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Parliamentary Joint Committee on Intelligence and Security

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

Friday, 16 March 2018

Melbourne

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PARLIAMENTARY JOINT COMMITTEE ON INTELLIGENCE AND SECURITY

Friday, 16 March 2018

Members in attendance: Senators Fawcett, McAllister and Mr Dreyfus, Mr Hastie, Dr Mike Kelly, Mr Leeser.

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Committee met at 8:43

CHAIR (Mr Hastie): Welcome. I declare open this public hearing of the Parliamentary Joint Committee on Intelligence and Security. The purpose of today's hearings is to discuss the proposed amendments to the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017. These are public proceedings, although the committee may agree to a request to have evidence heard in camera or may determine that certain evidence should be heard in camera.

I remind all witnesses that in giving evidence to the committee they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee and such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to a committee.

In accordance with the committee's resolutions of 12 October 2016, this hearing will be broadcast on the parliament's website, and the proof and official transcripts of proceedings will be published on the parliament's website. Those present here today are advised that filming and recording are permitted during the hearing. I also remind members of the media who may be present or listening on the web of the need to fairly and accurately report the proceedings of the committee. Do you have any comments to make on the capacity in which you appear?

Mr Kevin: I'm a former Australian senior diplomat and author of five published books—most recently, the literary historical travel memoir Return to Moscow.

CHAIR: Although the committee does not require you to give evidence under oath, I should advise you that this hearing is a legal proceeding of the parliament and therefore has the same standing as proceedings of the respective houses. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. The evidence given today will be recorded by Hansard and will attract parliamentary privilege. I now invite you to make a brief opening statement.

Mr Kevin: Thank you for inviting me to appear here today. As both of my published submissions state, I object to the draft foreign influence transparency part of the legislation on four main grounds. Firstly, it conflates the traditionally well-understood crime of espionage with a new presumed crime of harmful foreign interference in Australian public policymaking. Secondly, this legislation will put constraints on Australian citizens' present freedoms of expression and free association with foreign persons or organisations. Thirdly, there is the iniquity of obliging Australian citizens who wish to express views in public on international political issues and to have contact with foreign persons or organisations which might share such views to register as an 'agent of foreign influence' as a precaution against them possibly being charged as criminals under this legislation. Fourthly, there is the arbitrary and open-ended nature of the legislation which, as it stands, leaves large discretion to two ministers of the Crown in deciding which Australian persons to prosecute as criminal offenders under this legislation should it become law.

I do not see any good way to amend the present legislation to make it acceptable. I would like to see it withdrawn. The extremely broad definitions in article 11 of 'undertaking activity on behalf of a foreign principal' cover every conceivable contact between any Australian person and any foreign person. The requirement to 'register as an agent of foreign influence' if one has any such 'ties' to a foreign person or organisation, no matter how trivial or from what country, is unworkable. It would inhibit normal international discourse. It would also inhibit free discourse between persons within our country because people and public institutions in Australia could be afraid to engage with Australian citizens who are known to engage in dialogue with nationals from particular foreign countries.

In his media conference on 5 December, the Prime Minister said:

Now, we will not tolerate foreign influence activities that are in any way covert, coercive or corrupt. That’s the line that separates legitimate influence, from unacceptable interference. This has led us to a Counter Foreign Interference strategy built upon transparency, law enforcement, deterrence and capability.

There are many questions. How will the responsible ministers distinguish between foreign 'legitimate influence' and foreign 'unacceptable interference'? What exactly are they seeking to 'deter'? How will the legislation interpret and apply terms such as 'covert' and 'corrupt'? When is a private or casual conversation with a foreign national interlocutor a covert activity? When is acceptance of an international invitation that includes costs of travel and accommodation to take part in an international conference, for example, in Russia or China a corrupt activity? When is a speaker honorarium for preparing and giving a lecture in a foreign country a corrupt payment?
Neither the Prime Minister nor Senator Brandis, the former Attorney-General, were able to clarify how such lines would be drawn beyond the general admonition, 'If you are in any doubt, register.' They could only have been talking about two countries—China and Russia—and these were the only examples the Prime Minister gave, but what other countries might come under suspicion in future? Who knows? Obviously the government is not proposing that Australians involved in the myriad intellectual and lobbying contacts with foreign principals from the United States, Britain or Israel should register as foreign agents, but this is what the draft legislation actually says. The application and practice of this legislation, now and under future governments, will depend on personal decision making by two ministers, politicians engaged in the cut and thrust of day-to-day politics. This will not be 'government by law'; it will be 'government by men'. Such fundamentally flawed draft legislation should not be acceptable in our Australian rule-of-law based democracy. So I don't believe that the concept of 'agent of foreign influence', as expressed in this draft legislation, can safely be passed into law in our Australian democracy that rests upon freedom of thought, freedom of expression and freedom of association. No list of exemptions, however long, could make a silk purse out of a sow's ear.

We all recognise 'espionage'. We could all recognise 'covert, coercive or corrupt' attempts improperly to influence Australian government policymaking through subverting individuals in or close to parliament or government. Common sense enables our security agencies to recognise and counter such crimes under existing laws, as they have done in the past. We don't need new legislation that sets out to inhibit public discussion of ideas favourable to one or other particular great power in the world. We do need to try to engage in dialogue with nuclear weapons states China and Russia. We need to try to learn, without prejudice, why these countries think as they do about their place in the world. Australia is not at war with these countries, and I hope we never will be, because 'nuclear war cannot be won and must never be fought', as former US President Ronald Reagan wisely said.

Indeed, for Australians like me to engage in free and open dialogue with people from China or Russia is precisely in the Australian national security interests, because it's the best and safest way to reduce dangerous misunderstandings that could lead to war. I've watched with growing concern the way in which false negative ideas about China and Russia are becoming embedded in Australian public discourse and how counterarguments are finding it harder to get any public hearing. Anything that inhibits people like me from speaking or writing positively about Russia, or people like Paul Keating or Bob Carr or Andrew Robb from speaking or writing positively about China, worsens tensions. I'm not claiming here that Keating or Carr or Robb or I are necessarily correct in our opinions about China or Russia, but I am saying that our freedom to engage in public discourse in our society should not be inhibited by minatory legislation—that is, legislation that expresses or conveys threats. I believe that is what this draft legislation does. It conveys threats to loyal Australians in good public standing.

Finally, I must flag quickly the real anxiety this legislation is creating in Chinese and Russian origin communities in our liberal, multicultural society. I have read and I support the submissions by China Matters and the Chinese Community Council of Australia. This is deeply unsettling draft legislation. It will put such communities into invidious situations of feeling that they must demonstrate their loyalty to Australia by expressing particular attitudes about governments of particular countries with which these Australian citizens or residents have important cultural or religious or familial links. This is deeply threatening to the happiness and cohesion of our multicultural society. It is wrong and disturbing that Chinese Australians or Russian Australians should be put under a suspicious spotlight in this way. The same legislation could threaten other foreign sourced communities in our multicultural democracy in the future. Thank you for your patience. I am happy to be questioned further.

CHAIR: Thank you, Mr Kevin. You've obviously followed the hearings over the past eight weeks or so.

Mr Kevin: Yes.

CHAIR: Your submission today is quite unambiguous in your positioning on this legislation. Were you aware of the Deputy Director-General Peter Vickery's comments to this committee in, I think, late January, where he said that espionage and foreign interference are being conducted in this country at an unprecedented level? Are you familiar with those comments?

Mr Kevin: I have read newspaper reports of that, yes.

CHAIR: I guess my point is: do you recognise the need for this legislation or do you reject the basis for this legislation outright?

Mr Kevin: If I could answer that question slightly indirectly: I think we are in a situation now, with many, many tens of thousands of, for example, Chinese students in this country and many people of Chinese national origin in this country, where we have a choice whether to respect the judgement of these Australians, or these
temporary Australians, or to say that we have to protect them from their own place-of-origin government—in other words, mollycoddle them, cosset them, keep them under surveillance and so on, and develop policies to detach them from any possible loyalty to the Chinese Communist Party and so on. I think that's wrong. We have to be confident that our Australians of different ethnicities will find their own way to balance their identity as, for example, Chinese nationals and their identity as people who want to settle in Australia and become part of our country. We have to have confidence in them. This legislation, to my mind, puts these communities under a spotlight of suspicion that says: 'We have a particular national security problem. It's about your community, and we have to help you deal with it.' That, to me, is the fundamental problem.

CHAIR: You came at the answer rather indirectly, but if we accept what ASIO said is true, then it warrants a legislative response. Do you disagree with a response to this in any case or are you disagreeing with the content of these bills? To put it another way, is it the logic of the bills or the grammar of the bills?

Mr Kevin: I'm not a lawyer, so I'm a little bit out of my pay grade here.

CHAIR: You've been pretty forthright in your submission, so you can come with us a little further.

Mr Kevin: I can see how there could be scope for trying to define precisely what constitutes coercive or corrupt behaviour as it affects our members of parliament or senior public servants—of course I can see that. But something that captivates me having a conversation with somebody with a Russian passport who is working in a fruit shop is, to me, simply excessive.

Senator McALLISTER: Thanks for your submissions and your evidence. In your remarks, you have spoken about the role ministers and senior officials will have in making the discretionary assessments about who either is or is not prosecuted. Can you talk about that a little more? The expectation is often that any person who is not in compliance with a piece of legislation will be prosecuted.

Mr Kevin: Let me give you an example that is possibly contentious. The present minister for homeland security, if newspaper reports are correct, is willing to entertain representation from people who are sympathetic to the views of the National Rifle Association in the United States regarding gun-control. It seems to me that what the minister is doing there would be very much captured by this legislation. Is anybody going to say to the minister that he has to register himself as an agent of influence of the United States National Rifle Association as an agent of influence? I don't think so, in practical terms. But that's an example of the sorts of paradoxes and inconsistencies this legislation is going to throw up.

Senator McALLISTER: One of the principles in regulation and enforcement is that, in the end, there is a prioritisation of certain kinds of matters in any compliance framework. Whether it's the police or environmental protection or any other kind of enforcement agency, in an ideal world, they must allocate their resources proportionate to a threat. The best-case scenario is that there is an orderly and explicit policy framework within which those resources are applied. I think your assumption here is that the resources of government at present would be prioritised against individuals engaging with certain countries and not others. Would you like to talk about that a little? The basis of the legislation is, in fact, that it would apply equally to people interacting with all countries.

Mr Kevin: Yes. My more detailed earlier submissions talk about this. I didn't have time to address it in my five-minute opening statement, but I'm part of a growing community of people interested in international relations who believe that we are moving into a different kind of world. It is a more multipolar, balanced world where international security is no longer going to be set by a rules based order pretty much determined by one country: the United States. We're moving more into a situation where there is going to have to be a process of bargaining, if you like—through the UN, hopefully—that will maintain international security, but in a multipolar framework.

To me, that makes it incumbent on Australian scholars and commentators, like me, to make an effort to try to learn what the Chinese and the Russians, who are two major nuclear powers, think about the world order and the world balance. To me, it's important to do that. I don't want to be in a situation where I have to call myself an agent of a foreign influence in order to safely pursue those sorts of inquiries and contacts. I just think that's not in the national interest. I've answered you indirectly, once again, but when one starts with a position of potentially criminalising contacts with nationals of a particular country, one's going down a very dangerous road.

Senator McALLISTER: The government has sought to distinguish between criminalising this activity and making it transparent—that is, the rationale that's been presented by the Attorney-General's Department to this committee. It would say that there are no pejorative implications that flow from acting as an agent of a foreign country; it's merely a question of fact, it's not a normative judgement. Do you accept that explanation?

Mr Kevin: No, I don't, and let me explain why. Senator Brandis, interestingly, compared it to the register of lobbyists. The register of lobbyists deals with maybe a few hundred individuals who have a specific professional
task called 'lobbying'. It's an easy matter to draw up a register of those people, and it's not in any way pejorative towards them to put themselves on the register. What's being suggested in this legislation though is that people have to self-define whether they're an agent of foreign influence and, as I said in my opening remarks, it's quite impractical to think that the many, many thousands of people who have close contacts with organisations and individuals in the United States or the UK or Israel would consider themselves covered by this legislation. So you're already in a situation of discretion, which de facto singles out particular countries as being under suspicion. I don't see any way around that, because if everybody who was potentially capturable for registration, if I can use that term, did so then there would be hundreds and thousands of people doing it.

Senator McAllister: This brings me to my final question: the Attorney-General's Department have indicated to this committee that they expect around 500 individuals or organisations to register. Based on your knowledge and awareness of the level of activity within the scholar and diplomatic communities and the alumni around them, do you think that's a realistic estimate of the people who will be captured by the legislation as drafted?

Mr Kevin: I have no idea how they would have arrived at that figure.

Mr Dreyfus: I can tell you, Mr Kevin.

Mr Kevin: Thank you.

Mr Dreyfus: We asked the department, and they said that they had looked at the number of registrations under the Foreign Agents Registration Act of the United States and, as I understand the way in which the department put it, because Australia is a smaller country, proportionately they estimated, based on the registrations under the Foreign Agents Registration Act of the US, that about 500 registrations could be expected here in Australia. That was the calculation done by the Attorney-General's Department.

Mr Kevin: In other words, a comparative statistical comparison based on the mathematics of our populations.

Mr Dreyfus: Pretty much. I hope I am doing justice to the way in which the department explained the calculation. Speaking for myself, I found the calculation unsatisfactory because the Foreign Influence Transparency Scheme Bill this committee has before it is drafted very, very differently to the Foreign Agents Registration Act of the United States, not least because it casts a wider net and has narrower exemptions.

Mr Kevin: That's very interesting and important. Let me also add a further question mark over this so-called scientific estimate: a great many Australian people of academic background, who are very often truculently and fiercely independent, may simply decline to register as an agent of foreign influence, even though they know they're captured by the legislation, just out of sheer orneriness. I'm one of these people. It depends on what day I get out of bed, really: one day I say I'll never register; another day I say I probably should to protect my family. But I honestly don't know whether I would register if this became law. I don't know.

Mr Dreyfus: I want to ask you a more principled question. I understand your position, Mr Kevin, which is you're asking the government to withdraw this legislation in its entirety.

Mr Kevin: This aspect.

Mr Dreyfus: This scheme?

Mr Kevin: Foreign influence transparency. That's the part I'm focusing on. I have no problem with the espionage legislation.

Mr Dreyfus: It's a different bill.

Mr Kevin: Right.

Mr Dreyfus: I have taken your evidence to be directed at the Foreign Interference Transparency Scheme. The other witnesses we're hearing from today are going to be talking about the other bill that the committee has before it. So, no, understood. Do you think it's a worthwhile objective for regulation of any kind to try to increase the level of transparency of people who are acting and speaking in the Australian political context?

Mr Kevin: Yes, I do. Let me develop that briefly. In my two trips to Russia over the past two years—which, incidentally, have been entirely at my own expense and entirely programmed by me independently—I have been
at pains to use social media to put up publicly everything I do, anything of any potential interest to do with my discussions with Russians in Russia. And in my lectures and speeches and media interviews arising out of my trips to Russia I’ve been totally transparent. I think that’s a good principle. I think the minute people start behaving in clandestine ways, naturally it brings suspicion upon them. I make a point of never behaving in clandestine ways.

Mr DREYFUS: Again, speaking for myself, I think there’s pretty general agreement on both sides of Australian politics—on all sides of Australian politics—that increasing the level of transparency as to the sources of support for the person who is acting in the Australian political context, the level of direction for a person who is acting in the Australian political context, is all desirably made more transparent.

Mr Kevin: Yes.

Mr DREYFUS: What I want to ask you about, because you’ve obviously given this tremendous thought, is can you think of a useful way in which the government might regulate or legislate for increased levels of transparency? And just to perhaps give you a direction of thought for this: at election time, the Electoral Act requires that those speaking or publishing material add their names to the matters they choose to publish, whether by speaking it on radio, whether by appearing on TV or whether by publishing it in the printed form. As yet, the Electoral Act hasn’t quite caught up with a number of digital platforms, but, again, there’s the possibility at least that the regulations that require attribution could apply there too. Do you think that something along those lines might be useful in the subject of regulation?

Mr Kevin: I agreed with everything you said until the last three words. The ‘subject of regulation’ raises problems. I totally support the principle of transparency to be expressed in many different ways and, as I said, I try to live by that.

Mr DREYFUS: Can I interrupt you, Mr Kevin, and say that, the government—by the Prime Minister in the press conference that you’ve noted in your submission and by the Prime Minister in the second reading speech introducing the Foreign Influence Transparency Scheme Bill into parliament—has identified the problem as foreign principals, which is said to include not merely foreign countries but foreign corporations and foreign individuals directing or in some way covertly participating in Australian politics.

Mr Kevin: Yes, and I agree with that.

Mr DREYFUS: I take it that you accept that that’s a problem that we should try to prevent or try to lessen by making what is covert overt. Can you think of a way in which the Commonwealth could legislate to deal with that problem—in other words, to make what is presently covert if not totally overt, more overt?

Mr Kevin: Yes. I think what you’re saying is that we should have some kind of legislation that a member of parliament or a senior public official should never be in situation of saying to a foreign person, ‘Let’s go and talk about this where we’re out of range of telephones’—in other words, that there is a kind of a sense in which it’s wrong for a senior public official to engage with a foreigner in covert conversations knowingly and deliberately. I agree with all that.

Mr DREYFUS: Well, that’s one example, but another might be the MP or the senior public servant being approached by an Australian citizen who is in fact acting on the instructions of or on behalf of or paid by a foreign country, a foreign corporation or a foreign individual.

Mr Kevin: Well, we’re kind of getting into Nineteen Eighty-Four territory here, I think, because every Australian citizen, no matter what their ethnicity, has a right to lobby an MP and express views as a citizen. How one distinguishes in practice between doing it covertly as a result of contacts with a foreigner and doing it as a result of one’s own independent judgement that this is a policy that should be advocated, I really don’t know. That is my problem that I tried to articulate in my submissions and in my opening statement.

Mr DREYFUS: But that’s of course what this scheme is saying it is directed at—it singles out activities like collaboration.

Mr Kevin: Yes. It actually captures me. I don't want to personalise this, but it does capture me, because—

Mr DREYFUS: No, I think it's helpful, and that's what a number of the submitters to this committee have done. The Salvation Army has said, 'It captures us and all of our soldiers here in Australia.' The media organisations have made a submission that the Foreign Influence Transparency Scheme Bill captures them, and very many of the submitters to the committee have made this more real and more concrete by saying it captures them.

Mr Kevin: It captures human rights organisations too in their dialogues with foreign human rights organisations. It captures pretty much everybody who has an interest in politics and sees Australia as a citizen of
the world—that we are part of the world community and we really have an obligation to talk to people from other countries if we're going to make the world a better place. It's as fundamental as that. So I sympathise with the predicament of the committee, because I know that you're trying to look at this legislation in a dispassionate and responsible way. Metaphors come to mind: using a sledgehammer to crack a nut; cutting off your head to cure a headache. These are the metaphors that I think about when I look at this legislation as it stands.

Mr DREYFUS: Thanks very much.

Dr MIKE KELLY: As a follow-up to that last point, Mr Kevin, I know you're not a legal expert, but in your experience of foreign affairs and observing issues internationally, no doubt you've been aware of the misuse of humanitarian organisations to be fronts for other activities, and there have been questions about use of those organisations in terms of funnelling terrorism financing and other activities. Noting and completely accepting what you have said about the sledgehammer on the nut—which reflects language I used yesterday in discussions on this—have you got any observations to make about what might be a better way of going about dealing with those issues, perhaps regulating or exposing the relevant information concerning those types of risks and threats?

Mr Kevin: Obviously terrorism raises a whole new envelope of issues. It's a terribly important priority because it goes to the physical safety of Australians. I certainly would favour a good deal of targeting of investigation into any organisations that might be suspected of the kinds of activities you've referred to—no question. But it's a bit of a leap from that to targeting organisations that favour, for example, better relations with China or better relations with Russia. I think one's in a different sort of territory there.

Dr MIKE KELLY: Do you have any suggestions or recommendations to make about how we might deal with transparency issues generally?

Mr Kevin: I think I've probably expressed them in the last 20 minutes or so.

Dr MIKE KELLY: All right. Sorry, I missed that, as there have been some communications issues. I will catch up on that later.

CHAIR: Mr Kevin, thank you very much for your attendance here today. I don't think there are any additional questions. However, if you would like to forward anything further to the secretariat, please do so by 9 am on Tuesday, 20 March. You'll be sent a copy of the transcript of your evidence prior to its publication so that you can correct any errors. Thank you again.

Mr Kevin: Thank you very much, everybody.
BAILES, Mr Morry, President, Law Council of Australia
MOLT, Dr Natasha, Deputy Director of Policy, Policy Division, Law Council of Australia
NEAL, Dr David, SC, Member, National Criminal Law Commission, Law Council of Australia

[09:18]

CHAIR: Welcome. Although the committee does not require you to give evidence under oath, I should advise you that this hearing is a legal proceeding of the parliament and therefore has the same standing as proceedings of the respective houses. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. The evidence given today will be recorded by Hansard and attracts parliamentary privilege. I now invite you to make an opening statement.

Mr Bailes: As the committee would be aware, the Law Council is the peak national body representing the legal profession in Australia. I would like to thank the committee for the opportunity to provide further evidence to its inquiry on the proposed amendments to the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017. The Law Council welcomes many of the amendments to the bill, which appear to pick up points raised by the Law Council in its initial submission to the committee on 22 January, 2018. These amendments include amendments to the secrecy offences to introduce a division between communications coming from current or former Commonwealth officers, from those of persons other than Commonwealth officers, the broadening of the journalist defence, the tightening definition of security classification to 'secret' and 'top secret' classifications or equivalent classifications made by regulations, and the removal of strict liability for certain offences.

While these amendments are welcome, the Law Council wishes to emphasise the need for further improvements to be made on a broad range of other proposed offences. I wish to highlight a few of these recommendations. The Law Council remains concerned about the definition of 'national security' in the bill as going beyond the security and defence of Australia to include Australia's political and economic relations with other countries. The categories of 'inherently harmful information' and 'causing harm to Australia's interests' in the proposed secrecy offences do not accord with the Australian Law Reform Commission's recommendations in the Secrecy laws and open government in Australia report for an express harm requirement. The definition is still broadly defined in relation to interference with the performance or functions of the Australian Federal Police in respect of some of its functions, prejudice to Australia's international relations in relation to confidential information by foreign governments or international organisations, or information provided to the government.

In the absence of an express harm requirement, the offences should cascade in penalty and require that a person knew or, as a lesser offence, was reckless as to whether the protected information falls within a particular category. The term 'news media' under the broadened journalist defence requires further clarification. A person who supplied information to a journalist would have no defence, but the person who reported it in the news media would have a defence.

Amendments are still required to the secrecy offences to broaden the defences and exceptions for legal advice, legal proceedings and the dealing with information, not simply the communication of it. Amendments are required to ensure the innocent receipt of information—for example, in a filing cabinet—is not captured by the offence provisions. The fault element of intention that applies to the communicating or dealing with information cannot necessarily be interpreted to mean the information that falls within one of the prescribed categories. The link between the defendant's intention and the harmful behaviours targeted requires further precision in the bill.

The Law Council welcomes amendments (9), (10), and (11) to remove civil contraventions for the definition of 'cause harm to Australia's interest'. However, the maintenance of the phrase 'interferes with' remains very broad and may well stifle criticism of police, security or prosecution officials who have acted improperly or negligently. While the new exception for the news media, which applies to people who are working in the capacity of a person engaged in reporting news, presenting current affairs or expressing editorial content in the new media, is defined more widely than journalism, the Law Council remains opposed to the notion that the public interest exception should be available only to journalists or the news media. For example, it is unclear whether it would pick up an individual blogger.

The Law Council has also made a range of other specific recommendations, the detail of which is provided in our written submission—or may I more accurately say 'submissions', because of course you have our very detailed original submission, which, on our submission today, ought to be read with the submission in relation to the amendments, because much of what we've said in the original submission remains valid today and has not been addressed by the amendments so far sought.
My colleagues and I are happy to answer any questions the committee may have. Thank you.

**Senator FAWCETT:** If I can go to paragraph 6 of your submission, where you say, 'In the absence of a public interest defence (the preferred position)', et cetera, my reading of 122.5(6) is that there is actually a defence, because it says that the defence will be amended to apply where the person reasonably believes that dealing with or withholding the information is in the public interest. In light of that intent of the Attorney-General, I'm just wondering why you say, 'In the absence of a public interest defence'.

**Mr Bailes:** It is because—and I'd like to be assisted by my colleagues—there is an inconsistency in the application of that type of defence.

**Dr Neal:** The defence really is restricted by the news media requirement and the capacity of the journalist. For instance, if I come across or am a victim of some police or prosecution malpractice, and I voice my criticism of that generally, that doesn't fall within the amended defence. We welcome the fact that it's been extended beyond journalists, but it still reaches only people who are engaged in the news media, as opposed to me as a victim of prosecutorial police malpractice, for example—

**Senator FAWCETT:** Sure, but—sorry—that wasn't my question. Paragraph 6 specifically said, 'In the absence of a public interest defence'—that's your assertion. But 122.5(6) is to apply where a person reasonably believes that the dealing or holding of information was in the public interest.

**Mr DREYFUS:** If I can just cut across there, Senator Fawcett: it has to be read in conjunction with (a), which is that the person dealt with or held the information in the person's capacity as a person engaged in reporting news. The two go together.

**Senator FAWCETT:** Sure, but we are talking media here at the moment, and your comment in paragraph 6 was, 'In the absence of a public interest defence' for media', for journalists. As I read that, that is a public interest test. The person only has to reasonably believe that it's in the public interest, and that's the defence.

**Dr Neal:** We were at cross-purposes, and I'm sorry about that. But the substantive point is this: it's fine for journalists, but what about the rest of us?

**Senator FAWCETT:** So, for the rest of us—and I think the example you gave was that if somebody was aware of a miscarriage of justice in a prosecution and provided information to the journalist then they wouldn't have a defence. I think that was your second point, made in paragraph 6. The Attorney has indicated that the intent in terms of dealing with IGIS's concerns around their staff was to include an amendment to say that where there's an intersection with another piece of legislation that provides for somebody to deal with otherwise classified or privileged information that this won't override the other. Now, that was put in his letter in the context of IGIS, but it would apply to a Commonwealth or state public servant from a whistleblower perspective. Is that an adequate protection, from your perspective?

**Dr Neal:** It's still a case of 'What about the rest of us?', isn't it?

**Senator FAWCETT:** Sure, but where would the rest of us get access to classified information?

**Dr Neal:** Well, not necessarily classified information. It's anything—any information. But there's a definition in the existing legislation that says that information is any information. So, if it's information that interferes or is said to interfere with the prosecution or investigation, then that would be captured. I've spoken to this committee before about some of the problems in even the most perfect of the security agency or police force investigations where things go wrong. If I want to speak about that, which is in the public interest, and say, 'Look, we've now found out that the police are misusing this power', or a prosecution has done this, that or the other thing, and that's said to be interfering, then it's caught, and there is no public interest defence. That is not in the public interest.

