The Parliament of the Commonwealth of Australia

Senate Legal and Constitutional Legislation Committee

Consideration of Legislation Referred to the Committee

Provisions of the Criminal Code Amendment (Espionage and Related Offences) Bill 2002

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RECOMMENDATIONS

Recommendation 1

The Committee recommends that the *Criminal Code Amendment (Espionage and Related Offences) Bill 2002* be amended to ensure that espionage provisions do not apply to the communication of information in the public domain.

Recommendation 2

The Committee recommends that the *Criminal Code Amendment (Espionage and Related Offences) Bill 2002* be amended to address the uncertainty arising from the term "disclosed to another country or foreign organisation".

Recommendation 3

The Committee recommends that s.91.1 of the *Criminal Code Amendment (Espionage and Related Offences) Bill 2002* be amended so that an element of each offence is that a person knows that the information is, or has been, in the possession or control of the Commonwealth.

Recommendation 4

The Committee recommends that the current provisions relating to soundings be repealed and that the *Criminal Code Amendment (Espionage and Related Offences) Bill 2002* be amended to delete proposed Division 92.

Recommendation 5

The Committee recommends that, subject to the Committee's recommendations, the *Criminal Code Amendment (Espionage and Related Offences) Bill 2002* should proceed.

CHAPTER ONE

THE BILL

Referral

1.1 The *Criminal Code Amendment (Espionage and Related Offences) Bill 2001* was introduced into the House of Representatives on 27 September 2001. It was not debated, and lapsed when Parliament was dissolved for the November 2001 federal election.

1.2 The *Criminal Code Amendment (Espionage and Related Offences) Bill 2002* was introduced into the House of Representatives on 13 March 2002. This Bill differed from the 2001 Bill in that proposed Division 82, "Offences Relating to Official Secrets", was not included in the 2002 Bill. These provisions had been the subject of strong adverse comment from media organisations and the wider community.

1.3 On 20 March 2002, the Senate Selection of Bills Committee recommended[1] and the Senate subsequently agreed, that the provisions of the *Criminal Code Amendment (Espionage and Related Offences) Bill 2002* be referred to the Legal and Constitutional Legislation Committee ("the Committee"), for inquiry and report on or before 26 April 2002.

Reasons for referral

1.4 The Senate Selection of Bills Committee outlined the following reasons for referral and issues for consideration:

> Significant issues [are] contained in this Bill, including [a] major increase in penalties for espionage, and relating to a number of recent prosecutions, such as Lappas and Wispelaere. The Government has also significantly changed this Bill from that originally tabled, with the removal of provisions relating to non-security official secrets.[2]

Background to the Bill

1.5 Espionage provisions formed part of the *Crimes Act 1914* when it was first enacted. Part VII of the Act, then entitled "Breach of Official Secrecy," contained (and continues to contain) the relevant offences. The Act was amended in 1960 to include the current espionage provisions.

1.6 In 1987, the Government established an Independent Review Committee on Commonwealth Criminal Law, chaired by former Chief Justice of Australia, the Rt Hon Sir Harry Gibbs. The review examined Part VII of the *Crimes Act 1914* ("Espionage and

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1 Selection of Bills Committee, *Report,* No.2 of 2002

2 Selection of Bills Committee, *Report,* No.2 of 2002, Appendix 1A

Official Secrets"), and its report made 15 recommendations in relation to Part VII[3]. This Bill includes some but not all of the recommendations made in the Gibbs report in relation to Part VII.

1.7 In 1999, the Australian intelligence system and espionage provisions came under scrutiny when a former member of the Defence Intelligence Organisation, Mr Jean-Philippe Wispelaere, was arrested in the United States and charged with a range of offences associated with the unauthorised disclosure of United States intelligence material. Mr Bill Blick, the Commonwealth's Inspector General of Intelligence and Security, was commissioned to review security procedures. He reported in 2000, and made more than 50 recommendations. These are not publicly available "… because of the sensitive nature of many of the measures."[4] However, the recommendations were designed to:

- Give greater priority to, and heighten awareness of, security arrangements on a public service-wide basis;
- Enhance security coordination arrangements between government agencies;
- Ensure greater priority is given to effective security arrangements within Australian intelligence and security agencies and departments that handle highly sensitive national security information;
- Improve personnel security practices;
- Improve physical security arrangements in intelligence and security agencies and relevant departments; and
- Enhance computer security.[5]

1.8 The Attorney General has stated that the *Criminal Code Amendment (Espionage and Related Offences) Bill 2002* "… evolved as a result of both the Gibbs and Blick reviews."[6]

Conduct of the Inquiry

1.9 The Committee advertised the inquiry on 23 March 2002 in *The Weekend Australian*. The closing date for submissions was 2 April 2002.

1.10 The Committee received 10 submissions, and these are listed at Appendix 1.

1.11 The Committee held a public hearing in Sydney on 8 April 2002. A list of witnesses who appeared at this hearing is at Appendix 2.

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3 In fact the Gibbs report made more than 15, but the report dealt with espionage-related offences and other official secrets offences separately. The 15 recommendations cited here referred only to espionage offences.

4 The Hon Daryl Williams AM QC MP, News release *Improving Security Within Government*, 21 September 2000.

5 The Hon Daryl Williams AM QC MP, News release *Improving Security Within Government*, 21 September 2000.

6 The Hon Daryl Williams AM QC MP, Second Reading Speech, *Hansard* 13 March 2002.

The Bill

1.12 The *Criminal Code Amendment (Espionage and Related Offences) Bill 2002* will, if enacted, increase the scope of the espionage offences and the penalties which apply to espionage offences. This section of the Report provides an overview of the main provisions of the Bill which set out those offences and matters relating to them.

