PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

Advisory Report on the Foreign Influence Transparency Scheme Bill 2017

Parliamentary Joint Committee on Intelligence and Security

June 2018
CANBERRA

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Contents

List of Tables

List of Textboxes

Abbreviations

ACBC	Australian Catholic Bishops Conference
ACNC	Australian Charities and Not-for-profit Commission
AFMA	Australian Financial Markets Association
ALHR	Australian Lawyers for Human Rights
AMPAG	Australian Major Performing Arts Group
ANAO	Australian National Audit Office
APGRA	Australian Professional Government Relations Association
ASIO	Australian Security Intelligence Organisation
ASTRA	Australian Subscription Television and Radio Association
the Bill	Foreign Influence Transparency Scheme Bill 2017
the Code	Australian Government Lobbying Code of Conduct
CRA	Commercial Radio Australia
the Department	Attorney-General's Department
EFDR Bill	Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017
Espionage and	National Security Legislation Amendment (Espionage and

Foreign Interference Bill	Foreign Interference) Bill 2017
FARA	United States' *Foreign Agents Registration Act 1938* 22 U.S.C.
FECCA	Federation of Ethnic Communities' Councils of Australia
HRCA	Human Rights Council of Australia
ICCPR	International Covenant on Civil and Political Rights
LDA	United States' *Lobbying Disclosure Act 1995* 2 U.S.C
Lobbyist Register	Australian Government Register of Lobbyists
NFP	Not-for-profit
PJCHR	Parliamentary Joint Committee on Human Rights
RIS	Regulatory Impact Statement
the Scheme	Foreign Influence Transparency Scheme
SES	Senior Executive Service
the Statement	Statement of Compatibility with Human Rights
UN	United Nations
WVA	World Vision Australia

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Terms of Reference

On 8 December 2017, the Foreign Influence Transparency Scheme Bill 2017 was referred to the Committee by the Prime Minister.

List of Recommendations

Recommendation 1

10.10 The Committee recommends the implementation of the Attorney-General's proposed amendments to remove from the definition of 'foreign principal' in section 10 of the Bill, the terms

- 'foreign business',
- 'foreign public entity', and
- 'an individual who is neither an Australian citizen nor a permanent Australian resident'.

Recommendation 2

10.21 The Committee recommends implementation of the Attorney-General's proposed amendments to introduce the term 'foreign government related entity' (as defined in those amendments) within the definition of a 'foreign principal' in section 10 of the Bill.

The Committee further recommends the Explanatory Memorandum is amended to expressly set out that mere funding from a foreign government is not sufficient to satisfy the threshold requirements for the term's application to companies.

Recommendation 3

10.22 The Committee recommends that the Attorney-General's proposed definition of a 'foreign government related entity' be further amended so as to include those entities where the directors or members of the executive

committee are accustomed to act in accordance with the directions, instructions or wishes of a foreign government or a foreign political organisation, even if they are under no obligation to do so.

Recommendation 4

10.29 The Committee recommends the implementation of the Attorney-General's proposed amendments to introduce the term 'foreign government related individual' (as defined in those amendments) within the definition of a 'foreign principal' in proposed section 10.

Recommendation 5

10.30 The Committee recommends that the Attorney-General's proposed definition of a 'foreign government related individual' be further amended so as to include those individuals who are directors or members of an executive committee, who are accustomed to act in accordance with the directions, instructions or wishes of a foreign government or a foreign political organisation, even if they are under no obligation to do so.

Recommendation 6

10.39 The Committee recommends that the Bill retain the current inclusive definition of a 'foreign political organisation' but be amended to provide that 'foreign political organisation' includes:

- a foreign political party, and
- a foreign organisation that exists primarily to pursue political objectives.

Recommendation 7

10.44 The Committee recommends implementation of the Attorney-General's proposed amendments to remove, from the definition of 'undertaking activity on behalf of a foreign principal' in section 11 of the Bill, the terms

- 'with funding or supervision by the foreign principal', and
- 'in collaboration with the foreign principal'.

Recommendation 8

10.53 The Committee recommends that subsection 11(3) of the Bill be amended to provide that a person only undertakes an activity on behalf of a foreign principal *within the meaning of subsection* 11(1) if both the person and the foreign principal knew or expected that:

- the person would or might undertake the activity, and
- the person would or might do so in circumstances falling within sections 20, 21, 22 or 23 of the Bill (whether or not the parties expressly considered the existence of the scheme).

Recommendation 9

10.58 The Committee recommends the implementation of the Attorney-General's proposed amendment to introduce new subsection 11(4) to the Bill.

Recommendation 10

10.61 The Committee recommends implementation of the Attorney-General's proposed amendments to proposed subsection 12(1) of the Bill, which require that the activity must be for the sole or primary purpose, or a substantial purpose, of influencing political or governmental processes.

Recommendation 11

10.64 The Committee recommends implementation of the Attorney-General's proposed amendments to section 13 of the Bill which provide that broadcasters, carriage service providers and publishers are not required to register, merely because they edit information or materials produced by a foreign principal.

Recommendation 12

10.67 The Committee recommends that the Attorney-General's Department prepare and publish prior to the commencement of the Foreign Influence Transparency Scheme, detailed guidance material to assist online publishers and platforms with clarity as to their liability to register under the Scheme.

Recommendation 13

10.72 The Committee recommends that proposed section 14 of the Bill be amended to clarify that the *purpose of an activity* may be determined by having regard to the intent or belief of the person undertaking the activity and

- the intention of any foreign principal on whose behalf the activity is undertaken, or
- all of the circumstances in which the activity is undertaken.

Recommendation 14

10.77 The Committee recommends the implementation of the Attorney-General's proposed amendments with regard to additional obligations for former Cabinet Ministers and recent designated position holders in section 22 and proposed section 23 of the Bill, with further amendments as follows:

- for a former Cabinet Minister, the time period of ten years should be removed altogether, such that these additional obligations would extend in perpetuity; and
- for recent designated position holders, the time period be amended from seven years to 15 years.

Recommendation 15

10.78 The Committee recommends that the Government consider amending the definition of 'recent designated position holder' in the Attorney-General's proposed amendments to include individuals employed under the *Members of Parliament (Staff) Act 1984* at the rank of Senior Adviser or above within the Ministry, so that the additional duties in section 23 (Registrable activities: recent designated position holders) apply to such people after they leave their employment.

Recommendation 16

10.81 The Committee recommends that proposed section 22 (Registrable activities: former Cabinet Ministers) and 23 (Registrable activities: recent designated position holders) of the Bill be amended so that the individuals to whom those provisions apply cannot rely upon the exemptions in proposed section

29 (Exemption: government, commercial or business pursuits) to avoid what would otherwise be their registration obligations.

Recommendation 17

10.90 The Committee recommends implementation of the Attorney-General's proposed change to section 24 of the Bill.

The Committee further recommends that the Explanatory Memorandum is revised to clarify the circumstances under which the humanitarian aid and assistance exemption applies. In particular, the Committee recommends the exemption should not be limited to responsive humanitarian aid or assistance, but rather capture preventative and long-term humanitarian aid and assistance.

Recommendation 18

10.95 The Committee recommends implementation of the Attorney-General's proposed amendments to section 25 of the Bill, subject to the Government considering amending the section to also apply to activities that are 'incidental to' the matters currently listed in paragraphs (a) to (c).

Recommendation 19

10.104 The Committee recommends implementation of the Attorney-General's proposed amendment to section 27 (Exemption: religion) of the Bill, and that the Explanatory Memorandum be amended to reflect the Government's intention that religious institutions are exempt.

Recommendation 20

10.106 The Committee recommends implementation of the Attorney-General's proposed amendment to delete section 28 of the Bill.

Recommendation 21

10.112 The Committee recommends implementation of the Attorney-General's proposed amendments to section 29 of the Bill, with further amendments to subsection 29(2) so that the government, commercial or business pursuits exemption applies only where an individual's position as a director, officer or employee is obvious on the face of the otherwise registrable activity undertaken by the individual.

Recommendation 22

10.113 The Committee recommends that the Explanatory Memorandum be amended to clarify the intent of the amended section 29 of the Bill and the circumstances under which commercial and business pursuits would be exempt.

Recommendation 23

10.118 The Committee recommends implementation of the Attorney-General's proposed amendment to provide an exemption for industry representative bodies in section 29A of the Bill.

The Committee recommends the Government amend the Explanatory Memorandum to provide clarity to industry representative bodies as to what types of activities would be included and excluded under proposed section 29A(d) of the Bill.

Recommendation 24

10.121 The Committee recommends implementation of the Attorney-General's proposed section 29B exemption for personal representation in relation to administrative process etc.

Recommendation 25

10.132 The Committee recommends the Bill be amended to provide exemptions for charities, arts organisations and industrial associations, which would operate to relieve those organisations of an obligation to register when they are making routine representations in accordance with their respective purposes, and where the relationship with the foreign principal is well known or a matter of public record.

Recommendation 26

10.135 The Committee recommends that the Bill be amended to provide a limited exemption for professions (such as tax agents, customs brokers and liquidators) where representations to government are parts of the normal day-to-day work of the people in that profession, and where the activity is such a regular day to day representation in the name of a foreign principal.

Recommendation 27

10.139 The Committee recommends the Bill be amended to clarify that the proposed exemptions provisions apply to both arrangements and activities.

Recommendation 28

10.157 The Committee recommends implementation of the Attorney-General's proposed amendments to clarify the interaction of the Bill with parliamentary privilege, including by the insertion of a 'savings provision' in section 9A of the Bill and limiting the application of the Secretary's powers to obtain information or documents.

However, the Committee recommends that subsection 9A(1) be prefaced with the words 'To avoid doubt'.

Recommendation 29

10.158 The Committee recommends that the Bill be amended to provide that the Foreign Influence Transparency Scheme does not apply to members of the House or Representative or Senators.

The Committee further recommends that the House of Representatives and the Senate develop a parallel parliamentary foreign influence transparency scheme, imposing on Members and Senators similar transparency obligations to those in the Bill, but appropriately adapted for the parliamentary environment.

In developing that parallel scheme, the Houses should consider all conduct undertaken by Members and Senators in the course of their duties as parliamentarians, including conduct not directly related to proceedings in the Parliament. The scheme should be administered independently within the Parliament, and include

- an obligation to report registrable activities undertaken on behalf of a foreign principal, or registrable arrangements with a foreign principal, appropriately adapted for the parliamentary environment,
- a power for the administrator to obtain information and documents, and
- appropriate sanctions for non-compliance.

Recommendation 30

10.165 The Committee recommends that the review required under proposed section 70 of the Bill specifically consider the appropriateness of the reporting requirements in light of the experience garnered through the operation of the Scheme.

Recommendation 31

10.178 The Committee recommends that the rules should provide clarity about the disclosure requirements, and that the Government should consider the existing obligations contained under the *Commonwealth Electoral Act 1918* when developing these rules.

Recommendation 32

10.182 The Committee recommends that the Attorney-General's Department prepare, and publish prior to the commencement of the Scheme, detailed guidance on the types of records that are required to be kept for the purpose of section 40 (Keeping records) of the Bill.

Recommendation 33

10.183 The Committee recommends that section 40 of the Bill be amended to lower the period a person is required to retain records from five years to three years after registration ends, and that the Government consider an amendment that would provide that records of ten years or more are no longer required to be retained by a registered person.

Recommendation 34

10.187 The Committee recommends that the Bill be amended to remove section 63, and the Foreign Influence Transparency Scheme (Charges Imposition) Bill 2017, be withdrawn.

Recommendation 35

10.194 The Committee recommends that, following the passage of this Bill, the Government introduce measures to:

- better align the Lobbying Code of Conduct and the Register of Lobbyists with the proposed Foreign Influence Transparency Scheme, and

- amend the Lobbying Code of Conduct to provide an exemption for registration where a person is registered under the Foreign Influence Transparency Scheme.

Recommendation 36

10.198 The Committee recommends that the Explanatory Memorandum be amended to provide clarity about the terms 'commercially sensitive' and 'national security'.

