The Hon Christian Porter MP
Attorney-General

Mr Andrew Hastie MP
Chair
Parliamentary Joint Committee on Intelligence and Security
Parliament House
CANBERRA ACT 2600

Dear ~~Chair~~ Andrew

I am pleased to provide a copy of proposed parliamentary amendments to the National Security Legislation Amendment (Espionage and Foreign Interference) Bill to the Parliamentary Joint Committee on Intelligence and Security (the PJCIS).

These amendments, which were foreshadowed in my department's supplementary submission to the Committee on 13 February 2018, propose to amend the secrecy offences in Schedule 2 of the Bill to:

- narrow the definitions of *inherently harmful information* and *causes harm to Australia's interests*;
- create separate offences that apply to non-Commonwealth officers that are narrower in scope than those applying to Commonwealth officers and only apply to the most serious and dangerous conduct; and
- strengthen the defence for journalists at section 122.5(6) by:
    - removing any requirement of journalists to demonstrate that their reporting was 'fair and accurate';
    - ensuring the defence is available where a journalist reasonably believes that their conduct was in the public interest; and
    - clarifying that the defence is available for editorial and support staff as well as journalists themselves.

In addition to these matters, the amendments address a number of other concerns with the Bill, including the definition of *security classification*, the breadth of the offence at section 91.3 and the application of strict liability to elements of the offence relating to security classified information.

Amendments to the secrecy offences

In relation to the definition of *causes harm to Australia's interests*, the following paragraphs of the definition will be removed:

- subparagraph (a)(ii) – interfere with or prejudice the prevention, detection, investigation, prosecution or punishment of a contravention of a provision, that is subject to a civil penalty, of a law of the Commonwealth;
- paragraph (d) – harm or prejudice Australia's international relations in any other way; and

- paragraph (e) – harm or prejudice relations between the Commonwealth and a State or Territory.

In relation to the definition of *Commonwealth officer*, the definition will be amended to clarify that the definition does not include officers or employees of, or persons engaged by, the Australian Broadcasting Corporation or the Special Broadcasting Service Corporation. This appropriately recognises that members of these organisations, while being public employees, are engaged primarily in journalism and communications activities.

The amendments amend the definition of *security classification* in section 90.5 (at Item 16 of Schedule 1 of the Bill) and section 121.1 (at Item 6 of Schedule 2 of the Bill. Under the new definition, *security classification* will mean a classification of TOP SECRET or SECRET, or any other equivalent classification or marking prescribed by the regulations. Consistent with the Australian Government's Information Security Management Guidelines (available at www.protectivesecurity.gov.au), information should be classified as TOP SECRET if the unauthorised release of the information could cause exceptionally grave damage to the national interest. Information should be classified as SECRET if the unauthorised release of the information could cause serious damage to the national interest, organisations or individuals.

The new definition will not allow for lower protective markings to be prescribed in the regulations and will only allow equivalent classifications or markings to be prescribed. This will allow flexibility to ensure the definition can be kept up to date if new protective markings of equivalent seriousness are introduced, or to ensure information bearing former protective markings of equivalent seriousness can continue to be protected.

Sections 122.1 and 122.2 will be amended to apply only where a person has made or obtained the relevant information by reason of his or her being, or having been, a Commonwealth officer or otherwise engaged to perform work for a Commonwealth entity. This amendment has the effect of applying these offences only to Commonwealth officers (as defined in section 121.1) and former Commonwealth officers.

New offences will be created at section 122.4A applying to non-Commonwealth officers. These offences will apply to a narrower subset of information than the offences at sections 122.1 and 122.2 which apply to current and former Commonwealth officers.

The new offence at subsection 122.4A(1) will apply where:

- a person intentionally communicates information; and
- the information was not made or obtained by the person by reason of the person being or having been, a Commonwealth officer or otherwise engaged to perform work for a Commonwealth entity and the person is reckless as to this element; and
- the information was made or obtained by another person by reason of that other person being, or having been, a Commonwealth officer or otherwise engaged to perform work for a Commonwealth entity and the person is reckless as to this element; and
- any one or more of the following applies:
    - the information has a security classification of SECRET or TOP SECRET and the person is reckless as to this element;
    - the communication of the information damages the security or defence of Australia and the person is reckless as to this element;
    - the communication of the information interferes with or prejudices the prevention, detection, investigation, prosecution or punishment of a criminal

offence against a law of the Commonwealth and the person is reckless as to this element;
- the communication of the information harms or prejudices the health or safety of the Australian public or a section of the Australian public.

This offence will carry a maximum penalty of 10 years of imprisonment, which is lower than the penalty applying to the offences relating to communication of information by current or former Commonwealth officers at subsections 122.1(1) and 122.2(1).

The new offence at subsection 122.4A(2) will apply where:
- a person intentionally deals with information (other than by communicating it); and
- the information was not made or obtained by the person by reason of the person being or having been, a Commonwealth officer or otherwise engaged to perform work for a Commonwealth entity and the person is reckless as to this element; and
- the information was made or obtained by another person by reason of that other person being, or having been, a Commonwealth officer or otherwise engaged to perform work for a Commonwealth entity and the person is reckless as to this element; and
- any one or more of the following applies:
  - the information has a security classification of SECRET or TOP SECRET and the person is reckless as to this element;
  - the dealing damages the security or defence of Australia and the person is reckless as to this element;
  - the dealing interferes with or prejudices the prevention, detection, investigation, prosecution or punishment of a criminal offence against a law of the Commonwealth and the person is reckless as to this element;
  - the dealing harms or prejudices the health or safety of the Australian public or a section of the Australian public.