**Dr Molt:** Perhaps I could just add to that that I think in terms of the proposed amendments to address or ameliorate concerns raised by the IGIS it looks promising on what has been said by the Attorney-General. But, again, we would really need to see the detail of those amendments before we could provide the committee with any—

**Senator FAWCETT:** But that's my point: in principle, the approach that's been proposed in terms of allowing existing legislation for whistleblowers to not be gazumped, if you want to use that word, by this new legislation—you support the principle; you just want to see more detail?

**Dr Molt:** That's right—to actually know whether it would address the concerns we have about the rest of us.

**Mr Bailes:** Senator, can I perhaps speak up on that point as well. There seems to be a consideration in the Attorney's mind as to whether or not those matters should be dealt with by way of exceptions or defences. The IGIS prefers exceptions. It is that type of detail when we refer to whistleblowing legislation, for instance, that we

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would need to know. The dot points that appear at the bottom page 4 and the beginning of page 5 of the Attorney's submission is welcome.

Senator FAWCETT: He also goes on to say just on that point that in the practical effect he doesn't see a difference between defences and exceptions.

Mr Bailes: The IGIS does, with respect, because—

Senator FAWCETT: Your view as the Law Council would.

Mr Bailes: An exception probably has more utility to a person accused rather than simply availing oneself of a defence.

Senator FAWCETT: In practical terms? The A-G's point is that in practice they have the same effect. You dispute that?

Dr Neal: I think the distinctions are fine; I will grant that. The level of detail and intricacy of all of this and the speed at which it is being done, including these amendments which we are now very much on the run to capture, really do require a bit more thinking. That is the best answer I can give you on that. I am conscious in particular reading the whole of this legislation in thinking: 'What is this going to look like when a case is actually running? And what is involved in the logistics of it?' Some of the things here are going to be quite odd in a courtroom situation. We have had some of that already with the judgement in one of the cases involving acts of preparation where the judge's charge to the jury ran for 500 pages. A law school honours graduate wouldn't have passed that exam. That sort of technical detail is really still the subject of consideration, and it is very difficult.

Mr Bailes: It is also our respectful view, because we broadly agree with the intent behind the legislation, that the devil, however, is in the detail. That type of example ought to alert the committee to the fact that the entirety of the bill would function better and be more in Australia's interests if it were able to work with better or tightened definitions.

Can I come back to your original question. I am not sure if Mr Neal made this express point, but in relation to defences there is no journalist defence for espionage, and the espionage offence picks up on the definition of any information or uses the words 'any information', which is very broad. So, whilst there has been a fair bit of concentration on the secrecy offence, and we have got amendments to demonstrate that, the espionage event is still very wide and, between us, we actually can't count how many new offences there are.

Dr Neal: I've got 38.

Mr Bailes: We have both arrived at a different total. The point that I was driving at in the conclusion of the opening statement is that our original submission deals with every single one of those proposed offences. We are not critical of every single one. In fact, we say that in some instances where they have been redrawn it is actually a better piece of law. However, we as a law council are a little concerned—and I think Mr Neal has picked up on the theme—that this bill is so broad and has so many new provisions that it is very difficult to get your head around how they are all going to operate in practice. We are troubled by the fact that the concentration has been on a couple of the offences, whereas some of them haven't even been talked about by the media or in public consultation.

Dr Neal: Can I amplify one point there in relation to these espionage offences. 'Any information' is part of the concept in the offence, and the definition of 'national security' includes Australia's political or economic relations with other countries. Again, in a courtroom situation, I am not sure how a judge is going to direct a jury about whether something did or didn't harm or prejudice Australia's political relations with some other country or its economic relations. So, any information or any article which might damage Australia's political or economic relations with another country is 'any information', which is very broad. As Mr Bailes said, there is no defence there. That is an expansion of the concept of espionage into a realm that, listening to the last speaker, I don't know what it means; it's vague. What is it about our political relations with other countries that might be harmed or damaged? And how would a jury conclude beyond a reasonable doubt that publishing an article about the things that he mentioned did or did not prejudice those political relationships, to say nothing of our discussion in public about the economic relations we have with other countries and whether I as a citizen or anyone else as a citizen has the view, 'I think Australia's trade policy with respect to this or that issue is damaging to our economic relationship.'? And then some jury is going to make a conclusion: 'It was,' or 'No, it wasn't.'

Senator McALLISTER: I have a follow-up on this line of questioning. One possibility is that, in the circumstances you describe, a jury would conclude that Australia's political or economic interests had been damaged. But I think your broader point is that it is very uncertain for people seeking to comply with the legislation what indeed is required of them. I think it would be helpful for you to talk about the impact of uncertainty in the criminal law and what flow-on effects that has on all of us who seek to comply with that?
Dr Neal: I have said to this committee before that I chaired the committee that developed the Criminal Code. One of the great objectives was to take uniform concepts and apply them across the board so that those who have charge of implementing that legislation—and that includes the policing and prosecution agencies and the courts particularly, the juries—have simple concepts to deal with. There is nothing simple about these concepts, and when they get to be so vague, doing an act of preparation for information concerning the political or economic relations of Australia with other countries, there is a degree of precision that is required in criminal law—murder. You need to kill someone. This is so vague and yet the espionage offences at the more serious end carry life sentences. That lack of precision is not going to help anyone, and we are going to have judges saying, 'Look, I don't know how to tell you about this, ladies and gentlemen of the jury, but you need to be able to make a judgement about whether the political relations of Australia with East Timor, Russia or Israel or whoever were harmed or prejudiced.

Senator FAWCETT: Can I follow-up on that point?

Senator McALLISTER: Yes.

Senator FAWCETT: My understanding is that its definition of national security is consistent with the recommendations of the Law Reform Council and already exists in some legislation.

Dr Neal: I don't think it is. The Law Reform Commission does deal with international relations. I have the same problem, though, with that, as I just outlined. It doesn't go into the economic realm, to my recollection, but I am subject to correction.

Senator FAWCETT: The national security information act, I think it is.

Dr Neal: Even so, the problem is that the breadth of these concepts is just unworkable.

Senator McALLISTER: While we are on this theme—and sorry to cut across you, Senator Fawcett—what is the significance of the recklessness offences when combined with this level of uncertainty, Dr Neal?

Dr Neal: It simply extends the notion of intent to include people who actually don't want to damage political or economic relationships with other countries but who are prepared to take the risk in saying what they do that that will occur. It's described as: you've got to take a substantial and unjustifiable risk of that occurring. Again, it makes a vague concept even more vague, really. Compare that with the crime of murder. Did you when you tipped a load of bricks off the top of a building foresee the substantial and unjustifiable risk that that would cause death or serious injury to a person? Clear enough. Did you, when you published this article, know that there was a substantial risk that you would jeopardise Australia's political or economic relationships with another country?

If the answer to that question is yes, the jury would still have to conclude that it did in fact damage the political or economic relationships between Australia and another country—on what basis it's hard to tell—and then you would have committed the offence. Even if you didn't mean to or want to, you would have taken the substantial and unjustifiable risk that that consequence would have ensued.

Dr Molt: It's a key component of the rule of law that criminal offences be drafted in a way that's, readily known and available, certain and clear. The points that Dr David Neal has mentioned today and are also set out in our written submissions are that there is a lack of certainty and clarity with how the offence provisions are framed. That, of course, is combined with the recklessness element that you've just referred to. The concern of the Law Council is that individuals just will not know where the boundaries are in terms of whether or not they're actually committing criminal offences.

Mr DREYFUS: Dr Neal, I'm going to come back to the definitional question which has just been raised, but I wondered if you could outline for the committee the process by which the Criminal Code, which these are amendments to in this bill, in its current form came into existence.

Dr Neal: It was an initiative of the then standing committee of attorneys-general. Each state and territory nominated an expert criminal lawyer from each jurisdiction to sit on the committee.

Mr DREYFUS: When did it start?

Dr Neal: It started in 1991. The committee met and prepared discussion papers on specific topics which eventually became chapters of the Criminal Code. The first one that was done was the principles of criminal responsibility, and then we went through various other things: theft, blackmail, conspiracy and so on. That then was put out by way of discussion papers, and the committee did road shows all over the country, talking to all sorts of vested and non-vested interests about the proposals. Those proposals were then revised, and we ultimately then would provide a report in each of these areas. We submitted that to the government, it went through the processes and in 1995 the legislation was passed. That to me was a model of careful policymaking. The detailed consultation process and discussions with public defenders offices, DPPs, police, victims groups and so on made
enormous improvements in refining that body of work. I'm not blowing the committee's own trumpet, but the bill as enacted is very close to what was recommended in the reports. From feedback from both sides of the bar table on its operation, it's been a great success. I've had many law students I've taught come up and say, 'It's great to have this rather than to read all of those cases.'

These offences, because they're at the most serious end of the criminal law, really need to be carefully thought through and not to deal with such broad and vague concepts, some of which are included in this. In other instances, overthrowing in relation to the law of attempt, for instance—excluding it from certain offences in favour of a preparation offence. I remember that in the course of discussions of terrorism legislation with Senator Brandis there was discussion of why there is a need for a preparation offence. Why not attempt or conspiracy? He said, 'Look, that's only meant to capture the lone wolf attack.' The act of preparation was meant for lone wolves. I had the misfortune some years later to be doing an appeal involving five accused charged with conspiring to do an act of preparation, and that was the case where we had a 500-page charge to the jury, because conspiracy and the act of preparation are really complicated things. In the context of multiple trials, it's just making trouble.

The exclusion of law of attempt in some of the provisions—80.2.9 is one of them—the substitution of advocacy mutiny instead of the general principle of incitement, which applies to all offences—again, there's got to be an argument. Someone will take that argument to the High Court: what's the difference between advocating and inciting? My question to the committee is, why would you do that? Incitement means urging someone to commit an offence. It's already there. Use the mechanisms. The threat about interfering with political rights—it's already blackmail in all jurisdictions to demand that someone does something with menaces; why do we need this one as well? I don't think we've had the opportunity yet to ask those sorts of questions, and it's already, in any event, against a background where the report on which all of this is based is secret. That also makes it hard to know what the right tool is.

Mr Dreyfus: You've outlined a careful four-and-a-bit-year process that led to the creation of the current Criminal Code. We're in a situation where the government did not publicly consult at all before the bill that we're looking at was produced in the parliament on 7 December. Do you think that there has been any adequate process around the creation of this bill or, indeed, its current handling? That's a question generally for all you—

Dr Neal: I really think that we need to be much more careful with this. I think it needs to go out much more widely. We need area specialists to look at these offences and guide the parliament's thinking so that we avoid problems down the track which would result in trials and appeals and endless demands on prosecution resources, police resources and legal aid resources to deal with things that are top end of the criminal calendar.

Mr Bailes: I agree with Dr Neal's statement. Our original submission, if you were prepared to read it cover to cover, makes the very points that—

Mr Dreyfus: I can assure you that I have, Mr Bailes; all 78 pages.

Mr Bailes: Thank you very much. Then you would know that it makes the very points that are being said here—that is, inconsistencies in definitions amongst Commonwealth acts, inconsistency with the Australian Law Reform Commission's report in relation to these areas and, on occasion, a lack of definitions. I've already made the point about public consultation. It's very interesting to hear Dr Neal talk about the process in another setting. We have said that, although we support the broad scope of what's been attempted here, it has been very, very difficult to deal with this meaningfully in the time provided. The last thing that Australia needs is national security bills that don't operate well and properly. We would like to slow the whole process down while proper consultation takes place.

Mr Dreyfus: This is a question for Dr Molt or Dr Neal. I don't want you to go through each of the 38 new offences, which, as I understand it—

Dr Neal: We already did.

Mr Dreyfus: I know—indeed, your written submissions do that. Could you speak to what you've written about, but perhaps a bit more briefly, which is the departure from orthodox principles of criminal law that we see in the creation of some of these new offences?

Dr Neal: I've said as much as I think will be acceptable within our time frame about—

Mr Dreyfus: No, we do have some time.

Dr Neal: The law of intent has been developed over many, many centuries. It's that careful balance between not intervening at a time before anyone has really crossed the line and making sure, on the other hand, that if they've got to that line they're stopped before they get to their ultimate goal. The displacement of that by the concept of act of preparation on the basis of acts of preparation and explicit exclusion of law of intent—I don't see
where the justification or the argument or the thought processes behind that have come from, other than the assertion, 'Well, it would allow us to operate earlier.' The preparation offence is not limited, as it was initially thought it would be, to even exclude, for example, charging conspiracy to do an act of preparation. Then the law of intent is just ruled out of these offences—in 80.2.9 there are a couple of them—altogether. Where was the report, the discussion or the argumentation that went to justify that move—in a Criminal Code in which the Commonwealth sets out the general principles of criminal responsibility in some detail and which did go through a very long process on all sides of the debate and reached the conclusion that it did—to all of a sudden be amended out of these 38 provisions, which leaves a big hole?

**Dr Molt:** I'd add to that. This is one of the points that we make in our most recent submission: generally, the Criminal Code is structured in a way where offences that involve an intentional element carry a more significant penalty than offences that carry a recklessness element. In some of the offences that are in this bill, including with the proposed amendments, there's not necessarily always that cascading penalty in terms of criminal conduct. That's certainly something that we've suggested should be there if this bill is to proceed. For example, if I can take the committee through the new proposed secrecy offence that would apply to non-Commonwealth officers in proposed section 122.4A, what we have in terms of this offence is that there is a requirement for intention in relation to the communication of information.

**Mr DREYFUS:** This is item 35?

**Dr Molt:** That's right. Or there can be, for the subsidiary offence, intention in relation to dealing with information. In terms of the prescribed categories, in both cases there's a recklessness element. For example, if the information has a security classification of secret or top secret, there are recklessness elements there. One of the points that we have made and tried to articulate in our submission is whether the offences should be in fact cascading penalty, so that the person has intention to communicate the relevant information, but then there also being an offence provision for where the person is reckless as to that. That's a common way in which the Commonwealth Criminal Code has been set up generally, but it doesn't necessarily seem to be applicable to the proposed offences.

**Mr DREYFUS:** If I can paraphrase what you've just said: it's a particular concern you've expressed, which you've also expressed in relation to a number of other offences, that it doesn't actually fit within the scheme and cascading offences in the Criminal Code at present?

**Dr Molt:** That's correct.

**Mr DREYFUS:** Presumably you've looked at the responses that the committee has been provided with by the Attorney-General's Department as well as the submissions that the Attorney-General's Department has provided to the committee. Has there been an appropriate explanation offered by the Attorney-General's Department as far as you're concerned, to take Dr Neil's point, about the act of preparation offences or why that's being introduced?

**Dr Neal:** Not that I'm aware of.

**Dr Molt:** I think that there has been an explanation, but I think what we're seeing in terms of preparatory style offences is that there are more and more of those types of offences being introduced. What we have asked for in our initial written submission is that there actually be a public discussion about when it is appropriate to introduce preparatory offences rather than to simply be introducing them on an ad hoc basis for offences that some people might consider to be particularly serious types of offences. We've suggested that there needs to be a public discussion around that, and if we are going to have those sorts of offences, which were not recommended by the model criminal code committee, then when are the circumstances where it's appropriate to have those?

**Mr DREYFUS:** I take you back to the definition of 'national security', which, again, you've made written submissions about. Perhaps to give this context, we've got a new definition of national security proposed to be introduced as section 90.4 of the Criminal Code which, for the first time, adds concepts. It starts with:

The national security of Australia or a foreign country means any of the following:

Perhaps I should just check that you don't regard it as exceptional or in any way questionable that 'the defence of the country', which is subsection (1)(a), should be part of a definition of national security.

**Dr Neal:** That's the traditional one.

**Mr DREYFUS:** That's traditional. (b) 'the protection of the country', similarly, is part of the traditional concept of national security. (c) 'the protection of the integrity of the country's territory and borders from serious threats'—

**Dr Neal:** It follows.
Mr DREYFUS: That follows. Somewhat murkier but understandable is (d) 'the carrying out of the country's responsibilities to any other country in relation to the matter mentioned in paragraph (c)', which is 'protection of the integrity of the country's territory'. It then goes on to say 'or an activity covered by subsection (2)', and (2) is the provision which reads:

(a) espionage;
(b) sabotage;
(c) terrorism;
(d) political violence;
(e) activities intended and likely to obstruct, hinder or interfere with the performance by the country's defence force …
(f) foreign interference.

I'm going to come to (e) in a minute, but, in (d), are there problems with the way in which we now have a very expansive add-on to the definition of national security with that reference to subsection (2)?

Dr Neal: It makes my head hurt!

Mr DREYFUS: Believe me—you're still in practice; I'm struggling!

Dr Neal: There's the problem from a legislator's point of view when doing these sorts of things to try and tease out what's going to happen in the future. The trouble with provisions like this is that it's complex and it's hard. One of the things about the consultation process is that people like your previous witness can say, 'Look, I see implications about this,' and various other interested parties will too. I really got stuck on the 'political and economic relations' one. I'm trying to think, 'What does this mean and where will it take us?' It's a path into the unknown. But, similarly, when you ramify it with the combined effect of the provisions that you're talking about, I would like people to sit around and talk for a while and think about what this will mean in practice and think about, 'Do we want to go that far?'

Senator FAWCETT: Can I circle back on that one. I talked before about the national security information act 2004. I have just dug into that. It states:

In this Act, national security means Australia's defence, security, international relations or law enforcement interests.

And 'international relations' means:

… political, military and economic relations with foreign governments and international organisations.

So that definition has actually been in our law—

Mr DREYFUS: Sorry, what are you reading from?

Senator FAWCETT: That's from the 2004 act. So it's been in our law since 2004.

Mr DREYFUS: Which act?

Senator FAWCETT: The NSI Act 2004. It's been there since 2004, including 'economic interests'.

Dr Neal: Maybe it's time it was reformed, then, isn't it!

Senator FAWCETT: What I'm saying is that that came out of law reform recommendations. It's been in our law; it hasn't caused controversy; so why now, when we're drawing on that same recommendation that there's a precedent for—

Mr DREYFUS: I need to have this questioning clarified, Senator Fawcett—I'm not trying to interrupt. I want to know what Law Reform Commission report you're talking about and the name of the act that your reading from.

Senator FAWCETT: The act is the National Security Information (Criminal and Civil Proceedings) Act 2004, and I was reading from sections 8 and 10.

Dr Molt: And, to clarify, the Law Reform Commission report that you referred to?

Senator FAWCETT: I've just seen references to their input into that, which came from the same time frame.

Dr Molt: One of the points that we made in our initial written submission to the committee is that the way in which the term 'national security' has been defined requires further clarification. For example, there's a definition of 'security' in the ASIO Act, which I'm sure the committee's familiar with. It picks up on some of the points that are also proposed here in subsection 90.4(2). One of the recommendations that we have made is that this definition should be defined in a manner consistent with, for example, section 4 of the ASIO Act. I think there's a bit of a lack of clarity about this definition in terms of how it relates to both the definition in the NSI act, but then also other provisions in other pieces of Commonwealth legislation that we have, such as the ASIO Act. In our
initial written submission to the committee of January 2018, we certainly asked for some of these terms to be defined in a manner that's consistent, for example, with section 4 of the ASIO Act.

**Mr Bailes:** Can I just add to that. For the ease of the committee, when Dr Molt refers to our submission on this subject, it is contained in pages 17 to 20 of our original January submission. A lot of the difficulty with this bill would be cured by narrowing that definition. So it's not that we necessarily take a position that the definition ought not be revisited, but, what I think I hear Dr Neal saying is that there's sufficient ambiguity to create uncertainty and that, as a rule of law matter, you want as much certainty as you possibly can when creating new criminal offences. And there is likely a way to be able to do it, but our disappointment at the proposed amendments thus far is that that particular issue, which is central to this bill, hasn't been addressed.

**Senator FAWCETT:** Staff following this are wonderful. They can communicate with us. Just for clarity, it's ALRC report 98, *Keeping secrets: the protection of classified and security sensitive information*, tabled in June 2004.

**Dr Neal:** I'll come back to it. If I'm in front of a jury trying to talk to them about damage to Australia's political or economic relations in relation to an offence which carries a life sentence, whatever is presently in that legislation, I doubt that it has been prosecuted anyway but, whether it has or not, parliament really has a responsibility to think whether or not that is an unacceptably broad concept to include as the central concept in an offence that carries a life sentence. That's the major problem that I see with it. And that's quite apart from the practical difficulty of dealing with it in a court setting or, for the prosecution agencies, the extraordinarily subjective decisions that would be made in deciding whether to lay these sorts of charges. It's clear enough in the central case of espionage where you're dealing with military secrets or military equipment or computer systems. When you're damaging those sorts of things, it's sabotage, and that's clear, or when you're conveying secret information about those things, that's clear, but this is broader than that, because it's any information, not even secret information, about this vague concept of political relationships with another country or economic relationships with another country. Why do we need that? That's the question that really requires justification, and I think—

**Senator McALLISTER:** What problem are we trying to solve?

**Dr Neal:** Yes. Why do we need that?

**Dr Molt:** I'd also add to that, if we take what you have said as true—

**Senator FAWCETT:** I'm so very glad you do.

**Dr Molt:** In terms of the Australian Law Reform Commission recommending that political and economic relations be included in a definition of national security, it's not quite clear why these offences would pick up some aspects of the Law Reform Commission's recommendations and not others, for example, in the secrecy offences express requirements. So I think there's a need for further certainty as to why some aspects might be being picked up and why others are not.

**CHAIR:** Mr Dreyfus, have you finished your questions?

**Mr DREYFUS:** No. On this point that Senator Fawcett has just raised, I've just had a look at the National Security Information (Criminal and Civil Proceedings) Act 2004. I'll give some context, and then I'm going to ask you some questions. You may not be familiar with it, but it's an act which sets up the possibility of closed hearings.

**Dr Molt:** That's correct.

**Mr DREYFUS:** It's a procedural act. It doesn't give rise, other than in relation to breaching them, to the confidentiality of those closed hearings. It doesn't actually create any offences, so, if you like, it's a somewhat peripheral act to the overall Criminal Code architecture of Australia.

**Senator FAWCETT:** But it does go, Mr Dreyfus, to the question that was raised. The comment was made that we should have a broader discussion about what national security means, and my point is we've had the Law Reform Commission table a report which has been picked up in a piece of legislation, albeit administrative in nature, but it has taken that broad conversation and given a definition of national security, so this proposed legislation is drawing on a broad discussion and precedent in legislation.

**Dr Neal:** That's a good point. I think that we do need to have a discussion about national security. I noticed last week when President Trump was talking about the Trans-Pacific Partnership, he regarded it as something affecting US national security. That was a bit of a jump, too. The term is getting thrown around too loosely—

**Senator FAWCETT:** It's hard to get more nuance in 140 characters.
Dr Neal: Quite true. But your point, with respect, is right on the money. Is national security now going to become a vastly expanded concept which will now pick up the most serious offences in our criminal calendar? That's a pretty significant question in countries—and we've spoken about this before—where free speech about things which are vital to Australia's interest, there's a premium put on them, and this is saying, 'Just be very careful because you might cop a big penalty.'

CHAIR: Very quickly, could we just come back to the unintentional receipt of classified information, which you mentioned, Mr Bailes, in your opening remarks. Can you just restate your concerns, particularly around the example you gave of the filing cabinet?

Mr Bailes: We've been concerned from the outset that the difficulty or the challenge is a person may receive something with a lack of understanding about what it is. I'm not a journalist, but one would think it would not be uncommon in the scenario of a journalist being provided with information that they didn't know the origin or content of.

CHAIR: The amendments have actually narrowed the scope, though, of the offence of espionage involving security-classified information. If you go to section 91.3, a person commits an offence if the person deals with information or an article for the primary purpose of making the information or article available to a foreign principal or a person acting on behalf of a foreign principal. If you go down to paragraph (2), for the purposes of paragraph (1)(a) and (b), the person must intend the information or article to be made available to a foreign principal or a person acting on behalf of a foreign principal. On the face of it, I think it deals with that concern that you've raised.

Dr Molt: Certainly, in our initial written submission, one of the key recommendations that we made in terms of offences such as this is that they be confined to there being an intention to deal with the information acting on behalf of, for example, a particular foreign principal. That's certainly an improvement to the offence provision as we would see it. I think the concern that we have raised regarding the innocent receipt of information is that the secrecy offences and espionage offences here require, for example, an intention with regard to the dealing with information or, for some of the secrecy offences, an intention with regard to the communication of the information, but the link between that intentional element and the particular sort of information or article that's prescribed is not necessarily as precise as we would like to see it. So we think that there needs to be a little bit more clarification around that to ensure that people who do innocently receive information are not captured.

Dr Neal: Again, it's any information, and the definition of 'foreign principal' might be read to include the United Nations, for instance. There's a definition here: 'a public international organisation within the meaning of division 70.' I can't remember what's in division 70, but I did read it at one point. If this information—any information—is in the filing cabinet and you decide that that's something one of the international UN committees should be hearing about and provide it to them, that would seem to catch you.

CHAIR: You acknowledge that intent is an important—

Dr Neal: You might intend to do it because you think that there's an important human rights violation, for example, and that the UN Human Rights Committee should hear about it.

CHAIR: But, by purchasing the filing cabinet at an auction, for example, you're not intending to obtain that information.

Dr Neal: No; you're right. You wouldn't, by simply having it, be dealing with it, but if, on the amended version, you deal with it by saying, 'This is important. I'm going to tell the UN Human Rights Committee about this,' you could commit an offence. It's just any information. It's not like it's a secret document or even a government document; it's just any information—or article, I think.

CHAIR: Thank you.

Dr MIKE KELLY: I want to step back a bit here. I also want to give a bit of background to my question for the record. We have still in existence in Australia—it's just fallen into disuse—the D-notice system. It was begun in England in 1912, and we picked it up at the height of the Cold War in 1952. In fact, we were in a hot war at the time with Korea and an intense period of foreign espionage. There were many notices issued during the fifties, in particular, through that process. To remind people, it operates in the framework of a committee that is formed out of government ministers particularly and chaired by the Minister for Defence. Then there are members of media organisations who are members of that committee. In the last construction of it there were about 16 media representatives and four Defence representatives. It last met in about 1982. I'm referring to the Defence, Press and Broadcasting Committee. In 1982 the existing notices, the standing notices, were refined down from about seven to four, and those four notices are still extant. They consist of (1) capabilities of the ADF, including aircraft,
ships, weapons and other equipment; (2) the whereabouts of the Petrovs; (3) signals intelligence and communications security; and (4) matters relating to ASIS.

Noting that, this system doesn't have legal enforceability but was a consultative mechanism by which media organisations were meant to comply. It was a soft tool to use in relation to this, which seemed to operate effectively in the fifties through to the early eighties. That system also, potentially, can be backed up by available remedies, such as was highlighted—people may remember the farcical ASIS raid on the Sheraton Hotel in Melbourne back in 1983, and there was the High Court case, A v Hayden, which dealt with a range of issues and considerations arising from that matter. In particular there were efforts by some of those involved to have their identities kept secret, and in the end the Commonwealth did not support them in that. But the considerations that the court made related to the importance of national security and reflections on the expansion and contraction of that power. The public interest issue was well canvassed, well explained and described, and also there was a heavy emphasis placed by the judges on their reliance on views of relevant government ministers and the government on what needed to be protected and what didn't. In that case, the protection wasn't afforded because, basically, the government said it wasn't necessary.

