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Foreign Influence Transparency Scheme

ALHR POSITION STATEMENT

Democratic Freedoms



WHAT DOES THE LEGISLATION COVER?

When the Committee considering the Foreign Influence Transparency Scheme Bill took evidence, it became clear that there were widespread misunderstandings about the nature of the legislation. Members of the Committee kept referring to the Bill as having the objective of targeting covert activity for a foreign principal[1], falling short of actual interference in the political process.[2]

However senior officials from the Attorney-General's Department made it clear that this was not correct. The Bill would require registration of activities that were not covert, not illegal, and not otherwise the subject of regulation.[3]

The Bill would capture all types of communication to the public or a section of the public (**communications activities**), lobbying of government, lobbying of parliamentarians and making of disbursements (not covered here).

If the activity was carried out 'on behalf of' a foreign person, for the purposes of government or political influence, the person carrying out the activity would have to register under the 'foreign influence transparency scheme' and fulfil various reporting and record-keeping obligations, under pain of criminal penalties.

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- [1] See for example Hansard report of Parliamentary Joint Committee on Intelligence and Security inquiry Hearings, 16 March 2018, p 38: "CHAIR: I will transition now to the Foreign Influence Transparency Scheme, which is aimed at a different problem[with] 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?"
 - [2] Foreign interference is criminalised under a related law, the *National Security Legislation Amendment (Espionage and Foreign Interference) Act*.
 - [3] Hansard, op cit, pages 49, 52, 54.

Freedom of Political Speech

At first sight, the Bill appeared to amount to over-regulation, potentially in breach of Australia's implied constitutional right to free political speech. If the Bill required registration of certain persons (with related onerous obligations) before those persons could communicate and enter the 'marketplace of ideas' on behalf of certain classes of foreign persons, that would seem to be an unjustifiably broad restriction on free political speech.

This was particularly the case because, under the original Bill, normal concepts such as 'on behalf of' a foreign principal were redefined to cover very tenuous relationships. Thus, the Bill even included relationships where the Australian citizen (the object of the Bill) was the person deciding to do an activity and the so-called foreign 'principal' had no control or direction over the Australian and only knew about the activity. For example, if an Australian resident told a foreign person that they were planning to be involved in a political protest in Sydney, but ended up never going to the rally, the relationship would still, ALHR believes, have been registerable under the original Bill.

Government and Political Processes

It was argued by officials from the Attorney-General's Department that the Bill did not overregulate because it only targeted foreign influence related to processes, whether government or political. One official explained it in this way, in the context of comparisons with similar US legislation:

this is a comprehensive register of the nature, extent and level of foreign influence on political and governmental processes on behalf of foreign principals [4] ...I think the matters listed in the definition of 'political and governmental processes' [in the Australian Bill] are quite a lot narrower than simply any representation being made to the ... government. It has to actually have a process in mind. [5]

[4] Hansard, op cit, p 54.

[5] Hansard, op cit, , p 55.

Another stated that:

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...[6]

‘Influence’ is defined inclusively in section 10 of the Bill to include ‘affect in any way.’ Dictionary definitions talk about influence relating to the effect or change upon a person or thing. Neither ‘process’ nor ‘proceeding’ is defined in the Bill nor in the *Acts Interpretation Act 1901* and so those words would be given their ordinary meanings.

In everyday life we are often advised to ‘focus on the process’ rather than the outcome, whether it’s about dieting or learning a language, for example.

Applying the ordinary meanings of ‘process’ and ‘outcome’ makes a clear distinction which is easy to follow.

Outcomes

However, here again the Bill was drafted so broadly as to redefine ordinary meanings, resulting in legislation that is not at all easy to understand. The original Bill stated in section 12 that a person would be regarded as undertaking an activity for the purpose of political or governmental influence if a purpose of the activity was to influence ‘any aspect’ of that process ‘including the outcome.’ The argument that the Bill did not amount to overreach because it only related to influence in relation to government or political processes was therefore not correct. Outcomes were caught too.

