

Supplementary submission: PJCIS press freedom inquiry



Introduction

Thank you for the opportunity to provide a supplementary submission to the Committee, addressing questions taken on notice during our appearance before the Committee on 13 August 2019.

This submission addresses:

1. The threat of foreign agents using exemptions from espionage and secrecy laws as cover to operate in Australia.
2. The definition of “national security”.

Mitigating the threat of foreign agents posing as journalists

During public hearings on 13 August 2019, Senator McAllister raised a concern that proposed exemptions for journalists to secrecy and espionage offences could be “used as a cover” by foreign agents. Presumably the concern is that agents can pose as journalists and gain access to sensitive information leaked by government whistleblowers. Senator McAllister asked the HRLC to look into how comparative jurisdictions have dealt with this issue.

Unfortunately, in the limited time available we have not had an opportunity to review other jurisdictions’ laws on this specific issue.

However, we wish to draw the Committee’s attention to the independent review mechanism for disclosures of intelligence information, detailed in recommendation 15 of our submission and elaborated further below, that provides a mechanism for managing this concern, as well as providing safe disclosures of intelligence information.

A mechanism for managing disclosure of intelligence information in the public interest

In addition to the concerns raised by Senator McAllister, during public hearings, members of this Committee also expressed concern that journalists were currently performing the function of determining what aspects of leaked intelligence information were appropriate to include in media reports, albeit reportedly often following consultation with intelligence agencies.¹ The Chair of this Committee inquired into whether a formal mechanism could be developed, whereby journalists could work with intelligence agencies to ensure sensitive information that could undermine Australia’s national security would not be disclosed.² In response, Secretary of the Department of Home Affairs Mr Michael Pezzullo indicated that, at least in his opinion, it could.³

We agree that it is possible – and important – to develop a process that will protect against disclosures that would harm national security, but at the same time allow enough disclosure, where appropriate, to fulfil the public’s right to know to the greatest extent possible. There should not be a blanket rule of

¹ Senator Fawcett, *Public Hearings*, Parliamentary Joint Committee on Intelligence and Security, 13 August 2019, 16-17.

² Mr Hastings MP, *Public Hearings*, Parliamentary Joint Committee on Intelligence and Security, 14 August 2019, 22.

³ M Pezzullo, *Public Hearings*, Parliamentary Joint Committee on Intelligence and Security, 14 August 2019, 22: in response to Mr Hastie’s question “is there scope to formalise or create some way of streamlining that process?”, stated “it seems to me that there is a space of collaboration and collegiality that could be established [between journalists and intelligence agencies]”.

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secrecy for all intelligence information, providing cover for all morally and legally dubious action to be done without any public accountability.

Extensive consultation and consideration is required in order to how such a scheme would work, however we wish to draw the Committee's attention to relevant parts of our submission that address this issue.

First, at recommendation 15 of our written submission, we stated that the *Public Interest Disclosure Act 2013* (Cth) could be amended to include an independent reviewer, such as a retired judge, to assist in determining what intelligence information can be published in the public interest without risking Australia's national security. Such a reviewer could have the requisite security clearance, and could consult with both intelligence agencies and journalists before authorising publication.

Secondly, it may be that the threshold of disclosable conduct be made higher for intelligence agencies, thereby reducing the burden of such a mechanism on the operations of intelligence agencies: for instance, it may be that only matters important as human rights abuses and significant corruption within intelligence agencies are potentially disclosable.⁴

This mechanism would have the following benefits:

- (i) It creates parameters by which an objective reviewer can navigate what may be published in the public interest whilst also protecting national security.
- (ii) The process could be designed to prevent foreign agents who are posing as journalists from accessing information. For instance, the process may dictate that the whistleblower should first disclose information to the independent reviewer rather than a journalist, or presumably the public interest test itself would prevent covert or nefarious conduct.⁵
- (iii) Crucially, it would promote transparency as whistleblowers would have a clear, safe avenue by which to disclose matters in the public interest, without risking prosecution.
- (iv) It reduces the risk that disclosures will undermine our allies' trust in Australia's ability to keep information confidential, as only matters in the public interest, such as human rights abuses or corruption, will meet the public interest test and the system will prevent damaging information regarding our allies' operations from being disclosed.

Further guidance on the definition of national security

On a separate matter, during public hearings Senator Keneally inquired into the breadth of the definition of "national security" used in the espionage, sabotage and foreign interference offences in the *Criminal Code Act 1995* (Cth) (**Criminal Code**).⁶ In our written submission to this inquiry, we stated that the definition of "national security" used in those provisions is too broad, particularly insofar as it includes causing "prejudice" to Australia's political and economic relations with another country in circumstances where prejudice is only required to be something more than "mere embarrassment".

⁴ We note Natasha Molt's submission on behalf of the Law Council on 14 August 2019, that different thresholds could apply depending on the nature of the information: Oral Submissions, *Parliamentary Joint Committee on Intelligence and Security*, 14 August 2019, 66.

⁵ G Williams, Oral Submissions, *Parliamentary Joint Committee on Intelligence and Security*, 13 August 2019, .

⁶ Senator Keneally, Oral Submissions, *Parliamentary Joint Committee on Intelligence and Security*, 13 August 2019, 37. See Criminal Code section 90.4 for definition.

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We proposed that the definition be the subject of a full review.⁷ Failing such a review however, we believe that at the very least, the threshold for the prejudice or harm intended should be raised to require that the person who engaged in the offence either caused or intended to cause or was reckless as to causing *serious or grave prejudice* to Australia's national security.

More clarity and certainty needs to be provided around what constitutes a threat to national security. The overly vague and unclear provisions in the Criminal Code stand in contrast to the Attorney-General Department's Protective Security Policy Framework,⁸ which provides guidance to government entities as to what information is to be classified "secret" and "top secret". That document does not provide a definition of national security per se, but shows that it is possible to clearly distinguish between different threats to various national interests, and the severity of such threats. It is just one example and a full and proper consideration of the definition ought to draw out similar work that is relevant, including work already undertaken within government.

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⁷ At Recommendation 12.

⁸ Attorney-General's Department, *Protective Security Policy Framework: Sensitive and Classified Information*, 2018, available at <https://www.protectivesecurity.gov.au/information/sensitive-classified-information/Documents/pspf-infosec-08-sensitive-classified-information.pdf> (accessed 20 August 2019).