Recommendation 37

10.204 The Committee recommends that section 43 of the Bill be amended to require the Secretary to publish information listed in section 43 within a period of four weeks of receiving the information from a person liable to register under the Scheme.

Further, the Committee recommends that for information provided during voting periods, as required under proposed section 36 and 37, the Secretary should be required to publish relevant information within 48 hours of its receipt.

However, there should be a limited ability for the Secretary to take longer to publish information in circumstances where he or she is considering whether one of the grounds for non-publication applies.

Recommendation 38

10.207 The Committee recommends a Privacy Impact Assessment is undertaken at the earliest possible opportunity and prior to the commencement of the Scheme to ensure information both requested and shared by the Secretary is undertaken in compliance with an individual's right to privacy.

Recommendation 39

10.210 The Committee recommends that the Bill be amended to clarify that the Secretary's powers cannot be used to compel evidence from a person in order to obtain evidence from that person that is then admissible in a prosecution of that person for an offence contained in the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017.

Recommendation 40

10.214 The Committee recommends section 53 of the Bill be amended to provide that any additional persons with whom, or purposes for which, Scheme information may be shared, be referred to the Parliamentary Joint Committee on Intelligence and Security for its review and approval.

Recommendation 41

10.220 The Committee recommends implementation of the Attorney-General's proposed amendments to section 67 of the Bill that limit the powers and functions that the Secretary may delegate.

Further, the Committee recommends that section 67 be amended to provide that decisions by the Secretary under section 43 should not be delegated to an officer who is below the level of a Senior Executive Service officer.

Recommendation 42

10.224 The Committee recommends that after an initial period of operation, the Government give consideration to the Scheme being administered by an independent statutory officer, as an alternative to it being administered by the Secretary of the Attorney-General's Department .

Recommendation 43

10.238 The Committee recommends implementation of the Attorney-General's proposed amendments to the Bill which establish new Part 1, Division 3—Transparency notices, subject to the following further amendments. The Committee recommends that the transparency notice framework as proposed by the Attorney-General be separated to include:

- a 'provisional' transparency notice, and
- a 'final' transparency notice, and

the following technical amendments be implemented to:

- provide that the notice comes into force when it is made public, rather than when it is made, and

- clarify what 'details' (mentioned in subsection 14C(1)) must be included in a notice.

Recommendation 44

10.240 The Committee recommends that the Attorney-General's proposed amendments for 14B(2) of the Bill, not be implemented.

Recommendation 45

10.247 The Committee recommends implementation of the Attorney-General's proposed amendment to lower penalties under sections 57 and 57A of the Bill.

Recommendation 46

10.252 The Committee recommends that the Bill be amended to remove absolute liability from sections 57, 57A and 61.

Recommendation 47

10.253 The Committee recommends that the Bill be amended to remove strict liability from section 58.

Recommendation 48

10.257 The Committee recommends implementation of the Attorney-General's proposed amendments to

- lower the penalty in proposed section 60 of the Bill from five to three years,
- lower the penalty under proposed section 61—destruction etc. of records—from five years to three years, and
- introduce section 61A—geographical jurisdiction of offences.

Recommendation 49

10.266 The Committee recommends that section 69 of the Bill be amended to specify minimum requirements for inclusion in the annual report on the operation of the Scheme. These requirements should include:

- the numbers of new and ceased registrations, and reports provided to the Secretary,
- the number of transparency notices issued, varied or revoked,
- the number of written notices issued by the Secretary under sections 45 and 46, and the number of documents obtained by the Secretary as a result of section 46 notices,
- the number of occasions a subject of a provisional transparency notice issued under Part 1—Division 3 makes submissions to the Secretary,
- a statement of compliance with the obligations under section 42 of the Act (register of scheme information),
- the number of occasions on which Scheme information has been shared, including which agencies are obtaining Scheme information,
- the number of persons charged with offences under Part 5 of the Act, and the number prosecutions before the courts,
- information on fees collected under the Scheme, and
- any other matter prescribed by the rules for the purposes of the section.

Recommendation 50

10.270 The Committee recommends that section 70 of the Bill be amended to provide that the Parliamentary Joint Committee on Intelligence and Security initiate a review within three years of the commencement of the Scheme.

Recommendation 51

10.273 The Committee recommends that the Parliamentary Joint Committee on Intelligence and Security is provided with reports by the administrator of the Scheme, as follows:

- a report detailing the Scheme's implementation progress and strategy, to be provided to the Committee six months after Royal Assent of the Bill, or prior to the commencement of the Scheme, whichever occurs first, and

- a report detailing the Scheme's early operation to be provided to the Committee within 18 months of its commencement.

The administrator should be available to brief the Committee following the presentation of each report.

Recommendation 52

10.279 Subject to implementation of the Committee's recommendations, the Committee recommends that the Foreign Influence Transparency Scheme Bill 2017 be passed.

1. Introduction and threat environment

1.1 The Foreign Influence Transparency Scheme Bill 2017 (the Bill) and the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017 (the Espionage and Foreign Interference Bill) were introduced to the House of Representatives on 7 December 2017 by the Prime Minister, the Hon. Malcom Turnbull MP.

1.2 In his second reading speech, the Prime Minister advised the Parliament that both bills are 'designed to reinforce the strengths of our open democratic systems while shoring up its vulnerabilities'.[1] Currently, he declared, our agencies 'lack the legislative tools they [need] to act [and] … our system as a whole has not grasped the nature and magnitude of the threat'.[2]

1.3 In regards to the scale of threat, the Prime Minister quoted the Director-General of the Australian Security Intelligence Organisation (ASIO)

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1 The Hon. Malcolm Turnbull MP, Prime Minister, Second Reading Speech, *Hansard*, 7 December 2017, p. 13147.

2 The Hon. Malcolm Turnbull MP, Prime Minister, Second Reading Speech, *Hansard*, 7 December 2017, p. 13147.

who stated that the threat from espionage and foreign interference in Australia is 'unprecedented'.[3]

The current environment

1.4 ASIO advised the Committee that espionage and foreign interference activity against Australian interests is 'occurring at an unprecedented scale'.[4] More specifically, ASIO advised:

> This isn't something that we think might happen or could happen; it is happening now against Australian interests in Australia and … abroad. … Foreign actors from a range of countries seek access to privileged and/or classified information on Australia's alliances and partnerships, our position on international diplomatic, economic and military issues, our energy and mineral resources and our innovations in science and technology.[5]

1.5 The Director-General of Security explained that in the current environment, there is,

> … a more diverse range of hostile foreign intelligence services working against us than we've had in the past. … Many of these hostile foreign intelligence services have significantly increased the resources that are dedicated to foreign intelligence collection, and they have also greatly improved the spectrum and sophistication of their activities.[6]

1.6 In evidence to other inquiries of this Committee, ASIO has described the threat from espionage and foreign interference as 'extensive, unrelenting and increasingly sophisticated'.[7] During this inquiry, ASIO stated that though the harm from such activities may not be immediately apparent or

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3 The Hon. Malcolm Turnbull MP, Prime Minister, Second Reading Speech, *Hansard*, 7 December 2017, p. 13145.

4 Mr Peter Vickery, Deputy Director-General, Counter-Espionage and Interference and Capabilities, Australian Security Intelligence Organisation, *Committee Hansard*, Canberra, 31 January 2018, p. 18.

5 Mr Peter Vickery, Deputy Director-General, Counter-Espionage and Interference and Capabilities, Australian Security Intelligence Organisation, *Committee Hansard*, Canberra, 31 January 2018, p. 18.

6 Mr Duncan Lewis, Director-General of Security, Australian Security Intelligence Organisation, *Committee Hansard*, Melbourne, 16 March 2018, p. 33.

7 Australian Security Intelligence Organisation, *Submission to Review of Administration and Expenditure No. 16 (2016-2017), Submission 5*, p. 4.

overt, the consequences are far-reaching and serious. Such consequences include:

- undermining Australia's national security and sovereignty;
- damaging Australia's international reputation and relationships;
- degrading Australia's diplomatic and trade relations;
- inflicting substantial economic damage, and
- compromising nationally vital assets and critical infrastructure.[8]

1.7 ASIO have outlined that, in addition to traditional espionage efforts to penetrate Australian governments, foreign intelligence services are clandestinely targeting a range of other Australian interests, including our intellectual property, science and technology, and commercially sensitive information.[9]

1.8 Foreign intelligence services are increasingly using a wider range of techniques or 'vectors' to obtain intelligence and clandestinely interfere in Australia's affairs.[10] ASIO advised that the contemporary environment is unlike that of previous decades. The situation now is that Australia's adversaries are 'much more blurred', and Australia faces a raft of different countries that are seeking to interfere and exert influence in Australia.[11]

1.9 The Director-General of Security explained that in the 'information age', espionage activity in Australia is not limited to its 'classical form' where a foreign spy recruits an official for access to classified information. As a result of the features of globalisation, which has seen 'unimagined movement of money, … people [and] … information', espionage now includes 'more complex cyber-intrusion that's conducted typically from overseas to enable

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8 Mr Peter Vickery, Deputy Director-General, Counter-Espionage and Interference and Capabilities, Australian Security Intelligence Organisation, *Committee Hansard*, Canberra, 31 January 2018, p. 18.

9 Australian Security Intelligence Organisation, *Submission to Review of Administration and Expenditure No. 16 (2016-2017), Submission 5*, p. 4; see also Mr Duncan Lewis, Director-General Security, Australian Security Intelligence Organisation, *Committee Hansard*, Melbourne, 16 March 2018, pp. 33-34.

10 Mr Duncan Lewis, Director-General of Security, Australian Security Intelligence Organisation, *Committee Hansard*, Melbourne, 16 March 2018, p. 33; Australian Security Intelligence Organisation, *Submission to Review of Administration and Expenditure No. 16 (2016-2017), Submission 5*, p. 4.

11 Mr Peter Vickery, Deputy Director-General, Counter-Espionage and Interference and Capabilities, Australian Security Intelligence Organisation, *Committee Hansard*, Canberra, 31 January 2018, p. 20.

the theft of sensitive technologies'. Such intrusion is 'comparatively cheap, … instantaneous and, most importantly, it's very difficult to detect and to attribute'.[12]

1.10 ASIO confirmed that it operates a threat level system in relation to foreign interference and espionage to measure the scale of the threat. However, unlike terrorism, that system is not an over-arching threat level system but rather operates on a country-by-country basis. For some countries, ASIO described the threat as 'extreme' indicating that foreign interference and espionage activities are occurring within Australia.[13]

1.11 These activities include targeting and attempting to recruit officials and persons of influence.[14] ASIO described the range of situations where this targeting and recruitment is occurring:

> These [officials] have undertaken activities in conscious collaboration with foreign intelligence officers in order to advance the national security interests of those foreign countries by seeking access to and obtaining privileged information and classified information in relation to Australia's views on a whole raft of issues. … They do this on many occasions for money, so there's a transactional relationship where a person is cultivated and recruited and, in return for money and finance, they provide privileged information which then goes back to that particular foreign intelligence service and is then used as part of, I suppose, that particular service's overall assessment of Australia's capabilities, vulnerabilities and weaknesses so that they can target the country—they can target politicians, business officials or intelligence officers—to get an advantage for them to our detriment.[15]

1.12 Beyond foreign interference and espionage, ASIO stated there has been a greater focus on *covert influence* operations, in addition to the traditional methods of human-enabled collection, technical collection and exploitation

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12 Mr Duncan Lewis, Director-General of Security, Australian Security Intelligence Organisation, *Committee Hansard*, Melbourne, 16 March 2018, p. 33.

13 Mr Peter Vickery, Deputy Director-General, Counter-Espionage and Interference and Capabilities, Australian Security Intelligence Organisation, *Committee Hansard*, Canberra, 31 January 2018, p. 20.

14 Mr Peter Vickery, Deputy Director-General, Counter-Espionage and Interference and Capabilities, Australian Security Intelligence Organisation, *Committee Hansard*, Canberra, 31 January 2018, p. 21.

