Australian Human Rights Commission

24 January 2018

Attention: 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,

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

The Australian Human Rights Commission (Commission) welcomes the opportunity to make this brief submission in relation to the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017. The Commission is established by the *Australian Human Rights Commission Act 1986* (Cth) and is Australia's national human rights institution.

This submission focuses on the secrecy offences that Schedule 2 of the Bill would introduce into the *Criminal Code* (Cth) and the extent to which those provisions may interfere with the right to freedom of expression. The human rights framework discussed in this submission is equally applicable to other provisions that may limit the freedom of expression — for instance, the espionage provisions in Schedule 1 of the Bill.

The Commission acknowledges the legitimacy of the Bill's overarching objective, which might be summarised as protecting against the undermining of Australia's sovereignty and system of government by foreign entities. Nevertheless, the Commission considers that this objective could be achieved without impinging so significantly on human rights. Specifically, the Commission is concerned that the secrecy provisions in the Bill may limit the right to freedom of expression to a degree that has not been demonstrated to be necessary and proportionate to a legitimate objective.

The Commission urges the Committee to review the provisions and consider whether they can be amended to ensure that they are consistent with Australia's international obligations to respect the right to freedom of expression.

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There have been practical constraints for this inquiry's consultation process, given that a number of other parliamentary inquiries are proceeding at the same time that also deal with draft laws that engage important human rights. Noting these constraints that have made it difficult for some key stakeholders to contribute to this inquiry, the Commission urges Parliament or the Government to establish a more thorough and comprehensive review of the Bill and related national security laws that takes account of:

- the concerns raised by the Commission and others about the Bill, and any consequent recommendations by this Committee
- any recommendations made by the Parliamentary Joint Committee on Human Rights in its own review of the Bill
- related recommendations of law reform bodies, such as the Australian Law Reform Commission, in their consideration of laws dealing with secrecy, sedition and like offences.

The right to freedom of expression

The right to freedom of expression is enshrined in article 19 of the *International Covenant on Civil and Political Rights* (ICCPR),[1] which provides:

> 1. Everyone shall have the right to hold opinions without interference.
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> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
>
> 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> (a) For respect of the rights or reputations of others;
>
> (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

As the United Nations Human Rights Committee has observed, freedom of expression is both 'an indispensable condition for the full development of the person' and 'a necessary condition for the realization of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights.'[2] Article 19 expressly protects both the freedom to impart information and the freedom to seek and receive it.

The right to freedom of expression may only permissibly be limited for one of the purposes in article 19(3).[3] Further, any limitation must be:

- **provided by law.** Laws limiting the right must be made accessible to the public, and must provide sufficient guidance both to those executing the laws,

and to those whose conduct is being regulated.[4]

- **necessary and proportionate** to achieve a permissible purpose. Among other things, that means that the relevant law must restrict the relevant right to the minimum degree necessary to achieve its purpose, that the law must not destroy the essence of the right, and that the extent of any limitation on the right must be commensurate with the purpose the law aims to achieve.[5]

The Statement of Compatibility with Human Rights prepared in relation to the Bill suggests that a particular purpose of the Bill is to protect Australia's national security. National security may justify some secrecy laws.[6] However, those laws must comply with the general principles above. In particular, adequate safeguards must be put in place. 'National security' should not be invoked to prevent merely local or relatively isolated threats to law and order, and provision should be made for whistleblowers – in particular in relation to disclosures of human rights violations.[7]

A more detailed discussion of article 19 and its application to secrecy provisions, particularly in the context of national security laws, is attached to this letter as Attachment A.

