15 June 2018

PO Box A147
Sydney South
NSW 1235
DX 585 Sydney

www.alhr.org.au

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 Foreign Influence Transparency Scheme Bill 2017 – Second Supplementary Submission

Australian Lawyers for Human Rights (**ALHR**) appreciates the opportunity to provide this supplementary submission in response to the Committee's recent invitation, following on from the draft amendments to the Bill issued on 8 June 2018.

We note also that further amendments to the *Foreign Influence Transparency Scheme Bill 2017* are included in Schedule 5 to the *National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017.*

The comments made by the Committee in its recent report on the *National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017* to the effect that the *Foreign Influence Transparency Scheme Bill* needs to be considered as complementary to the *National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017* have informed our own submissions below. As you will see, there are a number of concerns common to both Bills, including the need for consistency in concepts and language.

We note with some considerable concern that the public has effectively been given only three and a half working days to respond to extensive changes to the *Foreign Influence Transparency Scheme Bill 2017* and that the text of amendments to the *Electoral Act and National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017* has not yet been made public.

We continue to be greatly concerned as to the chilling impact of these Bills on civil society, including academics and cultural organisations, and upon the implied constitutional right to free political speech generally.

1. Summary

1.1 In relation to the *Foreign Influence Transparency Scheme Bill:*

- Subsection 11(3) should be deleted and subsection 11(1) further amended to ensure that the relationship between foreign principal and agent is clearly a direct agency relationship;
- No criminal penalties should apply, nor should absolute or strict liability apply to any elements of the offences;
- It should be made quite clear that outcomes of processes are not included under 'political or governmental influence'
- The amendments proposed to the Bill in Schedule 5 to the *National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017* should not be adopted;
- The concept of 'a section of the public' should be clarified;
- An exception should be made for academic talks and writings;
- An exception should be made for charitable and advocacy activities;
- The exemption in relation to legal work should be further clarified.

1.2 In relation to the *National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017:*

- The UN and related bodies and representatives should not be included in the definition of 'foreign principal' – section 90.2(b) should be deleted.
- The definition of 'national security' should not include economic relations;
- Sections 92.2 and 92.3 should be amended and considerably clarified
- criminal penalties should be harms based and absolute or strict liability should not apply.
- Whistleblower and public interest defences should apply
- Temporary and de minimis public infrastructure damage should not be penalised

2. Foreign Influence Transparency Scheme Bill 2017

2.1 Direct agency relationship

ALHR welcomes the deletion of subsections 11(1)(e) and (f) which we know were of great concern to academics, cultural and sporting associations. This amendment has the effect of aligning the legislation more closely with the direct agency situation which applies under the US Foreign Agents Registration Act 1938.

However we submit that for consistency it is also necessary to delete subsection 11(3) which otherwise retains a concept of collaboration in the sense of common knowledge and expectation between the principal and the agent which is inconsistent with the removal of subsections 11(1)(f) and which is likely to cause confusion in practice.

We also submit that for greater certainty it is also preferable to delete the reference to 'arrangement' in section 11(1)(a) and the reference to 'or at the request of' in section 11 (1)(c) as this also departs from the concept of direct agency relationship. For example, Australian charities may be involved in overseas charitable work by arrangement with or at the request of, say, a Pacific Island government without that charity acting on behalf of the foreign government in the ordinary sense of the word. The concept of 'in the service of' under section 11(1)(b) is also problematic in this context, as it could be argued that charitable assistance to such a foreign country serves the interests of that country's government.

2.2 Foreign Political Organisation

Submissions were made in relation to the *National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017* to the effect that the term 'foreign political organisation' is

not sufficiently clearly defined and could well cover foreign independent advocacy bodies not aligned with any foreign government, such as UN bodies.

We endorse the submission of the Australian Lawyers Alliance (quoted at paragraph 3.53 of the report) that there should be a clarification limiting the definition of 'foreign political organisations' to 'foreign governments, foreign political parties and organisations aligned with such governments or parties.'