15 Mr Peter Vickery, Deputy Director-General, Counter-Espionage and Interference and Capabilities, Australian Security Intelligence Organisation, *Committee Hansard*, Canberra, 31 January 2018, p. 21.

of the internet and information technology.[16] ASIO expanded on the extent of covert influence operations in its 2016-17 Annual Report:

> We identified foreign powers clandestinely seeking to shape the opinions of members of the Australian public, media organisations and government officials in order to advance their country's own political objectives. Ethnic and religious communities in Australia were also the subject of covert influence operations designed to diminish their criticism of foreign governments.[17]

1.13 Such activities are undertaken covertly to obscure the role of foreign governments. ASIO advised that covert influence activities represent 'a threat to our sovereignty, the integrity of our national institutions and the exercise of our citizens' rights'.[18]

1.14 The extent of espionage, foreign interference and covert influence being undertaken in Australia was discussed in numerous submissions to this inquiry.[19] A number of submissions to the Committee's inquiry into the Espionage and Foreign Interference Bill 2017 also referenced covert and clandestine activities targeting Australia's national interests.[20]

Government response to the threat

1.15 In his second reading speech the Prime Minister referred to a classified report, prepared by the Department of the Prime Minister and Cabinet, which contained advice from ASIO of 'significant investigative breakthroughs and delivered a series of very grave warnings'.[21] In response

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16 Australian Security Intelligence Organisation, *Submission to Review of Administration and Expenditure No. 16 (2016-2017), Submission 5*, p. 4.

17 Australian Security Intelligence Organisation, *Annual Report 2016-17*, pp. 4–5.

18 Australian Security Intelligence Organisation, *Annual Report 2016-17*, p. 5.

19 Epoch Times, *Submission 23*; Falun Dafa Association of Australia, *Submission 24*; Australian Values Alliance, *Submission 25*; Professor John Fitzgerald, *Submission 26*; Dr Anne Marie Brady, *Submission 28*; Mr Alexander Nilsen, *Submission 30*; Ms Linda Jakobson, *Submission 39*; Chinese Community Council of Australia, *Submission 46*; The Federation of Chinese Associations (Victoria), *Submission 53*; Professor Rory Medcalf, *Submission 64*.

20 Mr Peter Jennings, *Submission 15*; Professor Clive Hamilton and Mr Alex Joske, *Submission 20*; Ms Linda Jackobson, *Submission 28*; The Federation for a Democratic China, *Submission 32*; Professor Rory Medcalf, *Submission 33*; Chinese Community Council of Australia, *Submission 37*.

21 The Hon. Malcolm Turnbull MP, Prime Minister, Second Reading Speech, *Hansard*, 7 December 2017, p. 13147.

to these discoveries, collectively, this Bill and the Espionage and Foreign Interference Bill are intended to 'counter the threat of foreign states exerting improper influence over our system of government and our political landscape'.[22]

1.16 The two bills form part of the Government's Counter Foreign Interference Strategy. The Strategy has four pillars: sunlight, enforcement, deterrence and capability.

1.17 The Foreign Influence Transparency Scheme is directed at the first of those pillars. The Prime Minister stated the intent of introducing the registration requirements under the Bill:

> If a person or entity engages with the Australian political landscape on behalf of a foreign state or principal then they must register accordingly. This will give the Australian public and decision-makers proper visibility when foreign states or individuals may be seeking to influence Australia's political processes and public debates. … Registration requirements are carefully structured so that the closer you get to the heart of Australian politics, the more likely it is that you must register. … This is not about shutting down legitimate debate, but rather enabling it.[23]

1.18 The Prime Minister also commented that 'sunlight is the most reliable disinfectant but it will not be sufficient on its own'. He indicated consequently the Scheme will work in tandem with the proposed offences contained in the Espionage and Foreign Interference Bill. These new offences are intended to comprise the second and third pillars: enforcement and deterrence.

1.19 At a public hearing, the Director-General of Security advised the Committee that ASIO 'strongly supports' the Espionage and Foreign Interference Bill, and 'supports' measures to increase the transparency surrounding foreign influence in Australia.[24] The Director-General stated that the reforms will provide 'integral and urgently required tools to help combat the

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22 The Hon Malcolm Turnbull MP, Prime Minister, Second Reading Speech, *Hansard*, 7 December 2017, p. 13145.

23 The Hon. Malcolm Turnbull MP, Prime Minister, Second Reading Speech, *Hansard*, 7 December 2017, p. 13147.

24 Mr Duncan Lewis, Director-General of Security, Australian Security Intelligence Organisation, *Committee Hansard*, Melbourne, 16 March 2018, p. 33.

unprecedented scale of espionage and foreign interference activities currently being conducted against us'.[25]

1.20 The Attorney-General's Department (the Department) sought to contrast 'foreign interference'—to which the Espionage and Foreign Interference Bill is addressed—and 'foreign influence'—to which this Bill is addressed—as distinct concepts.[26] ASIO advised the Committee that the two terms are 'interrelated',[27] and 'intertwined to the point where you can have one leading to the other'.[28]

1.21 This report presents the Committee's review of the Foreign Influence Transparency Scheme Bill. The Committee's review of the Espionage and Foreign Interference Bill is provided in a separate report, tabled on 7 June 2018.

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25 Mr Duncan Lewis, Director-General of Security, Australian Security Intelligence Organisation, *Committee Hansard*, Melbourne, 16 March 2018, p. 33.

26 Ms Anna Harmer, First Assistant Secretary, Security and Criminal Law Division, Attorney-General's Department, *Committee Hansard*, Canberra, 31 January 2018, p. 16.

27 Mr Duncan Lewis, Director-General of Security, Australian Security Intelligence Organisation, *Committee Hansard*, Melbourne, 16 March 2018, p. 38.

28 Mr Peter Vickery, Deputy Director-General, Counter-Espionage and Interference and Capabilities, Australian Security Intelligence Organisation, *Committee Hansard*, Melbourne, 16 March 2018, p. 38.

2. Outline of the Bill and its referral

The Bill and its referral

2.1 On 7 December 2017, the Prime Minister, the Hon. Malcolm Turnbull MP, introduced a package of national security bills into the House of Representatives. Included were the following bills:

- Foreign Influence Transparency Scheme Bill 2017, and
- National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017.

2.2 On 8 December 2017, the Prime Minister referred the bills to the Committee, requesting that the Committee, so far as possible, conduct its inquiry in public.

2.3 This report is the Committee's review of the Foreign Influence Transparency Scheme Bill 2017 (the Bill).

Purpose of the Foreign Influence Transparency Scheme

2.4 The Attorney-General's Department (the Department) stated that foreign influence is, in many instances, 'quite legitimate'. However, when done through an intermediary, the source of the influence is 'disguised', and decision-makers and the public alike may be unaware of the influences being brought to bear on Australian Government decision-making.

2.5 The Department explained that the Bill is intended to provide visibility of *covert* or *obscured* foreign influence and that a registration scheme will provide transparency to that disguised influence.[1] Similarly, the Director-General of Security, Mr Duncan Lewis, explained the purpose of the Bill as follows:

> What we're dealing with here is the covert—I use the word 'sinister'—nature of influence which is not apparent then to the Australian public and which results in a decision being taken or an outcome being achieved which the Australian people have not had visibility of.[2]

2.6 However, at a public hearing the Department advised that a person may nonetheless be liable to register where there has been no 'covert' activity or 'trade craft' being used to hide their link to a foreign principal.[3] Indeed, the Department further advised:

> I think a point is that the influence can be hidden, but it is not always hidden; it is not the covert Foreign Influence Transparency Scheme. So the fact that a relationship with a foreign principal may be disclosed is great and to be encouraged, but this is intended to be a comprehensive register … of the nature, extent and level of foreign influence on political and governmental processes on behalf of foreign principals. That's a valuable source of information.[4]

2.7 The Explanatory Memorandum states that the objective of the Bill is 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.[5]

2.8 The Explanatory Memorandum goes on to outline that the proposed Foreign Influence Transparency Scheme (the Scheme) is intended to provide

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1 Ms Anna Harmer, First Assistant Secretary, Security and Criminal Law Division, Attorney-General's Department, *Committee Hansard*, Canberra, 31 January 2018, p. 19.

2 Mr Duncan Lewis, Director-General of Security, Australian Security Intelligence Organisation, *Committee Hansard*, Melbourne, 16 March 2018, p. 48.

3 Ms Tara Inverarity, Assistant Secretary, Attorney-General's Department, *Committee Hansard*, Melbourne, 16 March 2018, p. 49.

4 Ms Tara Inverarity, Assistant Secretary, Attorney-General's Department, *Committee Hansard*, Melbourne, 16 March 2018, p. 54.

5 Explanatory Memorandum, p. 18, para 91.

'transparency and oversight of the many and varied ways in which foreign actors seek to exercise influence over Australian political and governmental systems and processes'.[6]

2.9 The Department described foreign influence as 'activities conducted on behalf of a foreign principal to pursue their own interests within Australia'.[7] It acknowledged that in many cases foreign influence is legitimate and lawful, but that it was 'problematic' when foreign influence is hidden or undisclosed through the use of an intermediary. This was described as,

> … impeding the ability of decision-makers in government, as well as the public, to fully understand and evaluate the interests being brought to bear in relation to a particular decision or process and to make informed decisions. The Foreign Influence Transparency Scheme will show the public and decision-makers the foreign influence in Australia's government and political processes.[8]

2.10 In a submission, the Department went further stating that undisclosed foreign influence can have 'serious implications for sovereignty and national policy as it may result in the prioritisation of foreign interests over domestic interests'.[9]

2.11 The Explanatory Memorandum notes that there is no existing formal mechanism that would require 'instances of foreign influence to be made known to government and the public'. The Explanatory Memorandum states that while some forms of foreign influence are captured through the Australian Government's Lobbying Code of Conduct and accompanying Register of Lobbyists, that register 'primarily target[s] very narrow conduct, being lobbying of government representatives and politicians, [and is] not supported by binding legislative or regulatory frameworks'.[10]

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6 Explanatory Memorandum, p. 2, paras 2-4.

7 Ms Anna Harmer, First Assistant Secretary, Security and Criminal Law Division, Attorney-General's Department, *Committee Hansard*, Canberra, 31 January 2018, p. 16.

8 Ms Anna Harmer, First Assistant Secretary, Security and Criminal Law Division, Attorney-General's Department, *Committee Hansard*, Canberra, 31 January 2018, p. 16.

9 Attorney-General's Department, *Submission 5*, p. 3.

10 Explanatory Memorandum, pp. 8-9, para 24.

2.12 A large number of stakeholders supported the objective of the Bill: to provide transparency of the level and extent of covert foreign influence in the course of political and governmental decision-making in Australia.[11]

2.13 ASIO advised the Committee that the Australian public are 'less well-educated' about the scale of the threat posed by foreign interference activities.[12] To this end, Mr Peter Jennings advocated for more public information and reporting, arguing that a well-informed public which understands the threats faced will ensure greater resilience within the community to those threats.[13]

2.14 Similarly, Ms Linda Jakobson, Chief Executive Officer and Founding Director of China Matters, advocated for more public information about foreign influence to 'enable Australians to develop a sophisticated understanding' of unlawful foreign interference. The submission argued that it is,

> … essential in a democratic society that our security agencies develop the practices and skills to be able to communicate with the public on matters that affect our democratic rights, without compromising their operations or detailed intelligence information.[14]

2.15 Mr Tony Kevin disputed the urgent need for the proposed Scheme,[15] and others argued that a case had not been clearly articulated.[16] Mr Ernst

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11 Australian Financial Markets Association, *Submission 3*, p. 1; Law Council of Australia, *Submission 4*, p. 5; Group of Eight Australia, *Submission 11*, p. 1; Australian Catholic Bishops Conference, *Submission 12*, p. 1; Peter Jennings, *Submission 14*, p. 1; Financial Services Council, *Submission 16*, p. 1; Australian Bankers' Association, Financial Services Council, Australian Private Equity and Venture Capital Association, Insurance Council of Australia, *Submission 18*, p. 1; Property Council of Australia, *Submission 21*, p. 1; Australian Industry Group, *Submission 32*, p. 1; Australian Friends of the Hebrew University, Jerusalem Limited and Technion Australia, *Submission 38*, p. 1; World Vision Australia, *Submission 45*, p. 2; Australian Institute of International Affairs, *Submission 48*, p. 1; Justice Connect, *Submission 50*, p. 2; Uniting Care Australia, *Submission 51*, p. 1; Australian Council for International Development, *Submission 55*, p. 1; Oxfam Australia, *Submission 57*, p. 3; The Smith Family, *Submission 60*, p. 4.

