TO pjcis@aph.gov.au

PJCIS: Submission on Foreign Interference legislation, introduced on 7 December 2017

Dear Sir/Madam,

I make this submission to the PJCIS, for consideration in its hearings scheduled for early 2018 on the Foreign Influence Transparency Scheme Bill 2017, and on its three companion bills. This legislation was introduced in Parliament on the final sitting day of the year, 7 December 2017. It attracted little political or media response at the time (a notable exception being Brian Toohey's article, 'Foreign interference laws go too far and crimp freedom of speech', in the *Australian Financial Review* on 12 December 2017:

http://www.afr.com/opinion/columnists/foreign-interference-laws-go-too-far-and-crimp-freedom-of-speech-20171212-h031se

Prior to the legislation's introduction into Parliament, The Prime Minister , the then Attorney-General Senator Brandis, and the Minister for Finance Senator Cormann, on 5 December 2017 issued a joint media release and held a joint Press Conference on the legislation. The text of the media release and the Press Conference transcript are at Attachment 1 to this submission.

As it stands, and as it was introduced to the public by the Prime Minister and the then Attorney-General Senator Brandis on 5 December, this draft legislation is in my view an attack on the freedoms of expression and association that all Australians currently enjoy. I deplore this draft legislation from a civil liberties point of view.

I have no comment to offer on the espionage aspects of this draft legislation. But I do wish to criticize:

1. The draft legislation's philosophical thrust and wording, which – as the Prime Minister's Media Release and press conference transcript also make clear – conflate the traditionally well-defined crime of espionage, with the new presumed crime of 'harmful foreign interference' in Australian government policymaking;
2. The constraints this legislation will put on Australian citizens' present freedoms of expression and free association with foreign persons or organisations;
3. The iniquity of obliging Australian citizens who wish to express views in public on contentious international political issues, and to have contacts with foreign persons or organisations who might share such views, to register as 'foreign agents' as a precaution against their possibly being charged as criminals under this legislation;
4. The arbitrary and open-ended nature of the legislation, which as it stands leaves large discretion to two politicians and Ministers of the Crown - the Minister for Home Affairs (the new homeland security-style department launched on 20 December 2017) and the Attorney-General – in deciding which Australian persons and/or actions should be prosecuted as criminal offenders and/or offences under this draft legislation if it becomes law.

The Prime Minister advised in his press conference on 5 December that it would be prudent for any persons in situations like my own (details are below) to make a precautionary registration as a foreign agent:

'Organisations that think they might, or individuals that think they might come within the ambit of the legislation would be wise to register. If in doubt, register, because then you're not going to get into trouble for not registering'.

My personal story offers a useful test of the Orwellian consequences which this legislation, if passed as presently drafted, could have for Australians.

I would be pleased to testify before the PJCIS any time after 15 February [redacted].

**

My name is Anthony Charles Kevin and I am [redacted] years old. [redacted]. I am retired [redacted]. I am an Australian-born Australian citizen. I do not hold a law degree and have never worked as a lawyer. Both my father John Charles Kevin and I enjoyed distinguished Commonwealth foreign service careers: he from 1939 to 1968 as a naval officer and Commonwealth wartime intelligence officer, and senior Australian diplomat thereafter; and I from 1968 to 1998 as an Australian career diplomat and foreign policy analyst. My last posts were as Australian Ambassador to Poland (1991-94) and finally Cambodia (1994-97).

Since retirement from the public service in 1998, I have been a freelance independent political commentator and author of five published books. Full details of my life and work are on my website www.tonykevin.com.au .

My most recent book was '*Return to Moscow*', published in February 2017 in Australia by University of Western Australia Publishing. For details of this book see https://www.uwap.uwa.edu.au/products/return-to-moscow

This book – relevant to this legislation - is in part a memoir of my first posting in Moscow in 1969-71 as a young Australian diplomat during the Cold War; in part, a travel memoir of my independently organised and self-funded visit to Russia in January-February 2016; in part, a discussion of what I see as the most important cultural and historical influences on contemporary Russian national identity and values, which are not well understood in Western countries; and finally, a reasoned appeal to Western governments and citizens to move on from the current destructive climate of Russophobia and hostility to the Russian government, and to seek to rebuild a climate of Western detente with Russia, involving

regular mutually respectful dialogue and the pursuit of mutual common international goals and interests under a rules-based multipolar world order.