Purpose of the Bill

1.13 In his second reading speech, the Attorney General stated that:

> The government is committed to protecting Australia's national security and punishing those who threaten Australia's interests. That is the purpose of this Bill. It is not aimed at hampering or preventing public discussion. The espionage provisions send a clear message to those who choose to betray Australia's security that this government regards espionage very seriously.[7]

1.14 The Attorney General also noted that, in addition to being informed by the Gibbs and Blick reports, the Bill took account of the equivalent provisions in the United States, the United Kingdom, New Zealand, and Canada.[8]

1.15 The explanatory memorandum to the Bill states that the legislation will strengthen Australia's espionage laws in four ways. First, the Bill refers to conduct that may prejudice Australia's "security and defence", rather than "safety and defence", and explicitly defines this term, consequently affording protection to a range of material that may not be protected under the current laws. The term 'security or defence' will apply to both the espionage offences as well as the existing official secrets offences in section 79 of the Crimes Act.

1.16 Secondly, the Bill expands the range of activity that may constitute espionage to cover situations where a person discloses information concerning the Commonwealth's security or defence with the intention of prejudicing the Commonwealth's security or defence, or the intention of giving advantage to the security or defence of another country.

1.17 Thirdly, the Bill affords the same protection to foreign sourced information belonging to Australia as it does to Australian-generated information.

1.18 Fourthly, the Bill increases the maximum penalty for a person convicted of espionage from seven years imprisonment to 25 years imprisonment.[9]

1.19 Schedule 1 of the Bill, "Amendments relating to the integrity and security of the Commonwealth," provides the new clauses proposed for insertion into the Criminal Code. The Schedule inserts Chapter 5 "The integrity and security of the Commonwealth" into the Criminal Code, and within Chapter 5 inserts Part 5.2 "Offences relating to espionage and similar activities."

1.20 Other Bills currently before the Parliament, the *Suppression of the Financing of Terrorism Bill 2002* and the *Security Legislation Amendment (Terrorism) Bill 2002*, also

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7 The Hon Daryl Williams AM QC MP, Second Reading Speech, *Hansard* 13 March 2002.

8 The Hon Daryl Williams AM QC MP, Second Reading Speech, *Hansard* 13 March 2002.

9 Criminal Code Amendment (Espionage and Related Offences) Bill 2002, *Explanatory Memorandum*, p.1

contain provisions to create, and insert provisions into, Chapter 5 of the Criminal Code.[10] This Bill is therefore one element of an overall program to develop and consolidate provisions in the Criminal Code relating to the integrity and security of the Commonwealth.

10 If either of these two Bills is enacted prior to the *Criminal Code Amendment (Espionage and Related Offences) Bill 2002* then the provisions creating the new Chapter 5 would not commence, as Chapter 5 would have already been created by the first Bill enacted.

CHAPTER TWO

ISSUES RAISED BY THE BILL

Introduction

2.1 Submissions and evidence before the Committee raised a number of issues in relation to the Bill. These were primarily that the Bill, if enacted, should not circumscribe civil liberties, particularly liberty to dissent, express dissent, and draw attention to unacceptable conduct by defence and intelligence services, whether in Australia or overseas.

2.2 Specific issues raised included:

- the definitions of "security or defence", "information", and "prejudice";
- the espionage offences in s.91.1;
- penalty provisions;
- the soundings offences; and
- institution of a prosecution in a "reasonable time".

2.3 This chapter deals with the concerns raised in respect of each of these matters.

Definitional Issues

As noted above, the definition of certain words in the Bill attracted concern in evidence and in submissions presented to the Committee. These concerns related to:

- "security or defence";
- "information"; and
- "prejudice"

Security or Defence

2.4 The current espionage offences seek to protect the "safety or defence" of the Commonwealth.[1] However this term is not specifically defined in the *Crimes Act*.

2.5 During the Gibbs Inquiry, the Australian Secret Intelligence Service (ASIS) submitted that the term should be changed to "security or defence".[2] The Gibbs Report did not take up this submission, noting that "the meaning of 'security', if not specifically defined, is unclear and in the context, "safety" appears the more appropriate term."[3]

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1 *Crimes Act 1914*, ss.78(1)

2 See *Bills Digest*: Criminal Code Amendment (Espionage and Related Offences) Bill 2002, Bills Digest No. 117 of 2001-02, p.4

3 *Review of Commonwealth Criminal Law*, Fifth Interim Report, June 1991, s.42.26, p.364

2.6 The *Criminal Code Amendment (Espionage and Related Offences) Bill 2002* proposes to replace the term "safety or defence" with "security or defence". The Committee is also currently considering the *Security Legislation Amendment (Terrorism) Bill 2002 [No.2] and Related Bills*, and is considering the definition of the term "security and integrity" in those Bills. For instance, ss.91.1(1) states as follows:

> (1) A person commits an offence if:
>
> a) the person communicates, or makes available:
>
> i) information concerning the Commonwealth's **security or defence**; or
>
> ii) information concerning the **security or defence** of another country, being information that is, or has been, in the possession or control of the Commonwealth; and
>
> b) the person does so intending to prejudice the Commonwealth's **security or defence**; and
>
> c) the person's act results in, or is likely to result in, the information being disclosed to another country or a foreign organisation, or to a person acting on behalf of such a country or organisation.[4]

2.7 In this context, the Bill proposes the following definition of "security or defence":

> ***security or defence*** of a country includes the operations, capabilities and technologies of, and methods and sources used by, the country's intelligence or security agencies.[5]

2.8 The explanatory memorandum to the Bill explained this definition in the following terms:

> The change to the term 'security or defence' in the Bill reflects the modern intelligence environment. The term 'security' is intended to capture information about the operations, capabilities and technologies, methods and sources of Australian intelligence and security agencies. The term 'safety' is unlikely to include such information.[6]

2.9 Submissions and evidence presented to the Committee raised two principal concerns with this definition. Both relate to the scope of the definition.

2.10 The New South Wales Council for Civil Liberties stated that:

> The widening of this definition means that it will now include in particular, the *operations and methods* of intelligence and security agencies. This could mean that exposure of an illegal action of a security agency or a security bungle could fall within the meaning of an act of espionage. There are many circumstances in

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4 *Criminal Code Amendment (Espionage and Related Offences) Bill 2002*, Schedule 1, ss.91.1(1). Emphasis added.

