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

Attorney-General's Department corrections to Response to Questions on Notice and Questions in Writing

Submission 5 – Law Council of Australia

The response to the Law Council's submission on page 13 of the department's supplementary submission should read as follows:

- **The proposed new espionage offences should require (as a minimum for 'outsiders') that the dealing with information did, or was reasonably likely to, or intended to prejudice Australia's national security or advantage the national security of a foreign country.**

  Existing espionage offences do not differentiate between 'insiders' and 'outsiders'. Under current law, any person can commit an espionage offence.

  The espionage offences proposed in the Bill (other than section 91.3) will require proof that a person intended to, or was reckless as to whether his or her conduct would, prejudice Australia's national security. The most serious offences in section 91.1 also apply where a person intends to, or is reckless as to whether his or her conduct would advantage the national security of a foreign country.

  Proof of actual harm to Australia's national security or advantage to a foreign country's national security in the espionage offences would severely limit the scope of the offences and their effectiveness and require actual harm to occur before an offence arises. The harm addressed and criminalised by the espionage offence is the information being provided to a foreign power and the person's intention to prejudice Australia's national security or advantage the national security of a foreign country. The espionage offences in the Bill contain these elements.

- **In the absence of an express harm requirement, the offences should cascade in penalty and require that a person knew, or as a lesser offence, was reckless as to whether, the protected information falls within a particular category (i.e. security classification or concerns Australia's national security) and should not provide that strict liability applies to that circumstance.**

  The penalties for the espionage offences are tiered based on whether a person intended to, or was reckless as to whether, his or her conduct would prejudice Australia's national security or advantage the national security of a foreign country. The offence in section 91.3, which does not require proof of this element, applies a lower penalty. Further tiering based on the person's level of knowledge about the nature of the information would not enhance the ability to relevantly discriminate across the seriousness of offending conduct.

The effect of removing strict liability would be that the prosecution would need to prove that the defendant was reckless as to whether the information or article had a security classification. This would require proof that the person was aware of a substantial risk that the information or article carried a security classification and, having regard to the circumstances known to the person, it was unjustifiable to take that risk. Given the security classifications are prominently marked on documents, it is unnecessary to require proof of the fact of the classification.

The response to the Law Council's submission on page 14 of the department's supplementary submission should read as follows:

- **Defences should be introduced to capture bona fide business dealings and persons acting in good faith. A defence should also be introduced for prior publication where the offences do not apply to a person dealing with the information if:**

  (a) the information has already been communicated, or made available, to the public (the *prior publication*); and
  (b) the person was not involved in the prior publication (whether directly or indirectly); and
  (c) at the time of the disclosure, the person believes that the disclosure:
    (i) will not endanger the health or safety of any person; and
    (ii) will not prejudice Australia's national security or advantage the national security of a foreign country; and
  (d) the person has reasonable grounds for that belief.

  A bona fide dealings or good faith defence is not appropriate in the context of espionage offences which (with the exception of section 91.3) require proof of a person's intention or recklessness as to whether their conduct will prejudice Australia's national security or advantage the national security of a foreign country. The prosecution will be required to prove intention to prejudice Australia's security or recklessness thereto element beyond a reasonable doubt. It is difficult to conceive a situation in which a person could simultaneously be reckless as to harming Australia's national interest, yet be acting in good faith. Genuine good faith would preclude recklessness being made out.

  In the case of espionage offences other than section 91.3, the prosecution will already have rebutted element (c)(ii) of the proposed defence in proving its case against the defendant.

The response to the Law Council's submission on page 25 of the department's supplementary submission should read as follows:

The presumption against the grant of bail under section 15AA Crimes Act should not be extended to treason, treachery, espionage and foreign interference cases as is proposed by the Bill.

The department does not agree with the Law Council's submission. The offences that are subject to a presumption against bail are very serious offences. The existing espionage, treason and treachery offences are currently listed in paragraph 15AA(2)(c) of the Crimes

Act. For these offences, it is important to note that, consistent with subparagraphs 15AA(2)(c)(i) and (ii), the presumption against bail will only apply if the person's conduct is alleged to have caused the death of a person or carried a substantial risk of causing the death of a person.

For foreign interference offences, the presumption against bail will only apply where it is alleged that any part of the conduct the defendant engaged in involved making a threat to cause serious harm or a demand with menaces. This limitation recognises the significant consequences for an individual's personal safety and mental health if the conduct involves serious harm (consistent with the definition of 'serious harm' in the Dictionary to the Criminal Code) or making a demand with menaces' (as defined in section 138.2 of the Criminal Code).

Submission 9 – Joint Media Organisations

The response to the Joint Media Organisations' submission on page 28 of the department's supplementary submission should read as follows:

We recommend that a general public interest/news reporting defence be available for all of the relevant provisions in both the secrecy and espionage elements of the bill

The department does not consider that espionage offences can be 'in the public interest'. It is hard to see how the passage of information to a foreign principal could be in the public interest where it is done with an intention to, or reckless as to whether the person's conduct will, prejudice Australia's national security or advantage the national security of a foreign country. The espionage offences (other than section 91.3) require proof of this element.

The department notes that a defence specifically in relation to fair and accurate reporting in the public interest already exists in subsection 122.5(6) of the Bill. This addresses public interest news reporting.

Questions in writing

The response to Question 4 on page 45 of the department's supplementary submission should read as follows:

4. *Could this broad definition of national security result in espionage or foreign interference allegations against a person who advocates against a particular trade agreement or military alliance? How is freedom of political expression protected?*

Although it is difficult to provide definitive advice about hypothetical scenarios, the department does not consider that these matters would fall within the scope of the espionage and foreign interference offences.