In addition to my book, I have written and spoken in many Australian public venues since around 2014 publicly advocating detente with Russia, particularly in several essays on John Menadue's public affairs blog *'Pearls and Irritations'* in the years 2014-17, and in a lecture I gave in Perth in June 2017 which was broadcast on the ABC Radio National *Big Ideas* program in July 2017 (see my website www.tonykevin.com.au for audio and text files of this lecture).

I will be in Russia on holiday from [redacted]. My travel is self-organised and self-funded. I will visit Crimea for five days [redacted] and I may meet representatives of the Crimean government. Australians are currently being advised by DFAT not to travel to Crimea because of its disputed political status: I am not taking this advice.

I am scheduled to give a public lecture in Moscow on 24 January and in St Petersburg in the days 10-12 February, on the theme 'Current prospects for Russia-West detente: reflections of a former Western diplomat". I am not being paid for these lectures, nor are my travel expenses being met in whole or in part.

Nevertheless under this legislation, some or all of this personal activity in Russia would potentially make me a foreign agent of Russia, and at the discretion of the Minister for Home Affairs and the Attorney-General, potentially subject to criminal prosecution. Although my submission goes to general public-interest issues in this draft legislation (see below), I do have and here declare this personal interest.

In respect of China, I have been less active as a writer and public speaker. But I published on 21 July 2016 a significant contrarian essay on John Menadue's public affairs blog *'Pearls and Irritations',*

https://johnmenadue.com/tony-kevin-south-china-sea-dispute-a-furious-china-challenges-the-high-priests-of-international-law/

'A furious China challenges the high priests of international law', which outlined and expressed support for the Chinese Government position on the South China Sea territories sovereignty question.

From time to time I have been invited to be interviewed on radio by CRI, China Radio International, on questions of China's international relations and relations with Australia. I sometimes express pro-Chinese Government views on this program.

Although I have received no financial payment or compensation for any of this public activity either in respect of Russia or China, I could nevertheless be forced as a matter of prudence to register as a foreign agent under the draft legislation if it is passed into law.

**

Let us go back to first principles here. Australia is a multicultural democracy. Australia is not at war with any country. Our government subscribes to the UN Charter. We have diplomatic relations with all governments. Our citizens are free to travel to any country in the world and to associate freely with citizens and public organisations in those countries, except in rare cases of states deemed to be terrorist entities.

We are free to travel to the US, China, and Russia, and to associate freely with citizens of these great powers. We are also free to travel to countries like Israel and Iran and North Korea and to associate with public organisations there. We are free to write about our journeys.

Many Australian citizens and public organisations have extensive and warm person-to-person contacts with public organisations in the United States and Israel. There are numerous educational tours, academic exchange schemes, and all-expenses-paid familiarisation visits between Australia, the US and Israel. Potentially, Australian citizens involved in such contacts and who write publicly about them could trigger the proposed foreign interference legislation if they fail to register as foreign agents.

But it is most unlikely that they would: because US and Israel as regarded *de facto* by most Australians as unquestionably friendly and in the case of US, an allied country. American and Israeli community networking in Australia is wide and deep. These relations are a fact of our national life, uncommented on until now – when the foreign influence and interference legislation might potentially bring them into question, at least from the legal consistency aspect.

Russia and China raise very different issues. Let me examine each case closely.

RUSSIA: Australia's relationship with Russia is even now, 27 years after the Cold War ended in 1991, insubstantial and under-developed. Australian governments have focussed their foreign policy on our own Asia-Pacific region, of which the Australian Government does not see Russia as really part, though in fact Russia's long and resource-rich North Pacific coastline makes it an Asia-Pacific power, as China, the two Koreas, and Japan well understand.

There is a significant Russian-origin and expatriate Russian community living and working in Australia. This community, as is its democratic right, maintains contacts with families and

friends in Russia and with Russian cultural and professional life. The Russian Embassy in Canberra and consulates in state capitals facilitate these contacts.