12 Mr Peter Vickery, Deputy Director-General, Counter-Espionage and Interference and Capabilities, Australian Security Intelligence Organisation, *Committee Hansard*, Canberra, 31 January 2018, p. 20.

13 Mr Peter Jennings, private capacity, *Committee Hansard*, Canberra, 30 January 2018, pp. 63-65.

14 Ms Linda Jakobson, *Submission 39*, p. 3.

15 For example, Mr Tony Kevin, *Submission 1*, p. 15.

16 For example, Mr Ernst Willheim, *Submission 2*, p. 2.

Willheim questioned the veracity of the problem that the Bill seeks to address, stating that the need for the Bill 'must be clearly established, the legislation itself should be clear and unambiguous'.[17]

2.16 The Committee will make comment on these issues in the final chapter of this report.

Conduct of the inquiry

2.17 After receiving the Prime Minister's referral, the Committee initially agreed to complete its inquiry and report to the Parliament by 20 February 2018, and later extended this date to 23 March 2018.

2.18 The Chair of the Committee, Mr Andrew Hastie MP, announced the inquiry by media release on 15 December 2017 and invited submissions from interested members of the public.

2.19 On 7 June 2018 the Attorney-General provided to the Committee a set of proposed amendments to the Bill. The Committee invited further submissions on these amendments.

2.20 In total, the Committee received 92 submissions, 48 supplementary submissions and a large number of form letters (2 545 total). A list of submissions received by the Committee is at Appendix A.

2.21 The Committee held eight public hearings and two private hearings in Canberra. Details of the hearings are included at Appendix B. The Committee also held three classified briefings.

2.22 Copies of submissions and the transcript from the public hearings can be accessed on the Committee's website at www.aph.gov.au/pjcis. Links to the Bill and Explanatory Memorandum are also available on the Committee's website.

Process of the inquiry

2.23 While supporting the intent of the Bill, a number of submitters raised process concerns regarding the timeframe for the inquiry,[18] and also the lack of consultation prior to the Bill's introduction into the Parliament.[19]

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17 Mr Ernst Willheim, *Submission 2*, p. 2.

18 Ernst Willheim, *Submission 2*, p. 2; Australian Lawyers for Human Rights, *Submission 7*, p. 1; Universities Australia, *Submission 9*, p. 2; Group of Eight Australia, *Submission 11*, p. 1; The

2.24 A number of stakeholders recommended that the Bill be withdrawn from the Parliament—and this Committee's review—to enable further consideration to be given to the development of a transparency scheme and its effective operation.[20]

2.25 At a public hearing the Department advised that the Committee's review of the Bill is in lieu of seeking public comment on an exposure draft prior to introduction in the Parliament.[21]

2.26 In parallel to the Committee's review of the Bill, the Department advised that it was consulting with stakeholders and considering issues and concerns raised during the Committee's inquiry.[22] Describing the nature of those consultations, the Department stated:

> We've been speaking to a range of stakeholders. … We've had further discussions to look further into some of the comments that have been made by a number of groups on the amendments, so we've benefited from those as well. … Of course any member of the public or the community, an organisation or an individual, is at all times able to provide observations, commentary, whether it be to the minister or to the department, whether there is a consultation process in train or not. Indeed, there are members of particular groups that have approached the department directly, and that's always open. … There's not been an open invitation to the public at large … We have approached specific stakeholders who have specific views to explore particular issues that are relevant to those groupings.[23]

Federation of Chinese Associations (Victoria), *Submission 53*, p. 1; Oxfam Australia, *Submission 57*, p. 3.

19 Australian Financial Markets Association, *Submission 3*, pp. 2-3; Australian Industry Group, *Submission 32*, p. 1; Australian Conservation Foundation, *Submission 40*, p. 1.

20 Universities Australia, *Submission 9*, p. 2; Group of Eight Australia, *Submission 11*, p. 1; Joint Media Organisations, *Submission 19.1*, p. 1; Australian Industry Group, *Submission 32*, p. 1; Oxfam Australia, *Submission 57*, p. 3; GetUp!, *Submission 63*, p. 5.

21 Ms Anna Harmer, First Assistant Secretary, Security and Criminal Law Division, Attorney-General's Department, *Committee Hansard*, Canberra, 31 January 2018, p. 42; see also Ms Anna Harmer, First Assistant Secretary, Security and Criminal Law Division, Attorney-General's Department, *Committee Hansard*, Melbourne, 16 March 2018, p. 42.

22 Ms Anna Harmer, First Assistant Secretary, Security and Criminal Law Division, Attorney-General's Department, *Committee Hansard*, Melbourne, 16 March 2018, p. 36.

23 Ms Anna Harmer, First Assistant Secretary, Security and Criminal Law Division, Attorney-General's Department, *Committee Hansard*, Melbourne, 16 March 2018, p. 42.

2.27 Despite parallel consultations, the Department advised that the Committee would not be provided amendments to the Bill at that time.[24] This was in contrast to the approach taken in the Espionage and Foreign Interference Bill, where proposed amendments were referred to the Committee for its ongoing review of that bill.

2.28 Responding to concerns about parallel processes, the Department stated:

> The department continues to consider a range of issues that have been raised in submissions on this bill. … [W]e continue to consider those iteratively as they are lodged iteratively with this committee and as questions are raised with us. As the committee will appreciate, it is an iterative process, and we will advise the Attorney on those issues that are raised and we consider them contemporaneously. It's certainly our experience in assisting this committee that the committee has asked us to reflect upon those issues that have been raised in submissions, and we've endeavoured to be forthright with the committee in indicating where an issue that's been raised in the submissions is one that might merit some further refinement to the bill. So our intention in flagging that there are areas in which the bill could be amended is both to address those areas where we do not think that there is a concern and indicate that we think that the bill operates as intended and achieves a policy intent but also to flag those areas where a legitimate question has been raised and we acknowledge that perhaps some refinement in the drafting may be required either to achieve the policy intent or to address a concern that's been raised. That has been an iterative process, and we will continue to consider those issues that are raised in submissions and, indeed, as a result of questions that are asked by this committee which have, naturally, prompted us to consider some issues in the bill, as we have done on previous bills before the committee.[25]

2.29 Six months into the inquiry the Committee had not been able to report on the proposed Scheme. On 7 June 2018, the Attorney-General provided to the Committee a set of proposed amendments to the Bill in order to assist its considerations, consistent with the process for the EFI Bill. These amendments proposed significant changes to the scope and operation of the Scheme, most of which went to addressing concerns raised during the inquiry. The Committee considered this proactive measure useful.

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24 Ms Anna Harmer, First Assistant Secretary, Security and Criminal Law Division, Attorney-General's Department, *Committee Hansard*, Melbourne, 16 March 2018, p. 41.

25 Ms Anna Harmer, First Assistant Secretary, Security and Criminal Law Division, Attorney-General's Department, *Committee Hansard*, Melbourne, 16 March 2018, pp. 46-47.

2.30 Following receipt of the Attorney-General's proposed amendments, the Committee invited further submissions and held additional hearings. Chapter 9 outlines the proposed amendments.

2.31 While acknowledging the need for increased transparency, the Committee has sought to identify areas where it considers appropriate amendments are required to improve the integrity and proportionality of the proposed measures, the clarity and effectiveness of their application and operation, and to ensure adequate safeguards are provided.

2.32 In the final chapter, the Committee presents its recommendations and commentary on issues raised. The Committee wholly supports the intention of the Bill to shine light on covert influence and influence which is not readily discernible. The Committee acknowledges the current threat environment and the need to be aware of influences that may act to undermine Australia.

Report structure

2.33 This report consists of ten chapters:

- The introductory two chapters set out the context and conduct of the inquiry, and discuss some process concerns. The remainder of this chapter provides an overview of the main elements of the Bill, its interaction with other bills before the Parliament, and discusses issues raised regarding international human rights considerations and constitutional validity;
- Chapter 3 discusses the broad scope of actors and activities that would be captured by the Bill;
- Chapter 4 considers the proposed exemptions in the Bill, and others raised in evidence;
- Chapter 5 explores the application of parliamentary privilege to the Bill;
- Chapter 6 discusses registrants' obligations and the operation and administration of the proposed Foreign Influence Transparency Scheme;
- Chapter 7 discusses proposed enforcement provisions;
- Chapter 8 addresses oversight and review processes of the Scheme;
- Chapter 9 presents the Attorney-General's proposed amendments and evidence provided by stakeholders on those amendments, and
- Chapter 10 sets out the Committee's comments, findings and recommendations.

Outline of the Bill (as introduced by the Prime Minister)

2.34 The Bill will establish the Foreign Influence Transparency Scheme (the Scheme). The Scheme seeks to bring transparency to activities undertaken on behalf of foreign principals, particularly where those activities are intended to influence Australian political and governmental systems and processes.

2.35 The Bill will require registration and ongoing reporting by 'intermediaries' who act on behalf of foreign principals. More regular reporting will be required during elections and other federal votes. The Bill contains a range of criminal penalties for failing to register or failing to fulfil a reporting responsibility. More extensive requirements are, appropriately, imposed on former politicians and senior officials, and, in particular, on former Cabinet ministers.

2.36 The Bill proposes that the Scheme be administered by a departmental Secretary,[26] who will have a range of powers to request information of persons who may be liable to register, as well as other third parties.

2.37 The Bill comprises six Parts. Following is a summary of the key elements of each Part.

Part 1–Preliminary

2.38 Proposed Part 1 sets out a number of matters relating to the object of the Bill, definitions, commencement, jurisdictional application and the constitutional heads of power that underpin the Bill.

2.39 Part 1 also sets out a number of definitions for key terms and concepts that determine the proposed scope and application of the Bill.[27] These matters are central to whether or not a person or entity will be required to register under the Scheme.

2.40 The definitions address, amongst other things, who a 'foreign principal' is, what kinds of activities are 'registrable activities,' when an activity is undertaken 'on behalf of' a foreign principal, and when an activity is taken to be undertaken 'for the purpose of political or governmental influence.'

2.41 A '*foreign principal'* is defined to mean a foreign government, a foreign public enterprise, a foreign political organisation, a foreign business, or an

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26 Proposed section 42.

27 Proposed section 10.

individual who is neither an Australian citizen nor a permanent Australian resident.[28] If certain activities are undertaken on behalf of a foreign principal, registration may be required under the Bill.

2.42 '*Registrable activities*' and '*registrable arrangements*' are activities, or arrangements to undertake activities, which will require a person or entity to register under the Scheme.[29] The kinds of activities which are captured by the Scheme are set out in Part 2 of the Bill, and considered in further detail in Chapter 3.

2.43 The phrase '*on behalf of*' is used to limit registrable activities to those that are undertaken 'on behalf of' a foreign principal. The phrase is defined to mean activities undertaken under an arrangement with, in the service of, on the order of, at the request of, under the control or direction of, with funding or supervision by, or in collaboration with, a foreign principal.[30]

2.44 In most circumstances, an activity will only be a registrable activity if it is done for the '*purpose of political or governmental influence*'. An activity is done for the purpose of political or governmental influence if a purpose of the activity is to influence a process in relation to:

- a federal election or designated vote;
- a federal government decision;
- parliamentary proceedings;
- a registered political party;
- an independent member of the Parliament; or
- a candidate in a federal election.[31]

2.45 Proposed section 12 includes a non-exhaustive list of examples of what might constitute an activity for the purpose of political or governmental influence with respect to the above listed processes.

