwealth or they are required to be a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory. The maximum penalty for the offence is imprisonment for life.<sup>52</sup>
62. The proposed new treason offences in section 80.1AA would introduce an offence where:
- (a) a party (the enemy) is engaged in armed conflict involving the Commonwealth or the Australian Defence Force; and
  - (b) the enemy is declared in a Proclamation made under section 80.1AB; and
  - (c) the person engages in conduct; and

<sup>40</sup> Offence of sabotage involving foreign principal with intention as to national security.

<sup>41</sup> Offence of sabotage involving foreign principal reckless as to national security.

<sup>42</sup> Offence of sabotage with intention as to national security.

<sup>43</sup> Offence of sabotage reckless as to national security.

<sup>44</sup> Offence of introducing vulnerability with intention as to national security.

<sup>45</sup> Offence of introducing vulnerability reckless as to national security.

<sup>46</sup> Espionage—dealing with information etc. concerning national security which is or will be made available to foreign principal.

<sup>47</sup> Ibid.

<sup>48</sup> Espionage on behalf of foreign principal.

<sup>49</sup> Offence of intentional foreign interference.

<sup>50</sup> Offence of reckless foreign interference.

<sup>51</sup> Espionage—dealing with information etc. which is or will be made available to foreign principal.

<sup>52</sup> *Criminal Code Act 1995* (Cth), s 80.1AA.

- (d) the person intends that the conduct will materially assist the enemy to engage in armed conflict involving the Commonwealth or the Australian Defence Force; and
  - (e) the conduct materially assists the enemy to engage in armed conflict involving the Commonwealth or the Australian Defence Force; and
  - (f) at the time the person engages in the conduct:
    - (i) the person knows that the person is an Australian citizen or a resident of Australia; or
    - (ii) the person knows that the person has voluntarily put himself or herself under the protection of the Commonwealth; or
    - (iii) the person is a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory.<sup>53</sup>
63. The proposed section updates subsection 80.1AA(1) of the Criminal Code to reflect the Four Geneva Conventions and their two Optional Protocols to include the terminology 'armed conflict' as opposed to the current wording of the section of the Criminal Code which refers to 'war'.
64. The term 'war' has been moved away from in modern times as the notion of war as traditionally understood – where countries declare war on each other – has fallen away. Declarations of war for example may not be made and 'war' may no longer be between two or more States, and includes non-State actors. 'Armed conflict' has a more precise meaning (it is defined in Common Article 2 of the Geneva Conventions of 1949) and is broader (e.g. includes resistance against colonial occupation and fighting certain regimes, like apartheid South Africa).<sup>54</sup>
65. The Law Council appreciates the necessity to update the treason offences as 'armed conflict' reflects the reality of the current international engagements of the ADF and Commonwealth (e.g. the fight against ISIS and the situation in Syria).
66. The Law Council is, however, concerned about the breadth of the proposed provision as it removes the requirement that the person's conduct assists a country or organisation engaged in hostilities *against* the Commonwealth or ADF.<sup>55</sup> The proposed requirement is that a person's conduct provides material assistance to a country or organisation engaged in an armed conflict *involving* the Commonwealth.<sup>56</sup> Given the multilateral nature of modern conflicts (see, for example, in the case of Syria), this makes the scope of the offence potentially very broad. Further, that

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<sup>53</sup> National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017, proposed section 80.1AA.

<sup>54</sup> Common article 2 of the following four Conventions: *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, opened for signature 12 August 1949, 74 UNTS 31 (entered into force 21 October 1950); *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950); *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950); *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950), (the **Geneva Conventions**) all available online at <<https://www.icrc.org/eng/assets/files/publications/icrc-002-0173.pdf>>.

<sup>55</sup> National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017, proposed section 80.1AA.

<sup>56</sup> *Ibid* proposed section 80.1AA(1)(a).

someone contributes to acting *against* the Commonwealth or ADF would seem to be the rationale behind treason.

67. Similarly, proposed section 80.1AB requires that the Governor-General may, by Proclamation, declare a party (i.e. a person, body or group of any kind) to be an enemy engaged in armed conflict *involving* the Commonwealth or the ADF. However, no criteria are prescribed for when a Proclamation may be made under this proposed section. Similarly, there is no requirement of periodic review of such a Proclamation or an ability of revocation.
68. The Explanatory Memorandum notes that 'a person should not be able to commit treason against Australia if it was impossible for them to know that another party was Australia's enemy'.<sup>57</sup> The Proclamation system is intended to ensure that there is a publicly accessible record of enemies against whom the Commonwealth is engaged in an armed conflict for the purposes of the treason offence at section 80.1AA. However, concerns arise that a person may not know or reasonably be aware that that an enemy has been declared to be engaged in armed conflict *involving* the Commonwealth or ADF as this may be less apparent than armed conflict against the Commonwealth or ADF.
69. Further, the Law Council considers that there should be a prohibition on the retrospective proclamation of a 'party to be an enemy engaged in armed conflict involving the Commonwealth or ADF'. The Law Council notes that such a prohibition appears in the existing offence under subsections 80.1AA(2) and (2A). Consistent with fundamental rule of law principles, this should be replicated for the proposed new section 80.1AA offence.

**Recommendations:**

- **The proposed new treason offences should be limited to conduct that will materially assist the enemy to engage in armed conflict against the Commonwealth or the ADF. Similarly, proposed section 80.1AB should provide that the Governor-General may, by Proclamation, declare a party (i.e. a person, body or group of any kind) to be an enemy engaged in armed conflict against the Commonwealth or the ADF.**
- **The Bill should prescribe certain criteria for when the Governor-General may make a Proclamation under proposed section 80.1AB.**
- **There should be a requirement of periodic review of such a Proclamation and an ability of revocation when the Governor-General is no longer satisfied that the criteria for making the Proclamation continues to be met.**
- **There should be a prohibition on the retrospective proclamation of a 'party to be an enemy engaged in armed conflict' under proposed section 80.1AB.**

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<sup>57</sup> Explanatory Memorandum, National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017, p. 29.

## Treachery

70. The Law Council supports the new proposed section 80.1AC treachery offence in the Criminal Code which, unlike the existing treachery offence in section 24AA of the Crimes Act, is limited to conduct which involves the use of force or violence. Given the severity of the maximum penalty (life imprisonment) this limitation is appropriate rather than applying to ‘any act or thing’ as is the case with the current offence provision.
71. The prosecution will not have to prove that the person intended to use force or violence. However, as noted in the Explanatory Memorandum, for proposed paragraph 80.1AC(1)(b), the prosecution will have to prove beyond a reasonable doubt that the person’s conduct involved the use of force or violence and that the person was reckless as to this element. Therefore, the defendant must have been aware of a substantial risk that the relevant conduct involved force or violence and, having regard to the circumstances known to the person it was unjustifiable to take that risk. Consistent with the offences in Subdivision C of Division 80 of the Criminal Code, the term ‘force or violence’ is not defined and will have its ordinary meaning.<sup>58</sup>
72. Again, given the severity of the penalty (life imprisonment), the Law Council considers that the fault element of intention should be required where the person engages in conduct involving the use of force or violence. That is, the person should be required to have intended to use force or violence given the potential penalty of life imprisonment.

### Recommendation:

- **The treachery offence in proposed 80.1AC should require the fault element of intention where the person engages in conduct involving the use of force or violence.**

## Sabotage

73. Currently the Commonwealth offence of sabotage is located in section 24AB of the Crimes Act. It requires an ‘act of sabotage’ or an intent to use a particular article for an ‘act of sabotage’, accompanied by possession of that article.<sup>59</sup>
74. An ‘act of sabotage’ means the destruction, damage or impairment, with the intention of prejudicing the safety or defence of the Commonwealth, of certain articles,<sup>60</sup> including those:
- used by the Defence force or by the armed forces of a proclaimed country;
  - used, in or in connection with the manufacture, investigation or testing of weapons or apparatus of war;
  - used, or intended to be used, for any purpose that relates directly to the defence of the Commonwealth; or

<sup>58</sup> Ibid p. 35 [184].

<sup>59</sup> *Crimes Act 1914* (Cth), s 24AB(2). ‘Article’ includes anything, substance or material’ – s 24AB(1).

<sup>60</sup> Ibid s 24AB(1)(a) – (d).

- those that are in or form part of a place that is a prohibited place.<sup>61</sup>
75. Acts of sabotage may, depending on the circumstances of the case, also constitute offences of destroying or damaging Commonwealth property which carry a lesser penalty.<sup>62</sup>
76. The Bill proposes to introduce new Division 82 into the Criminal Code (sabotage) which would create new offences for:
- sabotage involving a foreign principal with intention as to national security (imprisonment for 25 years);<sup>63</sup>
  - sabotage involving foreign principal reckless as to national security (imprisonment for 20 years);<sup>64</sup>
  - sabotage with intention as to national security (imprisonment for 20 years);<sup>65</sup>
  - sabotage reckless as to national security (imprisonment for 15 years);<sup>66</sup>
  - introducing vulnerability with intention as to national security (imprisonment for 15 years);<sup>67</sup>
  - introducing vulnerability reckless as to national security (imprisonment for 10 years);<sup>68</sup> and
  - preparing for or planning sabotage offence (imprisonment for 7 years).<sup>69</sup>
77. These offences will apply as noted above where a person 'damages public infrastructure' with an intention to,<sup>70</sup> or reckless as to,<sup>71</sup> damage causing prejudice to Australia's national security or advantage to the national security of a foreign country.

## Gibbs Committee Review

78. The Gibbs Committee noted that no prosecution had ever been brought under section 24AB of the Crimes Act, stating 'the section has not, it appears, ever been invoked in the 31 years since its enactment. Certainly, because no proclamation has been made under sections 24AA, section 24AB, in so far as it refers to armed forces of a proclaimed country, has had no operation'.<sup>72</sup>
79. The Report also recommended that a simplified and narrower version of the offence should be adopted, stating:

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<sup>61</sup> Ibid ss 24AB(1)(d), 80 (meaning of 'prohibited place'). 'Prohibited place' includes, for example, an arsenal, camp, barracks, railways, roads.

<sup>62</sup> Ibid s 29.

<sup>63</sup> National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017, proposed section 82.3.

<sup>64</sup> Ibid proposed section 82.4.

<sup>65</sup> Ibid proposed section 82.5.

<sup>66</sup> Ibid proposed section 82.6.

<sup>67</sup> Ibid proposed section 82.7.

<sup>68</sup> Ibid proposed section 82.8.

<sup>69</sup> Ibid proposed section 82.9.

<sup>70</sup> National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017, proposed sections 82.3, 82.5, 82.7.

<sup>71</sup> Ibid proposed sections 82.4, 82.6, 82.8.

<sup>72</sup> Harry Gibbs, Ray Watson and Andrew Menzies, *Review of Commonwealth Criminal Law: Fifth Interim Report*, Commonwealth Attorney-General's Department (1991), p. 310 [33.2].



*The Review Committee is of the opinion that, in time of peace, a provision of the width and severity of present section 24AB cannot be justified.*<sup>73</sup>

80. The Gibbs Committee recommended that the offence be changed to a:

**simplified and narrower version of the offence of sabotage**, namely, it should be an offence to destroy, damage or impair any article:

- *used, or intended to be used, by the Defence Force;*
- *used, or intended to be used in, or in connection with, the manufacture, development or testing of weapons of war or apparatus of war intended for or capable of use by, the Defence Force;*

*with a view to impairing or interfering with:*

- *the safety or defence of the Commonwealth;*
- *the functioning or operation of the Defence Force;*
- *the effective use by the Defence Force of that thing; or*
- *that manufacture, development or testing.*<sup>74</sup>

81. The Law Council notes that the proposed new offences significantly broaden the sabotage offences including for example through employing the concept of 'interfering with' and the definition of 'public infrastructure'.

82. While the recommendation of the Gibbs Committee Report may need to be re-examined in light of the current national security landscape, the Law Council encourages the Committee to consider whether the broadening of the sabotage offences in the proposed manner is indeed necessary and justified.

**Recommendation:**

- **In light of the Gibbs Committee Report, the Law Council encourages the Committee to consider whether the broadening of the sabotage offences in the proposed manner is indeed necessary and justified.**

## **Vulnerability offences – harm or prejudice to Australian economic interests**

83. Proposed section 82.7 would make it an offence for a person to engage in conduct that results in an article, thing or software that is, or is part of, public infrastructure becoming *vulnerable* to misuse, impairment or unauthorised access or modification where the conduct is *intended* to prejudice Australia's national security, harm or prejudice Australia's economic interests, disrupt the functions of an Australian government or to damage public infrastructure. This offence would be subject to a penalty of 15 years imprisonment.

84. Proposed section 82.8 would make it an offence for a person to engage in conduct that results in an article, thing or software that is or is part of public infrastructure becoming vulnerable to misuse, impairment or unauthorised access or modification, where the person is *reckless* as to whether it will prejudice Australia's national security, harm or prejudice Australia's economic interests, disrupt the functions of an

<sup>73</sup> Ibid p. 312 [33.8].

<sup>74</sup> Ibid pp. 312 – 313 [33.10] (emphasis added).

Australian government or damage public infrastructure. This offence would be subject to a penalty of 15 years imprisonment.

85. The necessity of this offence provision in light of the breadth of the proposed damage to Commonwealth property offence does not appear to have been sufficiently demonstrated.
86. Proposed subparagraphs 82.7(d)(ii) and 82.8(d)(ii) refer to harm or prejudice to Australia's 'economic interests'. Concerns regarding economic relations have already been noted above. In addition, the Law Council is concerned about the potential breadth of this provision which may arguably permit minor or trivial harm or prejudice. It is also not clear how the harm or prejudice to Australia's economic interests is to be determined when views as to what is in Australia's economic interests may vary substantially.
87. While the term 'economic interests' is not defined in the Bill, according to the Explanatory Memorandum:

*The term 'prejudice' is intended to capture a broad range of intended conduct, including an intention to harm or injure Australia's economic interests or to cause disadvantage to Australia. The term is also intended to cover impairment or loss to Australia's economic interests. **The prejudice to Australia's economic interests is not required to be serious or substantial but is intended to be more than a minor or trivial prejudice that has no long lasting effect on Australia's overall economy.***<sup>75</sup>

88. As noted, the intention of the Bill, namely that the prejudice is not required to be serious or substantial but is intended to be more than a minor or trivial prejudice is not self-evident upon reading the legislation.
89. The Law Council's primary position is that the Bill's extension to economic interests should be reconsidered. If this is not accepted by the Committee, in order to warrant the criminal sanctions contemplated by the provisions, the Law Council is of the view that the harm or prejudice to Australia's economic interests should be more than minor or trivial and that this should be included in the wording of the provisions.

**Recommendation:**

- **The extension of the sabotage offence provisions should be reconsidered. If this is not accepted by the Committee, the Law Council recommends that proposed subparagraphs 82.7(1)(d)(ii) and 82.8(d)(ii) of the Bill be amended to reflect the fact that the harm or prejudice to Australia's economic interests should be more than minor or trivial prejudice.**

## Preparatory sabotage offences

90. Proposed section 82.9 would establish a new offence of preparing for a sabotage offence. The offence can properly be described as preventative and preparatory in nature.

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<sup>75</sup> Explanatory Memorandum, National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017, p. 68 (emphasis added).