I have had various social contacts over the past year with the Russian Embassy in Canberra and once with the Russian Consul-General in Sydney when he attended and spoke at my Sydney book-launch of 'Return to Moscow' in February 2017. I have several times enjoyed the Ambassador's hospitality in his Canberra residence.

Australia's official stance towards Russia has been cold since the divisive events in Ukraine in 2014, starting with the February 2014 coup d'etat in Kiev which deposed the elected President Yanukevich and installed a nationalistic, anti-Russian government in Ukraine; the subsequent referendum under unofficial Russian protection in Crimea which resulted in the people of Crimea deciding by large majority to secede from Ukraine and to join Russia; the Ukrainian government's heavily armed attack on its rebel eastern provinces Donetsk and Lugansk, resulting in major civilian damage, many deaths, and large refugee outflows; and the still unexplained tragedy of the shootdown of MH17. Crimea's political status as part of Russia since 2014 is rejected by the Australian Government and allied Western governments.

The Australian national security community sees Russia as a major strategic competitor to our military ally the United States. The risk of incidents of military conflict between Australian and Russian forces in Syria was not negligible in recent years when our aircraft flew and supported attacks on ground targets in Syria in close proximity to, but not in cooperation with, Russian forces.

Despite these tensions Australia has maintained for many years correct official relations with Russia. President Putin attended the Brisbane G20 Summit in 2014. A recent high point was when the Foreign Ministers of both countries in 2017 exchanged official congratulatory

messages on the 75th Anniversary of the establishment of Australian-Soviet Russian diplomatic relations as wartime allies against Nazi Germany in 1942. These messages have been published. However, there have been no highlevel visits nor senior official talks.

There is large potential for improved relations with Russia, a country which can be admired for its contributions to a rules-based multipolar global order. I want to continue, as a loyal Australian citizen, to work towards the goal of Russia-West detente. I do not regard myself as a foreign agent for Russia and I would resent having to register as such.

CHINA: China is of course Australia's largest economic partner and Chinese students form the bulk of fee-paying foreign students in Australia, contributing importantly to the Australian economy. There is a substantial and growing affluent Chinese immigrant presence in our major cities. In every way, China is now a much bigger and more developed international partner for Australia than is Russia.

Still, similar Australian national security issues are said to arise in respect of both countries. When the Prime Minister wanted to demonstrate on 5 December that China was not being singled out for attack under the legislation, Russia was the only other example he cited. The Australian national security community sees China as a major strategic competitor to our military ally the United States, and thus as our potential enemy in war. The risk of incidents of military conflict between Australian and Chinese naval or air forces around disputed territories in the South China Sea, or in any US-China military confrontation around the Korean peninsula, is not negligible.

My personal contacts with China are less extensive than those I have with Russia. But many leading Australians, like Bob Hawke, Paul Keating, Andrew Robb, and Bob Carr, as prominent examples, (but there must be many less famous Australian citizens who have significant Chinese business or educational institutional links), sit on Chinese corporate or institutional

boards. They would thus be prudent – as the Prime Minister advised on 5 December - to register as foreign agents under this legislation. I presume also that they would receive some remuneration from such Board positions.

It would be for the Minister for Home Affairs and the Attorney-General to decide whether any such activities by such prominent Australians are potential criminal offences under the foreign interference and foreign influence legislation. Australians of Chinese ethnic origin might come under particular scrutiny, which I would find objectionable.

**

Overall, I find this legislation offensive and dangerous. It threatens my freedom to form and express political views on world affairs, and to visit or associate with individuals or public organisations from particular countries with which Australia has normal diplomatic relations.

I hold no official secrets, having been retired from the Australian public service for 20 years. All my information and policy insights come from information freely available to any Australians in the public arena.

Why should I not accept invitations to prestigious international non-governmental lecture tours or conferences in Russia or China – even expenses-paid invitations; speak at them; and write about them afterwards? Why should I not write books or articles on Australia's relations with Russia or China? Why should I not accept royalties from commercial or public organisations in those countries ?

And so on. A whole new category of potential or actual criminality is being created here, and to what purpose? Is our Australian democracy not strong enough to withstand free public discussion of contentious issues in Australia's relations with China or Russia? Are our citizens

so naive and vulnerable that they need to be protected from political contact with persons and ideas from these countries?

