

Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the situation of human rights defenders; and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism

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Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; Special Rapporteur on the situation of human rights defenders; and Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, pursuant to Human Rights Council resolutions 34/18, 34/5 and 31/3.

In this connection, we would like to submit the following comments on the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017 (“the Bill”), in response to the call for submissions by the Parliamentary Joint Committee on Intelligence and Security.

Introduction

The United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye, the Special Rapporteur on the promotion and protection of human rights while countering terrorism, Fionnuala D. Ní Aoláin, and the Special Rapporteur on the situation of human rights defenders, Michel Forst, submit these comments in response to the Committee’s call for submissions regarding the **National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017** (“the Bill”).

Special Rapporteurs are independent human rights experts with mandates from the Human Rights Council to report and advise United Nations member States on human rights issues from a thematic or country-specific perspective.

David Kaye was appointed Special Rapporteur in August 2014. Human Rights Council resolution 7/36, Section 3(c), mandates the Special Rapporteur to “make recommendations and provide suggestions” to U.N. member States concerning alleged or potential violations of the rights to freedom of opinion and expression, wherever they may occur. The Special Rapporteur’s observations and recommendations are based on an analysis of international human rights law, including relevant jurisprudence, standards, and international practice, as well as relevant regional and national laws, standards, and practices. Mr. Kaye is also Clinical Professor of Law and Director of the International Justice Clinic at the University of California (Irvine) School of Law.

Fionnuala D. Ní Aoláin was appointed Special Rapporteur in August 2017. Under Human Rights Council Resolution 15/15, the Special Rapporteur has been invited to gather, request, receive and exchange information on alleged violations of human rights and fundamental freedoms while countering terrorism, and to report regularly to the Human Rights Council and General Assembly about, *inter alia*, identified good policies and practices, as well as existing and emerging challenges and present recommendations on ways and means to overcome them. Ms. Ní Aoláin is also University Regents Professor at the University of Minnesota; holder of the Robina Chair in Law, Public Policy, and Society; and faculty director of the Human Rights Center at the University of Minnesota Law School. She is an internationally renowned expert on emergency powers, conflict regulation, transitional justice, and sex-based violence in times of war.

Michel Forst was appointed Special Rapporteur in June 2014. The mandate on the situation of human rights defenders was established in 2000 by the Commission on Human Rights to support implementation of the 1998 Declaration on human rights defenders. In 2014, with resolution 25/18, the Human Rights Council decided to continue the mandate on human rights defenders for a consecutive period of three years. Mr. Forst has conducted comprehensive surveys and case studies of the risks faced by human rights defenders and activists worldwide, including the threats posed by overbroad national security laws and associated threats of intimidation, harassment and reprisal.

Summary

We are concerned that the Bill, particularly those offenses pertaining to “inherently harmful information”, “information that harms Australia’s interests”, and espionage, are inconsistent with Australia’s obligations under article 19 of the International Covenant on Civil and Political Rights and related human rights standards. In particular, we are gravely concerned that the Bill would impose draconian criminal penalties on expression and access to information that is central to public debate and accountability in a democratic society. For example, several offences under the Bill would not only penalize disclosures of government information in the public interest, but also expose journalists, activists, and academics that merely *receive* such information to criminal liability. Such extensive criminal prohibitions, coupled with the threat of lengthy custodial sentences and the lack of meaningful defenses, are likely to have a disproportionate chilling effect on the work of journalists, whistleblowers, and activists seeking to hold the government accountable to the public. We urge the Committee to reconsider the Bill in line with the human rights standards outlined below, as well as our recommendations based on these standards.

International human rights framework for assessing the bill’s compliance with the right to information and freedom of expression

Before explaining our concerns with the Bill, we wish to stress your government’s obligations under article 19 of the International Covenant on Civil and Political Rights (“the Covenant”), ratified by Australia on 13 Aug 1980.

Article 19(1) of the Covenant establishes the right to freedom of opinion without interference. Article 19(2) establishes State Parties' obligations to respect and ensure "the right to freedom of expression," which includes the "freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."

