Professor Anne Twomey
Professor of Constitutional Law

13 June 2018

Mr Andrew Hastie
Chair
Parliamentary Joint Committee on Intelligence and Security
Parliament House,
Canberra, ACT, 2600

Dear Sir,

Supplementary submission on the *Foreign Influence Transparency Scheme Bill 2017*

This submission is made in relation to the amendments proposed by the Government on 8 June to the *Foreign Influence Transparency Scheme Bill*.

Constitutional validity

The effect of the amendments is to focus the application of the Bill more tightly on its legitimate end of making the exercise of foreign influence in relation to political and government matters in Australia more transparent through a registration system. This change in focus will significantly bolster the constitutional validity of the proposed law, as it will be easier to argue that its provisions are appropriate and adapted to serve the legitimate end.

Impact upon universities and academics

The potential effect of the *Foreign Influence Transparency Scheme Bill* upon the work of universities and academics will be ameliorated by the following proposed amendments:

- the exclusion from the definition of acting 'on behalf of a foreign principal' of activity undertaken with funding or supervision of a foreign principal or in collaboration with a foreign principal;
- the narrowing of the definition of 'foreign principal' to exclude foreign companies, foreign bodies and foreign nationals, unless they are closely related to a foreign government or foreign political organisation; and
- the narrowing of the definition of activity undertaken for a purpose of political or governmental influence so that it only applies where such influence is the sole, primary or substantial purpose of the activity.

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One of the principal concerns of universities has been that work done in collaboration with foreign scholars, or funded by grants from foreign organisations, or done under the supervision of a foreign academic, would trigger the application of the Act, even when no foreign influence or control existed. This should no longer be the case for two reasons. First, funding, supervision and collaboration are now proposed to be excluded from the definition of 'acting on behalf of a foreign principal'. Secondly, foreign individuals will no longer be caught by the terms of the Act unless they are under an obligation to act in accordance with the directions, instructions or wishes of a foreign principal or they are under the foreign principal's substantial control.

In addition, the range of scholarship potentially affected will be reduced to the extent that the sole, primary or substantial purpose of the communication must be political or governmental influence. It will usually be the case, in relation to academic work, that such influence would only be one purpose of the work – certainly not its sole purpose, and in most cases not its primary or substantial purpose. Hence the affected field will be significantly narrowed.

One question that may still arise is whether foreign universities fall within the definition of 'foreign principal' as 'foreign government related entities' and if so, what might be caught by an 'arrangement' with such a foreign principal. While many foreign universities, particularly in the United States, are private (eg Harvard, Stanford, MIT, and Columbia), others are public bodies (eg UCLA, UC Berkeley, University of Michigan and Rutgers). In the United Kingdom, most universities are public bodies to the extent that they are partly publicly funded and regulated, but they exercise high degrees of independence from government. Public universities in other countries, such as China, are more likely to be under a higher degree of governmental control. Hence, some might satisfy the test of control, as proposed, while others would not.

While the Attorney-General's letter states that the effect of the proposed amendments will be to ensure that 'academics are not required to register where they collaborate with counterparts working for foreign state universities or research institutes, or are supervised by such counterparts' there is still the possibility that they might be caught if the foreign university is regarded as a foreign principal, the research cooperation involves an 'arrangement' with that foreign university, and a substantial purpose of the research is governmental influence (eg a project aimed at influencing governments to apply better ways of dealing with drought or soil salinity). Of course if the foreign principal sought to control or influence the outcome of the research collaboration, then it would fall within the category of arrangements that should be registered. If, however, the foreign university's arrangements simply involved the provision of facilities, the exchange of staff or the funding of conferences, without any influence over the research outcomes, then it would not meet the purposes of the Act to require registration.

Accordingly, it would be preferable for the term 'arrangement' in s 11 to be clarified. At the moment it is drafted very broadly so as to include a 'contract, agreement, understanding or other arrangement of any kind, whether written or unwritten'. This could potentially include the funding arrangements and collaboration arrangements that the government has already agreed to remove from the provision. It would be consistent with the other revisions of the Bill, aid clarity and bolster constitutional validity if the term 'arrangement' was defined more narrowly so that it only applied to arrangements that involve 'an obligation (whether formal or informal) to act in accordance with the directions, instructions or wishes of the foreign principal' (consistent with the definition of foreign government related individual).

One of the other difficulties with the Bill is the level of uncertainty involved. An individual may be uncertain as to whether he or she needs to register because he or she has insufficient information as to whether or not a body with which he or she has an arrangement is a foreign principal and whether or not an activity under that arrangement would be regarded as for the 'substantial purpose' of political or governmental influence. In many cases, arguments may often be made both ways. Given the significant penalties involved, it would be helpful if some kind of guidance could be given to those who wish to comply with the law but are uncertain as to whether it is intended to apply to their circumstances.

Yours sincerely,

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