Consideration by the Australian Law Reform Commission and the Independent National Security Legislation Monitor

The question of when laws may justifiably criminalise the disclosure of information has been considered in detail by the Australian Law Reform Commission (ALRC) in its report, *Secrecy Laws and Open Government in Australia*.[8] More recently, the Independent National Security Legislation Monitor (INSLM) considered the same question in the specific context of the non-disclosure provisions relating to 'special intelligence operations' in the *Australian Security Intelligence Organisation Act 1979* (Cth).[9] The INSLM noted the ALRC's recommendation that many secrecy offences should be abolished, and that a new general secrecy offence should be created. He further observed that the ALRC generally:

- accepted that harm was implicit in any disclosure of information obtained or generated by intelligence agencies

- accepted that specific secrecy offences could be justified in this context (the ALRC recommended that many secrecy offences be abolished and a new general secrecy offence be created)

- recognised in this context a distinction between secrecy offences directed specifically at insiders (who have special duties to maintain secrecy) and those capable of applying to all persons, and

- recommended that secrecy offences capable of applying to persons other than insiders have an express harm requirement.[10]

The INSLM's approach was consistent with these recommendations.

The Commission considers that these recommendations reflect aspects of the requirement in international human rights law that limitations on the freedom of

expression must be necessary and proportionate to the purpose said to justify them. In particular:

- the requirement that disclosures should only be prohibited where they will result in some specific, identifiable harm reflects the principle that limitations on the right are only justified when they are necessary to achieve a legitimate purpose

- treating disclosures by 'insiders' as less serious than those by 'outsiders' reflects the fact that insiders are more likely to have access to sensitive material, are more likely to be aware that particular disclosures will be harmful, and are under special duties by virtue of these factors and their closer relationship with the organisation in possession of sensitive material. Therefore, there is likely to be a greater need to regulate disclosures by 'insiders'. Further, the principle of proportionality is likely to require that the different circumstances of 'insiders' and 'outsiders' will warrant different treatment.

The secrecy provisions in Schedule 2

The Commission is concerned that the secrecy provisions in Schedule 2 of the Bill:

- do not, for the most part, distinguish between conduct engaged in by 'insiders' and by 'outsiders'

- are not limited to prohibiting disclosures that are shown to damage the interests of the Commonwealth. While some of the provisions prohibit disclosures only of 'inherently harmful information'[11] or disclosures that will 'cause harm to Australia's interests',[12] the definitions of these phrases appear to be overbroad, in that they may well capture disclosures that are not in fact harmful, or are not sufficiently harmful to warrant criminalisation

- contain inappropriate strict liability provisions. For instance, the provisions prohibit disclosure of information that is classified.[13] The fact that the material is classified may well be unknown (and unknowable) by the discloser – particularly if they are an 'outsider'. The fact the material that is disclosed is classified appears to be the gravamen of such an offence. It is not appropriate in the circumstances for strict liability to apply to that element. Applying strict liability to a matter about which a person cannot inform themselves in advance does not allow the person to be aware of their obligations and to regulate their conduct accordingly. Relatedly, to the extent that a person (or category of persons) is unable to inform themselves prospectively of the specific conduct that is prohibited in order to avoid falling foul of the relevant secrecy offence provisions, the Bill violates a core principle of the rule of law

- do not contain adequate defences. For instance:

    - the defence relating to information that is 'already public' only applies where the prior publication was authorised by the Commonwealth.[14] It is unclear that that factor could be determinative of whether criminalisation of a disclosure is justified. A communication of

information that has already been placed in the public domain through an unauthorised disclosure will not necessarily further harm the interests of the Commonwealth. The defence provisions should be drafted to ensure they apply to (at least) disclosures of information that is already widely known or easily accessible. (This matter would be of less pressing concern if causing harm was an element of each offence.)

- the defence in proposed s 122.5(8) applies only to *communications* made by an 'outsiders' of information that has already been communicated. The defence does not apply to outsiders who *deal* with such information (as that term is defined in the Bill)

- while there is a defence for journalists,[15] there is no general defence for whistleblowers who make disclosures that are in the public interest.