Under article 19(3), restrictions on the right to freedom of expression must be "provided by law", and necessary "for respect of the rights or reputations of others" or "for the protection of national security or of public order (*ordre public*), or of public health and morals". Permissible restrictions on the internet are the same as those offline.¹

Since article 19(2) "promotes so clearly a right to information of all kinds," this indicates that "States bear the burden of justifying any withholding of information as an exception to that right."² The Human Rights Committee, the body charged with monitoring implementation of the Covenant, has also emphasized that limitations should be applied strictly so that they do "not put in jeopardy the right itself."³

Under the article 19(3) requirement of legality, it is not enough that restrictions on the right to information are formally enacted as domestic laws or regulations. Instead, restrictions must also be sufficiently clear, accessible and predictable.⁴

The requirement of necessity also implies an assessment of the proportionality of restrictions, with the aim of ensuring that restrictions "target a specific objective and do not unduly intrude upon the rights of targeted persons."⁵ The ensuing interference with third parties' rights must also be limited and justified in the interest supported by the intrusion.⁶ Finally, the restrictions must be "the least intrusive instrument among those

¹ Human Rights Council, Report of the Spec. Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Frank La Rue, A/HRC/17/27, ¶ 69, available at

http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf.

² General Assembly, Report of the Spec. Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, David Kaye, A/70/361, ¶ 8 ("A/70/361"), available at

http://www.un.org/en/ga/search/view_doc.asp?symbol=A/70/361.

³ U.N. Human Rights Comm., General Comment No. 34, article 19: Freedoms of opinion and expression, U.N. Doc. CCPR/C/GC/34, ¶21 (September 12, 2011) ("General Comment 34"), available at <http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>.

⁴ *Id.*, at para. 25.

⁵ Human Rights Council, Report of the Spec. Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, David Kaye, A/HRC/29/32, ¶ 35; see also U.N. Human Rights Comm., General Comment No. 27, Freedom of movement (Art. 12), U.N. Doc. CCPR/C/21/Rev.1/Add.9 (Nov 2, 1999) ("General Comment 27"), available at

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.9&Lang=en.

⁶ *Id.*

which might achieve the desired result.”⁷ In the context of the right to information, disclosures “must be shown to impose a specific risk of harm to a legitimate State interest that outweighs the public’s interest in the information to be disclosed.”⁸

Although article 19(3) recognizes “national security” as a legitimate aim, the Human Rights Council has stressed “the need to ensure that invocation of national security, including counter-terrorism, is not used unjustifiably or arbitrarily to restrict the right to freedom of opinion and expression.”⁹ In this regard, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has concluded that national security considerations should be “limited in application to situations in which the interest of the whole nation is at stake, which would thereby exclude restrictions in the sole interest of a Government, regime, or power group.”¹⁰ Additionally, States should “demonstrate the risk that specific expression poses to a definite interest in national security or public order, that the measure chosen complies with necessity and proportionality and is the least restrictive means to protect the interest, and that any restriction is subject to independent oversight.”¹¹

In the context of treason and espionage laws, the Human Rights Committee has stated that States parties must take “[e]xtreme care” to ensure that they comply with the strict requirements of article 19(3).¹² In particular, “[i]t is not compatible with paragraph 3 ... to invoke such laws to suppress or withhold from the public information of legitimate public interest that does not harm national security or to prosecute journalists, researchers, environmental activists, human rights defenders, or others, for having disseminated such information.”¹³

Concerns regarding the bill under international human rights law

In light of these standards, we are gravely concerned that the Bill may violate your government’s obligations under article 19 of the Covenant in the following ways:

Concerns regarding the criminalization of handling “inherently harmful information”

Section 122.1, Schedule 2, would create new offences related to “inherently harmful information.” The overbroad definitions of “inherently harmful information” and

⁷ General Comment 27, *supra* n. 5, at ¶14.

⁸ A/70/361, *supra* n. 2, at ¶ 10.

⁹ Human Rights Council, U.N. Doc. A/HRC/7/36 (Mar. 28, 2008), *available at* http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_7_36.pdf.

¹⁰ General Assembly, Report of the Spec. Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, David Kaye, A/71/373, ¶18, *available at* <https://undocs.org/A/71/373>.

¹¹ *Id.*

¹² General Comment 34, *supra* n. 3, at ¶ 30.

¹³ *Id.*

prohibited conduct concerning such information – coupled with the lack of harm and knowledge requirements – raise concern that these offences unduly interfere with the right to freedom of expression.

Vague and overbroad definition of “inherently harmful information”

Section 121.1(1) defines “inherently harmful information” to include, “security classified information,” “information the communication of which would, or could reasonably be expected to, damage the security or defence of Australia,” “information that was provided by a person to the Commonwealth or an authority of the Commonwealth in order to comply with an obligation under a law or otherwise by compulsion of law,” and “information related to the operations, capabilities or technologies of, or methods or sources used by, a domestic or foreign law enforcement agency.”