The Committee's report on that Bill appeared to agree also with the Australian Lawyers Alliance submission, saying that the 'ambiguity should be rectified' (par 3.86). **However no such rectification has been proposed in relation to the *Foreign Influence Transparency Scheme Bill 2017.* We submit that such rectification is required here also.**

While section 26(2) provides an exemption for the activities of UN persons or associated persons, it is not clear whether the UN is intended to be covered by the definition of a foreign political organisation and the Explanatory Memorandum (par 132) is not clear on this point.

It is strongly submitted that the UN and related bodies should be excluded from the definition of 'foreign political organisation' and that the definition should be limited to organisations that field candidates in government elections, or to the phrase suggested by Australian Lawyers Alliance. There is otherwise the risk that the definition might inadvertently capture foreign charities, think tanks and the like which engage in advocacy.

Assurances that measures are not intended to be applied by an Attorney General to certain activities or organisations are not a sufficient or acceptable alternative to clearly drafted legislative provisions which capture only the conduct sought to be addressed and reflect the true intent of the legislature.

Failure to exclude the UN and related bodies will result in laws that are inconsistent with the rules based international legal system and which provide neither a proportionate, necessary or reasonable response to the perceived harms the Government is saying it seeks to address.

2.3 Political or governmental influence

ALHR endorses the change to section 12 to delete the phrase "(including the outcome)" so that it is a little clearer that the harm against which the Bill is aimed is interference with government or political processes. However in our view it is still possible that a court could regard the outcome of a process or procedure as an integral part of such process or procedure, so we submit that it would be preferable rather than deleting the phrase "(including the outcome)" to amend it to read: "(but not including the outcome)."

We also submit that section 12 should be amended to make it clear that it is Australian government and parliamentary influence that is in question. Attempting to influence non-Australian entities should be clearly excluded.

Similarly, the definitions of 'communications activity' and 'lobbying' should be amended to clarify that they do not relate to activities primarily outside Australia and not relating to Australian political or governmental processes.

We note that there continues to be considerable confusion about how to distinguish an outcome from a process, despite the explanatory wording.

We note that influence is unlikely to be taken to include 'agreement with'. The Bill therefore effectively targets disagreement with government or political processes or proceedings, which has a particular impact on freedom of political communication and leads to additional confusion as individuals and organisations fear that they cannot express disagreement with the government of the day.

2.4 Political campaigners

ALHR submits that the amendments to the Bill proposed in Schedule 5 of the *National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017,* whereby influencing a process in relation to a political campaigner (as so registered under the *Electoral Act*) would be regarded as constituting political or governmental influence for the purposes of section 12 of the Bill, should not be included in the final wording of the Bill. While section 12 has been amended to delete the phrase "(including the outcome)" so that it is a little clearer that the harm against which the Bill is aimed is interference with government or political processes, the example now given in subclause 12(7) of processes of a political campaigner which might engage section 12 is very wide, including processes in relation to the campaigner's platform and policies on any matter of public concern.

For the government to establish a significant self-regulatory scheme with criminal penalties in relation to influence directed towards government bodies arguably justifiable for the protection of government (although that is not the exact argument that is being made). However for the government to establish such a scheme in relation also to influence directed at non-government political campaigners is definitely a step too far and an effective restriction on freedom of political speech in Australia.

2.5 Influencing a section of the public

Similarly we remain concerned that under section 12(2), a person is regarded as undertaking an activity for the purposes of political or governmental influence if a sole or primary purpose, or a substantial purpose, of the activity is to influence the public, or a section of the public, in relation to the matter.

In other legal contexts, 'section of the public' can mean even a very small group of people who have no common connection – for example, an audience at a public talk, no matter how few the number, or the readers of a public article, no matter how few the number. This interpretation is acknowledged by the Committee at page 231 of the Explanatory Memorandum in relation to the *National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017.*

Unless it is very clear in the Bill that the legislation does not apply except in the case of a direct principal/ agency relationship in the traditional legal sense (which, we submit, requires the deletion of subsection 11(3) and further amendment of subsection 11(1) as explained above), writers and speakers including journalists and academics will be afraid to communicate personal views at variance with those of the government of the day, and perhaps will even be afraid to discuss issues related to foreign interference, when they can be regarded as carrying out political or governmental influence even when they communicate with only a small audience. This is particularly the case because under section 14 the intention of the writer or speaker is not paramount, and they can be regarded as carrying out an activity for the purpose of political or governmental influence even if this is not their intention.