91. The proposed offence would criminalise conduct in preparation for, or planning, an offence against Division 82 (sabotage). The offence would be punishable by a maximum penalty of 7 years imprisonment.
92. According to the Explanatory Memorandum to the Bill:

*The purpose of the offence is to give law enforcement authorities the means to deal with preparatory conduct and enable a person to be arrested before Australia's national security is prejudiced or the national security of a foreign country is advantaged.*<sup>76</sup>
93. The Law Council is concerned with the increasing number of preparatory offences that are being introduced into the Criminal Code. In 2004 preparatory terrorism offences were introduced.<sup>77</sup> In 2017 this was extended to certain child sex offences<sup>78</sup> and now it is proposed to apply in relation to sabotage, espionage and foreign interference offences.
94. Preparatory offences capture conduct at a very early stage which challenges conventional principles of criminal law.<sup>79</sup> These types of offences, which seek to impose criminal sanctions for actions performed before a person has formed a definite plan to commit a specific criminal act, represent a departure from common forms of criminal liability. The Law Council considers that incitement, conspiracy and attempt provisions in Part 2.4 of the Criminal Code are sufficient to deal with preparatory conduct which has indicated a real intention to carry out the act.
95. For this reason, the Law Council has previously opposed the use of preparatory offences.<sup>80</sup> Moreover, the extension of criminal responsibility to cover preparatory acts requires law enforcement and prosecutorial authorities to exercise a considerable degree of discretion when determining whether an otherwise innocuous act should be subject to the charge and prosecution. In the Law Council's view, an unacceptable element of arbitrariness and unpredictability may arise in determining whether or not a person is charged with the preparatory offence under proposed section 82.9.
96. As a consequence, the Law Council does not support the passage of proposed section 82.9. However, if this position is not to be accepted by the Committee, the Law Council recommends that there be a public review conducted by the Attorney-General's Department which clearly identifies the appropriate criteria which should be used for determining the kinds of criminal conduct that warrant preparatory offences. The review should allow for a public submissions process and the outcomes be used to inform the Guide.

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<sup>76</sup> Ibid p. 69.

<sup>77</sup> Anti-Terrorism Bill (No 2) 2004.

<sup>78</sup> Crimes Legislation Amendment (Sexual Crimes against Children and Community Protection Measures) Bill 2017.

<sup>79</sup> See for example *Lodhi* [2006] NSWSC 584.

<sup>80</sup> See the Law Council of Australia Submission to the Senate Legal and Constitutional Committee, *Anti-Terrorism Bill (No. 2) 2004* (15 July 2004); Law Council of Australia, *Anti-Terrorism Law Reform Project* (October 2013); Law Council of Australia, *Crimes Legislation Amendment (Sexual Crimes against Children and Community Protection Measures) Bill 2017* (6 October 2017).

### Recommendation

- **Proposed section 82.9 ‘Preparing for or planning sabotage offence’ be removed from the Bill. Incitement, conspiracy and attempt provisions in Part 2.4 of the Criminal Code are sufficient to deal with preparatory conduct which has indicated a real intention to carry out the act. If this position is not accepted by the Committee, the Law Council recommends that there be a public review conducted by the Attorney-General’s Department which clearly identifies the appropriate criteria which should be used for determining the kinds of criminal conduct that warrant preparatory offences. The review should allow for a public submissions process and the outcomes be used to inform the Guide.**

### Defence

97. The proposed defence for sabotage offence (proposed section 82.10) is limited to where the conduct the person engaged in was accessing or using a computer or other electronic system in the person’s capacity as a public official. This is far more limited than the current defence which applies to acts done in good faith.
98. Under section 24F of the Crimes Act, it is a defence to a charge of treachery or sabotage if a person has:
- (a) endeavoured in good faith to show that the Sovereign, the Governor-General, the Governor of a State, the Administrator of a Territory, or the advisers of any of them, or the persons responsible for the government of another country, has or have been, or is or are, mistaken in any of his, her or their counsels, policies or actions;
  - (b) pointed out in good faith errors or defects in the government, the constitution, the legislation or the administration of justice of or in the Commonwealth, a State, a Territory or another country, with a view to the reformation of those errors or defects;
  - (c) excited in good faith another person to attempt to procure by lawful means the alteration of any matter established by law in the Commonwealth, a State, a Territory or another country;
  - (d) pointed out in good faith, in order to bring about their removal, any matters that are producing, or have a tendency to produce, feelings of ill-will or hostility between different classes of persons; or
  - (e) done anything in good faith in connexion with an industrial dispute or an industrial matter.
99. Subsection 24F(2) of the Crimes Act outlines several situations where it cannot be said that an act or thing is done in good faith.

100. The defence contained in subsection 24F of the *Crimes Act 1914* (Cth), like other 'good faith' defences, on its face, appears to be directed at protecting political communication.<sup>81</sup>
101. It is not contemplated at present that the current good faith defence be replicated in the Bill. The Explanatory Memorandum to the Bill does not explain why a good faith defence is no longer thought necessary.
102. The physical elements of the sabotage offences are broad and an important safeguard in relation to these offences is the availability of adequate defences. The Law Council considers that there should be a good faith defence appropriately adapted to the new sabotage offences in the absence of sufficient justification to the contrary.

**Recommendation:**

- **In the absence of sufficient justification to the contrary, a good faith defence should be available for the proposed sabotage offences.**

## Other threats to security

### Advocating mutiny

103. Proposed section 83.1 would replace the existing offence of inciting mutiny at section 25 of the *Crimes Act*.
104. The advocating mutiny offence would apply where a person advocates mutiny, reckless as to whether the result will be that a member of the defence force takes part in a mutiny. The offence would carry a maximum penalty of 7 years imprisonment.
105. The definition of 'mutiny' in proposed subsection 83.1(2) is consistent with that in section 3 of the *Defence Force Discipline Act 1982* (Cth) and means a combination between persons who are, or at least two of whom are, members of the ADF to:
  - overthrow lawful authority in the ADF or in a force of another country that is acting in cooperation with the ADF; or
  - resist such lawful authority in such a manner as to substantially prejudice the operational efficiency of the ADF, or of a part of, a force of another country that is acting in cooperation with the ADF.
106. The offence has been introduced subsequent to the introduction of the 'advocating terrorism' offence by the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth). The Law Council has previously observed that the advocating terrorism offence is broadly framed and may have the potential to unduly burden freedom of expression.<sup>82</sup> This view was supported by the PJCHR which concluded that the provision was 'likely to be incompatible with the right to freedom

<sup>81</sup> Simon Bronitt and James Stellios, 'Sedition, Security and Human Rights: 'Unbalanced' Law Reform in the 'War on Terror' (2006) 30 *Melbourne University Law Review* 923, p. 937. See also the six 'good faith' defences contained in *Criminal Code Act 1995* (Cth), s 80.3(a).

<sup>82</sup> Law Council of Australia, *Counter-terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (3 October 2014).

of opinion and expression'.<sup>83</sup> This conclusion was based on the view that the existing provisions in the Criminal Code apply to speech that incites violence and that the offence was 'overly broad' in its application (despite the good faith defence):

*This is because the proposed offence would require only that a person is 'reckless' as to whether their words will cause another person to engage in terrorism (rather than the person 'intends' that this be the case). The committee is concerned that the offence could therefore apply in respect of a general statement of support for unlawful behaviour (such as a campaign of civil disobedience or acts of political protest) with no particular audience in mind. For example, there are many political regimes that may be characterised as oppressive and non-democratic, and people may hold different opinions as to the desirability or legitimacy of such regimes; the committee is concerned that in such cases the proposed offence could criminalise legitimate (though possibly contentious or intemperate) advocacy of regime change, and thus impermissibly limit free speech.*<sup>84</sup>

107. The Scrutiny of Bills Committee also raised concern regarding the necessity of the offence in light of existing offences and regarding the breadth of the definition of 'advocates' which was not addressed prior to enactment.<sup>85</sup>
108. The ALRC in *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* (ALRC Report 129) (**Freedoms Report**) concluded that the advocating terrorism offence 'should be further reviewed' to see whether it 'unjustifiably limits freedom of speech'.<sup>86</sup>
109. The proposed new advocating mutiny offence should be considered bearing these matters in mind.
110. The term 'advocate' is not defined (as it is in the advocating terrorism offence) and is intended to take its ordinary meaning and could include counselling, promoting encouraging or urging the commission of mutiny.<sup>87</sup>
111. The Law Council is concerned that the breadth of the provision may not be compatible with the right to freedom of opinion and expression.<sup>88</sup> This is because the proposed offence would require only that a person is 'reckless' as to whether their words or conduct will cause another person to engage in mutiny (rather than the person 'intends' that this be the case) and it would extend to any person not only serving ADF members or members of a defence force of another country that is acting in cooperation with the ADF. The Law Council is concerned that the offence could therefore apply in respect of a general statement of support for unlawful behaviour (e.g. supporting the resistance of contentious orders). Indeed, the Explanatory Memorandum to the Bill appears to contemplate such broad application

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<sup>83</sup> Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Fourteenth Report of the 44th Parliament* (October 2014), [1.259].

<sup>84</sup> *Ibid* [1.258].

<sup>85</sup> Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Fourteenth Report of 2014*, (October 2014), p. 795.

<sup>86</sup> Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, Report No 129 (2016), pp. 126-127.

<sup>87</sup> Explanatory Memorandum, National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017, p. 78 [427].

<sup>88</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1979), Article 19.

when it notes that a spouse of an ADF member may be subject to this offence for persuading their spouse and members of the ADF to resist orders.<sup>89</sup>

112. Advocating mutiny is a lower standard than inciting mutiny, and captures a broader range of conduct. The Explanatory Memorandum provides an example of the offence where a spouse of a member of the ADF encourages that member to convince other members of the ADF to resist orders from their superiors so that a particular Defence operation against one of Australia's enemies cannot take place.<sup>90</sup>
113. The new offence could also capture a situation where a pacifist group reacting to an incident occurring during a war or armed conflict calls on ADF troops to follow their own conscience and lay down their arms (as occurred for example in Vietnam).<sup>91</sup> Requiring the consent of the Attorney-General to institute proceedings (proposed section 83.5) does not necessarily remedy this difficulty.
114. In addition, there is no proposed good faith defence (which is unlike the advocating terrorism offence) to address this kind of situation.
115. The Law Council is also concerned about the increase in introduction of 'advocating' certain crime type offences without any transparent criteria as to the crime types which may warrant such an approach.
116. For the above reasons, the Law Council does not support the proposed advocating mutiny offence and considers that an updated inciting mutiny offence in the Criminal Code replacing section 25 of the Crimes Act would be preferable. Incitement, conspiracy and attempt provisions in Part 2.4 of the Criminal Code should instead be relied on. If this is not to be accepted, the Law Council recommends that the fault element of intention rather than recklessness should apply as to whether the person's words or conduct will cause another person to engage in mutiny. In addition, a good faith defence should be provided to ensure that individuals or groups who in good faith with their words oppose the actions of the ADF or a defence force of another country that is acting in cooperation with the ADF and calls for a laying down of arms is not subject to the offence.

**Recommendation:**

- **The proposed advocating mutiny offence should not proceed. Instead, an updated inciting mutiny offence should be created in the Criminal Code which replaces section 25 of the Crimes Act and is directed at serving ADF members or a defence force of another country that is acting in cooperation with the ADF. Incitement, conspiracy and attempt provisions in Part 2.4 of the Criminal Code are sufficient to deal with the offence of mutiny. If this is not to be accepted, the fault element of intention should apply as to whether the person's words or conduct will cause another person to engage in mutiny. In addition, a good faith defence should be provided to ensure that individuals or groups who in good faith with oppose the actions of the ADF or a defence force of another country that is acting in cooperation with the ADF and/or calls for a laying down of arms is not subject to the offence.**

<sup>89</sup> Explanatory Memorandum, National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017, p. 76 [416].

<sup>90</sup> Explanatory Memorandum, National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017, p. 76 [416].

<sup>91</sup> 'Australians ease call for 'mutiny': Criticism Brings Retreat on Plea to Vietnam Forces' *New York Times* (21 December 1969), p. 2.

## Assisting prisoner of war to escape

117. Proposed section 83.2 would create an offence that applies where a person assists one or more prisoners of war to escape from custody controlled by the Commonwealth or ADF in the context of an international armed conflict. The offence carries a maximum penalty of 15 years imprisonment.
118. The Gibbs Committee urged the repeal of this offence under section 26 of the Crimes Act because such a provision is intended to operate 'only in peculiar and hopefully very rare circumstances' and the requirements of the offence would depend on the 'exigencies of the particular war-time situation'.<sup>92</sup> The Gibbs Committee suggested, for example, that the legislation may need to extend to civilian internees and the 'details of the legislation required cannot be foreseen now'.<sup>93</sup> While the proposed offence may apply to civilian internees (see discussion below), it does not appear to have addressed the Gibbs Committee's concern regarding such an offence depending on the exigencies of a particular war-time situation.
119. In addition, an element of the offence under proposed section 83.2 is that 'the conduct assists one or more prisoners of war (within the meaning of Article 4 of the Third Geneva Convention) to escape from custody'.
120. Therefore, the provisions of the Third Geneva Convention are directly relevant to the interpretation of this provision. However, the Law Council considers that this offence is not consistent with the Third Geneva Convention. The Third Geneva Convention stipulates that a prisoner of war should not be punished for a successful escape,<sup>94</sup> and that a prisoner of war captured in the process of escaping, if punished, should only be liable to a disciplinary punishment.<sup>95</sup> In the Law Council's view, it would be inconsistent with the Third Geneva Convention to make assisting a prisoner of war to escape a criminal offence liable to imprisonment for 15 years.
121. While the Law Council supports a reduction in the penalty from a maximum life imprisonment term (as is currently the case), in light of the above, it queries whether the proposed 15 years imprisonment is still too high.

### Recommendation:

- **Consideration should be given to lowering the proposed penalty of 15 years imprisonment under proposed section 83.2 (assisting prisoners of war to escape) in light of the Third Geneva Convention which stipulates that a prisoner of war should not be punished for a successful escape,<sup>96</sup> and that a prisoner of war captured in the process of escaping, if punished, should only be liable to a disciplinary punishment.<sup>97</sup>**

<sup>92</sup> Harry Gibbs, Ray Watson and Andrew Menzies, *Review of Commonwealth Criminal Law: Fifth Interim Report*, Commonwealth Attorney-General's Department (1991), p. 320 [35.6]-[35.7].

<sup>93</sup> *Ibid* [35.7].

<sup>94</sup> *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950), Article 91.

<sup>95</sup> *Ibid* Article 93.

<sup>96</sup> *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950), Article 91.

<sup>97</sup> *Ibid* Article 93.



