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Dear Committee Secretary

## **Inquiry into the provisions of the Foreign Influence Transparency Scheme Bill 2017**

Australian Lawyers for Human Rights (**ALHR**) is grateful for the opportunity to provide this submission in relation to the Committee's current Inquiry into the proposed *Foreign Influence Transparency Scheme Bill* (**'the Bill'**).

We note that the time frame for considering this and other related Bills has been particularly short and at a difficult time of year. There may well be other issues in relation to the Bill which we have failed to identify but which are also of importance.

While we do not disagree with the aim of requiring recent MPs and recent holders of senior Commonwealth positions to register their activities on behalf of foreign interests, ALHR's view is that the exclusions provided for such persons require clarification, and that the Bill is excessively far reaching in most other respects. The Bill provides only a light degree of regulation in relation to business interests<sup>1</sup> but imposes a jungle of regulations and strict liability penalties for non-business interests. The degree of regulation envisaged is completely unnecessary and inappropriate in today's international and inter-connected world.

Further, the Bill undermines the key role of charities and other non-government organisations in supporting Australia's democracy. The Bill restricts the ability of any speaker with minimal foreign connections to lobby government or even political parties. The very exceptions given to business tacitly recognise the repressive nature of the Bill.

ALHR's primary concern is that if enacted the Bill will, particularly in combination with the *National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017* and the *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017* (together, the **'Package'**),

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<sup>1</sup> Business and commercial interests are generally exempt under section 29 so long as the Australian party acts as an employee of, or "under the name" of, a foreign "business", in relation to "a commercial or business pursuit."

violate the fundamental universal human rights to freedom of speech and freedom of expression for persons in Australia, and severely restrict the implied Constitutional right to free political communication. We are making submissions also in relation to those other Bills, which appear to have been drafted so as to inter-relate and reinforce each other.

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## 1. Summary

- (1) The Package continues a general trend in recent Commonwealth legislation to impose strict liability and resultant **excessive penalties, including imprisonment for up to 7 years, irrespective of whether or not any harm has been caused**, and irrespective of the extent of any harm (see Section 7). ALHR is strongly opposed to such legislative provisions.
- (2) ALHR submits that the nature of the **types of harm** that might be caused by “foreign interference” **need to be fully analysed** so that the Bill can focus only on likely real harm - rather than spreading its present wide net which appears intended to catch any public speech on any policy matter whatsoever, even where the association of the speaker with any foreign interest is absolutely minimal and/or completely benign.
- (3) The Bill appears to capture private communications with politicians and political parties if there is some foreign association, even where the foreign association is quite irrelevant to the communication.
- (4) The legislation assumes that any lobbying activity in any way connected with foreign entities is necessarily inappropriate and should be notified to the Australian government and/or made public. There is no foundation for this supposition, particularly in the light of the very broad definitions of ‘lobbying’ and ‘on behalf of’ in the Bill, which will effectively catch much normal political discourse.
- (5) The Package continues a general trend in recent Commonwealth legislation to impose strict liability and resultant **excessive penalties even when there is no intent to harm** or at the worst where there is only minor negligence or recklessness (see Section 7). ALHR is strongly opposed to such legislative provisions.
- (6) The Package contains a number of key terms which are not clearly defined or are defined in a manner **far wider than their plain English meanings** (see Section 4). ALHR believes this type of drafting has the potential to deliver unintended results. This is a serious issue with not only the Bill but the Package as a whole.
- (7) In the view of ALHR, the combined effect of the provisions referred to in the preceding paragraphs is not only counterproductive but **highly dangerous** in terms of a proper approach to the rule of law. In combination, the above drafting problems could have the unintended effect that the Bills in the Package could **severely penalising bona fide and benign behaviour which causes minimal harm**.
- (8) There is no doubt that the Bill will severely chill public policy discussions, given the strict liability nature of the offences, the vague and excessive reach of key terms, and the additional onerous reporting requirements and associated expenses required from individuals or entities which wish to engage in public speech. Despite the Explanatory Memorandum saying that “the scheme is not intended to restrict, deter, criminalise or punish otherwise lawful activities or associations,” there is a real danger that the Bill will indeed have that effect.
- (9) The Bill continues the attack on political speech demonstrated in the *Criminal Code Amendment (Impersonating a Commonwealth Body) Bill 2017*. Under that proposed legislation, many artistic and satiric works which are intended to influence public policy could easily be caught within the scope of conduct intended to influence “the exercise of a public duty or function” and result in the potential for imprisonment under the Bill. ALHR submits that to influence the manner in which public functions are exercised is a normal aim of all political opposition and political comment. Engaging in influencing the exercise of a public duty or function through lawful and legitimate means such as public communications is a fundamental and indispensable principle of Australian democracy that cannot and should not be restricted so readily. For example, we as human rights lawyers constantly try to influence the exercise of public functions so that they are carried out in a manner consistent with human

rights. Such activity does not warrant the imposition of extreme penalties either under that Bill or under this.