We therefore submit that the several references in the Bill to communication with 'a section of the public' should preferably be deleted but if not should be clearly defined to enable people to understand whether or not they might be carrying out an activity which is caught under the Bill.

2.6 Academic work exemption

ALHR submits that in the light of the above points above it would be beneficial to include an exemption for academic work which is undertaken in collaboration with foreign bodies and

organisations, given that the very promulgation of the draft Bill has already had a general chilling effect upon academic activity. We suggest a provision along the following lines:

> *"Nothing in this Act requires a person to register under this Act in relation to any conduct done reasonably and in good faith for genuine academic purposes including conduct in collaboration with foreign universities or similar foreign scholarly institutions."*

2.7 Legal exemption

ALHR welcomes the expansion of the exemption in relation to legal advice and representation, and the inclusion of provisions confirming the situation in relation to legal professional privilege, but supports the Submission No 10 from Law Firms Australia to the effect that the exemption should also cover:

- work that is incidental to providing legal advice or representation; and
- all forms of legal representation without limit as to the type of matters in question.

We suggest that the present proposed paragraphs (a), (b) and (c) be replaced with the words: "legal advice or representation, and any work incidental thereto, in respect of the normal provision of professional legal services."

2.8 Charities exemption

ALHR submits that in the light of the above points above it would be beneficial to include an exemption for charitable work which is undertaken in collaboration with foreign bodies and organisations. While we acknowledge that the new section 11(4) clarifies that 'An activity undertaken by a company registered under the Corporations Act 2001 is not undertaken on behalf of a foreign principal merely because the company is a subsidiary (within the meaning of the Corporations Act 2001) of a foreign principal', that does not mean that all activities of a subsidiary are exempt from the impact of the legislation.

We suggest a provision along the following lines:

"Nothing in this Act requires a person to register under this Act in relation to any conduct done reasonably and in good faith for genuine charitable purposes including conduct in collaboration with foreign charities, advocacy groups or similar institutions."

2.9 Criminal penalties

ALHR acknowledges that the scope of the Bill is considerably more focused and targeted now that the definition of 'foreign principal' has been revised. However we submit that the penalties in the Bill should be harms-based and that appropriate penalties should be civil, not criminal.

Because 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.

The Bill is not about covert influence, as has been acknowledged many times, as opposed to the *National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017* which is (at least in part) about covert influence. This Bill deals with perfectly ordinary and – apart from the Bill - lawful behaviour. As the Attorney General's Department has said:

- "a key purpose of the Foreign Influence Transparency Scheme has been to shed light on quite legitimate dealings that are not criminal."[1]

- [1] Hansard, Joint Committee evidence 16 March 2018, p 49.

- "it is not the covert Foreign Influence Transparency Scheme... There is no inference or suggestion in the Foreign Influence Transparency Scheme that that foreign influence is harmful."[2]
- "there is no intention to cast negative aspersions or to criminalise or to otherwise take the view that it is wrong for there to be foreign influence; it's simply that there is value in that being disclosed and it being transparent to the community and decision-makers"[3]

That is, the only potential malfeasance relates to a new obligation created by the Bill: the failure of the relevant person to register with the regulator, with its consequent obligations. On that basis, **we submit that criminal penalties are entirely inappropriate**.

Our view is consistent with the Commonwealth Government's own Guidelines [4] which provide that such matters as 'whether the conduct in some way so seriously contravenes fundamental values as to be harmful to society' should be considered before imposing criminal penalties.[5] The Guidelines quote Report 95 of the Australian Law Reform Commission: *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, to the effect that:

> The main purposes of criminal law are traditionally considered to be deterrence and punishment. Central to the concept of criminality are the notion of individual culpability and the criminal intention for one's actions.[6]

and that

> ... a key characteristic of a crime, as opposed to other forms of prohibited behaviour, is the repugnance attached to the act, which invokes social censure and shame.[7]

We were particularly concerned to read comments from the Attorney General's Department to the effect that criminal prosecution would be used sparingly – but should be retained, effectively in order to encourage people to register under the Act. It was said that:

