



Law Council
OF AUSTRALIA

Office of the President

21 March 2018

Mr Andrew Hastie MP
Chair
Parliamentary Joint Committee on Intelligence and Security
PO Box 6021
Parliament House
Canberra ACT 2600

By email: pjcis@aph.gov.au

Dear Mr Hastie

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

Thank you for the opportunity for the Law Council to provide an additional written submission to the Parliamentary Joint Committee on Intelligence and Security's (**the Committee**) review of the EFI Bill following the Law Council's second appearance before the Committee on 16 March 2018.

The proposed espionage, sabotage and foreign interference offences in the EFI Bill are underpinned by a broad concept of 'national security' which includes political or economic relations with a foreign country. The Law Council has raised concern with the breadth of this definition in its initial written submission to the Committee dated 22 January 2018 and in its supplementary submission dated 13 March 2018.

During the Law Council's second appearance before the Committee, Senator Fawcett referred to the fact that the proposed definition of 'national security' is consistent with the Australian Law Reform Commission's (**ALRC**) Report 98, *Keeping secrets: the protection of classified and security sensitive information*, tabled in June 2004.

The difficulty is that this definition is based on a recommendation made by the ALRC, not in the context of espionage, sabotage and foreign interference offences, but in relation to recommendations regarding a National Security Information Procedures Act and, subsequently, secrecy offences.

The object of the now *National Security Information (Civil and Criminal Proceedings) Act 2004* (Cth) is to prevent the disclosure of information in federal criminal proceedings and civil proceedings where the disclosure is likely to prejudice national security, except to the extent that preventing the disclosure would seriously interfere with the administration of justice. Hence while there may be a broad use of the term 'national security' for the purposes of the NSI Act which is largely procedural in nature this is balanced by a judicial discretion regarding the administration of justice.

There is no such balancing proposed for the espionage, sabotage and foreign interference offences in the EFI Bill.

In relation to secrecy offences, the ALRC also made recommendations which included qualifiers that are not proposed to be introduced in relation to the proposed espionage, sabotage and foreign interference offences (e.g. a harm requirement, application only to all Commonwealth officers, Commonwealth information, unauthorised disclosures – rather than the more broadly dealing with or holding information) and where a range of exceptions and penalties far lower than those proposed in the EFI Bill were recommended.

The ALRC has not recommended that 'national security' be defined to include political and economic relations with another country for the purposes of espionage, sabotage and foreign interference offences.

In the absence of additional safeguards which were also recommended by the ALRC as noted above where a broad concept of 'national security' is employed, the Law Council maintains its concern about the inappropriate reference to political and economic relations with another country.

I trust this assists the Committee's consideration of the EFI Bill.

Thank you for the opportunity to provide a supplementary submission on these matters.

Please contact Dr Natasha Molt, Deputy Director of Policy, Policy Division [REDACTED] [REDACTED] in the first instance, if you require further information or clarification.

Yours sincerely

Morry Bailes
President