The Hon Christian Porter MP
Attorney-General

17/15686

Mr Andrew Hastie MP
Chair
Parliamentary Joint Committee on Intelligence and Security
Parliament House
CANBERRA ACT 2600

Dear ~~Chair~~ Andrew

I write to provide a copy of proposed parliamentary amendments to the Foreign Influence Transparency Scheme Bill 2017 (the Bill) to the Parliamentary Joint Committee on Intelligence and Security.

The Bill is critical to illuminate the nature and extent of foreign influences on Australia's political and governmental processes.

While foreign actors are free to promote their interests in Australia's free and open society, this must be done in an open and transparent fashion. Decision-makers, the Australian Government, and the Australian people should know what interests are being advanced in respect of government decision-making.

As the Director-General of Security, Mr Duncan Lewis AO DSC CSC, has repeatedly stated, both to the Committee and in other fora, the current scale of foreign intelligence activity directed against Australian interests is unprecedented, and these activities can inflict catastrophic harm on Australia's interests by undermining our sovereignty, security and prosperity.

The advice of the Australian Security Intelligence Organisation is that foreign actors are covertly attempting to influence and shape the views of the Australian public, the Australian media, the Australian Government, and members of diaspora communities in Australia, in an effort to advance the objectives of those foreign actors and to the detriment of Australia and our national interests.

The Bill, along with the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017, is critical to promoting transparency in, and the integrity of Australian Government decision-making.

I welcome the Committee's report on the Espionage and Foreign Interference Bill. While the Committee's process for that Bill generally followed the same process that has seen the Committee successfully navigate the previous 10 tranches of national security laws, two particular features of the recent Committee process have been notable.

First, that the Government provided tangible assistance to the Committee in the form of submitting a range of drafted amendments that addressed the most substantive stakeholder concerns raised in the public hearing process. And second, that the final stages of the work required to produce the final report involved a dedicated intensity of effort in the last 10 days and a model of bipartisan communication and negotiation on a range of complex technical drafting issues.

This process was conducted squarely in the national interest and represented a real fulfilment of Australians expectations for cooperative bipartisan conduct when serious national security issues are at stake. On this point, I would like to personally thank you, and to request that you extend my thanks to members of the Committee, in particular to the Deputy Chair, the Hon Anthony Byrne MP, and to the Shadow Attorney–General, the Hon Mark Dreyfus QC MP, for their skilled and good faith dealings which will ultimately improve the Bill.

The Government has indicated its willingness on a number of occasions to consider sensible amendments to the Foreign Influence Transparency Scheme Bill in the context of the Committee's Report and recommendations of its inquiry into the Bill. However, given the successful conduct and conclusion of the process that has resulted in the Committee finalising its report on the Espionage and Foreign Interference Bill, the Government has determined to replicate the central feature of that process in relation to the Foreign Influence Transparency Scheme Bill by providing tangible assistance to the Committee in the form of submitting a range of proposed amendments that address the most substantive stakeholder issues.

These amendments propose to:

- narrow the scope of the scheme by limiting the definition of 'foreign principal' only to foreign governments, foreign political organisations and other persons who are closely related to foreign governments and foreign political organisations
- amend key definitions including 'on behalf of' and 'activity for the purpose of political or governmental influence'
- introduce new exemptions for industry representative bodies, and individuals making personal representations, and expanding other exemptions
- increase the period within which former Cabinet Ministers bear additional obligations from three years to ten years
- extend the additional registration requirements for former senior officials to specifically cover former Ambassadors and High Commissioners
- increase the period within which former Ministers, members of Parliament and senior officials bear additional obligations from 18 months to seven years
- introduce a transparency notice scheme, allowing the Secretary of my department to issue a notice that a particular entity or individual is related to a foreign government, and
- introduce new, tiered criminal offences while reducing the applicable penalties.