> "in relation to that compliance and the suggestion that there is [a] negative connotation that comes from criminal proceedings—absolutely there is. But what I would say in respect of that registration piece is that the scheme has been designed to support compliance with the scheme, and hence that ability to engage with somebody who ought to be registered and to formally engage with them— we could of course do so informally prior—and to flag: 'It appears to us from what we see that you are engaging in activity of this nature. This seems to us to be something that requires registration. It wouldn't proceed directly to criminal action. Again, if there's an inadvertent failure to comply, the first port of call would not be criminal sanctions."[8]

---

2 Hansard, Joint Committee evidence 16 March 2018, p 54.

3 Hansard, Joint Committee evidence 16 March 2018, p 53.

4 Most recent version dated 2011 is available at: https://www.ag.gov.au/Publications/Pages/GuidetoFramingCommonwealthOffencesInfringementNoticesandEnforcementPowers.aspx

5 Ibid, page 13.

6 Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report 95: 2003, available at <http://www.austlii.edu.au/au/other/alrc/publications/reports/95/>, quoted at page 12.

7 ALRC 95 at 2.9, quoted at page 12.

8 Hansard, Joint Committee evidence 16 March 2018, pp 54 – 55.

Similar comments have been made by the Committee in relation to the *National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017*, to the effect that the Attorney General would exercise discretion as to whether or not persons would be prosecuted for espionage if they communicated with the United Nations and that communication might be argued to prejudice Australia's national security. However at the same time, the Attorney General's Department has said that "Ultimately, enforcement of the offences will be a matter for the AFP."[9]

If it is indeed the case that the Attorney General's Department does not propose to apply criminal sanctions in the manner contemplated in the legislation, then we submit that it is outrageous that any criminal penalties are being proposed at all for what is admitted to be otherwise legal behaviour. It would appear that the imposition of criminal penalties is being used to 'encourage' citizens to register under the Act, which we submit is clearly inconsistent with the Commonwealth Guidelines and amounts to an abuse of the rule of law.

We note that under section 15B of the *Crimes Act 1914* (Cwlth), where a criminal penalty involves more than 6 months imprisonment, no limitation period applies and a person can be prosecuted at any later time.

We also note that:

- by virtue of Part 2.5 of the Criminal Code, and Section 4B of the *Crimes Act 1914* a fine may be imposed upon corporations for offences that only specify imprisonment as a penalty; and
- it is possible for officers or employees of a company to be liable as accessories of the company if the company is regarded as having breached the Bill/Act.

Given the difficulties of understanding whether or not either Bill applies, and given the need for people who have caused no harm to rely on the practices of the Attorney General of the day, it is entirely inappropriate that there is no limitation period for crimes under the Bill. What happens when the government changes and there is a different Attorney General? What if officials later take a different interpretation of the legislation? We submit that if the criminal penalties are not removed, at least a reasonable limitation period like 2 years should be applied.

How can we have confidence that Commonwealth prosecution guidelines will be correctly applied, given that the offences in both the *National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017* and the *Foreign Influence Transparency Scheme Bill* do not appear to be framed in accordance with the Commonwealth's Guide to Framing Commonwealth Offences?

We are concerned that a similar situation applies under the *National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017*, as described further below, both in relation to the reliance that persons potentially caught by the legislation will need to place on the good graces of the Attorney General at the time, and in relation to the uncertainties as to whether or not the legislation applies.

2.10 Absolute liability and strict liability

We note that absolute liability has been introduced in sections 57(5) and 57A(5) in addition to the existing absolute liability in section 61(2). Strict liability allows a defence of honest and reasonable mistake of fact to be raised (section 9.2 of the Criminal Code, while the application of absolute liability does not.[10]

---

[9] Hansard, Joint Committee evidence 16 March 2018, p 55.

[10] Guidelines, page 22.

We submit there is no reason in principle why a defence of honest and reasonable mistake of fact should not be permitted under the Bill in relation to the sections referred to above. Indeed, given that there is so much confusion as to how the Bill will apply, including because of lack of clear definitions of key provisions such as 'section of the public', 'foreign political organisation' and the like, it is appropriate and reasonable to allow a defence of reasonable mistake of fact.