- (10) There is no limit on donations by a foreign individual or foreign “business” (not restricted to commercial businesses) (see section 21 of the Bill and paragraphs 6.3 and 6.16 below). **This provides a wide-open backdoor for foreign influence and is totally inconsistent with the purported ‘transparency’ regime contemplated by the Bill.**
- (11) ALHR expresses **strong doubts as to the adequacy of the Constitutional basis** for the Bill. Mere linguistic connections between the heads of power in Section 51 of the Constitution and the subject matter of the Bill (as expressed in section 7 of the Bill) are not enough, particularly in the light of the onslaught by the Bill and the Package as a whole on the implied Constitutional right of political communication.
- (12) The proposed legislation is an unreasonable overreach and utterly inimical to the values of a free and democratic society. ALHR submits that the Bill is not a proportionate response to the harms identified, and disproportionately impacts upon civil and human rights, free speech and democratic participation, as discussed in section 9.

## 2. ALHR’s Concerns

- 2.1 Pursuant to the principle of legality, Australian legislation and judicial decisions should adhere to international human rights law and standards, unless legislation contains clear and unambiguous language otherwise. Furthermore, the Australian parliament should properly abide by its binding obligations to the international community in accordance with the seven core international human rights treaties and conventions that it has signed and ratified, according to the principle of good faith.
- 2.2 ALHR endorses the views of the Parliamentary Joint Committee on Human Rights (PJCHR) expressed in Guidance Note 1 of December 2014<sup>2</sup> as to the nature of Australia’s human, civil and political rights obligations, and agree that the inclusion of human rights ‘safeguards’ in Commonwealth legislation is directly relevant to Australia’s compliance with those obligations.
- 2.3 Generally, behaviour should not be protected by Australian law where that behaviour itself infringes other human rights. There is no hierarchy of human rights – they are all interrelated, interdependent and indivisible. Where protection is desired for particular behaviour it will be relevant to what extent that behaviour reflects respect for the rights of others.
- 2.4 It is only through holding all behaviours up to the standard of international human rights that one can help improve and reform harmful and discriminatory practices.
- 2.5 Legislation should represent an **appropriate and proportionate response** to the harms being dealt with by the legislation, and adherence to international human rights law and standards is an important indicator of proportionality.<sup>3</sup> Despite the comments of the Explanatory Memorandum to the contrary, in the view of ALHR this legislation does not strike the right balance at all, and indeed **enshrines a list of restrictions unique in a purportedly modern democracy.**

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<sup>2</sup> Commonwealth of Australia, Parliamentary Joint Committee on Human Rights, *Guidance Note 1: Drafting Statements of Compatibility*, December 2014, available at <[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/Guidance\\_Notes\\_and\\_Resources](http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources)> accessed 16 January 2015, see also previous *Practice Note 1* which was replaced by the Guidance Note, available at <<https://www.humanrights.gov.au/parliamentary-joint-committee-human-rights>>.

<sup>3</sup> See generally Law Council of Australia, “*Anti-Terrorism Reform Project*” October 2013, <<http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/Oct%202013%20Update%20-%20Anti-Terrorism%20Reform%20Project.pdf>> .

### 3. Human rights breached by the proposed Bill

- 3.1 The Explanatory Memorandum identifies the following rights under the *International Covenant on Civil and Political Rights (ICCPR)* as potentially impacted, arguing however that the impact is proportionate, necessary and reasonable in the circumstances or indeed (in the case of freedom of expression) that the right is actually promoted by the Bill. These are:
- the right to liberty of person and freedom from arbitrary detention in Article 9(1) of the ICCPR
  - [the right to a fair and public hearing in both civil and criminal proceedings including] the right to be presumed innocent in Article 14(2) of the ICCPR
  - the right to privacy in Article 17 of the ICCPR
  - the right to freedom of opinion and freedom of expression in Article 19 of the ICCPR
  - the right to freedom of association in Article 22 of the ICCPR, and
  - the right to take part in public affairs and the right to vote in Article 25 of the ICCPR.
- 3.2 The Explanatory Memorandum concedes that the Bill limits the presumption of innocence by:
- imposing strict liability offences (section 58);
  - imposing absolute liability for certain offence elements (section 61);
  - placing an evidentiary burden on the defendant with respect to defences (sections 59 and 60); and
  - providing for evidentiary certificates which is prima facie evidence of the existence of certain facts (section 51).

