Dr Lawrence McNamara
York Law School
University of York
York YO10 5GD

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Dear Sir/Madam

Submission to PJCIS:

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

Summary

1. This submission focuses on Schedule 2 of the Bill. It provides some views on the Bill, especially in light of the UK experience in protecting official data.

2. It is a very brief submission and makes recommendations in broad terms but I would be happy to expand on any points either in writing or orally should it be of assistance to the Committee.

About the author

3. I am an Australian academic, based in the UK since 2007 (and now dual British/Australian). I am a Reader in Law at the University of York, in York, and Senior Research Fellow at the Bingham Centre for the Rule of Law in London. The Bingham Centre is part of the British Institute of International and Comparative Law (BIICL), a registered charity. I have been researching on issues relating to security and terrorism for more than a decade, both in Australia and the UK. My work has been cited in UK parliamentary reports and debates, especially in relation to the Justice and Security Act 2013.

The approach in the Bill and Schedule 2

4. The Bill, and especially Schedule 2, is unbalanced in that it is directed towards establishing new criminal offences but does not on its face consider whether national security governance and disclosure methods are appropriate and adequate.

5. In the UK, a core point of comparison is the current inquiry by the Law Commission of England & Wales: *The Protection of Official Data: A Consultation Paper* (CP 230, February 2017), which reviews the official secrets statutes, among other matters. The Commission's 300-page consultation paper attracted much criticism when published, especially from the media and civil

society organisations. The Commission received over 1,200 submissions. The Commission has continued to consult over the past year and, as I understand it, is looking to report sometime mid-2018.

6. I am among those who have made a written submission (available at http://bit.ly/2Bk1lZb), co-authored with Prof Lorna Woods (University of Essex) and Dr Judith Townend (University of Sussex). I and my co-authors are also among those who have by invitation met with the Commissioner (Professor Ormerod) and his staff during 2017.

7. For the PJCIS, some significant points that arise out of the UK experience are set out below.

Governance – not just criminal offences.

8. The Law Commission consultation approaches the protection of official data not only by looking at the regime of criminal offences, but also at the methods by which current and former staff of security and intelligence agencies may raise concerns internally and to oversight bodies. While in our submission we argue that there are problems with the specific processes that the Commission tentatively advances, there is a great deal to be said – and in contrast to the Australian Bill – for the interrogation of whether existing mechanisms are adequate. That same broader approach characterised the Australian Law Reform Commission inquiry, *Secrecy Laws and Open Government in Australia* (ALRC Report 112, Dec 2009), which is a detailed and landmark report for Australia. It would seem that both in principle and for the purposes of public confidence, adherence to and departures from the ALRC recommendations in that report should be articulated and reasoned.

9. **Recommendation (1): The PJCIS should consider and articulate the extent to which existing mechanisms are adequate, including with reference to the conclusions reached by the ALRC. The PJCIS should also articulate and explain how the proposals follow and/or depart from the ALRC recommendations.**

Public confidence and the importance of openness

10. The public must be able to have confidence that the agencies that work in its name and to protect it are working within the rule of law. The protection of official data is, of course, essential but any legal framework must have mechanisms to ensure that there will be effective and democratic accountability. The Bill as it stands does not currently appear to provide such mechanisms.

11. This is evident in two ways. First, the use of absolute and strict liability offences, combined with an AG certificate, appears to mean that prosecution would be able to proceed very substantially on the basis of assertion by the state of the significance of information (which though only prima facie evidence would be difficult to contest – perhaps so difficult that fair trial and equality of arms concerns might be invoked), and without proof of damage. The result, it appears, could be that individuals are successfully prosecuted but without any transparency around what, exactly, the substance of the offence was and whether it really did pose any risk. If the UK path for trials is followed then the approach taken by the Court of Appeal (Criminal Division) in *Incedal* could

see extensive and worrying restrictions on open justice, including the use of "accredited" journalists who are not permitted not to report or remove notes from the court.[1]

12. Secondly, there do not appear to be provisions that, for example, require any reporting on or evaluation of the use of the laws. For example, in any regime that could see opaque prosecutions and extensive restrictions on reporting and open justice, it would be appropriate that there are requirements, for example, for the Attorney-General to report annually to Parliament on arrest and charge in relation to the new offences, and for an independent review of the operation of the provisions after five years. A reporting and review regime does not solve flaws in legislation, but it may be a fairly straightforward step that can help limit some of the negative effects and risks of flaws.