5 *Criminal Code Amendment (Espionage and Related Offences) Bill 2002*, Schedule 1, ss.90.1(1). Emphasis in the original

6 Criminal Code Amendment (Espionage and Related Offences) Bill 2002, *Explanatory Memorandum*, p.5

> which it is in the public interest to discuss the methods and operation of security agencies that will under this legislation become an offence liable to prosecution. We recommend that the definition remain as safety and defence and there be no change.[7]

2.11 The Law Institute of Victoria made a similar point, and gave the example of recent concerns about the interception of telecommunications by the Defence Signals Directorate:

> Would, for example, the communication of information about the *inappropriate* use of Australia's intelligence services, as has been alleged in relation to the recent Tampa crisis, be classified as an attempt to 'prejudice the security or defence of the Commonwealth' under this definition?

2.12 The International Commission of Jurists, on the other hand, supported the change in terminology from "safety or defence" to "security or defence." The Commission, however, criticised the definition of "security or defence" contained in the Bill. In its submission, the Commission maintained that, as the definition is an inclusive definition, it does not exclude the ordinary meaning of "security or defence." The submission stated:

> As a matter of interpretation "defence" and "security" have their ordinary meaning. This is a very wide provision and means that the offences created under this have application for issues of defence which may relate to the Defence Force as such or the specific geographic requirements of Australia's defence and are therefore wide and imprecise and we would recommend that the definition sections be recouched in more precise terms since it is a Criminal Statute that is being created.[8]

2.13 In evidence to the Committee, the Hon. Justice Dowd, President of the Commission, explained this issue in the following terms:

> The use of the word 'includes' is a very dangerous drafting technique because it does not define at all; it simply expands. If you are doing something as clearly important as this, you should define it. You have not defined 'defence', you have not defined 'security' and therefore there are three concepts: security undefined, defence undefined and an expansion of both. That is no way to draft legislation for serious offences such as this; you should in fact define it.[9]

2.14 The Attorney-General's Department responded to these concerns, stating:

> [the Bill] is intended to be broader than the existing provision which refers to safety or defence, and I think a court would have regard to the legislative history of the provisions. It is certainly intended … to cover those matters there. If the word "means" were used there, the concern would be that we should capture everything that might need to be foreseen in any future case."[10]

2.15 The Committee notes concerns expressed in evidence concerning the term "security or defence" and the definition of the term contained in the *Criminal Code Amendment*

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7 *Submission 3*, NSW Council for Civil Liberties, p.1. Emphasis in the original

8 *Submission 9*, International Commission of Jurists, p.2

9 International Commission of Jurists, Legal and Constitutional Legislation Committee, *Hansard*, 8 April 2002, p.3

10 Attorney-General's Department, Legal and Constitutional Legislation Committee, *Hansard*, 8 April 2002, p.25

(Espionage and Related Offences) Bill 2002. The Committee also notes explanations provided by officers of the Attorney-General's Department in relation to "security or defence." The Committee considers that the evidence presented in support of these concerns was compelling, and that the response by the Attorney-General's department did not convince the Committee that a wider definition is appropriate. The Committee therefore considers that the Attorney-General should review the definition of "security or defence" to ensure the range of matters covered by that definition is limited as appropriate and takes account of the reasonable concerns raised by witnesses and submissions to this inquiry.

Information

2.16 The Bill contains a number of offences relating to information concerning the Commonwealth's security or defence. For instance, ss.91.1(1) provides:

> 1) A person commits an offence if:
>
> a) the person communicates, or makes available:
>
> i) **information** concerning the Commonwealth's security or defence [and]
>
> b) the person does so intending to prejudice the Commonwealth's security or defence; and
>
> c) the person's act results in, or is likely to result in, the information being disclosed to another country or foreign organisation, or to a person acting on behalf of such a country or organisation.

2.17 The Bill defines "information" in the following terms:

> ***Information*** means information of any kind, whether true or false and whether in a material form or not, and includes:
>
> (a) an opinion; and
>
> (b) a report of a conversation[11]

2.18 This definition differs from the definition contained in the current Act in that it removes the word "whatsoever" after the words "of any kind."

2.19 Several witnesses raised concerns about the definition of "information". For example, Mr David Bernie, Vice President of the New South Wales Council for Civil Liberties, stated that the definition of "information" is extremely broad and does not just relate to classified information. He explained:

> I understand there is a system of classification in relation to information. I think if we are going to be dealing with information we should be dealing with classified information. We should not be dealing with information that deals with the amount of tea and biscuits that might be consumed by the Department of Defence or ASIO.

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11 *Criminal Code Amendment (Espionage and Related Offences) Bill 2002*, Schedule 1, ss.90.1(1). Emphasis in the original

> It should be about classified information because we are talking about offences here which will have a penalty of imprisonment for 25 years.[12]

2.20 In response to the concerns expressed by the New South Wales Council for Civil Liberties, the Attorney-General's Department provided the following advice:

> Information is relevant for the purposes of these offences where such information can be credited with the relevant characteristic; that is, information concerning the Commonwealth's security or defence or information concerning the security or defence of another country. The very nature of such information means that it is likely to be security classified, however it is not the intention to unnecessarily limit the application of the offences. Similarly, the espionage provisions as currently contained in section 78 of the *Crimes Act 1914* do not limit the application of the espionage offences to classified information.[13]

2.21 The Committee notes that the Gibbs Inquiry considered whether "information" should be limited to classified information. In doing so it examined a similar proposal for espionage legislation in Canada, and dismissed it as follows:

> The Canadian proposed provision … assumes that the relevant information has been duly classified. However, it may not have been classified (it could for instance be oral) and the provision would seem too narrow in scope.[14]

2.22 The Committee accepts the advice of the Attorney-General's Department relating to the definition of "information" contained in the Bill and notes that the only change from the current definition is the omission of the word "whatsoever." The Committee does not support proposals to change the definition of "information" contained within the Bill.

