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16 February 2023

Committee Secretary
Select Committee on Foreign Interference through Social Media
Department of the Senate
PO Box 6100
Canberra ACT 2600

To the Committee,

Inquiry into Foreign Interference through Social Media

Thank you for the opportunity to make a submission to this Inquiry. I do so as a member of the University of Queensland, TC Beirne School of Law. I am solely responsible for the views and content of this submission.

My submission is limited to Term of Reference B:

> *Responses to mitigate the risk posed to Australia's democracy and values, including by the Australian Government and social media platforms.*

In particular, I address the adequacy of existing crimes of foreign interference in this context.

My primary point for the Committee's attention is that **Australia's crimes of foreign interference are not adequate** to address the threat posed by foreign interference through social media. Despite this, **law reform should focus on regulating the conduct of social media companies**, not individual criminal liability, in light of recognised issues with existing foreign interference offences.

This analysis draws on research published in:

- Sarah Kendall, 'How Australia's Foreign Interference Laws Undermine Press Freedom' (2022) 47(2) *Alternative Law Journal* 124.

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1. Australia's foreign interference offences are not adequate to address foreign interference through social media

Australia has a complex framework of nine foreign interference offences, found in Division 92 of the *Criminal Code Act 1995* (Cth) ('*Criminal Code*'). These novel offences were introduced in 2018 in response to the growing threat of espionage and foreign interference.[i]

Division 92 criminalises two broad categories of conduct. First, providing resources, support or funds to, or receiving funds from, a foreign intelligence agency ('foreign intelligence agency' offences).[ii]

Second, engaging in covert, deceptive or threatening conduct on behalf of, in collaboration with, or where directed, funded or supervised by, a foreign principal.[iii] The person engaging in this conduct must do so intending to (or reckless as to whether they will) influence a political or governmental process or right, support the intelligence activities of a foreign principal, or prejudice Australia's national security ('foreign interference' offences).

These foreign interference offences have the capacity to apply to individuals engaged in foreign interference through social media. This is because the offences apply to conduct through any medium,[iv] including conduct online (such as via social media). The offences also apply to conduct within and outside Australia, so they could capture users of social media located anywhere in the world at the time of offending.[v] This reflects today's globally-connected social media environment.

Despite this, the foreign interference offences are not adequate to address foreign interference through social media. This is because practical issues may limit the effectiveness of these laws as they apply in this context. Specifically:

1. It may be difficult to identify the offending individual, who may have obscured their identity online using anonymising technologies;
2. Even if the offender can be identified, if they are located overseas then they will need to be extradited to Australia to face prosecution, which can be a challenging process; and
3. There may be barriers to collecting necessary evidence, especially if such evidence is located on foreign servers.

In light of these limitations, law reform may be necessary to strengthen Australia's response to foreign interference through social media.

2. Law reform should focus on regulation of social media companies

My primary submission is that law reform, if undertaken, should focus on regulation of social media companies, not on foreign interference offences targeting individuals. This is because Australia's existing foreign interference offences are already overly broad, which risks undermining basic rights and freedoms and criminalising innocent conduct of individuals.

Key terms used in the foreign interreference offences are broad and uncertain. For example, *national security* includes international and economic relations,[vi] *foreign principal* includes entities

that are owned or controlled by foreign principals (such as foreign-controlled media companies or foreign public universities),[vii] and *prejudice* has not been defined positively.[viii] The breadth of these terms means that conduct that should not be criminalised – such as certain journalistic or academic conduct – may in fact be criminalised.[ix] This can have unintended consequences for basic rights and freedoms, such as a chilling effect on free speech and academic freedom.

Rather than reforming foreign interference offences as they apply to individuals, the law should be strengthened as it applies to social media companies. This is especially so given the practical limitations of prosecuting individuals under existing foreign interference offences (as described above).

Specifically, social media companies should be required to take reasonable steps to prevent foreign interference from occurring via their platforms. Failure to do so could be regulated in a number of ways, including via civil and/or criminal penalties if appropriate.[x] Given the seriousness of foreign interference and the potential harm it can cause, this kind of approach to addressing foreign interference through social media is arguably warranted.

In **summary**, I submit that:

1. Australia's foreign interference offences are not adequate to address foreign interference through social media.
2. Law reform should focus on the regulation of social media companies, not individual criminal liability, in light of recognised issues with existing foreign interference offences.

Yours sincerely

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References

[i] Introduced by the *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018* (Cth).
[ii] *Criminal Code Act 1995* (Cth) ss 92.7, 92.8, 92.9, 92.10.
[iii] Ibid ss 92.2(1), 92.2(2), 92.3(1), 92.3(2). Preparing for such conduct is also criminalised: ibid s 92.4.
[iv] Ibid s 4.1(2) (definition of 'engage in conduct').
[v] Ibid ss 92.6, 15.2.
[vi] Ibid s 90.4.
[vii] Ibid ss 90.2, 90.3.
[viii] Ibid s 90.1 (definition of 'prejudice').
[ix] See, eg, Sarah Kendall, 'How Australia's Foreign Interference Laws Undermine Press Freedom' (2022) 47(2) *Alternative Law Journal* 124.
[x] Potential reforms to corporate criminal liability, which could be applied in the context considered by this Inquiry, have been discussed by the Australian Law Reform Commission ('ALRC'): ALRC, *Corporate Criminal Responsibility Final Report* (ALRC Report No 136, April 2020).