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LAWYERS
FOR
HUMAN RIGHTS

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Committee Secretary
Parliamentary Joint Committee on Intelligence and Security
PO Box 6021
Parliament House
Canberra ACT 2600

By email: pjcis@aph.gov.au

Dear Committee Secretary

Inquiry into the provisions of the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017 as amended

Australian Lawyers for Human Rights (**ALHR**) has previously made a submission in relation to the original version of the proposed *National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017* (**'the Bill'**) and is grateful for the opportunity to provide this supplementary submission in relation to the Committee's current Inquiry into as the Bill as amended in accordance with the changes included in Submission 40.1 from the Attorney General's Department (the **'amendments'**).

ALHR

ALHR was established in 1993 and is a national association of Australian solicitors, barristers, academics, judicial officers and law students who practise and promote international human rights law in Australia. ALHR has active and engaged National, State and Territory committees and specialist thematic committees. Through advocacy, media engagement, education, networking, research and training, ALHR promotes, practices and protects universally accepted standards of human rights throughout Australia and overseas.

1. ALHR Concerns

- 1.1 ALHR is concerned that Commonwealth legislation should represent an **appropriate and proportionate response** to the problems and issues addressed by that legislation. Adherence to international human rights law and standards is an important indicator of such proportionality.¹
- 1.2 While the amendments make some improvements, which ALHR applauds, ALHR submits that the amendments do not go far enough in protecting human rights.

¹ See generally Law Council of Australia, "Anti-Terrorism Reform Project" October 2013, <<http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/Oct%202013%20Update%20-%20Anti-Terrorism%20Reform%20Project.pdf>> .

2. Summary

- 2.1 ALHR endorses certain of the proposed amendments, particularly the removal of some of the strict liability provisions.
- 2.2 However the Bill retains some other examples of strict liability provisions and retains many instances in which there are **excessive penalties, irrespective of whether or not:**
 - a) any harm has been caused or is likely to be caused; or
 - b) there was any intent to harm.
- 2.3 We agree with the Human Rights Law Centre that the new sections 122.1 and 122.4 should adopt a harm-based approach and that sections 122.1 – 122.4A are too broad.
- 2.4 We also agree that laws that criminalise expression necessarily discourage and chill lawful forms of expression and that this is especially so when the penalties involved are, as here, so severe.
- 2.5 ALHR submits that the nature of the **types of harm** that might be caused by “foreign interference” **need to be fully analysed** so that the Bill can focus only on real harms and not impose severe penalties where this is disproportionate and inappropriate.
- 2.6 The introduction of economic relations as a national security issue continues to be problematic (see section 82.7 (d)(ii), 82.8 (d)(ii), and the definition of national security in 90.4(1)(e)). It is not clear how it will be possible to establish whether Australian economic relations would have been harmed or were intended to be harmed.
- 2.7 The apparent defences for sharing or otherwise dealing with information which is already in the public arena generally only apply where the information or article that has already been communicated or made available to the public was made public “with the authority of the Commonwealth” (sections 91.4(2), 91.9(2), 122.5(2)). These provisions have not been amended. ALHR submits that it is unreasonable to penalise people for innocently using or sharing information which is already in the public arena, for whatever reason, and that defences should be broadened accordingly.
- 2.8 Similarly, defences relating to humanitarian aid are too narrowly drafted and have not been amended.
- 2.9 We agree with the amendments to new section 122.5 providing a defence for journalists, but believe that it is still too narrowly drafted, as mentioned in our original submission. We endorse the comments of the Human Rights Law Centre that the Bill still does not adequately address public interest disclosures.
- 2.10 ALHR is also particularly concerned about the excessive scope of the proposed sections 92.2, 92.3 and 92.4 (Offence of intentional foreign interference, Offence of reckless foreign interference and Offence of preparing for foreign interference) of the Criminal Code, as described further below.
- 2.11 In the view of ALHR, the combined effect of the type of provisions referred to in the preceding paragraphs is not only counterproductive but **highly dangerous** in terms of a proper approach to the rule of law. In combination, the above drafting problems could have the unintended effect that the Bill could **severely penalise bona fide and benign behaviour which causes minimal or no harm**.

3. Offences relating to foreign interference (see Appendix)

- 3.1 The proposed sections 92.2 and 92.3 of the Criminal Code commence by dealing in their first subsections with “conduct that is covert, deceptive, involves threats of harm or demands with menaces” whereby a person acts on behalf of a foreign principal so as to “influence a political or

governmental process of the Commonwealth or a State or Territory” or “influence the exercise (whether or not in Australia) of an Australian democratic or political right or duty.” One wonders if ‘on behalf of’ has its normal meaning or the much-extended meaning prescribed in the *Foreign Interference Transparency Scheme Bill*. It is noted however that ‘foreign principal’ is defined in the Bill more narrowly than in the *Foreign Interference Transparency Scheme Bill*. Section 90.2 defines ‘foreign principal’ as basically a:

- foreign government
- foreign government authority
- foreign political party
- terrorist organisation
- public international organisation, or
- subsidiary entity or organisation of the above.

