

Government response:
Parliamentary Joint Committee on Intelligence and Security
Advisory Report on the
National Security Legislation Amendment (Espionage and Foreign
Interference) Bill 2017

(Report tabled 7 June 2018)

Recommendation	Response
<p>1. Passage of the Bill</p> <p>The Committee recommends that, following implementation of the recommendations in this report, the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017 be passed.</p>	Accepted.
Definitions	
<p>2. Prejudice to national security</p> <p>The Committee recommends that the Bill be amended to clarify that, for the purpose of the Bill's espionage, foreign interference and sabotage offences, the expression 'prejudice to national security' cannot consist of embarrassment alone, and must also include a degree of damage or harm.</p>	Accepted.
<p>3. Advantaging the national security of a foreign country</p> <p>The Committee recommends that the Bill be amended to reflect the intent of the Explanatory Memorandum that the term 'advantaging the national security of a foreign country', does not apply to conduct that is mutually advantageous to the security of both Australia and a foreign country.</p>	<p>Accepted.</p> <p>The definition will require the conduct to advantage Australia's national security to an equivalent extent.</p>
<p>4. Meaning of 'Espionage', 'sabotage', 'political violence' and 'foreign interference'</p> <p>The Committee recommends that the Explanatory Memorandum be amended to provide greater clarity about the intended meaning of the terms, 'espionage', 'sabotage', 'political violence' and 'foreign interference' for the purposes of the definition of national security at proposed section 90.4.</p>	Accepted.
<p>5. ASIO Act</p> <p>The Committee recommends that the Bill be amended to clarify that the Bill does not affect the operation of existing provision in the ASIO Act, unless explicitly stated.</p>	Accepted.

Recommendation	Response
<p>6. Foreign political organisation</p> <p>The Committee recommends that the Bill be amended to define what foreign political organisation may be covered by the term ‘foreign political organisation’.</p>	Accepted.
<p>7. Australian Government security clearance</p> <p>The Committee recommends that the Bill be amended to define the meaning of ‘Australian Government security clearance’.</p>	Accepted.
Security Classifications	
<p>8. Security classification – definition and regulations</p> <p>The Committee recommends that the Bill be amended to define each ‘security classification’ to which criminal liability attaches. Each definition should include harm-based statutory criteria to determine proper classification to apply to that information. Any material incorporated by reference into the regulations should be required to be publically available.</p>	Accepted.
<p>9. Security classification and strict liability</p> <p>The Committee recommends implementation of the Attorney-General’s proposed amendments to</p> <ul style="list-style-type: none"> • narrow the proposed definition of ‘security classification’ to a classification of SECRET or TOP SECRET • remove strict liability from espionage and secrecy offences 	<p>Accepted.</p> <p>Strict liability will not apply to the definition of ‘security classification’ to the extent that the definition relates to the information carrying a classification of SECRET or TOP SECRET. The prosecution will need to prove that the defendant was reckless as to this. Strict liability will apply to other aspects of the definition, which are technical matters and not relevant to the defendant’s culpability.</p>
Evidentiary certificates	
<p>10. Certification of security classification</p> <p>The Committee recommends that the Bill be amended to require that, prior to initiating proceedings for an espionage or secrecy offence that relies on the fact that information is security classified, the head of the originating agency must certify that it is appropriate that the information had a security classification at the time of the conduct that is alleged to constitute the offence. This certificate should operate as a condition precedent to the initiation of proceedings. The certificate should not have any evidentiary effect.</p>	<p>Accepted.</p> <p>The Attorney-General will be responsible for providing this certification as part of the consent to prosecute process. The Attorney-General will receive advice from relevant agencies, including the originating agency, to inform this decision.</p>