I recall during the eighties, when we were working up our counterterrorism capability with the SAS and we were concerned about protecting exercise activities, there was one incident I was involved in—it would've been about 1987—where Channel Ten, I think it was, got media footage of a SAS exercise held on a vessel. The scenario was that it had been hijacked in Sydney Harbour. We approached the media organisation and obtained the material, and it never aired. But we also had a system, where we prepared standby injunctions and had information concerning standby magistrates, whereby we could immediately get injunctions restraining media organisations from publishing that kind of material. In light of the possibility of resuscitating the D-notice regime and the available remedies that seem to be out there as well, is it not possible, in your view, to rely on these sorts of existing mechanisms rather than the approach that's been taken in relation to the media here? Or do you feel there are some legitimate legislative measures that should be taken in addition to these possible options?

**Dr Molt:** Thank you for the question. One of the key things that we have been emphasising to the committee is the need for there to be comprehensive public consultation in relation to these offences so that we can tease out more as to whether they are actually necessary. In the time frames available for response, we haven't been able to make that kind of assessment as to whether the offences relating to protecting identities, for example, of ASIO staff or affiliates or Intelligence Services Act staff are indeed necessary.

**Mr Bailes:** I just want to add the concept that's been raised by the media, which we raise as well; that is, that that regime existed a long time ago when the media looked very different to what it is today, as does the way in which information is published. I think we all must accept that we're in a new world.

**Dr Neal:** Dr Kelly, thank you for the question. It goes to the points we were making about what is the problem and what's the right tool. With your suggested alternative—and there may be others—some mature reflection about those options would be really welcome.

**Dr Mike Kelly:** I understand that the media landscape has dramatically altered. But we're talking here about material that's published in any event, where there'd be a criminal sanction applied post facto. There will be situations where, regardless, we're using this as a deterrent, in terms of criminal sanctions. But preventing the material being published in the first place, to me, is the primary objective here. If you expand your engagement with organisations, that will have a large impact in the social media, or online, space. But if you have in your golf bag the ability to pull out the injunction mechanism when you're aware that someone or some organisation has this information and may be seeking to publish it, then you'd have that to fall back on. Is that sufficient to deal with the issue of preventative measures, where, if we're talking about preventing material getting into the public space, this legislation takes it further than those two mechanisms?

**Dr Molt:** Injunctive relief can certainly be an effective remedy if the information has not already been communicated. But I think the question here, perhaps, is regarding circumstances where the information has already been communicated, and what remedies there might be available to, for example, the Commonwealth to address that.

**Mr Bailes:** With regard to injunctive relief, and if the information has already been released, those types of orders are jurisdictionally based. Once the information has flown, there may need to be other mechanisms.

**Mr Dreyfus:** I'm conscious of the time and that we've got other witnesses, from the Human Rights Law Centre, who are waiting on the phone to give evidence. You've written about the definition of national security, so we'll accept your written submission. I want to go to another point that you've raised, in both the initial submissions and the further submissions, and that's this question of the Law Reform Commission's report _Secrecy_
laws and open government in Australia, from 2009, on which some of these amendments are said to be based. One of the central recommendations of that weighty report was recommendation 8-2, which reads as follows:

Specific secrecy offences should include an express requirement that, for an offence to be committed, the unauthorised disclosure caused, or was likely or intended to cause, harm to an identified essential public interest, except where:

(a) the offence covers a narrowly defined category of information and the harm to an essential public interest is implicit; or

(b) the harm is to the relationship of trust between individuals and the Australian Government integral to the regulatory functions of government.

I wonder if any of you could speak to that central recommendation of the Law Reform Commission about the need for criminal offences which are being created in relation to secrecy to have an express harm requirement. What's behind that recommendation?

Dr Neal: A bit more certainty. Harm itself is a kind of elusive concept. In criminal cases, harm to the individual is debated. This legislation picks up the concept of harm in parts but doesn't do it consistently. It makes that concept even vaguer when it refers to harm or prejudice. As you will have seen from our submission, we support the ALRC recommendation in relation to harm, because it does give a greater degree of certainty, although it's not ideal. But it's certainly better than harm or prejudice, or even vaguer concepts. It's certainly not a consistently applied criterion through these offences. So there is a consistency point about it too. In some points there will be a paragraph that talks about harm. Another one might talk about harm or prejudice, or maybe it doesn't talk about harm or prejudice at all.

Dr Molt: The secrecy offences look like they are kind of a mixture between what the ALRC refers to as general secrecy offences and specific secrecy offences. For example, for one of the definitions, we have included interference with the AFP's functions under proceeds-of-crime legislation. The ALRC, in its report, fairly clearly spelt out that that should be covered, if it's needed at all, by a specific secrecy offence rather than in the general secrecy offences which we have here. Certainly there are elements of harm and the harm requirement that Dr Neal has spoken about involved, but then there also seems to be a confusing between when general secrecy offences should be applicable as opposed to specific secrecy offences.

Mr Bailes: Can I just underscore that point that Dr Neal made, and that is the inconsistency with the concept of harm in some of the offences and then not in some, and it's expressed in very different ways. This is another reason why we'd like to understand an explanation as to why that particular, slightly sporadic approach is in the bill.

Senator McALLISTER: Dr Neal, can you clarify a point you made earlier in relation to this question of harm or prejudice. Is your evidence that 'harm' is a well-understood concept in the criminal law but 'prejudice' less so? Is that what you're researching?

Dr Neal: The various crimes acts will talk about doing harm to an individual or person. 'Harm' or 'injury' will be two things that are used. There has been a lot of debate about it. Some legislation requires 'serious harm', and what's the difference between 'serious' and 'harm' and nothing at all. So I think we can't be overly prescriptive. We have a familiarity with that concept, and there's some case law around it, so the concept is well understood. But my point, when I said that earlier, was just to say that 'harm' has an attractive objectivity about it, but when you start to look at it a bit more closely it's not quite as sharp edged as you might think, but it works. But then, if you make it vaguer by adding 'or prejudice', what's the difference? And, again, don't give lawyers that sort of stuff to play with!

Dr Molt: It seems like the phrase 'prejudice' has clearly been recommended by the Australia Law Reform Commission. But where we have raised concerns is, in particular, with the even broader term of 'interference with' and what exactly that means and the potential for that broader phrase to impact on freedom of speech in relation to, for example, prosecution malpractice issues, which David mentioned earlier. So in our initial written submission, we recommended that the phrase 'interferes with' be removed from the provisions, given its breadth.

Mr DREYFUS: I will come back to 'harm' or, in particular, the way in which this legislation has got a concept of 'inherently harmful information' by way of definition. What this legislation proposes, even after the amendments that the Attorney-General has now provided to the committee, is that, simply because the information had been security classified—in other words, it was in a document that had 'secret' or 'top secret' on it; and they've thrown in the possibility that the regulations can actually still prescribe another type of classification as well—that's going to be the basis of an offence. Now, is that what the Law Reform Commission had in mind when they said that, as an exception, the offence covers a narrowly defined category of information, given that 'classified documents' is not restricted in any way; it's just every top secret or secret document?
Dr Neal: We specifically drew your attention to that in our submission. We understand—and I noticed that the IGIS submission had also picked up this point—that there is a degree of lack of clarity about just exactly what the process is for classifying things as top secret and secret, and that it's subject to a variety of processes that we really don't understand or know about. But in our submission we said, 'Because of that concern that you have raised, we sought further information about just how that process might work and whether or not that's a satisfactory basis to be picked up on in a statutory definition of these serious offences.' It doesn't seem appropriate, and I think that's what IGIS is also saying.

Dr Molt: Can I just add to that? In paragraph 35 of our initial written submission to the committee we note that the ALRC did not recommend that a general secrecy offence cover, for example, national security classified information. They did not do so because they reached a conclusion that, while a category may be directed to protecting a legitimate public interest, the disclosure of information within that category will not always cause or be likely to cause harm.

Mr Dreyfus: Thanks very much, Dr Molt. The final matter relates to whether or not this legislation still in some way criminalises innocent receipt of information. This is something that the media submitters have also drawn attention to. I wonder if you can go to that. You've mentioned it in your supplementary submission:

The provisions also require clarification to ensure that the innocent receipt of information (e.g. in a filing cabinet) is not captured by the offence provisions.

So, is it the case that, even with the amendments put forward by the Attorney-General, innocent receipt remains a concern?

Dr Molt: The position that we've put forward is that we're just not certain as to whether that kind of conduct will be captured or not by the offence provisions because, as I referred to earlier, there's an intention fault element that's required, for example, for the dealing with information. If a person intends to buy a filing cabinet, for example, from a particular store, they do so, and they intend to open up the cabinet and deal with the information in a certain way. The question is: will they then be subject to the offence or not, given that there are recklessness elements that then apply to whether, for example, the information has a security classification?

Dr Neal: It's an ongoing problem in criminal law to do with drugs. I've got a suitcase and I bring it into the country. Did I know what was in the suitcase? There's case law about it. It might be better, as a point of clarification, to say innocent receipt of information is not covered or something like that just to short-circuit that debate.

Mr Dreyfus: I think the reason this is on our minds is because we've had the actual example of a filing cabinet purchased at a Fyshwick second-hand furniture store that contained a whole range of secret cabinet documents—a cabinet of cabinet documents. That's why, because of this real-life example, it's there before us. I take it that the Law Council's position is that merely purchasing the filing cabinet and drilling open the locks to find that there are those documents should not give rise to a criminal offence.

Mr Dreyfus: The position that we've put forward is that we're just not certain as to whether that kind of conduct will be captured or not by the offence provisions because, as I referred to earlier, there's an intention fault element that's required, for example, for the dealing with information. If a person intends to buy a filing cabinet, for example, from a particular store, they do so, and they intend to open up the cabinet and deal with the information in a certain way. The question is: will they then be subject to the offence or not, given that there are recklessness elements that then apply to whether, for example, the information has a security classification?

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Dr Neal: And, more to the point, it's the contents of the documents. I open the cabinet. I know there are documents in there. Once I read the documents, I know that it's sensitive information but I'm going to publish it to the world—that's the knowledge that the offence, I take it, is geared to capture. The question is: do the provisions sufficiently identify that and get around the problem of innocent acquisition of—you might be handed a book; the same problem arises. I know I've got the book and I'm going to put it on my shelf. I've dealt with the book. That's not what the offence is designed to capture; it's meant to deal with the use of the information and broadcasting it more widely or refusing to hand it back once you know what the content of it is. It's a hard problem to grapple with, but my suggestion would be to have something even in a statutory note to say: that's not what we mean to capture.

Mr Bailes: Just listening to my two colleagues, Dr Molt's describing a lack of clarity about when the moment of culpability starts, and Dr Neal, in making that suggestion of another form of words, is saying that that brings greater clarity to when the moment of culpability arises. That's all we're saying.

Mr Dreyfus: The media organisations have given us the hypothetical example of documents being received in a plain manila envelope by a journalist—

Senator McAllister: By a receptionist.

Mr Dreyfus: or a receptionist who opens the envelope, because that's what receptionists do. They hand it to a journalist. The journalist reads the documents. The journalist then goes to her editor and says, 'These are documents that look very interesting.' The editor then agrees and reads the documents, and goes to the news organisation's lawyer. They've all dealt with the documents. Should they be regarded as having committed a criminal offence? They haven't published anything, but they've certainly dealt with the documents. They could
certainly be taken to have knowledge that they're classified documents or documents concerning Australia's defence to take the hypothetical example further. Should that dealing by them be regarded as committing a criminal offence?

Mr Bailes: The difficulty is a practical one, isn't it, because at what point in time do you recognise, without reading the document, or at what point during the reading of the document, do you recognise what you've got in your hands? We have seen the joint media organisations' submission that the problem is that there are also other people involved in that chain.

Dr Neal: Including the guy who originally purchased the filing cabinets who is just—

Dr Molt: I think the question is, of course, in that particular circumstance where you're talking about people working for news media organisations, the extent to which that news media defence comes into play or not. It may in that circumstance that you're referring to, but one of the key points that we've made in our submission is that we're concerned about ordinary people being captured by this who aren't necessarily working in that kind of environment.

Senator McALLISTER: Dr Molt, for our benefit, I think, you provided some examples earlier of scenarios earlier where an ordinary person might find themselves in that position. Do you wish to add to that at all?

Dr Molt: One of the examples that we've been discussing is a person who just purchases a filing cabinet from a Fyshwick store, for example. If they're not necessarily a person who works in the news media and are purchasing the filing cabinet for their own home purposes, the issue is the extent to which they may or may not be captured.

Dr Neal: It has to do with the specification of the offence itself. An innocent position shouldn't be caught. For someone who gets it but then wants to publish it but who's not in the news media, the public interest offence should apply. I assume that everyone around the table would not regard the guy who purchased the filing cabinets as someone who would be subject to a criminal offence, because he actually picks up the documents, drives them home and puts them in his shed.

Senator McALLISTER: And the blogger?

Dr Neal: The blogger is now conscious of what the information is and is using it, because the blogger thinks that it would be in the public interest to publish it. That would be where the public interest offence in our view should kick in and—

Senator McALLISTER: But doesn't.

Dr Neal: It doesn't for that person. In relation to the sorts of people who are the assistants within the journalism process, their receipt or dealing with the document should be regarded as innocent so that the offence specification itself needs to be dealing with the problem that Morry Bailes has just raised to say it's at this point that the offence would be committed, because you've been requested to hand it back and you didn't. You've been told, 'You can't give that back.'

Dr Molt: There are different ways that this can be dealt with—and I'm sure that the Attorney-General's Department will have views on this as well. One way is to have intention as the element in relation to the circumstances or knowledge to help tighten up the actual offences. Another way, in which it could also be ameliorated, is through this public interest type offence which Dr Neal's been speaking of.

CHAIR: Thank you very much. We've run over time. I appreciate your attendance here today. If you've been asked to provide any additional information, could you please forward it to the secretariat by 9 am Tuesday, 20 March. We'll give you a transcript of your evidence before we go public. Thank you.

Proceedings suspended from 10:38 to 10:49
RYAN, Hannah, Lawyer, Human Rights Law Centre

SATHANAPALLY, Dr Aruna, Director of Legal Advocacy, Human Rights Law Centre

Evidence was taken via teleconference—

CHAIR: Welcome. Although the committee does not require you to give evidence under oath, I should advise you that this hearing is a legal proceeding of the parliament and therefore has the same standing as proceedings of the respective houses. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. The evidence given today will be recorded by Hansard and attracts parliamentary privilege. I invite you make an opening statement.

Dr Sathanapally: Thank you. The Human Rights Law Centre has provided a supplementary submission to the committee in relation to the espionage and foreign interference bill in response to amendments proposed by the Attorney-General. In that submission, we explain the effect of the amendments as we understand them. In short, each of the proposed amendments is an improvement on the bill. They pull back on certain excesses in the original drafting, and we welcome the department's engagement on this. There is, however, some way to go before the bill gets the balance right. I want to emphasise that this legislation is extraordinarily important. It introduces a series of very serious offences into the existing and established structure of the Criminal Code, but it's also important for the approach that Australia takes to government information as a whole. It is vital that we get it right, and I acknowledge in particular the Attorney's openness to further recommendations from the committee. We appreciate the exercise that the committee is undertaking to try and work out how to proceed.

Without revisiting the detail in our submission and the submissions of others, there are three principal areas in which we see further changes as being necessary to schedule 2. The first is that even after the proposed amendments, the offences would still capture conduct by Commonwealth officers that does not cause harm to an essential public interest. This is most evident in the continued inclusion of proposed section 122.4, which represents a principal component of the law that is overdue for repeal. The entire ALRC report was directed to why sections 70 and 79 of the Crimes Act needed to be repealed and what needed to replace them, yet this bill would make section 70 an enduring feature of Commonwealth law with no concrete timetable for repeal. That would be a real disappointment for necessary law reform in Australia.

I know I emphasised this last time, but I'll do so again: the ALRC's exercise was extraordinarily comprehensive in its consultation and care. You can see from its advisory committee and its analysis that this is a whole-of-government exercise. By contrast, this bill was not subject to that level of care and consultation before drafting, and we are seeing the consequences of that now in terms of the concerns of those departments that have made submissions to this inquiry as well as the concerns of civil society. This legislation will affect employees of every agency of the Commonwealth government and everyone in the country who deals with government information. While some departures from the ALRC blueprint can be expected, new section 122.4 and aspects of new section 122.1 depart from the core of the ALRC's report, which is the harm-based approach.

The second area of concern is the scope of conduct criminalised. Again, the ALRC was clear in its reasoning that secrecy offences ought to be limited to disclosure. A significant part of the difficulty with the alignment between the bill and the Public Interest Disclosure Act is because of this broadening of the captured conduct, and it is not entirely evident how this can be addressed without either narrowing the conduct, which is what we would strongly recommend, or otherwise altering the public interest disclosure scheme. More fundamentally, it's not clear why 'dealing', as broadly defined, needs to be criminalised when preparatory offence provisions exist that would capture attempts to disclose or conspiracy to disclose information. Moreover, as we mentioned in our previous submission, the full range of administrative sanctions are available for conduct that falls short of disclosure.

The third area of concern is the extension of offences to those who are not Commonwealth officers. This is what creates the difficulties with the effects on press freedom, public debate and civil society. The proposed amendments have taken the proper step of separating-out outsiders from offences that cover Commonwealth officers, and the drafting of new section 122.4A takes a harm based approach, which we welcome. However, it is missing an important element. It is our recommendation that the bill should not extend to outsiders unless those outsiders owe some duty of confidentiality with respect to the information. It is, again, aligned with the ALRC's recommendations, and we've provided the relevant recommendations in an appendix to our supplementary submission.

What this means in practice is that the bill remains something that would exercise a chilling effect on legitimate and robust expression in our democracy, including scrutiny of government. Taking a harm based approach, narrowing the conduct to disclosure and tightening the offences with respect to outsiders will go most
of the way towards getting the right balance with the necessary protection of highly sensitive information. But a necessary piece of the puzzle is absolutely ensuring that public interest disclosures by whistleblowers in relation to corruption, misconduct and abuse of power remain lawful.

The Law Council has recommended a public interest defence. The joint media organisations have recommended a public interest reporting exemption. We believe both of these ideas are ones that the committee should be actively exploring or that should be the subject of a proper consultation process.

For our part, we would emphasise that immunities are generally better than defences from the perspective of chilling expression that we would all agree is legitimate. But the current immunities provided by the Public Interest Disclosure Act were not crafted for such a wide-ranging and severe law as this one. Even on the existing state of the law, the public interest disclosure regime needs improvement. None of us is served well by government agencies who can keep mistakes, wrongdoing and corruption hidden from outside viewers.

I have just one final point. Our initial submission concentrated on schedule 2 of the bill, and schedule 2 of the bill is the focus of the amendments. There are concerns of the same order that relate to schedule 1 of the bill but, as has been pointed out already, they have not been addressed by these amendments.

We're happy to answer any questions the committee has.

CHAIR: Thank you very much for your submission.

Mr DREYFUS: Thank you again for appearing before the committee, and thank you for the supplementary submission. I wanted to ask about what you've said at paragraph 15 of your supplementary submission, and I wonder if you could expand on it. It's where you've talked about the proposed new section 122.4A, which is the splitting of the secrecy offence into an offence for Commonwealth officers and a different offence for non-Commonwealth-officers. In relation to that second offence, you say:

... proposed new section 122.4A does not capture an essential element of any secrecy offence that applies to outsiders, being either that the outsider was provided the information on a confidential basis, or that the outsider knew or was reckless as to the fact that the information was disclosed to them in breach of a secrecy offence.

Are you able to expand on that?

Dr Sathanapally: Certainly. We start from the proposition that, in a free-speech-respecting democracy, we don't generally criminalise people dealing with information, discussing information or sharing information. So that's the starting point. Commonwealth officers owe specific duties by virtue of being employees, which is why you can have a structure ranging from employment penalties through to criminal offences that apply when they use information in an unauthorised fashion. However, if you are then going to put criminal offences on anyone—the ordinary person or the person who is engaged in some function that isn't part of government—for essentially dealing with, sharing or disclosing information, there needs to be some duty or reason why the person could not deal with that information freely.

Where outsiders are captured, one of the ways in which these offences are described is as subsequent disclosure offences. As a practical matter, for information to leave government in the first place, either a Commonwealth official needs to have done something wrong, in terms of the information being unauthorised in its release, or an outsider needs to have done something wrong, in terms of theft of information or some other offence that will otherwise be an offence under the law. What a subsequent disclosure offence captures is where an outsider receives information because of some obligation of confidence—so they're told, 'You're being told this, but this is not for sharing,' and they then go and share the information—or when an outsider receives information that has been obtained through the breach of a primary secrecy offence by a Commonwealth officer. That's what provides the nexus between what the outsider is doing and the Commonwealth information, which is then protected.

Absent that, you end up with a free-floating criminal offence attaching to any person in Australia dealing with particular information, and that, we say, is a bridge too far and that's not something that liberal, rights-respecting democracies do—for very good reasons.

Mr DREYFUS: Yes. Now, elsewhere in your submission—and it applies here, too—you've talked about the problem of basing a criminal offence simply on a security classification, on an administrative act, by some public servant—very often, an unknown public servant somewhere in the Public Service—who has decided that they'll put a stamp on a particular document. I wonder if you could speak just to that problem. You've mentioned it in your original submission. You've mentioned it in these supplementary submissions. What is the problem with using security classification, an administrative system, as the basis for a serious criminal offence?

Dr Sathanapally: There are a couple of problems that we've identified. The first one is a certainty-of-law issue, which comes to the sort of precision that we want to see in our criminal law. If we are creating offences
with such severe penalties, we need to be confident that the way in which those laws are drafted captures circumstances where those penalties are appropriate. It's hard for us to do that. It's hard for parliament to do that, when parliament doesn't know necessarily what types of documents are going to be classified under the bill, as it would be amended, 'secret' or 'top secret'. Again, it may be that right now we can see what documents have been classified in that manner. But, if this is going to be an offence introduced into our criminal code on an enduring basis, parliament needs to be satisfied that those documents will continue to be classified in a way that is appropriate, such that disclosure of them or handling of them gives rise to this sort of criminal offence. It's very hard to do that if the administrative classification is itself not governed by law in any way.

At this point in time, what we would be doing is introducing into the Criminal Code the concept of a particular document of a particular status where that status arises purely from an administrative decision which at the moment is fairly unregulated. There are guidelines, but those guidelines don't have to be followed, and those guidelines don't require sign-off so that the decision can be exercised at a junior level. All of these things are ways in which the law which is on the statute books is capable of being administratively expanded, in effect, through a liberal application of classification protocols.

Mr DREYFUS: As it stands, however, in the legislation as drafted—even with the amendments—there is the possibility of an offence being committed for the transmission of an already published document which simply happens to have a 'top secret' stamp placed on it, perhaps as part of a larger document. In other words, it is possible to conceive of a classified document that has many pages and part of which in fact has already been published elsewhere—publicly—but nevertheless bears the 'top secret' stamp. As it stands, someone could be prosecuted for transmission of even an already published document simply because it bore a 'top secret' classification.

Dr Sathanapally: Yes, that's how we would understand the bill as it stands, and it draws attention to why processes of declassification are so important in terms of general document management in the Commonwealth. And, certainly, not having those systems right, we shouldn't be rushing to criminalise all sorts of handling of information that is tagged in a particular way for document management purposes and document circulation purposes within the Commonwealth.

Mr DREYFUS: You talk a bit about the improvements that the Attorney-General's amendments have made providing at least some defence for journalists if specified conditions are met. But do I understand paragraph 30 to be saying that it is still the case that sources to journalists, sources to the media, remained exposed to criminal charges, even if they had a public interest motive and even if they've acted in the public interest?

Dr Sathanapally: Yes, that's how we see the effect of the amendments to 122.5(6), because they only extend to persons engaged in reporting news and therefore would not extend to a person who has no role in reporting news but who, say, is a whistleblower or is the source of the information.

Mr DREYFUS: Don't take me as trying to rush this, but we do have your two written submissions, which were extremely helpful, Ms Ryan and Dr Sathanapally. On the question of a harm based approach, I wonder if I could take you to the definition of 'inherently harmful information' appearing at page 51 of the print of the bill, which then in turn forms the basis of a very serious criminal offence, namely communicating inherently harmful information, which we see at 122.1. It carries an imprisonment of 15 years. Is what you're saying at paragraph 36 of your submission that there's an incoherence or a strangeness about defining 'inherently harmful information' first as 'security classified information'—we can understand that, and the amendments now say that that's to be top secret or secret. Your concern is with (b). Can you just tease that out for us? What's the problem with putting in a definition of 'inherently harmful information' as something that is described as 'information the communication of which would, or could reasonably be expected to, damage the security or defence of Australia'?

Dr Sathanapally: The difficulty here is that 122.2 is the harm based offence, essentially. It is the closest thing we have, and we're closer now to what the ALRC recommended, which was that, where disclosure of information causes harm to an essential public interest then that disclosure is criminalised. 122.1—

Mr DREYFUS: Can I just interrupt you. That's a true harm based offence?

Dr Sathanapally: That's a harm based offence because an element of that offence is that the disclosure or other forms of dealing caused harm to Australia's interests as defined, whereas 122.1 is an offence that is based on categories of information. For a start, it's the approach that the ALRC recommended not taking. But then what it does is include, within the category of information, harm based criteria, which again just doesn't make sense across 122.1 and 122.2. We're not clear why 'information the communication of which' et cetera wouldn't be captured within 122.2, which is the appropriate harm based offence. This is more a technical point than a—
Mr DREYFUS: No, I understand that, but, just to tease it out: you object to or you would oppose the inclusion of a non-harm-based offence, which is of course what you do when you're providing an offence that is based simply on security-classified information. But you're saying that, if there's to be a definition of 'inherently harmful information', because there is a harm based offence at 122.2, you certainly don't need to include in the definition of 'inherently harmful information' what we see there at (b)?

Dr Sathanapally: Yes, I think that's an excellent way to put it.

Mr DREYFUS: Thank you. If I can just summarise: in your earlier submissions to this committee, you talked about the way in which these proposed amendments to the Criminal Code don't sufficiently engage with the Public Interest Disclosure Act—that's the protection in Australian law for public servants and people working in the public sector who make public interest disclosures. I take it that you're saying that, notwithstanding the set of amendments that have been put forward by the Attorney-General, it remains your concern that this proposed legislation does not engage with protecting public interest disclosures?

Dr Sathanapally: That's right. The elements to that are in part that the Public Interest Disclosure Act does not extend to the types of conduct and the people who would be covered by these new offences. Another element of that is that there are elements of the Public Interest Disclosure Act that need to be improved anyway. And then the final element is the fact that, because this bill doesn't have a public interest defence, the pressure mounts on the Public Interest Disclosure Act to provide an effective public interest immunity, and the Public Interest Disclosure Act isn't equipped for that function, having been passed without this sort of law in mind.