## Military-style training involving foreign government principal

122. Proposed section 83.3 would create an offence that applies where a person provides, receives or participates in training that involves using arms or practising military exercises, movements or evolutions. The offence would apply when that training is provided on behalf of a foreign government principal, or is directed, funded or supervised by a foreign government. Defences apply to permit training expressly authorised by the Commonwealth, as part of service with the armed forces of the government of a foreign country, or where a declaration in relation to specified armed forces is made. The offence is punishable by a maximum penalty of 20 years imprisonment.
123. Relevant to the interpretation of this offence is international humanitarian law, specifically the Geneva Conventions, which create a regime of combatants and non-combatants. Combatants enjoy certain privileges over non-combatants (for example, immunity from prosecution for acts committed during war, such as the killing of enemy soldiers) but also can be legitimately targeted, unlike non-combatants. Non-combatants, being civilians or combatants *hors de combat*, enjoy the protection under the Geneva Conventions of immunity from attack. However, civilians may be targeted when they are *directly participating in hostilities*. Civilians directly participating in hostilities do not enjoy the combatant privilege immunity from prosecution for acts committed during armed conflict.<sup>98</sup>
124. While the Law Council considers that it is appropriate to criminalise the conduct of civilians directly participating in hostilities against the Commonwealth or ADF, the Law Council considers that the proposed section 83.3 offence is too broad and captures conduct which would not amount to direct participation in hostilities.
125. However, what qualifies as ‘directly participating in hostilities’ has been the subject of much discussion in international humanitarian law, which led the International Committee on the Red Cross (ICRC) to publish an *Interpretive Guidance on Direct Participation in Hostilities (Guidance)*. While this Guidance does not have the status of international law, it is persuasive as the ICRC authored the Geneva Conventions and also because it collects data concerning State practice on the issue. On whether ‘training’ qualifies as direct participation in hostilities, the ICRC notes that:
- [[I]ndividual conduct that merely builds up or maintains the capacity of a party to harm its adversary, or which otherwise only indirectly causes harm, is excluded from the concept of direct participation in hostilities... although the recruitment and training of personnel is crucial to the military capacity of a party to the conflict, the causal link with the harm inflicted on the adversary will generally remain indirect. Only where persons are specifically recruited and trained for the execution of a predetermined hostile act can such activities be regarded as an integral part of that act and, therefore, as direct participation in hostilities.*<sup>99</sup>
126. As presently drafted, the offence is too broad, as it applies to a person who ‘provides, receives, or participates in, training’ and ‘the training involves using arms or practising military exercises, movements or evolution’ provided by a foreign

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<sup>98</sup> See International Committee of the Red Cross, *Protocols Additional to the Geneva Conventions of 12 August 1949 (1977)*, Article 45, available online at <[https://www.icrc.org/eng/assets/files/other/icrc\\_002\\_0321.pdf](https://www.icrc.org/eng/assets/files/other/icrc_002_0321.pdf)>, p. 34.

<sup>99</sup> International Committee on the Red Cross, *Interpretive Guidance on Direct Participation in Hostilities* (2009) <https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf>, p. 53.

principal without the requirement for that training to be directed towards a predetermined hostile act nor for it to form an integral part of that act.

127. Proposed subparagraph 83.3(1)(c)(ii) also requires a finding that ‘the training is directed, funded or supervised by a foreign government principal or a person acting on behalf of a foreign government principal’.
128. The Law Council notes that a State that is responsible for directing, funding or supervising training of the nationals of a second State for the purposes of acting against that second State violates the principle of non-intervention and therefore may amount to an internationally wrongful act.<sup>100</sup>
129. An Australian domestic court is unable to make a finding against a foreign State under the principle of sovereignty at international law. Nonetheless, the Law Council encourages the Committee to inquire into the possible impact at international law as to whether a finding by an Australian court for the purposes of this offence may amount to *opinio juris* at international law.

#### Recommendations:

- **The proposed offence relating to military-style training involving a foreign government principal should be amended to reflect that it is only an offence for a person to undergo such training where the person is specifically undergoing training for the execution of a predetermined hostile act and those training activities are an integral part of that hostile act.**
- **An Australian domestic court is unable to make a finding against a foreign State under the principle of sovereignty at international law. Nonetheless, the Law Council encourages the Committee to inquire into the possible impact at international law as to whether a finding by an Australian court for the purposes of this offence may amount to *opinio juris* at international law.**

### Interference with political rights and duties

130. The Law Council supports the proposed interference with political rights and duties offence in proposed section 83.4. This proposed offence will replace the existing offence of interfering with political liberty at section 28 of the Crimes Act, which will be repealed by Item 43 of Schedule 1.
131. Currently, section 28 of the Crimes Act provides that any person who, by violence or by threats or intimidation of any kind, hinders or interferes with the free exercise or performance, by any other person, of any political right or duty, commits an offence. The offence carries a 3 year imprisonment term.<sup>101</sup>

<sup>100</sup> See *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America) (Judgement)* [1986] Merits, ICJ Rep 14.

<sup>101</sup> See also subsection 327(1) of the *Commonwealth Electoral Act 1918* (Cth) also provides that a person shall not hinder or interfere with the free exercise or performance, by any other person, of any political right or duty that is relevant to an election. The penalty for this offence is 10 penalty units or imprisonment for six months or both. In addition, subsection 327(2) provides that a person must not discriminate against another person on the ground of the other person making a donation to a political party or group by denying the person access to membership of certain groups; by not allowing the person to work or continue to work; or by

132. Proposed section 83.4 of the Bill would replace section 28 of the Crimes Act to provide that a person will commit the offence if:
- (a) the person intentionally engages in conduct; and
  - (b) the person's conduct involves the: use of force or violence; or intimidation; or the making of threats of any kind; and the person is reckless as to this element; and
  - (c) the person's conduct results in interference with the exercise or performance, in Australia by any another person, of an 'Australian democratic or political right or duty' and the person is reckless to this element; and
  - (d) the right or duty arises under the Constitution or a law of the Commonwealth (absolute liability will apply to this element per proposed subsection 83.4(2)).
133. The defence under section 80.3 for acts done in good faith is proposed to apply to this offence. The new offence will be subject to a 10 year maximum penalty as compared to the current term of 3 years.
134. The proposed new offence (akin to the current section 28 Crimes Act offence) is broader than other offences in the *Commonwealth Electoral Act 1918* and the *Referendum (Machinery Provisions) Act 1984 (Cth)*<sup>102</sup> as it would capture for example the use of force or violence, or intimidation; or the making of threats of any kind against persons lawfully participating in protests as well as Australian elections and referenda.
135. The proposed offence differs from section 28 of the Crimes Act in the following ways:
- 'use of force' is a broader concept than 'violence' and may, as the Explanatory Memorandum indicates, capture 'acts such as restraining, manipulating, coercing and physically making a person do something against their will'.<sup>103</sup> The Law Council considers that the expansion to conduct involving the use of force is appropriate;
  - the current offence has as a result that the conduct '*hinders or interferes with the free exercise or performance, by any other person, of any political right or duty*' (emphasis added). In contrast, the new offence is limited to the result of 'interference with' the exercise or performance, in Australia by any another person, of an Australian democratic or political right or duty where that right or duty arises under the Constitution or a law of the Commonwealth. The concept of 'interference' is arguably broader than 'hinders'. The Law Council does not oppose the removal of the term 'hinders' in the new offence;
  - interference must be to an 'Australian democratic or political right or duty where that right or duty arises under the Constitution or a law of the Commonwealth'. The Law Council supports this amendment which is in part

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subjecting the person to any form of intimidation or coercion or any other detriment. The penalty for this offence is a \$9 000 fine or imprisonment for 2 years (or both) if the offender is a natural person, or 200 penalty units if the offender is a body corporate. See also subsection 120(1) of the *Referendum (Machinery Provisions) Act 1984 (Cth)*.

<sup>102</sup> Ibid.

<sup>103</sup> Explanatory Memorandum, National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017, [523].

consistent with the Gibbs Committee Report.<sup>104</sup> However, it notes that the Gibbs Committee found that the term 'political rights and duties' in current section 28 of the Crimes Act was ambiguous and there was a question whether the term could encompass the rights and duties of a Member of Parliament or whether these were matters that must be dealt with as contempt of Parliament.<sup>105</sup> This ambiguity carries over to the new proposed section 83.4 of the Bill. The Gibbs Committee recommended that:

*... any doubt as to the application of the provision to the rights and duties of a Member of Parliament should be removed, but not so as to affect the power of Parliament to deal with such conduct as contempt of Parliament, provided that a person may not be punished twice for the one act or omission.*<sup>106</sup>

The Explanatory Memorandum to the Bill does not address the intersection between the proposed new offence and contempt of Parliament.<sup>107</sup>

Presumably section 4C of the Crimes Act may apply to ensure that a Member of Parliament may not be punished twice for the one act or omission but this should be clarified in the Explanatory Memorandum.<sup>108</sup>

- Further, it is the Law Council's view that clear reasons for the increase from a 3 year to 10 year maximum penalty have not been given. In the absence of a clear justification, the proposed maximum term is too high.<sup>109</sup>

136. The Law Council is also concerned that the making of threats of 'any kind' is too broad. This may capture for example a politician that states to a colleague that they may lose their preselection if they engage in certain conduct. It could also involve a person making a threat not to vote for a particular amendment to a Bill. The making of threats should therefore be limited to the use of force or violence.

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<sup>104</sup> The Gibbs Committee found that the term 'political rights and duties' would presumably be 'read down by a court so as to be limited to political rights or duties under the Constitution or a Commonwealth law and the Review Committee considers that it should be expressed accordingly - Harry Gibbs, Ray Watson and Andrew Menzies, *Review of Commonwealth Criminal Law: Fifth Interim Report*, Commonwealth Attorney-General's Department (1991), [37.11].

<sup>105</sup> *Ibid* p. 331 [37.10].

<sup>106</sup> *Ibid* [37.12].

<sup>107</sup> The House of Representatives and the Senate has the power to punish conduct that it finds to be a contempt of its respective House – see *R v Richards; Ex parte Fitzpatrick* (1955) 92 CLR 157. This is a wide power regulated by the *Parliamentary Privileges Act 1987* (Cth). The punishment may include a maximum 6 months imprisonment or a fine – section 7 *Parliamentary Privileges Act 1987* (Cth). Where a House imposes a penalty of imprisonment for an offence, the resolution of the House and the warrant committing the person to custody must set out the particulars of the matters determined by the House to constitute the offence – section 8 *Parliamentary Privileges Act 1987* (Cth). Judicial review of the House's action in an application for habeas corpus will enable a court to inquire whether the particulars do in law constitute an offence against the House. However, the court will not be able to review the accuracy of those particulars – see e.g. *Stocksdale v Hansard* (1839) 112 ER 1112 at 1162 (Lord Denman CJ); *Middlesex Sheriff's Case* (1840) 113 ER 419 at 425, 426 (Lord Denman CJ); *R v Richards; Ex parte Fitzpatrick* (1955) 92 CLR 157.

<sup>108</sup> Section 4C *Crimes Act 1914* (Cth) provides that where an act or omission constitutes an offence under two or more laws of the Commonwealth or both under a law of the Commonwealth and at common law, the offender shall not be liable to be punished twice for the same act or omission. In addition it provides for where an act or omission constitutes an offence under both a law of the Commonwealth and a law of a State/Territory, and where the offender has already been punished for the offence under the law of the State/Territory, the offender shall not be liable to be punished for the offence under the law of the Commonwealth.

<sup>109</sup> The Explanatory Memorandum simply states, 'The maximum penalty of ten years imprisonment is appropriate and appropriately criminalises conduct involving force or violence that interferences with a person's exercise of their democratic or political rights or duties.' See Explanatory Memorandum, National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017, p. 93.

**Recommendations:**

- **In regards to the interference with political rights and duties offence, the Explanatory Memorandum to the Bill should be amended to make clear that the availability of the offence does not affect the power of Parliament to deal with such conduct as contempt of Parliament, provided that a person may not be punished twice for the one act or omission.**
- **Clear justification should be given for the maximum term of imprisonment and the increase by seven years for the interference with political rights and duties offence.**
- **The ‘making of threats’ in the proposed interference with political rights and duties offence should be limited to threats made in relation to the use of force or violence rather than ‘threats of any kind’.**

## Espionage

137. Freedom of expression is not an absolute right and must be balanced against necessary limitations to maintain public safety and be proportionate to the threat.<sup>110</sup> However, due to the concerns identified below the Law Council does not consider that the appropriate balance has been struck. Primarily, the Law Council is concerned that Australians, Australian businesses and advocacy groups and journalists may be caught by the offences for innocuous conduct that is undertaken as a matter of course or in the public interest. In circumstances where the dealing with the information or article relates to politics, and specifically elections, a question may also arise as to whether the provisions will be read down by a court so as to avoid invalidity with the implied right to freedom of political communication.<sup>111</sup>
138. The existing espionage offence in section 91.1 of the Criminal Code includes communicating or making available information that concerns the security or defence of the Commonwealth, with the intention of prejudicing the security or defence of the Commonwealth, in circumstances where the likely result is that the information will be made available to a foreign power or organisation. The proposed new offences go far beyond the current offence provision to capture political and economic relations with another country.
139. Schedule 1 of the Bill would create the following new offences:
- espionage dealing with information etc. concerning national security which is or will be made available to a foreign principal with either intention or recklessness as to national security (carrying a penalty of life or 25 years imprisonment);<sup>112</sup>

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<sup>110</sup> International Covenant on Civil and Political Rights, 16 December 1966, [1980] ATS 23, (entered into force generally on 23 March 1976), Article 19(2).

<sup>111</sup> *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Australian Capital Television Pty Ltd and New South Wales v Commonwealth* (1992) 177 CLR 106; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.

<sup>112</sup> National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017, s 91.1.

- espionage dealing with information etc. which is or will be made available to a foreign principal with either intention or recklessness as to national security (carrying a penalty of 25 or 20 years imprisonment);<sup>113</sup>
- espionage regarding security classified information (carrying a penalty of 20 years imprisonment);<sup>114</sup>
- aggravated espionage, where the person dealt with information or an article: that has a security classification of secret or above; from a foreign intelligence agency; the person; or the person dealt with 5 or more records or articles each of which has a security classification; the person altered a record or article to remove or conceal its security classification; at the time the person dealt with the information or article, the person held and Australian Government security clearance (carrying a penalty of life or 25 years imprisonment);<sup>115</sup>
- espionage on behalf of foreign principal with intention or recklessness as to national security or conduct on behalf of foreign principal (carrying a penalty of 25 or 20 years imprisonment);<sup>116</sup>
- soliciting or procuring an espionage offence or making it easier to do so (carrying a penalty of 15 years imprisonment);<sup>117</sup> and
- preparing for an espionage offence (carrying a penalty of 15 years imprisonment).<sup>118</sup>

140. The Law Council does not support the proposed new espionage offences as they are currently drafted. The following issues of concern raise serious questions that the proposed espionage offences may not be compatible with freedom of expression.

141. As noted above, the espionage offences rely on the definitions of 'national security' and 'security classified information'.<sup>119</sup> Some issues with these definitions have already been noted above.

142. Another issue that arises is in the context of the definition of 'national security', 'foreign principal' and the potential operation of proposed espionage offences. Part of the problem comes from the wide definition of 'national security' in proposed section 90.4, particularly, the elements of political relations with another country in proposed paragraph 90.4(1)(e). Another aspect is how this broad definition applies to the definition of a foreign principal (proposed section 90.2) which covers state owned companies (and enterprises that are directed or controlled by the state) and foreign private companies that are being used to channel government activities.

143. The proposed espionage offences, with the economic and political elements of the definition of national security, would seem to cover any form of consultancy with a foreign government, the sort that accountancy or legal firms may engage in as a matter of course. It may also cover the provision of information to other entities such as foreign banks or state owned companies by Australian companies or businesses. Australian think tanks or advocacy groups that provide information to a 'foreign principal' may also potentially be caught.

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<sup>113</sup> Ibid s 91.2.