Based on our understanding of the text of this Bill and how it would relate to pre-existing laws, policies, and regulations, the definition specified in Section 121.1(1) would include the following types of information:

“Security classified information” that encompasses any information classified based on information security management guidelines published by the Attorney General’s Department, which are implemented and enforced without judicial review or oversight;

Commonwealth-related information that encompasses a wide range of governmental affairs, including information pertaining to the Therapeutic Goods Administration, the Australian Competition and Consumer Commission, and the Australian Securities and Investment Commission, among other regulatory agencies; and

Information concerning domestic law enforcement agencies that citizens would have a right to access under the Freedom of Information Act and other domestic laws, including information pertaining to unlawful law enforcement methods or procedures.

In other words, the current definition of “inherently harmful information” potentially encompasses information bearing inappropriate classification markers, information submitted to government agencies or regulators that have little or no connection to national security or public safety, and even information that individuals may successfully request for under other domestic laws, such as the Freedom of Information Act.

Furthermore, under existing law, “information” is also defined as information of any kind, whether true or false, or in material form or not, and includes opinions and reports of conversations.

The sweepingly broad scope of information that would expose individuals to liability for offences under Section 122.1 raises concern that they fail to provide sufficient guidance to both subjects and enforcers of the law, and are in any event disproportionate to any legitimate governmental aim.

Vague and overbroad definition of conduct concerning “inherently harmful information”

Exacerbating these concerns is the scope of conduct that would qualify as improper handling of information.

Section 122.1(1) would make it an offence to communicate (i.e. “publish and make available”) inherently harmful information, with a penalty of 15 years imprisonment.

Section 122.1(2) would make it an offence to “deal” with inherently harmful information. A person “deals” with such information if he “receives or obtains it,” “collects it,” “possesses it,” “makes a record of it,” “copies it,” “alters it,” “conceals it,” and communicates it. The penalty is 5 years imprisonment.

The wording of these provisions raises concern that the mere *receipt* of such information – and even opinions or reports about such information, accurate or not – would be subject to criminal penalty.

Lack of harm and knowledge requirements

These provisions also would not require a showing that the person intended to cause harm, would likely cause harm, or did in fact cause harm to legitimate State or public interests.

Additionally, there is no requirement under these provisions that the person knows, or should have known, that the information at issue falls within the definition of “inherently harmful information.”

The lack of any requirement to demonstrate actual or threatened harm exacerbates concerns of legality, necessity, and proportionality. Furthermore, the imposition of strict liability imputes knowledge that information is “inherently harmful,” even though the current scope of such information is vaguely defined and potentially contradicts other domestic laws.

Concerns regarding the criminalization of handling of information that harms Australia’s interests

Our concerns regarding this category of offences are similar to those outlined above. Section 122.2 makes it an offense to “communicate” or “deal” with information

that “causes harm to Australia’s interests,” or “will or is likely to cause harm to Australia’s interests.”

Taken to their logical conclusion, the definitions of “communicate”, “deal,” and “information,” which are the same as Section 122.1, create a number of concerning scenarios. For example, any person who publicly states an *opinion* that is construed as harmful to Australia’s interests could be liable to prosecution. The mere receipt of these opinions, or any other information considered harmful to Australia’s interests, could also be prosecuted.

Even though these offences establish a harm requirement, the broad definition of what constitutes “harm to Australia’s interests” heightens concerns of overreach. Section 121.1 defines “harm to Australia’s interests” to include harm or prejudice to Australia’s international relations “in any way,” relations between “the Commonwealth and a State or Territory,” “the health or safety of the public,” or “a section of the public.”

As a result, these offenses impose severe criminal sanctions to protect a broad range of asserted government interests, without consideration of the seriousness of the interest harmed, the degree of harm caused or threatened, and related contextual factors. This categorical reliance on criminal sanctions – as opposed to administrative or civil proceedings in less serious circumstances – also heightens concern that these offences are more intrusive than necessary.

Concerns regarding new espionage offences

We are also concerned that the Bill establishes espionage offences that are overbroad. Section 91.1(2), Schedule 1, would make it an offence for a person to “deal” with information in a way that makes it available to a foreign principal if that person is “reckless” as to whether his or her conduct will “prejudice Australia’s national security” or “advantage the national security of a foreign country.” The penalty is 25 years’ imprisonment.

Section 91.2(2) would make it an offence for a person to “deal” with information in a way that makes it available to a foreign principal if that person is “reckless” as to whether his or her conduct will “prejudice Australia’s national security.” The penalty is 20 years’ imprisonment.