ALHR opposes these provisions.

- 3.3 Australia is a contracting party to the ICCPR which was signed by the Australian government on 18 December 1972 and ratified on 13 August 1980. Pursuant to Article 26 of the 1969 Vienna Convention on the Law of Treaties, Australia is obliged to the international community to implement, uphold, protect and respect all of the rights contained in the ICCPR including the right to freedom of expression and the right to a fair and public hearing in both civil and criminal proceedings.
- 3.4 ALHR submits that the legislation as drafted provides neither a proportionate, necessary or reasonable response to the perceived harms of foreign interference in Australia's political and governmental processes and negatively impacts upon all of the human rights referred to above. As mentioned throughout this Submission, the Bill is drafted so broadly that it will have a major impact on ordinary political discourse even where there is only a minimal association between the speaker and a foreign person or entity.
- 3.5 In addition, the Bill continues this government's concerning and very undesirable pattern of criminalising 'reckless' behaviour that is in no way intended to cause harm, and quite irrespective of whether or not harm has actually been caused. Given that the Bill might result in incarceration for non-malignant behaviour which actually causes no harm, the Bill is potentially in breach of Article 9 of the ICCPR and Article 3 of the Universal Declaration of Human Rights (UDHR) which protect the right to liberty. We remind the Committee that Australia had a significant role in drafting the UDHR and in its adoption by the United Nations General Assembly on 10 December 1948. This is a proud history that Australia has in upholding basic human rights and we should be vigilant to guard against their infringement by the government of the day. ALHR submits that the Australian electorate should not allow the government of the day to dispense with and dispose of fundamental human rights so frivolously as appears to be the intention of the Bill.

- 3.6 The Bill clearly and severely impacts also on the fundamental rights of individuals to take part in the conduct of public affairs as provided for by Article 25 of the ICCPR. We fear that the Bill as presently drafted is so excessive in its scope and in the penalties imposed as to have a severely chilling effect upon free speech, and particularly constitutionally-protected free political speech. It diminishes our democracy.

#### 4. Terms which are given excessively broad meanings

##### *Foreign principal*

- 4.1 This is defined (in section 10) as not only covering foreign governments, public enterprises, political organisations and businesses, but also any “individual who is neither an Australian citizen nor a permanent Australian resident”.
- 4.2 Over 28 per cent of Australia's current population was born overseas.<sup>4</sup> Nearly half (49 per cent) of Australians are either born overseas (first generation Australian) or have one or both parents born overseas (second generation Australian).<sup>5</sup> It is clear that over 49 percent of Australians will have family and friends who live overseas and who are likely to fall within the definition of ‘foreign principal.’
- 4.3 It is likely that most of the remaining 51 percent of Australian who (like their parents) were born in Australia will also have friends, and possibly relatives, who live overseas and who fall within the definition of ‘foreign principal.’
- 4.4 On the face of it, one would not think that these relationships would be caught by the Bill. However there are many circumstances in which activities carried out with the knowledge of foreign friends or family could be caught by the Bill, because of the excessive width of the definition of ‘on behalf of.’
- 4.5 The fact that exemptions are provided in sections 22 and 23 for recent Cabinet Ministers, recent Ministers, members of Parliament or holders of senior Commonwealth positions from dealings with foreign principals who are individuals (paragraph (b) of each Section) makes it clear that the drafters have decided that it would be excessive to capture relationships between those persons and foreign individuals. That principle is even more applicable to ordinary Australians.

##### *Foreign business*

- 4.6 This term is defined as meaning a person (other than an individual) that:
- (a) *either:*
    - (i) *is constituted or organised under a law of a foreign country or of part of a foreign country; or*
    - (ii) *has its principal place of business in a foreign country; and*
  - (b) *is not a foreign government, foreign public enterprise or foreign political organisation.*
- 4.7 The definition would appear to be intended to catch every foreign entity not otherwise specified in the Bill, even those entities which are not carrying on a business, or not carrying on a business for profit, including trusts, charities, schools, universities, think tanks and the like, and would appear to apply whether or not such entities are acting in conjunction with any Australian subsidiary.