To impose absolute liability is both undesirable and inconsistent with Commonwealth Guidelines. As the Guidelines say:

> The requirement for proof of fault is one of the most fundamental protections in criminal law. This reflects the premise that it is generally neither fair, nor useful, to subject people to criminal punishment for unintended actions or unforeseen consequences unless these resulted from an unjustified risk (ie recklessness).
>
> The application of strict and absolute liability negates the requirement to prove fault (sections 6.1 and 6.2 of the Criminal Code). Consequently, strict and absolute liability should only be used in limited circumstances, and where there is adequate justification for doing so. This justification should be carefully outlined in the explanatory material.
>
> The Criminal Justice Division should be consulted at an early stage on any proposal to apply strict liability to all elements of an offence that is punishable by imprisonment.[11]

Under the Bill, strict liability offences apply to sections 58(1), 58(2) and 58(3). The Guidelines also recommend against the inclusion of strict liability provisions, saying:

> The Committee considers that the following principles should apply to the framing and administration of strict and absolute liability offences.
>
> - **Strict liability offences should be applied only where the penalty does not include imprisonment** [emphasis added] and the fine does not exceed 60 penalty units for an individual.
> - Strict liability may be appropriate where it is necessary to ensure the integrity of a regulatory regime, such as public health, the environment, or financial or corporate regulation. However, as with other criteria, this should be applied subject to other relevant principles.
> - Strict liability should not be justified by reference to broad uncertain criteria, such as offences being intuitively against community interests or for the public good. Criteria should be more specific.
> - Strict liability may be justified where its application is necessary to protect the general revenue.
> - Strict liability should not be justified on the sole ground of minimising resource requirements; cost saving alone would normally not be sufficient, although it may be relevant together with other criteria.
> - Absolute liability may be acceptable where an element is essentially a precondition of an offence and the state of mind of the defendant is not relevant. Such cases are rare and should be carefully considered.[12]

---

[11] Guidelines, op cit, page 22.

[12] Guidelines, op cit, page 24.

3. National Security Legislation Amendment (Espionage and Foreign Interference) Bill

3.1 Communicating with the UN or espionage? Section 91.2

ALHR endorses the concerns expressed by Amnesty International in the *Sydney Morning Herald* [13] that by virtue of section 90.2(b), under the proposed section 91.2 it is possible that normal activities of human rights organisations such as sharing information with UN bodies, if the relevant information has the potential to embarrass the government and thus perhaps to 'prejudice' Australia's national security interests, could amount to crimes under section 91.2.

We strongly submit that section 90.2(b) should be deleted as entirely inappropriate. It is extraordinary that communication with the public international organisations which form part of our international rules-based order should be potentially criminalised in this manner.

While ALHR recognises that it has now been clarified that mere embarrassment will not be sufficient to establish harm to Australia's national security, given the very broad definition of national security (see below) it will be very difficult for organisations and individuals to assess whether or not their actions might be caught by section 91.2.

Comprehensibility of the elements of a crime, including the ability to clearly distinguish different elements of the offence, is crucial but is not established by this section.

The Head of ASIO has stated that "when we're talking about espionage, it's generally an intelligence agency versus an intelligence agency. That is a matter between intelligence professionals."[14] It is therefore very clear that section 91.2 far exceeds a reasonable and proportionate response to espionage.

We do not agree with the Committee's apparent suggestions that if dealing with UN bodies is excluded from the section, then spies will find a way to utilise such bodies in order to achieve their espionage ends (par 3.91 of the report in relation to the *National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017*).

If there are any gaps in the *National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017*, it is the fact that 'foreign principal' does not include foreign businesses. In our view, it is much more likely that spies would conduct espionage through the gap of foreign business rather than the so-called gap of UN bodies.

Nor do we agree that it is appropriate for the public to rely on the Commonwealth's prosecution guidelines to protect them in relation to crimes for which they could be jailed for life, and in relation to which there is no period of statutory limitation.

We again note that mere assurances that measures are not intended to be applied by an Attorney General to certain activities or organisations are not a sufficient or acceptable alternative to clearly drafted legislative provisions which capture only the conduct sought to be addressed and which reflect the true intent of the legislature.

As mentioned above, how can we have confidence that prosecution guidelines will apply, given that the offences in both the *National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017* and the *Foreign Influence Transparency Scheme Bill* do not appear to be framed in accordance with the Commonwealth's Guide to Framing Commonwealth Offences cited above?