Section 91.3 would make it an offence to “deal” with information that “concerns Australia’s national security” in a way that makes it available to a foreign principal. The penalty is 20 years’ imprisonment.

This category of offences penalizes information disclosures only when they implicate national security. However, Section 90.4 of the Bill contains a particularly broad definition of national security, which includes not only “the defence of the country” and the protection of its territorial integrity, the protection of the country or the people of the country from espionage, sabotage, terrorism, political violence, activities

interfering with the country's defence, and foreign interference, but also "the country's political, military or economic relations with another country or other countries". Adopting such a sweeping definition broadens the scope of related offenses while conferring far-reaching discretion on the government.

Furthermore, the lack of specificity regarding information disclosures that will "prejudice" or "concern" Australia's national security, or "advantage" the national security of a foreign country, fails to establish a direct and immediate connection between the expression and the threat. Accordingly, these offences raise the possibility that any person who publicly communicates or receives information deemed politically controversial or sensitive could be prosecuted for espionage.

Concerns regarding lack of adequate defenses

Against this broad scope of offences, the limited defenses offered do not sufficiently mitigate the legality, necessity, and proportionality concerns raised above.

Section 122.5(4) establishes a defense against prosecution for information communicated in accordance with the Public Interest Disclosure Act of 2013 ("PIDA"). However, PIDA is only available to public officials, and in any event do not appear to apply to the wide range of conduct that would be classified as "dealing" with information (including mere receipt of information).

The other defense against prosecution, established under Section 122.5(6), is limited to persons whom have "dealt with or held information ... in the public interest ... and ... in the person's capacity as a journalist engaged in fair and accurate reporting." The wording of this defense raises concern that the government will have broad discretion over what is considered "fair and accurate," including the legitimacy of reporting that is controversial or critical of the government, government policies or government officials.

Neither defense protects other categories of individuals who are likely to receive or disclose information in the public interest, such as activists, human rights organizations and defenders, and academics.

We are concerned that the cumulative effect of these restrictions, coupled with the lack of meaningful defenses, will disproportionately restrict disclosures of government-related information that is nevertheless in the public interest, particularly disclosures that draw critical public scrutiny to government fraud, waste, and abuse.

We are particularly concerned that these restrictions will disproportionately chill the work of media outlets and journalists, particularly those focused on reporting or investigating government affairs. The lack of clarity concerning these restrictions, coupled with the extreme penalties, may also create an environment that unduly deters and penalizes whistleblowers and the reporting of government wrongdoing more generally.

Recommendations

In light of these concerns, we urge the Committee to implement the following recommendations in order to bring the Bill in line with human rights standards:¹⁴

Ensure that any restriction on improper handling of government information would protect any person who discloses information that he or she reasonably believes, at the time of disclosure, to be true and to constitute a threat or harm to a specified public interest, such as a violation of international law, abuse of authority, waste, fraud, or harm to the environment, public health or public safety;

In the context of public national security disclosures, ensure that restrictions only apply upon the government's showing of a real and identifiable risk of significant harm to a specifically defined national security interest (such as ongoing defense plans or intelligence sources and methods), and that the person disclosing the information did not have a reasonable belief that the public interest in disclosure outweighed this harm;

Ensure that definitions of the scope of protected disclosures are not legalistic or overly broad, and should be easily understandable by potential whistleblowers;

Ensure that the Bill provides for a clear and acceptably narrow definition of the term "national security" in order to reduce the breadth of discretion conferred upon implementing authorities.

Establish internal institutional and external oversight mechanisms that provide effective and protective channels for whistleblowers to motivate remedial action;

Ensure that law enforcement and justice officials, including any government official involved in the classification of information, is trained to ensure adequate implementation of standards establishing protection of the right to access information and the consequent protections of confidentiality of sources and whistleblowers; and

Publicly recognize the contribution sources and whistleblowers make by sharing information of public relevance and condemn attacks against them.

Finally, we would like to inform your Excellency's Government that this communication, as a comment on pending or recently adopted legislation, regulations or policies, will be made available to the public and posted on the website page for the mandate of the Special Rapporteur on the right to freedom of expression: <http://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/LegislationAndPolicy.aspx>.

¹⁴ For a comprehensive list of recommendations pertaining to the protection of public interest disclosures, please refer to A/70/361, *supra* n. 2.

Please accept, Excellency, the assurances of our highest consideration.

David Kaye

Special Rapporteur on the promotion and protection of the right to freedom of opinion
and expression

Michel Forst

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Fionnuala Ní Aoláin

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