Look closely at what the Prime Minister said in his media conference on 5 December:

'The reforms will include a new Foreign Influence Transparency Scheme. The principle is straightforward; *if a person or entity engages with the Australian political landscape on behalf of a foreign state or a principal, then they should register. Both elements are required, the ties to the foreign player and the advocacy.* (My italics)

'This will give the Australian public and decision-makers proper visibility when foreign states or individuals may be seeking to influence our political processes and public debates. *Being registered, I should say, should not be seen as any kind of taint and certainly not a crime. But if you fail to disclose your ties, then you will be liable for a criminal offence'* . (My italics).

And as seen even more bluntly in his words in this subsequent question and answer exchange -

JOURNALIST: Can I just clarify PM - sorry, had to step away a moment – people such as Bob Carr and Andrew Robb, will they have to appear on the register or not?

PRIME MINISTER: Well it depends, as George [Senator Brandis] said. It depends on what they're doing, but if they are in effect lobbying – which has been defined broadly and George just described that – on behalf of a foreign government or a foreign public entity, a foreign political and so forth, then they would be obliged to register.

JOURNALIST: Is that lobbying, or is that - ?

PRIME MINISTER: It depends what it does. Again, it depends what the work of the organisation is. Look, to be practical about it, you look at the US experience. Organisations that think they might, or individuals that think they might come within the ambit of the

legislation would be wise to register. *If in doubt, register, because then you're not going to get into trouble for not registering'.* (My italics).

The Prime Minister's warnings could not be more ominous: all the more so because of the vagueness and lack of clarity of his language, e.g., .' *engages with the Australian political landscape on behalf of a foreign state or a principal', and 'Both elements are required, the ties to the foreign player and the advocacy.'*

**

In conclusion, I offer further reflections on the wording of some relevant parts of the draft Foreign Interference legislation, and in the three Ministers' explanations in their media release and media conference on 5 December.

In Section 11, *'Undertaking activity on behalf of a foreign principal': A 'foreign principal'* is defined as any foreign government, government or non-government agency, or individual from any foreign country. This definition captures everyone from a head of state, down to the humblest individual foreign citizen.

Section 11 defines '*undertaking activity on behalf of a foreign principal*' thus:

(1) A person undertakes an activity on behalf of a foreign principal if the person undertakes the activity:
   (a) under an arrangement with the foreign principal; or
   (b) in the service of the foreign principal; or
   (c) on the order or at the request of the foreign principal; or
   (d) under the control or direction of the foreign principal; or
   (e) with funding or supervision by the foreign principal; or
   (f) in collaboration with the foreign principal.

(2) For the purposes of subsection (1), it does not matter whether consideration is payable.

I note how vague and open-ended this language is. In section 11(1), what does 'undertakes an activity' mean? In Section 11.1(f), what does 'in collaboration with the foreign principal' mean?

In the Prime Minister's words on 5 December, what does the phrase *'ties to the foreign player' mean?* This could simply mean any act of discussing some issue with a foreign person, face-to-face, or by letter or email, or by phonecall. And I note that 11(2) explicitly states that 'it does not matter whether consideration is payable'.

And what is *'advocacy'* as the Prime Minister referred to it on 5 December? There is a fine line between elucidating a foreign country's position on an issue in international contention, e.g., Russia on the Crimea issue, or China on the disputed South China Sea territories, and 'advocating' that position. Much of my writing explains Chinese or Russian views on international issues in contention: does this make it 'advocacy'?

In all these ways, this legislation would put the onus of establishing innocence on the Australian citizen, in circumstances that could be construed as pointing to guilt, e.g., a monitored private phonecall with a foreign person on a political issue. This is how totalitarian regimes operate - not democracies.