Various statements from Attorney General Department officials confirmed that outcomes were also intended to be captured. One official stated, for example, that the logic of the Act was:

... to draw attention to where there is influence or [on?] 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.[7]

[6] Hansard, op cit, , p 49.

[7] Hansard, op cit, , p 49.

Disagreeing with Government

ALHR and many others argued that for the legislation to capture ‘outcomes’ of government and political matters, effectively required registration of any expressions of disagreement with government policy or decisions, where made ‘on behalf of’ a foreign principal (and bearing in mind the very wide meaning that the original Bill gave to that phrase).

The concept of ‘influence’ in terms of seeking to effect change is irrelevant where the influence is aimed at expressing agreement with a policy or decision. The Bill would therefore in practice be most likely to have the effect of discouraging individuals and organisations having any foreign associations from expressing disagreement with the government of the day. This would have been a clear restriction on communication and on freedom of political speech.

What is the Real Harm the Bill Should Focus On?

Committee members questioned whether the Bill was really aimed, ineffectively, at covert rather than overt influence. In the words of the Shadow Attorney-General:

... 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.[8]

Many also argued that the Bill was focusing on the wrong people - the communicators - and should be tailored to focus on the real harms involved in the behaviour of government and political decision-makers. ‘Influence’ is only a problem if the person being influenced inappropriately changes their behaviour in accordance with that influence. Government personnel and parliamentarians should act with integrity and not take extraneous or inappropriate matters into account in their decision-making, whatever influences are brought to bear. If

[8] Mark Dreyfus, Hansard, op cit, p 53.

that is the situation, what does it matter who communicates their own or others' views about what they believe would be the most desirable outcome of those decisions? Surely what is of fundamental concern in situations involving undesirable 'foreign influence' is the behaviour of the individual deviant decision-maker or decision-makers.[9]

In addition, many argued that full publication of Ministerial diaries would give greater transparency and more relevant information to the public about who was trying to influence what decisions than would be achieved by the scheme proposed under the Bill, at less cost to the free speech rights of all Australians.

Bill Amendments

While ultimately the government was persuaded to remove the reference to 'outcomes' from section 12, to narrow the definition of 'on behalf of', and to narrow the definition of 'foreign principal,' the original wording in relation to these issues still casts a long shadow.

As the government did not act on ALHR's suggestion that section 12 be amended to say specifically that processes do not include outcomes, there remains the theoretical argument that an outcome can be said to be a part of the process that produced it.

This source of potential confusion is evidenced in the internal inconsistencies in the amended legislation as ultimately enacted, and in the fact sheets issued for the guidance of the public by Attorney-General's Department.

It needs to be borne in mind that if the Act is interpreted so as to capture activity attempting to influence the outcomes of government or political processes - that is, as requiring registration in relation to any communications activity aimed at influencing government or political decisions - then the problems noted before in relation to constitutionality of the Act would again become relevant.

It is submitted that to read the Act as covering outcomes would be

[9] See Petrus van Duyne, "Will Caligula Go Transparent? Corruption in acts and attitudes", *Forum on Crime and Society*, 2001, vol. 1, nr. 2, 73-98, also available at <http://www.petrusvanduyne.nl/wp-content/uploads/2017/08/Corruptie-VN.pdf>, p 3.

unconstitutional because it would result in an interpretation which requires registration of many normal political communications. Such an interpretation would have a severe and chilling impact on freedom of communication about political matters, particularly disagreements with government policy or decisions.

Outcomes and Processes in the Act

The Act deals with four types of activity: communications activity, lobbying of government, lobbying of parliament and disbursement activity (not considered here). In the Act, 'outcomes' are now only referred to in the context of lobbying. Lobbying is defined in section 10 as including communicating 'in any way, with a person or group of persons for the purpose of influencing any process, decision or outcome; and [representing] the interests of a person, in any process.'

But before lobbying is registerable, even if the activity is on behalf of a foreign principal, there is a further test that applies, except in the case of lobbying on behalf of a foreign government (which is registerable without any further purpose being required to be shown). The further test is under section 21, which requires the activity to be for the purpose of 'political or governmental influence.' That phrase is defined in section 12 which now, as discussed above, only refers to processes. So it would appear that, unless the activity has the purpose of influencing a governmental or political process (as opposed to an outcome), it is not registerable even if it amounts to lobbying.