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<p>11. Evidentiary certificate regimes – security classified information</p> <p>The Committee recommends that the Bill be amended to remove the evidentiary certificate regimes in proposed section 93.3 (1)(a)-(b) and 121.3, in relation to security classified information.</p>	Accepted.
<p>12. Evidentiary certificate regimes –concerns national security</p> <p>The Committee recommends that the Bill be amended to remove the evidentiary certificate regimes in proposed section 93.3 (1)(c)-(d) in relation to information that ‘concerns Australia’s national security’.</p>	Accepted.
Preparatory offences	
<p>13. Guide to Framing Commonwealth Offences</p> <p>The Committee recommends that the Government amend the <i>Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers</i> to identify criteria to be used for determining the kinds of criminal conduct that warrant preparatory offences.</p>	Accepted.
Secrecy	
<p>14. Secrecy offences – intention and recklessness</p> <p>The Committee recommends that the Bill include a note making explicit that the secrecy offences relating to security classified information and other ‘inherently harmful information’ will only apply where a person intentionally deals with the relevant information, and where the person reckless as to the nature of that information.</p>	Accepted.
<p>15. Scope of section 122.1</p> <p>The Committee recommends that the Attorney-General’s proposed amendments to narrow the scope of the offences at proposed section 122.1 in relation to ‘inherently harmful information’ be implemented. This includes removing paragraph (d) from the definition of ‘inherently harmful information’, removing strict liability from elements of the offences, and limiting the offence to Commonwealth officers.</p>	<p>Accepted.</p> <p>Strict liability will not apply to the definition of ‘security classification’ to the extent that the definition relates to the information carrying a classification of SECRET or TOP SECRET. The prosecution will need to prove that the defendant was reckless as to this. Strict liability will apply to other aspects of the definition, which are technical matters and not relevant to the defendant’s culpability.</p>

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<p>16. Inherently harmful information</p> <p>The Committee recommends that the Bill be amended to move paragraph (b) – information the communication of which would, or could be reasonable expected to, damage the security or defence of Australia – from the definition of ‘inherently harmful information’ into the definition of cause harm to Australia’s interest’ in proposed section 121.1.</p>	Accepted.
<p>17. Scope of section 122.2</p> <p>The Committee recommends that the Attorney-General’s proposed amendments to narrow the scope of the offences at proposed section 122.2 in relation to conduct causing harm to Australia’s interests be implemented. This includes removing paragraphs (a)(i), (d) and (e) from the definition of ‘cause harm to Australia’s interest’, clarifying that paragraph (f) applies to the health or safety of the <i>Australian</i> public, or a section of the <i>Australian</i> public, and limiting the offences to Commonwealth officers.</p>	Accepted.
<p>18. Regulations prescribing ‘proper place of custody’</p> <p>The Committee recommends that the Bill be amended to require that any material incorporated into regulations for the purpose of the definition of ‘proper place of custody’ at proposed section 121.2 be publically available.</p>	Accepted.
<p>19. Scope of section 122.1(4)</p> <p>The Committee recommends that the Bill be amended to limit the secrecy offence at proposed section 122.1(4), in relation to failing to comply with a lawful direction, to directions that have been issued for the purpose of protecting the security of the ‘inherently harmful information’ against unauthorised access or disclosure.</p>	<p>Accepted.</p> <p>The scope of section 122.1(4) has been narrowed to apply where the failure to comply with a direction <i>results in a risk to security</i>.</p>
<p>20. Aggravating factor – holds security clearance</p> <p>The Committee recommends that the Bill be amended to limit the aggravating factor at subparagraph 122.3(1)(b)(v), in relation to the proposed secrecy offences for Commonwealth officers, to persons holding an Australian Government security clearance that allows the person to access information with a classification of SECRET or above.</p>	Accepted.