Prejudice

2.23 Currently, s.78 of the *Crimes Act 1914* provides that a person commits an offence if the following conditions are met:

> (1) If a person with the intention of **prejudicing** the safety or defence of the Commonwealth or a part of the Queen's Dominions:
>
> a) makes a sketch, plan [etc] … that is … likely to be … useful to an enemy or a foreign power;
>
> b) obtains, collects [etc] … information that is likely to be … useful to an enemy or a foreign power; or
>
> c) … enters … a prohibited place;

2.24 The *Criminal Code Amendment (Espionage and Related Offences) Bill 2002* uses different terminology. For example, s.91.1 provides that:

> (1) A person commits an offence if:

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12 NSW Council for Civil Liberties, Legal and Constitutional Legislation Committee, *Hansard*, 8 April 2002, p.5

13 *Submission 10*, Attorney General's Department, p.2

14 *Review of Commonwealth Criminal Law*, Fifth Interim Report, June 1991, s.42.20, p.363

(a) The person communicates, or makes available:

(i) information concerning the Commonwealth's security or defence; or

(ii) information concerning the security or defence of another country …; and

(b) the person does so intending to **prejudice** the Commonwealth's security or defence; and

(c) the person's act results in, or is likely to result in, the information being disclosed to another country or foreign organisation, or to a person acting on behalf of such a country or organisation.

2.25 The word "prejudice" is not defined in the Bill.

2.26 Some witnesses commented on the use of the term "prejudice" in evidence to the Committee. The International Commission of Jurists raised the issue by stating that "prejudice" is a very subjective word:

> Someone may be intending to improve our security and defence by criticising it and ultimately benefit the country. Prejudice is a matter which would be difficult to define, and an alternative word should be considered.[15]

2.27 In evidence, the Hon Justice Dowd, President of the Commission, stated:

> I would rather have a word which meant harm rather than prejudice, something which imports conscious damage rather than prejudice, which is a very nebulous term. Prejudice actually does not mean that— 'prejudice' here is a misuse of that word anyway in this statute; prejudice means forming a view about something as to not properly judge something. So 'prejudice' is a vernacular usage here and therefore is ambiguous and ought to be 'harm'.[16]

2.28 The Attorney-General's Department, explained that the word "prejudice" has been retained in the proposed legislation because "it is a word that is used in the existing provision, and it was thought by the drafter better to use that language than to change it, bearing in mind that we are not seeking to narrow the existing provision in any way but in fact to broaden it."[17]

2.29 The Committee notes that the term "prejudice" has been used in other Commonwealth legislation in the same manner as is proposed in this Bill, and that the term has been used in the context of national security issues. For example, "prejudice" is used in the following instances:

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15 *Submission 9*, International Commission of Jurists, p.2

16 International Commission of Jurists, Legal and Constitutional Legislation Committee, *Hansard*, 8 April 2002, p.2

17 Attorney-General's Department, Legal and Constitutional Legislation Committee, *Hansard*, 8 April 2002, p.17

- *Freedom of Information Act 1984*: A document may be exempt from disclosure if its disclosure might "prejudice the maintenance or enforcement of lawful methods for the protection of public safety."[18]
- *Intelligence Services Act 2001*: The Committee on ASIO, ASIS and DSD "must not require a person or body to disclose to the Committee … information that would or might prejudice Australia's national security or the conduct of Australia's foreign relations."[19]
- *Evidence Act 1995*: Evidence relates to matters of state if adducing it as evidence would "prejudice the security, defence or international relations of Australia."[20]
- *Seas and Submerged Lands Act 1973*: The United Nations Convention on the Law of the Sea, which is contained in the Schedule to the Act, states that "Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State."[21]

2.30 On the basis of evidence presented during the inquiry, and the use of the term in other Commonwealth legislation, the Committee therefore does not support the replacement of the term "prejudice" with a word meaning "harm" in the Bill.

Espionage Offence Provisions

2.31 Proposed Division 91, contained within Schedule 1 of the Bill, sets out four offences for "Espionage and similar activities."

2.32 The first offence is contained in ss.91.1(1). The explanatory memorandum to the Bill explains this offence in the following terms:

> Subclause 91.1(1) provides that a person commits an offence if that person *communicates or makes available* information concerning the Commonwealth's security or defence or information concerning the security or defence of another country in the possession or control of the Commonwealth, intending to prejudice the Commonwealth's security or defence.[22]

2.33 The second offence is contained in ss.91.1(2). The explanatory memorandum to the Bill explains this offence in the following terms:

> Subclause 91.1(2) provides that a person commits an offence if the person *communicates or makes available* information concerning the Commonwealth's security or defence or information concerning the security or defence of another country in the possession or control of the Commonwealth, and the person does so

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18 *Freedom of Information Act 1982*, para.37(2)(b)

19 *Intelligence Services Act 2001*, Schedule 1, Clause 43, Part 1 s.1

20 *Evidence Act 1995*, para.130(4)(a)

21 Article 19, United Nations Convention on the Law of the Sea, Schedule to the *Seas and Submerged Lands Act 1973*

22 Criminal Code Amendment (Espionage and Related Offences) Bill 2002, *Explanatory Memorandum*, pp.6-7

> without lawful authority intending to give an advantage to another country's security or defence.[23]

2.34 The explanatory memorandum to the Bill explains that the third and fourth offences, contained in ss.91.1(3) and ss.91.1(4), have the same elements as the offences contained in ss.91.1(1) and ss.91.1(2) except that they relate to:

> Situations where a person makes, obtains or copies a record in any form of information concerning the Commonwealth's security or defence or information concerning the security or defence of another country that is, or has been, in the possession or control of the Commonwealth.[24]

2.35 Each offence is punishable by imprisonment for 25 years.

2.36 Submissions and evidence before the Committee raised a number of concerns regarding the four offence provisions. The main concerns were as follows:

- The disclosure of information in the public interest; and
- information that is, or has been, in the possession of the Commonwealth.