Amendments to definition of 'foreign principal'

The central change that I propose to make to the scheme is to limit the definition of foreign principal in section 10 to foreign governments, foreign political organisations, foreign government related entities and foreign government related individuals. The key implication of this change is that persons will not be required to register if they undertake activities on behalf of a foreign business or a foreign individual, unless that business or individual is closely related to a foreign government or foreign political organisation.

A foreign government related entity (which replaces the concept of a foreign public enterprise) is further defined in section 10 to mean a person, other than an individual, who is related to a foreign government or foreign political organisation in one of more of the following ways:

- if the person is a company, one of more of the following applies:
    - the foreign principal holds more than 15% of the issued share capital of the company;
    - the foreign principal holds more than 15% of the voting power in the company;

  - the foreign principal is in a position to appoint at least 20% of the 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 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;
- if the person is not a company, either of the following applies:
  - 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 principal;
  - the foreign principal is in a position to exercise, in any other way, total or substantial control over the person;
- if the person is not a company, or falls within paragraphs (d) to (h), of the definition of ***person*** in section 10 and the foreign principal is a foreign political organisation:
  - a director or 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
  - 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.

A foreign government related individual is also defined in section 10 to mean an individual:

- who is neither an Australian citizen nor a permanent Australian resident; and
- who is related to a foreign principal that is a foreign government, foreign government related entity or foreign political organisation in either or both of the following ways:
  - the individual is under an obligation (whether formal or informal) to act in accordance with the directions, instructions or wishes of the foreign principal; or
  - the foreign principal is in a position to exercise, in any other way, total or substantial control over the individual.

Limiting the range of foreign principals in respect of whom registration is required serves two important objectives. First, this amendment will ensure the scheme is more closely focused on promoting transparency in relation to foreign *government* influence on Australian political and government processes. The effect of these amendments would be that a person will only be required to register if they undertake registerable activities on behalf of:

- a foreign government
- a foreign political organisation, or
- a foreign entity or individual that is closely-related to a foreign government or political organisation.

Second, this amendment will assist to ensure that the regulatory burden imposed by the scheme is reasonable and proportionate, by reducing the circumstances in which registration will be required.

The refined threshold for when a company is deemed to be related to a foreign government or political organisation, including the 15 per cent ownership and voting power thresholds, and the 20 per cent directorship threshold, reflect the reality that a foreign government or political organisation need not have absolute control over a company to be able to exercise significant influence, or even actual control, over its activities.

Proposed new paragraph (c) of the definition of foreign government related entity would capture situations where the law of a foreign jurisdiction, or the constitution, rules or other governing documents for the entity, require that either:

- one or more directors, officers or employees of the entity, or
- a part of the entity itself,

be a member or part of a foreign political organisation. The purpose of this limb of the definition is to assist potential registrants to determine whether a company or entity is related to a foreign political organisation, by using the objective fact of whether the laws of a foreign country, or the rules of the relevant entity, impose political membership requirements as a benchmark.

Amendments to key definitions

Former Cabinet Ministers and designated position holders

The existing definitions of 'recent Cabinet Minister' and 'senior Commonwealth position' in section 10 have been removed in the revised Bill and replaced with new definitions of 'former Cabinet Minister' and 'recent designated position holder', which are relevant to the registration requirements under sections 22 and 23.

A former Cabinet Minister, within the meaning of the Bill, will be a person who was a member of the Cabinet in the past 10 years and who is not presently a designated position holder, such as a former Cabinet member who remains a member of the Parliament.

A recent designated position holder means a person who has been any of the following within the past seven years, and is not presently in one of these roles:

- a Minister
- a member of the Parliament
- an Agency Head (within the meaning of the *Public Service Act 1999*), a deputy agency head (however described)
- the holder of an office established by or under a law of the Commonwealth and equivalent to that of Agency Head or deputy agency head
- the holder of an office of the Commonwealth as an Ambassador or High Commissioner, in a country or place outside Australia.