Foreign businesses and individuals (unless acting on behalf of one of those entities) are not included, unlike the situation under the *Foreign Interference Transparency Scheme Bill*

Lack of clarity

- 3.2 It is not clear what an “Australian democratic or political right or duty” may be, nor whether it is an individual or collective right. The phrase is also used in the proposed section 83.4 in the context of conduct using force, intimidation or threats, where it is slightly clarified by the qualifier in paragraph (1)(d) that ‘the right or duty arises under the Constitution or a law of the Commonwealth.’ There is no such qualifier in sections 92.2 or 92.3 so it is possible to argue that the phrase is there given a wider meaning.

Harm principle not applied

- 3.3 In relation to the offences created under the second subsections of each section, again a relevant foreign connection is required and the perpetrator must intend or be reckless as to whether their behaviour could have the same type of influence as mentioned in the first subsections. However in this case there need be no covert behaviour, no deception, no threats and no menacing demands. The influence intended could be entirely kindly and benign. But unless the perpetrator notifies the intended ‘target’ as to the foreign connection involved in the perpetrator’s influence attempt, the perpetrator is still liable to jail for up to 20 years (if intentional) or 15 years (if reckless) for attempting an influential communication – or even, under section 92.4, for preparing to make an influential communication!

Practical problems


- 3.4 One wonders who it is that the perpetrator should be notifying about their attempt to influence a political or government process? What if the target is ‘the Australian public’? what if the target is not clear? One also wonders how it is that the perpetrator should notify their target? If the Bill means to say that the perpetrator should make their foreign connection publicly known (even when their ‘target’ is private), what would achieve this? A statement on a website? A notice in a newspaper? And what does it mean that ‘the person does not need to have in mind a particular foreign principal’ (as provided in subsection (3) of each proposed section)? How can the perpetrator notify someone that they are acting ‘on behalf of’ a foreign principal when they do not even have any particular foreign principal in mind?
- 3.5 These questions arise even before one considers the practicality of applying the sections in the case of any person seeking to influence the exercise of an “Australian democratic or political right or duty.” The offences in subsections (2) appear difficult to understand and difficult to enforce. However the severity of the potential penalties remains.

- 3.6 Here again ALHR submits that the nature of the **types of harm** against which these provisions are aimed **need to be fully analysed** so that the Bill can focus only on real harms and not impose severe penalties where this is disproportionate and inappropriate.

4. Conclusion

- 4.1 Any legislation which impinges upon human rights must be narrowly framed, proportionate to the relevant harm it addresses, and provide an appropriate contextual response which minimises the overall impact upon all human rights. ALHR is concerned that in many respects the Bill does not strike the right balance.
- 4.2 ALHR is concerned that not just the Bill but all of the related so-called 'foreign interference' legislation will severely impact on the ability of individuals and non-government associations, from major charities to small volunteer groups, to participate in political discourse (while leaving major businesses relatively untouched), because the legislation casts such a wide net. This is an entirely undemocratic outcome.

ALHR is happy to provide any further information or clarification in relation to the above if the Committee so requires.

If you would like to discuss any aspect of this submission, please email me 

Yours faithfully

Kerry Weste

Acting President

Australian Lawyers for Human Rights

92.2 Offence of intentional foreign interference		92.3 Offence of reckless foreign interference
1. Interference generally – subsection (1)	conduct that is covert, deceptive, involves threats of harm or demands with menaces	
2.	the conduct is: <ul style="list-style-type: none"> ○ engaged in on behalf of, or in collaboration with, a foreign principal or a person acting on behalf of a foreign principal; ○ directed, funded or supervised by a foreign principal or a person acting on behalf of a foreign principal; 	
3.	Person intends that conduct will:	Person is reckless as to whether conduct will:
4.	(i) influence a political or governmental process of the Commonwealth or a State or Territory; or (ii) influence the exercise (whether or not in Australia) of an Australian democratic or political right or duty; or (iii) support intelligence activities of a foreign principal; or (iv) prejudice Australia’s national security;	
	Penalty – imprisonment for 20 years	Penalty – imprisonment for 15 years
5. Interference involving targeted person – subsection (2)	Conduct has foreign connection as per par 2 above and person intends their conduct to influence another (the target) in relation to	Conduct has foreign connection as per par 2 above and person is reckless as to whether their conduct will influence another (the target) in relation to
6.	<ul style="list-style-type: none"> ○ a ‘political or government process of the Commonwealth or a State or Territory,’ [<i>who is the target?</i>] or ○ the target’s exercise, in any place in the world, of ‘any Australian democratic or political right or duty’ 	
	Failure to disclose foreign connection to target: – imprisonment for 20 years	Failure to disclose foreign connection to target: – imprisonment for 15 years
7. Other matters – subsection (3)	<ul style="list-style-type: none"> ○ the person does not need to have in mind a particular foreign principal; and ○ the person may have in mind more than one foreign principal. 	