2.46 The '*purpose*' of an activity is determined by reference to the intention of the foreign principal, the intention or belief of the person undertaking the activity, or all of the surrounding circumstances.[32]

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28 Proposed section 10.

29 Proposed section 10.

30 Proposed section 11.

31 Proposed section 12.

32 Proposed section 14.

2.47 The Bill proposes the Scheme will have extraterritorial application, such that it will cover situations where a person makes an arrangement with a foreign principal outside of Australia,[33] as well as the activities of former elected representatives and former senior officials wherever they occur in the world.[34]

2.48 The Bill will commence upon Proclamation or within 12 months of receiving Royal Assent, whichever occurs earlier.[35]

Part 2–Registration: liability, process and exemptions

2.49 Proposed Part 2 sets out when a person or entity will be liable to register and cease to be liable to register under the Scheme.

2.50 A person or entity will be liable to register from the moment that:

- they engage in registrable activities on behalf of a foreign principal, or
- enter into a registrable arrangement with a foreign principal,

and, no exemption applies in relation to the activity.[36]

2.51 The Bill establishes that a liable person or entity must register under the Scheme within 14 days of engaging in the registrable activity or entering into the arrangement.[37] Registration will be accompanied by a fee, which will be specified in regulations.[38] These regulations, or the amount of the proposed charge, have not been made available to the Committee in its consideration of the Bill.

2.52 An application for registration will be required to be in writing,[39] though the Bill does not specify the information that will be required to be provided to the Secretary to complete registration. This is proposed to be provided in the rules,[40] and is further discussed in Chapter 5.

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33 Proposed section 6; Explanatory Memorandum, p. 19, para 96.

34 Proposed section 6; Explanatory Memorandum, p. 19, para 97.

35 Proposed section 2.

36 Proposed section 18; Proposed Division 4.

37 Proposed section 16.

38 Proposed section 63.

39 Proposed section 16.

40 Proposed section 71.

2.53 A person or entity will cease to be liable to register if they no longer engage in registrable activities on behalf of a foreign principal or no longer have a registrable arrangement with a foreign principal, and they have given notice to the Secretary advising of the cessation of registration.[41]

2.54 Proposed Division 3 of Part 2 sets out four categories of 'registrable activities'. They are:

- lobbying a member of Parliament or staffer (described as *'parliamentary lobbying'*) within Australia on behalf of a foreign government,[42]
- engaging in certain activities within Australia for the purpose of *influencing a political or governmental system or process*.[43] These activities are:
  - *parliamentary lobbying* on behalf of a foreign principal other than a foreign government;
  - *general political lobbying*[44] on behalf of any kind of foreign principal;

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41 Proposed section 19.

42 Proposed section 20.

'Parliamentary lobbying' is defined in proposed section 10 of the Bill to mean lobbying any one or more of the following persons:
(a) a member of the Parliament, and
(b) a person employed under section 13 or 20 of the *Members of Parliament (Staff) Act 1984*.

43 Proposed section 21.

Proposed section 12 of the Bill provides that 'an activity is for the purpose of political or governmental influence if a purpose of the activity (whether or not there are other purposes) is to influence, directly or indirectly, any aspect (including the outcome) of any one or more of the following:
(a) a process in relation to a federal election or a designated vote;
(b) a process in relation to a federal government decision;
(c) proceedings of a House of Parliament;
(d) a process in relation to a registered political party;
(e) a process in relation to a member of the Parliament who is not a member of a registered political party, and
(f) a process in relation to a candidate in a federal election who is not endorsed by a registered political party.

44 Proposed section 10 defines 'general political lobbying' to mean 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, and
(d) a candidate in a federal election;
other than lobbying that is 'parliamentary lobbying'.

  - *communications activity*[45] on behalf of any kind of foreign principal, and
  - *donor activity*[46] on behalf of a foreign government, foreign public enterprise or foreign political organisation;
- a former Cabinet Minister who is employed by, or acts in any capacity for, any foreign principal (other than a foreign individual),[47] and
- a former Minister, member of Parliament or senior Commonwealth official who is employed by, or acts in any capacity for, any foreign principal (other than a foreign individual), where they contribute skills, knowledge, experience or contacts which have been gained through their former role.[48]

2.55 Chapter 3 addresses the scope of these registrable activities in further detail.

2.56 Division 4 of Part 2 proposes a number of exemptions which will mean that a person or entity who would otherwise be liable to register for an activity, will not need to register. A number of exemptions are 'blanket' in nature, and will apply in all circumstances irrespective of who the person or entity undertaking the activities is, or who the foreign principal is. Other exemptions are more limited in their proposed application, depending upon the purpose for which the activities are undertaken, who the person or entity undertaking the activities is, or who the foreign principal is.

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45 Proposed section 13 of the Bill provides that a person 'undertakes communications activity if the person communicates or distributes information or material.' 'Information or material' is defined in proposed subsection 13(2) to include information or materials in any form, including oral, visual, graphic, written, electronic, digital and pictorial forms.

46 Proposed section 10 of the Bill provides that 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*.

47 Proposed section 22.

Proposed section 10 defines 'recent Cabinet Minister' to mean a person who was a Cabinet Minister within the last three years, and who is not currently a Minister, member of Parliament or senior Commonwealth official.

48 Proposed section 23.

Proposed section 10 defines 'recent member of Parliament' and 'recent Minister' to mean a person who held one of those positions within the last the three years, but who is not presently a Minister, member of Parliament or senior Commonwealth official; and a 'recent holder of a senior Commonwealth position' to mean a person who occupied that position within the last 18 months, but who is not presently a Minister or member of Parliament.

2.57 In broad terms, the exemptions are:

- activities done for the sole purpose of, or which solely relate to, the provision of humanitarian aid or assistance;[49]
- activities done for the sole purpose of, or which solely relate to, the provision of legal advice or representation;[50]
- activities of diplomats, consular and other officials;[51]
- activities done for the sole purpose of, or which solely relate to, the religious pursuits of a foreign government;[52]
- activities done for the sole purpose of news, current affairs or editorial content;[53]
- certain business and commercial activities, including:
  - the negotiation or conclusion of contracts for the provision of goods or services (where they do not relate to national security, defence or public infrastructure),[54] and
  - the activities of employees within Australia of foreign businesses,[55] and
- any other circumstances prescribed by the rules.[56]

2.58 Chapter 4 addresses these proposed exemptions, and their application to certain foreign principals in further detail.

Part 3–Responsibilities of registrants

2.59 Proposed Part 3 sets out the responsibilities and obligations that will be placed upon persons or entities that are registered under the scheme, known as 'registrants'.

2.60 Registrants will be required to report on various matters whilst registered, with greater regularity during elections and other voting periods. The reporting and other responsibilities are to:

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49 Proposed section 24.

50 Proposed section 25.

51 Proposed section 26.

52 Proposed section 27.

53 Proposed section 28.

54 Proposed subsection 29(1).

55 Proposed subsection 29(2).

56 Proposed section 30.

- renew registration on an annual basis;[57]
- report material changes in circumstances within 14 days;[58]
- report when donor activity on behalf of a foreign principal reaches $13,500 or a multiple thereof (this must be reported within 14 days,[59] or within seven days if during an election or other voting period);[60]
- update registration information within 14 days of the commencement of an election or other voting period;[61]
- report on registrable activities within seven days if undertaken during an election or other voting period;[62]
- make disclosures in any communications materials distributed on behalf of a foreign principal,[63] and
- maintain records for the duration of registration, and for a period of five years after the cessation of registration.[64]

2.61 Registrants must report to the Secretary on the above-mentioned matters within the timeframes specified. However, there is no requirement in the Bill that the information is then made available to the public, or published within a certain period of time. These obligations are discussed further in Chapter 6.

2.62 A number of strict liability offences will apply for failing to fulfil a reporting responsibility. Offences are dealt with in Part 5 of the Bill, and are considered in further detail in Chapter 7 of this report.

Part 4–Obtaining and handling information

2.63 Proposed Part 4 outlines how information provided under the Scheme will be obtained, stored and disclosed.

2.64 The Bill provides that the Secretary will keep a register that will hold a wide range of information about persons and entities, including third parties that

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57 Proposed section 39.

58 Proposed section 34.

59 Proposed section 35.

60 Proposed section 37.

61 Proposed section 36.

62 Proposed section 37.

63 Proposed section 38.

64 Proposed section 40.

are not registered under the Scheme.[65] For example, this will include the name of the person and the foreign principal, the registration application and annual renewal documents, a record of any communications between the registrant and the Secretary, and any documents provided by the person as requested by the Secretary.

2.65 Not all information contained on this register will be publicly available. The Bill provides that the Secretary must publish on a website the following:

- the name of the person and the foreign principal;
- a description of the kind of registrable activities the person undertakes on behalf of the foreign principal, and
- any other information prescribed by rules.[66]

2.66 The Bill proposes to grant the Secretary the discretion not to publish certain information if the Secretary is satisfied that the information is commercially sensitive, affects national security or is related to matters prescribed by rules.[67]

2.67 The Bill proposes powers for the Secretary to compel information or documents from persons or entities registered under the Scheme, as well as any third parties. Information could be compelled for the purpose of determining whether a person or entity should be registered,[68] or if the information is relevant to the operation of the Scheme.[69]

2.68 It will be a criminal offence for a person to fail to comply with a request, or to provide false or misleading information to the Secretary in response to a request.[70] The Bill clarifies that a person will not be excused from providing information or documents on the basis that it may incriminate the person or expose them to penalty.[71] However, the information or document will not be admissible in criminal or civil proceedings (except in relation to providing false or misleading information).

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65 Proposed section 42.

66 Proposed section 43.

67 Proposed section 43.

68 Proposed section 45.

69 Proposed section 46.

70 Proposed section 59.

71 Proposed section 47.

2.69 The Bill authorises the Secretary to share Scheme-information with a wide range of entities and for a range of purposes, including law enforcement and security agencies.[72] Additional entities and purposes for which information can be shared can be prescribed in rules following consultation with the Information Commissioner.[73]

2.70 The Secretary may delegate all or any functions under the Bill down to the level of acting Executive Level 2.[74]

2.71 The Secretary's role and proposed powers are further discussed in Chapter 6.

Part 5–Enforcement

2.72 Proposed Part 5 of the Bill will create a number of criminal offences. The new offences are outlined in Table 2.1.

Table 2.1 Proposed offences

Proposed offence	Proposed penalty
Intentional omission to apply or renew and registrable activity undertaken (proposed subsection 57(1))	Seven years imprisonment
Section 31 notice given knowing arrangement still exists and undertaking registrable activity (proposed subsection 57(2))	Seven years imprisonment
Reckless omission to apply or renew and registrable activity undertaken (proposed subsection 57(3))	Five years imprisonment
Intentional or reckless omission to apply or renew whether or not registrable activity undertaken (proposed subsection 57(4))	12 months imprisonment

72 Proposed section 53.

73 Proposed section 53.

74 Proposed section 67.

Section 31 notice given knowing arrangement still exists whether or not registrable activity undertaken (proposed subsection 57(5))	12 months imprisonment
Failure to fulfil reporting responsibility (proposed subsection 58(1))	60 penalty units
Failure to fulfil responsibility to disclose in communications activity (proposed subsection 58(2))	60 penalty units
Failure to keep records (proposed subsection 58(3))	60 penalty units
Failure to comply with notice requiring information (proposed section 59)	60 penalty units
False or misleading information or documents (proposed subsection 60(1))	Six months imprisonment
Destruction of records (proposed subsection 61(1))	Five years imprisonment
Intentionally not registering and engaging in activities on behalf of a foreign principal (proposed subsection 57(1))	Three years imprisonment

2.73 All offences for failing to apply for or renew registration require knowledge of the obligation to register, and either intention or recklessness as to failing to register or renew registration.