<sup>114</sup> Ibid s 91.3.

<sup>115</sup> Ibid s 91.6.

<sup>116</sup> Ibid s 91.8.

<sup>117</sup> Ibid s 91.11.

<sup>118</sup> Ibid s 91.12.

<sup>119</sup> National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017 proposed sections 91.1, 91.2, 91.3, 91.6, 91.8, 91.11 and 91.12.

144. The information utilised in these situations may concern Australia's broadly defined national security or advantage the national security of a foreign country and fall outside the defence of having been released by authority of the Commonwealth without being unduly sensitive. It may also be the sort of information that well-informed journalists, academics and consultants of all sorts routinely have access to. Individual citizens exercising freedom of speech on government or political matters may also be captured. The foreign country or foreign principal may also be from a country considered to be an ally of Australia (although this situation may arise less frequently where Australia's allies have fewer state owned companies or enterprises).
145. Similarly, it is not clear that the defence in proposed paragraph 91.4(1)(a) (in accordance with a law of the Commonwealth) would be available in these kinds of situations if the defendant is unable to point to a specific law of the Commonwealth that they acted in accordance with (noting the proposed evidential burden of proof on the defendant).
146. Similarly, whistleblowers or journalists revealing harmful conditions in detention centres, misconduct or corruption or reporting on politics or economics could potentially be captured by the provisions. In the absence of any defence under the Bill that the disclosure of information at issue is in the public interest, the offence provisions could have a significant chilling effect on the freedom of media outlets to publish information relating to Australia's national security.
147. In circumstances where reporting on politics occurs for example regarding Australia's elections and the reporting results or will result in the information or article being made available to a foreign principal or a person acting on behalf of a foreign principal, a question arises as to the extent that this may be inconsistent with the implied right to freedom of political communication.<sup>120</sup> The current and proposed checks and balances may not be sufficient to ameliorate this concern.<sup>121</sup>
148. The difficulty is that the offence provisions are not necessarily limited to sensitive Commonwealth information and may also include situations where the information or article is unclassified material. It is possible for any person who has information or an article concerning Australia's national security (broadly defined) or information that may be subject to a security classification (without the defendant knowing it is subject to such) who deals with the information in a way that it does or will result in it being made available to a foreign principal or a person acting on behalf of a foreign principal being captured by the offences.
149. These problems are exacerbated by:
- there being no requirement of actual harm caused;
  - the proposed aggravated espionage offence in proposed section 91.6 – which does not require that the person knows that the information or an article has a security classification of secret or above; that the information is from a foreign

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<sup>120</sup> *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Australian Capital Television Pty Ltd and New South Wales v Commonwealth* (1992) 177 CLR 106; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.

<sup>121</sup> Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth* (2014), available online at <<https://www.cdpp.gov.au/publications/prosecution-policy-commonwealth>>; National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017 proposed section 93.1 which would require the Attorney-General's consent prior to the institution of the proceedings against a person for an offence against Part 5.2 'Espionage and related offences'.

intelligence agency; that the 5 or more records or articles had a security classification;

- the proposed espionage on behalf of a foreign principal offence in proposed section 91.8 – which would find a person guilty of an offence subject to a 25 or 20 year imprisonment term for dealing with information or an article which may come under the definition of ‘national security’ in a way that they intend to advantage for example a foreign client which may be a state owned company and guilty of an offence if they are reckless as to whether *any other person* engages in an espionage offence. Under proposed subsection 91.8(3) there is no requirement even that the person intended or was reckless as to whether their conduct will prejudice Australia’s ‘national security’ or advantage the ‘national security’ of a foreign country. A person may be subject to a term of imprisonment for 15 years;
- the proposed offence of soliciting or procuring an espionage offence or ‘making it easier to do so’ in proposed section 91.11 – this could capture a foreign government or state owned company (a client) that seeks to establish a relationship with an Australian economist or range of consultancy services (who is not a Commonwealth officer or Australian Government employee) for the purpose of obtaining information regarding what Australian companies may be worth investing in. The broad prosecutorial and enforcement discretion arising from the preliminary nature of these offences is further extended by the ambiguity of key terms such as ‘making it easier to solicit or procure’. The Law Council does not consider that such an offence is needed in light of the availability of attempt under section 11.1 for the espionage offences in proposed sections 91.1, 91.2, 91.3, 91.6 and 91.8;
- the proposed offence of preparing for, or planning, an offence against subdivision A (espionage) or B (espionage on behalf of a foreign principal) in proposed section 91.12, the Law Council’s concerns regarding preparatory offences occurring too early in the course of wrongdoing have been noted above and similarly apply in this context. Further, the Law Council does not consider that such an offence is needed in light of the availability of attempt under section 11.1 for the espionage offences in proposed sections 91.1, 91.2, 91.3, 91.6 and 91.8; and
- the inadequacy of defences to capture *bona fide* business dealings and persons acting in good faith. The Law Council notes that there are no defences for journalists reporting or for individuals discussing domestic or international politics or economics. In contrast, in new Division 122 (secrecy offences) there is a defence specifically applying to journalists engaged in fair and accurate reporting in the public interest.

150. For the above reasons, the Law Council makes the following recommendations.

**Recommendations:**

- **The proposed new espionage offences in the Bill should not proceed. If this is not to be accepted, the Law Council makes the following recommendations:**
  - **The proposed new espionage offences should regulate the dealing with ‘Commonwealth information’ which may be defined as information to which a person has, or had, access by reason**



of his or her being, or having been, a Commonwealth officer or received from a Commonwealth officer.<sup>122</sup>

- The proposed new espionage offences should require (as a minimum for ‘outsiders’) that the dealing with information did, or was reasonably likely to, or intended to prejudice Australia’s national security or advantage the national security of a foreign country.
- In the absence of an express harm requirement, the offences should cascade in penalty and require that a person knew, or as a lesser offence, was reckless as to whether, the protected information falls within a particular category (i.e. security classification or concerns Australia’s national security), and should not provide that strict liability applies to that circumstance.<sup>123</sup>
- Defences should be introduced to capture *bona fide* business dealings and persons acting in good faith. A defence should also be introduced for prior publication where the offences do not apply to a person dealing with the information if:
  - (a) the information has already been communicated, or made available, to the public (the *prior publication*); and
  - (b) the person was not involved in the prior publication (whether directly or indirectly); and
  - (c) at the time of the disclosure, the person believes that the disclosure:
    - (i) will not endanger the health or safety of any person; and
    - (ii) will not prejudice Australia’s national security or advantage the national security of a foreign country; and
  - (d) the person has reasonable grounds for that belief.
- Consideration should be given as to whether the proposed maximum penalties for the espionage offences which range between 15 years to life imprisonment are too high. The necessity of more than doubling the previous maximum term of seven years must be demonstrated to be necessary and proportionate.

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<sup>122</sup> See e.g. Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009) 255, Recommendation 6-3, p. 10.

<sup>123</sup> National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017, proposed sections 91.1, 91.3, 91.6, 91.11 and 91.12.

## Foreign interference

151. Schedule 1 of the Bill would introduce new foreign interference offences into Division 92 into Part 5.2 of the Criminal Code. These offences are designed to:

*... complement the espionage offences by criminalising a range of other harmful conduct undertaken by foreign principals who seek to interfere with Australia's political, governmental or democratic processes, to support their own intelligence activities or to otherwise prejudice Australia's national security.*<sup>124</sup>

152. The offences would apply where a person's conduct is covert or deceptive, involves threats or menaces or does not disclose the fact that conduct is undertaken on behalf of a foreign principal. New Division 92 would also criminalise the provision of support or funding to foreign intelligence agencies. The proposed new foreign interference offences would include:

- offence of intentional foreign interference for interference generally (imprisonment for 20 years) or interference involving a targeted person (imprisonment for 20 years);
- offence of reckless foreign interference for interference generally (imprisonment for 15 years) or interference involving a targeted person (imprisonment for 15 years);
- offence of preparing for a foreign interference offence (imprisonment for 10 years);
- knowingly supporting a foreign intelligence agency (imprisonment for 15 years);
- recklessly supporting a foreign intelligence agency (imprisonment for 10 years);
- knowingly funding or being funded by a foreign intelligence agency (imprisonment for 15 years); and
- recklessly funding or being funded by a foreign intelligence agency (imprisonment for 10 years).

153. The Law Council does not support the proposed foreign interference offences in their current form.

154. Definitional issues have been identified above with regard to 'national security' and 'foreign intelligence agency'.

155. In addition, in regards to the proposed foreign interference offences in Division 92, Subdivision B, the Law Council is concerned about the possibility of investigative journalists or ordinary citizens being captured. For example, an investigative journalist or a citizen exercising the freedom of expression may engage in 'covert' conduct to influence the exercise of an Australian democratic or political right in collaboration with a person acting on behalf of a foreign principal.

156. The Explanatory Memorandum explains that:

*The reference to 'covert' is intended to cover any conduct that is hidden or secret, or lacking transparency. For example, conduct may be covert if a*

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<sup>124</sup> Explanatory Memorandum, National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017, [9].

*person takes steps to conceal their communications with the foreign principal, such as deliberately moving onto encrypted communication platforms when dealing with the foreign principal, meeting in a concealed location, communicating by coded messages, or leaving communications in a concealed location for collection by the foreign principal. Conduct may also be covert if the defendant copies documents or listens into private conversations without the targeted person's knowledge or consent, and then passes that information to a foreign principal.*<sup>125</sup>

157. While circumstances of investigative journalism on behalf of or in collaboration with a foreign principal or person acting on behalf of a foreign principal may in practice be rare, the Law Council considers that there should be a defence available for persons acting in the public interest for the foreign interference offences in proposed Division 92, Subdivision B.
158. The Law Council is concerned about the possible interaction of the proposed foreign interference offences with the Foreign Influence Transparency Scheme Bill 2017. If enacted, the Foreign Influence Transparency Scheme Bill 2017 would create criminal offences for intentionally or recklessly not registering under the scheme. Strict liability offences are in place for registrants that fail to notify the Secretary of material changes, report on certain activities, or keep adequate records of activities. A person who is found guilty for one of these strict liability offences may be considered to be operating in a 'deceptive' manner for the purposes of the proposed foreign interference offences. The Law Council considers that the Explanatory Memorandum to the Bill should make clear that a finding of guilt in relation to the Foreign Influence Transparency Scheme Bill 2017 will not necessarily amount to a finding of guilt in relation to the proposed foreign interference offences in the Bill. The intersection between the two Bills should be clarified in the Explanatory Memorandum.
159. The Law Council does not support the proposed offence of preparing for a foreign interference offence in section 92.4 for reasons outlined above. The Law Council considers that it would be preferable to rely on ancillary provisions in the Criminal Code relating to attempt.
160. In regards to proposed Subdivision C of Division 92 seeking to criminalise the provision of support or funding to or being funded by 'foreign intelligence agencies', the Law Council does not support the offences as they require no intention or recklessness with regards to prejudicing Australia's national security. The imposition of such a requirement would not create undue overlap with the espionage offence provisions which are limited to the dealing with information or an article or the treason offence which requires an enemy to be engaged in armed conflict involving the Commonwealth or the ADF.
161. The proposed Subdivision C of Division 92 offences are broad such that, for example, an Australian honours graduate who obtains employment for New Zealand intelligence would appear to be caught by proposed section 92.7 (knowingly supporting a foreign intelligence agency). A person that receives funds directly or indirectly from, for example, the Central Intelligence Agency would be subject to the provisions.
162. The proposed offences in sections 92.7 and 92.8 (relating to support for a foreign intelligence agency) do not require that the person intend or be reckless as to whether the support or resources would help the organisation to directly or indirectly

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<sup>125</sup> Ibid [989].

engage in, preparing, planning, assisting in or fostering an act prejudicial to Australia's security. It is sufficient that the support or resources are provided and the person knows that the organisation is a foreign intelligence agency. In contrast, section 102.7 of the Criminal Code requires that person intend or be reckless as to whether the support or resources would help the organisation to directly or indirectly engage in, preparing, planning, assisting in or fostering a terrorist act. In this respect, the Law Council considers that there should as a minimum be a requirement that the person intend or be reckless as to whether the support or resources would help the organisation to directly or indirectly engage in, preparing, planning, assisting in or fostering an act or activities prejudicial to Australia's security.

163. The proposed offences in sections 92.9 and 92.10 (relating to funding or being funded by a foreign intelligence agency) do not require that the person is reckless as to whether the funds will be used to facilitate or engage in activities prejudicial to Australia's national security. In contrast, the financing terrorism offences in the Criminal Code require that the person is reckless as to whether the funds will be used to facilitate or engage in a terrorist act.<sup>126</sup> The proposed offences in sections 92.9 and 92.10 (relating to funding or being funded by a foreign intelligence agency), unlike the financing terrorism offences, also apply to the obtaining of funds. However, there is no requirement that the obtaining of funds will be used to facilitate or engage in activities prejudicial to Australia's national security or amount to undue influence. The Law Council considers that this should be a minimum requirement.

**Recommendations:**

- **A defence for persons acting in the public interest should be provided for the proposed foreign interference offences in Division 92, Subdivision B.**
- **The preparing for a foreign interference offence in section 92.4 should not proceed. Instead, the ancillary provisions of the Criminal Code for incitement, conspiracy and attempt should be relied upon.**
- **The proposed offences in sections 92.7 and 92.8 (relating to support for a foreign intelligence agency) should cascade in penalty and require that the person knew, or as a lesser penalty, was reckless as to whether the support or resources would help the organisation to directly or indirectly engage in, preparing, planning, assisting in or fostering an act prejudicial to Australia's security.**
- **The proposed offences in sections 92.9 and 92.10 (relating to funding or being funded by a foreign intelligence agency) should require that the person is reckless as to whether the funds will be used to facilitate or engage in activities prejudicial to Australia's national security or, in the case of obtaining funds, involve undue influence.**
- **The Explanatory Memorandum to the Bill should clarify the intersection between the proposed foreign interference offences in the Bill and those in the Foreign Influence Transparency Scheme Bill 2017.**

<sup>126</sup> *Criminal Code Act 1995* (Cth), ss 103.1(1)(b), 103.2(1)(b).

## Theft of trade secrets on behalf of a foreign government

164. Proposed section 92A.1 of the Bill would introduce a ‘theft of trade secret offence’ for where a person dishonestly receives, obtains, takes, copies or duplicates, sells, buys or discloses information in specific circumstances, as provided for by proposed paragraphs 92A.1(1)(b) and (c).<sup>127</sup> The new offence would apply to dishonest dealings with trade secrets on behalf of a foreign government principal.
165. The Explanatory Memorandum to the Bill notes that the ‘theft of trade secrets amounts to economic espionage and can severely damage Australia’s national security and economic interests’.<sup>128</sup>
166. In the Law Council’s view, where there has been a theft of a ‘trade secret,’ the responsibility for enforcement should generally rest on the aggrieved individual or organisation. In such a case, civil measures for enforcement are more appropriate than imposing criminal sanctions on a guilty party, given the expense to the public associated with bringing a claim on behalf of an individual business or firm. The Law Council notes the following difficulties with criminalising the theft of trade secrets:
- there is a lack of evidence that such criminalisation would be likely to prove a significantly greater deterrent than civil law;<sup>129</sup>
  - the risk of greater publicity about loss of trade secrets brought about by criminal trials could deter many victims of industrial espionage from complaining to the authorities; and
  - criminal sanctions themselves would not actually compensate the owners of trade secrets for their loss.<sup>130</sup>
167. The Law Council notes that other comparable jurisdictions, such as the United Kingdom, do not have a trade secrets criminal offence.<sup>131</sup>
168. The limitation of the proposed offence to thefts involving ‘foreign government principals’ does not appear justified. Prosecution of the offence will require that a person be subject to a charge. The Explanatory Memorandum does not appear to provide sufficient justification as to why particular kinds of individuals that engage in thefts of trade secrets should be subject to a serious criminal offence when others are not.
169. The Law Council does not therefore support the proposed theft of trade secrets offence in proposed section 92A.1 of the Bill.