Mr DREYFUS: In particular, because there was a 2016 review of the Public Interest Disclosure Act by Philip Moss, the government ought to get on and deal with what he suggested be changed in the Public Interest Disclosure Act before it passes this legislation?

Dr Sathanapally: That would seem like a sensible way of proceeding and is the type of thing that I think would be effectively picked up in a more consultative, careful exercise around this bill to make sure that our secrecy offences line up with our Freedom of Information Act and line up with our Public Interest Disclosure Act. On the drafting of this bill, I think that's work that needs to be done. It's not straightforward work, but it is work that needs to be done.

Mr DREYFUS: Yes, thanks. In your previous submission, you drew attention to the very large penalties or increased penalties that are provided in this bill. I think you made the point that a penalty of 20 years imprisonment is something that we see elsewhere in the Criminal Code for the offence of subjecting a person to cruel, inhuman or degrading treatment or for certain war crimes. In your view, has the government advanced a reason as to why we should suddenly see in these secrecy offences, which up until now have attracted penalties in the order of two or five years, and the ALRC recommended seven years—have you been able to find any explanation by the government for why we're to have—15 years or 20 years for aggravated offences?

Dr Sathanapally: No. We're not aware of any evidence that would support such a dramatic increase in penalties. In terms of the arguments that have been put forward, one argument that has been put forward by the department for why the offences are put this way is that they've put in a penalty that reflects the absolute, most serious possible scenario they could imagine, and that provides the guideline. While it might be possible to imagine a situation where the disclosure of information in an unauthorised fashion might lead to the loss of life—and I think it is possible to imagine that; I'm not suggesting that that's fanciful—in other contexts in the criminal law we would have a specific offence that included that as an element. So disclosure of information occasioning loss of life would be an offence that might have a more severe penalty, but that's not what we have here.

What we have here is an offence just of disclosure or communication or handling of information that would then have a penalty down as 20 years, which has an effect not only in any criminal proceedings but also on anyone who's checking what the law is before trying to work out what to do with certain information that they have. The effect of such a large penalty is to cast a net wider than whatever is actually criminalised, because the reaction of most people to seeing a criminal offence of 20 years is to steer well clear of anything that may even possibly fall within the offence.

Mr DREYFUS: Finally, when you came before the committee on, I think, 30 January, you pointed out to the committee that you hadn't had a lot of time to look at this rather large bill, and you had therefore focused on schedule 2 of the bill, the secrecy provisions. What you've now done in your supplementary submission is to say that you've looked at the other part, the espionage provisions. I'm not going to take you through it all, but you adopt the recommendations and findings of the Law Council in relation to the espionage provisions, which we see in schedule 1?
Dr Sathanapally: That's correct, and we've had the benefit now of seeing some of the submissions that were made to the committee in that regard and we would certainly endorse the very deep concerns around schedule 1. In fact, several of those concerns are quite similar to the concerns that we articulated with respect to secrecy offences. They are of a similar order. The final point we would make is that the committee should, of course, be aware that a lot of the conduct that could be captured by the secrecy offences could equally be captured by some of the other provisions, so there is a need for a consistency of approach across the two schedules.

Mr DREYFUS: That's a point that I wanted to draw out from the last bit of your submission. In paragraph 51, you've described whole lot of features of division 91 and you say: The combination of these features means the espionage offences are far broader than necessary to protect national security information, and risk capturing a range of communications and conduct made or performed in good faith, in the regular course of journalism, business or academia (for example) that cause no harm to Australia. This is clearly a disproportionate imposition on freedom of expression. Can you give us some examples of what you're talking about there—hypothetical examples of the range of communications and conduct in, perhaps, journalism or business?

Hannah Ryan: I would just draw the committee's attention to the examples provided by the Law Council in their initial submission on the espionage offences. Particularly, they pointed out that these kinds of offences could capture good-faith conduct in the ordinary course of business dealings, consulting and activities of that nature. And I'd make two further points about the offences in division 91 in relation to their breadth. In some respects, they are broader than the offences in schedule 2 in that the information captured doesn't have to be government information or Commonwealth information and that the defences available to defendants under division 91 are narrower in compass than those available under schedule 2.

Mr DREYFUS: Thank you very much.

Senator FAWCETT: Thank you for your submission. I want to come back to a point raised by Mr Dreyfus and again in your submission, about prior publishing. I notice in 122.5(8)(b) there is a specific defence for information that's already been communicated, or made available, to the public or is a prior publication. There are two other subparagraphs, (d) and (e), which you've asked to be removed. I'm interested in why you want them to be removed. As I read it, that appears to give additional defence—an additional option—as opposed to restricting anything. I'm interested to understand why you want it removed, because it is consistent with the approach taken in section 35B of the ASIO Act, which was inserted on the recommendation of INSLM.

Dr Sathanapally: I think there might be some confusion. We haven't made any recommendations in relation to 122.5(8). That may be someone else's recommendation.

Senator FAWCETT: Okay, I'll take that, then.

CHAIR: Thank you again for your submission and for your attendance today. If you've been asked to provide any additional information, could you please forward it to the secretariat by 9 am, Tuesday, 20 March 2017. You will be sent a copy of the transcript of your evidence and will have an opportunity to request corrections to transcription errors.

Dr Sathanapally: Thank you.

Senator FAWCETT: To clarify, I was reading ahead. That was the joint media organisations' submission.
MURPHY, Mr Paul, Chief Executive, Media Entertainment and Arts Alliance

SCHUBERT, Ms Georgia-Kate, Head of policy and government affairs, News Corp Australia

[11:20]

CHAIR: I now welcome representatives of the joint media organisations to give evidence today. Although the committee does not require you to give evidence under oath, I advise you that this hearing is a legal proceeding of the parliament and therefore has the same standing as proceedings of the respective houses. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. The evidence given today will be recorded by Hansard and attracts parliamentary privilege. I now invite you to make an opening statement.

Ms Schubert: Our opening statement will be quite short; it is just to say thank you very much for seeing us for the second or third time.

CHAIR: Third?

Ms Schubert: The third time. We were invited to attend the hearing today to discuss the espionage and foreign interference bill, for which we made a second supplementary submission earlier in this week. That submission focuses on the proposed amendments submitted by the government a couple of weeks ago. It is correct to say that we do still have outstanding concerns with the bill with the incorporation of those amendments, including that it remains the case that journalists are criminalised for doing their jobs. It also continues to be quite broad, and the Law Council discussed this this morning. The definition and the activities that are addressed with the term 'dealing with and holding information' continue to be a concern to us in particular. We haven't directly addressed the outstanding concerns we had on the espionage bills, but they do remain a concern to us, including that there is no defence for the espionage offences in the bill that would cover media organisations. In addition to that, we did put in a supplementary submission, albeit late on Wednesday afternoon—it was published yesterday—on the FITS bill and our outstanding concerns on that particular matter. We are happy to take questions on both bills and both submissions, and Paul may want to make additional comments.

Mr Murphy: No, that's fine.

CHAIR: Thank you very much for your supplementary submission. I will go straight to one of your overarching concerns, which is that there needs to be an exemption for public reporting so that journalists and support staff won't risk jail time by simply doing their jobs. Do you acknowledge that there is a public interest defence for journalists and support staff—anyone working in media—in section 122.5(6), which reads:

It is a defence to a prosecution for an offence by a person against this Division relating to the dealing with or holding of information that …

(a) the person dealt with or held the information in the person's capacity as a person engaged in reporting news, presenting current affairs or expressing editorial content in news media; and (b) at that time the person reasonably believed that dealing with or holding the information was in the public interest.

Ms Schubert: It is correct that that is what appears in the revamped bill. That, we don't think, is an adequate defence for the offences listed in the bill itself.

CHAIR: Could you go into further detail on that?

Ms Schubert: The second part of that is the importance of a defence being available to what we would term 'support staff', as we've discussed previously. Someone who is support staff couldn't actually attest to whether or not something is in the public interest or otherwise. That's not within their capacity in the normal course of their job. So the defence that is written in that bill as it currently stands wouldn't be available to them, because they couldn't actually make an assessment on whether or not something was in the public interest or otherwise. In the case where someone innocently receives some information and/or reads something over the phone to a journalist who's out and about and does that sort of thing, they would not know the public interest value or otherwise of information, so that would mean they couldn't actually satisfy that subsection (b), for starters.

The other elements of concern we have in relation to that amendment are particularly at issue, and we would need to actually have that expanded. So we've made some suggestions there in relation to adding some words: 'in the business of reporting news'. The other thing is that it applies to a narrow range of news media formats. To the extent that it would be strict news reporting, that may well fall within the definition. But, to the extent that it was opinion and those sorts of things, that would fall outside of that definition.

Mr Murphy: The overwhelming issue at the heart of our submission, of course, is that we believe it should be an exemption rather than a defence. We believe there should be a public interest exemption. While we acknowledge that there's been a clear effort by the Attorney to broaden, strengthen and improve the defence, it's
still the case that, in the course of public interest reporting and in the course of the normal work of other editorial staff, they still find themselves potentially facing criminal prosecution and having to mount a defence. Our view is that the public interest exemption is the appropriate approach and that no-one should find themselves in court facing the full force of the DPP as a result of doing their job genuinely and legitimately in the public interest.

CHAIR: Even if the public interest defence were reframed as an exemption, wouldn't the evidential burden still fall on the defendant, though? They'd still end up in the same place.

Ms Schubert: I think that's a point that's been made in the Attorney-General's letter in relation to someone else's recommendations in a different section of the bill. The evidentiary burden is, as I understand it—not being a criminal lawyer—the same in both cases. However, it is at a very different point in the process that an exemption occurs rather than a defence. So we would absolutely prefer an exemption and having to meet an evidentiary burden. We still think that the defence, as it's currently framed in this bill, would require amendment to cover the support staff and the broader undertakings of news media organisations to be adequate, even if it were reframed as an exemption. But an exemption is definitely the preferable option.

Senator FAWCETT: I think you know my first question!

Ms Schubert: 122.5(8)!

Senator FAWCETT: Why do you want to get rid of subparagraphs (d) and (e), and do you accept that (b) actually provides the exemption that was discussed earlier about the stuff that has been previously published and made available to the public?

Ms Schubert: No, actually. If there were what I'd call an unauthorised release of information, however that may occur, that we then, as news media organisations, wanted to report upon, the whole area in relation to that defence actually still requires the original release of the information being an authorised release. For example, if someone breached the Public Interest Disclosure Act and made a public interest disclosure, if I could put it that way, and that were picked up by the media, that defence would not hold. Equally, if someone published a lot of documents—a WikiLeaks style example has been articulated in this committee previously—and media organisations were to report on that then, as that wasn't an authorised release of information, we couldn't rely on the defence.

Mr Murphy: It's a concern that's still outstanding from our original submission, which essentially argued that prior publication should automatically be a defence without qualification.

Senator FAWCETT: On what basis do you say that this defence requires that the previous disclosure was authorised? I don't read that anywhere in here.

Ms Schubert: I think that's different, so I'd need to go and check the bill, or my previous submission.

Senator FAWCETT: The secretariat has just highlighted to me that perhaps you're looking at subsection (2), which does require the authority of the Commonwealth, whereas we're dealing with subsection (8), and that clause is not in there. So, it's a different subsection. It doesn't require that previous authorisation.

Ms Schubert: My apologies. Then I think our comment relates to 122.5(2)—correct?

Senator FAWCETT: So, 122.5(8) you'll then—

Ms Schubert: Yes, 122.5(8)—

Senator FAWCETT: you're happy to withdraw that criticism?

Mr Murphy: No, I think our submission argues that those elements are linked and the way we read paragraph (d) it still requires, in our mind, prior assessment and authorisation. It's still not clear in that drafting that you are automatically exempt from prosecution if you're simply reporting on something that's already been published.

Senator FAWCETT: To my mind it's a fairly clear separation of those two sections. But anyway, that's fine; that's your evidence, so I'm happy to accept that.

Mr DREYFUS: Just to be clear: I'm reading page 7 of your submission, about paragraph 122.5(8). Paragraph 122.5(8) is a defence that is headed 'Information that has previously been communicated'. It's fair enough, perhaps, that (a) says that you don't get to rely on this if you're a Commonwealth officer; (b) says that it's already been communicated or made available to the public. Your concern is that there shouldn't then be added—oh, and fair enough: it says you weren't involved in the prior publication; it's not going to be a concern for journalists. And your concern is with (d) and (d), that there oughtn't be the additional requirements for a defence that journalists, reporting on something that's already been made publicly available, should not then, in addition, have to draw a conclusion that it won't cause harm and have reasonable grounds for it.
Ms Schubert: That's correct, and also you're right: the information's previously been communicated, whereas information that is already public, that assumes a previous authorisation—and the defence for (8) could relate to that information, that it's not authorised. But it would be very difficult to mount a defence—or even that we should mount a defence in relation to communicating information that has been made public that would—or it's causing harm to Australia's interest or having regard to the nature, extent and place of a prior publication, because we couldn't actually do that.

Mr DREYFUS: No. You just won't know.

Ms Schubert: You wouldn't know. So, you couldn't discharge (d) and (e).

Senator FAWCETT: If you had any doubt, though, that something might cause harm—for example, disclosing the name of an operative for one of Australia's agencies—my understanding is that the media have points of contact, that they can clarify things with agencies. So, why would you not do that? As we saw with the case of the filing cabinet and the ABC, there was dialogue there, yet they still published some information, but they also exercised some discernment over what they thought was potentially damaging. If somebody exercised a recklessness in that, that they thought, 'Well, it might be damaging; we're not sure, but we'll publish anyway', shouldn't there be some sanction for that, given that there are avenues to clarify?

Mr Murphy: In relation to revealing the identity of an intelligence officer, it's quite clear it's covered under defence (2). It's covered in the ASIO Act and other places, I think, so that's quite a clear area. The public record shows that media organisations in Australia are incredibly responsible when it comes to matters that may potentially have negative impacts on the security of the country and the security of their fellow citizens. But we believe it's unnecessary in this area where something's already been published. The effect of this bill, and the way it remains drafted, is, in our view, to create a great deal of uncertainty and a complete lack of clarity in the minds of journalists and media organisations about what in their reporting may trigger, virtually automatically, criminal prosecutions. But it's certainly the case that any examination of the public record and the record of media organisations in this country indicates a high degree of responsibility in this area, in the way that they operate.

Senator FAWCETT: My main point, though, is that it also demonstrates there are avenues for people in the media to clarify with agencies—'I hold this information and I'm looking to publish it. Is there anything sensitive in there?' If the agencies came back and said, 'Yes, there is,' and the media decided to publish anyway, shouldn't there be some sanction for that rather than just saying, 'Well, I'm a journalist and I'm going to go ahead and publish it'?

Mr Murphy: There are fine areas of judgement in there. I wonder in what circumstances an agency would come back and say anything other than, 'Yes, there is sensitive information in there and you shouldn't publish it,' to be honest.

Senator FAWCETT: Thank you.

Mr DREYFUS: We're dealing here with the problem of someone being prosecuted for publishing information that was already public. That's dealt with twice in the defences. First of all, it's dealt with at 122.5(2), which is not really a defence that is offered to the journalist who publishes information made public because it's only going to apply if it's published with the authority of the Commonwealth. Then we go to the other section that deals with publishing information that's already been made public—it, too, is heavily qualified. It's not enough that it has been made public; in addition, the journalist is meant to explore whether or not it's going to call it 'the further publication' or cause harm. It's not the situation that Senator Fawcett has put to you of 'never published information', where, perhaps, a journalist is required to check whether or not there's harm that is going to flow from publication. Here, the provision is trying to deal with information that's already been made public.

Ms Schubert: Correct, and the WikiLeaks example is therefore a good example; that is, if someone releases a lot of documents and the media would like to report about it—that's the circumstance that's trying to be captured here, I imagine—the defence wouldn't actually allow the media to do it. So it has a chilling effect on reporting of information that has already been made public, however that may have been made.

Senator FAWCETT: You said 'trying to capture'. This is based on the INSLM's recommendations to the ASIO Act around the whole 35P discussion. It's something that we've been through before with your organisation.

Ms Schubert: Could I add that we're not necessarily enamoured by the 35P process nor the previous point nor the amendments. Just because it exists somewhere else doesn't necessarily mean we agree with it.

Senator FAWCETT: Sure. But what I'm saying is: we have had a long and extensive process reaching the point of deciding that that was the appropriate balance. I understand you're not happy with it—

Ms Schubert: And I'd argue it wasn't a long and extensive process either!
Senator FAWCETT: but is it not a reasonable approach to say there is a precedent there, now in law, that has not caused heartache to people—as was foretold—and, therefore, it's a good precedent to use for new legislation?

Ms Schubert: No, I would not agree with that.

Senator FAWCETT: So you don't agree with the INSLM?

Mr Murphy: I wouldn't necessarily agree that it hasn't necessarily caused heartache for people either. It's difficult to quantify the impact of this type of legislation in terms of its chilling effect and stories that aren't told that perhaps the public would otherwise, in their own interests, have access to.

Senator FAWCETT: Thank you.

Mr DREYFUS: On Senator Fawcett's question, section 35P is a secrecy provision dealing with a very confined, small area of Commonwealth operations—namely, secret intelligence operations conducted by ASIO. What we are dealing with here is the general secrecy provisions to apply to all information of the Commonwealth. So they are not directly comparable, are they?

Mr Murphy: Certainly not in their application. The drafting of this bill captures an alarmingly wide range of activity.

Mr DREYFUS: You have given us a helpful further written submission. I am anxious not to go over the ground fully that you have dealt with in that further written submission, but, in the broad, what you are saying is that, despite the Attorney-General's efforts in the further amendments provided to this committee, which have been made publicly available, there is still a problem that a whole range of activities that are going to be conducted in media organisations are potentially criminalised. I want to particularly focus on the situation of everyone involved in the chain—editors, legal advisers, assistants. Is it your view that, even with the Attorney-General's proposed amendments, it remains the position that those people in the chain as distinct from the ultimate publisher are potentially exposed to criminal prosecution?

Ms Schubert: Yes. Correct.

Mr DREYFUS: Your suggestions that we see in the submissions are to make explicit that there ought to be a protection available to everybody engaged in the business.

Ms Schubert: Yes. That would be necessary due to editorial staff checking things—I think it goes to some of Senator Fawcett's questions—which is that journalists acting responsibly in the internal process will actually check with legal counsel. They may well have a conversation with editors. Someone may have opened an email, read an email or dealt with the information—that is another issue we can talk about, which is 'dealing with'. Our amendments go to the heart of it needing to apply to all elements in the chain.

Mr DREYFUS: Again, in the broad, what you are proposing is that, rather than journalists being required to rely on a defence, the offence be redefined so as to include within it exemptions that would cover public interest reporting.

Ms Schubert: That would be our primary objective, yes.

Mr DREYFUS: The other matter you have drawn to the attention of the committee is the problem that can potentially arise from reporting activities that might be regarded as supporting a foreign intelligence agency. You give the unfortunate example of a Wall Street journalist being sentenced to prison by a Turkish court in respect of an article which simply reported on the views of the PKK, a terrorist organisation in Turkey.

Ms Schubert: That's right.

Mr Murphy: That's correct. I would point out that our own colleague Peter Greste found himself in a similar situation and spending 400 days in an Egyptian prison. I recall that he wrote at the time, while he was still in prison, that in the climate of the war on terror, as its described, the situation for journalists trying report independently and in a balanced and fair way is becoming increasingly difficult because, in the minds of an increasing number of agencies and governments around the world, simply reporting the views of someone who is deemed to be the enemy is interpreted as the journalist supporting those views, and this legislation, I think, goes too far down that path.

Mr DREYFUS: Lest it be thought that it perhaps is only more authoritarian governments such as the government of Egypt or the government of Turkey that might engage in prosecutions, you've given a real-life example of news.com.au, let's say, having a brush with the authorities, Ms Schubert, over a story that was published online about instructions given to readers of an Islamic State magazine. Are you able to explain what happened there? I see that you've said that the Australian Press Council said the story didn't breach the council's standards of practice, but what happened?
Ms Schubert: news.com.au published a story about instructions that were included in a magazine in relation to terrorism, and that story outlined what the readers of that terrorist magazine were reading, which was how to attract potential victims, particularly Australians, using online trading sites. When news.com.au wrote that story, a complaint was received by the Classification Board, I understand, to classify that material. It was classified 'refused classification' on the basis that the story indirectly provided instruction in the doing of a terrorism act. The story was taken down as a result of that. We were asked to take it down, and it was taken down. A complaint was also made with the Australian Press Council. The complaint was not successful, and the Press Council said the story itself didn't breach the council's standards of practice. I draw attention to that because it's clearly interesting that it was found under the Classification Board that the story indirectly provided instruction in the doing of a terrorism act. news.com.au were very clear that they thought it was a story that was very important for Australians to know and in the public interest.

Mr DREYFUS: By way of analogy, is what you're saying that, if section 92.7 and 92.8, which make it an offence to provide support for a foreign intelligence agency or to recklessly provide support for a foreign intelligence agency, that merely writing in a faintly positive or non-negative—perhaps neutral—way about a foreign intelligence agency might be regarded as the commission of a criminal offence?

Ms Schubert: Yes, that's correct—particularly in the neutral way, which I think is also the case with The Wall Street Journal story. There was no support or advocating for or otherwise but neutral reporting. In fact, including the information itself may well make it an offence.

Senator FAWCETT: To follow up on that point: Ms Schubert, are you aware of Angus Grigg's article in December last year in the AFR where he describes a foreign agency trying to recruit him to, essentially, provide information to him?

Ms Schubert: No.

Senator FAWCETT: You're describing a situation where somebody innocently does things and saying they shouldn't face sanction, but here we have a firsthand account of a foreign agency trying to recruit a journalist to provide that. Surely we need to have some ability to sanction, because not all action is going to be innocent as you've just outlined there to Mr Dreyfus.

Ms Schubert: Under the espionage offences, however, there is no defence even for the news.com.au story being written, which is a concern to us. We would argue, of course, that it should be an exemption. Where there is a deliberateness or that sort of thing which has been uncovered—and I didn't read the story, so I'm not familiar with it, but we're not talking about deliberateness here. The news.com.au story and The Wall Street Journal story were actually just reports of terrorism or foreign powers in legitimate news stories, which definitely requires being dealt with in a way in the bill which is currently not there. We would ask for an exemption for that.

Senator FAWCETT: When you say that you'd ask for that, to clarify: were you consulted by the A-G's department over this round of amendments?

Ms Schubert: Yes.

Senator FAWCETT: And did you indicate to them at the end of that consultation that—did you see the amendments at the end of that consultation period?

Ms Schubert: Not their mark-up, no. We've done our own mark-up of the bill at the end of the consultation of the amendments. Some media organisations were consulted—I don't think the MEAA was—at a meeting at the Attorney-General's Department. We said at the end of that meeting, 'Thank you very much. It's been very useful. We can't comment on these until we've actually assessed how these work in practice.' There was a long list. As you can see in the mark-up version of the bill, there's a lot of detail in that bill as you go through. We didn't make any comment at the time about that. We're raising issues that remain of concern to us.

CHAIR: To be clear, with the amendments that we're discussing now, you were consulted and then briefed on the changes.

Ms Schubert: We weren't consulted. We were briefed on the changes. Sorry. That's a useful differential to make. We were briefed on the changes.

Senator FAWCETT: The Attorney-General's Department briefed you on the amendments after they had finalised the amendments.

Mr Murphy: No. The briefing I attended was well before the amendments were finalised.

Senator FAWCETT: My understanding was that there had been a briefing back to the JMO when the amendments were finalised.
Ms Schubert: There was a time frame between that briefing and the Attorney-General—and the government—sending those amendments to the Parliamentary Joint Committee on Intelligence and Security. I made the assumption there were no changes or differential between what we were briefed on at that meeting and what was actually given to us. But that was a verbal briefing, and we went and did a mark-up of the document after that.

Mr DREYFUS: I want to ask a question on behalf of Senator McAllister, who's had to go to another committee meeting, unfortunately, at this very time. She was interested in your submission about the foreign influence transparency scheme. You've helpfully provided us with a submission about the foreign influence transparency scheme. I want to do justice to what you've said. In essence, you seem to be saying in this submission is that this bill, if it proceeds at all, should be completely rewritten.

Ms Schubert: Yes, it should. It's really intended. That's right. It would also apply to industry associations that would have a member who would be a foreign principal. In the case of Free TV, it would apply to Free TV because Channel 10 is a member.

Mr DREYFUS: When you say Free TV, you are talking about the peak body—

Ms Schubert: Yes. It is the peak body for commercial free-to-air television in Australia.

Mr DREYFUS: Having as one of its members a foreign owned TV station.

Ms Schubert: That's correct. Channel 10 is owned by CBS. It would apply to the Australian Subscription on Television and Radio Association with Foxtel and Fox Sports, but also beIN Sports, ESPN and a range of others. It goes beyond just the central media companies. Given the difficulties with the bill—the way it's drafted—it actually applies to all companies with a foreign principal who would be engaging in the legitimate influencing of government in the country in which they operate, which I understand from the department's supplementary submissions is not what's really intended. Having it taken out of this process and rewritten would be an easier process than trying to redraft amendments. We've redrafted amendments here, but they are highly interrelated and highly complex, and that's looking at the three issues that we've raised.

Dr MIKE KELLY: I'll have to depart shortly, so I've got one quick question. I raised earlier the issue of an historic mechanism for engagement with the media, which was the D-notice system in Australia that was administered under the Defence, Press and Broadcasting Committee and operated between 1952 and 1982—that was its heyday. It consisted of members of Defence—the defence minister chaired it—and members of the leadership of the media organisations. It last met in 1982, and there were four notices that were generically issued at that time. It's become moribund since then. In relation to perhaps implementing your suggested amendments, it would be an alternative to some of the measures that are being put forward. I note that Attorney-General Robert McClelland tried to engage with media organisations in 2010 to resuscitate this or create a new mechanism. Would there be willingness, do you believe, amongst media organisations to revisit a mechanism along those lines?

Ms Schubert: I'm afraid that the D-notice system is something that's not familiar to me, so I couldn't comment.

Mr Murphy: Nor me, I'm afraid, Dr Kelly. We might need to take that on notice.

Dr MIKE KELLY: Perhaps that's something for you to look at and come back to us on. Effectively, a D-notice was a communication issued to the media by that committee, as I say, which included at that time 16 media representatives, and it outlined subjects that bore upon defence or national security. The United Kingdom, apart from initiating the system, have kept it going—although these days it's known as the Defence Security Media Advisory notice system, DSMA, and is still in active use. Perhaps you could revisit that. I was thinking that Attorney-General McClelland, who attempted to engage with media organisations on this and revisit a mechanism along these lines back in 2010, didn't really get much engagement on that. I'd be interested to know whether there'd be interest from the media organisations in looking at this as perhaps a complement to your amendment as an alternative to some of the approaches that have been taken in this legislation. It was a system that didn't
Mr Murphy: I'm happy to do that. I'm familiar with the D-notice system only to the extent that I know what it was, but I'm not familiar with the detail of how it operated or the history of its operations. We'd just need to take that into consideration.