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

---

[13] 11 June 2018 p 22, "Security bill will muzzle human rights activists"

[14] Hansard, Joint Committee evidence 16 March 2018, p38.

communicated or made available to the public was made public "with the authority of the Commonwealth".

Firstly, these provisions will not protect bodies which are making private communications to UN bodies or that have not already published those communications.

Secondly, in the normal course of events the Commonwealth would not be authorising such communications and so the defences would not apply. (In that context we submit that Clauses 91.4(2), 91.9(2), 122.5(2): should be amended by deleting "with the authority of the Commonwealth" and replacing that phrase with ",including a section of the public.")

These concerns also apply to new sections 92.2 and 92.3 as discussed below.

3.2 Broad definition of 'national security'

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" as well as, in subsection 90.4(2), "foreign interference."

We agree with the Committee's recommendation (par 8.57) that 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' should be amended to remove references to:

- 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 or temporary in nature).

However we also believe that 'economic relations' should be deleted from section 90.4 and section 121.1 and the meaning of 'foreign interference' should be clarified in the Bill, not just the explanatory memorandum (as proposed in par 3.81 of the Committee Report).

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?

President Trump regards the Trans Pacific Partnership as something affecting US national security[15]. *Will advocating against the Trans Pacific Partnership be regarded as intended to 'harm or prejudice Australia's (or another country's) 'economic interests' or 'economic relations' and therefore be a crime?*

We note in relation to section 121.1 that the phrase used is 'Australia's international relations' but the Committee in its report expresses the view that this phrase includes "Australia's political, military and economic relations with foreign governments and international organisations" (par 2.52). We submit that it is therefore appropriate to specifically exclude economic relations from section 121.1. While it is said that

> 'Proposed section 121.1 adopts the definition of 'international relations' provided in the *National Security Information (Criminal and Civil Proceedings) Act 2004*, which provides: 'international relations means political, military and economic relations with foreign governments and international organisations'[16]

---

15 Dr Neal, Hansard, Parliamentary Joint Committee on Intelligence and Security, 16 March 2018, p 14.

16 Footnote 6 to par 2.52 in the Committee report.

we note that that legislation does not establish any offences and that to use the same phrase in the context of criminal offences is not something that should be done without close consideration of the impact involved.

It was argued that the Australian Law Reform Commission recommended the inclusion of 'economic relations' as a head of 'national security.' This is not exactly correct. The Australian Law Reform Commission Report 98, *Keeping secrets: the protection of classified and security sensitive information*, tabled in June 2004, discussed at pages 44 and 45 references to wording about 'national security' in the *Commonwealth Protective Security Manual,* which included a definition of "international relations" as relating to significant political and economic relations with international organisations and foreign governments and a definition of "national interest" as relating to "economic, scientific or technological matters vital to Australia's stability and integrity." The ALRC recommended (11-3, p 19) that the wording be adopted in the *National Security Information (Criminal and Civil Proceedings) Act* for consistency with the wording in the Security Manual.[17] However that Act does not establish any offences, and the use of that phrase in that Act was for quite different purposes than its use in the Bill.

It is not correct to justify the use of 'economic relations' in the definition of 'national security' by reference to ALRC recommendations in respect of another matter entirely.

The Head of ASIO has expressed the view that 'national security' may cover any type of 'threat', saying that:

> the definition of 'national security' is something that does actually change through time. We've always sought to redefine it as circumstances in the world change. I don't think it's unreasonable at all to include, on occasions when there is a direct nexus between the two issues you raised, which is political or economic international activity and national security. That seems to me to be very, very defendable. One needs to be careful. You can't just sort of lay it down and say, 'That is national security.' It's a very elusive definition. It depends on what is actually a threat to the nation at any given time. And if something is a threat, then I consider that to be part of national security, and it's part of my remit to identify those threats and reflect them to the government, to provide early advice on the threat as it presents.[18]

ALHR submits that it is not appropriate for criminal liability to be based on overly broad and potentially changing meanings. 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, as would appear to be the effect of the Bill.

Given that 'foreign interference' is not defined, the inclusion of 'foreign interference' as one type of national security activity is problematic, as again it is difficult for a person to know if this element of a crime is made out.