At present, the Bill imposes additional registration requirements on recent Cabinet Ministers for a period of three years after they cease to be a Member of Parliament or a holder of a senior Commonwealth position. Increasing this period to 10 years reflects a considered judgment that the reasons for imposing these additional registration requirements on former Cabinet Ministers, as outlined in the Explanatory Memorandum, remain germane for a longer period of time than is presently reflected in the Bill.

At present, the Bill imposes additional registration requirements on former junior Ministers, members of Parliament, Secretaries and Deputy Secretaries of Commonwealth departments, and the heads and deputy heads of other Commonwealth agencies for a period of 18 months after they cease to hold such positions.

The inclusion of former Ambassadors or High Commissioners in the concept of recent designated position holder recognises that such persons play a unique role in Australia's foreign relations and that, when acting on behalf of a foreign government, political organisation, or related entity or individual in their retirement or upon ceasing their role as Ambassador or High Commissioner, such persons have the potential to be uniquely influential. Accordingly, it is appropriate and in the public interest to require transparency from such individuals.

Increasing the period for which recent designated position holders are subject to additional registration obligations to seven years after ceasing in a particular role reflects a considered judgment that the reasons for imposing these additional requirements remain germane for a longer period of time than is presently reflected in the Bill.

Donor activity / disbursement activity

The amendments also propose changes to the definition in section 10 of 'donor activity', which has been renamed 'disbursement activity', to provide greater clarity about this concept in relation to the electoral donations disclosure regime and minimise any perception of overlap.

Changes have not been made to the substance of this definition in section 10 – it continues to provide that disbursement activity is undertaken by a person if the person disburses money or things of value, and neither the person nor a recipient of the disbursement is required to disclose it under Division 4, 5 or 5A of Part XX of the *Commonwealth Electoral Act 1918.* Disbursement activity remains registrable under section 21 when undertaken in Australia on behalf of a foreign principal for the purpose of political or governmental influence.

Undertaking activity of behalf of a foreign principal – section 11

The amendments propose to narrow the definition of 'undertaking activity on behalf of a foreign principal' in section 11, to address concerns raised during the Committee process. The amendments remove reference to activities that are undertaken with funding or supervision by, or in collaboration with, a foreign principal.

In combination with the amendments to reduce the range of foreign principals in respect of whom registration is required, the effect of these amendments to section 11 will be to ensure that, for example:

- 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, and
- charities are not required to register solely because they receive funding from foreign governments or foreign government related entities.

The amendments also propose a new subsection 11(4) to clarify that an activity undertaken by a company registered under the *Corporations Act 2001* is not undertaken on behalf of a foreign principal merely because the company is a subsidiary (within the meaning of the *Corporations Act 2001*) of a foreign principal. This addresses concerns raised by companies that they will be required to register simply because they are a local subsidiary of, or are owned by, a foreign principal.

Activity for the purpose of political or governmental influence – section 12

The amendments propose to narrow the definition of 'activity for the purpose of political or governmental influence' in section 12 to require that the sole or primary purpose, or a substantial purpose, of the activity is to influence any aspect of a political or governmental process, as opposed to it being a purpose of the activity.

Other amendments to section 12 would clarify that a person undertakes an activity for the purposes of political or governmental influence if the sole or primary purpose, or a substantial purpose, of the activity is to influence the public or a section of the public in relation to a political or governmental process. These amendments, which address concerns raised in the Committee inquiry, will narrow the scope of the scheme and provide clarity to potential registrants.

Communications activity – section 13

I propose to revise section 13 to clarify that broadcasters, carriage service providers and publishers are not required to register, merely because they edit information or materials produced by a foreign principal to ensure compliance with Australian media laws and regulations, or to ensure the information or materials can be re-transmitted or published, for

example by shortening a television program by a few seconds so that it fits into an allocated timeslot.

The proposed amendments are technology-neutral, and so will apply to all media formats and technologies, including print and online media, free-to-air, subscription and streaming television, and publishers.