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<sup>127</sup> *Criminal Code Act 1995* (Cth) s 5.6 applies the automatic fault element of intention to this paragraph. For this paragraph, the prosecution must prove beyond reasonable doubt that the defendant intended to dishonestly receive, obtain, take copy or duplicate, sell buy or disclose information. Information is defined by *Criminal Code* s 90.1 to mean information of any kind, whether true or false and whether in a material form or not and includes an opinion and a report of a conversation.

<sup>128</sup> Explanatory Memorandum, National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017, p. 27.

<sup>129</sup> See Gillian Dempsey, ‘Industrial Espionage: Criminal or Civil Remedies’ (1999) *Australian Institute of Criminology: Trends and Issues in Criminal Justice*, available online at <[http://www.aic.gov.au/media\\_library/publications/tandi\\_pdf/tandi106.pdf](http://www.aic.gov.au/media_library/publications/tandi_pdf/tandi106.pdf)>.

<sup>130</sup> *Ibid.*

<sup>131</sup> *Protecting trade secrets under English law* (2015), available online at <<http://www.osborneclarke.com/insights/protecting-trade-secrets-under-english-law/>>.

**Recommendation:**

- **The proposed offence of theft of trade secrets involving a foreign government principal should not proceed.**

## Damaging Commonwealth Property

170. The Law Council considers that the proposed damaging Commonwealth property offence is more appropriately framed in accordance with the Criminal Code model than the existing offence of destroying or damaging Commonwealth property at section 29 of the Crimes Act.
171. Proposed section 132.8A would insert a new offence where:
- a person intentionally engages in conduct; and
  - the person's conduct results in damage to, or the destruction of, property and the person is reckless as to this element; and
  - the property belongs to a Commonwealth entity (subsection 132.8A(2) applies absolute liability to this element meaning that no fault element needs to be proved and the defence of mistake of fact is unavailable).
172. This new offence would carry a maximum term of imprisonment of 10 years, as is currently the penalty for section 29 of the Crimes Act.<sup>132</sup>
173. As noted in the Explanatory Memorandum to the Bill, the term damage is intended to have its ordinary meaning and would include conduct that impairs the value, usefulness, or normal functioning of the property, or have some other type of detrimental effect on the property.<sup>133</sup>
174. This offence may include conduct such as graffiti on a building, damaging a plate glass door,<sup>134</sup> damage to a police car,<sup>135</sup> damage to an immigration detention centre,<sup>136</sup> or damage or destruction of Commonwealth infrastructure. The Law Council considers that a court would be likely to apply a sentence that matched the gravity of the particular conduct concerned.

## Secrecy of information

175. Secrecy laws and the need to protect sensitive government information must be balanced with freedom of speech and the constitutional implied freedom of political communication.
176. The Law Council considers that there must be some balance between the desirability of open government and the legitimate public interest in protecting some

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<sup>132</sup> Explanatory Memorandum, National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017, p. 207.

<sup>133</sup> *Ibid* p. 208.

<sup>134</sup> *R v Loewenthal; Ex parte Blacklock* (1974) 131 CLR 338.

<sup>135</sup> *Re R v Allan Christopher Ward* [1985] FCA 469.

<sup>136</sup> See e.g. *Al-Saleh v Clarkson* [2002] WASCA 122; *Shams v Clarkson* [2002] WASCA 121.

information from disclosure, for reasons including national security, defence, international relations, and privacy considerations.

177. However, criminal sanctions for disclosure of information should only be used when strictly required for the effective functioning of government.<sup>137</sup>
178. Currently, sections 70 and 79 of the Crimes Act deal with disclosure of information by Commonwealth officers and official secrets respectively.
179. Item 6 of Schedule 2 of the Bill would insert a new Part 5.6 to the Criminal Code, entitled 'Secrecy of information'. New Part 5.6 would contain the new general secrecy offences, replacing Parts VI and VII of the Crimes Act. This Part would provide for:
- offences of inherently harmful information in proposed section 122.1 (penalties ranging from 5-15 years imprisonment depending on relevant fault and physical elements);
  - an offence of conduct causing harm to Australia's interests in proposed section 122.2 (penalties ranging from 5-15 years imprisonment depending on relevant fault and physical elements);
  - aggravated offences for inherently harmful information and conduct causing harm to Australia's interests in proposed section 122.3 (penalties ranging from 10-20 years imprisonment); and
  - an offence of unauthorised disclosure of information by Commonwealth officers and former Commonwealth officers in proposed section 122.4 (imprisonment for 2 years).
180. The basic difficulty with the first three offence provisions is that they cover a broad range of conduct relating to non-specific interests which may or may not be in the public interest. This means that while some information may justifiably be subject to a secrecy offence provision, there may be a ban on a broader range of communications or dealings with information beyond a clear and specific public interest.
181. The offence provisions themselves do not distinguish between journalists and others (outsiders) and insiders (being Commonwealth officers). The application of the broad secrecy prohibitions to outsiders is not adequately justified.
182. The information that is made or obtained by a person by reason of his or her being, or having been, a Commonwealth officer or otherwise engaged to perform work for a Commonwealth entity may be justifiably subject to general secrecy provisions. However, the proposed secrecy provisions do not appear justified as they do not contain adequate safeguards for protecting the rights of outsiders. This impacts on the necessity and proportionality of the proposed offences.
183. Laws that engage the freedom of expression must be necessary and proportionate to the protection of specific public interests.<sup>138</sup> The proposed secrecy provisions in the Bill, due to their breadth, are arguably inconsistent with article 19 of the ICCPR and not in accordance with Australia's international obligations. They may also

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<sup>137</sup> Law Council of Australia, *Submission to the Australian Law Reform Commission, Secrecy Laws and Open Government in Australia*, 27 February 2009, [3-4].

<sup>138</sup> International Covenant on Civil and Political Rights, 16 December 1966, [1980] ATS 23, (entered into force generally on 23 March 1976), Article 19(3).

arguably be invalid on the basis that they infringe the constitutional protection of freedom of political communication.

184. Given the history of these secrecy provisions in the Crimes Act,<sup>139</sup> the Law Council urges this Committee to await the PJCHR's assessment of the Bill for its impact on freedom of speech before completing its inquiry and if necessary, extend the opportunity to make submissions in response to the information obtained. Any issues identified by the PJCHR should be addressed prior to enactment.
185. The Law Council supports the position of the ALRC in the Secrecy Report. In this Report, the ALRC generally:
- recommended that a general secrecy offence be established for behaviour that harms, is reasonably likely to harm or intended to harm, essential public interests;
  - accepted that harm was implicit in any disclosure of information obtained or generated by intelligence agencies;
  - accepted that specific secrecy offences could be justified in this context (the ALRC recommended that many secrecy offences be abolished and a new general secrecy offence be created);
  - recognised in this context a distinction between secrecy offences directed specifically at insiders (who have special duties to maintain secrecy) and those capable of applying to all persons; and
  - recommended that secrecy offences capable of applying to persons other than insiders have an express harm requirement.<sup>140</sup>
186. These principles were recently affirmed by the second INSLM in his analysis of section 35P of the ASIO Act. The second INSLM made recommendations regarding the specific secrecy offence relating to special intelligence operations which were subsequently adopted through amendments to the provision.
187. In addition, the ALRC recommended that:
- the conduct proposed to be regulated by the general secrecy offences should capture 'disclosures of Commonwealth information';<sup>141</sup> and
  - the general secrecy offences carry a maximum penalty 7 years imprisonment. The Law Council notes that the second INSLM permitted a maximum 10 year penalty in relation section 35P of the ASIO Act.
188. These principles do not appear to have been followed in the drafting of the proposed secrecy offences.

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<sup>139</sup> The Australian Law Reform Commission recommended that the general secrecy offences in sections 70 and 79 of the *Crimes Act 1914* (Cth) were in need of review as to whether they unjustifiably limit freedom of speech (Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, Report No 129 (2016), p. 126). The Parliamentary Joint Committee on Human Rights also supported such a review (Parliamentary Joint Committee on Human Rights, *Freedom of Speech in Australia* (2017) [5.25]).

<sup>140</sup> See also Roger Gyles AO QC, *Section 35P of the ASIO Act* (2016), available online at <<https://www.inslm.gov.au/sites/default/files/files/impact-s35p-journalists.pdf>> p. 18.

<sup>141</sup> Explanatory Memorandum, National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017, proposed sections 122.1 – 122.4 broadly covers the following conduct: communicating information; dealing with information; removing information from a proper place of custody; holding the information outside a proper place of custody for the information; or failure to comply with a direction regarding the retention, use or disposal of information.



189. The Law Council considers that the first three proposed new categories of secrecy offences relating to inherently harmful information, conduct causing harm to Australia's interests and the aggravated offence should distinguish between 'insiders' and 'outsiders' as noted by the second INSLM in relation to section 35P of the ASIO Act.<sup>142</sup> This is because 'insiders' owe a duty of confidence above that of 'outsiders'.<sup>143</sup>
190. As currently drafted, for the inherently harmful information or conduct causing harm to Australia's interests offences, an outsider may receive the same penalty as a Commonwealth officer.
191. Similarly, for the aggravated offence, an outsider may be subject to the aggravated offence (subject to certain circumstances existing) as would an insider who held an Australian Government security clearance.
192. The offence provisions should be redrafted in a manner which is consistent with the ALRC's Secrecy Report and the second INSLM's section 35P ASIO report.
193. Further, as noted above in relation to the proposed espionage offences, in the absence of an express harm requirement, the proposed secrecy offences should cascade in penalty and require that a person knew, or as a lesser offence, was reckless as to whether, the protected information falls within a particular category (i.e. security classification or concerns Australia's national security), and should not provide that strict liability applies to that circumstance.

**Recommendations:**

- **The proposed general secrecy offences in the Bill should be amended in a manner which is consistent with the ALRC's Secrecy Report and the second INSLM's section 35P of the ASIO Act report. If this is not to be accepted, the Law Council makes the below recommendations:**
  - **in the absence of an express harm requirement, the offences should cascade in penalty and require that a person knew, or as a lesser offence, was reckless as to whether, the protected information falls within a particular category (i.e. security classification or concerns Australia's national security), and should not provide that strict liability applies to that circumstance.**
  - **The secrecy of information offence provisions should be redrafted to treat insiders and outsiders separately to improve the proportionality of the measures.**
  - **The secrecy of information offence provisions should be redrafted to distinguish between intentional and reckless conduct regarding the communication or dealing with inherently harmful information or causing harm to Australia's interests.**

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<sup>142</sup> Roger Gyles AO QC, *Section 35P of the ASIO Act* (2016), available online at: <https://www.inslm.gov.au/sites/default/files/files/impact-s35p-journalists.pdf> p. 2.

<sup>143</sup> *Ibid* p. 23.

## Harm requirement

194. The proposed secrecy offences assume that harm is implicit in communication or dealing with certain categories of information. These categories are listed under proposed section 121.1 relating to the definitions of ‘cause harm to Australia’s interests’ and ‘inherently harmful information’.

195. The problem with such categories is that they extend considerably beyond the essential public interests that the ALRC identified for new general secrecy offences. The ALRC recommended that secrecy offences should be ‘reserved for behaviours that harms, is reasonably likely to harm or intended to harm essential public interests’.<sup>144</sup> The ALRC noted that the general secrecy offence should be limited to ‘unauthorised disclosures’ that are likely to:

- damage the security, defence or international relations of the Commonwealth;
- prejudice the prevention, detection, investigation, prosecution or punishment of criminal offences;
- endanger the life or physical safety of any person; or
- prejudice the protection of public safety.<sup>145</sup>

196. In contrast, the proposed general secrecy offence provisions would relate to communications of, or dealings with, information relating to one of the many listed categories in proposed section 121.1 relating to the definitions of ‘cause harm to Australia’s interests’ and ‘inherently harmful information’.

197. This approach is problematic for at least two reasons:

- the harm to the above essential public interests is not necessarily implicit in the prescribed categories of information; and
- the offence provisions do not distinguish between insiders and outsiders and include an express harm requirement for outsiders.

198. A large and imprecise range of information would be captured by the offence provisions some of it with no likely prejudicial impact on Australia’s interests. The below examples may assist in demonstrating the breadth of the proposed provisions:

- A journalist receives an unexpected envelope from a known Commonwealth officer. The envelope contains a copy of a security classified document. While the document has a protected security marking, the journalist reads the document and considers that its contents are innocuous. The journalist shreds the document and no further use is made of it. The mere fact of the journalist receiving the document and possessing it would come within the ‘dealing with’ ‘inherently harmful information’ proposed offence provisions. A question may also arise as to whether the destruction of the document in such circumstances would amount to ‘concealing’ the information which is also captured by the broad definition of ‘dealing with’. It is questionable that the proposed defence in subsection 122.5(6) would apply in such circumstances as it may not be considered that they dealt with the information in the public interest or in their capacity as a journalist engaged in fair and accurate reporting.

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<sup>144</sup> Ibid p. 23.

<sup>145</sup> Ibid p. 23.

- A client may be subject a theft of a trade secret involving a foreign government principal. Information may have been disclosed by an Australian law enforcement or intelligence agency as to how the theft occurred and what measures the client should take to protect themselves in future from similar abuses. The client may relate information to a lawyer in the course of seeking legal advice for a possible civil claim. Both the client and the lawyer may be subject to the inherently harmful information secrecy offences.

199. The likely impact is uncertainty as to how information may be communicated or dealt with without fear of prosecution. The provisions may have a chilling effect on dissemination of material about security with no relevant connection to the categories of information captured by the provisions.
200. Ministers of State, journalists, whistleblowers or individuals engaging in free speech may be subject to the proposed offences in certain circumstances notwithstanding the availability of proposed defences.
201. As noted, the Law Council supports updating the outmoded general secrecy offences in the Crimes Act in a manner consistent with the ALRC's Secrecy Report. However, if this is not accepted by the Committee, several issues need to be addressed prior to enactment of the proposed secrecy offences to ensure the proportionality and necessity of the offences. These are discussed below.

#### Causing harm to Australia's interests

202. The proposed offences in section 122.2 would rely on a definition of 'causing harm to Australia's interests' in proposed section 121.1. The categories of information, however, (as noted) are not 'reserved for behaviours that harms, is reasonably likely to harm or intended to harm essential public interests'.<sup>146</sup> They extend well beyond 'unauthorised disclosures' that are likely to:
- damage the security, defence or international relations of the Commonwealth;
  - prejudice the prevention, detection, investigation, prosecution or punishment of criminal offences;
  - endanger the life or physical safety of any person; or
  - prejudice the protection of public safety.<sup>147</sup>
203. The proposed categories extend for example to the below conduct.