Dr Mike Kelly: In theory, there are four notices that are still extant under our system. No. 1 was capabilities of the ADF, including aircraft, ships, weapons and other equipment. Notice 2 was the whereabouts of the Petrovs. Notice 3 was signals intelligence and communications security. Notice 4 is ASIS, and they're, in theory, still in existence. I'd appreciate your reflections on that. Thanks Chair. I'll have to depart now, so thank you very much.

Senator McAllister: Thank you for your most submission in relation to the FITS Bill. I wanted to ask you a couple of questions about that. You say that since your first two submissions on this question, your concerns about the FITS bill have intensified. Can you just explain briefly why that is?

Ms Schubert: In reviewing it a number of times, that interrelationship and the three categories have become increasingly obvious as concerns—that is, it applies to media companies that operate in Australia regardless of foreign principal status, particularly as the defences that are incorporated into the bill are actually not as broad as the offences themselves. So that means that there are significant ramifications for that. There are also significant ramifications—and I know I discussed this with the committee previously—in relation to commercial arrangements, so particularly content syndication. Foxtel has made a separate submission in relation to the carrying on of other channels—not only news channels but what would possibly come under the heading of entertainment channels could be perceived as trying to influence the Australian government, and you'd have no warming of that because it gets put to air without someone reviewing each and every program across all the channels. The other is that it would apply to any media company with a foreign principal that operates in Australia. So would the entire News Corporation Australia workforce have to register with the scheme? Would every conversation every journalist had with a member of parliament or with any other government official have to be recorded under the continuous disclosure obligations? That does not seem to us to be the reason for or the intent of the legislation, but that's actually the drafting as it currently stands.

Also, the bill applies to any company with a foreign principal that operates in Australia, but the defence that's currently drafted doesn't actually provide an adequate cover. If I can give my own example, it's been mentioned to me that as I have a role in influencing government policy and the government affairs arena in News Corp Australia—

Senator McAllister: As you seek to do today.

Ms Schubert: As I seek to do today, yes—clearly there's a foreign principal involved in our business, but with the exemption that currently is drafted I would need to be employed directly by that foreign principal and there's a proposed section (a) and (b) in that, and neither of those apply to me. So I would need to register; I would need to disclose and have that ongoing. I don't think that my employment relationship with News Corp Australia and the foreign principal—it being part of a foreign multinational company—is unusual; I could imagine that applying to a range of other companies and industries. The mining industry comes to mind, but it could well be a lot broader. To the extent that there's certainly a necessity to ensure that what is not intended in the bill is actually not what the bill eventually says, it does definitely require redrafting of those three elements.

Senator McAllister: You indicate in your recommendation on page 2 that:

The Bill should only apply to foreign government influence—not foreign business influence.

What impact do you think that would have on the ability of the bill to address the problem that it seeks to respond to?

Ms Schubert: I think it would certainly enable the bill to be more targeted to achieve what it seeks to respond to. It seems that the law has a very rightful place in attempting to shine a light on people, or get people to register, who are influencing on behalf of a foreign government where there is a common purpose, perhaps to bring to light—'covert' might be a term I could use there. But in fact what the bill does in its current form is it would require registration and continuous obligation by those entities who I think would be classed as having legitimate grounds to influence and engage with government officials and are usually doing it overtly, if I could put it that way, as opposed to trying to do it through secret and quiet channels. We do not deny that there may well be instances of that latter part occurring. The bill is just drafted very broadly and so captures far more, and I think, in
a compliance sense, it would be entirely unwieldy to do. I don't think anyone really wants to have every employee of News Corp Australia, Foxtel, Fox Sports and Channel 10, let alone every other organisation that may well need to register under the way in which the bill's currently drafted.

**Senator McALLISTER:** Your written submission moves through the more detailed questions in a very orderly way. Is there anything else you want to put on the record in relation to the FITS Bill?

**Ms Schubert:** No, that's okay.

**CHAIR:** Very well. Thank you for your attendance here today. If there are no further comments—

**Mr Murphy:** I think it's worth re-emphasising that the organisations really appreciate the engagement of this committee with our concerns, and we very much appreciate the amendments that the Attorney-General has already brought forward. Nonetheless, we still have very clear and pressing concerns. But we are concerned also to engage positively on a continuing basis with this committee and in this process to try and achieve an outcome that meets the express needs of the government and at the same time provides appropriate defences for media organisations, journalists and whistleblowers going about their activities in the public interest.

The only other thing I wanted to do was to leave with the committee a petition that my organisation has run online, which has just short of 9,000 signatures on it, expressing concerns specifically in relation to the Espionage and Foreign Interference Bill. It's a petition that's going to both the Prime Minister and the Attorney-General.

**CHAIR:** Thank you, Mr Murphy. Once again, we appreciate your submission. If you've been asked to provide any additional information, if you could get that to the secretariat by Tuesday of next week, that would be great. You'll be sent a transcript of your evidence and you'll be able to make corrections. Thank you very much.
Leading evidence is a serious matter and may be regarded as a matter of national security. Intrusion is that it's comparatively cheap, it's instantaneous and, most importantly, it's very difficult to detect and to attribute. Shifting tack from espionage, foreign interference, on the other hand, is a far broader field of activity. It grows with the imagination and ambition of foreign powers, ranging from a foreign power using local Australians to observe and harass its diaspora community here in our midst. Technologies, the wonder of cyberintrusion that's conducted typically from overseas to enable the theft of sensitive classified information and then using tradecraft to conceal that act—thief about the threat. Hostile foreign spies are currently conducting harmful activity against Australia. The point here is that we are in a new and unexplored cyberthreat environment. Similarly, cheap and easy international travel, globalised communication technologies, and the global trade and finance systems that we take for granted in our modern society have also opened the door for hostile foreign spies, and they are, necessarily, ruthlessly exploiting these vectors to covertly harm our Australian interests. We all recognise that we are living in the information age. I think that's generally accepted in the community, and it's hardly a surprise therefore that the theft of information, or the manipulation of information, gives strategic advantage.

To be clear, espionage now ranges from its classical form of a foreign spy typically paying an official for classified information and then using tradecraft to conceal that act—early John Le Carre stuff, if you like—to what is now complex cyberintrusion that's conducted typically from overseas to enable the theft of sensitive technologies. The wonder of cyberintrusion is that it's comparatively cheap, it's instantaneous and, most importantly, it's very difficult to detect and to attribute. Shifting tack from espionage, foreign interference, on the other hand, is a far broader field of activity. It grows with the imagination and ambition of foreign powers, ranging from a foreign power using local Australians to observe and harass its diaspora community here in our

HARMER, Ms Anna, First Assistant Secretary, Attorney-General's Department
INVERARITY, Ms Tara, Assistant Secretary, Attorney-General's Department
LEWIS, Mr Duncan, Director-General of Security, Australian Security Intelligence Organisation
MARSON, Ms Laura, Director, Attorney-General's Department
VICKERY, Mr Peter, Deputy Director-General, Australian Security Intelligence Organisation

[12:14]

CHAIR: Welcome. Although the committee does not require you to give evidence under oath, I should advise you that this hearing is a legal proceeding of the parliament and therefore has the same standing as proceedings of the respective houses. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. The evidence given today will be recorded by Hansard and attracts parliamentary privilege. I now invite you to make an opening statement.

Mr Lewis: Thank you for the opportunity to appear before the committee today. Building on ASIO's previous appearances before this committee—and we've made a number of them—to discuss the espionage and foreign interference bill, I'd like to take the opportunity today to make some further remarks relating to ASIO's position. I would seek to comment on the context in which we are operating and to reinforce some of the case examples that were provided to this committee previously. My remarks will build upon public statements already offered in ASIO's annual report—and I do commend that report to you; it has a good amount of detail in it about the challenge we face—and, of course, in our various estimates appearances.

I'd like to talk about five things today: the unprecedented nature of the threat; the outdated and inadequate provisions of the current laws as we see them; the pressing need for a public deterrent; the inadvisability of exemptions or carve-outs; and, finally, I'd like to briefly remind the committee of those examples or case studies that we have provided where, under existing law, prosecution hasn't been possible. I want to put this up-front: ASIO strongly supports the revised espionage and foreign interference bill. We also support the measures proposed to increase the transparency surrounding foreign influence in Australia. We see these reforms as providing integral and urgently required tools to help combat the unprecedented scale of espionage and foreign interference activities currently being conducted against us.

Let me talk about the threat. Hostile foreign spies are currently conducting harmful activity against Australia on an unprecedented scale. I said that in the annual report. Put simply, there are more foreign spies today, and they have more ways of attacking us. I just want to trawl through that. There is a more diverse range of hostile foreign intelligence services working against us than we've had in the past. You know that the primary Cold War contest, between the West and the Soviet bloc, has been replaced by a much more complex international security environment, with a wide range of foreign powers independently jockeying for advantage, and many are aggressively pursuing espionage and foreign interference activities to assist them in this contest. Many of these hostile foreign intelligence services have significantly increased the resources that are dedicated to foreign intelligence collection, and they have also greatly improved the spectrum and sophistication of their activities. Our open democracy and the features of globalisation involve hitherto unimagined movement of money, movement of people, movement of information—which I hasten to say enrich our country and our society but nevertheless provide an unprecedented array of vectors that foreign spies can and do use to attack us. The most obvious example of this is the widespread use of the cyber vector to conduct espionage and interference. Cyber is a vector that simply did not exist during the previous high point of intelligence activity against Australia, the Cold War. The point here is that we are in a new and unexplored cyberthreat environment. Similarly, cheap and easy international travel, globalised communication technologies, and the global trade and finance systems that we take for granted in our modern society have also opened the door for hostile foreign spies, and they are, necessarily, ruthlessly exploiting these vectors to covertly harm our Australian interests. We all recognise that we are living in the information age. I think that's generally accepted in the community, and it's hardly a surprise therefore that the theft of information, or the manipulation of information, gives strategic advantage.

To be clear, espionage now ranges from its classical form of a foreign spy typically paying an official for classified information and then using tradecraft to conceal that act—early John Le Carre stuff, if you like—to what is now complex cyberintrusion that's conducted typically from overseas to enable the theft of sensitive technologies. The wonder of cyberintrusion is that it's comparatively cheap, it's instantaneous and, most importantly, it's very difficult to detect and to attribute. Shifting tack from espionage, foreign interference, on the other hand, is a far broader field of activity. It grows with the imagination and ambition of foreign powers, ranging from a foreign power using local Australians to observe and harass its diaspora community here in our
country through to the recruitment and co-opting of influential and powerful Australian voices to lobby our decision-makers.

Foreign spies are now not only interested in government information; we know that they also pursue privileged information and intellectual property from the private sector. That includes the agricultural sector, the mining technology field, medical research, the tertiary institution research and development field and, of course, the financial sector data. In fact, when I think about this, there would be very few walks of life that would be immune from potential foreign intelligence interest.

I want to circle back to where I started on this subject and reiterate that ASIO sees a growing volume of both espionage and foreign interference. In short, we face more spies and more vectors than in the past. I also note that our experience shows that foreign intelligence services have a patient approach to their craft. This means that, while some espionage and interference activity is readily and immediately apparent, some other effects don't become evident for many years after the event, when the harm is generally irreversible. When looking at events such as the reported assassination in the United Kingdom a week or two ago, which the Prime Minister has rightly described as a heinous attack, we should not consider ourselves immune from such extreme acts. I note that, like Australia, UK Prime Minister May has also flagged consideration of further powers to clamp down on the hostile activity of foreign agents. This is the current thing that's running presently. Our international allies and partners with whom we share threat information tell us resoundingly that Australia is not alone in confronting a new threat environment, one that's different from what we've seen before. In ASIO's view, we must now adjust to this harsh reality. One of the key adjustments that I believe is necessary to support my organisation in our mission is the legislation before us today.

If I could make some remarks about current laws being outdated and inadequate, it has been said recently that Australia's existing laws are sufficient to deal with the current espionage and interference threat. With the greatest respect, I do not share this view. Indeed, it's my firm view that the current criminal offences are inadequate to deal with the foreign intelligence threat that we now face. Based on ASIO's recent investigative and operational experience, Australian criminal laws in relation to espionage and foreign interference activities have proven outdated and deficient. Current offences are either inadequate or unworkable in the modern security environment. Indeed, in the case of foreign interference, there are no offences at all. The net effect is that our nation's freedom of decision-making and core interests are not adequately protected by the rule of law.

As has been the case for counterterrorism in recent years, we urgently need new espionage and foreign interference offences that are fit for purpose. Just as we tailored our counterterrorism laws to deal with new dynamics such as foreign fighters and lone wolf attackers, we need new espionage and foreign interference laws specifically designed to defeat the tradecraft that we see being used by foreign spies and malicious insiders. The proposed laws as amended will enable a vital whole-of-government response to the current foreign intelligence threat—the type of response that cannot be achieved under the current inadequate and outdated laws. From our point of view these new laws will provide an opportunity for ASIO to work closely with law enforcement partners to ensure the arrest and prosecution of those caught engaging in espionage and foreign interference. The laws will provide powerful and necessary means to deter and disrupt this type of activity in a way that a security service such as ours cannot achieve alone. The laws include, as you know, modernising espionage offences. They involve secrecy offences and new sabotage and economic espionage offences.

I want to make some remarks about the deterrent effect, because this is very important. I believe these new laws are needed urgently. There's a pressing requirement to deter hostile foreign spies who are conducting espionage and foreign interference against Australian interests as we sit here today. The proposed laws would, in my view, make Australia a much harder target for foreign intelligence services. It would be demonstrably more difficult to operate here. Since ASIO was established nearly 70 years ago, the nation's security service has been and is doing all that we can to use investigative, operational and advisory tools to combat and disrupt these activities. However, facing no realistic prospect of criminal investigation and prosecution for their activities against us, our foreign adversaries are currently shielded from the significant disincentive of public exposure and punishment, and they are taking advantage of this gap. In our view the proposed reforms are well targeted on the covert and malicious activities being used against us, without impinging or compromising the very institutions that we are seeking to protect.

Criminal prosecutions for espionage, foreign interference, secrecy, sabotage and economic espionage offences that are tested in our courts and reported in our media will send a very powerful message to those orchestrating such activity against us. Prosecutions will also discourage individuals from being caught up in these activities. Prosecutions will provide strong disincentives for those who may become unwittingly or recklessly involved in harming Australian interests. Just as this committee is considering the legislation before us today, I assure you...
that so too are our adversaries considering our legislation. While you're looking at closing the gaps in legislation, they are looking for gaps to exploit.

Let me speak about exemptions. This is a contested space, I'm aware. I would like to briefly comment on submissions regarding the inclusion of exemptions for classes of people or industries. ASIO does not support the concept of exemptions or carve-outs. It's ASIO's view that such exclusions will fundamentally undermine the effectiveness of the legislation. We know, from decades of our operational and investigative work, that our adversaries deliberately structure their activities to exploit the existing vulnerabilities in legislation to protect both foreign spies and governments engaged in activity and the individuals whom these foreign spies seek to recruit.

I'd like to draw on some relevant examples now to assist the committee, first with respect to the foreign intelligence threat to journalists and the media. Let me say that, to their enormous credit, Australian journalists have, at times, self-reported on approaches by foreign spies seeking to recruit them for the purpose of gaining access to decision-makers and privileged information. Angus Grigg from *The Australian Financial Review* provided, a couple of days before Christmas, an illuminating account of one such approach, albeit an unsuccessful one. While I won't be drawn or confirm the details of this specific example, I can say that the events described by Mr Grigg are stunningly consistent with other examples known to ASIO, and they shine a clear light on the problem. Journalists and intelligence officers generally have very different motivations, but the committee might be surprised to know that the activities of intelligence officers and journalists are not that dissimilar. Both of us pursue information and insights that are held largely beyond the public view. Accordingly, journalism can provide an ideal cover for a foreign power seeking to hide its intelligence activities, and journalists are therefore, quite unsurprisingly, frequently targeted by foreign spies.

I'd like to publicly acknowledge the significant contribution of Australian journalists in shining light on espionage and foreign interference in this country. However, ASIO can't guarantee that we're aware of all approaches that are made to Australian journalists and we can't guarantee, of course, that all of those approaches have been rejected or reported. Broad exemptions for the media and journalists would, in my view, effectively leave a door wide open for foreign spies to exploit and may have the unintended consequence of increasing the intelligence threat that's faced by our journalists.

Coming towards the end of my comments, recent examples of harmful conduct that can't be prosecuted we have trawled through some detail in previous hearings, so I don't wish to go back over the detail of that. In the interest of time, I just want to highlight the examples again that span a range of harmful activity that has been impacted. Firstly, there was an Australian academic, who we discussed, who was recruited by a foreign spy and agreed to commit espionage by stealing classified information—that's a live case. Secondly, an Australian businessperson, another one of our fellow countrymen, consciously worked for a foreign spy and recruited an Australian official to pass privileged information. Thirdly, there was a case of a sleeper agent sent to Australia by a foreign spy service and activated decades later to inform on dissidents and support overt intelligence operations here in our country. There's the case of the Commonwealth officer who removed large volumes of electronic media and agreed to pass on information to a foreign spy. And there's an Australian citizen who received training from a foreign spy service and concealed this fact during an Australian government security clearance application.

In each of those examples, the current legislative regime did not permit prosecution, and yet each of these covert and deceptive activities sought to harm Australia's interests relative to the foreign powers that orchestrated them. Those involved took steps to conceal their activities and avoid detection. Some sought to secretly affect our decision-making. Some pursued unfair advantage for foreign powers by undermining or disclosing Australia's intentions and capabilities. Most importantly, some put Australian nationals and residents directly in harm's way.

It's my view that it's entirely proper that the Australian public ask: is it acceptable that the forms of conduct that I've mentioned here occur without the prospect of prosecution? We Australians should ask ourselves the question: are our families, our workplaces, our communities and our nation adequately protected by contemporary laws that address the current threats of espionage and foreign interference? In my capacity as the Director-General of Security and the head of ASIO, I can say without reservation that adding modern, practical and meaningful criminal offences to your security intelligence service toolkit will represent huge progress in our collective efforts to counter the growing espionage and foreign interference threat facing our nation and it will provide our country with the protections we need. Thank you. I'm sorry to have taken up so much time, but it's important that I say these things. I'm happy to take your questions or go where you wish.

**CHAIR:** Director-General, thank you very much for your statement. Before we move to discussion, Ms Harmer, did you have anything that you wanted to add?

**Ms Harmer:** I'll be very brief and just thought I'd just give you an update since our last appearance before the committee and to quickly address a couple of issues that have been raised in supplementary submissions. The
committee has received amendments proposed by the Attorney-General relating to secrecy and espionage offences. I don't propose to step through those now but look forward to assisting the committee with any questions on those amendments.

Against that background, I should note that the Attorney-General has indicated that he is open to further amendments to both bills following consideration of this committee's recommendations. I would not want the committee to be under the impression that other issues raised in submissions and in evidence are not being considered simply because they don't appear in those amendments that have been provided to the committee during the course of this inquiry.

We have considered the supplementary submission of the joint media organisations with respect to the espionage and foreign interference bill. It is our view that some of the amendments proposed in that submission are not necessary. The offences applying to non-Commonwealth officers have been significantly narrowed, as the committee will have seen, and the defence for members of the media has been broadened. The department's view is that that strikes an appropriate balance and takes into account a range of the concerns that have been expressed.

The joint media organisations have pressed that exceptions are preferable to a defence to the offences, and have further suggested that consideration of an exception arises at a different stage in the criminal process. For the avoidance of any doubt, I thought it would be useful to point out that that is incorrect; an exception operates in precisely the same way as a defence, and it does also achieve their stated aim of not risking jail for doing a journalist's job. A defence is considered by both the AFP and DPP in determining whether to prosecute or investigate an offence, and moreover the prosecution policy of the Commonwealth expressly requires the Director of Public Prosecutions to take into account available defences before proceeding, and not in court in the course of a prosecution as has been suggested by the joint media organisations.

I should also quickly turn to the expressed concern about the language of support that the joint media organisations have raised. They've expressed concern about the breadth of the term 'support' in relation to foreign intelligence agencies. I should say that the term there appears to have been misread or misconstrued. The explanatory memorandum, which I will draw the committee's attention to, clarifies that support in that context covers the provision of a benefit or other practical goods or aid. I would also say that that language is consistent with, and mirrors, the language used in the terrorism offences of providing support to a terrorist organisation. We're happy to speak further to the issues raised by the joint media organisations in relation to espionage and foreign interference during today's hearing if that's helpful.

I should also say that the department continues to work with the Inspector-General of Intelligence and Security and the Commonwealth Ombudsman to address issues raised by these organisations which they've drawn to the attention of this committee and which we have also continued to discuss with them. Again, the fact that those changes are not reflected in the draft provided to the committee by the Attorney does not mean that those are not being pursued, and we continue to work on those.

The committee also raised with us in additional questions the issue of compliance of the consequential amendments to the Australian Citizenship Act with the Statelessness Convention. We have considered this issue further, and our view is that some changes may be needed to remove a small number of offences in the bill from the scope of the definition of 'national security offences' in the Australian Citizenship Act, and we are working through those details with the Department of Home Affairs, which administers the Australian Citizenship Act.

Very briefly on the Foreign Influence Transparency Scheme Bill, the Attorney has again said that he is open to amendments on that bill to ensure that it meets its objectives of providing transparency in respect of foreign influence. One of the amendments that we consider necessary is to clarify that the bill does not override parliamentary privilege, and we spoke about this previously. We have closely considered the submissions from the clerks of both the House of Representatives and the Senate and consider that an amendment may be required to restrict the secretary's powers to request information where it forms part of proceedings in parliament. That would address the issues that have been raised.

Finally, I should mention, seeing as it was addressed in questions this morning, that we have not had the opportunity to review the supplementary submission of the joint media organisations in respect of the foreign influence transparency scheme—having received notification of its lodgement this morning—but we are of course happy to answer any questions that you might have.

CHAIR: Thank you, Ms Harmer. Director-General, if I could start with your statement. You mentioned the unprecedented nature of the threat and also the inadequacy of the current legislation. I think you gave us five examples of Australian citizens involved in some form of espionage. Can you talk a bit about how foreign
intelligence services are exploiting the gaps in our legislation and, if you could, highlight particular areas of concern?

Mr Lewis: One of those examples that I cited, the businessman, is a very good case in point. Again, without, unfortunately, going into the details of the case, it was very evident that the legislative inadequacies had provided a hole through which that particular case had driven. Being an intelligence agency ourselves, we understand that where there are gaps in a legislative framework then they are opportunities that should be exploited, because you can operate more freely without restriction in the gaps, whereas when you're operating under a very clear regime of legislation you are constantly running the risk of, upon being caught, being prosecuted, and then the entire operation, which can be very expensive at times and very laboriously put together, can be compromised. Gaps in legislation are certainly one of the environmental checks that any foreign intelligence agency will do before they start targeting Australia, or any other country for that matter.

Mr Vickery: I would just add to that: in relation to that specific example, where you've got the businessman who's working for a foreign intelligence service who's recruited an Australian official, the businessman and the foreign intelligence service are very careful not to make mention of harm. It's a classic sort of recruitment and motivation technique—that is, you don't let the person think they're actually causing harm. So they're very careful to avoid such terminology. In this particular case, there's no reference to security or defence information either; it's another type of information. So by purposely avoiding references to that type of thing, there's a gap created immediately—if that makes sense.

CHAIR: Sure. And on that point, if we were to exempt entire professions or sectors, what I'm picking up from you is that would increase the risk profile to your work at ASIO.

Mr Lewis: It would increase the challenge for us because there would be, in my view, a very clear opportunity for a foreign intelligence service to exploit that carve out—and the journalist issue is the most acute. I hope I've said some very complimentary things here about the profession of journalism, because we are enormously grateful for the support that we get from that profession, but I know that if that particular class is exempt from the legislation it will automatically become a target for foreign intelligence services. That is where you would drive into it. It just so happens, of course, that the profession of journalism is a good vector anyway, because of, as I mentioned, the similarity and the nature of a journalist's work to get behind what is the public face of commentary, to give a more in-depth analysis and to explain to the public what's going on. Now that is a very, very good vector for a foreign intelligence service to use, and they do. They do. We have cases of that right now on the books, so it's quite important that we understand that.

If other professional areas are to be exempt, there would be a similar dynamic. I'm not saying other areas would be necessarily as attractive as perhaps the journalist vector for a foreign intelligence service, but nevertheless, if they were exempt, they would become an object of interest or a subject of interest for a foreign intelligence service.

CHAIR: There has been quite a bit of media reporting on alleged foreign espionage in Australia and overseas. Without commenting on specific cases—I know the limitations we have here in this public hearing—I wonder if you could confirm whether ASIO is seeing efforts similar to what has already been publicly reported? You mentioned the Angus Grigg article published on 21 December 2017 about the PRC's effort to recruit him. I'm assuming you have seen similar things that haven't been reported—efforts to recruit journalists in Australia? Is that right?

Mr Lewis: That is the case. I obviously can't and wouldn't comment about the Angus Grigg case. He wrote the article just prior to Christmas. I think I said in my statement that the case he described is astonishingly similar to other cases that we have seen in this country, where journalists—not necessarily Australian journalists, but journalists operating in Australia—have been the subject of approaches.

Mr Vickery: And Australian journalists operating overseas as well.

Mr Lewis: Yes.

CHAIR: If we could move then to state-controlled media, in its 2017 annual report to Congress the US-China Economic and Security Review Commission states:

Xinhua—

I think that's the correct pronunciation of the official press agency of the PRC—serves some of the functions of an intelligence agency by gathering information and producing classified reports for the Chinese leadership …
Does ASIO have concerns about directly or indirectly state-controlled media organisations being used as vehicles for espionage, foreign interference or covert influence?

Mr Lewis: It's obviously not appropriate for me to talk about Xinhua as a case in point, but the issue you raise is: are we in, a general sense, worried about state-owned media and the control of that media and the influence it can therefore have? The answer is absolutely yes.

CHAIR: And if we could talk about the university sector, Professor Clive Hamilton has made allegations that PRC is recruiting academics and pushing into our university sector. Does ASIO have concerns around espionage being conducted on university campuses and through those institutions?

Mr Lewis: Again, I wouldn't want to speak specifically to what Professor Hamilton has written and the cases that he's cited. But, again, the thrust of your question is: are we concerned about tertiary institutions being a vector through which espionage and foreign interference can be exerted? The answer is unquestionably yes, and I believe we said as much in the annual report.

CHAIR: I will transition now to the Foreign Influence Transparency Scheme, which is aimed at a different problem. It's the EFI bill, so different offences: covert foreign influence rather than espionage or foreign interference. Are foreign governments using intermediaries to covertly influence Australian politicians and officials, and is this covert influence entirely separate from the threat of espionage and foreign interference?

Mr Lewis: Reflecting on the second part of your question first: they are interrelated; they are intertwined. There is a nexus between the two. The first part of your question: is there evidence in the cases that we are facing that this is a vector for influencing political figures and, generally, leadership in Australia? The answer is, yes.

CHAIR: And if you were to give a weighting to either of the two—espionage or foreign interference—which poses the greatest threat?