This offence will carry a maximum penalty of three years of imprisonment, which is lower than the penalty applying to the offences relating to dealings with information by current or former Commonwealth officers at subsections 122.1(2) and 122.2(2).

The defence at subsection 122.5(6) will be amended so that it applies where a person dealt with or held the information in the person's capacity as a person engaged in reporting news, presenting current affairs or expressing editorial content in news media. This replaces the previous reference in the defence to 'a journalist', which was not sufficiently broad to cover editorial or other support staff in news media organisations.

The defence will also be amended to remove reference to the journalist being 'engaged in fair and accurate reporting'. The defence will also be amended to apply where the person reasonably believed that dealing with or holding the information was in the public interest. Previously, the defence was only available where the person dealt with or held the information in the public interest.

Subsection 122.5(7) is being amended to provide that a person may not reasonably believe that dealing with or holding information is in the public interest if the person is dealing with or holding the information for the purpose of directly or indirectly assisting a foreign intelligence agency or a foreign military organisation. Section 121.1 will be amended to define *foreign military organisation* as the armed forces of the government of a foreign country or the civilian component of the Department of State of a foreign country or a government agency in a foreign country that is responsible for the defence of the country.

Amendments will also be made to paragraph 122.5(7)(d) to reflect the categories of information covered by the new offences at section 122.4A. If a person's communication or dealing with the information harms or prejudices the health or safety of the Australian public or a section of the public (under subparagraphs 122.4A(1)(d)(iv) or (2)(d)(iv)) and, at that time, the dealing with or holding the information will or is likely to result in the death of, or serious harm to, a person, the person will not be able to reasonably believe that his or her conduct is in the public interest.

Other amendments

Under various offences in the Bill as currently drafted, strict liability applies to the physical element that information has a security classification. The amendments remove the provisions that apply strict liability. The effect of these amendments is that, in addition to proving that information or article had a security classification, the prosecution will also have to prove that the defendant was reckless as to the fact that the information or article had a security classification. Consistent with section 5.4 of the *Criminal Code Act 1995*, this will require proof that the person was aware of a substantial risk that the information had a security classification and, having regard to the circumstances known to him or her, it was unjustified to take the risk.

The amendments also narrow the scope of the offence at section 91.3 (in Item 17 of Schedule 1 of the Bill). Under the proposed amendments, section 91.3 will apply where:

- a person intentionally deals with information or an article; and
- the person deals with the information or article for the primary purpose of making the information or article available to a foreign principal or a person acting on behalf of a foreign principal; and
- the person's conduct results or will result in the information being made to a foreign principal or a person acting on behalf of a foreign principal and the person is reckless as to this element; and
- the information or article has a security classification and the person is reckless as to this element.

These amendments ensure that conduct that results in classified information being passed to a foreign principal is punishable as an espionage offence where the person's primary purpose in dealing with the information was to make it available to a foreign principal. The inclusion of this additional element ensures that the offence will not inappropriately cover the publication of information by a journalist whose conduct does indirectly make the information available to a foreign principal, but whose primary purpose is to report news or current affairs to the public.

Inspector-General of Intelligence and Security – proposed response

Although the proposed amendments to the Bill do not include amendments to address the issues raised by the Inspector-General of Intelligence and Security, I assure the Committee that I have carefully considered these issues.

My initial views are that, subject to the views of the Committee, the Bill should be amended by:

- inserting a provision clarifying that that the defences to the secrecy offences in Schedule 2 do not affect any immunities that exist in other legislation;
- broadening the defences at subsections 122.5(3) and (4) of the Bill to cover all dealings with information; and

- inserting a provision similar to subsection 18D(2) of the *Australian Security Intelligence Organisation Act 1979* to ensure that IGID officials do not bear an evidential burden in relation to the defences in section 122.5 of the Bill.

My view is that it is not necessary to amend the defences in subsections 122.5(3) or (4) so that they are exceptions rather than defences. Consistent with the principles of criminal responsibility in Chapter 2 of the Criminal Code, there is no practical difference between a defence and an exception. The effect of both types of provisions is that a person is not criminally responsible for an offence. Under subsection 13.3(3) of the Criminal Code, a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by the law creating an offence bears an evidential burden in relation to that matter. The evidential burden applies whether a particular matter is framed as a defence or an exception.

The proposed amendments directly respond to the testimony or submissions of witnesses to the inquiry and issues raised by members of the PJCIS. I thank the PJCIS members and witnesses for their work in this important area. While noting that these amendments relate to issues already raised and discussed in the committee process at some length, officials from my Department can be made available to provide a further detailed briefing if required.

I trust this information is of assistance to the Committee in finalising its inquiry into the Bill. I also attach the draft parliamentary amendments, which may assist the Committee.

Yours sincerely

The Hon Christian Porter MP
Attorney-General

Encl.
Draft parliamentary amendments to the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017