#### *Interference*

204. A mere 'interference' rather than damage or prejudice is required for:
- the prevention, detection, investigation, prosecution or punishment of a criminal offence against or a contravention of a provision that is subject to a civil penalty of a law of the Commonwealth; or
  - the performance of functions under the Australian Federal Police's (AFP) protective or custodial functions or the POCA.

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<sup>146</sup> Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009) 255, p. 23.

<sup>147</sup> *Ibid.*

205. An interference is a much lower threshold, and depending on how it is interpreted, may extend to a broad range of conduct, including innocuous conduct. In this regard, the Law Council's *Policy Statement on Rule of Law Principles* assert that 'offence provisions should not be so broadly defined that they inadvertently capture a wide range of benign conduct'.<sup>148</sup>

*Civil penalty contraventions and proceeds of crime legislation*

206. Cause harm to Australia's interests includes interference or prejudice of the prevention, detection, investigation, prosecution and punishment of contraventions of Commonwealth civil penalty provisions. Cause harm to Australia's interests also includes interfering with or prejudicing the performance of the functions of the AFP under the POCA. As noted in the Explanatory Memorandum, such an extension goes beyond the recommendation of the ALRC which considered that it would be more appropriate to rely on specific secrecy provisions in the POCA.<sup>149</sup>

207. This would involve applying a criminal secrecy offence (proposed section 122.2) which may carry a 5 or 15 year term of imprisonment (for the aggravated offence) to what is a civil penalty issue which may not involve a serious breach of the law. This is a disproportionate measure to the problem which the Parliament has identified in certain situations as not so serious as to carry a criminal offence for the substantive contravention. As a minimum, the provision should be limited to contraventions of serious Commonwealth civil penalty provisions which attract an equivalent civil penalty of 3 years imprisonment.<sup>150</sup>

208. This definition becomes more problematic when a mere 'interference' is involved which as noted may not in fact cause harm, or be reasonably likely to cause harm, to Australia's interests.

209. The Law Council supports the position of the ALRC on how the general secrecy offence should be limited and confined. The ALRC observed that in circumstances where disclosures breach a civil law statute are serious enough as to warrant the protection of the criminal law, specific offences should be introduced for these. Moreover, the ALRC recommended that the general secrecy offence should not extend to:

- unauthorised disclosures of information that would prejudice the enforcement of laws relating to the confiscation of the proceeds of crime, or the protection of the public revenue as taxation law and proceeds of crime legislation already contain specific secrecy offences targeting Commonwealth information in those contexts;
- unauthorised disclosures of information that would prejudice the prevention, detection, investigation, prosecution or punishment of a breach of a law imposing penalties or sanctions that are not criminal as it would be excessive to impose criminal sanctions in the general secrecy offence for disclosures of information that threaten civil or administrative processes.<sup>151</sup>

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<sup>148</sup> Law Council of Australia, *Policy Statement on Rule of Law Principles* (March 2011) Principle 1, p. 2, at <http://www.lawcouncil.asn.au/lawcouncil/index.php/divisions/international-division/rule-of-law>.

<sup>149</sup> Explanatory Memorandum, National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017, p. 223, [1289].

<sup>150</sup> See section 15GE *Crimes Act 1914* (Cth) which defines a 'serious Commonwealth offence' for the purposes of that Part as involving a matter in s 15GE(2) and which is punishable on conviction by a period of imprisonment of three years or more.

<sup>151</sup> Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009) 255, pp. 157-158.

210. However, the ALRC recognised that there could be circumstances in which the disclosure of information that contravenes civil law provisions may warrant criminal sanctions. The ALRC cited the example of corporate regulation where serious penalties are imposed for serious breaches of the law, for example where the *Australian Securities and Investments Commission (ASIC) Act 2001 (Cth)* makes it an offence to use or disclose records of witness examinations made in the course of an investigation except in compliance with the conditions imposed by ASIC.

211. The Law Council supports this position of the ALRC.

*Harm or prejudice to Australia's international relations 'in any other way'*

212. Proposed paragraph 121.1(d) would define the phrase 'causing harm to Australia's interests' to mean 'harm or prejudice Australia's international relations in any other way'.

213. The Explanatory Memorandum to the Bill notes a range of categories which may include harm or prejudice to Australia's international relations. These categories include (but are not limited to):

- a reduction in the quantity or quality (sic) of information provided by a foreign government or international organisation; or
- intangible damage to Australia's reputation or relationships between the Australian Government and a foreign government or international organisation, or between officials.<sup>152</sup>

214. However, 'intangible damage' is referred to in a manner which is not consistent with how 'intangible damage' has been interpreted by the courts. This inconsistency may create uncertainty with regards to how 'in any other way' is interpreted.

215. In the context of freedom of information, the term 'damage to international relations' can include intangible or speculative damage, such as the loss of trust and confidence in the Australian Government or damage to Australia's reputation.<sup>153</sup> In *Re Maher and Attorney-General's Department*, the Administrative Appeals Tribunal found that, while such damage might be difficult to assess, it is still contemplated by the term.<sup>154</sup> However, in the Explanatory Memorandum, 'loss of confidence or trust' is noted as a separate part of the concept of 'harming or prejudicing Australia's international relations'.<sup>155</sup>

216. For the purposes of proposed paragraph 121.1(d), the Explanatory Memorandum should clarify what may amount to 'intangible damage' and be amended to note a reduction in the 'quantity or quality of information provided by a foreign government or international organisation' (emphasis added).

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<sup>152</sup> Explanatory Memorandum, National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017, p. 223 [1298].

<sup>153</sup> Office of the Australian Information Commissioner, *Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982*, [5.37].

<sup>154</sup> *Re Maher and Attorney-General's Department* (1985) 7 ALD 721, [40]. The AAT also noted its decision in *Re Bui and Department of Foreign Affairs and Trade* (2005) 85 ALD 793 in which it held that 'damage to international relations' refers to 'Australia's ability to maintain good working relations with other overseas governments and to protect the flow of confidential information between Australia and other governments'.

<sup>155</sup> Explanatory Memorandum, National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017, p. 224 [1298].

217. Similar issues arise in the context of proposed paragraph 121.1(1)(e) of the Explanatory Memorandum (relating to harming or prejudicing relations between the Commonwealth and a State or Territory).

**Recommendations:**

- **The phrase ‘interfering with’ should be removed from proposed paragraphs 121.1(a) and (b) of the Bill.**
- **The phrase ‘contravention of a provision, that is subject to a civil penalty, of’ should be removed from proposed subparagraph 121.1(1)(a)(ii). As a minimum the provision should be limited to contraventions of serious Commonwealth civil penalty provisions which attract an equivalent civil penalty of 3 years imprisonment.**
- **The POCA should be removed from proposed subparagraph 121.1(1)(b)(ii).**
- **For the purposes of proposed paragraphs 121.1(d) and (e), the Explanatory Memorandum should clarify what may amount to ‘intangible damage’ and be amended to note a reduction in the ‘quantity or quality of information provided by a foreign government or international organisation’ (emphasis added).**

**Inherently harmful information**

218. The proposed offences in section 122.1 would rely on a definition of ‘inherently harmful information’ in proposed section 121.1. ‘Inherently harmful information’ would mean information that is any of the following:

- (a) security classified information;
- (b) information the communication of which would, or could reasonably be expected to, damage the security or defence of Australia;
- (c) information that was obtained by, or made by or on behalf of, a domestic intelligence agency or a foreign intelligence agency in connection with the agency’s functions;
- (d) 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; and
- (e) information relating to the operations, capabilities or technologies of, or methods or sources used by, a domestic or foreign law enforcement agency.

219. The Explanatory Memorandum notes that:

*The definition [of inherently harmful information] exhaustively lists categories of information that are inherently harmful, in the sense that:*

- *communicating such information;*
- *otherwise dealing in such information;*
- *removing such information from, or holding such information outside, a proper place of custody for the information; or*

- *failing to comply with a lawful direction regarding the retention, use or disposal of such information,*

***will, or would reasonably be expected to, cause harm to essential public interests of the Commonwealth*** (emphasis added).<sup>156</sup>

220. However, the Law Council notes that the categories of 'inherently harmful information' may not, depending on the circumstances of the case, amount to a matter that would, or would be reasonably likely to, cause harm to a public interest of the Commonwealth.
221. The definition in paragraphs (c) and (e) above do not require that communication of or dealings with such information would, or would be reasonably likely to, cause harm to an identifiable public interest of the Commonwealth. Information obtained by or made on behalf of a foreign intelligence agency in connection with the agency's functions does not necessarily involve a harm to Australia's interests. Similarly, information relating to the operations, capabilities or technologies of, or methods used by, a foreign law enforcement agency, may not involve a harm to Australia's interests. The Law Council considers that such provisions relating to foreign intelligence agencies and foreign law enforcement agencies should be redrafted to make it clear that the information would, or would be reasonably likely to, harm one of the four essential public interests identified by the ALRC (noted above).
222. In the absence of such a harm requirement, a person may be found guilty of a serious offence for example by revealing some misconduct or action undertaken by a domestic law enforcement agency that they are aware of due to personal experience. For example, a person that is charged with an offence or the subject of a civil proceeding may be subject to inappropriate conduct by a domestic law enforcement agency. The misconduct may be disclosed during the process of a court hearing and relate to the agency's operations. The information may not be subject to a suppression order. Nonetheless, subsequent to the trial the person may reveal to the media the circumstances of the case. It is not apparent that this subsequent disclosure would be covered by the proposed defences as the person may have been involved in the prior publication to the court.
223. The Law Council considers that criminal offences should not be so broadly framed as to capture benign conduct. Citizens should not be exposed to the risk of being charged with an offence and put through the distress of having to defend their right to speak freely about government and political matters. This is critically important in relation to agencies such as law enforcement and security agencies which exercise extraordinarily far reaching power. If the definition is to proceed, a general public interest defence is needed to ensure freedom of expression is not unduly restricted (discussed further below).
224. Proposed paragraph 121.1(b) seeks to provide such a link by providing a category for 'information the communication which would, *or could* reasonably be expected to, damage the security or defence or Australia' (emphasis added). However, the standard of 'could' is much lower than 'reasonably likely to' which was recommended by the ALRC and that is supported by the Law Council.<sup>157</sup> Further, the other categories captured by the term 'inherently harmful information' go beyond the recommendation of the ALRC.

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<sup>156</sup> Ibid [1319].

<sup>157</sup> Ibid Recommendations 6-5.

**Recommendations:**

- **The proposed ‘inherently harmful information’ criminal offences should not proceed in the absence of sound justification for the proposed categories, noting the previous consideration of the ALRC in its Secrecy Report.**
- **Provisions relating to foreign intelligence agencies and foreign law enforcement agencies in the definition of ‘inherently harmful information’ should be redrafted to make it clear that the information would, or would be reasonably likely to, harm on of the four essential public interests identified by the ALRC in its Secrecy Report.**
- **If conduct relating to ‘communication’ continues to be regulated, proposed paragraph 121.1(b) of the definition of ‘inherently harmful information’ should be amended to read ‘information the communication of which would, or would be reasonably likely to, damage the security or defence of Australia’.**

## Proper place of custody

225. Proposed subsection 121.1(1) would insert a new definition of ‘proper place of custody’ for the purposes of Part 5.6 of the Criminal Code. The term is used as part of the offence provisions in Division 122, which provide that it is an offence in certain circumstances for a person to intentionally remove information from a proper place of custody, or to hold information outside a proper place of custody.
226. The term ‘proper place of custody’ would have the meaning given in proposed section 121.2 which allows the term to have the meaning prescribed by the regulations.
227. Part 2.3.4 of the Guide provides that the content of an offence should only be delegated to another instrument where there is a demonstrated need to do so.<sup>158</sup>
228. The Explanatory Memorandum to the Bill seeks to explain the need to define ‘proper place of custody’ by prescription in the regulations. However, the Guide also notes that:

*When the content of an offence is delegated to a subordinate instrument, safeguards should be put in place to ensure that the types of matters that can be delegated are clear and that those who are subject to the offence can readily ascertain their obligations.*

...

*The following principles should be applied in developing appropriate safeguards for offences containing content delegated to a subordinate instrument.*

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<sup>158</sup> Attorney-General’s Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011), available online at <https://www.ag.gov.au/Publications/Documents/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers/A%20Guide%20to%20Framing%20Cth%20Offences.pdf> p. 26.



- *The content that may be delegated to the subordinate instrument should be clearly defined and circumscribed in the Act.*<sup>159</sup>

229. The Law Council notes that this principle does not appear to have been followed in the Bill's definition of 'proper place of custody'. This is particularly problematic as significant matters, such as what constitutes the type of information which would result in the commission of an offence (subject to up to 5-20 years imprisonment) is not included in the primary legislation.

230. The type of information which may be 'proper place of custody' should be more clearly defined and circumscribed in the Bill, for example, through appropriate criteria to assist in ensuring that the matter would, or would be reasonably likely to cause harm to a public interest.

**Recommendation:**

- **The type of information which may be 'proper place of custody' should be more clearly defined and circumscribed in the Bill, for example, through appropriate criteria to assist in ensuring that the matter would, or would be reasonably likely to cause harm to or prejudice Australia's national security.**

### Definition of a 'Commonwealth officer'

231. Under proposed section 121.1 of the Bill a 'Commonwealth officer' is defined to mean any of the following:

- (a) an APS employee;
- (b) an individual appointed or employed by the Commonwealth otherwise than under the *Public Service Act 1999*;
- (c) a member of the Australian Defence Force;
- (d) a member or special member of the Australian Federal Police;
- (e) an officer or employee of a Commonwealth authority;
- (f) an individual who is a contracted service provider for a Commonwealth contract;
- (g) an individual who is an officer or employee of a contracted service provider for a Commonwealth contract and who provides services for the purposes (whether direct or indirect) of the Commonwealth contract.

232. The proposed definition of a 'Commonwealth officer' in proposed subsection 121.1(1) does not include:

- The Governor-General; or
- Parliamentarians who are not appointed to roles of a Minister of State or Parliamentary Secretaries.

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<sup>159</sup> Ibid pp. 28-29.

233. The proposed secrecy offences would still capture the Governor-General or Parliamentarians generally where the information was made or obtained by that person by reason of having previously been a Commonwealth officer or otherwise engaged to perform work for a Commonwealth entity. They will also capture the Governor-General or Parliamentarians where the information was made or obtained by any other person by reason of his or her being, or having been, a Commonwealth officer or otherwise engaged to perform work for a Commonwealth entity.
234. However, the ALRC, in its Secrecy Report, recommended that the definition of 'Commonwealth officer' should include the Governor-General.<sup>160</sup>
235. The ALRC did not propose extending the definition of Commonwealth officer beyond the executive branch to include members of parliament who are not ministers or parliamentary secretaries.<sup>161</sup> The ALRC did not receive any specific feedback on this point.<sup>162</sup> It did note, however, that members of parliament may be liable to criminal penalties if in breach of the subsequent disclosure offences or other provisions of the Criminal Code (e.g. provisions that prohibit a Commonwealth public official from using any information that was obtained in his or her capacity as an official with the intention of dishonestly obtaining a benefit for himself or herself or for another person, or dishonestly causing a detriment to another person).<sup>163</sup>
236. Nonetheless, a question arises as to whether the Governor-General should be held to a higher standard and specifically included in the definition of a 'Commonwealth officer'. As the head of state, the Governor-General should arguably meet higher levels of accountability to the Australian people. Information that is generated or obtained by the Governor-General may also be of a sensitive nature. For these reasons, the Law Council suggests that the Committee give consideration to whether the definition of 'Commonwealth officer' for the purposes of proposed subsection 121.1(1) should include the Governor-General.