Mr Lewis: I'm not sure I can give an adequate answer on that. They are different vectors and they can cause different harms. The thing that concerns me is that, when we're talking about espionage, it's generally an intelligence agency versus an intelligence agency. That is a matter between intelligence professionals. When you come to the subject of foreign interference, of course it becomes far more diffuse through the society. To that end, it could be seen as more insidious. But with regard to the actual harm that comes of either, of course they can both be equally harmful.

Mr Vickery: They're obviously categorised somewhat differently, but they are intertwined to the point where you can have one leading to the other. Where a person seeks to exert foreign interference, that could lead to an espionage example. It's very hard to separate them, in a sense, because of the interconnections between them.

CHAIR: In this inquiry we've focused on offences and the transparency scheme, but are there other gaps in ASIO's investigative framework or toolbox that need attention from the government?

Mr Lewis: There is one other area that I think would be very helpful to us. We would need to do some more work around this, but it would be around the issue of questioning warrants. I just cite the example that occurred in the UK the other day. If you would imagine that such a thing occurred in Australia, and we had some indication of it being in prospect—that is, we had a lead that said this might happen—then to be able to move very quickly with a questioning warrant would be very, very helpful. But it's something that I would like to develop further. I think it's something that we need to talk more about.

CHAIR: Noting the time constraint that we have, I will hand to Senator Fawcett.

Senator FAWCETT: I have a couple of questions for the AGD. Media organisations raised concerns about journalists facing criminal liability for passive offences, for someone who accidentally overhears a conversation or is handed a file. Could you talk about your view as to whether that's a valid concern?

Ms Inverarity: Certainly the definition of 'deals' in the bill continues to include receiving information. I think that has been the centre of some of the consideration. However, in the redrafted offences, which include new offences for non-Commonwealth officers, which would be the ones applying to people involved in the media, it is a significantly narrower list of information that will be covered by those offences, and all of the information will require proof of a fault element that the person was reckless as to the information they were dealing with. In the previous bill, strict liability applied in relation to security classified information, and that was potentially a broader term, but it has now been significantly narrowed, and the person will have to have a level of knowledge about that information in order to commit the offence. I don't think someone can inadvertently or in a completely passive way commit the offence, even though the verb 'to receive' is covered in the list of dealings.
Senator FAWCETT: You said you don't think. Can you point to the legislation? The concern that's been raised is that there is a fair bit of judgement by Commonwealth officers, whether they be ministers or officials, as opposed to the legislation very specifically laying out the boundaries to address that concern.

Ms Inverarity: Certainly. In proof of the elements of this offence, the prosecution will have to prove both the physical elements—that a person did receive the information and that the information was of the nature described in the offence—and a fault element for each part of the offence. A person will have to intentionally receive the information and will have to have a level of knowledge about the fact that it's Commonwealth information and that it is one of the categories of information. You can't inadvertently be reckless as to those matters. You will have to have a level of knowledge, and if that is established then the offence can be proved.

Senator FAWCETT: Can you give the committee a little bit more information about why you've been so insistent on including the receipt element as opposed to just the communicating element?

Ms Inverarity: Certainly. It's to cover the continuum of behaviour that can constitute a harmful matter. As you'll see in the offences, the communication is treated more seriously than the other dealings, but, in working closely with operational agencies about what they see in the threat environment, the list of matters that are covered by the definition of 'deals' reflects their advice on what is actually happening with information that falls within these offences. So, as part of the drafting process, each of those matters was carefully considered as to whether there were harmful case examples that fell within those categories.

Senator FAWCETT: We've had a number of witnesses comment that there hasn't been adequate discussion on a broad basis for some of the measures in this legislation. Are there precedents that you're drawing on for this issue of dealing with classified information or information more broadly?

Ms Inverarity: There are precedents, but we haven't exactly replicated one particular provision. It's been a first-principles approach with what is happening, what is being seen in the environment that is harmful and needs to be criminalised. In some cases that will and does overlap with other offences or other parts of the statute book, but our starting proposition was to work with the agencies on what harm is being caused and then to reflect that in the legislation.

Senator FAWCETT: I'm continuing with the joint media organisations. They've raised concerns that even the revised defence still only applies to journalists and doesn't capture support staff. Do you have a position on that?

Ms Inverarity: Certainly. Paragraph (c) of that defence would not require the prior publication to be authorised by the Commonwealth, and also their request that subparagraphs (d) and (e) be removed. I read those as additional protections. They read them as potentially limiting the protection. Could you provide some comment on that?

Ms Inverarity: I think they might be two separate issues. The latter goes to the foreign interference offence of supporting a foreign intelligence agency. Ms Harmer addressed in her opening statement the fact that we think the term 'support' covers much more practical, material things than expressing a view that aligns with that of an organisation. So we see them as separate issues, I think.

Senator FAWCETT: They've expressed concern across the spectrum: things from the support staff right through to arguing that somebody who reported favourably on a foreign intelligence service might be captured. Is there any basis for a concern such as that?

Ms Inverarity: We're very open to considering their views as to why that broadened definition is still not sufficiently broad. We've seen their redraft. I think we'd like to better understand their reasoning for thinking that it's not sufficiently broad. But certainly we're very open to suggestions as to how that could be broadened to cover the types of staff who are legitimately involved in the reporting of news media but not so broad that it can cover everyone regardless of whether they are actually connected to that process of reporting the news.

Senator FAWCETT: Finally, I had a long discussion with them about section 122.5.8(b), about the prior publication, and whether or not that had a caveat on it that it had to have been authorised or not authorised by the Commonwealth, and also their request that subparagraphs (d) and (e) be removed. I read those as additional protections. They read them as potentially limiting the protection. Could you provide some comment on that?

Ms Inverarity: Certainly. Paragraph (c) of that defence would not require the prior publication to be authorised by the Commonwealth. Paragraphs (d) and (e) do limit the defence. They're extra matters that the defendant would have to discharge an evidential burden in relation to. We consider that they do essential work in the defence and that removing them would be problematic. Just because information has previously been published anywhere does not mean that further publication of that information can't cause significant harm. The obvious example is a document leaked that discloses the identities of Australian intelligence officers around the world. In fact, subsequent publication will amplify the harm that can come from that disclosure by making it more broadly available and therefore leading to much graver risks of harm to those individuals.

Senator FAWCETT: The Law Council raised the issues of the interaction with other legislation. We had a discussion about the Attorney-General's comment that he would be returning to the IGIS's concern by putting in a clause to talk about the interaction with other legislation. We talked about the fact that that could apply to...
whistleblower legislation, which clearly covers public servants. They raised the concern about people who aren't public servants but come into receipt of information that may expose some illegal or inappropriate dealing by government. How would they be covered if there's no legislation covering them for whistleblowing but it is clearly in the public interest to disclose malpractice?

Ms Inverarity: The issue that we're working through with the IGIS and the ombudsman is to ensure that the specific immunities that are provided for in the legislation are not in any way overridden by defences that are included in this act, and that would extend to the Public Interest Disclosure Act as well. In relation to the broader issue of other whistleblowers who are not Commonwealth officers, I accept that the Public Interest Disclosure Act doesn't cover those, but it doesn't mean that there aren't means to bring that malpractice, corruption or whatever is alleged to the appropriate authorities without publication of it in the media.

Senator FAWCETT: So, if something is classified, reporting to IGIS would be one of those channels to raise to an independent body the fact that there has been malpractice without going on WikiLeaks or something and publishing documents.

Ms Inverarity: That's correct. My understanding is that IGIS's functions are not limited to receiving information from public officials the way that, for example, the Public Interest Disclosure Act would be.

Senator FAWCETT: Thanks.

Senator McALLISTER: Thanks for your evidence, and, Mr Lewis, thanks for being here and providing your opening statement. It's perhaps important to say initially that we of course accept the propositions you've put about the changing nature of the threat environment. I accept the logical conclusion of that, which is that we do need to update and change the legislation that regulates that environment. The evidence this morning from a number of witnesses, particularly coming out of the criminal law profession, is that they are concerned that inconsistencies with the architecture of the proposed espionage bill with regard to espionage and secrecy offences have the potential to create significant uncertainty in the criminal law. They provided a number of examples of the ways that new terms, new ideas and variations between the expression of a concept in one part of the legislation and another might in fact generate problems in the way that the law is practically applied for prosecutors and defendants. They gave the example of the way that the idea of harm, or harm and prejudice, is deployed across different offences in the proposed legislation. They talked about inconsistencies in the ways that the offences cascade from aggravated offences through to reckless and standard offences. They talked about the uncertain combination of preparatory offences with conspiracy and the actual committing of the offences. The argument, I think, was that the legislation could be made more certain if time were allocated for further consultation and engagement with legal practitioners.

I suppose this is my first question to you, Mr Lewis: certainty is part of creating the deterrents that you're seeking, isn't it?

Mr Lewis: Without question. I wouldn't demur from the notion that we should make any legislation as clear as possible. I think that's uncontested.

Towards the end of your comments there, you mentioned the issue of timeliness. I hope that, in the comments I made, it was apparent to members of the committee that the threat that we face is a current one. This is something that is happening now, so—obviously without wishing to be indecent in the way that we put legislation together—there is a pressing need to get some statutes on the books around this issue, because we are missing opportunities on a fairly regular basis.

Ms Harmer: Could I just offer some comments from a legislative drafting perspective. We certainly value the views that have been received and the submissions that have been made, and we have had a close look at those. But, in terms of that question of legislative certainty, some of those issues that have been raised are ones which are not unknown to the Commonwealth statute books. The cascading offences, as you describe them, have actually been useful in providing greater certainty around how conduct will be criminalised, rather than putting a single offence and having a large penalty. Then there can be considerable sentencing discretion within that. Likewise, preparatory offences, although newer, are not unknown to the statute books and have been used in terrorism offences and in offences in relation to online harm against children. So we have, where appropriate, adopted and built on existing concepts which are known to the Commonwealth Criminal Code. Again, there is that body of jurisprudence and knowledge around the operation of the Commonwealth Criminal Code.

Just in relation to disparity of language, obviously, from a legislative drafting perspective, we seek to provide clear definitions, and a number of terms have been defined. Some of the areas in which differences have been pointed to have actually been to draw on and correct alignment with the language used in the ALRC report around secrecy offences. So, where there are some differences, it's actually been to create that certainty by linking it to
concepts which are known and which have been subject to discussion and commentary. Certainly we would agree with the objective of providing clarity in legislation, but clarity and consistency are not necessarily the same thing, and we seek to draw distinctions where that's appropriate.

**Senator McALLISTER:** Do you think that that's been achieved? I note your point that some of the distinctions that are drawn, or some of the differences, may have been an attempt to deliberately engage with different legal concepts, but are you satisfied that the bill as drafted provides the necessary level of consistency to deliver a certain legal framework?

**Ms Harmer:** I think what I'd say is that there are a number of issues where we've flagged to the committee that there are areas in which the bill would benefit from amendments, and there are a number of issues that we're looking at. I don't think those are around clarity of drafting; they're more around the extent to which the bill achieves the policy objectives and the extent to which there may be some consequences that have been drawn to attention where some refinements would be appropriate. But, from a drafting perspective, I can broadly say that the bill gives effect to the intended outcomes, and we are certainly benefiting from the submissions and the deliberations of this committee in terms of any further clarity that might be required.

**Mr DREYFUS:** If I can just intrude on Senator McAllister's questioning for a moment, you've said a number of times, Ms Harmer, in the course of your opening statement and in answers to questions from the chair and from Senator Fawcett that the department is looking at amendments. We've had a set of amendments to the secrecy part, to schedule 2 of the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017. Are we to take it that there are other amendments coming from the government?

**Ms Harmer:** As I said to the committee previously, we are looking at a range of issues, but—

**Mr DREYFUS:** No, I'm trying to get beyond that, Ms Harmer, because—if you let me finish—the committee has been asked to look at a bill. The government, halfway through the committee's deliberations, has provided a huge set of amendments to the secrecy part of the bill. You're sitting here, as the senior representative of the department, saying that there are yet further amendments that the government is working on. So, from the point of view of self-interest of this committee and self-preservation and the orderly conduct of this committee's work, I'm asking you for a straight answer: are there to be further amendments coming—not, 'We're looking at it,' but are there further amendments coming?

**Ms Harmer:** If I can answer that question in a couple of steps—and I appreciate that you're—

**Mr DREYFUS:** Go for it. Okay. Further obfuscation is great, Ms Harmer, but I've asked you a direct question. Are there further amendments coming?

**Ms Harmer:** I'm not going to obfuscate the committee.

**Mr DREYFUS:** If you need to take two or three steps, take them, but, if you're not giving a straight answer, tell me, 'I'm not going to give you a straight answer.'

**Ms Harmer:** I'm going to reflect on the comments that the Attorney-General has made, which are to indicate his willingness to consider amendments that might be required to this bill and indeed to particularly reflect that there might be amendments as a result of the deliberations of this committee and its findings. This committee—

**Mr DREYFUS:** No, that's a different thing, Ms Harmer. Sorry. If you think I'm being rude, it's because this committee is being placed in an invidious position by the haste with which the government has proceeded, the disorderly way in which consultation has occurred, the disorderly way in which this committee has been given some amendments and then being told by you that the department is working on further amendments. This committee should be asked to consider legislation the government is proceeding with, not asked to consider legislation the government is not proceeding with. So when are the amendments that you are looking at to be provided to this committee?

**Ms Harmer:** There are no further amendments to be provided to this committee. That's what I'm saying.

**Mr DREYFUS:** So what are you looking at?

**Ms Harmer:** We are looking at the range of issues that have been raised by submitters to this committee and in commentary, as I think the committee would expect. When there are submissions made to this committee which raise concerns or ask questions about the bill, we would naturally simultaneously consider those issues whilst the committee is looking at those. Where a logical concern has been raised, we are looking at that as well, and we have been forthright with the committee in indicating where we believe that a valid point has been raised and ought to be considered further.

**CHAIR:** In fairness, Mr Dreyfus, Ms Harmer is not the executive. That's a question for the Attorney-General.

**Mr DREYFUS:** Yes, but the reason for my question, Chair, is a frustration—

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INTELLIGENCE AND SECURITY COMMITTEE
CHAIR: I understand the reason for the question.

Mr DREYFUS: The committee has been given a bill. The government, through its senior representative here, is saying that there are further changes being considered, and we might be completely barking up a uselessly wrong tree by looking at a bill that the government's already decided it's going to change.

CHAIR: I appreciate the limitations on representatives of the AGD here today, so, if your frustration is going to be given further expression, I'd ask you to reserve it for the executive.

Mr DREYFUS: The executive's not here, so I have to deal with who's here. I'll give it back to Senator McAllister.

Senator McALLISTER: There have been a lot of essentially technical issues—but with significant policy consequences—raised over the course of our hearings, and you've indicated that some of those you've already dealt with; some of those are being dealt with in another process not associated with our committee. The Law Council this morning gave evidence about drafting and policymaking processes that have been undertaken in the past that involve consultation with practitioners prior to the release of the legislation and prior to the examination of a bill by a committee like ours. Why was that not undertaken in this instance?

Ms Harmer: I think that may be a question I've answered before another committee, but forgive me if my recollection is incorrect and it was this one. Ultimately the question of consultation on the development of legislative amendments is one for the government—and to determine whether it wishes to release exposure draft legislation and whether it wishes to consult on the principles or indeed to introduce legislation and to have a matter considered by the parliament or indeed a committee as well. In this instance, the Attorney-General at the time determined to introduce those amendments, and I believe he publicly indicated prior to doing so that it was his intention to refer those amendments to this committee and that this committee provided an appropriate forum for the consideration of the detail of those amendments.

Senator McALLISTER: Did you as a department provide advice to him about that decision?

Ms Harmer: I don't believe we were expressly asked to do so. It was his express intention to proceed in this manner.

Senator McALLISTER: So Senator Brandis, who was at the time the Attorney-General, made the decision that this would proceed without any public consultation prior to legislation being introduced into the parliament?

Ms Harmer: It was a decision of government to proceed in this matter, but, yes, that's correct.

Senator McALLISTER: Is the government contemplating any other consultative process, given that you are involved in examining the possibility of further amendments? Are you consulting with stakeholders, or are you exclusively reliant on the evidence that's being brought to this committee?

Ms Harmer: We've been speaking to a range of stakeholders. One, for example, which I mentioned in my opening statement admittedly is within government, although I should say that the inspector-general is independent, but we've been working with the inspector-general and the Ombudsman on specific questions raised there. We have also had discussions that have been referenced by the joint media organisations this morning. We've had further discussions to look further into some of the comments that have been made by a number of groups on the amendments, so we've benefited from those as well.

Senator McALLISTER: If a community organisation wished to involve itself in this consultation that's taking place, how would it go about doing that?

Ms Harmer: There are obviously two bills that are before the committee. If an organisation were to come to us, we'd certainly draw their attention to the fact that there is an inquiry on foot, noting of course that submissions have closed for this inquiry. Where there is an inquiry, we would encourage a community organisation to make a submission. But of course any member of the public or the community, an organisation or an individual, is at all times able to provide observations, commentary, whether it be to the minister or to the department, whether there is a consultation process in train or not. Indeed, there are members of particular groups that have approached the department directly, and that's always open.

Senator McALLISTER: But you're conducting what I would describe as an ad hoc consultation with selected stakeholders. There's no broad process that someone can become involved in to assist your department in the work that you're presently undertaking?

Ms Harmer: There's not been an open invitation to the public at large, no; that's correct. We have approached specific stakeholders who have specific views to explore particular issues that are relevant to those groupings.

Ms Inverarity: And those have, I think, exclusively been people who have made submissions to this committee where we've wanted to understand a bit more where they were coming from or where we had
questions, to delve a bit more behind what their concern was so we could start thinking more about some of the reasoning behind what may have landed as a recommendation in their submission, just to step through their thought process a little bit more.

**Ms Harmer:** And indeed to dispel some concerns in some instances. It is fair to say that there have been some misunderstandings about the bills, and some further conversations have been useful in dispelling those and narrowing the range of issues that are now under consideration.

**Senator McALLISTER:** Mr Lewis, you talked quite a bit in your opening remarks about the relationship with the media and the significance of the secrecy offences in relation to the media. I think it's the secrecy offences where the greatest interaction occurs between editorial content and the practices of journalists and the proposed legislation. A range of submitters this morning essentially put the view here that one of our core objectives ought to be not criminalising innocent receipt of material. Is that an objective that you would support?

**Mr Lewis:** No. I think Ms Harmer described a few moments ago the spectrum—it might have been Ms Inverarity; I'm sorry—between receipt and actually communicating that information. But it's very clear to me that there can conceivably be cases where receipt of information is indeed much less than innocent, and I think that's probably the issue. Anna, do you want to say more about it? It's a bit technical.

**Senator McALLISTER:** It is technical, because I accept that, from a legislative perspective, defining when receipt of information is and is not innocent may well be very difficult, but the objective surely ought to be not to criminalise innocent receipt of information. I'm interested in Mr Lewis's response from a—

**Mr Lewis:** There's also another dimension to this, and that is that quite obviously, if you were able to disrupt whatever is going on at the time of receipt of the information, then that's far preferable, from our point of view, to disrupting it once the communication has been made and whatever it is that was trying to be protected has in fact been made public. From that point of view, it's a first-principle issue, from an ASIO perspective.

**Senator McALLISTER:** But this question about innocent receipt—the person who, without any knowledge about what might be in it, opens the envelope, or the person who, without any knowledge of what might be in it, purchases the filing cabinet. These are innocent actions.

**Ms Inverarity:** It's essential to take all the elements of the offence as a whole. Simply proving that someone intentionally received information will be—

**Senator McALLISTER:** I'm not really asking about the defence; I'm asking about the policy objective—from Mr Lewis's perspective, what he needs to be able to deal with the threat environment that he's—

**Mr Lewis:** I can't offer you a technical explanation of that part of the law. What I'm trying to explain to you is that from my agency's point of view the issue of disruption of what is potentially a leak, for example, at the earliest possible point is—

**Senator McALLISTER:** Are you saying that you would support doing that by criminalising the receipt of leaked information by an innocent person—the receptionist or the person who opens the filing cabinet?

**Ms Inverarity:** My apologies: a person who does not know what's in the envelope or does not know what's in the filing cabinet will not be able to commit this offence. They will not be reckless as to the specific nature of the information. So, the receipt is one element. All elements and all fault elements must be proved, and that factual scenario just will not satisfy the offence.

**Senator McALLISTER:** Look, I'm trying to understand what the objective is, and I think I'm hearing from all of you that we don't seek to criminalise that person.

**Ms Inverarity:** And we do not believe we have criminalised that person.

**Senator McALLISTER:** And you don't believe you have. And that's the question that you're answering.

**Ms Inverarity:** Yes. So, no, that's not the policy objective, and that's why it's not within the scope of the offence.

**Senator McALLISTER:** That is not the reading from the witnesses who've come before the committee this morning. I'm interested in understanding—I know that you talked about it earlier—why it is that you think that their concerns are dealt with in very specific ways in the legislation.

**Ms Inverarity:** I unfortunately didn't hear their specific evidence, but I can explain to you why I say that it's not covered by this offence, and that is because the prosecution will have to prove beyond a reasonable doubt—picking just one of the elements for clarity—that the information was classified as secret or top secret and that the person was reckless as to that. So, the person will need to be aware of a substantial risk that what is in whatever package they've received is secret or top secret and, having regard to the circumstances known to them, it's
unjustifiable to take that risk. So, if they genuinely have no idea what is in it—they might know that there's paper in there, because it feels of a certain weight—if we have no evidence that establishes that they were aware of a substantial risk that it was top secret, for example—we will not be able to prove that element and they will not commit the offence.

Senator McALLISTER: I want to ask Mr Lewis about the breadth of the definition of 'national security', because this was the subject of quite some discussion this morning. What are the grounds for extending the definition of 'national security' to include political and economic relations with other countries?

Mr Lewis: I have a personal view on this, and that is that the definition of 'national security' is something that does actually change through time. We've always sought to redefine it as circumstances in the world change. I don't think it's unreasonable at all to include, on occasions when there is a direct nexus between the two issues you raised, which is political or economic international activity and national security. That seems to me to be very, very defendable. One needs to be careful. You can't just sort of lay it down and say, 'That is national security.' It's a very elusive definition. It depends on what is actually a threat to the nation at any given time. And if something is a threat, then I consider that to be part of national security, and it's part of my remit to identify those threats and reflect them to the government, to provide early advice on the threat as it presents.

Ms Inverarity: And this is a matter where we did look to the existing statute book to draw from existing definitions and the reflection in this definition of political and economic relations with other countries is directly drawn from the National Security Information (Criminal and Civil Proceedings) Act, which was enacted in 2002, I believe. This definition was informed by the definition of 'security' in the ASIO Act and the definition of 'national security' in that national security information act. Indeed, we've chosen a narrower definition than what appears in the National Security Information (Criminal and Civil Proceedings) Act. In that act, it extends also to law enforcement interests, and we've excluded that from this definition. So we are working with concepts that are established in the statute book in preparing this definition. That definition was, in turn, informed by ALRC consideration. There was an ALRC report that led to the establishment of that act, so it draws back into that work that was done by the ALRC in the early 2000s.

Senator McALLISTER: I might leave it to Mr Dreyfus to comment on the origins of that particular definition in that particular piece of legislation, which strikes me as something quite procedural rather than something that creates a serious offence and that ordinary citizens need to comply with. I will defer that for Mr Dreyfus to discuss.

The evidence that was provided this morning was just that, by extending it in this way to political and economic questions, you very significantly broaden the range of information or interactions a person might be having that might then see them caught in an act of espionage or foreign interference. The evidence really was: how would it be judged, either by the offender or by a jury assessing the behaviour of an offender, whether or not someone's actions really did cause harm to our political and economic interests?

Ms Inverarity: I guess my first point would be: that's one perspective on this definition. At the moment, in the espionage offences they refer to security or defence, which is not exhaustively defined. So we would argue that—

Senator McAllister interjecting—

Ms Inverarity: Potentially—'potentially' means exactly the same or even more than what we've included in this definition because it is not exhaustively defined in the statute book. It would be a matter for a court to determine on the basis of the evidence before it. It could mean more than this. We have tried to bring clarity by having an exhaustive definition that can be seen and worked through and draws on existing concepts. It's entirely possible that that definition of security and defence already covers these matters, or perhaps it doesn't. We think that this doesn't necessarily narrow or broaden, but it is clear what the statute book considers to be national security for the purposes of the offences. Then it will always be a matter of fact for the court to determine as to whether it meets that definition based on the evidence before it, but it at least has parliament's explicit statement of what this term means exhaustively included with the offences.

Senator McALLISTER: It's a complex piece of legislation and, as I possibly pointed out to you before, I'm not a lawyer. I am interested to understand how that definition, which sits up at the front of the legislation, then flows through to the offences around foreign interference and espionage. It seems to establish a category or an area of activity that you might be involved in that then places you in a position to commit one of these offences. Politics and economics, of course, are something that lots of people are involved in. Defence and security are not.

Ms Inverarity: The term does a few different things in the legislation, which is partly why it's drafted in the way that it is. It would have been clearer if we were simply defining the national security of Australia, but this definition needs to work for both the national security of Australia and the national security of a foreign country,
so that's why it may look slightly more complex. The term 'national security' wherever it appears through the act is coupled with something else. It's information concerning national security or where there is a prejudice to national security or an advantage to the national security of a foreign country. So those terms always qualify it in bringing the harm element. It sits in the context of whichever paragraph of the offence it appears in and has meaning in that context, and this is just intended to be that definitive statement of how it flows through. We recognise that it does need some working through, but we do believe it works as a definition for national security with the other acts that seek to in any way grapple with that concept.

Mr LEESER: These amendments have obviously gone some way from where the bill started. In this space, it is always a balancing act between liberty and security. To what extent have there been concessions made in relation to security to advance a little bit more individual liberty here and to what extent is that significant?

Ms Harmer: Probably the most useful thing to do is refer to our supplementary submission to the committee on that point. Obviously, the offences particularly in relation to secrecy have been narrowed somewhat. What they have done is apply lower penalties to those who are non-Commonwealth officers. That is not so much having an adverse impact as recognising the distinction between a Commonwealth officer and a non-Commonwealth officer. A Commonwealth officer perhaps ought to be held to higher standards and may be more culpable in circumstances where there is an unauthorised disclosure of information.

The other narrowing has been in relation to the nature of the information that is disclosed and limiting that to information that has a marking of 'secret' or 'top secret'. Again, that is one which focuses on that harm which is most significant. In relation to journalists, the change has been to the defence and to not require that the reporting be fair and accurate but rather to limit that to the public interest. Those are ones in which we have been very mindful of the balance to be achieved between the security outcomes of the bill and focusing on the conduct that is to be criminalised. It has not removed things from criminality in a way that substantially undermines the effectiveness of the bill but rather makes some adjustments, I would say, to take into account the concerns that have been raised, while still delivering on that core policy objective of creating substantially revamped espionage offences, creating foreign interference offences and having secrecy offences that have been rewritten against the background of the ALRC report but with some adjustments as a result of the feedback we've received.

Mr Leeser: If someone causes damage to our foreign relations with a foreign country, like the United States, can that harm our national security?

Mr Lewis: Absolutely. You would need go no further than perhaps the case of Snowden to think about that—the enormous damage that was done to various diplomatic relations as a result of the leaks that came out of Snowden.