Public Interest

2.37 The Committee was told that these provisions may preclude the release, in the public interest, of information that is not in the public domain. The New South Wales Council for Civil Liberties proposed that a public interest defence be included in the Bill. In support of this contention the Council offered the following hypothetical example:

> The National League for Democracy in Burma has information concerning the operation of Burmese security forces and their intention to execute or imprison pro-democracy campaigners in that country. At the same time the Australian Foreign Minister has been briefed with this information. The National League for Democracy, operating in Sydney passes the information to the US Congress and the US State Department so that it might take action against Burma. This could be a clear case of an offence under subsection 4 making the members of the National League for Democracy liable [to] an offence for which they could be imprisoned for 25 years.[25]

2.38 The International Commission of Jurists also raised concerns about this matter. The Commission suggested that the provisions contained in ss.91.1(2) and ss.91.1(4) might prevent a person from providing information in order to assist a country with which Australia shares friendly relations. The Hon. Justice Dowd stated that:

> Because of our security exchange with a friendly country – New Zealand, Canada, the UK and the USA – we in fact may be endeavouring to expose a glitch that is for the benefit of that country, yet we may be advantaging that country. There is an assumption in the drafting of this legislation that the country is a bad country,

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23 Criminal Code Amendment (Espionage and Related Offences) Bill 2002, *Explanatory Memorandum*, pp.7

24 Criminal Code Amendment (Espionage and Related Offences) Bill 2002, *Explanatory Memorandum*, pp.7

25 *Submission 3*, NSW Council for Civil Liberties, p.3

> someone with interests inimical to Australia. That is not the case, and there needs to be some qualification of that.[26]

2.39 The explanatory memorandum to the Bill explains that the reasons for the wording used in ss.91.1(2) and ss.91.1(4) is to "[afford] the same protection to foreign sourced information belonging to Australia as Australian-generated information."[27]

2.40 In his second reading speech, the Attorney-General noted that "As a result, we can offer greater assurances to our information exchange partners that, when they provide information to us in confidence, we will protect that information in the same way that we protect our own sensitive information."[28]

2.41 The Attorney-General's Department has the view that disclosures which constitute offences but which are made in the public interest should remain as offences, in order to require people to use official channels.

> Formal mechanisms exist for reporting activities that are illegal under international law. 'Leaking' information is not one of those mechanisms. Information regarding security or defence matters that is in the possession or control of the Commonwealth will be sensitive and should be considered in the context of other available information to assess its veracity and utility. Information considered in isolation may be mis-interpreted or misunderstood, particularly if a single piece of information is part of an ongoing investigation or a broader matter, of which the recipient of the information is unaware. For that reason, it is an offence for a person to communicate such information without lawful authority.[29]

2.42 The Attorney-General's Department has advised that there are checks and balances in the system which militate against the prosecution of people disclosing information in the public interest.[30] The first is the Prosecution Policy of the Commonwealth, which details the matters the Director of Public Prosecutions (DPP) must consider before undertaking a prosecution. The Committee notes that the policy states:

> (2.8) The prosecutor must … consider whether … the public interest requires a prosecution to be pursued. It is not the rule that all offences brought to the attention of the authorities must be prosecuted.
>
> (2.10) Factors which may arise for consideration in determining whether the public interest requires a prosecution include:
>
> (a) the seriousness or, conversely, the triviality of the alleged offence …;
>
> (g) the effect on public order and morale;

26 International Commission of Jurists, Legal and Constitutional Legislation Committee, *Hansard*, 8 April 2002, p.2

27 Criminal Code Amendment (Espionage and Related Offences) Bill 2002, *Explanatory Memorandum*, p. 1

28 The Hon Daryl Williams AM QC MP, Second Reading Speech, House of Representatives, *Hansard,* 13 March 2002.

29 *Submission 10*, Attorney General's Department, p.3

30 *Submission 10*, Attorney General's Department, p.2

(i) whether the prosecution would be perceived as counter-productive, for example, by bringing the law into disrepute;

(s) whether the alleged offence is of considerable public concern[31]

2.43 The Attorney-General's Department advised that "an additional safeguard for anyone liable to prosecution for these offences"[32] is the requirement, under s.93.1, for the Attorney-General's consent to be obtained before a prosecution can proceed. This requirement means that once the DPP has considered the Prosecution Policy and determined that a prosecution is appropriate, the Attorney-General has a further opportunity to consider whether to proceed with the prosecution. The provision requiring the Attorney-General's consent is also included in the *Security Legislation Amendment (Terrorism) Bill 2002*, which has been referred to the Committee for consideration. In evidence provided by the Attorney-General's Department for the Inquiry into the *Security Legislation Amendment (Terrorism) Bill 2002* they explained:

> … the DPP has its normal role, but there is an additional gateway, as under the existing Crimes Act treason offence, that the Attorney-General has to agree to the prosecution going ahead. But that in no way diminishes the DPP's independent role.[33]

2.44 The Committee notes the advice from the Attorney-General's Department and considers that there are sufficient safeguards for activities carried out in the public interest. The Committee does not support the inclusion of a Public Interest defence in the Bill.

Information in the Commonwealth's Possession

2.45 An element of the offences relating to espionage and similar activities involves communicating or making known information that "…is, or has been, in the possession or control of the Commonwealth."

2.46 Witnesses raised two concerns regarding this element of the offences. These were:

- the range of information in the possession or control of the Commonwealth; and
- whether it is reasonable to expect people to know what information is, or is not, under Commonwealth control.

2.47 The first of these concerns was raised by the New South Wales Council for Civil Liberties, who observed that the Commonwealth obtains a very broad range of information, all of which may be regarded as information for the purposes of the Bill. In its submission, the Council stated:

> Given the wide definition of information this could include ministerial briefings of many kinds to, for example, the defence or foreign minister and as the information is not limited to classified information could include information that is in the

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31 *Prosecution Policy of the Commonwealth*, ss 2.08 and 2.10.