Outcomes and Processes in the Fact Sheets

Several of the fact sheets equate disagreement with a government policy with influencing a process, or describe a government policy or decision as a process rather than an outcome. ALHR does not believe that these descriptions properly reflect the current wording of the Act. The fact sheets could therefore encourage people to register under the scheme where they have no legal obligation to do so.

For example, Fact Sheet 3 states that *"The scheme covers activities that are political in nature (e.g. lobbying of members of parliament) and activities undertaken for political or government influence (e.g. providing information or material to influence public voting during a federal election)."* ALHR believes that providing information

or material to influence public voting during a federal election (while this might involve obligations under the Commonwealth Electoral Act) would amount to ‘communications activity’ under the Act. Communications activity is not registerable unless it relates to a government or political process. Also, the paragraph describing communications activity should be updated to refer to the amended wording in the Act. [10]

Similarly, in our view, examples 2 and 4 are incorrect in so far as they refer to registration being required in relation to communication activity about the outcome of a government or political decision.

Fact sheet 14 blurs the distinction between process and outcome, including by saying or implying that:

- influencing the public’s opinion about a process is the same as influencing a process (“[a]ny attempt by a foreign principal to influence the Australian public’s opinion about its political and government processes can directly impact Australia’s national interest.”);
- the creation of laws and policies is a process and that therefore the Act covers [the outcome of] government and executive decisions;
- “influencing any aspect of our political and governmental architecture could result in foreign interests being prioritised over Australian interests” – even though political and government ‘architecture’ does not appear to refer to processes;
- “Influence refers to the act of trying to affect or have an impact on a process, decision or outcome” – this is only true in relation to lobbying and then not necessarily registerable if there is no attempt to influence a process, as described above.

Fact sheet 16 seems to incorrectly imply:

- in the first example that calling for [people to encourage the government to] vote against a policy would be registerable; and
- in the second example, that supporting a policy outcome could be registerable.

[10] We suggest: “A communications activity is registerable if the activity is undertaken for the **sole or primary purpose or substantial** purpose of **influencing one of the processes and proceedings described** political or government influence (see above).”

Fact sheet 17 states that a person registering needs to provide details about the purpose of the activity, 'including the governmental or political process the activity is aimed at influencing'.

However, the example that is given is 'the federal budget' which is surely a policy document created as an outcome of a process, rather than a process which the activity is aimed at influencing. It also states that the person must provide details about 'the particular subject matter or issue in relation to which the activity is being undertaken' but the example given is 'the federal government's policy on a particular matter, or a specific funding decision.' Again, policies and funding decisions are outcomes, not processes, and it is submitted that therefore the fact sheet gives the wrong message.

Who is a Foreign Principal Under the Act?

The previous references to any individual who is neither an Australian citizen nor a permanent Australian resident (and whether in Australia or not) have been removed. Arguably this would have included relatives, friends and colleagues both in Australia and overseas. A foreign 'principal' now includes a:

- Foreign government (includes government authorities and state or local government bodies);
- Foreign government related entity (a company or other entity controlled by the government of a foreign country or of part of a foreign country);
- Foreign political organisation (includes a foreign political party);
- Foreign government related individual (an individual subject to control of any of the above or obliged to act in accordance with their directions, instructions or wishes and who is neither an Australian citizen nor a permanent Australian resident, and whether in Australia or not).

Definitions of control in relation to companies reflect the tests under Australia's anti-money laundering legislation but, unlike that legislation, take no account of whether the company is publicly listed or not.

