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Submissions on the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017

Nyman Gibson Miralis

1. This submission is made to the Parliamentary Joint Committee on Intelligence and Security with respect to their review of the *National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017* (**the bill**).
2. Nyman Gibson Miralis is a leading Australian criminal law firm with expertise in national security matters including anti- terrorism law, terrorism financing, international cyber -crime and global transnational organised crime (including Interpol red notices and extradition) as it potentially impacts on Australia's national security interest.
3. Nyman Gibson Miralis draws on its extensive international experience in dealing with multiple state actors in making this submission.

Introduction

4. In light of current threats that are potentially harmful to Australia's national security interests (including terrorism, recent cyber-attacks committed overseas and foreign interference in Australia's political and governmental processes) it is reasonable for the Government's to expand the scope of national security law.
5. However, in our respectful submission, the bill as currently drafted operates too broadly and is a disproportionate response to the national security threats identified.

Scope of 'National Security' under s 90.4

6. The term 'national security' appears under the bill's new sabotage, espionage and foreign interference offences.
7. The Bill defines National Security under s 90.4(1) as:
    a. the defence of the country;
    b. the protection of the country or the people of the country from activities covered by subsection 90.4(2);
    c. the protection of the integrity of the country's territory and borders from serious threats;
    d. the carrying out of the country's responsibilities to any other country in relation to the matter mentioned in paragraph (c) or an activity covered by subsection (2);
    e. the country's political, military or economic relations with another country or other countries.
8. We express concern regarding the breadth of the term 'National Security', particularly with respect to its capacity to unduly expose innocent people to allegations of espionage under Division 91 and its capacity to interfere with human rights.
9. We submit that there is a wide range of circumstances that could potentially be caught by the breadth of the criminal liability expressed by this term which is unlikely to have been the intent of the Parliament:
    a. A Whistle-blower who is a foreign-national residing in Australia and has secret information regarding high-level corruption occurring between a foreign head of state and an Australian company. If the whistle-blower were to provide this information to Australian authorities, such disclosure could be adverse to Australia's economic and political relationship with the foreign country whose head of state is the subject of the whistle-blower's corruption allegations.
    b. Such disclosure could fall within the very broad ambit of s 90.4(1)(e) as it would concern Australia's "political...or economic relations with another country". Consequently, the disclosure could give rise to exposure to an espionage offence contrary to s 91.1(2 as the whistle blower):
        i. dealt with information that concerns 'Australia's national security';
        ii. was likely reckless to the fact their disclosure would prejudice Australia's national security (i.e. political or economic relations with another country); and
        iii. assuming their conduct resulted in the information (i.e. corruption allegations) being made available to a "foreign principal" (i.e. another country).
    c. Based on the same set of facts the whistle blower could also be found liable of the lesser proposed offence under 91.2(2). The primary difference with this offence is that the 'information or article' which the

whistle-blower discloses does *not* need to be concerned with 'Australia's national security interest', unlike in s 91.1(2)(b).

d. The penalty for an offence committed under the proposed s 91.1(2) is imprisonment for 25 years. The penalty under s 91.2(2) is Imprisonment for 20 years.

10. One unintended consequence of these provisions is to deter whistle-blowers from providing valuable information to law enforcement in Australia concerning foreign governments
11. The above reasoning has the capacity to equally apply to a foreign national who wishes to provide information to Australia concerning human rights abuses in their country of origin, such information being classified in that country. The publication of that information has the capacity to prejudice Australia's national security, as presently defined.
12. A further circumstance relates to Australian lawyers undertaking cross-border investigations in a foreign country being conducted on behalf of a client who is subject to criminal proceedings in Australia, for alleged transnational crimes such as drug importation/cybercrime/money laundering. The client is a high profile foreign-national.
    a. Australian lawyers make their own inquiries with foreign law enforcement in the client's home country to gather exculpatory evidence, including providing to foreign law enforcement material obtained by Australian law enforcement during the criminal investigation, (for the foreign country to conduct their own investigation) such cross border investigation could amount to espionage.
    b. In an extreme example, the home country may not respond well and criticise Australia's treatment of the client. This immediately affects Australia's political relationship with the client's home country in adverse way. There is the potential for this conduct to be caught by operation of s 90.4(1)(e) (or s 90.4(1)(C)) and s 91.1(2) and/or s 91.2(2).
13. These provisions therefore have the capacity to prevent lawyers from acting in their client's best interests in cross border/international criminal cases. Such restrictions fundamentally interfere with a person's right to a fair criminal trial and offends essential criminal justice principles that underpin our legal system.
14. It is our recommendation that sub-s 90.4(1)(a)(c) and (e) be limited and qualified by inserting express reference to the activities enumerated in s 90.4(2).