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<sup>4</sup> Australian Bureau of Statistics Media Release 30 March 2017 at <http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/3412.0Media%20Release12015-16>, accessed 18 January 2018

<sup>5</sup> Australian Bureau of Statistics Media Release 27 June 2017 at <http://www.abs.gov.au/ausstats/abs@.nsf/lookup/Media%20Release3>

### On behalf of

- 4.8 The object of the Bill is stated to be “to provide for a scheme for the registration of persons who undertake certain activities on behalf of foreign governments, foreign businesses and other foreign principals, in order to improve the transparency of their activities on behalf of those foreign principals.” The term ‘on behalf of’ would normally be understood to mean that one entity acts as agent for the other.
- 4.9 However section 11(1) states that a person undertakes an activity on behalf of a foreign ‘principal’ (retaining the principal/agency concept) not only in the normal agency situations but also if the first person undertakes an activity ‘in collaboration’ with the foreign principal.
- 4.10 ‘Collaboration’ is not defined either in the Bill or in the *Acts Interpretation Act 1901*. The Cambridge English Dictionary definition is: “the situation of two or more people working together to create or achieve the same thing”.
- 4.11 That is, ‘on behalf of,’ which normally has the concept of a directing principal and a directed agent, is in this Bill being used to include the situation of two autonomous principals who choose to work together, where the Australian principal is not necessarily being directed in any way by the foreign principal.
- 4.12 Section 11(3) expands the meaning of ‘on behalf of’ even further. It includes the situation where both the Australian principal and the foreign principal ‘knew or expected that the [Australian principal] would **or might** undertake the activity’ (in circumstances set out in sections 20 to 23 – as to which see pars 5.3 and following).
- 4.13 So if (1) any Australian principal has anything to do with any non-Australian foreign person or entity, and (2) the non-Australian foreign person or entity ‘knew or expected’ that the Australian principal ‘would’ or even ‘might’ undertake the particular registerable activity, then the Australian principal is regarded as acting ‘on behalf of’ the non-Australian foreign person or entity. The consequences are that the Australian principal must register this relationship, and must carry out further reporting obligations. Interestingly, the transitional provisions in Schedule 5 of the *National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017* relating to the Bill refer to the necessity of registering an existing ‘registerable arrangement’ between a person and a foreign person, despite the Bill catching relationships which are far looser and more nebulous than an ‘arrangement.’
- 4.14 The Bill raises a question about the *mens rea* of the relevant parties. One of the preconditions for there to be a registerable activity is that “both” the relevant Australian and foreign parties must know/expect that the Australian party ‘would or might’ undertake the registerable activity. It is not clear how the Australian principal can always be aware of the foreign principal’s state of mind or expectations, particularly when the knowledge or expectations of the foreign principal relates to something indefinite – that is, to something that the Australian principal might or might not do.

### Purpose

- 4.15 Section 14 provides that:

*The purpose of an activity may be determined by having regard to any one or more of the following:*

- (a) the intention or belief of the person undertaking the activity;*
- (b) the intention of any foreign principal on whose behalf the activity is undertaken;*
- (c) all of the circumstances in which the activity is undertaken.*

*Note: The purpose of an activity is relevant for the purposes of certain registrable activities (see sections 12 and 21) and for the purposes of the exemptions in Division 4 of Part 2.*