#### **Recommendation**

- **The Committee consider whether the definition of 'Commonwealth officer' for the purposes of proposed subsection 121.1(1) should include the Governor-General.**

### **Secrecy of information exceptions and defences**

237. The exception and defence provisions to the proposed secrecy offences need in some cases further clarity to aid certainty in judicial interpretation and need to be expanded in several respects as noted below.

#### **Public interest defence**

238. To aid transparency, there should be a public interest disclosure defence to the secrecy provisions where the disclosure would, on balance, be in the public interest.<sup>164</sup> The existing defence for journalists alone is unduly restrictive.

<sup>160</sup> Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009) 255, Recommendation 6-1.

<sup>161</sup> *Ibid* [6.51-6.52].

<sup>162</sup> *Ibid*.

<sup>163</sup> *Ibid*.

<sup>164</sup> Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009) 255 [7.120].

239. The proposed journalist defence in subsection 122.5(6) is limited to where a journalist deals with or holds the information in the public interest and in the person's capacity as a journalist engaged in fair and accurate reporting.
240. The Law Council is concerned that the heightened secrecy provisions, may discourage legitimate whistleblowers from speaking out publicly. There is no proposed defence for whistleblowers such as staff and contractors or others that speak out publicly in the public interest. The intent is instead that such persons use formal channels such as the PID Act.
241. Proposed subsection 122.5(4) would provide a defence to a prosecution for an offence by a person relating to the communication of information that the person communicated the information in accordance with the PID Act. That is, there is not necessarily a defence for dealing with – for example by making copies of information – in order to make the communication in accordance with the PID Act. Similarly, disclosures that may be made under private sector whistleblower laws under for example the *Corporations Act 2001* (Cth) are not captured by the defence. These issues should be addressed by the Bill.
242. However, given the breadth of the proposed secrecy provisions which apply to anyone including for example doctors reporting on conditions in immigration detention, a constitutional challenge to the provisions on the grounds that they breach the implied right to freedom of political communication may be likely.
243. The term public interest is not defined although proposed subsection 122.5(7) sets out several matters that are not in the public interest such as the dealing or holding of information that would publish the identity of an intelligence officer, contravene witness protection laws or 'will or is likely to harm or prejudice the health or safety of the public or a section of the public'. The term 'public interest' does not set out some factors that favour allowing the dealing with or holding of information in the 'public interest'. The determination will therefore rely on judicial interpretation under the common law. In the absence of factors or criteria which suggests what may amount to the public interest, there may be uncertainty for journalists in the likely application of the defence provision. This may have a chilling effect on fair and accurate reporting.
244. The proposed journalist defence appears to be set out in an objective way so that a court will be required to make the decision as to whether the conduct was in the public interest rather than the defendant reasonably believed that the dealing with or holding of information was in the public interest.
245. Generally, a public interest test would require a balancing of factors for and against the dealing with or holding of information, with the exceptions which would be contrary to the public interest for identified reasons. The terms of the provision are generally regarded as a total expression of the content of the public interest,<sup>165</sup> although the proposed defence in subsection 122.5(6) is drafted in a broad way which may allow for scope to evaluate or balance competing interests. The question of public interest needs to be assessed having regard to matters specific to the document or information in issue.<sup>166</sup> The fact that a section of the public may be interested in an activity does not necessarily establish a public interest.<sup>167</sup> A

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<sup>165</sup> *Re Edelsten and Australian Federal Police* (1985) 9 ALN N65; *Re O'Donovan and Attorney-General's Department* (1985) 8 ALD 528; *Ryder v Booth* [1985] VR 869.

<sup>166</sup> *Re Chapman and Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 43 ALD 139.

<sup>167</sup> *Re Public Interest Advocacy Centre and Community Services and Health (No 2)* (1991) 23 ALD 714; *Re Angel and Department of Arts, Heritage & Environment* (1985) 9 ALD 113.

disclosure that is contrary to the interests of the government does not necessarily mean it will be contrary to the public interest.<sup>168</sup>

246. Matters that have previously been found to be in the public interest favouring disclosure include for example the interest in:
- shedding light on whether an agency has acted in accordance with the law or whether it is soundly administered;<sup>169</sup>
  - finding out about current decision-making at a stage where it is still possible to contribute to that process and the interest in discovering what has transpired.<sup>170</sup>
247. Under equitable principles mere exposure to public discussion, review and criticism of government action is not necessarily enough to show a detriment to the government.<sup>171</sup> A government's claim to confidentiality may be measured by injury to the public interest where a disclosure would prejudice the security, relations with foreign countries or the ordinary business of government.<sup>172</sup> The degree of embarrassment to for example Australia's foreign relations may also be relevant to the assessment.<sup>173</sup>
248. The publication of confidential information may be found to be in the public interest where it is to protect the community from destruction, damage or harm, or it discloses things done in breach of national security or in breach of the law (including fraud).<sup>174</sup> Public interest may also include preventing unfair commercial advantage, breaches of privacy or prejudice to the orderly administration of the executive government.<sup>175</sup>
249. The Law Council considers that there may be value in non-exhaustively identifying some factors that may be considered for the purposes of determining whether the dealing with or holding of information may be in the public interest. Such factors may include for example:
- promoting open discussion of public affairs, enhancing government accountability or contributing to positive and informed debate on issues of public importance;
  - informing the public about the policies and practices of agencies in dealing with members of the public;
  - ensuring effective oversight of the expenditure of public funds;
  - the information is personal information of the person to whom it is to be disclosed; and

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<sup>168</sup> See *Re Bartlett and Department of the Prime Minister and Cabinet* (1987) 12 ALD 659. In *Fisse v Secretary, Dept of the Treasury* (2008) 172 FCR 513 Flick J expressed some reservation as to the conclusion reached in *Re Bartlett and Department of the Prime Minister and Cabinet*.

<sup>169</sup> *Re Lianos and Secretary, Department of Social Security* (1985) 7 ALD 475 at 500, 501 per Hall DP; *Re Downie* (1985) 8 ALD 496; *Re Birrell and Department of Premier & Cabinet (Nos 1 & 2)* (1986) 1 VAR 230 at 240, 241.

<sup>170</sup> *Re Lianos and Secretary, Department of Social Security (No 2)* (1985) 9 ALD 43 at 49 per Hall DP; *Re Young and State Insurance Office* (1986) 1 VAR 267.

<sup>171</sup> *Commonwealth v John Fairfax & Sons Ltd* ("Defence Papers case") [1980] HCA 44 at [29] (Mason J).

<sup>172</sup> *Ibid.*

<sup>173</sup> *Ibid* [37].

<sup>174</sup> *Ibid* [57].

<sup>175</sup> *Deacon v Australian Capital Territory* [2001] ACTSC 8, [87]

- revealing or substantiating that an agency (or a member of an agency) has engaged in misconduct or negligent, improper or unlawful conduct.

#### Legal advice and legal proceedings

250. There is no proposed exception for where the conduct is engaged in for the purpose of obtaining legal advice in relation to the matter the subject of the offence. Such an exception (as opposed to a defence) should be included, as it is in other secrecy offences such as paragraph 35P(3)(e) of the ASIO Act.<sup>176</sup> This is particularly important given the definition of ‘causing harm to Australia’s interests’ in proposed paragraph 121.1(c) includes ‘harm or prejudice Australia’s international relations in relation to information that was communicated in confidence’. This would potentially capture a lawyer engaged to represent a government, authority or organisation, who communicates or receives information on behalf of their client.
251. Proposed subsection 122.5(5) provides a defence for information communicated to a court or tribunal. This is narrower than other exceptions relating to sensitive information. For example, paragraph 35P(3)(b) of the ASIO Act provides that the offence provisions do not apply if the disclosure was for the purposes of any legal proceedings arising out of or otherwise related to the Division or of any report of any such proceedings. Such an exception should be included.

#### Information that has previously been communicated

252. Proposed subsection 122.5(8) would provide a defence for information that has been previously communicated. However, it does not extend to where the defendant has ‘dealt with’ information. The proposed defence relating to information that has previously been communicated, or made available, to the public should extend to where the person has dealt with or held the information (i.e. not just be limited to where they have communicated it). Similarly, the proposed defences relating to communication to an oversight body, information to a court or tribunal should extend to where the person has dealt with or held the information.

#### Information relating to a person

253. The defence that permits disclosure with consent proposed subsection 122.5(9) of the Bill should be reconsidered. Proposed subsection 122.5(9) would provide a defence for the dealing with information where the dealing is in accordance with the express or implied consent of the person to whom the information relates.
254. However, the ALRC considered that this kind of disclosure was not appropriate in all circumstances, noting that it may be sensitive for other reasons—for example, it may be personal information about one individual that is relevant to an ongoing investigation into the criminal activities of another individual.<sup>177</sup>
255. A PIA should be conducted of the secrecy provisions. The ALRC has suggested that a PIA should be prepared when a secrecy provision is proposed that may have a significant impact on the handling of personal information.<sup>178</sup>

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<sup>176</sup> A distinction may be drawn between an ‘exception,’ which limits the scope of conduct prohibited by a secrecy offence, and a ‘defence’, which may be relied on to excuse conduct that is prohibited by a secrecy offence.

<sup>177</sup> Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009) 255, [7.90].

<sup>178</sup> *Ibid* [16.179].

256. The proposed secrecy provisions should expressly indicate: whether they override the *Freedom of Information Act 1982* (Cth); and how they will interact with the agency's obligations under the *Privacy Act 1988* (Cth).<sup>179</sup>

**Recommendations:**

- **Schedule 2 of Part 1 of the Bill (Secrecy of information) should be amended to:**
  - **include a public interest disclosure defence to the secrecy provisions where the disclosure would, on balance, be in the public interest;**<sup>180</sup>
  - **non-exhaustively identify some factors that may be considered for the purposes of determining whether the dealing with or holding of information may be in the public interest for the purpose of the proposed journalist defence. Such factors may include for example:**
    - **promoting open discussion of public affairs, enhancing government accountability or contributing to positive and informed debate on issues of public importance;**
    - **informing the public about the policies and practices of agencies in dealing with members of the public;**
    - **ensuring effective oversight of the expenditure of public funds;**
    - **the information is personal information of the person to whom it is to be disclosed; and**
    - **revealing or substantiating that an agency (or a member of an agency) has engaged in misconduct or negligent, improper or unlawful conduct.**
  - **capture in proposed subsection 122.5(4) the dealing with information in order to make the communication in accordance with the PID Act. The Committee should consider whether disclosures that may be made under private sector whistleblower laws under for example the *Corporations Act 2001* (Cth) should also be captured by the defence provisions.**
  - **include an exception for where the conduct (i.e. communication/dealing with/holding/removing) is engaged in for the purpose of obtaining legal advice in relation to the matter the subject of the offence.**
  - **include an exception that offence provisions do not apply if the disclosure was for the purposes of any legal proceedings arising out of or otherwise related to the Division or of any report of any such proceedings.**
  - **extend to where the person has dealt with or held the information (i.e. not just be limited to where they have**

<sup>179</sup> Office of the Privacy Commissioner, Submission to the Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, August 2009, [9].

<sup>180</sup> Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009) 255 [7.120].

**communicated it) for the proposed defence relating to information that has previously been communicated, or made available, to the public. Similarly, the proposed defences relating to communication to an oversight body, information to a court or tribunal should extend to where the person has dealt with or held the information.**

- **insert an 'or' after paragraph 122.5(7)(c) and an 'and' after subparagraph 122.5(9)(d)(ii).**
- **The defence to the proposed secrecy offences that permits disclosure with consent in section 47 of the Bill should be reconsidered.**
- **A privacy impact assessment should be conducted of the proposed secrecy provisions.**
- **The proposed secrecy provisions should expressly indicate whether they override the *Freedom of Information Act 1982 (Cth)* and how they will interact with obligations under the *Privacy Act 1988 (Cth)*.**

## Aggravated offence of giving false or misleading information

257. Section 137.1 of the Criminal Code currently provides for an offence for giving false or misleading information.

258. Under that provision, a person commits an offence if the person gives information to another person and the person does so knowing that the information is false or misleading or omitting any matter or thing without which the information is misleading and the information is given to:

- a Commonwealth entity;
- a person who is exercising powers or performing functions under, or in connection with, a law of the Commonwealth; or
- the information is given in compliance or purported compliance with a law of the Commonwealth.

259. The maximum penalty for the offence is 12 months imprisonment.

260. Proposed subsection 137.1A(1) would create an aggravated offence for giving false or misleading information. The aggravated offence would apply where a person commits an underlying offence against subsection 137.1(1) (false or misleading information), and the information given in committing the underlying offence was given in relation to an application for, or the maintenance of, an Australian Government security clearance. The aggravated offence will be punishable by a maximum penalty of 5 years imprisonment.

261. In addition to establishing the underlying offence, and the requisite intention of knowing that the information is false or misleading or omitting any matter or thing without which the information is false or misleading, when proving the elements of the new proposed offence, the prosecution would also need to prove beyond a

reasonable doubt that the information given in committing the underlying offence was given in relation to an application for, or the maintenance of, an Australian Government security clearance. Section 5.6 of the Criminal Code would apply the automatic fault element of recklessness to the circumstance in paragraph 137.1A(1)(b).

262. The Explanatory Memorandum notes that examples of this may include where a person does not disclose that they have previously participated in military service for a foreign country or they have an association with an employee of a foreign government when seeking a security clearance.<sup>181</sup>
263. However, the aggravated offence provision may apply to a far broader range of circumstances of false or misleading information other than those where there may be foreign influence.
264. For example, a person who misleads as to a singular incident of past use of recreational drugs in relation to an application for, or the maintenance of, an Australian Government security clearance may be subject to the aggravated offence provision. Such conduct would already be captured under section 137.1 of the Criminal Code which carries a 12 months term of imprisonment. While such conduct may potentially make a person vulnerable to bribery in the course of their official capacity and demonstrate a level of dishonesty, the conduct, depending on the circumstances, may not warrant such a severe criminal penalty as that proposed by the aggravated offence provision.
265. The Law Council recommends limiting the proposed aggravated offence to the intent of the Bill, namely, ensuring that foreign adversaries do not wield undue influence on the Australian political landscape, causing harm to Australia's national security or compromising Australia's military capabilities and alliance relationships.
266. An offence to deal with such conduct may be better dealt with as an offence of failing to disclose defined activities linked to a foreign country/principal in relation to an application for, or the maintenance of, an Australian Government security clearance. Alternatively, the aggravated offence for false and misleading information should be limited to activities linked to a foreign country/principal in relation to an application for, or the maintenance of, an Australian Government security clearance.

**Recommendation:**

- **The proposed aggravated offence for false and misleading conduct in proposed subsection 137.1A(1) should not proceed. Instead, it should be replaced with an offence of failing to disclose defined activities linked to a foreign country/principal in relation to an application for, or the maintenance of, an Australian Government security clearance. Alternatively, the aggravated offence for false and misleading information should be limited to activities linked to a foreign country/principal in relation to an application for, or the maintenance of, an Australian Government security clearance.**

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<sup>181</sup> Explanatory Memorandum, National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017, p. 295.