Mr LEESER: I have one further question. The joint media organisation submission talks about journalists facing criminal liability for passive activities such as passively receiving and copying information. Would the
offences apply to a person who is unexpectedly given top secret information or who accidentally overhears a conversation? I apologise if this is a line of questioning you have already dealt with.

Mr Lewis: This is sort of what we were discussing a moment ago. It really is a technical issue. My interest in this is always to ensure that, as far upstream in the process of a leak as we are able to, we intervene and disrupt, and so we are very interested, as an agency, in the matter of receipt of information, long before it is communicated anywhere. We have had the discussion about the innocent receipt or otherwise of that information, and I think Ms Inverarity made it clear that we are not seeking to prosecute somebody who had absolutely no idea of what he or she was receiving and is completely without blame. That's a non-legal explanation of what you more eloquently put, Ms Inverarity.

Ms Inverarity: It was very good. The person will have to intentionally receive the information, so being subject to a conversation that you had no ability to control, or where you were just literally a passive person standing nearby, won't necessarily meet that threshold. In addition, there will have to be proof that you were reckless as to the nature of the information—so, if you had no way of knowing or no way of becoming aware that it was classified as top secret, then you also wouldn't satisfy that element of the offence.

Mr Leeses: I'm cognisant of the fact that I've missed quite a bit of the hearing, and I'll look at the transcript for some of the other points.

Mr Dreyfus: I just want to return to the question of possible amendments. When do you expect, Ms Harmer, to be in a position to advise the Attorney-General of the amendments that the department thinks are appropriate—further amendments in addition to the ones that the Attorney-General has brought forward so far?

Ms Harmer: I assume you're referring to the additional issues that we've been contemporaneously considering whilst—

Mr Dreyfus: Yes. You've said repeatedly that the department is considering further amendments additional to the ones that the Attorney-General has formally put to this committee. My question is: when do you expect to be in a position to advise the Attorney-General—I appreciate that it's his decision—as to what other amendments are appropriate to the espionage and foreign interference bill?

Ms Harmer: I would anticipate doing so in the context of advising him on the recommendations of this committee once that report's available.

Mr Dreyfus: That's not an answer.

Ms Harmer: That's when I would anticipate advising him on further amendments.

Mr Dreyfus: Well, it's not an answer, Ms Harmer. I'll ask it again: when do you expect to be in a position to advise the Attorney-General about appropriate amendments to the espionage and foreign interference bill based on the work that you've been doing?

Ms Harmer: Based on the work that I've been doing, I anticipate advising the Attorney on any further amendments at the same time as I advise him—

Mr Dreyfus: Right. That's not an answer, because you're not telling me when you'll be ready. You're saying you don't intend to advise the Attorney-General until this committee's reported.

Senator Fawcett: Chair, can I just say it's the normal process for this committee to report and then for the Attorney-General's Department to take the recommendations of the report and go to the Attorney-General and the government with a recommendation as to whether to accept them, accept them in principle or reject them. I think that's all Ms Harmer is saying, Mr Dreyfus. I don't know that it's fair to—

Mr Dreyfus: I am indebted to Senator Fawcett for his intervention, but here we've got a bill that is massively flawed, that the government has accepted is massively flawed, and the Attorney-General has made public comments and has acted on his own public comments about the flaws by producing one set of amendments. I'll say again: you've said repeatedly that the department is looking at other amendments to this legislation, quite apart from anything that this committee might report on. I'm suggesting to you that it would be of great assistance to this committee to have the assistance of the department, whatever the Attorney-General wants to do, because a lot of this, as my colleagues have made clear, is very technical legislation.

Ms Harmer: The department continues to consider a range of issues that have been raised in submissions on this bill, some of those submissions having only come to our attention this morning. That was when they were notified to us. So we continue to consider those iteratively as they are lodged iteratively with this committee and as questions are raised with us. As the committee will appreciate, it is an iterative process, and we will advise the Attorney on those issues that are raised and we consider them contemporaneously. It's certainly our experience in assisting this committee that the committee has asked us to reflect upon those issues that have been raised in
submissions, and we've endeavoured to be forthright with the committee in indicating where an issue that's been raised in the submissions is one that might merit some further refinement to the bill. So our intention in flagging that there are areas in which the bill could be amended is both to address those areas where we do not think that there is a concern and indicate that we think that the bill operates as intended and achieves a policy intent but also to flag those areas where a legitimate question has been raised and we acknowledge that perhaps some refinement in the drafting may be required either to achieve the policy intent or to address a concern that's been raised. That has been an iterative process, and we will continue to consider those issues that are raised in submissions and, indeed, as a result of questions that are asked by this committee which have, naturally, prompted us to consider some issues in the bill, as we have done on previous bills before the committee.

Mr DREYFUS: That's very helpful. Is it possible, then, for the department to provide the committee with a list of those areas? I appreciate we've had some examples today where you've said you don't agree with what the joint media organisations said, but you've got other areas that are in the other category of things that you think still warrant refinement and possible amendment.

Ms Harmer: I believe we have done that collectively through our supplementary submissions. You will recall the many pages of submissions—

Mr DREYFUS: Yes, I'm accepting that. I'm looking for a refined list that will actually say, 'These are the ones that we're still looking at amendments for.'

Ms Harmer: We could distil from our supplementary submissions and our remarks to this committee those things that we've drawn to the committee's attention that we are working on. If that assists, we can pull those together out of our supplementary submissions and our—

Mr DREYFUS: I reckon it would. I'm looking for anything that can give order to what is a somewhat disorderly process. And, when I say that, that's not a reflection on you; it's a reflection on the government.

Ms Harmer: We're happy to compile our comments thus far on those issues that we're giving further thought to.

Mr DREYFUS: That would be of assistance, I think, to the committee, simply because it assists us to know if you're already looking at it or already accept that there's something there that needs to be looked at—

Ms Harmer: And that's been our intention in flagging those issues with the committee.

Mr DREYFUS: Yes, and that's helpful, as I've said. It might mean there's slightly less work for this committee because we can then focus on other issues where perhaps we don't accept what the department has said or we do accept what various submitters have said. There's a lot here; that's all. So you will take that on notice. I want to ask a question of Mr Lewis. In the Prime Minister's second reading speech on 7 December and in the press conference that he gave on 5 December, a couple of days ahead of the second reading speech, he made quite a deal of the example of Russian interference in our democratic processes—the Brexit referendum, the 2017 presidential elections in France and the 2016 presidential election processes in the United States. Of course, it is now apparent that it went back a couple of years before that; there was actually Russian interference in the primaries in the United States before the actual presidential election. In this espionage and foreign interference bill that we've got in front of us, for the first time, there are going to be new provisions that don't exist at the moment which criminalise foreign interference; is that right?

Mr Lewis: Yes.

Mr DREYFUS: I'm not asking you for a legal opinion, Mr Lewis. We've got lots of lawyers here who can jump in, if need be. We see the offence under 92.2 headed 'Offence of intentional foreign interference' and then there's another one, 'Offence of reckless foreign interference.' I'll give you a little summary. They refer to a person who engages in conduct on behalf of a foreign principal or conduct funded or supervised by a foreign principal, and then they refer to intent—that is, the conduct will influence a political or governmental process of the Commonwealth or a state or territory or influence the exercise of a democratic or political right or duty and some other things. Then it says that being covert is one of the bases of the criminal offence. There are others involving the making of threats or other things, but it's the aspect of being covert that I'm interested in. If that kind of activity that the Prime Minister referred to as having been undertaken by Russia in relation to three other friendly democratic countries—France, Britain and the United States—were to be undertaken in relation to Australia, then we would have on our statute book an offence that would deal with that conduct; is that right?

Mr Lewis: I accept that; I think that's right.
Ms Inverarity: The legal answer was also going to be yes.

Mr DREYFUS: That's encouraging.

Ms Inverarity: That was one of the scenarios we considered in formulating these offences.

Mr DREYFUS: The committee hasn't been provided with any evidence of such conduct, as was described or referred to by the Prime Minister, by Russia in relation to France, Britain and the US. The committee hasn't been provided with any evidence that suchlike activities have taken place here in Australia. So, we're dealing hypothetically with: if that kind of interference in our democratic processes were to be uncovered, we'd have this offence there. And it's a very serious offence. It's punishable by 20 years for intentional foreign interference and slightly less, but still a very heavy penalty of 15 years, for reckless foreign interference. I just wanted to set that out first. When you made your introductory comments, as well as this bill—the Espionage and Foreign Interference Bill—were you talking about the other bill that the committee has before it, namely the Foreign Influence Transparency Scheme Bill?

Mr Lewis: No, I was not particularly addressing what we call the FITS Bill. It was the Espionage and Foreign Interference Bill that my comments were directed to.

Mr DREYFUS: Having got that clear, I want to ask you about the Foreign Influence Transparency Scheme Bill. Just say, Mr Lewis, if you don't know enough about it. It's not intended to be a quiz question. We've got this bill that proposes a large registration scheme that, according to many dozens of submissions that the committee's received, would create registration obligations for potentially thousands of Australian citizens and hundreds of organisations. Submissions have come forward saying that universities would have to register and make continuing disclosures; the Salvation Army's 10,000 people in Australia would have to register and make continuing disclosures; the Indigenous rangers, it's recently been suggested, would have to register because they receive money from the Pew Charitable Trusts, an overseas source of funds. The universities said that just the Group of Eight had 23,000 co-authored papers with foreign authors and that, on their reading of this Foreign Influence Transparency Scheme Bill, they would all have to register and make continuing disclosures. And that's just a sample list that I've given you. Is it likely that the covert activities that you've expressed most concern about are going to be the least affected by this registration scheme that is proposed by the Foreign Influence Transparency Scheme?

Mr Lewis: I can see why you might come to that view. I wouldn't share that view. I can't comment on the scale of the registration requirement. There are people here better able to do that than I am.

Mr DREYFUS: Except that the foreign interference offence actually describes conduct of influencing a political or governmental process. That's what constitutes the interference offence, and it's a criminal offence.

Mr Lewis: Yes, but you would accept that there are ways you could bring about influence which had no sinister or illegal notions attached to them at all.

Mr DREYFUS: Of course. That's politics.

Mr Lewis: That's right. So, what we're dealing with here is the covert—I use the word 'sinister'—nature of influence which is not apparent then to the Australian public and which results in a decision being taken or an outcome being achieved which the Australian people have not had visibility of. You say, 'Aren't the covert influencers the people least likely to be affected by such a registration scheme?' It's not for me to say whether there should be 5,000 or 10,000 or whatever agencies involved in this registration. What I would say is that if somebody is interfering covertly and they are not registered on that list then, prima facie, there's a case there. I'm very interested to make sure that we are doing everything that we can to narrow down the space in which covert influence can be exercised in the country.

Mr DREYFUS: But this bill creates a very serious criminal offence of covertly influencing a political or governmental process.

Mr Lewis: I think it is a serious criminal offence.

Mr DREYFUS: How is ASIO, or indeed the government of Australia or the people of Australia, likely to be assisted by a huge registration scheme that's going to catch thousands of innocent people and organisations in the quest to deal with covert influence?

Mr Lewis: As I say, I can't comment on the scale of the registration requirement. There are people here better qualified than me to comment on that. What I'm worried about is the deeper end of this, as you alluded to earlier.
Mr DREYFUS: Sure. Sorry to interrupt, Mr Lewis, but that's why the criminal offence is being created, isn't it—to deal with your concern about the deeper activity?

Mr Lewis: Yes.

Ms Harmer: May I say a few words about the purpose of the Foreign Influence Transparency Scheme?

Mr DREYFUS: Of course.

Ms Harmer: I may refer back to comments that I made in one of my opening statements—I can't remember exactly which one—which were to draw attention to the fact that there are close relationships but also distinctions between the objectives of the foreign interference offences and the Foreign Influence Transparency Scheme. While, from an operational perspective, the organisation has reflected upon the fact that there can be a close relationship in some instances and they're complementary, a key purpose of the Foreign Influence Transparency Scheme has been to shed light on quite legitimate dealings that are not criminal but which have the effect of foreign influence over Australian political and governmental processes, the logic there being to draw attention to where there is influence or decisions that are being made and it is not apparent where the influence is coming from, so that decision makers can be aware on whose behalf a particular view is being presented but also so that the Australian public, indeed the electorate, can be aware of where influences and views are coming from that ultimately seek to influence democratic outcomes in Australia. That's the complementary objective.

Ms Inverarity: And I think that use of an intermediary can sometimes be, but is not always, hidden. The use of the term 'covert' in the offences imports into it some sense of trade craft being used to cover up that influence, whereas the fact that a person may be required to register does not imply in any way that there's trade craft being used to hide their link to a foreign principal. It simply indicates that it can be hidden and that the registration makes it transparent. We also would disagree that so many people would have to register. We believe it would be a much narrower subset and therefore the register would be more usable by people in order to find out what influences might be behind a particular intermediary's actions.

Senator McALLISTER: Who's going to use it? It goes to the theory of social and political change that underpins the initiative, doesn't it. Mr Lewis has pointed to a regulatory function, which is that if a person that their organisation is interested in has failed to meet this registration test then it provides perhaps—and I don't wish to put words into your mouth, Mr Lewis—low-hanging fruit for prosecution. That's one function, and we can have a debate about whether the value of that is worth the broader obligations that it places on a whole lot of very innocent and benign actors. But you said other people might use it. That seems to be the secondary function. Who do you think is going to use it?

Ms Inverarity: I think a lot of people would use it. I might use it. If I'm tasked with writing a brief for a meeting the Attorney's having or the secretary's having and I don't know who that person is, I might search to understand if there's any foreign influence so I can inform the person meeting with that interlocutor of that. Your staff might use it if somebody were coming to meet with you to seek to convince you of a position. We know the media uses it. They use the US register to obtain information about who's working for whom in order to shed light on some of those relationships. The public might use it if a suspicious leaflet appears in their letterbox at a time of heightened political activity. They might want to understand whether that is on behalf of a foreign principal, and they would have that mechanism. Or indeed the media might bring that to light for them as well.

Senator McALLISTER: Just as an experienced campaigner, I would suggest to you that if a suspicious leaflet appears in a letterbox it's not going to have anyone's name on the bottom of it!

Ms Inverarity: Sure, but, because it does require registration when someone is trying to influence the public, the public can be a consumer of this or the media can on their behalf use it to illuminate relationships which would otherwise be hidden. It is used in the US in that way. It is quite a powerful source of information for the media to undertake their work.

Senator McALLISTER: So, in your mind, the value is in illuminating the influence behind high-profile activities—campaigning activities, lobbying and advocacy—that are occurring in a visible way in the public domain?

Ms Inverarity: That is one part of the scheme, but it doesn't always connect to that. Registration could be required where a person is lobbying an individual. It could be required where an activity is public facing and who might use it will vary depending on the circumstances.

Senator McALLISTER: The scope of the definition of 'lobbying' is very broad and goes to a much wider range of activities than lobbying parliamentarians. It goes to seeking to influence really any aspect of the political process. It is potentially very broad.
Ms Inverarity: Yes. Without wishing to indicate that we are working on amendments, we have heard those concerns and will be very interested in the committee's view on whether any of those definitions that construct the scheme require narrowing in order to ensure that some of those matters fall outside it. One of the ones that continues to come up over and over again is whether 'in collaboration with' is too broad to be included in the definition of 'on behalf of'. I think in particular some of those concerns about thousands of academics being required to register stem back to that part of the definition. So that may be a sensible area to consider narrowing so that the scheme on its face is not as broad as it appears.

Mr DREYFUS: Why don't you wish to indicate that you're working on amendments?

Ms Inverarity: Because we believe the committee's views are critical before we or the government—

Mr DREYFUS: So we are playing some kind of game here where we have to go first and then you are going to tell us something?

Ms Inverarity: Not at all. In parallel, we are reading the submissions and thinking about the issues people have raised if it's a perspective for us that we didn't have before. It will place us in a position to be able to respond if the committee's view is that that type of amendment is desirable.

Mr DREYFUS: But it might save us all a lot of time if the Attorney-General, based on your advice, were to indicate that the government has actually accepted a whole lot of the concerns that have been raised by many dozens of submitters about the overreach in this legislation.

Ms Harmer: Again, this is something where we have sought to assist the committee previously. I have said in another place that one of the common themes that we've derived from the submissions—and the committee invited us to consider submissions to this inquiry—is that the concerns around the Foreign Influence Transparency Scheme often go back to that question of 'in collaboration with' in a range of scenarios. I think it was in answer to Senator McAllister's questions on notice. To the extent that those were covered by the scheme—there might be a view by this committee that they ought not to be—that typically came back to the question of whether 'in collaboration with' was an appropriate element of the scheme. So we have sought to identify those areas where there is a common theme and what that comes back to and to suggest our view that something may be appropriate for consideration. Again, it's not a question of not wanting to indicate that we are considering amendment so much as not wanting to presume what the committee's views might be and giving some clear advice where we think there is some merit in the comments that have been made and how that could be dealt with. The phrase 'in collaboration with' is one of those ones where we consider there could be some sensible amendments by looking at that particular element of the definition of 'on behalf of'.

Mr DREYFUS: I don't care what you presume about this committee, Ms Harmer; I am interested in work that is being done. So any assistance that the Attorney-General's Department can provide to this committee about work that is being done or about active consideration that is being given to amendments to either of these bills is going to help this committee in its work because it will save us from looking at stuff that we don't need to.

Ms Harmer: That is indeed what we have endeavoured to do in each of our answers to the questions on notice. Where we think there is a question that merits further exploration, we have been forthright in indicating so. In each of my opening statements, I've given an update on those things that we are turning our minds to and that we consider merit further thought. I've also sought to quite directly—and perhaps boldly, in some instances—indicate where we don't think an amendment is required.

Mr DREYFUS: All of which is helpful. Ms Inverarity, can you state why the department thinks that the estimates that we've had from dozens of submitters, about thousands and thousands of individuals and organisations being required to register, are wrong? Why do you think it's a lesser number?

Ms Inverarity: We don't think that all those scenarios are for the purpose of governmental influence. Some of the academic concerns that were raised were an academic in Australia collaborating with an overseas university to produce research, which, down the track, might lead to findings that will be used to seek to convince the government of a position. Our view of the scheme is that the purpose of that collaboration is research; it is not to convince anyone of anything. Therefore, that would not be registrable. Others have taken a different interpretation, but our view is that that would not be registrable.

Mr DREYFUS: That's one example. What about the Salvation Army?

Ms Inverarity: I'm not familiar with the Salvation Army's—

Ms Harmer: We looked at suggestions that were made by the Australian Catholic Bishops Conference, who suggested that each member of the Catholic Church who sought to advocate for the poorer and disadvantaged members of the community might need to register, because they were operating on behalf of a foreign principal.
We don't think general advocacy for the disadvantaged, in the context of the membership of the Catholic Church, is acting on behalf of a foreign principal. So, again, that narrows the range of it. I think that, in each instance where we've been given an example of a large number of registrants, an element has been missing. The purpose needs to be political, and government influence needs to be done on behalf of a foreign principal for it to be registrable. We've taken a number of examples—certainly the ones that Senator McAllister gave to us—and stepped through each of the elements to identify whether, indeed, there would be a registrable activity or not.

**Mr DREYFUS:** You'd appreciate, though, that most Australians want to be law abiding. Charities, particularly, want to be law abiding; universities want to be law abiding; and one imagines the Salvation Army wants to be law abiding! If their interpretation of the bill as currently drafted is that they're going to have to register, is that something that needs to be dealt with, because there is clearly a doubt? Some of them have taken legal advice, Ms Harmer.

**Ms Harmer:** There's a statutory scheme that is proposed that would generate registration requirements. We would envisage that a scheme of that nature will be supported by guidance. It's intended to be a public-facing register. We certainly hope that it is an easy-to-use register, and we'll be working on the implementation arrangements. But I think the interpretations that we have taken are ones that are not only available but preferable on the face of the bill that's before the committee. We've had subsequent discussions with a number of groups and I think we've been able to dispel some of those concerns. But I think the interpretation we've taken is not only available but supported by the explanatory materials. But we will, in having a scheme that requires people to register, be having a range of guidance material that supports that to assist people to determine whether or not they do need to register.

**Ms Inverarity:** Obviously that will grow over time as it is administered. So if somebody is deemed not to be required to register—say, the first time an academic sought to register because they were collaborating on research—that registration might not be accepted by the department, as it doesn't fit with our view of the scheme. Therefore, that could form part of the explanatory guidance, and, therefore, the next person who has that question would learn from that experience as well.

**Mr DREYFUS:** Is this something in the work you're doing here that you're able to share with the committee about the refinement, or why it is that the various submissions that we've got that say, 'We'll be required to register and we're concerned that we'll be required to register,' aren't right?

**Ms Harmer:** I think we have done that in those answers to the written questions. There were a number of scenarios put to us—

**Mr DREYFUS:** Not really, Ms Harmer. In fact, the department's position has been 'it's not our intention that', which is a quite different position from explaining why it is that the legislation doesn't actually catch people. Can I give you a little hypothetical example—do you have to go, Mr Lewis?

**Mr Lewis:** I do, I'm sorry.

**Mr DREYFUS:** Thank you very much for assisting the committee with its inquiry.

**Mr Lewis:** Thank you very much.

**Mr DREYFUS:** I'll give you a different hypothetical example to the pure research example. If the current Australian of the Year co-authors an op-ed with a British academic about increases in science funding in both countries, is she required to register?

**Ms Inverarity:** I don't have enough information to answer that scenario.

**Mr DREYFUS:** Well, neither does she unless you tell her. You're the department. I'm telling you that she's an Australian, and she co-authors an article that calls on the government to increase science funding. She co-authors that article—be it an academic article or an op-ed in the newspaper—calling on both the government of the United Kingdom and the government of Australia to increase funding for science. That's clearly a governmental matter. Is she required to register? She's an academic, for your benefit.

**Ms Harmer:** I think we would ask a range of questions around the outcome that's sought to be achieved. You mentioned that that is to influence government decision-making. The question would be whether the academic is acting on behalf of a foreign principal. Again, we come back to that—

**Mr DREYFUS:** No. The Australian of the Year is an academic, and she's co-authoring the paper with a British academic who's a foreign citizen. The bill captures foreign citizens.

**Ms Inverarity:** That's correct. A foreign individual can be a foreign principal. The question would be: does that activity meet any of the requirements of the definition of 'on behalf of', noting our earlier comments about 'in collaboration with' potentially being something that requires further consideration.
Mr DREYFUS: I'll go back to the question I was asking Mr Lewis, but he had to go. It relates to, again, the fact that we are criminalising, in the espionage and foreign interference bill, an amendment to the Criminal Code, conduct that's described as conduct on behalf of a foreign principal that's either directed or funded or supervised that influences—that's the word used in the criminal provision—a political or governmental process or influences the exercise of a democratic right. That's the criminal offence.

Ms Inverarity: There's an additional element that it—

Mr DREYFUS: Sure, covert. A number of additional elements—

Ms Inverarity: It's quite an important additional element.

Mr DREYFUS: They're all alternatives. The first is covert.

Ms Inverarity: Yes.

Mr DREYFUS: And you want to say, just while we're on it, that covert means something about tradecraft.

Ms Inverarity: I'm not saying it necessarily means something about tradecraft but—

Mr DREYFUS: It actually just means undisclosed, doesn't it, or secret? How does it mean anything different to secret or undisclosed?

Ms Inverarity: I'm saying that use of tradecraft would be an indicator that activity is covert, not that it necessarily means that.

Mr DREYFUS: Right, but it might also just mean secret, tradecraft or not.

Ms Inverarity: Yes; potentially.

Mr DREYFUS: Or undisclosed, tradecraft or not.

Ms Inverarity: And a person being reckless as to that, correct.

Mr DREYFUS: No, that's the second offence. That's the reckless offence.

Ms Inverarity: No, recklessness applies to that element. It's is not simply the fact that something is covert but also the person's fault element in relation to that.

Mr DREYFUS: Sure. What I want to ask you is in relation to the Foreign Influence Transparency Scheme. If there's covert activity that's directed at influencing political or governmental processes, or influencing the exercise of democratic or political rights, it's not very likely that this registration scheme is going to pick up much, or even any, of that activity, is it?

Ms Inverarity: That's why we think that the two bills complement each other, because, if it doesn't fall within the foreign interference offence, it may be picked up as a transparency requirement. If it is at the more serious end of the spectrum, there's an offence available. But a full investigation and prosecution of this offence is quite a different end goal from having transparency for the public and for decision-makers.

Mr DREYFUS: I appreciate that. I'm interested in how these two schemes fit together. A foreign actor who wants to remain in the shadows is going to continue to want to remain in the shadows, aren't they?

Ms Inverarity: Yes; potentially.

Mr DREYFUS: And a registration scheme is going to be of no interest to them. They're not going to participate in it.

Ms Inverarity: Hence the enforcement powers in the scheme to allow that to be required or punished, if it knowingly is not complied with, and then for the offences in the bill to be an investigative option, if the factual circumstances fall within those offences. So there are options available in that circumstance to pursue that conduct.

Mr DREYFUS: My questions are going to the design of the Foreign Influence Transparency Scheme as a whole, and maybe my questions aren't very well targeted, but we've got a scheme that's going to catch, self-evidently, whether it be your number, 500, or the number that has been put forward by a number of submitters, thousands, of innocent Australians and innocent organisations, who are not in any way surreptitious or with ill intent towards our democracy, having to register.

Ms Harmer: Perhaps if I can come back to—

Mr DREYFUS: Just let me finish, Ms Harmer. The ill, the wrong, the harm that we've been told by the government the Foreign Influence Transparency Scheme is directed at is: not knowing about some foreign influence, some foreign direction, some foreign collaboration—I'm using the terms used in the bill—that lies behind action in our political processes. What my question is directed to is: a scheme has been put forward that is
going to catch many, many innocent Australians and organisations and is actually most unlikely to catch the harm or ill that the government says is the problem.

**Ms Harmer:** There are, as I said previously, a couple of purposes to the transparency scheme, and the primary purpose is to provide that transparency around foreign influence on political and government decision-making, and so goes to that 'not knowing', as you put it, where that influence is coming from. So the registration requirement is intended to achieve that and to provide that transparency around who is influencing decision-making. That is a different class of persons from those whom you are separately referring to who may be committing the foreign interference offence, who, you say, quite rightly, because they have nefarious intentions, are unlikely to want to register, and that's then when those offences in the influence scheme come into it, in terms of being able to identify to a person that they appear to be engaged in those activities—

**Mr Dreyfus:** So, for those people, the ones who want to remain in the shadows, you're relying on prosecuting them to achieve the transparency effect that the government wants?

**Ms Inverarity:** Or we have powers, obviously, in the Foreign Influence Transparency Scheme to write to them and say, 'We believe you should be registered. Why are you not?' That is a different way to approach that scenario that you're putting, and that decision as to what particular type of intervention is best in a particular case would be one taken in consultation with other agencies that might be involved in considering particular conduct that is known to be occurring and is known to be hidden, so that there would be a suite of options. But the secretary who administers the scheme could make that inquiry and achieve registration that way.