*for the purpose of political or governmental influence*

- 4.16 Section 12(1) defines this phrase in a way that at first sight appears to be quite narrow in that it focuses on parties (bearing in mind that section 14 contemplates either or both of the parties having a particular purpose) seeking to influence the form rather than the substance of political issues – to influence ‘processes’ and ‘proceedings’ rather than outcomes. Neither ‘process’ nor ‘proceeding’ is defined in the Bill nor in *the Acts Interpretation Act 1901*.
- 4.17 However section 12(1) then states that ‘for the purpose of political or governmental influence’ includes where ‘any’ purpose of the registerable activity is to directly or indirectly influence any aspect of the processes and proceedings described, ‘including the outcome’.
- 4.18 “Process” and “proceeding” thus are described so as to include the outcomes of the particular process or proceeding.
- 4.19 Subsection 12 (2) adds that “an activity is taken to be for the purpose of political or governmental influence” if “a 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 process or proceedings.”
- 4.20 That is, any activity which may influence some or all of ‘the public’ (whether or not it is a public or private activity) may be caught by the Bill. The term ‘section of the public’ has a long history in financial services law (see Corporations Act s 82) but the relevant case law would not appear to be relevant to the concept of a ‘section of the public’ in the context of establishing foreign influence.
- 4.21 Subsections (3), (4), (5) and (6) give further examples of what is caught in relation to a ‘process’:
- (a) Subsection (3) gives examples of “federal government decisions” in the context of “a process in relation to a federal government decision” (Section 12 (1)(b)) and subsection (4) clarifies that this applies whether or not a decision is final; and
  - (b) In relation to processes of a registered political party, subsection (5) includes that party’s “policy on any matter of public concern” as well as internal matters relating to a party’s constitution, procedures, candidate selection and conduct of campaigns, while subsection (6) repeats similar examples (the person’s platform, the person’s policy on any matter of public concern) in relation to independent MPs and candidates not aligned with a registered party.
- 4.22 It is therefore clear that ‘for the purpose of political or governmental influence’ covers activities intended to influence government or party policy.

**5. Part 2, Division 4 exemptions**

- 5.1 The exemptions included in Division 4 of Part 2 are as follows:

- 24 *humanitarian aid or assistance*
- 25 *legal advice or representation*
- 26 *diplomatic, consular or similar activities*
- 27 *religion*
- 28 *news media*
- 29 *commercial or business pursuits*
- 30 *prescribed circumstances*

- 5.2 ALHR is concerned with the scope of several of the exemptions.

- 5.3 The exemption concerning humanitarian aid or assistance in section 24 shares the defects of a similar exemption in the in the *Criminal Code Act 1995* (which was amended by virtue of the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014*). The effect of



that amendment was to make it much harder to claim a humanitarian aid exception, as the exception was to apply only where it was the *sole reason* for the conduct in question, even though there could be many additional reasons why the particular conduct was carried out that were not related to offensive activities. There are similar difficulties with the wording here. Given that any conduct can convey multiple messages to different audiences, it is likely to be virtually impossible for anyone to prove that their conduct had a ***sole purpose*** or a ***sole message***.

- 5.4 Similarly, the limitation in section 25 of legal advice “solely” to matters relating to legal advice or representation in relation to judicial, criminal or civil “law enforcement inquiries, investigations or proceedings” appears unnecessarily narrow.
- 5.5 It is unclear why section 27 privileges religious lobbying on behalf of theocracies. This does not seem to be a desirable exception.
- 5.6 The exemption in section 28 for news media for activities “solely, or solely for the purposes of, reporting news, presenting current affairs or expressing editorial content in news media” clearly does not cover opinion pieces. Given that opinion pieces are a major part of most mainstream news (on which, indeed, the Huffington Post is based) it is not appropriate to exclude opinion pieces. The consequences for journalists writing for overseas publications would be excessive.
- 5.7 The exemption in section 29 in relation to commercial or business pursuits is far too wide. So long as the Australian party acts as an employee of, or “under the name” of, a foreign “business”, in relation to “a commercial or business pursuit”, they are completely exempt from the legislation. However, inconsistently, no such exemption is given to non – commercial NGOs, whether they might be charities, think tanks, arts or sporting associations, even though generally such bodies will:
  - have lesser resources for lobbying and communication than will commercial businesses; and
  - crucially: be lobbying or communicating not on their own behalf or for their own benefit (unlike the businesses), but to share their expertise in a way that improves Australian society and to advocate for the needy and dispossessed.
- 5.8 We submit that at the very least the requirement that the activity is in relation to a commercial or business pursuit be removed, thus allowing Australian activity on behalf of foreign non-commercial interests, again so long as the Australian party acts as an employee or “under the name of” the entity.
- 5.9 Without such amendments it would appear that Australian subsidiaries of non-business foreign organisations would not be exempt under Division 4 of Part 2 – potentially catching such organisations as the Red Cross.
- 5.10 When one contrasts the proposed exemptions with the width of the ‘free speech’ exemptions in section 18D of the *Racial Discrimination Act 1975* (Cth) it is clear that the exemptions are not proportionate to the penalties that the Bill imposes. We recommend that the exemptions be substantially enhanced along the lines of those in section 18D. For example, an additional Section could be included to read along similar lines as follows:

*This Act does not apply to anything said or done in Australia reasonably and in good faith (whether or not carried out for profit, and whether or not resulting in any benefit or loss to any person):*

*(a) in the performance, exhibition or distribution of an artistic and/or political work, including any comedic or satirical work; or*

*(b) in the course of any statement, publication, discussion or debate made or held for any genuine political or artistic purpose or any other genuine purpose in the public interest; or*

*(c) in making or publishing a fair and accurate report of, or statement of opinion upon, any of the above matters.*

## 6. Registerable activities

### *Recent MPs and recent holders of senior Commonwealth positions*

- 6.1 Cabinet Ministers and MPs who held those positions within the last 3 years, and senior Commonwealth staff who held those positions within the last 18 months, must register their dealings “on behalf of” foreign principals (sections 22 and 23) unless the principal is an individual or the person is exempt under Division 4 of Part 2.
- 6.2 We believe these provisions are reasonable, so long as it is clear that the exemptions in 22(b) and 23(b) do not apply if the foreign individual is in turn acting on behalf of a foreign business, public enterprise, political organisation or government. We suggest an additional provision, perhaps as a section 14A, be included to clarify this point. We also suggest that the normal plain English meaning of ‘on behalf of’ should be used, rather than the expanded meaning otherwise given in the Bill.

### *Other persons carrying out activities in Australia*

- 6.3 Where a person in Australia carries out an activity ‘on behalf of’ a foreign principal (bearing in mind the excessive width of that term as defined in the Bill) both:

- (a) in Australia, and
- (b) for the/a purpose of ‘political or governmental influence,’

then the activity is subject to the Bill where the following circumstances apply (section 21). See also the Table in the Appendix to this submission.

Activities in Australia for the “purpose” of “political or governmental influence”		
Item	Activity	Foreign principal
1	Parliamentary lobbying	Any kind of foreign principal except a foreign government (which is covered under section 20)
2	General political lobbying	any kind of foreign principal
3	Communications activity	any kind of foreign principal
4	Donor activity	Any kind of foreign principal except a foreign business or an individual who is neither an Australian citizen nor a permanent Australian resident

- 6.4 To understand the full reach of the relevant sections we need to examine the various terms used.

### *Lobbying*

- 6.5 In section 10, **lobby** is defined as ‘including’ to:

- (a) *communicate, in any way, with a person or a group of persons for the purpose of influencing any process, decision or outcome; and*
  - (b) *represent the interests of a person, in any process.*
- 6.6 The definition of 'lobbying' is inconsistent with the concepts established by the very broad definition of 'on behalf of.' The definition of 'lobbying' follows the more traditional concept that a lobbyist both communicates with persons for the purpose of influencing their views (and hence their decisions) and in doing so acts as the agent or representative of another person. Both elements must be present.
- 6.7 It is highly likely that many persons caught by the Bill on the basis that they are purportedly acting 'on behalf of' a foreign person or entity would not be caught by the concept articulated in the definition of 'lobby,' because they would not be acting so as to represent the interests of the foreign person or entity.
- 6.8 However the definition of 'lobby' is stated to be inclusive, rather than exclusive, and so there is the possibility of a court holding that the definition of 'lobby' still catches an Australian person or entity who is deemed - by virtue of the definition in section 10 of 'on behalf of' - to be acting on behalf of the foreign person or entity, even though the Australian person or entity is not actually representing the interests of the foreign party.
- 6.9 The definition of 'lobby' confirms that not only the activities of influencing processes or proceedings are caught by the Bill. It is confirmed that influencing the outcome of a process or proceeding or influencing a decision can also be a registerable activity under the Bill (if the other necessary elements are present).