The purpose of limiting the exemption in subsection 13(3) by including a requirement that the identity of the producer is apparent from the information or material disseminated, or is otherwise disclosed in accordance with the rules, is to ensure that the exemption does not inadvertently enable foreign governments, political organisations, and related entities and individuals to exploit our free press as a vehicle for covert foreign influence.

Media organisations and publishers will not be required to register if the identity of the principal is already transparent. Examples of this would include, for example:

- in the case of an opinion piece published in a newspaper or periodical—where the piece is published under the name of its author;
- in the case of a book published by a publisher—where the book is published in the name of the author; or
- in the case of a live interview on radio or television—the identity of the interviewee would be inherently transparent.

However, if the disseminator broadcasts or publishes the material as though it was native content, thereby concealing the provenance of the material, registration should be required. For example, registration may be required where a foreign government provides an Australian media organisation with content that is intended to influence the Australian people, or a section thereof, in relation to a political or governmental process, and the media organisation publishes or broadcasts that content, as though it were the Australian organisation's own editorial position.

Proposed changes to subsection 13(3) mean that it is no longer necessary to define 'broadcaster' and 'periodical' in section 10 of the Bill and these definitions have been removed.

The specific exemption for carriage service providers in current subsection 13(3) has been retained in revised subsection 13(4), as carriage service providers do not communicate or distribute information or material in the ordinary course of their business, but rather provide the means by which concern service providers communicate information or material.

Amendments to Division 4 of Part 2—Changes to existing exemptions

Changes to the scope of the Bill have necessitated amendments to the exemptions in Division 4 of Part 2, as well as to address concerns raised in the Committee's inquiry.

Section 27 exemption: religion

The current exemption for religion at section 27 seeks to ensure that religions with a link to a foreign government are not required to register when undertaking activities consistent with the religion's doctrines, tenets, beliefs or teachings. I am aware that the Committee has heard evidence from the Catholic Church that the exemption, as currently drafted, would not exempt them from the requirement to register.

While the exemption was intended to exclude the Catholic Church from the application of the scheme, amendments will be necessary to the exemption to put this beyond doubt. To this end, the proposed amendments to section 27 exempt all religious activities undertaken in good faith on behalf of a foreign principal from registration requirements under the scheme.

Section 28 exemption: news media

The exemption for news media in section 28 of the Bill only applied if the foreign principal was a foreign business or individual. As these persons no longer form part of the definition of foreign principal, section 28 is proposed to be removed from the Bill.

Section 29 exemption: commercial or business pursuits

The exemption for commercial or business pursuits in section 29 has been retitled 'government, commercial or business pursuits' and has been expanded to cover activities undertaken by individuals on behalf of a foreign government in the individual's capacity as an officer or employee of the foreign government, and in the name of the foreign government.

Such activities are inherently transparent, so there would be little benefit in requiring individuals acting in their official capacity as an employee of officer of a foreign government to register.

Amendments to Division 4 of Part 2—New exemptions

A new exemption is provided in proposed section 29A which relates to professional industry bodies incorporated in Australia which represent the collective interests of its members and have both domestic and foreign entities within their membership.

This addresses concerns raised in the Committee's inquiry by professional industry bodies that the Bill as introduced imposes an unnecessary regulatory burden on such entities by requiring them to register as they do not represent the interests of any particular foreign principal member. Rather, the professional industry body represents the interests of the industry as a whole, not the interests of the foreign principals who may form part of its membership. If a professional industry body were to lobby on behalf of one of its foreign members (rather than on behalf of the industry as a whole), it may still be required to register.

I am aware that a range of stakeholders have raised concerns with the Committee that making representations on behalf of individuals would be captured by the scheme as it is currently drafted. The amendments, outlined above, to remove foreign individuals from the range of foreign principals in respect of whom registration is required will largely resolve this issue. To the extent that registration continues to be required in respect of foreign government related individuals, the amendments propose a new exemption for representations made by a person on behalf of a foreign principal who is also an individual where:

- the individuals are either members of the same family, or know each other personally and the individual undertaking the activity does so because of this and in that individual's personal capacity; and
- the activity is, or relates primarily to, representing in good faith the interests of the foreign principal in relation to:
    - an administrative process of a government involving the foreign principal, or
    - matters affecting the personal welfare of the foreign principal.