For example, in relation to the espionage offences at sections 91.1 and 91.2, the offence will only be committed if a person deals with information with an intention to (or reckless as to whether his or her conduct will) prejudice Australia's national security. If the information

the person is dealing with concerns national security or is security classified, the offence will also apply if the person intends to (or is reckless as to whether his or her conduct will) advantage the national security of a foreign country. The Explanatory Memorandum clarifies the meaning of 'prejudice' and 'advantage' at paragraphs 615 and 616.

The response to Question 52 on page 69 of the department's supplementary submission should read as follows:

52. *Could the proposed espionage offence capture private discussions a person has with a foreign contact? For example, where a private citizen proffers an opinion which is critical of government decision making or conduct?*

    The espionage offences in sections 91.1 and 91.2 of the Bill require the prosecution to prove, amongst other things, that:

    - the person's conduct resulted or would result in the information being made available to a foreign principal or a person acting on behalf of a foreign principal
    - the person was reckless as to whether his or her conduct would have this result, and
    - that the person intended to (or was reckless as to whether his or her conduct would) prejudice Australia's national security or, if the information is security classified or concerns national security, to advantage the national security of a foreign country.

    Section 91.3 of the Bill will not require proof of intention (or recklessness) to prejudice Australia's national security or advantage the national security of a foreign country.

    It is not possible to provide a definitive answer on whether a 'private conversation' with a 'foreign contact' would meet these elements, as it will depend on all of the facts and circumstances of the case.

The response to Question 65(a) on page 73 of the department's supplementary submission should read as follows:

65. *Could a public interest group uncovering serious government corruption on their website be caught by the proposed offences? For example, would the conduct of organisations like WikiLeaks and the International Consortium of Investigative Journalists (which published the Panama Papers) be captured by espionage offences?*

    a. *Is there, or should there be, a public interest defence?*

    It is hard to see how the passage of classified information or information relevant to national security to a foreign principal could be in the public interest, where it is done with an intention to, or reckless as to whether the person's conduct will, prejudice Australia's national security or advantage the national security of a foreign country. The espionage offences (other than section 91.3) require proof of this element.

Similarly, it is difficult to see how the passage of unclassified information to a foreign principal, with an intention to prejudice Australia's national security, would be in the public interest.

There are established mechanisms for Commonwealth officers to make public interest disclosures under the Public Interest Disclosure Act.

The response to Question 86 on pages 80-81 of the department's supplementary submission should read as follows:

86. *Why is there no defence of acting in good faith, similar to the defence in s. 24F of the Crimes Act 1914?*

Scenario: A contract electricity professional is asked to carry out major work on a privately owned electricity substation that provides electricity to the public. The contractor is aware of the importance of the electricity substation and is aware that the work has potential to damage the electricity substation. The upgrade causes wide-ranging damage to the electricity substation. As the contractor is working on behalf of a private company that owns the infrastructure, there is no defence available.

Scenario: An IT professional has written to an Australian Government Department for a year pointing out that a vulnerability he has found in software has not been fixed. Frustrated by what he sees as government inaction he exploits this vulnerability to 'prove' to the bureaucracy that he is correct. He has no nefarious intent and is acting in good faith.

The sabotage offences only apply where a person intended to, or was reckless as to whether his or her conduct would, prejudice Australia's national security or advantage the national security of a foreign country (or, in relation to sections 82.7 and 82.8, to harm or prejudice Australia's economic interests, disrupt the functions of government or damage public infrastructure). A good faith defence is not appropriate.

The response to Question 92(a) on page 82 of the department's supplementary submission should read as follows:

92. *Unlike other sabotage offences, s. 82.7 and 82.8 do not require the person to intend or be reckless as to whether their conduct will prejudice Australia's national security, or advantage another country's national security. The offence will be made out if the person intended or was reckless as to whether their conduct will harm or prejudice Australia's economic interests; disrupt government functions; or damage public infrastructure (s. 82.7 and 82.8).*

Scenario: An animal rights organisation, upset with Australia's live animal exports, introduces a vulnerability to the Department of Agriculture and Water Resources' IT systems that slows down animal exports. Whilst there is no suggestion that the group was planning to prejudice Australia's national security, it is alleged the group was seeking to create harm or prejudice to Australia's economic interests. The penalty for this action is 10 years.

    a. *Was this deliberate?*

The sabotage offences in sections 82.7 and section 82.8 will apply if a person engages in the conduct with the intention to prejudice Australia's national security (subparagraph 82.7(d)(i)) or is reckless as to whether his or her conduct would prejudice Australia's national security (subparagraph 82.8(d)(i)). They will also apply in the circumstances listed in Question 92.

The response to Question 111 on page 90 of the department's supplementary submission should read as follows:

111. Why do the amendments include all of the proposed offences in new Division 82 (Sabotage) and Division 91 (Espionage), rather than be limited to the most serious of the sabotage and espionage offences? If this was intended, could the Minister possess a discretion to approve a citizenship application where the applicant has been convicted of one of the less serious sabotage or espionage offences proposed in new Division 82 and new Division 91 of the Criminal Code?

The scope of espionage and sabotage offences is a matter for the Parliament. The policy intention of the consequential amendments to the *Australian Citizenship Act* is to ensure that the scope of the definition of 'national security offence' in the Australian Citizenship Act aligns with the scope of the enacted offences, as determined by the Parliament.

This would mean that the Minister could consider any of the sabotage or espionage offences in proposed new Divisions 82 and 91 of the Criminal Code when exercising a power in the Australian Citizenship Act that relies on the definition of 'national security' in section 3 of that Act.