**Mr Dreyfus:** So, since you're relying—for these covert actors, the people who want to remain in the shadows—on somehow, other than the registration scheme, finding out about them and sending them a notice or prosecuting them for failing to register, have you thought about devising a quite different scheme that actually focuses on those people who are trying to remain in the shadows and doesn't cast this extraordinarily wide net that's going to catch thousands of innocent Australians and organisations?

**Ms Harmer:** The point that I wanted to make before—and it's clear I wasn't making it very articulately—is: it's not the intention of the scheme to cast a very wide net to catch a large number of people in order to capture that small group who don't intend to register. There is value and a deliberate purpose in capturing those people who are acting at the behest of a foreign actor to influence political and government decision-making. So it's not the case that the scheme captures those and that those are a collateral impact of an intention to look to find those people who are not registering so that you can look into them and that they may be engaged in foreign interference. While the schemes are complementary, the foreign influence scheme is not simply intended to catch those people who are engaging in foreign interference but to bring light to that foreign influence in political and government decision-making. I think as I said in my very first opening statement, there is no intention to cast negative aspersions or to criminalise or to otherwise take the view that it is wrong for there to be foreign influence; it's simply that there is value in that being disclosed and it being transparent to the community and decision-makers. But they are not captured simply for the purposes of picking up those who may be engaging in foreign interference; that is not the case and not the intention of the bill.

**Mr Dreyfus:** But the scheme captures many, many people whose foreign connection is already apparent. We had the Black Swan State Theatre Company, part of the Australian Major Performing Arts Group, suggest that it will be required to register because it has a public collaboration with the National Theatre of China and has made joint performances with the National Theatre of China in both China and Western Australia. That connection is not the harm that the Foreign Influence Transparency Scheme is directed at, is it?

**Ms Inverarity:** It wouldn't mean that that would be for the purpose of political or governmental influence either.

**Mr Dreyfus:** No, it would depend on the subject matter of the play, I would suggest, Ms Inverarity. They think that they would be required to register; that's the point. You might say it's not the intention, but that's what they think. The Major Performing Arts Group gave us a number of examples of their 28 members, which are the major performing arts groups in Australia who have international collaborations, who think they will be required to register. So what we've got is a scheme that is going to catch very, very many people who are nothing to do with the harm that this scheme is directed at. What I'm suggesting to you is that the harm that the scheme is directed at is covert influence on Australian politics., and we want to make that transparent; that's the name of the scheme: the Foreign Influence Transparency Scheme. I'm putting to you that the people who are now covert—the people who are now in the shadows—are not going to register, so you are not going to reach them.
Ms Inverarity: I think a point is that the influence can be hidden, but it is not always hidden; it is not the covert Foreign Influence Transparency Scheme. So the fact that a relationship with a foreign principal may be disclosed is great and to be encouraged, but this is intended to be a comprehensive register—

Mr Dreyfus: Why do we need a scheme if it's already public?

Ms Inverarity: So that this is a comprehensive register of the nature, extent and level of foreign influence on political and governmental processes on behalf of foreign principals. That's a valuable source of information.

Ms Harmer: I think where you may be at cross-purposes is in referring to the harm. There is no inference or suggestion in the Foreign Influence Transparency Scheme that that foreign influence is harmful. I think what you're talking about are those scenarios in which there's thought to be a detrimental impact through the influence that's being brought to bear. That's not necessarily that case; it's about foreign influence being transparent more broadly. There is nothing in it that says that the foreign influence needs to be harmful or detrimental, and, indeed, we've been at pains to emphasise that there is nothing in here that draws the inference that there is anything wrong with that collaboration, funding or acting on behalf of; it's simply that it ought to be drawn to light.

Mr Dreyfus: The government has described the harm. The government has said that what it is getting at is making transparent, 'bringing sunlight'—which I think was one of the Prime Minister's phrases—to bear on covert influence in Australian politics. That is the harm that this scheme is directed at, because, if, as you say, there's no harm implied in having a foreign connection—there's no harm implied in the Black Swan theatre company having a collaboration with the National Theatre of China or any number of other examples; there is no harm implied in an Australian academic co-authoring a paper with another, foreign academic—then all of those people potentially being caught by this scheme is not to the point. The harm is the people in the shadows. I'm asking you to focus on the fact that I think is the case, which is that the people in the shadows—the covert influences on Australian politics—are those least likely to register under this scheme, and, just to complete, your answers to me indicate that you are relying on the criminal enforcement process in your scheme to get the people who don't want to register.

Ms Harmer: In respect of those people who deliberately seek to avoid registration, yes, we have coupled the bill with both the ability to provide notices and then offences for failure to register. But, as I said previously, the intention of the bill is not simply to target those people who do not wish to register because they might be engaging in something in the nature of foreign interference. It is to more broadly bring light to foreign influence without an inference that that is necessarily to cause the harms that are referenced in the foreign interference offence.

Senator McAllister: It's perhaps an observation you won't be able to respond to, but I don't think that that is how the community will experience it. The evidence provided to us is that there is a pejorative associated with foreign influence and that anyone who's placed on this register will be described as an agent of foreign influence. There is a long history of that being a pejorative term; that is why people are concerned and why they're presenting evidence to us. They are concerned about the legislation in part because there are quite significant criminal penalties associated with noncompliance and in part because compliance will have, in the framework in which this legislation is being presented, some pejorative implication.

Ms Harmer: There are probably two things that I can easily say there. We've taken note of those concerns and we see those, and, where we can, we've sought to address those and respond to those. As I said, we've had some further discussions with a number of those areas who have thought that there has been a negative influence. While this is obviously a scheme that is new to the Australian context, it's one where we've drawn from the US experience. The experience there has certainly been that there is now a level of registration and a level of comfort. It has been in place for decades and there is no negative connotation in the US. Indeed, Australian state governments are registered on the US Foreign Agents Registration Act, as well as other principals. The experience there has not been that there's a negative connotation with that; it's now an accepted part. There is registration, there is disclosure and, indeed, the regime there is actually a more onerous one which requires disclosure of a significant amount of information. There's a publication of a range of contracts and documents, which we've actually sought to stay away from here.

The other thing I would say in relation to that compliance and the suggestion that there is negative connotation that comes from criminal proceedings—absolutely there is. In the event that there's a criminal prosecution of a person, clearly there's an allegation that has been made there of a contravention of the law. But what I would say in respect of that registration piece is that the scheme has been designed to support compliance with the scheme, and hence that ability to engage with somebody who ought to be registered and to formally engage with them—we could of course do so informally prior—and to flag: 'It appears to us from what we see that you are engaging in activity of this nature. This seems to us to be something that requires registration. Can we have a conversation
about why that's not the case? It wouldn't proceed directly to criminal action. Again, if there's an inadvertent failure to comply, the first port of call would not be criminal sanctions. That's not dissimilar from other regulatory schemes across the Commonwealth, where there is something where there's an intention—for example, tax. Before you have a civil penalty issued for failing to lodge your tax return, you have a notice: 'We've noticed that you've not put in your tax return. Could you please explain why?'

Senator McALLISTER: Can I ask about that? In a good regulatory framework, you'd ordinarily have some internal procedural guidelines about when regulatory action would be initiated and priorities for both investigation and enforcement. Has the department started working on guidelines of that kind?

Ms Harmer: We haven't started working on guidelines, precisely. We've obviously taken notice of the range of issues and questions that people have that would inform the kind of guidance that would be required, but no we don't have guidance documentation to assist in its implementation at this point.

Senator McALLISTER: I'm speaking specifically about documentation that would be made available to those charged with enforcing these provisions, not with people seeking to comply. Have you commenced work on guidance of that kind?

Ms Inverarity: Ultimately, enforcement of the offences will be a matter for the AFP. It would be their operational priorities that would also be relevant. We have not yet started work on the guidance material that would support the enforcement powers for the secretary in the scheme and the notices that could lead up to a matter being referred to the AFP for investigation.

Mr DREYFUS: On something you just said about the Foreign Agents Registration Act in the United States: a number of the submissions that we've received have told us that this bill, the Foreign Influence Transparency Scheme, is considerably wider in its reach than the Foreign Agents Registration Act and considerably narrower in its exemptions—that's a correct description of it, isn't it?

Ms Inverarity: No, we disagree with that.

Mr DREYFUS: Why?

Ms Inverarity: Because we have included the purpose of the activities as being relevant to the registration requirement, whereas that's not present in the US FARA. Any representation to the US government can be registrable under FARA, hence the need for broader exemptions.

Ms Harmer: We've taken it the opposite way around; we've narrowed—

Ms Inverarity: Narrowed the registration requirement rather than requiring all things to be registrable and then carving them out.

Mr DREYFUS: But we have a registration requirement that arises from simple collaboration with anyone foreign. We have a registration requirement that arises simply from any seeking to influence any Australian governmental or political process. How is that narrower?

Ms Inverarity: I think the matters listed in the definition of 'political and governmental processes' are quite a lot narrower than simply any representation being made to the US government. It has to actually have a process in mind.

Mr DREYFUS: We might have to differ on that, and certainly the submissions do, but I haven't got time to go into it. I do want to ask you about a matter of great importance to the committee, which is parliamentary privilege. A very eminent Australian lawyer, Mr Bret Walker, has appeared before the committee in his private capacity to, through this committee, raise with the parliament a concern that this bill, being a legislative act by the Commonwealth parliament, overrides parliamentary privilege. You've said, Ms Harmer, that the Attorney-General is open to amendments to clarify—I think I took an accurate note—that the bill does not override parliamentary privilege. What does the Attorney-General have in mind?

Ms Harmer: I think there might be two sentences of mine that have been combined to get there.

Mr DREYFUS: I apologise if I did that.

Ms Harmer: That's okay. I'm actually looking back to my own notes to refresh my memory. Perhaps I can outline where we're going on this particular issue and just refer back to some statements I made to this committee in another context, which is that as a matter of legal principle, as you would be familiar with, typically legislation requires express words to override parliamentary privilege. We certainly didn't intend to override parliamentary privilege. We've taken note of the comments made by Mr Walker, and there is a point there—that there might be some ambiguity. Indeed, the clerks have drawn a similar point in their submissions. We think that an option for dealing with this, making the intention abundantly clear and ensuring that that is achieved would be to include a savings provision which says that the information-gathering powers do not override the operation of
parliamentary privilege. To restrict the secretary's powers in that way would ensure that we achieve the effect that was intended and, I think, address the concern that Mr Walker had raised. I think it was the Clerk of the House—

Mr DREYFUS: Just on Mr Walker's concern, one of his concerns was that the power given to the Secretary of the Attorney-General's Department—I think I'm right that it's the Attorney-General's Department—

Ms Harmer: Yes.

Mr DREYFUS: The Secretary of the Attorney-General's Department could send a notice to a member of parliament requiring the provision of information. That was the concern that he expressed, and you're saying that the Attorney-General is in fact not proposing that and that there will be some amendments coming forward at some point to say the secretary will not have power to demand information from a member of parliament.

Ms Inverarity: That seems to be the advice of the clerks, which we would carefully consider.

Mr DREYFUS: Well, that's what they want, and I get that. They've taken the very unusual step, for clerks of either house, of making a submission to a committee. I think it has happened on a few rare occasions, but it's pretty rare for a clerk of either house. As it happens, on this occasion the clerks of both houses have made a very direct submission to the committee. They say that a representative of the executive—namely, the Secretary of the Attorney-General's Department—should not have the power to demand any information from a member of parliament about their activities, full stop.

Ms Inverarity: Where they relate to proceedings of parliament. That is what I understood the clerks' advice to be.

Mr DREYFUS: Yes.

Ms Harmer: And, where they relate to proceedings of parliament, that's where we would see there being a role for an amendment to make it very clear that that's not—

Mr DREYFUS: And, since this act is all directed at political activity, it's hard, in fact, to imagine any notice that could ever be sent by the Secretary of the Attorney-General's Department to a member of parliament that wouldn't in some way relate to the registrable activities as described in the bill at the moment.

Ms Inverarity: My reading of the submission was that there is a large amount of documentation created by members of parliament that is not subject to parliamentary privilege.

Mr DREYFUS: Not much. I think that is what they said—not much. My bank account might not be covered by parliamentary privilege, but I can tell you that every paper I have in front of me is covered by parliamentary privilege, and almost every document in my office and on my various devices is covered by parliamentary privilege.

Ms Inverarity: Obviously we would work with the Office of Parliamentary Counsel and take into account the views of the Attorney, but the goal would be to ensure that we align the bill with the views of the clerks, who obviously have expertise in parliamentary privilege which we are happy to be guided by.

Senator McALLISTER: Would it soon be the intention of the Attorney-General to have parliamentarians register?

Ms Harmer: The express intention of the bill is that in circumstances where there is a registrable activity on behalf of a foreign principal that would require registration. The exclusion that we would propose is to not require the production of material that would be subject to parliamentary privilege.

Senator McALLISTER: It does create an anomaly, where it is effectively unenforceable or unable to be investigated, though, does it not?

Ms Inverarity: I think that can be the result of privilege being asserted in a range of contexts, which can mean that a matter cannot be proved. So if it amounts to the fact that without those documents that are subject to privilege an enforcement action can't proceed, then that would not be uncommon in matters where privilege is invoked. It can mean that an offence can't be prosecuted or that a regulatory action can't be taken. But, obviously, in the interest of respecting privilege, that is the correct outcome.

Mr DREYFUS: Are you in a position to provide some written advice to this committee about privilege and the position that the government intends to adopt or the nature of amendments that you are considering?

Ms Harmer: I would need to refer to the Attorney in respect of the nature of the amendments that we're considering, but, just referring back to our previous commitment to consolidate all of those issues where we have indicated that we think an amendment may be appropriate, I think in general terms we could consolidate all of that and, to the extent that I made comments in my opening remarks—that we'd consider an amendment would be appropriate, and that would be to the secretary's powers—where the relevant information forms part of the
proceedings of the parliament, we can put that to you. The question of any amendments that might be brought forward would be one for the Attorney, but we can certainly summarise our views as we've expressed them to the committee in a document, in that single document that we've already committed to provide.

Mr DREYFUS: Thank you very much, Ms Harmer. There are several other matters that I could ask about; I will ask about one, which is the classified information point that arises at clause 122 or, indeed, slightly earlier, in the definition of 'inherently harmful information'.

Ms Inverarity: The definition of 'security classification' is in clause 90.5 of the bill and then that's picked up in the—

Mr DREYFUS: Let's be complete—thank you, Ms Inverarity. That's the one that's been slightly changed by the amendments so as to make clear that we're talking to secret and top secret, subject of course to a regulatory power where you could add in—

Ms Inverarity: Anything of equivalent nature—it would have to have an equivalent level of harm as those classifications should the terminology around classifications change in the future, for example.

Mr DREYFUS: You might want to say AUSTEO.

Ms Inverarity: AUSTEO is not—

Mr DREYFUS: It's a lower classification?

Ms Inverarity: It's a classification.

Ms Harmer: It's not a classification.

Mr DREYFUS: What is it?

Ms Inverarity: It's a caveat.

Mr DREYFUS: When we see that stamp 'Australian eyes only' on documents—

Ms Harmer: AUSTEO typically accompanies a classification. It's a dissemination-limiting marker. Effectively, what it does is the classification indicates what the range of harm is—the classification that you apply depends on what the harm would be if that information was disclosed. On top of that you may apply a particular dissemination-limiting marker—AUSTEO is one of those. It indicates that it's for Australian eyes only.

Mr DREYFUS: This is all going to be news to the public.

Ms Harmer: I think I've done it previously—we can again draw to the committee's attention the information that is publicly available about how material is classified and on what basis it is classified. The Protective Security Policy Framework is available on the Attorney-General's Department website and sets out all those criteria. We can certainly draw attention to that.

Mr DREYFUS: It's not widely known. Senator McAllister draws to my attention the fact that in the aggravated offence provision—clause 122.3—the fact that the record is marked with a code word, which you're saying is not a classification but is something else—'for Australian eyes only', or AUSTEO—will in fact be an aggravating circumstance.

Ms Inverarity: You'd have to prove both the classification and the application of that caveat in order for the aggravated offence to apply. In that case, it would have to be top-secret-AUSTEO or secret-AUSTEO. If it was unclassified-AUSTEO it would not be the subject of the offences in relation to the application of a classification.

Mr DREYFUS: Have you ever seen unclassified-AUSTEO? I don't think I have.

Ms Harmer: Logically, you wouldn't end up with unclassified-AUSTEO, but it's more the point that you have to have the combination of the two

Ms Inverarity: Yes, they both need to be present.

Mr DREYFUS: I digress—

CHAIR: We had AUSTEO documents leaked to the press last year, which had my name through it, so it is topical.

Mr DREYFUS: I know what AUSTEO is. I'm just trying to get to the possibility of further classifications—

Ms Inverarity: Being prescribed?

Mr DREYFUS: Yes.

Ms Inverarity: They would have to have the equivalent harm as top secret or secret, and that aligns to—I can't remember the exact wording, but top secret is grave disclosure of the information—

Mr Vickery: Exceptionally grave.
Ms Inverarity: Exceptionally grave harm, and then I think secret is grave harm.

Mr Vickery: Serious damage.

Ms Inverarity: I shouldn't speak for ASIO. So they are very high standards of harm to the Australian national interest that need to be present before a document can be classified at that level. If a new name was developed for 'secret' that was at that same level of harm, it could be prescribed, but, if it was a much lower level of harm—it could cause just damage—it would not be able to be prescribed as a classification for the purposes of these offences. It would have to have—

Mr DREYFUS: Who applies the classification?

Ms Inverarity: The person who originates the document.

Mr DREYFUS: The author?

Ms Inverarity: Correct.

Mr DREYFUS: Who says, 'I think this should be top secret or secret. I'm going to put that stamp on it.'

Ms Inverarity: Yes.

Mr DREYFUS: Is it reviewable?

Ms Harmer: The originator of the material can review the classification of the document.

Mr DREYFUS: Of course—by somebody else.

Ms Harmer: There are a range of circumstances in which a classification might be reviewed. For example, at a later point, information that was at one point classified may no longer be classified. So, certainly, yes: a classification can change, but you're asking—

Mr DREYFUS: I wasn't talking about archival release. There's no actual process for someone to come along and say—

Ms Inverarity: It's not second counselled, if that's what you're getting at, no.

Senator McALLISTER: It's not contestable?

Ms Inverarity: No, other than within an agency. A supervisor and a staff member might discuss if it's the appropriate—

Mr DREYFUS: And there's no need to review it because it's just distribution and treatment. It's a handling device.

Ms Inverarity: It determines a range of protective security measures that need to be taken in relation to a document.

Mr DREYFUS: 'Keep it in a safe;' 'Don't keep it in a safe'—

Ms Inverarity: 'Carry it in a certain way'.

Mr DREYFUS: 'Don't put it on devices.'

Mr Vickery: And, depending on the caveats that surround it, it might have a secret clearance, but it might have a particular code word or caveat that goes with it which means you still can't get it—in other words, 'need to know'.

Mr DREYFUS: But it's effectively an internal Public Service and agency regime that protects and assists in handling of information—

Ms Inverarity: Correct.

Mr DREYFUS: but is not otherwise subject to any review, and there's no particular motive for anyone to come along and say, 'I don't think that should be secret,' or, 'I don't think that should be top secret'—

Ms Inverarity: Those conversations are had frequently between agencies if the information in a document could be useful in another context. That can be discussed as to whether it can be reduced to a lower classification, but that decision rests with the originating agency of the information. You can't unilaterally decide to apply a different classification so you can use in a different context.

Mr DREYFUS: Let's accept that every originator is going to act in good faith and believe that some harm might flow from wider dissemination of a particular document, and that's why they give it the classification that they do. But they might be wrong and there's no—if you nod, Ms Inverarity, it won't be recorded in *Hansard*.

Ms Inverarity: I think everybody who applies a classification does so taking their best efforts.
Ms Harmer: This is something on which I think I've provided some advice to the committee previously. Within each agency that deals with classified material and for clearance holders, there are a range of obligations that apply to those clearance holders but also a range of training that is provided in both the handling and the marking of documents. It is ultimately, as you say, a matter of administrative practice but consistent with a whole-of-Commonwealth policy on the protection of security classified information.

Mr DREYFUS: And underlying it is the notion that the author thinks at least there'll be some harm.

Ms Inverarity: Some harm, yes, but secret and top secret are very grave or exceptionally grave harm.

Mr DREYFUS: I take you to page 51 of the bill, where we see the definition of inherently harmful information. This is in the definitions to go into the Criminal Code at 121.1. The Human Rights Law Centre made a point to us this morning, which I think was reiterating a point they'd made earlier, that there's a confusion in putting in the definition of inherently harmful information a requirement, as an alternative—it's not cumulative; it's an alternative—(b) 'information the communication of which would, or could reasonably be expected to, damage the security or defence of Australia'. They suggested that the proper place to deal with such information is not in that definition but rather by it being encompassed by 122.2, which is an offence that is a harm based offence.

Ms Inverarity: That argument would involve moving that part of the definition from 'inherently harmful' to 'causes harm to Australia's interests'. The offences align with each other, so which definition it sits in wouldn't make any practical difference. So, if there were an argument that it should be moved—

Mr DREYFUS: Their suggestion made a great deal of sense to me.

Ms Inverarity: Yes, there is a harm element in that offence—I can see that argument.

Mr DREYFUS: What we've got is 122.1, which is a secrecy offence that is based on the defined term 'inherently harmful information' and then the very next provision is one which says that the publication has to cause harm—

Ms Inverarity: I think it could be placed in the other definition without causing any adverse consequences. But the practical effect of what the Commonwealth would have to prove to use that paragraph would be the same regardless of which definition it sits in.

Mr DREYFUS: Sure, but it might be somewhat more coherent.

Ms Inverarity: Yes, certainly.

Mr DREYFUS: It's right, isn't it, that the Law Reform Commission went and looked at all of this in its secrecy report in 2009 and said that there should be a harm based approach taken to the creation of offences?

Ms Inverarity: Yes.

Mr DREYFUS: Are we right in assuming that the way in which this bill proceeds is to treat documents that are simply security classified, without more, as if publication of them were harmful?

Ms Inverarity: Yes.

Mr DREYFUS: But there's actually no means of unpicking that assumption. It can't be challenged in the proceeding. It can't be challenged in any other way. You're just stuck with it.

Ms Inverarity: That's right, and we note in that regard the IGIS's suggestion in her supplementary submission of having a provision similar to what's in the Australian Border Force Act, which has a process prior to the prosecution of somebody attesting to the accuracy of the classification. So we've noted that suggestion and discussed that with her. That would, as a condition precedent to a prosecution, require somebody to assess and then certify that the classification was accurate.

Mr DREYFUS: What would that mean—the classification that it was given or that it was correctly given?

Ms Inverarity: At the time of the commission of the offence the classification of secret or top secret remained accurate. Therefore, if somebody were—

Mr DREYFUS: No, I'm just trying to get at what the difference is.

Ms Inverarity: So somebody other than the originating agency would therefore have undertaken an assessment that, even if it was a historical document, for a prosecution to proceed, the classification of secret or top secret remained accurate at the time the offence was committed.

Mr DREYFUS: This is a pretty serious offence, isn't it—it's punishable with imprisonment of 15 years.

Ms Inverarity: If the document is communicated, that's correct.

Mr DREYFUS: That offence will have been committed even if no harm could be established as flowing?
Ms Inverarity: Our position is that the fact that that classification has been applied means that the criteria is that disclosure of that document would cause harm to Australia's national interests.

Mr DREYFUS: Just pausing—at the time the classification was applied, let's assume that the officer, the originator, has correctly applied, in the sense that there was some identifiable harm, at least in the mind of the originator, but 10 years later?

Ms Inverarity: Yes, and hence our discussion with the IGIS about something to be inserted that could allow an independent analysis of whether—

Mr DREYFUS: No. I took you to be saying accurate in the sense that it was accurately applied on the day that the stamp was put on the document.

Ms Inverarity: No, what the IGIS is suggesting is at the time of the commission of the offence—so, on whatever day the document was disclosed—the classification was accurate.

Mr DREYFUS: So the offence of inherently harmful information becomes an inherently uncertain offence because you won't actually know until someone's had another look at it?

Ms Harmer: I don't think that was the intention behind the suggestion; I think it's more that the offence continues to apply because there is the classification that has been applied to the document, but an additional safeguard could potentially be inserted—and again we're referring to a suggestion that's been made by the inspector-general—that there be some process for reviewing the appropriateness of that classification at the point in time when the conduct occurs.

Mr DREYFUS: So a later assessment?

Ms Harmer: The fact that a document bears a security classification of secret or top secret indicates that at the time that was applied the disclosure of that material would cause exceptionally grave or serious harm to the national interest. We start from the assumption that is correct, but the suggestion has been made that a further safeguard could be included that there be a review at the time of the relevant conduct. But, nevertheless, the offence appropriately criminalises where there is a disclosure of communication of material that bears that classification.

Mr DREYFUS: If you are going to go there, why don't you just have a harm based offence? That is that at the time the information was published there was harm to the Commonwealth in its publication. That was the suggestion of the Law Reform Commission. I am just not sure what we would be achieving if you were going to add to the offence as currently drafted in this bill of inherently harmful information being subject to some further step of having someone come in and say, 'At the time of publication and at the time of the commission of the alleged offence, there was harm.'

Ms Harmer: Perhaps we are looking at it in a different way, but it seems to us that indicating on the face of the legislation the communication material bears a secret or top-secret marking provides greater clarity than saying, at an assessment at a later point, that it causes harm. So we are flagging that.

Mr DREYFUS: I am talking about the construction of this criminal offence.

Ms Inverarity: It is quite a different proposition of proof as well to prove that harm actually occurred because of the release of the classified information as opposed to proving that a document classified as top secret was released which had the potential to cause that harm. They are quite different evidentiary propositions.

Mr DREYFUS: Your harm based offence is 'likely to cause harm'. If you are going to put an add-on to the inherently harmful information offence that someone can come along at the IGIS's suggestion and review it, you will have in effect introduced a harm component.

Ms Inverarity: My starting proposition is that people should not be disclosing material that is classified as secret or top secret—

Mr DREYFUS: Everybody at this table agrees with that.

Ms Inverarity: because of the considerations that have gone into classifying a document as such. If a person wishes to disclose information that has that classification—say, if it's a historical document and they hold a genuine view that it does not still carry that harm—they should be speaking to the originating agency about declassifying it. If the originating agency doesn't agree with that, they should not be disclosing that document.

Senator FAWCETT: To clarify, that only applies to public servants who are bound by things like the official secrets act. So it is a serious matter for them to disclose something that has that classification.

Ms Inverarity: This element is also part of the offence for non-Commonwealth officers. So disclosing secret or top-secret information would also be an offence for non-Commonwealth officers.
Senator FAWCETT: So this is a serious matter. The whole reason we classify things is that we don't want the information out there.

Ms Inverarity: That's right. That's why they have the highest classifications in a protective security framework.

CHAIR: Thank you for your attendance here today. There have been a few questions put on notice. If we could get a response back to the secretariat by Tuesday next week that would be good. You will be sent a copy of the transcript of your evidence, which you will be able to make corrections to. Thank you for appearing today.

Committee adjourned at 14:43