Foreign government related entity' means: a person, other than an individual, who is related to a foreign principal that is a foreign government or a foreign political organisation in one or more of the following ways:

- (a) *if the person is a company—one or more of the following applies:*
 - (i) *the foreign principal holds more than 15% of the issued share capital of the company;*
 - (ii) *the foreign principal holds more than 15% of the voting power in the*
 - (iii) *company;*
 - the foreign principal is in a position to appoint at least 20% of the*
 - (iv) *company's board of directors;*
 - the directors (however described) of the company are under an obligation (whether formal or informal) to act in accordance with the*
 - (v) *directions, instructions or wishes of the foreign principal;*
 - the foreign principal is in a position to exercise, in any other way, total or substantial control over the company;*
 - (b) *if the person is not a company—either of the following applies:*
 - (i) *the members of the executive committee (however described) of the person are under an obligation (whether formal or informal) to act in accordance with the directions, instructions or wishes of the foreign*
 - (ii) *principal;*
 - the foreign principal is in a position to exercise, in any other way, total or substantial control over the person;*
 - (c) *if the person is a person other than a body politic and the foreign principal is a foreign political organisation:*
 - (i) *a director, officer or employee of the person, or any part of the person, is required to be a member or part (however described) of that foreign political organisation; and*
 - (ii) *that requirement is contained in a law, or in the constitution, rules or other governing documents by which the person is constituted or according to which the person operates.*
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What Does "*on behalf of*" Now Mean?

Section 11(1) previously provided that a person is regarded as undertaking an activity on behalf of a foreign principal if the person undertakes the activity:

- (a) under an arrangement with the foreign principal; or
- (b) in the service of the foreign principal; or
- (c) on the order or at the request of the foreign principal; or
- (d) under the control or direction of the foreign principal; or
- (e) with funding or supervision by the foreign principal; or
- (f) in collaboration with the foreign principal.

However subsection (3) expanded this definition even further. It provided that:

Without limiting subsection (1), a person undertakes an activity on behalf of a foreign principal if both the person and the foreign principal knew or expected that:

- (a) *the person would or might undertake the activity; and*
- (b) *that the person would or might do so in circumstances set out in section 20, 21, 22 or 23 (whether or not the parties expressly considered the existence of the scheme).*

The sections referred to basically set out further requirements, depending on the nature of the activity, which will if met make the activity registerable: that the activity be for the purpose of governmental or political influence, and that the foreign principal fall within certain categories.

ALHR argued that the impact of subsection (3) was to reverse the common concept of principal and agent and include relationships where the foreign principal had no control and was only aware of (or might expect) activities initiated by the Australian party.

In the final wording of the Act, section 11 has changed significantly. Subsection (1) has been amended to remove paragraphs (e) and (f) and

remove the reference to 'control' in paragraph (d). 'On behalf of' therefore now relates only to arrangements with, directions, orders and requests from, and being in the service of, the foreign principal. The requirements in what was subsection (3) have been added to subsection (1) as an additional element.

Therefore, in order for a person to be acting 'on behalf of' a foreign principal, it is now necessary that there be an arrangement, direction, order, request or service agreement between the relevant parties and that at the time the arrangement or service is entered into, or the order, request or direction is made, both the person and the foreign principal knew or expected that the person would or might undertake the activity in circumstances that would make the act registerable.

These amendments remove the previous anomaly where the principal/agent relationship could be reversed, but the relationship could still be registerable.

"Arrangement" is defined in section 10 as including 'a contract, agreement, understanding or other arrangement of any kind, whether written or unwritten' and is therefore quite broad. 'Order', 'direction', and 'in the service of' are not defined.

It is submitted that the wording of the section, although improved, is still too vague and could make it difficult for people to know whether or not their association is registerable.

Problems With Exemptions – Academic Work

The academic exemption many commentators argued for has not been included in the final wording of the Act. Rather, academics must rely on the exemption for registered charities, given that universities and other educational establishments are generally registered as charities in Australia. The exemption for registered charities looks to whether the activity is undertaken 'in pursuit of' a charitable purpose of the organisation (s29C) within the specific meaning of Part 3 of the Charities Act 2013. Such purposes can include:

- advancing health
- advancing education
- advancing social or public welfare
- advancing religion
- advancing culture
- promoting reconciliation, mutual respect and tolerance between groups of individuals that are in Australia
- promoting or protecting human rights
- advancing the security or safety of Australia or the Australian public
- preventing or relieving the suffering of animals
- advancing the natural environment
- promoting or opposing a change to any matter established by law, policy or practice in the Commonwealth, a state, a territory or another country (where that change furthers or opposes one or more of the purposes above), and
- other similar purposes 'beneficial to the general public' (a general category).

