Submission to the Parliamentary Joint Committee on Intelligence and Security (Joint) on the Review of the

- **National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017**
- **Home Affairs and Integrity Agencies Legislation Amendment Bill 2017**
- **Foreign Influence Transparency Scheme Bill 2017**

Committee Secretary
Parliamentary Joint Committee on Intelligence and Security
PO Box 6021 Parliament House Canberra ACT 2600
Phone: +61 2 6277 2360 Fax: +61 2 6277 2067
pjcis@aph.gov.au

1. I am an Australian lawyer in private practice. I make this submission on my own account as a matter of public interest. The opinions expressed are my own. I am available to appear before the Committee in person if required.

2. This submission is in a form suitable to be published on the internet.

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

3. Schedule 1 Clause 4 introduces section 83.1 to the Criminal Code Act 1995. This section creates an offence by a civilian of "advocating mutiny". Such an offence could have the effect of criminalising any peaceful advocacy by civilians against Australian involvement in wars or warlike activity or peaceful advocacy that Australian servicemen and women apply the Nuremburg principle in considering the lawfulness of orders they have been given. No policy case has been raised by the Executive that would support such a change.

4. Schedule 1 Clause 4 introduces section 83.4 to the Criminal Code Act 1995. It creates a very broad offence of "interference with political rights and duties". This appears to be excessive criminalisation of conduct that is already well-addressed by existing, more specific, laws and no policy case has been raised by the Executive that would support such a change.

5. The amendments introduced by Part 5.2 of Schedule 1 will potentially make receipt by lawyers, or receipt or publication etc by journalists and others who have essential public-protective functions of information that has a security classification (whether or not they know of the classification) a serious criminal offence subject to 25 years imprisonment eg clause 91.1(2). No policy case has been raised by the Executive that would support such draconian laws. Lawyers and journalists have public functions vital to the continuance of the Australian democracy. Such laws will have a chilling effect on political debate and will impair the ability of citizens to seek legal advice about whistleblowing and proper steps to hold the government of the day to account.

6. The legislation does not contain any criteria for the application of security classifications but leaves this to later regulations.

7. Schedule 1 clause 22 creates an additional offence under new section 132.8A Criminal Code Act 1995 of damaging Commonwealth property by conduct outside Australia. One imagines that the intention of this offence is to heap additional misery on the poor souls detained in off-shore detention over whom Australia exerts control while apparently denying responsibility for their well-being. If detainees are the target of this law it is surely unnecessary, as local law will already apply.

8. Schedule 2 inserts a new Part 5.6 into the Criminal Code Act 1995. New section 122 et seq create offences regarding communicating or dealing with information relating to the operations, capabilities or technologies of, or methods or sources used by, a domestic or foreign law enforcement agency. Conceivably this very broad language could also include disclosures or whistleblowing about breaches of law or international law or ethical standards by such agencies. Defences that provide some protection for whistleblowing are created by section 122.5. However, the defences omit to provide for the disclosure to or receipt by a lawyer for the purpose of the person receiving legal advice about how to make a protected disclosure.

9. Section 122.5(6) provides a defence for journalists but they must prove their holding or dealing with the information was in the public interest and in their capacity as a journalist "engaged in fair and accurate reporting". This additional requirement seems unnecessary, vague and rather in the eye of the beholder. Again, the uncertainty of the defence and the risk of exposure to criminal penalty will have a chilling effect on political debate and the proper role undertaken by journalists to hold the government of the day to account. This is particularly so given the impacts of technological and market change on journalism which mean some of the most important journalism is now carried out by freelance writers and investigative journalists and small media/non-mainstream media without the legal resources of traditional main-stream media publishers. Indeed, the definition of who is entitled to style themselves "a journalist" may be open to debate.

Home Affairs and Integrity Agencies Legislation Amendment Bill 2017

10. The reports of the Inspector-General of Intelligence and Security should be made to the Prime Minister and the Attorney-General in addition to the responsible Minister, whether or not the report was requested by the Prime Minister.

11. This is particularly important in view of the unprecedented consolidation into the purview of one Minister of the powers of intelligence-gathering and surveillance (foreign and domestic), police, financial transaction reporting, citizenship and residency and movements of persons, goods and communications into and out of Australia and the unprecedented number of functions involving the exercise of effectively unreviewable discretions by that Minister and increasingly draconian secrecy provisions (see also Secrecy Laws and Open Government in Australia Australian Law Reform Commission Report 112 December 2009 p 22).

12. Additionally, the reports of the Inspector-General of Intelligence and Security should be made available to the leader of the Opposition.

Foreign Influence Transparency Scheme Bill 2017

13. In its present form, the Foreign Influence Transparency Scheme Bill 2017 is both insufficient and excessive in scope. It is also insufficiently defined in content.

14. It is insufficient in scope in that it
    (1) does not catch all, or a sufficiently broad range of, foreign influence activities in Australia;
    (2) will not make some of the most important influence activities transparent; and
    (3) allows influence activities to continue that parliament should consider prohibiting.