Recommendation	Response
<p>21. Secrecy offence for non-Commonwealth officers</p> <p>The Committee recommends that the Attorney-General's proposed amendments, to create separate secrecy offences that apply to non-Commonwealth officers that are narrower in scope than those applying to Commonwealth officers, be implemented.</p>	<p>Accepted.</p>
<p>22. Section 122.5 defence and FOI Act</p> <p>The Committee recommends that the Bill be amended to make clear the effect of the defence in subsection 122.5(1) and (2) in relation to the <i>Freedom of Information Act 1982</i>.</p>	<p>Accepted.</p> <p>A new defence specifically covering the <i>Freedom of Information Act 1982</i> has been created at subsection 122.5(4) rather than amending subsections 122.5(1) and (2).</p>
<p>23. Sunset period on section 122.4</p> <p>The Committee recommends that the Bill be amended to apply a sunset period of five years to proposed section 122.4 ('Unauthorised disclosure of information by current and former Commonwealth officers etc')</p>	<p>Accepted.</p>
<p>24. Review of existing secrecy offences in other legislation</p> <p>The Committee recommends that, following the passage of the general secrecy offences in Schedule 2 to the Bill, the Attorney-General initiate a review of existing secrecy offences contained in other legislation, taking into account the set of principles contained in the Australian Law Reform Commission's report, <i>Secrecy Laws and Open Government in Australia</i>.</p>	<p>Accepted.</p>
<p>25. Protections for IGIS</p> <p>The Committee recommends that the Bill be amended to ensure that staff of the Inspector-General of Intelligence and Security are appropriately protected, noting the limitations on the Inspector-General and members of staff of the Inspector-General giving evidence under the <i>Inspector-General of Intelligence and Security Act 1986</i>. The Committee recommends that this amendment be developed in consultation with the Inspector-General and her Office.</p>	<p>Accepted.</p> <p>The Inspector-General of Intelligence and Security and her Office were consulted and have agreed to these amendments.</p>

Recommendation	Response
<p>26. Defences in section 122.5</p> <p>The Committee recommends that the following proposed defence be broadened to cover all dealings with information, rather than being limited to communication of information:</p> <ul style="list-style-type: none"> • proposed section 122.5(3) – relating to the Inspector-General of Intelligence and Security, the Commonwealth Ombudsman and the Law Enforcement Integrity Commissioner • proposed section 122.5(4) – relating the <i>Public Interest Disclosure Act 2013</i> • proposed section 122.5(5) – relating to information provided to a court or tribunal, and • propose section 122.5(8) – relating to information that has been previously communicated. 	Accepted.
<p>27. Defence for journalists</p> <p>The Committee recommends that the Attorney-General's proposed amendments to the defence for journalists at proposed section 122.5(6), and the associated amendments at 122.5(7), be implemented. This includes expanding the defence to all persons engaged in reporting news, presenting current affairs or expressing editorial content in news media where the person reasonably believed that dealing with or holding the information was in the public interests.</p> <p>The Committee also recommends that the Government consider further refinements to the propose defence in order to</p> <ul style="list-style-type: none"> • make explicit the editorial support staff are covered by the defence, including legal advisors and administrative staff, • ensure editorial staff and lawyers, who are engaging with the substance of the information, be required to hold a reasonable belief that their conduct is in the public interest, and • allow administrative support staff working at the direction of a journalist, editor or lawyer who holds the reasonable belief, to benefit from the defence. 	Accepted.
<p>28. Defence for journalists</p> <p>The Committee recommends that the Bill be amended to remove proposed paragraph 122.5(7)(d), which currently limits the availability of the defence for persons engaged in reporting news.</p>	Accepted.