32 *Submission 10*, Attorney General's Department, p.2

33 Attorney-General's Department, Legal and Constitutional Legislation Committee, *Hansard*, 8 April 2002 p.12

> public domain in any event. The information does not have to be obtained from the Commonwealth; it is enough for it to be in its possession or control.[34]

2.48 Professor Andrew Goldsmith also noted the wide range of information obtained by the Commonwealth. In his submission, he suggested a solution to this concern:

> One way to refine the legislation would be to insert 'exclusive' prior to 'possession or control' or if that does not reflect security exigencies (eg shared information with security agencies of other countries), to specifically exclude the provision's application, via modification to the definition of 'information', to information that is "already in the public domain or is readily obtainable by lawful means from public sources."[35]

2.49 In its submission, the Attorney-General's Department advised that the Bill is not intended to inhibit the free flow of information in the public domain. The submission stated:

> It was not the intention that the espionage provisions capture the disclosure of information in the public domain, or information properly in the possession of someone other than the Commonwealth, where that information also happens to be held by the Commonwealth.[36]

2.50 The Department further advised that information in the public domain was unlikely to be captured by the Bill because such information is unlikely to be "disclosed" as required by s.91.1. The submission of the Attorney-General's Department explained this matter further:

> 'Disclosed' is also not defined in the Bill, however it can be literally interpreted as involving the revelation of information previously unknown. Therefore, information already in the public domain is unlikely to be 'disclosed' by a person who would otherwise be acting in contravention of this provision, even where that information coincidentally happens to be in the possession or control of the Commonwealth.[37]

2.51 The Committee notes advice from the Attorney-General's Department that the espionage provisions do not include information in the public domain. However, given that this is not made clear in the Bill or the Explanatory Memorandum the Committee believes that further clarification is desirable.

Recommendation 1

The Committee recommends that the *Criminal Code Amendment (Espionage and Related Offences) Bill 2002* be amended to ensure that espionage provisions do not apply to the communication of information in the public domain.

2.52 This evidence, however, raised subsequent concerns with the Committee regarding the potential for unintended consequences as a result of this interpretation of "disclosed."

34 *Submission 3*, NSW Council for Civil Liberties, p.2

35 *Submission 6*, Professor Andrew Goldsmith, p.1

36 *Submission 10*, Attorney General's Department, p.2

37 *Submission 10*, Attorney General's Department, p.3

2.53 For example, Australia and New Zealand, through lawful and official channels, may share certain information regarding intelligence activities. If a person obtains, from Australia, top secret information (which has previously been shared with New Zealand) regarding Australian intelligence activities and seeks to communicate or make this information available to New Zealand with the intention of prejudicing the Commonwealth's security or defence, this may not constitute an offence under the Bill. It may be that if "disclosure" is the revelation of previously unknown information, the information is known to New Zealand, and therefore 91.1(1)(c) is not satisfied.

2.54 The Committee sought advice on this issue from the Attorney-General's Department who confirmed that there may be unintended consequences arising from the use of the term "information being disclosed to another country or foreign organisation" and advised that "The Department is in the process of identifying solutions to overcome this unintended consequence."[38]

Recommendation 2

The Committee recommends that the *Criminal Code Amendment (Espionage and Related Offences) Bill 2002* be amended to address the uncertainty arising from the term "disclosed to another country or foreign organisation".

2.55 The second issue in relation to this matter was whether a person would know that the Commonwealth was in possession or control of certain information. For example, in its submission, the International Commission of Jurists noted:

> This 'information,' however it may be communicated, may be information not known to the recipient to be information that is in the possession of the Commonwealth and thus the offence should include the requirement that [the] latter fact be known by the recipient.[39]

2.56 The Committee shares the concern of the International Commission of Jurists that offences related to espionage and similar activities may be committed by a person who communicates information to another country, not knowing that the information is in the possession or control of the Commonwealth.

Recommendation 3

The Committee recommends that s.91.1 of the *Criminal Code Amendment (Espionage and Related Offences) Bill 2002* be amended so that an element of each offence is that a person knows that the information is, or has been, in the possession or control of the Commonwealth.

38 *Correspondence,* Attorney-General's Department, 22 April 2002

39 *Submission 9*, International Commission of Jurists, p.2

Penalty provisions

2.57 The Bill was referred to the Committee in order to consider a "… major increase in penalties for espionage".

2.58 In his second reading speech, the Attorney-General noted that the Bill increases the maximum penalty for the most serious cases of espionage to 25 years imprisonment. In doing so the Attorney-General recognised that this is a "… significant increase from the current seven-year penalty".

2.59 The Attorney explained the need for such an increase in the following terms:

> This government considers seven years imprisonment to be a grossly inadequate punishment for the more serious acts of espionage during peace. Penalties in comparable countries for equivalent offences range from the death penalty in the United States to 14 years imprisonment in the United Kingdom, Canada and New Zealand. We should regard espionage as seriously as these countries.[40]

2.60 This significant increase in penalties was commented on in evidence during the enquiry. For example, Mr Erskine Rodan, a member of the Law Institute of Victoria, told the Committee that the extension of the maximum penalty from seven years to 25 years was a "… sledgehammer approach".[41]

2.61 In response to these concerns, the Attorney-General's Department informed the Committee that "… the most serious cases of espionage do great damage to a country's security interests". He commented:

> When regard is had to penalties for other offences, such as people-smuggling and so on, 25 years is regarded as the appropriate maximum penalty for this kind of offence.[42]

2.62 The Committee notes the explanation provided by the Attorney-General's Department and supports the Bill's imposition of a maximum penalty of 25 years imprisonment. The Committee further notes that the penalty expressed in the Bill represents a maximum penalty and not a mandatory penalty.

Soundings Offences

2.63 Currently, s.83 of the *Crimes Act 1914* makes it an offence to take, make record of, or communicate outside the commonwealth, unlawful soundings. The term "unlawful soundings" is not defined in the Act.

2.64 Proposed Division 92 in the Bill deals with an offence relating to soundings. The Bill does not refer to "unlawful soundings" but simply to "soundings."

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40 The Hon Daryl Williams, AM QC MP, Second Reading Speech, House of Representatives, *Hansard*, 13 March 2002.

41 Law Institute of Victoria, Legal & Constitutional Legislation Committee, *Hansard*, 8 April 2002, p.11

42 Attorney-General's Department, Legal & Constitutional Legislation Committee, *Hansard*, 8 April 2002, p.25

2.65 S.92.1 makes it an offence to take soundings, or to record, possess, or communicate outside the Commonwealth a record of soundings. However under ss.92.1(2) it is a defence if the soundings were made under the authority of the Commonwealth government, or a State or Territory government, or if they were reasonably necessary for the navigation of the vessel from which they were taken or for any purpose in which the vessel from which they were taken was lawfully engaged. The maximum penalty for the offence is two years' imprisonment.