Overlap with 'traditional' criminal offences

15. In our view, it is apparent that other kinds of criminal conduct, such as cybercrime, have the potential to fall under the proposed offences relating to espionage and sabotage.

16. Such overlap is concerning given that a defendant could be subject to significantly higher penalties under the proposed offences than the substantive offence that specifically deals with the particular type of criminal conduct in question.
    a. Taking the example of cybercrime - a person who hacks into an Australian company's computer system and limits access to it for the purpose of obtaining confidential financial data could be charged for committing a serious computer offence under the *Criminal Code 1995* (Cth). However, such conduct could also amount to sabotage under the proposed sections 82.6 (reckless) and 82.5 (intentional) which respectively carry 15 - 20 years imprisonment. In comparison, the serious computer offences stipulate terms of 10 years imprisonment.
    b. Such disproportionality in penalties is further exaggerated by conduct that would typically fall under 'fine only' offences (i.e. contravention of export licence conditions). But by operation of the proposed offences, a defendant could instead be imprisoned for the same conduct.

Sentencing concerns for undefined harm

17. We submit that the proposed espionage offences under division 91 also impose disproportionate penalties (i.e. imprisonment for life) because these offences have no requirement to prove that specific harm was caused.
18. Such undefined harm poses difficulties in sentencing an offender for espionage given that there is no frame of reference to measure the objective seriousness of such conduct, particularly with respect to the amorphousness of the term 'national security'.
19. Though criminal sentencing is a discretionary exercise, the exceptionally wide range of conduct captured by the proposed espionage offences could create too much uncertainty and lack of consistency in sentencing decisions.
20. Thus, we recommend inserting a requirement under s 16A of the *Crimes Act 1914* (Cth) that admissible evidence of specific harm must be adduced with respect to the proposed national security offences to demonstrate any aggravation in the objective seriousness of the offender's conduct.

Interfering with police functions in relation to proceeds of crime proceedings

The proposed secrecy offence under s 122.2 operates conditionally upon the definition of 'causing harm to Australia's national interest' under s 121.1.

21. Our concern with the definition is that mere 'interference' with the functions of the Australian Federal Police (**AFP**) under the *Proceeds of Crime Act 2002* (Cth) (**POCA**) amounts to 'causing harm to Australia's national interest'.
22. Consequently, persons who receive information from the AFP regarding proceedings instituted under POCA for the seizure of their assets and who then challenge the proceedings in a foreign jurisdiction challenging for example the applicability of any purported extra territorial application of the freezing order, could be caught under the proposed secrecy offence.

23. The proposed secrecy offence has the potential to *criminalise* conduct that is ordinarily innocuous conduct and overtly breaches the right to a fair hearing in civil proceedings.
24. It is our submission that the proposed definition of 'causing harm to Australia's national interest' under s 121.1 be limited and confined.

Foreign interference

25. The bill also introduces new foreign interference offences by inserting division 92 into the *Criminal Code 1995* (Cth). The proposed foreign interference offences serve as a complement to the proposed espionage offences under division 91.
26. We submit that the proposed foreign interference offences significantly, disproportionately and unnecessarily infringe upon various individual rights including the freedom of expression, freedom of religion and even the constitutional guarantee of the implied freedom of political communication.
27. Australia is a multi-cultural society whose people migrate from overseas and may still hold strong ties to their country of origin. It is our submission that the proposed foreign interference offences may have the effect of potentially criminalising these innocent connections.
    a. Take for example an Australian citizen who seeks to lobby the Australian government for support with respect to their former country's territorial dispute
    b. Such a person is likely to commit a foreign interference under s 92.2 (1) if:
        i. Person disseminates propaganda or political information in favour of their former country;
        ii. And the propaganda material is sourced from their former country's embassy in Australia;
        iii. That person tends to influence the federal political process; and
        iv. That person attempts to conceal their communication with the former country's embassy.
    c. The penalty under s 92.2(1) imprisonment for 20 years.
28. Such conduct should not be criminalised as it offends a person's autonomy and their right to freely express an opinion. Neither does the mere fact that a person who still holds a strong connection to their former country warrant any concern with respect to national security without any objective evidence of actual harm being caused to Australia.

Nyman Gibson Miralis recommends that the bill be further scrutinised to ensure that it does not adversely impact on freedom of speech in Australia and over criminalise conduct that cannot objectively be said to amount to a national security threat.

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