#### *Specific activities*

- 6.10 It would appear that the specific activities which may be registerable are described in the Bill in order of generality.
- 6.11 The narrowest activity is '**parliamentary lobbying**'. This is defined in section 10 as meaning
  - lobbying any one or more of the following persons:*
  - (a) *a member of the Parliament (meaning the Federal Parliament);*
    - (b) *a person employed under section 13 or 20 of the Members of Parliament (Staff) Act 1984.*
- 6.12 Such a definition would appear to catch an Australian individual's private lobbying of their local member of Parliament, provided that some foreign friend or relative knows that the Australian person is likely to contact their MHR or Senator. There is no exception for private communications.
- 6.13 The next activity is '**general political lobbying**'. This is defined in section 10 as as meaning:
  - lobbying any one or more of the following:*
  - (a) *a Commonwealth public official;*
    - (b) *a Department, agency or authority of the Commonwealth;*
    - (c) *a registered political party;*
    - (d) *a candidate in a federal election;*
  - other than lobbying that is Parliamentary lobbying.*
- 6.14 The next activity is "**communications activity**" which is defined in section 13(1) as communicating or distributing "information or material" including (as per section 13(2)) "information or materials in any form, including oral, visual, graphic, written, electronic, digital and pictorial forms." Again, private communications would appear to be caught by this

definition just as fully as public communications. Exceptions are included in section 13 for the “publisher of a periodical” who publishes the information or materials, as well as for the broadcaster of the relevant communication, but in neither case is an exception provided for the journalist involved. **Nor is there any exemption for attending public demonstrations, signing public petitions, writing letters to a newspaper or online or other normal methods of political discourse aimed at changing government policy.**

- 6.15 The final type of activity which may be registerable is donor activity. That is defined as follows:

*a person undertakes **donor activity** if:*

*(a) the person disburses money or things of value; and*

*(b) 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.*

- 6.16 It should be noted that there is no limit on donations by a foreign individual or foreign “business” (not restricted in this case to commercial businesses). **This provides a wide-open backdoor for foreign influence and is totally inconsistent with the purported ‘transparency’ regime contemplated by the Bill.**
- 6.17 To summarise: the extreme width of the meaning given to the phrase ‘for the purpose of political or governmental influence’ would mean that if a person in Australia were to text, email or phone a family member or friend who is not a permanent Australian resident nor an Australian citizen and say: “I’m going in the demonstration at Parliament House tomorrow to support Marriage Equality” then potentially that person would be regarded as acting on behalf of that other (‘foreign’) party and their activity is registerable as such (and subject to criminal penalties).

## 7. Criminal penalties

- 7.1 The offences in sections 56 onwards are criminal offences with severe penalties both in terms of imprisonment for up to 7 years and value of fines (Civil penalties for the most minor infringement are set at 60 penalty units which is currently \$12,600). The offences under section 57 relate to a person undertaking an activity on behalf of the foreign principal after the end of a registration period or when they have knowingly failed to register/renew their registration. The following offences relate to a person failing to fulfil responsibilities under the scheme (sections 58 and 61), or to provide information sought by the Regulator (sections 59 and 60). However all of these offences would apply:
- (a) irrespective of whether or not harm has actually been caused by the activity and with no ‘de minimus’ defence; and
  - (b) even when no intention to cause harm exists.
- 7.2 Generally, offences under the criminal law should only be imposed where an activity both causes, or is likely to cause, harm to an essential public interest, and where there is relevant *mens rea*. Otherwise, the activity should be dealt with by administrative or civil penalties, which should be proportionate to the likely harm of the activity. Given the extremely broad reach of the Bill and the lack of exemptions for activities involving normal political discourse, the current approach is of great concern to ALHR.
- 7.3 It is not clear how the penalties apply to individuals who represent legal entities. Are all directors of a corporation subject to criminal offences under sections 56 and 57? Or the whole board of management of an incorporated association? Section 65 appears to leaves this question to be solved by the Rules, saying: “The scheme applies to a person that is not a legal person, other than a partnership, as if the person were a legal person, but with the changes prescribed by the rules for that kind of person.” It is submitted that this issue needs clarification in the Act, not the Rules.

## **8. Fees**

- 8.1 Section 63 imposes a variety of charges upon persons required to register under the scheme and leaves the possibility open for further fees to be charged under the rules. The imposition of such costs will have a chilling effect upon free political speech.

## **9. Lack of Transparency**

- 9.1 As mentioned, the broad exemptions for business and commercial interests make nonsense of the general aim of transparency. Other entities, conversely, are required to provide an unending stream of notifications to the Regulator. However it is unclear to what extent anything more than the fact of a person's registration (section 43(2)) will be made public. Unless all notifications made under the scheme are publicly accessible in full, the transparency this Bill promises will be transparency to the Regulator only and not to the general public.