15. It is excessive in scope in that it does not exempt some legitimate activity from the burden of registration.

16. It is insufficiently defined in that major aspects of the operation of the "scheme" depend on rules yet to be promulgated. Further, the effective operation of the transparency regime in large part depends on the exercise of essentially unreviewable discretions by the Secretary or his/her delegate.

17. Conduct that should be identified and made transparent under the scheme that is not caught includes:

    (1) soliciting, collecting or dispensing contributions, loans, money, or other things of value for or in the interest of a foreign principal that are not covered by the definition of donor activities (clause 13(1) is limited to "disburse"[ment]) – compare Foreign Agents Registrations Act 1938 (U.S.C. § 611 et seq – United States Code) at § 611(c)(1)(iii).
    (2) donations by foreign businesses and individuals – there is no explained policy reason to exempt donation activity by foreign businesses and individuals from scrutiny (clause 21 item 4). There does not appear to be a principled distinction, especially if the real possibility of close relationships between foreign individuals or foreign businesses and foreign governments, including through organised crime, is considered. One of the difficulties with exempting businesses and individuals from the scheme is that it facilitates avoidance of the scheme by the device of using an entity or individual to make a donation that would otherwise be identified.

18. Lobbying and other influence activities by foreign businesses may remain largely opaque as the bill (clause 43(2)) empowers the Secretary or his/her delegate to determine that such activity is "commercially sensitive" and therefore that information about it not be made public, even information merely of the fact of an agency relationship and a brief description of agency activities. The bill provides no criteria for such a decision and it would be effectively unreviewable. Public understanding of the influence operations of foreign businesses is one of the key beneficial functions of the bill and yet it could be substantially undercut by this discretion. This is even more important when the close ties of foreign businesses to foreign governments is also considered, including in regimes where business, government and organised crime interests may be indistinguishable. The Australian public should be able to ascertain when lobbying and other influence campaigns or activities are being conducted on behalf of foreign business interests including those seeking to effect change in Australia's taxation and monetary policies, national health system, pharmaceutical benefits scheme, mining, land ownership, media

ownership, internet neutrality, intellectual property laws and integrity of natural heritage assets.

19. The exemption given for individuals or organisations involved in humanitarian work (clause 24) appears too limited in scope. A better test would exempt activity of the agent where the dominant activity of the foreign principal is the provision of humanitarian aid or assistance or the advocacy of human (and animal) civil and political rights recognised under international law. Substantial fees[1] and administrative burdens could have the effect of stifling criticism of Australian policies, practices or norms by international human rights and labour organisations, jurists and charities or preventing or limiting their advocacy on behalf of vulnerable individuals or groups in Australian society or other vulnerable people for whom Australia has or should acknowledge ethical responsibility. The Australian polity would be poorer for immunising itself from such criticism or advocacy.

20. A very broad exemption is given (clause 27) to foreign governments who are "acting in good faith in accordance with the doctrines, tenets, beliefs or teachings of the particular religion of the foreign government". The purpose or rationale for this exemption is not evident. Australian government is secular and freedom *from* religion is as important to the Australian polity as individual freedom to practice religion. There is no reason that agents of a foreign government pursuing lobbying activities in Australia to, for example, effect a change in the availability of abortion as a Medicare service or to advocate the restriction of the education of women or the reversal of the recent amendment to the marriage law, should be exempt from registration and identification. The breadth and strangeness of this section is increased by what is missing from the exemption when compared with the corresponding provision in the Foreign Agents Registrations Act 1938 (U.S.C. § 611 et seq – United States Code § 613 (e) which exempts "activities in furtherance of bona fide religious, scholastic, academic, or scientific pursuits or of the fine arts".

21. Freedom of news media in all forms is essential to the Australian democracy. However, a function of foreign agency legislation is or should be to require identification of foreign propaganda machines. The broad exemption under clause 28(1) might be too broad because the dissemination of propaganda by "expressing editorial content in news media" would allow foreign media businesses or foreign 'think tanks' that are in reality fronts for foreign governments or non-media businesses to provide such content without either registration or other identification of the source of the material. It may be useful to compare the broader requirements in respect of foreign-owned news media under Foreign Agents Registrations Act 1938 (U.S.C. § 611 et seq – United States Code) at § 611(d). Nevertheless any limitation on activity by news media should be approached with extreme caution.

22. The bill only looks at the activities of the agent and not those at whom the activities are aimed. The real transparency of foreign influence activity would be better secured if the appointment diaries of Ministers and members of parliament were published (in real time) including the names of participants in meetings with them that are not public meetings (other than matters of national security and claims for whistleblower protections), including any informal or social meetings for which Ministers or members claim any expense

[1] The bill provides for fees to be applied to registrants (clause 63). The fees are not set or articulated by the bill but are left to future rules.

reimbursement or receive assistance with or compensation for their attendance in any form from any source or are required to disclose benefits received in connection with their attendance on the pecuniary register.

23. Whether in this bill or otherwise, parliamentary consideration should be given to prohibiting
    (1) foreign political donations to parties and candidates.
    (2) Ministers, members of parliament and senior public servants from working for foreign principals within the exclusion periods proposed by the bill except with the approval of a two/thirds vote of the Senate.

Valerie Heath

22 January 2018