Recommendation	Response
<p>29. Defence for reporting maladministration in Commonwealth criminal proceedings</p> <p>The Committee recommends that the Bill be amended to provide for a defence for a person who reports, to an appropriate entity, malpractice or maladministration in the prevention, detection, investigation, prosecution or punishment of a criminal offence against a law of the Commonwealth or the functions of the Australian Federal Police under paragraph 8(1)(be) of the <i>Australian Federal Police Act 1979</i> or the <i>Proceeds of Crimes Act 2002</i>.</p>	<p>Accepted.</p> <p>This defence (at subsection 122.5(4A)) has been broadened to also cover persons who are dealing with information for the purpose of reporting an alleged crime against a law of the Commonwealth.</p>
<p>30. Defence for obtaining legal advice</p> <p>The Committee recommends that the Bill be amended to include a defence for dealing with information for the purpose of obtaining legal advice.</p>	<p>Accepted.</p>
<p>31. Obligations and immunities</p> <p>The Committee recommends that the Bill be amended to clarify that the secrecy offences in Schedule 2 do not override the obligations and immunities included in the:</p> <ul style="list-style-type: none"> • <i>Freedom of Information Act 1982</i>, • <i>Privacy Act 1988</i>, • <i>Ombudsman Act 1976</i>, • <i>Inspector-General of Intelligence and Security Act 1986</i>, or • <i>Public Interest Disclosure Act 2013</i>. 	<p>Accepted.</p> <p>The legislation listed in the recommendation does not need to be specifically included in the provision, which applies to <u>any</u> other right, privilege, immunity or defence.</p>
<p>32. Information provided to IGIS – statutory immunity</p> <p>The Committee recommends that the <i>Inspector-General of Intelligence and Security Act 1986</i> be amended to extend statutory immunity to persons who voluntarily provide information to the Inspector-General or her office.</p>	<p>Accepted.</p>
<p>33. Consent to prosecute</p> <p>The Committee recommends that Bill be amended to require the Attorney-General's consent for a prosecution under the proposed secrecy offences in Division 122 of the Bill. In deciding whether to consent, the Attorney-General should be required to consider whether the conduct might have been authorised or is otherwise covered by an exception under any of the proposed defence in the Division.</p>	<p>Accepted.</p>

Recommendation	Response
<p>34. Reduction of penalties</p> <p>Consistent with recommendations of the Australian Law Reform Commission, the Committee recommends that the Bill be amended to reduce the maximum penalty for the secrecy offences in proposed sections 122.1, 122.2 and 122.4A to seven years' imprisonment for conduct involving communication of information, and three years' imprisonment for other dealings.</p> <p>The maximum penalty for the aggravated secrecy offences in proposed section 122.3 should be ten years' imprisonment for conduct involving communication of information (consistent with the most serious secrecy offences in the <i>Australian Security Intelligence Organisation Act 1979</i> and the <i>Intelligence Services Act 2001</i>), and five years' for other dealings.</p>	<p>Accepted.</p> <p>The penalties for the offences at section 122.4A applying to non-Commonwealth officers have also been reduced to ensure they remain lower than the penalties applying to current and former Commonwealth officers.</p>
Espionage	
<p>35. Definition of 'concerns'</p> <p>The Committee recommends that the Bill be amended to define the term 'concerns' national security.</p>	<p>Accepted.</p>
<p>36. Definition of 'make available'</p> <p>The Committee recommends that the Bill be amended to define the term 'made available' for the purpose of the espionage offences.</p>	<p>Accepted.</p>
<p>37. Prior publication defence</p> <p>The Committee recommends that the Bill be amended to introduce a prior publication defence for the proposed espionage offences. The defence should be appropriately drafted to ensure the effectiveness of the provisions whilst protecting freedom of expression and the implied constitutional right to freedom of political communication.</p> <p>The Bill should further be amended to require that, prior to instituting proceedings to commit a person to trial for an espionage offence, the Attorney-General must consider whether the conduct might be authorised in any of the defence outline in Division 91</p>	<p>Accepted.</p>