Introduction of transparency notice regime

The amendments propose the introduction of a power for the Secretary to issue transparency notices in new Division 3 of Part 1 of the Bill (proposed sections 14A to 14E).

The Secretary of my department may issue a notice that a person is a foreign government related entity or a foreign government related individual if the Secretary is satisfied that the person is a foreign government related entity or foreign government related individual. If a notice is issued, the person or entity named in the notice will be a foreign principal for the purposes of the Scheme. Key features of the transparency notice regime are that:

- the notice must be in writing and be made publicly available
- the notice comes into force when it is issued and remains in force until it is revoked by the Secretary
- the Secretary may vary a notice if he or she is satisfied that the details in the notice should be updated or corrected
- the Secretary must revoke a notice if he or she ceases to be satisfied that the person is a foreign government related entity or a foreign government related individual
- the Secretary is not required to observe procedural fairness requirements in issuing, varying or revoking a notice
- the decision of the Secretary to issue, vary or revoke a notice may be reviewed on application to the Administrative Appeals Tribunal
- the notice, as well as variation or revocation of a notice, is not a legislative instrument, and
- there is no action for defamation against the Commonwealth, a Minister, Secretary, department or other agency because the Secretary has issued, revoked or varied a notice, or has made the notice publicly available.

The purpose of the transparency notice framework is to enable the Government to investigate and declare that a company or individual is related to a foreign government or political organisation, or to a foreign government related entity in the case of an individual. This framework may be of utility in cases where:

- there is some genuine uncertainty about whether a company or individual is related to a foreign government—a declaration-making power may provide clarity for putative registrants, and
- a company or individual is attempting to conceal their relationship with a foreign government.

Interaction with Parliamentary privilege

The Committee has heard evidence, and received submissions, about the interaction between the proposed Scheme and Parliamentary privilege. To ensure clarity, the amendments amend the Bill to insert a new section which clarifies the interaction between the Bill and certain privileges and immunities.

Proposed section 9A makes it explicit that nothing in the Bill affects powers, privileges and immunities relating to each House of Parliament, their members and committees, as well as the law relating to legal professional privilege. The section also limits the application of the Secretary's powers to obtain information and documents under sections 45 and 46 where the information or documents are subject to parliamentary privilege or legal professional privilege.

Amendments to criminal offences

The amendments also propose changes to the offence provisions in Part 5 of the Bill to introduce offences applying recklessness as a fault element applying to the physical element that the person was required to apply for registration or renew registration. These offences will exist in a tiered offence structure, with higher penalties applying to the offences requiring knowledge as the fault element for that physical element.

The amendments also propose to lower the maximum penalties for the criminal offences in the Bill.

A provision providing for extended geographical jurisdiction in respect of offences where the defendant is, or was at the time of the offence, a former Cabinet Minister or a recent designated position holder, has also been included.

Further amendments

The amendments also propose a number of minor changes to provide clarity to existing provisions in the Bill and respond to evidence received by the Committee during its inquiry, as well as reflect the revised scope of the Scheme.

In particular, amendments are proposed to:

- add the phrase 'statutory appointee' in section 8 relating to the Scheme's application to Commonwealth, States and Territories, to clarify that the Scheme does not apply to organisations or individuals in statutory appointed independent roles
- prevent the Secretary from making information which is commercially sensitive, affects national security or is prescribed by the rules to the public under section 43 (Certain information to be made publicly available), and
- remove the Secretary's ability in section 67 to delegate his or her coercive information gathering powers under sections 45 and 46 and his or her powers relating to communication of Scheme information under Division 4 of Part 4 to APS employees below Senior Executive Service employees.

I trust this information is of assistance to the Committee in finalising its inquiry into the Bill.

Yours sincerely

The Hon Christian Porter MP
Attorney-General