The majority of these concerns, and a number of others, are addressed in some detail in the submission of the Law Council to the Committee dated 22 January 2018.[16]

Conclusion

The Commission considers that the Bill should not be passed unless and until the secrecy offences in Schedule 2 of the Bill are amended to ensure they are necessary and proportionate to achieve their objective, and are consistent with the freedom of expression, as explained in the attachment to this letter.

The Commission would be pleased to answer any questions arising from this submission.

Yours sincerely,

Rosalind Croucher
President

Edward Santow
Human Rights Commissioner

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[1] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
[2] UN Human Rights Committee, *General Comment 34: Article 19: Freedoms of opinion and expression*, 102nd Sess, (12 September 2011), UN Doc. CCPR/C/GC/34, [2]-[3].

[3] UN Human Rights Committee, *General Comment 34: Article 19: Freedoms of opinion and expression*, 102nd Sess, (12 September 2011), UN Doc. CCPR/C/GC/34, [22].
[4] UN Human Rights Committee, *General Comment 34: Article 19: Freedoms of opinion and expression*, 102nd Sess, (12 September 2011), UN Doc. CCPR/C/GC/34, [25].
[5] UN Human Rights Committee, *General Comment 34: Article 19: Freedoms of opinion and expression*, 102nd Sess, (12 September 2011), UN Doc. CCPR/C/GC/34, [34].
[6] In the Explanatory Memorandum to the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017, [40], [42].
[7] See Attachment A to this submission and the authorities discussed therein.
[8] Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009).
[9] Independent National Security Legislation Monitor, *Report on the impact on journalists of section 35P of the ASIO Act* (2015).
[10] Independent National Security Legislation Monitor, *Report on the impact on journalists of section 35P of the ASIO Act* (2015), 18 [30].
[11] Proposed s 122.1.
[12] Proposed s 122.2.
[13] See proposed s 122.1 and the definition of 'inherently harmful information' in proposed s 121.1.
[14] Proposed s 122.5(2).
[15] Proposed s 122.5(6).
[16] Law Council of Australia, Submission to the Parliamentary Joint Committee on Intelligence and Security (22 January 2018), 54-71.

Attachment A: Article 19 – Freedom of Expression

Article 19 of the ICCPR provides:

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

    (a) For respect of the rights or reputations of others;

    (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

Freedom of expression is both 'an indispensable condition for the full development of the person' and 'a necessary condition for the realization of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights.'[1]

The only permissible restrictions on the freedom of expression are those described in paragraph 3 of Article 19.[2]

Any limitation on the freedom of expression must be according to law. Laws limiting the freedom must be made accessible to the public, and must provide sufficient guidance both to those executing the laws, and to those whose conduct is being regulated.[3]

Further, any limitation on the freedom of expression must be necessary and proportionate to achieve a legitimate objective. The objective must be one within the scope of article 19(3). The means adopted to achieve it must not destroy the essence of the right. It is for a State party to the ICCPR to demonstrate the legal basis for any restriction on the freedom.[4]

Article 19 expressly contemplates that the freedom of expression may be limited for the protection of national security. The term 'national security' refers to the protection of the existence of a nation. The *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* (Siracusa Principles)[5] state:

29. National security may be invoked to justify measures limiting certain rights only when they are taken to protect the existence of the nation or its territorial integrity or political independence against force or threat of force.

30. National security cannot be invoked as a reason for imposing limitations to prevent merely local or relatively isolated threats to law and order.

31. National security cannot be used as a pretext for imposing vague or arbitrary limitations and may only be invoked when there exists adequate safeguards and effective remedies against abuse.