13. The Prime Minister noted in the Second Reading speech that different legislative components that make for deterrence are interlocking (Reps Hansard, 7 Dec 2017, page 13145). In that same vein, the preservation and protection of security, democracy and the rule of law – the impetus behind the suite of reforms – requires more than just deterrence through criminal offences.

14. There are, inevitably, great difficulties in keeping secret information that is crucial for protecting national security while at the same time ensuring that information is not kept secret to prevent embarrassment (rather than to protect security) and ensuring that failures of the state are prevented or, where they occur, uncovered and addressed. It is essential that there are effective regimes for disclosure, including reporting by the media. As Legal Director of the Guardian, Gill Phillips, has noted, "If public interest journalism is made harder or even criminalised, there is a real risk that whistleblowers will bypass responsible journalists altogether, and simply anonymously self-publish data leaks online, without any accountability."[2]

15. I cannot address here in detail the adequacy of the specific provisions for journalism in the Bill but one of the lessons of the UK experience in 2017 has been that media contributions to debates around the Law Commission paper have been important. Learning from that, the PJCIS should address explicitly and in detail any media concerns, propose amendments where need be, and assure itself, the Parliament and the public, that these provisions are adequate and that the state wrongdoing and state failures cannot be hidden

16. **Recommendation (2): The PJCIS should include provisions for annual reporting and independent review of the operation of the laws. The PJCIS should also articulate how the proposals or other existing laws will ensure that there will still be effective and**

[1] There are several judgments in the *Incedal* case relating to open justice and media reporting. Among them was a trial judge decision by Nicol J, and then the Court of Appeal published a preliminary judgment in June 2014. On 24 Sept 2014 the court of appeal published a full judgment on the June decision: *Guardian News and Media Ltd and others v Incedal* [2014] EWCA Crim 1861 (24 Sep 2014). After the trial, the media sought to report on what had happened and the Court of Appeal held that no further information could be published: *Guardian News and Media Ltd v R & Incedal* [2016] EWCA Crim 11 (9 Feb 2016). On the implications of the decision at different stages and its reception, see: L McNamara, 'Secret trials: secrecy at the expense of justice' INFORRM, 7 June 2014 http://bit.ly/2DA9gGY; L McNamara, 'Secret trials: a little transparency, a lot to worry about', UK Human Rights Blog, 12 June 2014 http://bit.ly/2DtauV8; L McNamara, 'How open will this newly opened justice be?' INFORRM, 14 June 2014 http://bit.ly/2G4Z9sc; and L McNamara, 'The implications of Incedal: managing the new normal in national security cases' 14 Feb 2016 http://bit.ly/2G4Z9sc. For a journalist's experience, see Ian Cobain, 'The secret trial of Erol Incedal' [2016] Proof Magazine (Issue 2) http://thejusticegap.com/2017/01/proof-magazine-secret-trial-erol-incedal/.

[2] Kieran Pender, '"Creeping Stalinism": secrecy law could imprison whistleblowers and journalists', The Guardian, 10 Jan 2018, https://www.theguardian.com/australia-news/2018/jan/11/creeping-stalinism-secrecy-law-could-imprison-whistleblowers-and-journalists.

transparent accountability, including where there are failures of the state to operate within and act consistently with the rule of law.

17. In our submission to the Law Commission (see above, para 6), we address in more detail some of the matters in the UK context. Notably, we look at some of governance options, the role of and justification for a public interest defence for disclosure, and problems that arise in criminal prosecutions, especially with regard to open justice. Some of those concerns apply with equal force in the Australian context.

18. I hope the above comparative comments are helpful to the Committee in its consideration of the Bill.

Dr Lawrence McNamara

University of York, 22 January 2018