In the case of universities, advancing education would appear to be the relevant charitable purpose. In addition, at the time the activity is undertaken, both of the following must be apparent or disclosed:

- the activity is being undertaken on behalf of a foreign principal, and
- the identity of the foreign principal.

Officials from the Attorney General's Department have confirmed that the fact that academics collaborate with foreign institutions on research which is not itself aimed at changing Australian government policy - but which might be used in the future for that purpose – does not make the collaboration registerable. [11] In addition, references to collaboration have now been removed from the definition of 'on behalf of,' as explained above.

It is not clear if the exemption means that as long as the person is acting under the auspices of a university, for example, in relation to one of its charitable purposes, it doesn't matter whether they are an employee, a casual worker or independent contractor.

[11] Hansard, op cit, p 50.

It is also not clear how an individual can be sure they are protected by the exemption, and the fact sheets provide no guidance on these points.

Conclusion

It is submitted that the Act does not, and should not, require registration of communications which are aimed at informing or even changing the mind of the public, political parties, parliamentarians, or any part of the government.

It is ALHR's view that communications on behalf of foreign principals should not be registerable unless the communication is aimed at inappropriately influencing a process - for example, by persuading the decision maker to:

- deviate from the proper criteria which should rule their decision-making; or
- act according to motives which cannot be justified as an appropriate element of the decision-making process;

which would be to inappropriately influence the proper process that the decision-maker should follow. [12]

The connection with process as opposed to outcome is crucial to the appropriate focus and operation of the legislation, and, with all due respect, to its constitutionality.

The Act should be interpreted in this light and the fact sheets relating to the scheme should be carefully amended as a matter of urgency to reflect the appropriate interpretation of the Act.



See page 15 overleaf for the current wording of the first subsections of section 12 of the Act, marked to show changes from the original Bill wording.

[12] following Professor van Duyne's definition of 'corruption': op cit. p 3.

The following shows the current wording of the first subsections of section 12 of the Act, marked to show changes from the original Bill wording.

- (1) A person undertakes an activity for the purpose of ***political or governmental influence*** if a the sole or primary purpose, or a substantial purpose, of the activity ~~(whether or not there are other purposes)~~ is to influence, ~~directly or indirectly, any aspect (including the outcome) of any one or more of the following:~~
- (a) a process in relation to a federal election or a designated vote;
 - (b) a process in relation to a federal government decision;
 - (c) proceedings of a House of the Parliament;
 - (d) a process in relation to a registered political party;
 - (e) a process in relation to a member of the Parliament who is not a member of a registered political party;
 - (f) a process in relation to a candidate in a federal election who is not endorsed by a registered political party;
 - (g) processes in relation to a person or entity registered under the Commonwealth Electoral Act 1918 as a political campaigner.
- (2) Without limiting subsection (1), A person also undertakes an activity is taken to be for the purpose ~~for the purposes~~ of ***political or governmental influence*** if a the sole or primary purpose, or a substantial purpose, of the activity is to influence an aspect of a process or proceedings mentioned in that subsection by influencing the public, or a section of the public, in relation to the a process or proceedings mentioned in subsection (1).



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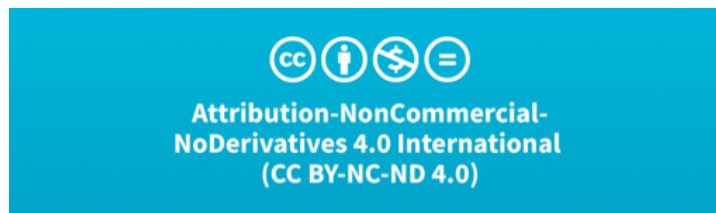
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FOREIGN INFLUENCE TRANSPARENCY SCHEME ALHR DEMOCRATIC FREEDOMS POSITION STATEMENT

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