2.74 There are no civil penalties or enforcement mechanisms contained in the Bill.

2.75 The enforcement provisions are further discussed in Chapter 7.

Part 6–Miscellaneous

2.76 Proposed Part 6 covers a range of matters, including that:

- an annual report must be prepared and presented to the Parliament on the operation of the Scheme,[75] and

[75] Proposed section 69.

- the Scheme must be formally reviewed within five years of its commencement.[76]

2.77 Chapter 8 discusses the oversight and review of the proposed Scheme.

Amendments proposed by the Attorney-General

2.78 The Committee was requested to inquire into and report on the Bill as introduced to the House. However the Committee notes that, six months into the inquiry, the Attorney-General proposed a set of amendments to the Bill.

2.79 Chapter 9 outlines the Attorney-General's proposed amendments to the Bill and evidence in relation to those proposed amendments.

Intersection with other bills

2.80 The Bill was introduced by the Prime Minister into the House of Representatives as a package of legislative reforms alongside the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017 (the Espionage and Foreign Interference Bill), and the Foreign Influence Transparency Scheme (Charges Imposition) Bill 2017.

2.81 On the same day that the Prime Minister introduced these Bills, the Minister for Finance introduced the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017 (the EFDR Bill) into the Senate. That Bill was referred to the Joint Standing Committee on Electoral Matters for inquiry and report by 28 March 2018.

2.82 The Bills were collectively described by the Prime Minister as having 'interlocking components' to counter foreign interference.[77]

2.83 The Espionage and Foreign Interference Bill was also referred to this Committee for review. Schedule 5 of the Espionage and Foreign Interference Bill sets out transitional arrangements such that if a registrable arrangement exists prior to the commencement of the Scheme, a person will not be required to register under the Scheme on the date of commencement. In such circumstances, a person will have six months from the date of commencement to register.

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[76] Proposed section 70.

[77] The Hon. Malcolm Turnbull MP, Prime Minister, Second Reading Speech, *Hansard*, 7 December 2017, p. 13145.

2.84 Schedule 5 of the Espionage and Foreign Interference Bill also proposes to incorporate a number of concepts and definitions into this Bill that will be created by the EFDR Bill if passed. This includes expanding the list of processes that are deemed to be for the 'purpose of political or governmental influence' under proposed section 12 of the Bill to include processes in relation to 'political campaigners'.

2.85 A definition of 'political campaigner' will be inserted into the *Commonwealth Electoral Act 1918* by the EFDR Bill. The proposed reforms made by the Espionage and Foreign Interference Bill mean that anyone who lobbies a 'political campaigner' or undertakes activities to influence processes in relation to a political campaigner, may be required to register under the Scheme.

2.86 The Espionage and Foreign Interference Bill will also amend the Bill to omit the current defined 'electoral donations threshold' ($13,500) to the threshold within the meaning of the *Commonwealth Electoral Act 1918*. That threshold will also be $13,500, however it will be subject to indexation. If the disclosure threshold under the *Commonwealth Electoral Act 1918* changes, the electoral donations threshold under the Scheme will change to mirror that threshold.

2.87 If the Parliament does not pass these sections of the EFDR Bill, the present Bill will not be amended. The effect of this will be that:

- political campaigner will not be referred to in the 'activities for the purpose of political or governmental influence'; and
- the threshold for 'donor activity' will remain at $13,500 (and will not be subject to indexation).

2.88 The Committee released its report on the Espionage and Foreign Interference Bill on 7 June 2018, and recommended that the Bill, with amendments, be passed.

International human rights issues

2.89 The Explanatory Memorandum to the Bill includes a Statement of Compatibility with Human Rights (the Statement).

2.90 The Statement asserts that the Bill is compatible with the human rights and freedoms recognised or declared in the international instruments which are listed at section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

2.91 The following human rights were described as being promoted by the Bill:

- the right to opinion and freedom of expression in Article 19 of the International Covenant on Civil and Political Rights (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.

2.92 The rights were described as being promoted by the Bill because its provisions encourage and promote a 'political system that is transparent,' and enable the exercise of rights and duties without interference.[78]

2.93 The following human rights were described as being limited by the Bill:

- the right to liberty of person and freedom from arbitrary detention in Article 9(1) of the ICCPR;
- 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 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 the conduct of public affairs and the right to be elected in Article 25 of the ICCPR.

2.94 To the extent that any of the abovementioned rights were described as being limited by the Bill, the Statement went on to note that each are nonetheless consistent with Australia's international human rights obligations. The Statement explained that the limitations are 'reasonable, necessary and proportionate for the pursuit of a legitimate objective'[79] being transparency for the Australian government and public about foreign influence over political and governmental systems and processes.

2.95 The Parliamentary Joint Committee on Human Rights (the PJCHR) released its report on the Bill on 6 February 2018. The PJCHR concluded that although the objective of the Bill may be a legitimate objective, the limitations placed on human rights may not be proportionate, nor sufficiently circumscribed, to ensure that it is only as extensive as is strictly necessary to achieve that legitimate objective.[80]

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78 Explanatory Memorandum (Statement of Compatibility with Human Rights), pp. 7-8, paras 15-19.

79 See for example, Explanatory Memorandum (Statement of Compatibility with Human Rights) p. 8, para 20.

80 Parliamentary Joint Committee on Human Rights, *Human Rights Scrutiny Report – Report 1 of 2018*, p. 39.

2.96 In reaching that conclusion, the PJCHR expressed concern regarding the breadth of definitions of a 'foreign principal', activities 'on behalf of' and 'for the purpose of political or governmental influence'. The PJCHR stated that the breadth of definitions created an 'uncertain and potentially very broad range of conduct falling within the scope of the scheme'.[81] As a result, the Bill 'may unduly obstruct the exercise of the freedom of expression, association and right to take part in public affairs'.[82]

2.97 Further, the PJCHR examined the Bill's proposed exemptions from the Scheme, finding 'it is not clear, however, whether these safeguards in this bill are, of themselves, sufficient'.[83]

2.98 In a submission to this Committee's inquiry, the Australian Lawyers for Human Rights similarly advocated that the Bill 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 … human rights'.[84]

Constitutional validity

2.99 The Bill, in whole, relies upon:

- the external affairs power;
- powers incidental to the exercise of a power vested in the Commonwealth, and
- any implied legislative powers of the Commonwealth.[85]

2.100 A number of other constitutional powers are referred to as 'additional and severable heads of legislative power' which support the Bill.[86] That is, if a

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81 Parliamentary Joint Committee on Human Rights, *Human Rights Scrutiny Report – Report 1 of 2018*, p. 39.

82 Parliamentary Joint Committee on Human Rights, *Human Rights Scrutiny Report – Report 1 of 2018*, p. 41.

83 Parliamentary Joint Committee on Human Rights, *Human Rights Scrutiny Report – Report 1 of 2018*, p. 41.

84 Australian Lawyers for Human Rights, *Submission 7*, p. 5.

85 Proposed section 7.

86 Proposed section 7 lists the following Constitutional heads of power as supporting the Bill – paragraph 51 (xxix) (external affairs); paragraph 51 (xxxix) (matters incidental to execution of a power); paragraph 51(i) (trade and commerce); paragraph 51(v) (communications); 51(xx) (corporations); paragraph 51(xi) (census and statistics); paragraph 51(xix) (aliens); and, any implied legislative powers of the Commonwealth.

court were to find that a legislative head of power does not support the Bill or an aspect of the Bill, then that can be 'severed' and ensure that the rest of the Bill is valid to the extent that other legislative heads of power support the Bill.[87]

2.101 Some submitters raised concerns regarding the constitutional validity of the Bill, in particular the impact on the implied freedom of political communication.[88] For example, Australian Lawyers for Human Rights expressed strong doubt as to the constitutional basis for the Bill, describing the legislative package as 'an onslaught … on the implied constitutional right of political communication',[89] fearing that it will 'have a severely chilling effect upon free speech, and particularly constitutionally-protected free political speech'.[90]

2.102 The Law Council Australia also discussed the constitutionally implied right to freedom of political communication, noting that it is 'not amenable to alteration by legislation'. However, the Council advised that:

> In the context of laws addressing national security and public order, it is accepted that there may be legitimate countervailing interests which require the imposition of reasonably and proportionate limitations upon freedom of expression.[91]

2.103 The Law Council was of the view that the strict application of the proposed penalties, together with the broad scope of actors and activities captured under the Scheme, means that the Bill has the 'very real likelihood of muting public debate and dialogue, an outcome that is unsatisfactory and beyond the objects of the Bill'.[92]

2.104 Mr Bret Walker SC also noted that the Bill raises significant constitutional questions for the implied right to political communication:

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87 Explanatory Memorandum, p. 19, para 98.

88 Mr Ernst Willheim, *Submission 2*, pp. 3-4; Australian Lawyers for Human Rights, *Submission 7*, p. 4; Oxfam Australia, *Submission 57*, p. 3; Dr Luke Beck, *Submission 68*, p. 1; Professor Anne Twomey, *Submission 82*, p. 1.

89 Australian Lawyers for Human Rights, *Submission 7*, p. 4.

90 Australian Lawyers for Human Rights, *Submission 7*, p. 6.

91 Law Council of Australia, *Submission 4*, pp. 9-10.

92 Law Council of Australia, *Submission 4*, p. 10; see also Mr Tony Kevin, private capacity, *Committee Hansard*, Melbourne, 16 March 2018, p. 5.

> My feeling is that the core of the legislative project is not necessarily outside permissible regulation of political communication. That's what might be called the Platonic ideal behind the legislation; it is not intended to say the drafting's got it right. It's not yet clear what the courts' approach will or ought to be concerning the inhibition that might be supposed to be created which would affect the content or frequency or nature of political communication if you knew that a note had to be taken and kept for five years and made available to the executive.[93]

2.105 The Department submitted that the Scheme will 'help protect the freedom of political communication' by encouraging and promoting a political system that is transparent.[94]

2.106 In answers to questions on notice, the Department stated:

> The department is confident that the Scheme does not infringe or unnecessarily burden the implied freedom of political communication. The registration and transparency requirements in the Scheme do not prevent any person from engaging in political communication in Australia. Rather the Scheme merely requires the ultimate source of such communications to be available through registration under the Scheme. The Scheme's objective – to inform the Australian Government and the public about the ultimate source and interests behind political communications being made to them – is appropriate and adapted to serve a legitimate end of enhancing transparency of foreign influence in Australian political and governmental processes.[95]

2.107 After consideration of the amendments proposed by the Attorney-General, Professor Anne Twomey noted that their effect is to 'focus the application of the Bill more tightly on its legitimate end'.[96] She concluded that:

> This change in focus will significantly bolster the constitutional validity of the proposed law, as it will be easier to argue that its provisions are appropriate and adapted to serve the legitimate end.[97]

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93 Mr Bret Walker SC, private capacity, *Committee Hansard*, Canberra, 16 February 2018, pp. 8-9.

94 Attorney-General's Department, *Submission 5*, p. 3.

95 Attorney-General's Department, *Submission 5.1*, p. 11.

96 Professor Anne Twomey, Submission 82.1, p. 1.

97 Professor Anne Twomey, *Submission 82.1*, p. 1.

United States' *Foreign Agents Registration Act 1938*

2.108 As noted in Chapter 1, in May 2017 the Prime Minister requested that the Attorney-General conduct a review of Australia's espionage, foreign interference, treason and related laws. The Prime Minister's terms of reference included that the review consider the merit of creating a legislative regime based on the United States' *Foreign Agents Registration Act 1938* (FARA).

Overview of the *Foreign Agents Registration Act 1938*

2.109 Enacted in 1938 to promote transparency with respect to foreign influence in the political process, FARA requires 'agents of foreign principals' undertaking certain activities on behalf of foreign interests to register with and file regular reports with the United States' Department of Justice.