---

[17] The *National Security Information (Criminal and Civil Proceedings) Act 2004* provides: "In this Act, national security means Australia's defence, security, international relations or law enforcement interests" and 'international relations' means "political, military and economic relations with foreign governments and international organisations." The other possibly relevant provision is Section 85ZL of the Crimes Act 1914 (Cth) which refers to "information affecting the defence, security or international relations" of Australia.

[18] Hansard, Joint Committee evidence 16 March 2018, p 44.

There is no defence for harming or causing ‘prejudice to’ or ‘interference with’ national security, **even in relation to issues that are matters of public discussion**. All terms are excessively broad and vague and make it very hard to know what is required of people seeking to comply with the legislation.

The Chair of the committee that developed the Criminal Code, Dr Neal, says that the Code is meant to be based on simple and uniform concepts, but “there is nothing simple about these concepts,” the breadth of which is “just unworkable”.[19] “Do we want to go that far?” he asks.[20]

ALHR endorses the concerns of the Law Council that individuals “just will not know where the boundaries are in terms of whether or not they're actually committing criminal offences”.[21]

3.3 Lack of definitions

We endorse the concerns of the Law Council, the Independent National Security Legislation Monitor and others that it is of fundamental concern that key terms such as ‘espionage,’ ‘sabotage,’ ‘political violence’ and ‘foreign interference’ are deliberately undefined (given that the Bill will remove existing definitions in some cases).

Similarly, phrases such as ‘prejudice Australia’s national security’ and ‘concerns national security’ are unclear and should be defined, given the breadth of the term ‘national security.’

How is it that Australians will know what the legislation means if terms are not defined? We do not believe that the answer is to add more explanations to the Explanatory memorandum as the Committee proposes in paragraph 3.81 and elsewhere. Changes should be made to the Bill itself.

3.4 The difficulties of understanding and applying Sections 92.2(2) and 92.3(2)

Comprehensibility of the elements of a crime is crucial but is not established in these sections. There is no definition of one aspect which is crucial to these provisions, being “an Australian democratic or political right or duty.” While the Explanatory memorandum suggests voting, the right to make donations (at least domestically) and, ironically, the implied constitutional right of free political communication as such rights, it does not offer any further assistance. Given that there is no Federal Human Rights Act one must look to implied Constitutional rights, common law rights and Federal anti-discrimination legislation to find what is meant by democratic rights. This is a complex topic, as the public inquiry on ‘Traditional’ Rights and Freedoms demonstrated. The meaning of the phrase is not at all clear, but is a crucial element in relation to a potential offence. It is submitted that this phrase urgently needs clarification.

The questions that we initially raised about the manner in which these sections could operate if the foreign principal was not known to the perpetrator (as is contemplated in subsection (3) of each section) have not been answered by the Committee’s report. 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? 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?

---

[19] Hansard, Parliamentary Joint Committee on Intelligence and Security, 16 March 2018, p 10.

[20] Hansard, Parliamentary Joint Committee on Intelligence and Security, 16 March 2018, p 13.

[21] President of the Law Council of Australia, Hansard, Parliamentary Joint Committee on Intelligence and Security, 16 March 2018, p 10.

It is not clear if proposed new sections 92.2(2) and 92.3(2) use the *Foreign Interference Transparency Scheme Bill* definition of ‘on behalf of’ or not to capture non-agency relationships. The new sections still retain references to ‘collaboration’ and funding which have been removed from section 11(1) of the *Foreign Interference Transparency Scheme Bill.* It is submitted that similar amendments should be made to these new sections for similar reasons.

Given that ‘Foreign principal’ is defined to include UN bodies, these sections also have the potential to criminalising non-covert normal international communication about human rights breaches.

At the very least, we suggest amending the clauses as follows:

1. Clauses 92.2(2)(b) and 92.3(2): *amend as follows (including for consistency with FITS changes):*

(2) A person commits an offence if:

(a) the person engages in conduct; and

(b) any of the following circumstances exists:

(i) the conduct is engaged in on behalf of ~~or in collaboration with~~ a foreign principal or a person acting on behalf of a foreign principal;

(ii) the conduct is directed, ~~funded or supervised~~ by a foreign principal or a person acting on behalf of a foreign principal;

2. Clauses 92.2(2)(c) and 92.3(c): *amend as follows (including for consistency with FITS changes):*

(i) in relation to a political or governmental process of the Commonwealth or a State or Territory (but not including the outcome of such process); or

(ii) in the target’s exercise (whether or not in Australia) of any Australian democratic or political right or duty; and

(d) the person conceals from, or fails to disclose to, the target the circumstance mentioned in paragraph (b).