Recommendation	Response
<p>38. ‘Primary purpose’ of making information available to foreign principal</p> <p>The Committee recommends that the Attorney-General’s proposed amendments to narrow the scope of the offence in proposed section 91.3 of the Bill be implemented. This includes requiring that the person dealt with the information for the ‘primary purpose’ of making it available to a foreign principal, limiting the offence to information or articles that have a security classification, and removing strict liability from the offence.</p>	Accepted.
<p>39. Scope of defences – ‘in accordance with a law of the Commonwealth’</p> <p>The Committee recommends that the Explanatory memorandum be amended to clarify the intended scope of the proposed defence in Division 91 for dealings ‘in accordance with a law of the Commonwealth’. The Explanatory Memorandum should provide examples of situations in which conduct would be excused by the specific defence, but not the general defence of lawful authority available under section 10.5 of the Criminal Code.</p>	Accepted.
<p>40. Aggravating factor 91.6(1)(b)(v)</p> <p>The Committee recommends that the Bill be amended to limit the aggravating factor at subparagraph 91.6(1)(b)(v), in relation to the proposed espionage offences, to persons holding an Australian Government security clearance that allows the person to access information with a classification of SECRET or above.</p>	Accepted.
<p>41. Right to freedom of expression</p> <p>The Committee recommends that the Explanatory Memorandum be amended so that the Statement of Compatibility with Human Rights explicitly addresses the limitation to the right to freedom of expression imposed by the espionage offences.</p>	Accepted.
Foreign Interference and theft of trade secrets	
<p>42. Material support</p> <p>The Committee recommends that the Bill be amended to explicitly provide that the term ‘support’ refers to ‘material support’, and that the Explanatory Memorandum provide examples of conduct that will not constitute material support, for example, news reporting, editorial or opinion writing and humanitarian assistance.</p>	Accepted.

Recommendation	Response
<p>43. Online theft of trade secrets</p> <p>The Committee recommends that the Explanatory Memorandum be amended to clarify whether the offence is intended to capture the theft of trade secrets by hacking or other online vectors.</p>	Accepted.
Sabotage	
<p>44. Introducing vulnerability offences</p> <p>Consistent with the other sabotage offences in the Bill, the Committee recommends that proposed sections 82.7 and 82.8 (introducing vulnerability with intention, or recklessness, as to national security) be amended to remove the following elements:</p> <ul style="list-style-type: none"> • harm or prejudice to Australia's economic interests, • disruption to the functions of the government of the Commonwealth, or a State or of a Territory, and damage to public infrastructure. 	Accepted.
<p>45. Defence for private owners of public infrastructure</p> <p>The Committee recommends that the defence at proposed section 82.10, in relation to the Bill's sabotage offences, be broadened to include conduct engaged in on behalf of a private owner or operator of infrastructure, in addition to public officials.</p>	Accepted.
Treason, treachery and other threats to security	
<p>46. Advocating mutiny - definition of 'advocating'</p> <p>The Committee recommends that the Bill be amended to define the term 'advocating' for the purpose of proposed section 83.1 (advocating mutiny), consistent with other existing offences in the <i>Criminal Code</i>.</p>	Accepted.
<p>47. Advocating mutiny - good faith defence</p> <p>The Committee recommends that the Bill be amended to provide that the 'good' faith defence at section 80.3 of the Criminal Code is available for the offence of advocating mutiny.</p>	Accepted.

Recommendation	Response
<p>48. Advocating mutiny - consent to prosecute consideration</p> <p>The Committee recommends that proposed section 83.5(4) 'Consent of Attorney-General required for prosecutions' be amended so that, for an offence against section 83.1 (advocating mutiny), the Attorney-General must consider whether conduct might be authorised in a way mentioned in section 80.3.</p>	Accepted.
<p>49. Military style training - humanitarian defence</p> <p>The Committee recommends that proposed section 83.3 (military style training involving foreign government) be amended to provide a defence against prosecution for those engaged in humanitarian work, including compliance training on the laws of armed conflict.</p>	Accepted.
<p>50. Interference with political rights and duties – penalty</p> <p>The Committee recommends that the Government reduce the penalty for the offence of 'interference with political rights and duties' at proposed section 83.4 from 10 years' imprisonment.</p>	Accepted.
<p>51. Interference with political rights and duties - contempt of Parliament</p> <p>The Committee recommends that the Explanatory Memorandum be amended to clarify that nothing in the Bill affects the Parliament's powers in relation to contempt.</p>	Accepted.
<p>Schedules 3 – 5 and consequential amendments</p>	
<p>52. Telecommunication interception powers</p> <p>The Committee recommends that the Explanatory Memorandum be amended so that the Statement of Compatibility with Human Rights explicitly addresses the necessity, reasonableness and proportionality of the expansion of telecommunications interceptions powers to all of the offences specified in Schedule 4 of the Bill.</p>	Accepted.