2.110 FARA applies to individuals and organisations who:

- act under the order, request, control or direction of, or whose activities are directly or indirectly supervised, directed, controlled, financed or subsidised in whole or substantial part by a foreign principal (including a foreign country, person or organisation outside the United States),[98] and
- on behalf of the foreign principal within the United States, engage in political activities; act as a public relations counsel, publicity agent, information service employee or political consultant; solicit, collect, disburse or dispense contributions, loans, money or other things of value; or make representations to United States government agencies or officials.[99]

2.111 FARA contains several exemptions, including:

- *diplomats, consular officers*, officials of foreign governments and staff members of diplomatic or consular officers;[100]
- persons solely engaged in private and non-political activities in furtherance of the *bona fide trade or commerce* of a foreign principal,

98 *Foreign Agents Registration Act*, 22 U.S.C. § 611.

99 *Foreign Agents Registration Act*, 22 U.S.C. § 611(c)(1).

100 *Foreign Agents Registration Act*, 22 U.S.C. § 613 (a)-(c).

activities *not predominantly serving a foreign interest,* or activities providing purely *humanitarian assistance*;[101]

- persons engaging in *bona fide religious, scholastic, academic, artistic or scientific pursuits or fine arts*;[102]
- persons whose foreign principal is a government of a foreign country, and the President has deemed the defence of that foreign country as vital to the defence of the United States;[103]
- persons engaged as lawyers for a foreign principal provided that the *purpose of legal representation* does not include attempts to influence or persuade agency personnel or officials other than in the course of judicial, criminal or civil law enforcement enquiries, investigations or proceedings,[104] and
- persons engaged in lobbying activities and who have registered under the United States' *Lobbying Disclosure Act 1995* (LDA).[105]

2.112 FARA also requires agents of foreign principals to file copies of informational materials that they distribute for a foreign principal within 48 hours of transmittal,[106] and to maintain records of their activities on behalf of their principal. Supplementary statements are required to be lodged every six months.

2.113 Failure to comply with FARA may subject agents to criminal and civil penalties.

2.114 Although FARA has not been litigated extensively, American courts have recognised a compelling governmental interest in requiring agents of foreign principals to register and disclose foreign influence in the domestic political process, resulting in a number of constitutional challenges being rejected over the decades since FARA's initial enactment.[107]

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101 *Foreign Agents Registration Act*, 22 U.S.C. § 613(d).

102 *Foreign Agents Registration Act*, 22 U.S.C. § 613 (e).

103 *Foreign Agents Registration Act*, 22 U.S.C. § 613 (f).

104 *Foreign Agents Registration Act*, 22 U.S.C. § 613 (g).

105 *Foreign Agents Registration Act*, 22 U.S.C. § 613(h) and 2 U.S.C. § 1601.

106 *Foreign Agents Registration Act*, 22 U.S.C. § 614(a).

107 Congressional Research Service, *The Foreign Agents Registration Act: A Legal Overview*, December 2017, (CRS R45037), <https://fas.org/sgp/crs/misc/R45037.pdf>, last accessed 5 March 2018.

Development of the current Bill

2.115 In developing the Bill, the Department advised that it closely consulted its counterparts in the United States.[108] Specifically, the Department advised that the Bill has sought to avoid what it has identified as the challenges and limitations of FARA in meeting its objective. The Department identified the following:

- FARA exemptions are 'broad', and
  - persons engaged in lobbying activities who are registered under the LDA are exempt from registration under FARA; LDA has fewer regulatory requirements and requires less information to be disclosed;[109]
  - as a result, public awareness and understanding of registration requirements remain a challenge;[110]
- FARA does not provide a coercive power to compel the production of information, and there are 'few tools available' to officials to enforce compliance;[111]
- registrants do not regularly provide timely and full submissions to the Department of Justice,[112] and
- registration and renewal fees have been criticised for being too high and for hindering the transparency objective.[113]

2.116 In its submission, the Department provided a comparative table that seeks to contrast the liability and obligations between FARA and the Scheme as proposed in the Bill (that is, without reference to the Attorney-General's proposed amendments). For reference, it is included in Appendix C to this report.

2.117 Throughout the Committee's review, the Department sought to clarify that the Bill would apply to a more narrow set of conduct. For example, at a public hearing, the Department noted that the scope of conduct is limited by the purpose of the activities being relevant to the registration requirement—

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108 Attorney-General's Department, *Submission 5*, p. 6.

109 Attorney-General's Department, *Submission 5*, p. 7.

110 Attorney-General's Department, *Submission 5*, p. 7.

111 Attorney-General's Department, *Submission 5*, p. 7.

112 Attorney-General's Department, *Submission 5*, p. 8.

113 Attorney-General's Department, *Submission 5*, p. 8.

that is, political or governmental influence. The Department advised that FARA captures any representation to the United States' Government, which in its view, explained the need for broader exemptions.[114]

2.118 Evidence provided by the Department and other submitters have compared the Bill with FARA, and the following chapters summarised this comparative evidence.

[114] Ms Tara Inverarity, Assistant Secretary, Attorney-General's Department, *Committee Hansard*, Melbourne, 16 March 2018, p. 55.

3. Scope of actors and activities

Introduction

3.1 This chapter considers the scope of actors and activities that will be subject to the Foreign Influence Transparency Scheme. The evidence and issues presented here do not take account of the amendments proposed by the Attorney-General that were provided to the Committee on 7 June 2018.

3.2 The Foreign Influence Transparency Scheme Bill (the Bill) proposes that persons who undertake certain activities on behalf of a foreign principal, for the purpose of political or governmental influence, will be required to register under the Scheme. As noted in previous chapters, the objective of the Bill—to provide transparency of the level and extent of *covert* foreign influence in Australia—was supported by a large majority of submitters.[1]

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[1] Australian Financial Markets Association, *Submission 3*, p. 1; Law Council of Australia, *Submission 4*, p. 5; Group of Eight Australia, *Submission 11*, p. 1; Australian Catholic Bishops Conference, *Submission 12*, p. 1; Peter Jennings, *Submission 14*, p. 1; Financial Services Council, *Submission 16*, p. 1; Australian Bankers' Association, Financial Services Council, Australian Private Equity and Venture Capital Association, Insurance Council of Australia, *Submission 18*, p. 1; Property Council of Australia, *Submission 21*, p. 1; Australian Industry Group, *Submission 32*, p. 1; Australian Friends of the Hebrew University, Jerusalem Limited and Technion Australia, *Submission 38*, p. 1; World Vision Australia, *Submission 45*, p. 2; Australian Institute of International Affairs, *Submission 48*, p. 1; Justice Connect, *Submission 50*, p. 2; Uniting Care Australia, *Submission 51*, p. 1; Australian Council for International Development, *Submission 55*, p. 1; Oxfam Australia, *Submission 57*, p. 3; The Smith Family, *Submission 60*, p. 4; Mr Tony Kevin, private capacity, *Committee Hansard*, Melbourne, 16 March 2018, pp. 2-3.

3.3 Despite the strong support for the purpose of the Bill, a significant number of submitters expressed concerns about the scope of actors and activities captured by the Bill,[2] with many suggesting that the wide range of conduct captured is beyond the objective of the Bill and may actually impede the intended transparency.

3.4 The Law Council of Australia noted that the breadth of the Bill may 'unduly impact those that have no intention to disrupt Australian democracy and sovereignty, while lacking the ability to curb the types of influential behaviour that is of identifiable concern'.[3]

3.5 The Law Council went on to question whether the proposed measures represent a proportionate reaction to the issue of foreign interference and influence in Australia. The Council also queried whether the approach is 'the most effective policy response'.[4]

3.6 Others, such as the Australian Catholic Bishops Conference (ACBC), described the Bill's scope as 'extraordinary'[5] and the Australian Financial Markets Association (AFMA) stated that the Bill has the potential to 'become one of the most wide reaching regimes in the Australian regulatory system'.[6]

3.7 As a result of its breadth, some stakeholders concluded that the Bill's provisions would have national consequences beyond its objective. For example, the Australian Lawyers for Human Rights (ALHR) submitted:

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2 Tony Kevin, *Submission 1*, pp. 11-12; Australian Financial Markets Association, *Submission 3*, p. 3; Law Council of Australia, *Submission 4*, p. 6; Australian Catholic University, *Submission 6*, p. 1; Australian Lawyers for Human Rights, *Submission 7*, p. 1; American Chamber of Commerce in Australia, *Submission 8*, p. 2; The Group of Eight, *Submission 11*, p. 1; Australian Professional Government Relations Association, *Submission 13*, p. 2; Financial Services Council, *Submission 16*, p. 1; Community Council for Australia, *Submission 34*, p. 2; Australian Major Performing Arts Group, *Submission 37*, p. 1; JMTinc, *Submission 41*, p. 1; Social Ventures Australia, *Submission 42*, p. 1; World Vision Australia, *Submission 45*, p. 2; Free TV Australia, *Submission 47*, p. 2; Justice Connect, *Submission 50*, p. 3; The Chamber of Arts and Culture Western Australia, *Submission 54*, p. 2; Oxfam Australia, *Submission 57*, p. 5; WWF-Australia, *Submission 58*, p. 1; Federation of Ethnic Communities' Councils of Australia, *Submission 59*, p. 2; The Smith Family, *Submission 60*, p. 4; GetUp!, *Submission 63*, pp. 2-3.

3 Law Council of Australia, *Submission 4*, p. 6; see also Community Council for Australia, *Submission 34*, p. 6.

4 Law Council of Australia, *Submission 4*, p. 9.

5 Australian Catholic Bishops Conference, *Submission 12*, p. 3.

6 Australian Financial Markets Association, *Submission 3*, p. 3.

> 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.[7]

3.8 Responding to some of these concerns, the Department stated that it is,

> … not the intention of the Scheme to cast a very wide net to catch a large number of people. … There is value and a deliberate purpose in capturing those people who are acting at the behest of a foreign actor to influence political and government decision-making. … [T]here is no intention to cast negative aspersions or to criminalise or to otherwise take the view that it is wrong for there to be foreign influence; it's simply that there is value in that being disclosed and it being transparent to the community and decision-makers.[8]

3.9 Beyond these general concerns, stakeholders identified specific concerns about the language employed in the Bill that would likely capture conduct that is beyond the Bill's objective of revealing *covert* influence. These specific concerns can be grouped into to four categories:

- the expansive definition of a 'foreign principal' as specified in proposed section 10;
- the categories of relationships between persons and foreign principals that are described as undertaking activities 'on behalf of' a foreign principal, as provided in proposed section 11;
- how the purpose of the registrable activity is to be determined as provided in proposed section 14;
- the list of registrable activities in proposed Division 3, and
- the registrable activities of recent Cabinet Ministers, Ministers, members of Parliament and other holders of senior Commonwealth positions.

3.10 Each of these concerns is addressed in the following sections, with comparison (where applicable) to the similar concepts in the United States'

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7 Australian Lawyers for Human Rights, *Submission 7*, p. 3; see also Oxfam Australia, *Submission 57*, p. 8.

8 Ms Anna Harmer, First Assistant Secretary, Security and Criminal Law Division, *Committee Hansard*, Melbourne, 16 March 2018, p. 53.

Foreign Agents Registration Act (FARA), as the only other comparable scheme in operation.

Definition of 'foreign principal'

3.11 A 'foreign principal' is defined in the Bill as including:

- foreign governments;
- foreign public enterprises;
- foreign political organisations;
- foreign businesses, and
- individuals who are neither Australian citizens nor permanent residents.[9]

3.12 There was general support for the inclusion of foreign governments, foreign public enterprises and foreign political organisations. The inclusion however of foreign businesses and individuals who are neither Australian citizens nor permanent residents attracted concern.

Foreign businesses

3.13 The obligations contained within the Bill would be engaged where an individual or organisation undertakes certain activities, or enters an arrangement to undertake certain activities, on behalf of a 'foreign business'.

3.14 Proposed section 10 defines a 'foreign business' as a 'person, (other than an individual) that:

- either:
  - is constituted or organised under a law of a foreign country or part of a foreign country; or
  - has its principal place of business in a foreign country, and
- is not a foreign government, foreign public enterprise or foreign political organisation.