It is worth recalling also what former Senator Brandis said, in amplifying the Prime Minister's opening remarks on 5 December:

'The second piece of legislation, the second brick in this edifice, is the creation of a new Foreign Influence Transparency Scheme. As the Prime Minister has said, what this is, is a

registration requirement. It is not directed to malicious conduct. *The objectives of the offences bill is (sic) to broaden the basis on which malicious conduct is criminalised*. The transparency scheme is aimed, as its name suggests, at transparency, *so that we know who is seeking to influence the Australian political process and on whose behalf*. It will apply to persons or entities acting on behalf of foreign Governments, foreign public enterprises, foreign political organisations, or foreign businesses who seek to affect the Australian political system, the outcomes of Australian elections, or the decision of a Government authority. *Anything that bears upon the political, electoral governmental process engaged in by someone on behalf of a foreign actor*, *in this case whether covertly or overtly, and not necessarily for the purposes of harming the Australian national interests*, *will be required to register,* much as lobbyists are required to register.' (My italics)

The Prime Minister in the media conference on 5 December said *'Interference is unacceptable from any country, whether considered on any view, friend or foe'.* This legislation, the Prime Minister said, attempts to distinguish between 'harmful foreign interference' and 'normal foreign influence'. It tries to do so in a way that – as the Prime Minister claimed – does not discriminate between countries. Yet implicit in the Media Release and in what the Prime Minister said on 5 December is a clear presumption that some countries are our friends, and some are our foes.

I believe, as I noted above, that the language of this legislation, and the way it was presented to the public by senior Ministers on 5 December, is misconceived and harmful to our democracy. We live in an interconnected multipolar world, where there is constant exchange of goods, services, information and ideas between Australia and many countries: some of which are our military allies, and some not. We cannot nor do we want to close ourselves off from this diverse wider world. Our nation would be economically and intellectually impoverished if we tried to do so. We also need to deal with an increasingly complex and multipolar world in a political and strategic context, in which all countries

share a common interest in the avoidance of war through adherence to the UN Charter and UN Security Council rules.

Do we want to leave important decisions of this kind, to establish whether or not there is any criminality by Australian citizens under this Foreign Interference legislation, to the discretion of the Minister for Home Affairs and the Attorney-General? I see large problems here.

In my view, the draft legislation leaves far too much room to ministerial discretion by these two Ministers, in deciding what constitutes 'harmful foreign interference' in our open democracy, which has as broadly accepted core values individual freedom of expression, and freedom to exchange and discuss ideas with other persons. This legislation will open the door to an Australian form of McCarthyism.

The legislation is silent on questions of who decides, and on what basis, which countries are engaged in 'normal' and 'legitimate' foreign influence-seeking in Australia (e.g., United States or Israel?) and which are engaged in 'harmful' , 'unacceptable' interference or influence-seeking (e.g., China or Russia?).

The Prime Minister under media questioning on 5 December said former NSW Premier Bob Carr and former Coalition Cabinet Minister Andrew Robb would be well advised to register as foreign lobbyists because of their current Chinese corporate connections: but he said there was 'no presumption of criminality' in their lobbying activity.

The Prime Minister said:

'*Now, we will not tolerate foreign influence activities that are in any way covert, coercive or corrupt. That's the line that separates legitimate influence, from unacceptable interference. This has led us to a Counter Foreign Interference strategy built upon transparency, law enforcement, deterrence and capability'.*

But how will this legislation interpret and apply terms like 'covert' or 'corrupt' ? When is a private conversation with a foreign national friend or colleague a 'covert' activity? When is acceptance of an invitation to attend free of cost a prestigious international conference in Russia or China a 'corrupt' activity ? How does one distinguish between 'legitimate influence' and 'unacceptable interference'?

All such questions keep coming back to fallible personal decision-making by two Ministers of the Crown – politicians engaged in the cut and thrust of day-to-day party politics.

It is just not good enough to put this forward as Australian legislation. This will not lead to 'government by laws'. It will lead to 'government by men'. Such poorly conceived draft legislation should be unacceptable in our Australian rule-of-law based democracy.

And there is no demonstrated urgent national security need for it at this time, in my view.

For all these reasons, I submit that these Foreign Interference bills should be set aside and not taken any further.

I reaffirm my readiness to meet with the Committee to discuss these matters further, if Committee members so wish, anytime after 15 February: while noting again that I am not a lawyer, but a concerned citizen of substantial Australian diplomatic career background.

In any case, I request that my submission be accepted by PJCIS and made public by the Committee at a time when the Committee deems appropriate. Could I be informed by email when my submission is made public please?

Regards,

Tony Kevin, [redacted]

Phones [redacted]

Email [redacted]

Website www.tonykevin.com.au

3 January 2018