2.66 Proposed s.92.1(5)provides that a reference in the Bill to soundings includes a reference to a hydrographic survey.

2.67 The Committee understand that "soundings" refer to information obtained from "echo-sounding" equipment or similar devices which can be used by ships or aircraft to take hydrographic surveys of the ocean floor. The Committee also understands that ocean-going vessels over a certain size are required to carry echo-sounders in accordance with the *International Convention for the Safety of Life At Sea 1974*.[43]

2.68 Evidence presented to the Committee identified two specific concerns with the provisions in the Bill relating to soundings. These were:

- the need for a soundings offence; and
- reversal of the onus of proof.

The Need for a Soundings Offence

2.69 During the inquiry, the Committee became aware that the issue of the need for a soundings offence was addressed in the Gibbs Review of Commonwealth Criminal Law. The Gibbs Review Committee recommended that soundings offences be repealed, stating:

> The [Australian Federal Police] said in effect that the need for the retention of this provision appeared questionable in the light of technological developments. The Department of Defence[44] said that it has no objections to the repeal of section 83. The Review Committee, in the light of the above, recommends the repeal of section 83.[45]

2.70 In light of the recommendation of the Gibbs Review Committee, the Committee noted the reasoning for the offence contained in the explanatory memorandum to the Bill, namely:

> There are significant security, safety and defence risks associated with soundings being unlawfully communicated to any person outside the Commonwealth particularly where, as a consequence of the communication, the Commonwealth does not exclusively retain the best possible information about the hydrographic characteristics of its territorial waters.[46]

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43 International Convention for the Safety of Life at Sea 1974, Chapter V, Regulation 12 (d). The Convention is Schedule 1 of the *Navigation Act 1912.*

44 The Committee understands that the Department of Defence has contributed to the Attorney General's Department's preparation of the *Criminal Code Amendment (Espionage and Related Offences) Bill 2002* and supports the view that the sounding offence should be retained.

45 *Review of Commonwealth Criminal Law*, Fifth Interim Report, June 1991, ss.43.16 – 43.17, pp.387-388

46 Criminal Code Amendment (Espionage and Related Offences) Bill 2002, *Explanatory Memorandum*, p.8

2.71 The Committee was concerned that the scope of the proposed offence relating to soundings may have unintended consequences. For example, the Committee discussed with witnesses the possibility of Swedish-owned tuna fishing operators in Port Lincoln sending soundings information back to their parent company in Sweden, thereby offending s.92.1 and being liable for imprisonment for two years.[47]

2.72 The NSW Council for Civil Liberties also expressed the view that the soundings offence is unnecessary:

> I could not actually see the reasons why such an offence was necessary … most of this is publicly available information, so I am not even sure of the basis. It seems like an old offence. […] It does not seem that taking a sounding in that way is what anyone in the community would consider to be an act of espionage. It is a mystery as to why it is here.[48]

2.73 During the Committee's hearing, the Committee raised concerns with the Attorney-General's Department that the proposed Soundings offence may be inconsistent with other safety and navigation requirements established for vessels in Australian waters:

> …it is now a requirement for the safety of crews and ships that lie within Commonwealth waters to maintain an ongoing record of the sounding of that ship at all times … If you are a ship in Commonwealth waters, then you are obliged to keep a record of those soundings.[49]

2.74 In response, the Attorney-General's Department stated that "where legislation allows for or requires the taking of soundings the act of so doing is therefore authorised."[50]

2.75 The response of the Attorney-General's Department did not address the Committee's concerns on this matter. If vessels operating in Australia take soundings for safety purposes, and such soundings are authorised, as the Attorney-General's Department suggests, then there appears to be little justification for the proposed provisions. Furthermore, the Committee noted that, if the Bill were enacted in its current form, then the operators of these vessels would bear the onus of proving that the soundings were authorised .

2.76 The Committee recognises the need for the Commonwealth to obtain information about the hydrographic characteristics of Australian waters. However, the Committee does not support the view that an offence, in the proposed form, is required in order to achieve this outcome.

Recommendation 4

The Committee recommends that the current provisions relating to soundings be repealed and that the *Criminal Code Amendment (Espionage and Related Offences) Bill 2002* be amended to delete proposed Division 92.

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47 Legal and Constitutional Legislation Committee, *Hansard*, 8 April 2002, p.7

48 Legal and Constitutional Legislation Committee, *Hansard*, 8 April 2002, pp.7-8

49 Legal and Constitutional Legislation Committee, *Hansard*, 8 April 2002, p.18

50 *Submission 10*, Attorney-General's Department, p.2

Reversal of the Onus of Proof

2.77 Proposed s.92.1(2) states:

> (2) It is a defence to a prosecution of a person for an offence under subsection (1) if the person proves that the soundings concerned:
>
> > (a) were made under the authority of the Commonwealth Government, a State Government or the Government of a Territory; or
> >
> > (b) were reasonably necessary for the navigation of the vessel from which they were taken or for any purpose in which the vessel from which they were taken was lawfully engaged.
> >
> > Note: The defendant bears a legal burden in relation to the matter in subsection (2) (see section 13.4)

2.78 This means that the defendant in a prosecution under this Division of the Bill is required to prove one of the defences. This reverses the onus of proof. It should be noted that the relevant section of the *Crimes Act 1914* also reverses the onus of proof.[51]

2.79 Submissions and witnesses criticised this aspect of the Bill. For example, the International Commission of Jurists stated:

> This reverses the criminal onus and is contrary to the overwhelming nature of criminal offences and obliges a person whom may have quite innocently obtained information who [may be] making soundings for quite [l]awful purposes to go into evidence to show that the taking of soundings was lawful. This offence should be presented in the normal form and require the Crown to negative the items included as defences.[52]

2.80 The Committee notes these objections. The Committee has recommended that proposed Division 92 be removed from the Bill, and as a consequence of this recommendation the reversal of the onus of proof in prosecutions relating to soundings would also be removed.