3.4 Definition of ‘foreign political organisation’

We endorse the submission of the Australian Lawyers Alliance (quoted at paragraph 3.53 of the Committee’s report in relation to the *National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017*) that there should be a clarification limiting the definition of ‘foreign political organisations’ to ‘foreign governments, foreign political parties and organisations aligned with such governments or parties.’

3.5 Absolute liability and strict liability

We repeat the concerns expressed in relation to the application of such concepts to the *Foreign Influence Transparency Scheme Bill 2017* also in relation to the *National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017*). Many of the 38 new

offences are offences of absolute liability irrespective of intent, including the crime of preparing to commit a crime.[22]

3.6 Criminal penalties

We repeat the concerns about the excessive nature of criminal penalties as expressed in relation to the *Foreign Influence Transparency Scheme Bill 2017* also in relation to the *National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017*). Many offences have severe penalties irrespective of whether or not any ham has been caused, including offences that penalise the unintentional receipt of classified information and relating to communicating information to a foreign party or organisation.[23] The offences are not 'harm based'.

3.7 Whistleblowing and public interest conduct

Whistleblowing is insufficiently protected[24]. The crime of 'interfering with' Australian interests remains very broad[25] and may stifle criticism of police, security or prosecution officials who have acted improperly or negligently. The public interest exception is not available to independent journalists or bloggers, nor to whistleblowers who may be guilty of 'dealing' if they contact news media (including with government documents).[26] A person can be guilty of espionage by being reckless as to whether their disclosure of any information or article to a 'foreign principal' (widely drafted) might 'prejudice' Australia's national security.[27]

In addition, we submit that there should be a public interest defence consistently with Schedule 2.

3.8 Damage to public infrastructure

Some provisions have a de minims concept and some do not. We submit that it is inappropriate to impose criminal penalties in relation to minimal damage or temporary inconveniences. We suggest amendments as marked up below.

Division 82 – amend definition of 'damage to public infrastructure' as follows:

conduct results in ***damage to public infrastructure*** if any of the following paragraphs apply in relation to public infrastructure:

(a) the conduct destroys it or results in its destruction;

(b) the conduct involves interfering with it, or abandoning it, resulting in it being lost or rendered unserviceable;

---

22 See for example New Criminal Code section 80.2.9. This is contrary to the 2004 ALRC Report 98 recommendation 8-2: "Specific secrecy offences should include an express requirement that, for an offence to be committed, the unauthorised disclosure caused, or was likely or intended to cause, harm to an identified essential public interest, except where: (a) the offence covers a narrowly defined category of information and the harm to an essential public interest is implicit; or (b) the harm is to the relationship of trust between individuals and the Australian Government integral to the regulatory functions of government."

23 See new Criminal Code sections 122.4 and 122.4A.

24 See section 122.5(6) as amended (only relate to persons reporting news therefore not the source or whistleblower).

25 As the President of the Law Council of Australia notes, "the categories of 'inherently harmful information' and 'causing harm to Australia's interests' in the proposed secrecy offences do not accord with the Australian Law Reform Commission's recommendations in the Secrecy laws and open government in Australia report for an express harm requirement": Hansard, Parliamentary Joint Committee on Intelligence and Security, 16 March 2018, p 7.

26 See Hansard, Parliamentary Joint Committee on Intelligence and Security, 16 March 2018, pp 18 and 19.

27 Proposed new Criminal Code section 91.2.

(c) the conduct results in it suffering a loss of function on more than a temporary basis or becoming unsafe or unfit for its purpose;

(d) the conduct 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 on more than a temporary basis;

(e) the conduct results in it or any part of it becoming significantly defective or being significantly contaminated on more than a temporary basis;

(f) the conduct significantly degrades its quality;

(g) if it is an electronic system—the conduct seriously disrupts it on more than a temporary basis

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

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.