## **Conclusion**

Political comment aimed at making a better nation is a fundamental underpinning of any democracy. Public participation in our political system is a fundamental and indispensable part of Australian democracy. The discourse of NGOs and charities and the media's ability to report and comment on the same are a potent expression of the free spirit of Australia and our democracy. They should not be traded away so carelessly by overreaching legislation such as the proposed Bill.

Any legislation which impinges upon human rights must be narrowly framed, proportionate to the relevant harm, and provide an appropriate contextual response which minimises the overall impact upon all human rights. The drafting of the Bill far exceeds its stated aims and has the potential to criminalise normal political behaviour and to chill the exercise of free speech including political comment.

ALHR is concerned that the Package will severely impact on the ability of non-government associations, from major charities to small volunteer groups, to participate in political discourse, while leaving major businesses relatively untouched. This outcome ensures that the voices of the 'haves' dominate our democracy, while those who attempt to speak on behalf of the 'have nots' will be so limited and restricted that their voices will not be heard. Growing inequality in the world is indeed "a direct consequence of the voice of working people being crushed" as a former Australian Treasurer has said, and this Package would have that very effect.

ALHR submits to the Committee that given the potential for the Bill's excessive reach to seriously infringe on fundamental democratic freedoms, all of the questions and ambiguities raised must be clarified before the Bill is put to a vote in the parliament, especially in the circumstances that Australia has no bill of rights or federal charter of rights and so Australians do not have an express legally protected right to freedom of speech and/or expression, which makes the contents of the proposed Bill all the more troubling.

ALHR is happy to provide any further information or clarification in relation to the above if the Committee so requires.

If you would like to discuss any aspect of this submission, please email me

Yours faithfully

Benedict Coyne

**President**  
**Australian Lawyers for Human Rights**

## ALHR

ALHR was established in 1993 and is a national association of Australian solicitors, barristers, academics, judicial officers and law students who practise and promote international human rights law in Australia. ALHR has active and engaged National, State and Territory committees and specialist thematic committees. Through advocacy, media engagement, education, networking, research and training, ALHR promotes, practices and protects universally accepted standards of human rights throughout Australia and overseas.

<b>Activities in Australia registerable for the “purpose” of “political or governmental influence” by virtue of connection with “foreign” parties</b> <i>(including by way of collaboration and including situation where both the Australian and the foreign parties ‘knew or expected that the [Australian party] “would or might” undertake an activity referred to in sections 20 to 23)</i> <i>- unless in any case the Australian party is exempt under Division 4</i>						
Item		<b>Foreign government</b> (includes govt authorities and state or local government bodies)	<b>Foreign public enterprise</b> (a company or any other person (other than an individual) controlled by the government of a foreign country or of part of a foreign country)	<b>Foreign political organisation</b> (includes a foreign political party)	<b>Foreign ‘business’</b> (means a person (other than an individual) that: (a) either: (i) is constituted or organised under a law of a foreign country or of part of a foreign country; or (ii) has its principal place of business in a foreign country; and (b) is not a foreign government, foreign public enterprise or foreign political organisation)	<b>An individual who is neither an Australian citizen nor a permanent Australian resident</b>
1	<b>Parliamentary lobbying</b> (lobbying any one or more of the following persons:(a) a member of the Parliament (meaning the Federal Parliament); (b) a person employed under section 13 or 20 of the <i>Members of Parliament (Staff) Act 1984</i> )	Caught, whatever the purpose - s 20 ✗	caught ✗	caught ✗	caught ✗	caught ✗
2	<b>General political lobbying</b> (lobbying any one or more of the following: (a) a Commonwealth public official; (b) a Department, agency or authority of the Commonwealth; (c) a registered political party; (d) a candidate in a federal election – [in each case] other than lobbying that is Parliamentary lobbying)	caught ✗	caught ✗	caught ✗	caught ✗	caught ✗
3	<b>Communications activity</b> (communicating or distributing “information or material” including (as per section 13(2)) “information or materials in any form, including oral, visual, graphic, written, electronic, digital and pictorial forms)	caught ✗	caught ✗	caught ✗	caught ✗	caught ✗
4	<b>Donor activity</b> (a person undertakes this if: (a) the person disburses money or things of value; and (b) 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 <i>Commonwealth Electoral Act 1918</i> )	Caught – except if already required to disclose under the Cwlth Electoral Act ✗	Caught – except if already required to disclose under the Cwlth Electoral Act ✗	Caught – except if already required to disclose under the Cwlth Electoral Act ✗	Not caught – can donate ✓	Not caught – can donate ✓