Institution of Prosecution in a Reasonable Time

2.81 Proposed Division 93 relates to prosecutions and hearings of persons charged with espionage and similar activities. In relation to the institution of a prosecution, s.93.1 provides:

> (1) A prosecution under this Part may be instituted only by, or with the consent of, the Attorney-General or a person acting under the Attorney-General's direction.
>
> (2) However:
>
> > (a) a person charged with an offence against this Part may be arrested, or a warrant for his or her arrest may be issued and executed; and

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51 *Crimes Act 1914*, ss.83(3)

52 *Submission 9*, International Commission of Jurists, p.3

(b) such a person may be remanded in custody or on bail;

even if the consent of the Attorney-General or a person acting under his or her direction has not been obtained, but no further proceedings are to be taken until that consent has been obtained.

(3) Nothing in this section prevents the discharging of the accused if proceedings are not continued within a reasonable time.

2.82 Division 93 of the Bill indicates that, before proceeding with a prosecution for an offence relating to espionage or similar activities, the consent of the Attorney-General must be obtained. However, before such consent is obtained, a person charged with such an offence may be arrested and remanded in custody or bail in the normal way even before the consent of the Attorney-General, or a person acting under his or her direction, is obtained. Nothing in the Bill prevents the discharge of a person if the prosecution does not commence (in effect, if the Attorney-General's consent is not obtained) within "a reasonable time".

2.83 Concerns were raised in submissions and evidence on what constitutes a reasonable time for the institution of a prosecution. For example, the International Commission of Jurists expressed concern that the Bill does not stipulate what is a reasonable time for the accused to be discharged if proceedings are not continued. The Commission suggested that a specific time limit, such as 48 hours, should be included in the Section.[53]

2.84 In evidence, Mr Erskine Rodan, Council Member, Law Institute of Victoria, suggested that one result of ss.93.1(3) might be that a person could be detained for an indefinite time, without being charged:

> I do not think anyone should be detained without trial. You are basically saying that he or she can be remanded for an indefinite time … I believe that is against our obligations as set down by the International Covenant on Civil and Political Rights. […] I think if they want to remand someone, they must charge the person immediately – within, say, 48 hours.[54]

2.85 In response to this evidence, the Attorney-General's Department advised that a person arrested for any of the offences outlined in the Bill would be subject to the normal procedures for arrest and detention, outlined in various sections of the *Crimes Act*.[55]

2.86 In this regard the Committee notes s.3ZD of the *Crimes Act 1914*, which states that a person being arrested must be told, at the time of the arrest, of the offence for which they are being arrested. The Committee also notes s.23C of the *Crimes Act 1914* provides that an arrested person must be brought before a magistrate within 4 hours[56] or "… as soon as practicable"[57] thereafter, and that (under s.23G of the *Crimes Act 1914*) an arrested person has the right to communicate with a legal practitioner and to have them present during the arrested person's questioning.

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53 *Submission 9*, International Commission of Jurists, p.3

54 Law Institute of Victoria, Legal and Constitutional Legislation Committee, *Hansard*, 8 April 2002, p.2

55 Attorney-General's Department, Legal and Constitutional Legislation Committee, *Hansard*, 8 April 2002, p.18

56 2 hours if the person is under 18, or an Aboriginal person or Torres Strait Islander.

57 *Crimes Act 1914* para.23C(3)(b)

2.87 The Committee further notes that once the person has appeared before the magistrate and been either remanded in custody or released on bail, the prosecution must be commenced within the time frames outlined in s.15B of the *Crimes Act 1914*. In the case of the offences contained in the current Bill, the time frame for the commencement of a prosecution is "… at any time."[58]

2.88 In evidence, the Attorney-General's Department advised that after the person is remanded in custody or released on bail, the court sets a date for the trial and normal court processes apply. He stated:

> You would have a normal date when the court said that the matter was ready to be brought forward in a hearing in a court. If the prosecution attempted to say, "No, we are not in a position to do that because we are waiting on the Attorney's consent," then the court would be able essentially to terminate the proceedings.[59]

2.89 The Committee notes the advice of the Attorney-General's Department on the institution of prosecutions within a reasonable time under the *Criminal Code Amendment (Espionage and Related Offences) Bill 2002*.

Recommendation 5

The Committee recommends that, subject to the Committee's recommendations, the *Criminal Code Amendment (Espionage and Related Offences) Bill 2002* should proceed.

Senator Marise Payne

Chair

58 *Crimes Act 1914* para.15B(1)(a). This paragraph is relevant because the maximum penalty exceeds imprisonment for six months.

59 Attorney-General's Department, Legal and Constitutional Legislation Committee, *Hansard*, 8 April 2002, p.18

APPENDIX 1

INDIVIDUALS AND ORGANISATIONS THAT PROVIDED THE COMMITTEE WITH SUBMISSIONS

1. The New South Wales Bar Association
2. Mr Patrick Coleman
3. The New South Wales Council for Civil Liberties
4. The Law Institute of Victoria
5. Ms Sue McDonald
6. Professor Andrew Goldsmith
7. Friends of the Earth Northern Rivers
8. Ms Caroline Le Couteur
9. The Honourable Justice John Dowd AO
10. The Attorney General's Department

APPENDIX 2

WITNESSES WHO APPEARED BEFORE THE COMMITTEE

Public Hearing held in Sydney on Monday, 8 April 2002

Mr Karl Alderson, Principal Legal Officer, Criminal Law Division, Attorney-General's Department.

Mr David Bernie, Vice President, NSW Council for Civil Liberties

The Hon. Justice John Dowd, Commissioner; and President, Australian Section, and Member, International Executive Committee, International Commission of Jurists

Mr Peter Ford, First Assistant Secretary, Information and Security Law Division, Attorney-General's Department

Ms Jamie Lowe, Senior Legal Officer, Information and Security Law Division, Attorney-General's Department

Mr Cameron Murphy, President, NSW Council for Civil Liberties

Mr Erskine Hamilton Rodan, Council Member, Law Institute of Victoria