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Committee Secretary
Parliamentary Joint Committee on Intelligence and Security
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Dear Committee Secretary

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

Australian Lawyers for Human Rights (**ALHR**) is grateful for the opportunity to provide this submission in relation to the Committee's current Inquiry into the proposed *National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017* ('**the Bill**').

We have also made a submission in relation to the *Foreign Influence Transparency Scheme Bill* and will be making a submission in relation to the *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017*. We refer to these Bills collectively as the '**Package**.'

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1. ALHR's Concerns

- 1.1 Pursuant to the principle of legality, Australian legislation and judicial decisions should adhere to international human rights law and standards, unless legislation contains clear and unambiguous language otherwise. Furthermore, the Australian parliament should properly abide by its binding obligations to the international community in accordance with the seven core international human rights treaties and conventions that it has signed and ratified, according to the principle of good faith.
- 1.3 ALHR endorses the views of the Parliamentary Joint Committee on Human Rights (PJCHR) expressed in Guidance Note 1 of December 2014¹ as to the nature of Australia's human, civil and political rights obligations, and agree that the inclusion of human rights 'safeguards' in Commonwealth legislation is directly relevant to Australia's compliance with those obligations.
- 1.4 Generally, behaviour should not be protected by Australian law where that behaviour itself infringes other human rights. There is no hierarchy of human rights – they are all interrelated, interdependent and indivisible. Where protection is desired for particular behaviour it will be relevant to what extent that behaviour reflects respect for the rights of others.
- 1.5 It is only through holding all behaviours up to the standard of international human rights that one can help improve and reform harmful and discriminatory practices.
- 1.6 Legislation should represent an **appropriate and proportionate response** to the problems and issues addressed by that legislation, and adherence to international human rights law and standards is an important indicator of such proportionality.²

2. Summary

- 2.1 The Package continues a general trend in recent Commonwealth legislation to impose strict liability and resultant **excessive penalties, including in this Bill imprisonment for life, irrespective of whether or not any harm has been caused or is likely to be caused.**
- 2.2 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.
- 2.3 The Package continues a general trend in recent Commonwealth legislation to impose strict liability and resultant **excessive penalties even when there is no intent to harm** or at the worst where there is only minor negligence or recklessness (see sections 3 and 4 below). ALHR is strongly opposed to such legislative provisions.
- 2.4 In the case of this Bill, the introduction of economic relations as a national security issue is particularly problematic. 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.
- 2.5 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". ALHR submits that it is unreasonable to penalise people for innocently using

¹ Commonwealth of Australia, Parliamentary Joint Committee on Human Rights, *Guidance Note 1: Drafting Statements of Compatibility*, December 2014, available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources> accessed 16 January 2015, see also previous *Practice Note 1* which was replaced by the Guidance Note, available at <<https://www.humanrights.gov.au/parliamentary-joint-committee-human-rights>>.

² 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>> .

or sharing information which is already in the public arena, for whatever reason, and that defences should be broadened accordingly.

- 2.6 Similarly, defences relating to humanitarian aid are too narrowly drafted.
- 2.7 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 Bills in the Package, including this Bill, could **severely penalise bona fide and benign behaviour which causes minimal harm**.

3. Human rights breached by the proposed Bill

- 3.1 The Explanatory Memorandum identifies the following rights under the *International Covenant on Civil and Political Rights (ICCPR)* as potentially impacted, arguing however that the impact is proportionate, necessary and reasonable in the circumstances or indeed (in the case of freedom of expression) that the right is actually promoted by the Bill. These are:
- the prohibition of torture, or cruel, inhuman and degrading treatment or punishment in Article 7 of the *International Covenant on Civil and Political Rights (ICCPR)*
 - the right to liberty of person and freedom from arbitrary detention in Article 9(1) of the ICCPR
 - the right to trial within a reasonable period or to release in Article 9(3) of the ICCPR
 - the right to be tried without undue delay in Article 14(3)(c) of the ICCPR
 - the right to be presumed innocent in Article 14(2) of the ICCPR
 - the right to privacy in Article 17 of the ICCPR
 - the right to opinion and freedom of expression in Article 19 of the ICCPR
 - the prohibition on propaganda for war and advocacy of national, racial or religious hatred in Article 20 of the ICCPR
 - the right to peaceful assembly in Article 21 of the ICCPR
 - the right to freedom of association in Article 22 of the ICCPR, and
 - the right to take part in public affairs and the right to vote in Article 25 of the ICCPR.
- 3.2 The Explanatory Memorandum concedes (par 69) that the Bill limits the presumption of innocence by:
- imposing strict liability and absolute liability for certain offence elements;
 - placing an evidentiary burden on the defendant with respect to defences; and
 - providing for evidentiary certificates which are prima facie evidence as to the existence of certain facts.