Recommendation	Response
<p>53. Australian Citizenship Act – section 35A</p> <p>The Committee recommends that Schedule 1, item 29 of the Bill be amended such that section 35A of the <i>Australia Citizenship Act 2007</i> applies to the foreign interference offences in the Bill, and does not apply to</p> <ul style="list-style-type: none"> • proposed section 82.9 (preparing for or planning sabotage offence), • proposed section 83.4 (interference with political rights and duties), or • proposed Part 5.6 – Secrecy of information 	Accepted.
<p>54. Australian Citizenship Act – national security offence</p> <p>The Committee recommends that the Bill be amended such that the phrase ‘national security offence’ in the <i>Australian Citizenship Act 2007</i> is limited to those offences which contain a clear nexus to national security.</p>	Accepted.
<p>55. Citizenship amendments and statelessness</p> <p>The Committee recommends that the Explanatory Memorandum be amended so that the Statement of Compatibility with Human Rights explicitly addresses the interaction between the proposed consequential amendments to citizenship application provisions, and Australia’s international obligations regarding stateless persons.</p>	<p>Accepted.</p> <p>The Supplementary Explanatory Memorandum explicitly addressed Australia’s international obligations regarding stateless persons. This is addressed in the body of the Supplementary Explanatory Memorandum rather than the Statement of Compatibility, which, consistent with the <i>Human Rights (Parliamentary Scrutiny) Act 2011</i> is intended to address the human rights within the definition in section 3 of that Act. This does not include the Statelessness Conventions.</p>
<p>56. Presumption against bail</p> <p>The Committee recommends that the Bill be amended to provide that section 15AA(1) of the Crimes Act 1914 applies to an offence against proposed Division 80, Division 91 and Division 92 of the Criminal Code only if:</p> <ul style="list-style-type: none"> • the death of a person is alleged to have been caused by conduct that is a physical element of the offence, or • conduct that is a physical element of the offence carried a substantial risk of causing the death of a person. 	Accepted.

Recommendation	Response
<p>57. Application of s93.2 Criminal Code – hearing in camera etc.</p> <p>The Committee recommends that the Explanatory Memorandum for the Bill be amended to clarify the scope and application of section 93.2 of the <i>Criminal Code</i>.</p>	Accepted.
<p>58. Minimum non-parole periods</p> <p>The Committee recommends that the Bill be amended to provide that section 19AG of the <i>Crimes Act 1914</i>, relating to minimum non-parole periods for certain offences, applies to an espionage offence against section 91.1(1) or 91.2(1), rather than all espionage offences in Division 91.</p>	Accepted.
Concluding recommendations	
<p>59. INSLM Review</p> <p>The Committee recommends that, after a period of three years, the Independent National Security Legislation Monitor be required to conduct a review of Division 82 (sabotage), Part 5.2 (espionage, foreign interference, theft of trade secrets), and Part 5.6 (secrecy) of the <i>Criminal Code</i>.</p> <p>A copy of the report on the independent review should be provided to the Attorney-General, who should be required to provide it to the Committee. Any amendments proposed to be made to the laws as a result of the review should be referred to the Committee for inquiry.</p>	Accepted.
<p>60. Correction of drafting errors</p> <p>The Committee recommends that the Attorney-General's Department review the Bill and Explanatory Memorandum in detail with a view to making amendments to correct any drafting errors prior to the conclusion of debate in the Parliament.</p>	Accepted.