## Telecommunications serious offences

267. Under the TIA Act an 'enforcement agency' may apply for a warrant to intercept communications. An application can be made in relation to a 'serious offence' as defined in section 5D of the TIA Act. A 'serious offence' includes any offence punishable by at least 7 years imprisonment and a list of prescribed offences which carry significant penalties. These prescribed offences include for example offences involving bribery or corruption of an officer of the Commonwealth and serious fraud.
268. Schedule 4 of the Bill would amend the TIA Act to insert new subparagraphs into the definition of 'serious offence' in paragraph 5D(1)(e) of the TIA Act to cover:
- Division 82 of the Criminal Code (sabotage);
  - Division 83 of the Criminal Code (other threats to security);
  - Division 91 of the Criminal Code (espionage);
  - Division 92 of the Criminal Code (foreign interference); and
  - Division 92A of the Criminal Code (theft of trade secrets involving foreign government principal).
269. Treason offences are already listed as serious offences under subparagraph 5D(1)(e)(ia) of the TIA Act.
270. Proposed subparagraph 5D(1)(e)(viii) would include new section 137.1A of the Criminal Code (aggravated offence for giving false or misleading information in the security clearance process) in the definition of 'serious offence' for the purposes of the TIA Act.
271. The Law Council is concerned by the extension of the TIA Act to the proposed new aggravated offence for giving false or misleading information in the security clearance process (maximum penalty of 5 years imprisonment).
272. As previously noted by the Committee, the TIA Act has two key objectives: to protect the privacy of communications by prohibiting unlawful interception, while enabling limited interception access for the investigation of serious crime and threats to national security.<sup>182</sup>
273. There is no requirement in the aggravated false and misleading proposed offence that the giving of false or misleading information as part of obtaining or maintaining a security clearance be linked to a foreign country/principal. This may mean that an interception warrant could be obtained to assist in determining false or misleading information which would not pose a threat to Australia's national security. A broad range of circumstances may be captured by this offence provision and the proposed expansion of the TIA Act would be considerable and does not appear justified.
274. The Law Council's recommendations regarding the improvement of the aggravated false and misleading offence provision in accordance with the intent of the Bill becomes more acute if the TIA Act is to be available to investigate such an offence.

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<sup>182</sup> Parliamentary Joint Committee on Intelligence and Security, *Report of the Inquiry into Potential Reforms of Australia's National Security Legislation* (2013) rec-1, [2.17] p. 13.

**Recommendation:**

- **Proposed subparagraph 5D(1)(e)(viii) (aggravated offence for giving false or misleading information) of the TIA Act should be removed from the Bill so that this offence is not defined as a ‘serious offence’ for the purposes of the TIA Act. If this is not to be accepted, the Law Council’s recommendations regarding the improvement of this offence provision in accordance with the intent of the Bill becomes more acute.**

## Procedural matters

### Bail

275. The Bill would ensure that a bail authority must not grant bail unless satisfied that ‘exceptional circumstances’ exist to justify bail in relation to the proposed offences of treason, treachery, espionage and foreign interference (the latter of when there is a threat to cause serious harm or a demand with menaces).

276. The Law Council acknowledges the importance of protecting the community from harm caused by terrorism, espionage, treason and foreign interference. The Law Council also recognises that there have been circumstances in which an accused has been involved in a terrorist incident subsequent to being granted bail for a crime not related to terrorism.<sup>183</sup> Such circumstances highlight the need to ensure that:

- bail laws effectively allow bail authorities to take into account the potential risk to the community and the presumption of innocence of the defendant;
- criminal intelligence information of law enforcement or intelligence agencies may be drawn upon where necessary in bail applications subject to the defendant’s ability to challenge the material proposed to be used against them; and
- effective cooperation and information sharing between State, Territory and Commonwealth policy and intelligence agencies while preserving the right to privacy.

277. However, the Law Council does not support the presumption against bail on the basis that it is inconsistent with the presumption of innocence. The Law Council has advocated for the maintenance and promotion of rule of law principles, including as they apply to detention in a criminal law context.<sup>184</sup> The Law Council’s *Policy Statement on Principles Applying to Detention* state that:

*A person who has been charged with a criminal offence, including an indictable offence, and is awaiting trial, should not generally be detained in custody. For that reason, there should be a presumption in favour of bail in all cases. This presumption may be rebutted where the court is satisfied there is an unacceptable risk, which cannot be mitigated by the imposition of conditions, that the person:*

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<sup>183</sup> State Coroner of New South Wales, *Inquest into the deaths arising from the Lindt Café Siege* (2017), available online at <<http://www.lindtinquest.justice.nsw.gov.au/Documents/findings-and-recommendations.pdf>> p. 12.

<sup>184</sup> See Law Council of Australia, *Policy Statement on Principles Applying to Detention in a Criminal Law Context* (23 June 2013), available online at <<http://www.lawcouncil.asn.au/lawcouncil/index.php/library/policies-and-guidelines>> p. 5.

- i. will not appear in court when required; or
- ii. will reoffend; or
- iii. will interfere with the investigation; or
- iv. will intimidate or attempt to influence potential witnesses; or
- v. will threaten or cause harm to another person or the community at large.<sup>185</sup>

*The presumption in favour of bail should not be reversed regardless of the nature of the offence. Although the seriousness of the offence with which a person is charged may be taken into account in determining whether he or she is: a flight risk, at risk of reoffending, or a risk to the community, the seriousness of the offence alone should not determine whether bail is granted.*<sup>186</sup>

*Throughout any pre-trial detention, the right to the presumption of innocence should be guaranteed.*<sup>187</sup>

278. Article 9(3) of the ICCPR provides, in part, that: 'It shall not be the general rule that persons awaiting trial shall be detained in custody'. This 'properly places the burden upon the State to establish the need for the detention of an accused person to continue'.<sup>188</sup> The Special Rapporteur, in 2006, took the view that the new bail provisions applying to those charged with terrorism offences are incompatible with article 9(3) of the ICCPR.<sup>189</sup>
279. The United Nations Human Rights Committee has stated on a number of occasions that pre-trial detention should remain the exception and that bail should be granted except in circumstances where the likelihood exists that, for example, the accused would abscond, tamper with evidence, influence witnesses or flee from the jurisdiction.<sup>190</sup>

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<sup>185</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1979), Article 9.3; *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, G.A. res 43/173, annex 43 U.N. GAOR Supp. (No. 49) at 298, U.N. Doc A/43/49 (1988), Principle 39. The sorts of matters that the Court might take into consideration in determining whether to refuse to grant bail reflect the factors generally accepted under Australian law: see for example s 4(2)(d) *Bail Act 1977* (Vic); see also, for example, *R v Light* [1954] VLR 152). In New South Wales, the *Bail Act 2013* (NSW) has replaced the existing system of presumptions for and against bail with a new test of whether an 'unacceptable risk' existed that a person would fail to appear, commit a serious offence, endanger community or individual safety or interfere with witnesses or evidence (section 17). A right to release was however included for fine-only offences and some summary offences (paragraph 21(c)). A bail authority that makes a bail decision must have regard to the presumption of innocence and the general right to be at liberty (subsection 3(2)).

<sup>186</sup> The Law Council acknowledges that this principle is contrary to the present law in many Australian jurisdictions (eg. s 4(2)(a) *Bail Act 1977* (Vic)). However, the Law Council has always taken the view that a reverse presumption denies the court adequate discretion to properly address the necessity and proportionality of detention in the particular circumstances of the case.

<sup>187</sup> *Ibid.*

<sup>188</sup> Martin Scheinin, Special Rapporteur, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, Martin Scheinin - Australia: Study on human rights compliance while countering terrorism, UN Doc A/HRC/4/26/Add.3 (14 December 2006), available online at <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G06/155/49/PDF/G0615549.pdf?OpenElement>> p. 14.

<sup>189</sup> *Ibid.*, p. 23.

<sup>190</sup> UN Human Rights Committee, *Smantser v Belarus* (1178/03); *WBE v the Netherlands* (432/90); *Hill and Hill v Spain* (526/93).

280. The use of section 15AA in the Crimes Act<sup>191</sup> illustrates the high hurdle applicants must overcome before bail is granted and the manner in which the reversal of the presumption in favour of bail can jeopardise the fair trial rights of the accused, including the right to be tried without undue delay.<sup>192</sup>
281. Case law indicates that significant delays between arrest and trial, even when coupled with particularly harsh conditions of detention, may not be enough to give rise to exceptional circumstances and justify a grant of bail pursuant to section 15AA.<sup>193</sup>
282. Pre-trial detention for other complex cases such as those relating to espionage, treason and foreign interference may similarly be lengthy given the time it may take for the parties to prepare their cases for trial. Given the breadth of the proposed offences, relatively innocuous or trifling conduct could land a person in pre-trial detention.
283. While the Law Council does not support the current and proposed presumptions against bail, if they are to proceed, the Law Council recommends that the bail and provisions be examined by the INSLM including their impact on children.
284. In addition, there should be no provision for a grant of bail to be stayed if the prosecution notifies an intention to appeal.
285. Under subsections 15AA(3C) and (3D) of the Criminal Code, even where a person charged with an offence against subsection (2) is granted bail, they may be detained in custody for up to 3 days if the prosecution notifies an intention to appeal the bail decision.
286. In the Law Council's view, if a person has successfully satisfied the bail authority that there are exceptional circumstances which warrant his or her release, they should not be denied the benefit of that decision, even for 3 days.
287. If the Parliament has concerns about the capacity of bail authorities at certain levels to hear and determine bail applications in certain cases such as those relating to offences relevant to the Bill, the appropriate response would be to amend the legislation to be more prescriptive about the level of judicial officer to whom a bail application may be made. Authority should not be conferred on an officer to make a bail decision only to reserve the right to have it set aside if the prosecution notifies an intention to appeal.

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<sup>191</sup> See for example *Raad v R* [2007] VSC 330; *Hammoud v R* [2006] VSC 516 and *Haddarra v R* [2006] VSC 8.

<sup>192</sup> Up to the end of April 2006, 26 persons were charged with various terrorism offences (3 have pleaded guilty or been convicted, 4 have been committed for trial, and 19 are awaiting committal for trial). Of those persons, only four have been granted bail: Martin Scheinin, Special Rapporteur, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin - Australia: Study on human rights compliance while countering terrorism*, UN Doc A/HRC/4/26/Add.3 (14 December 2006), available online at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G06/155/49/PDF/G0615549.pdf?OpenElement> p. 14. This right is protected by article 14(3)(c) of the *International Covenant of Civil and Political Rights*.

<sup>193</sup> See for example, *Raad v R* [2007] VSC 330, *Hammoud v R* [2006] VSC 516, and *Haddara v R* [2006] VSC 8.

## Parole

288. Current section 19AG of the Crimes Act and the Bill would provide for mandatory minimum non-parole periods in relation to the offences in Divisions 80 (treachery, treason, urging violence and advocating terrorism or genocide) and 91 (offences relating to espionage and similar activities) of the Criminal Code.
289. This would involve:
- unjustified and arbitrary mandatory minimum non-parole provisions for terrorism offences; and
  - inappropriate restrictions on judicial discretion as to non-parole for these offences.
290. The assumption in section 19AG of the Crimes Act that a figure of three-quarters of the head sentence for non-parole will be necessary and appropriate whenever a person is charged with one of these offences is arbitrary and inconsistent with the principle of proportionality in sentencing. This principle traditionally allows a court to weigh all relevant considerations and exercise judicial discretion as to the appropriate non-parole period. While section 19AG does not limit a judge from imposing a proportionate head sentence before considering the non-parole period, the section completely removes judicial discretion over the non-parole period or the issuing of a recognizance order.
291. The Law Council is of the view that the well-established principle of the exercise of judicial discretion in setting non-parole periods should not be precluded solely on the basis of the nature of the offence. Although the seriousness of the offence with which a person is charged may be taken into account in determining the appropriate non-parole period, the seriousness of the offence alone should not determine an arbitrary figure of three-quarters the head sentence for a minimum non-parole period.<sup>194</sup>
292. The imposition of this minimum non-parole period is a somewhat troubling attenuated form of mandatory sentencing that intrudes on the substantive evaluative assessment made by a court when setting non-parole periods. Courts are also unlikely to impose a lower head sentence to simply mitigate against any perceived injustices of the mandatory non-parole period. In *R v Lodhi*, for instance, Whealy J held that a court should not set a lower head sentence simply because of the operation of section 19AG.<sup>195</sup>
293. Mandatory minimum non-parole sentencing provisions which effectively remove sentencing discretion from the courts that hear and examine all of the relevant circumstances of a particular case, undermines the independence of the judiciary and threatens an essential component of the rule of law. As stated in the Law Council's *Policy Statement on Rule of Law Principles*:

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<sup>194</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1979), Article 9 prohibits arbitrary detention, and requires consideration of principles of justice and proportionality when a penalty is imposed under law – see Human Rights Committee, *Communication No 560/1993*, UN Doc CCPR/C/59/D/560/1993 (3 April 1997) [9.2] ('*A v Australia*'). See also Human Rights Committee, *Communication No 305/1988*, UN Doc CCPR/C/39/D/305/1988 (15 August 1990) [5.8] ('*Van Alphen v The Netherlands*'). See also Australian Human Rights Commission, *Human Rights Brief No. 2*, available online at <<https://www.humanrights.gov.au/publications/human-rights-brief-no-2>>.

<sup>195</sup> *R v Lodhi* [2006] NSWSC 691 [105].

*In criminal matters, judges should not be required to impose mandatory minimum sentences. Such a requirement interferes with the ability of the judiciary to determine a just penalty which fits the individual circumstances of the offender and the crime.*<sup>196</sup>

294. Prescribing minimum sentences in legislation removes the ability of courts to consider relevant factors such as the offender's criminal history, individual circumstances or whether there are any mitigating factors, such as mental illness or other forms of hardship or duress. This prescription can lead to sentences that are disproportionately harsh and mean that appropriate gradations for sentences are not possible.
295. Imposing mandatory minimum non-parole sentences that cannot be subject to appeal may also be inconsistent with article 14(5) of the ICCPR which provides that 'everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law'.<sup>197</sup> While head sentences are subject to appeal, the three-quarters per cent non-parole period is not.
296. The Law Council therefore recommends that the mandatory minimum non-parole period for the offences in Division 80 and 91 should not proceed.

**Recommendations:**

- **The presumption against the grant of bail under section 15AA Crimes Act should not be extended to treason, treachery, espionage and foreign interference cases as is proposed by the Bill.**
- **The INSLM should review the bail and non-parole periods in sections 15AA and 19AG of the Crimes Act, including their impact on children.**
- **There should be no provision for a grant of bail to be stayed if the prosecution notifies an intention to appeal.**
- **The mandatory minimum non-parole period for terrorism offences, Division 80 (treachery, treason, urging violence and advocating terrorism or genocide) or 91 (offences relating to espionage and similar activities) under section 19AG should be repealed and not proceed.**

<sup>196</sup> Law Council of Australia, *Policy Statement on Rule of Law Principles* (March 2011) Principle 1, p. 2, available online at

<http://www.lawcouncil.asn.au/lawcouncil/index.php/divisions/international-division/rule-of-law>.

<sup>197</sup> For further discussion see Sarah Pritchard, 'International Perspectives on Mandatory Sentencing' (2001) 7(2) *Australian Journal of Human Rights* 51, 17, note 8.