ALHR opposes these provisions which, given the seriousness of the offences involved, are inconsistent with the principles that form the bedrock of Australia's criminal justice system as well as international human rights standards.

- 3.3 Australia is a contracting party to the ICCPR which was signed by the Australian government on 18 December 1972 and ratified on 13 August 1980. Pursuant to Article 26 of the 1969 Vienna Convention on the Law of Treaties, Australia is obliged to the international community to implement, uphold, protect and respect all of the rights contained in the ICCPR including the right to freedom of expression and the right to a fair and public hearing in both civil and criminal

proceedings.

- 3.4 ALHR submits that the legislation as drafted negatively impacts upon all of the human rights referred to above.
- 3.5 In addition, the Bill continues this government's concerning and very undesirable pattern of criminalising 'reckless' behaviour that is in no way intended to cause harm, and quite irrespective of whether or not harm has actually been caused. Given that the Bill might result in incarceration for non-malignant behaviour which actually causes no harm, the Bill is potentially in breach of Article 9 of the ICCPR and Article 3 of the Universal Declaration of Human Rights (UDHR) which protect the right to liberty.
- 3.6 We remind the Committee that Australia had a significant role in drafting the UDHR and in its adoption by the United Nations General Assembly on 10 December 1948. This is a proud history that Australia has in upholding basic human rights and we should be vigilant to guard against their infringement by the government of the day.
- 3.7 We note also that Australia campaigned for its seat on the United Nations Human Rights Council on that basis that it is an 'international human rights leader' with 'respect for democracy and the rule of law.'

4. Broadness of the Bill's scope

- 4.1 The Bill is so widely drafted that if any person communicates or deals with any type of information that falls within very broadly drawn categories, they can be subject to criminal penalties. This includes not just members of departments dealing with national security issues, but persons who have no knowledge that the relevant information is restricted in this way (see proposed sections 122.1 to 122.3).

5. Causing harm and/or intending harm?

- 5.1 A serious offence should involve at the very least either an intent to harm or the causing or likely causing of actual harm. In ALHR's view, if neither component exists, it is not appropriate that the penalties for the offence are serious. However, the Package continues a general trend in recent Commonwealth legislation to impose strict liability and resultant excessive penalties, including in this Bill imprisonment for life, irrespective of whether or not any harm has been caused or could have been caused. ALHR is strongly opposed to such legislative provisions.

Was any harm caused? No de minimis exceptions

- 5.2 The proposed offences in subsections 122.1 and 122.4 impose criminal liability without a requirement that the disclosure caused, or was likely to cause, any harm. While the proposed subsection 122.2 requires proof of harm or damage, the types of issues identified are not all ones that are appropriate subjects of criminal penalties.
- 5.3 The Australian Law Reform Commission recommended in a comprehensive report in 2009³ that general secrecy offences under the *Crimes Act 1914* should require that the disclosure of the information causes, or is likely to cause, harm to an essential public interest. Where that is not the case, unauthorised disclosure should be dealt with by administrative or civil penalties. ALHR supports this position, which is unfortunately not reflected in the Bill.

Analysis of harm

- 5.4 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, rather than

³ Australian Law Reform Commission, *Secrecy Laws and Open Government, Report 112, December 2009*, tabled in March 2010, at <https://www.alrc.gov.au/inquiries/secrecy-laws-and-open-government>

spreading its present wide net. For example, while the information regulated by subsection 122.1 is presented as “inherently harmful” it is not at all obvious that this is the case for each type of information in question. Similarly, where the Bill does adopt a harm-based approach such as in subsection 122.2, the interests listed are not necessarily those that should be protected through criminal law offences

This point leads to the next issue.

6. How do economic interests mesh with national security interests?

- 6.1 The proposed new Criminal Code section 90.4 definition of ‘national security’ now includes “the country’s political, military or economic relations with another country or other countries.”
- 6.2 In addition, the offences in proposed sections 82.7 and 82.8 which are stated to be offences ‘of introducing vulnerability with intention as to national security’ and ‘of introducing vulnerability reckless as to national security’ relate to offences which may involve not only prejudice to national security, but also:
- harm or prejudice to Australia’s economic interests;
 - disruption to the functions of the Government of the Commonwealth, of a State or of a Territory; or
 - damage to public infrastructure (no matter how minimal in nature).
- 6.3 Given the extent of academic dispute within the science of economics as to likely causes and consequences of particular economic phenomena, how will it be possible to establish whether Australian economic relations would have been harmed or were intended to be harmed by any conduct? *Will opposition to the Trans Pacific Economic Agreement now amount to a breach of national security?*
- 6.4 ALHR submits that to include economic relations or interests as national security matters is unworkably vague and will have an unreasonably chilling impact on freedom of speech and discourse regarding matters of genuine public interest. This is inconsistent with democratic principles. Although in practice a number of non-intelligence and non-military issues may have an impact on a country’s national security – such as food security, climatic conditions, economic inequality and energy security, for example – this is no reason to criminalise holding or dealing with information about such matters.