The Siracusa Principles go on to observe that the systematic violation of human rights undermines 'true national security'.[6]

The United Nations Human Rights Committee has made similar comments in General Comment 34:

> Extreme care must be taken by States parties to ensure that treason laws and similar provisions relating to national security, whether described as official secrets or sedition laws or otherwise, are crafted and applied in a manner that conforms to the strict requirements of paragraph 3 [of article 19]. It is not compatible with paragraph 3, for instance, to invoke such laws to suppress or withhold from the public information of legitimate public interest that does not harm national security or to prosecute journalists, researchers, environmental activists, human rights defenders, or others, for having disseminated such information. Nor is it generally appropriate to include in the remit of such laws such categories of information as those relating to the commercial sector, banking and scientific progress.[7]

Article 19(3) provides for a number of other limitations on the freedom of expression, including the protection of the rights of others. The rights relevant to this limitation include 'human rights as recognised in the [ICCPR], and more generally in international human rights law.'[8]

It should be noted that article 19 includes a right to have access to information. It therefore requires that appropriate protection be afforded to whistleblowers. This issue has received particular attention from international experts in the field of secrecy laws enacted in the name of national security.

For instance, the *Johannesburg Principles on National Security, Freedom of Expression and Access to Information* include the following:[9]

> **Principle 12: Narrow Designation of Security Exemption**
> A state may not categorically deny access to all information related to national security, but must designate in law only those specific and narrow categories of information that it is necessary to withhold in order to protect a legitimate national security interest.
>
> **Principle 13: Public Interest in Disclosure**
> In all laws and decisions concerning the right to obtain information, the public interest in knowing the information shall be a primary consideration.
>
> ….
>
> **Principle 15: General Rule on Disclosure of Secret Information**
> No person may be punished on national security grounds for disclosure of information if (1) the disclosure does not actually harm and is not likely to harm a legitimate national security interest, or (2) the public interest in knowing the information outweighs the harm from disclosure.
>
> **Principle 16: Information Obtained Through Public Service**
> No person may be subjected to any detriment on national security grounds for disclosing information that he or she learned by virtue of government service if

the public interest in knowing the information outweighs the harm from disclosure.

Principle 17: Information in the Public Domain
Once information has been made generally available, by whatever means, whether or not lawful, any justification for trying to stop further publication will be overridden by the public's right to know.

The *Global Principles of National Security and the Right to Information* (Tshwane Principles) contain similar provisions.[10] For instance, they provide that certain types of disclosure should be protected, including those which reveal corruption or human rights violations.[11]

Consistently with these principles, the UN High Commissioner for Human Rights has recently stated that whistleblowers who disclose human rights violations should be protected.[12]

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[1] UN Human Rights Committee, *General Comment 34* (2011), UN Doc. CCPR/C/GC/34, [2]-[3].
[2] UN Human Rights Committee, *General Comment 34*, (2011), UN Doc. CCPR/C/GC/34, [22].
[3] UN Human Rights Committee, *General Comment 34*, (2011), UN Doc. CCPR/C/GC/34, [25].
[4] UN Human Rights Committee, *General Comment 34*, (2011), UN Doc. CCPR/C/GC/34, [27].
[5] United Nations Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, U.N. Doc. E/CN.4/1985/4, Annex (1985), [29]-[31].
[6] At [32].
[7] UN Human Rights Committee, *General Comment 34* (2011), UN Doc. CCPR/C/GC/34, [30].
[8] UN Human Rights Committee, *General Comment 34* (2011), UN Doc. CCPR/C/GC/34, [28].
[9] *The Johannesburg Principles on National Security, Freedom of Expression and Access to Information* (1996), available at http://www.article19.org/data/files/pdfs/standards/joburgprinciples.pdf (accessed on 14 August 2014).
[10] *The Global Principles of National Security and the Right to Information* (Tshwane Principles) (2013), available at http://www.opensocietyfoundations.org/publications/global-principles-national-security-and-freedom-information-tshwane-principles (accessed on 14 August 2014).
[11] Principle 37.
[12] Navi Pillay, UN High Commissioner for Human Rights, speaking at the launch of Office of the UN High Commissioner for Human Rights publication *The right to privacy in the digital age*, reported at http://www.abc.net.au/news/2014-07-17/snowden-deserves-protection-from-prosecution3a-un-rights-chief/5603236, 17 July 2014 (accessed on 14 August 2014).