7. Exemptions too narrow

Humanitarian Aid

- 7.1 ALHR submits that the exemption for humanitarian aid in subsection **80.1AA(4) Treason—assisting enemy to engage in armed conflict** is too narrowly drafted as the qualification that the conduct be “solely” for the exempt purpose is problematic. The exemption shares the defects of a similar exemption in the in the *Criminal Code Act 1995* (which was amended by virtue of the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014*). The effect of that amendment was to make it much harder to claim a humanitarian aid exception, as the exception was to apply only where it was the sole reason for the conduct in question, even though there could be many additional reasons why the particular conduct was carried out that were not related to offensive activities. There are similar difficulties with the wording here. Given that any conduct can convey multiple messages to different audiences, it is likely to be virtually impossible for anyone to prove that their conduct had a sole purpose or a sole message.

Information in the public arena

- 7.2 The apparent defences for sharing or otherwise dealing with information which is already in the public arena are likely to be of little use to the extent that the defences 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” (see for example proposed sections 91.4(2) and 122.5(2)). It is not clear how a defendant will know whether or not this is the case.
- 7.3 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. Section 122.5 (8) provides a broader exemption, although limited to persons having no direct Commonwealth involvement.

8. Whistleblowing and public interest issues

- 8.1 The over-reach of the Bill as described above will have a highly concerning chilling effect on free speech but particularly upon whistleblowing and journalism. This means that it will be very hard for governments of all persuasions to be held to account by the public.
- 8.2 ALHR endorses the inclusion of exemptions for whistleblowers and journalists, but notes that:
- while whistleblowers will not be liable if they comply with the *Public Interest Disclosure Act 2013* (proposed section 122.5(4)), that Act does not provide the most comprehensive protection, in particular in this context because it does not apply to intelligence information.⁴ As one former whistleblower noted:

The biggest failing of the [Act] is that agencies will still investigate their own complaints. No minister wants to front a press conference on corruption in their department. An internal complaint unit can make the whole thing go away by tipping off the perpetrator and terrorising the whistleblower. The government can sit on a complaint indefinitely during which time the whistleblower is vulnerable to retribution and cannot talk to the media

... [the] whistleblower laws ... exclude punitive and exemplary damages. Instead, the whistleblower is only entitled to damages “to put them back in the position they would have been in”, and they still risk being held liable for costs. The safest course of action for a whistleblower remains not make the complaint in the first place. The new laws won’t protect whistleblowers reporting corruption by politicians.⁵

- Under s 122.5(6), to avail themselves of the defence a journalist must be acting in the public interest and be engaged in “fair and accurate reporting.” Subsection (7) adds further limits upon the journalistic defence, including the strange limitation that the journalist is restricted from ‘dealing with or holding information that will or is likely to harm or prejudice the health or safety of the public or a section of the public’ – surely the very kind of information that it would be in the public’s interest to be informed about?

ALHR submits that these measures threaten open, transparent and accountable government.

9. Conclusion

- 9.1 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

⁴ Sections 41 and 26.

⁵ Brendan Jones, “You better be careful blowing the whistle — new laws have holes”, *Crikey*, at <https://www.crikey.com.au/2013/07/30/you-better-be-careful-blowing-the-whistle-new-laws-have-holes/>, accessed 21 January 2018

minimises the overall impact upon all human rights. ALHR is concerned that in several respects the Bill does not strike the right balance.

- 9.2 ALHR is concerned that the Package as a whole will severely impact on the ability of non-government associations, from major charities to small volunteer groups, to participate in political discourse, while leaving major businesses relatively untouched. This outcome ensures that the voices of the 'haves' dominate our democracy, while those who attempt to speak on behalf of the 'have nots' will be so limited and restricted that their voices will not be heard. Growing inequality in the world is indeed "a direct consequence of the voice of working people being crushed" as a former Australian Treasurer has said, and ALHR is concerned that this Package would have that very effect.

We note that the time frame for considering this and other related Bills has been particularly short and at a difficult time of year. There may well be other issues in relation to the Bill which we have failed to identify but which are also of importance.

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 at: president@alhr.org.au

Yours faithfully



Benedict Coyne

President
Australian Lawyers for Human Rights

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.