3.15 This will capture a wide range of organisations, both for-profit organisations and not-for-profit organisations, the latter which includes trusts, charities, schools, universities and think tanks.[10] This definition is broadly comparable

9 Proposed section 10.

10 Australian Lawyers for Human Rights, *Submission 7*, p. 6.

to the FARA, which establishes a foreign business 'organized under the laws of or having its principal place of business in a foreign country'.[11]

3.16 A number of stakeholders expressed concern regarding the expansive breadth of a definition that did not require any close foreign 'nexus'.[12]

3.17 The AFMA recommended that the definition be amended to exclude businesses registered as a foreign company by the Australian Securities and Investment Commission. AFMA advocated that this would ensure that foreign companies that have a regulated *Australian* business are not treated as a 'foreign business'.[13]

3.18 In a joint submission, Australian Associated Press, Australian Subscription Television and Radio Association (ASTRA), Bauer Media Group, Commercial Radio Australia, Community Broadcasting Association of Australia, Fairfax Media, Free TV Australia, HT&E, Media Entertainment and Arts Alliance, News Corp Australia, and The West Australian (referred to as Joint Media Organisations) recommended that the Scheme only apply to:

- foreign governments, and
- foreign businesses and/or individuals operating on behalf of foreign governments.[14]

3.19 In separate submissions, Free TV Australia and Network Ten reiterated this recommendation.[15]

3.20 At a public hearing, the Joint Media Organisations stated that the impact of such an amendment would 'certainly enable the bill to be more targeted to achieve what it seeks to respond to'. The Organisation elaborated:

> It seems that the law has a very rightful place in attempting to shine a light on people, or get people to register, who are influencing on behalf of a foreign government where there is a common purpose, perhaps to bring to light— 'covert' [activity] ... But in fact what the bill does in its current form is it would require registration and continuous obligation by those entities who I think

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11 *Foreign Agents Registration Act,* 22 U.S.C. § 611(b).

12 Australian Financial Markets Association, *Submission 3*, p. 7; Joint Media Organisations, *Submission 19*, p. 1; Free TV Australia, *Submission 47*, p. 2; Network Ten, *Submission 56*, p. 1.

13 Australian Financial Markets Association, *Submission 3*, p. 7.

14 Joint Media Organisations, *Submission 19*, p. 1.

15 Free TV Australia, *Submission 47*, p. 2; Network Ten, *Submission 56*, p. 1.

> would be classed as having legitimate grounds to influence and engage with government officials and are usually doing it overtly … as opposed to trying to do it through secret and quiet channels. We do not deny that there may well be instances of that latter part occurring. The bill is just drafted very broadly and so captures far more, and I think, in a compliance sense, it would be entirely unwieldy to do. I don't think anyone really wants to have every employee of News Corp Australia, Foxtel, Fox Sports and Channel 10, let alone every other organisation that may well need to register under the way in which the bill's currently drafted.[16]

3.21 ALHR also reflected on the breadth of the definition commenting that it would appear to 'apply whether or not such entities are acting in conjunction with any Australian subsidiary'.[17]

3.22 AFMA and the Australian Professional Government Relations Association (APGRA) similarly commented that extending registration obligations to foreign businesses may impact the competitive neutrality of Australia's open economy.[18] APGRA was of the view that the Bill has 'the potential [to] … be viewed as protectionist or an example of economic nationalism'.[19]

3.23 By contrast, Mr Peter Jennings cautioned against creating an 'artificial distinction between the actions of foreign Governments and foreign businesses, when in some cases the aims and objectives of these entities are closely interlinked'.[20]

3.24 The Attorney-General's Department (the Department) responded to the recommendation of the Joint Media Organisations, stating that it would 'undermine the Scheme's transparency objective'. It explained that limiting the Scheme as recommended would,

> … make it easy for foreign governments who wish to influence a political or governmental process in Australia to funnel that activity through a foreign

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16 Ms Georgia-Kate Schubert, Head of policy and government affairs, News Corp Australia, *Committee Hansard*, Melbourne, 16 March 2018, pp. 31-32.

17 Australian Lawyers for Human Rights, *Submission 7*, p. 6.

18 Australian Financial Markets Association, *Submission 3*, p. 3; Australian Professional Government Relations Association, *Submission 13*, p. 5; see also American Chamber of Commerce in Australia, *Submission 8*, p. 3.

19 Australian Professional Government Relations Association, *Submission 13*, p. 5.

20 Mr Peter Jennings, *Submission 14*, p. 2.

business or individual, thereby making the activities fall outside the scope of the Scheme.[21]

Individuals who are non-citizens and non-permanent residents

3.25 The obligations contained within the Bill would be engaged where an individual or organisation undertakes certain activities, or enters an arrangement to undertake those activities, on behalf of an individual who is neither an Australian citizen nor a permanent Australian resident.

3.26 The ACBC stated that the inclusion of an individual who is neither a citizen nor a permanent resident will apply to a wide range of individuals who 'cannot be identified with precision at any time'.[22] This breadth may well be extended by the Bill's extraterritorial application in some circumstances to activities done and persons located outside Australia.[23]

3.27 In contrast, the FARA definition of a foreign principal appears to include an individual outside the United States unless it is established that he or she is an American citizen and is domiciled in the United States.[24] Further, the FARA scheme does not have extraterritorial effect. It regulates conduct that takes place (or under an arrangement, would take place) within the United States.[25]

3.28 The Law Council stated that the inclusion of non-citizens and non-permanent residents within the definition of foreign principal may have the effect of 'capturing activity that is well beyond the intent of the measures'. The Council also noted that the Bill will 'apply to a very wide range of individuals who 'currently engage in dialogue on Australian domestic policy either directly or through a third-party entity, including as a client, member or financial supporter'.[26]

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21 Attorney-General's Department, *Submission 5.1*, p. 12.

22 Australian Catholic Bishops Conference, *Submission 12*, p. 3.

23 Proposed section 6.

24 *Foreign Agents Registration Act*, 22 U.S.C. § 611(b).

25 *Foreign Agents Registration Act*, 22 U.S.C. § 611(c).

26 Law Council of Australia, *Submission 4*, pp. 10-11.

3.29 This concern was shared by the ACBC and ALHR and the Australian Friends of the Hebrew University, Jerusalem and Technion Australia.[27] In a joint submission, Australian Friends of the Hebrew University, Jerusalem and Technion Australia commented:

> It is entirely legitimate in our view for the Australian government to seek to monitor and control any attempts at interference or influence-peddling in Australian politics by foreign governments or their proxies through Australian intermediaries. However, care needs to be taken to ensure that in the process Australian citizens are not penalised, simply by virtue of having overseas connections, for expressing their views in support of one side or another in any international conflict.[28]

3.30 Over 28 per cent of Australia's current population was born overseas. 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).[29] Reflecting upon this diversity, both the Federation of Ethnic Communities' Councils of Australia (FECCA) and the Ethnic Communities' Council of Victoria expressed concern that the inclusion of foreign individuals would likely have a disproportionate effect on culturally and linguistically diverse communities.[30] FECCA noted that under the Bill, 'advocating for domestic violence sufferers on temporary visas would likely require FECCA to register'.[31]

3.31 In a different setting, the Australian Academy of Science noted that the inclusion of foreign individuals within the definition of a foreign principal would 'include researchers working in Australia who are not Australian citizens, such as visiting academics or overseas students at universities, as well as non-Australian members of international research collaborations and consortia'.[32]

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27 Australian Catholic Bishops Conference, *Submission 12*, p. 3; Australian Lawyers for Human Rights, *Submission 7*, p. 6; Australian Friends of the Hebrew University, Jerusalem and Technion Australia, *Submission 38*, p. 5.

28 Australian Friends of the Hebrew University, Jerusalem and Technion Australia, *Submission 38*, p. 5.

29 Australian Lawyers for Human Rights, *Submission 7*, p. 6.

30 Federation of Ethnic Communities' Councils of Australia, *Submission 59*, p. 2; Ethnic Communities' Council of Victoria, *Submission 61*, p. 1.

31 Federation of Ethnic Communities' Councils of Australia, *Submission 59*, p. 2.

32 Australian Academy of Science, *Submission 44*, p. 2.

3.32 The Department advised the Committee however that it is 'not the intention of the scheme to cover representation on behalf of an individual'.[33]

3.33 The Department noted that 'it may be desirable for an exemption for individual representations to be included in the Bill',[34] and that it 'considers inquiries and advocacy in relation to the welfare of individuals would be appropriate case for an exemption by regulation'.[35]

Undertaking activity 'on behalf of' a foreign principal

3.34 The definition of undertaking an activity 'on behalf of' a foreign principal extends the scope of the proposed Scheme to a wide range of relationships that might exist between a person and a foreign principal.

3.35 A person will undertake an activity 'on behalf of' a foreign principal if the person undertakes the activity:

- under an arrangement with the foreign principal; or
- in the service of the foreign principal; or
- on the order or at the request of the foreign principal; or
- under the control or direction of the foreign principal; or
- with funding or supervision by the foreign principal, or
- in collaboration with the foreign principal.[36]

3.36 An activity may still be considered to be undertaken 'on behalf of' a foreign principal where the funding, supervision or direction from foreign principal is 'not the only impetus for the person undertaking the activity'.[37] The Explanatory Memorandum provides the following example:

> A person may receive money from both a foreign principal and a domestic actor to engage in parliamentary lobbying activities for the purpose of political or governmental influence. The fact that the person receives funding from a

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33 Ms Anna Harmer, First Assistant Secretary, Security and Criminal Law Division, Attorney-General's Department, *Private Committee Hansard*, Canberra, 16 February 2018, p. 7.

34 Attorney-General's Department, *Submission 5.1*, p. 9.

35 Attorney-General's Department, *Submission 5.1*, pp. 37-38.

Proposed section 30 provides that additional exemptions may be prescribed in rules.

36 Proposed section 11.

37 Explanatory Memorandum, p. 35, para 182.

> domestic actor does not negate the fact that the person is acting on behalf of the foreign principal when they engage in parliamentary lobbying activities.[38]

3.37 The FARA scheme is limited to relationships where the person is in some way directed by the foreign principal to undertake those activities, and as such, captures relationships with a higher degree of materiality than that proposed in the Bill. The FARA establishes that an agent of a foreign principal means any person who:

- acts as an agent, representative, employee, or servant of a foreign principal, or
- acts in any other capacity at the order, request, or under the direction or control, of a foreign principal or of a person any of whose activities are directly or indirectly supervised, directed, controlled, financed, or subsidized in whole or in major part by a foreign principal.[39]

3.38 Stakeholders expressed concern that the Bill as drafted captures a wide breadth of relationships which would not usually be considered to be within the commonly understood meaning of 'on behalf of'.

3.39 Many argued that the approach taken 'goes beyond the usual meaning of the phrase',[40] and that it extends beyond 'normal agency relationships'.[41] For example, ALHR submitted that the term 'on behalf of' would 'normally be understood to mean that one entity acts as agent for the other'.[42]

3.40 The Human Rights Council of Australia (HRCA) noted that the 'ordinary English phrase "on behalf of" expresses a degree of control in the nature of a legal arrangement such as "principal and agent" or "employer and employee"'.[43] With the breadth of meaning given to 'on behalf of', HRCA noted that its arrangements with international human rights organisations and the United Nations may fall within the definition which include:

- a contractual arrangement to engage in human rights research;

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38 Explanatory Memorandum, pp. 35, para 182.

39 *Foreign Agents Registration Act*, 22 U.S.C. § 611(c)(1).

40 World Vision Australia, *Submission 45*, pp. 2-3.

41 GetUp!, *Submission 63*, p. 4; see also Human Rights Council of Australia, *Submission 29*, pp. 2-3.

42 Australian Lawyers for Human Rights, *Submission 7*, p. 7.

43 Human Rights Council of Australia, *Submission 29*, pp. 2-3.

- a funding arrangement to engage in human rights research (including without a written contract);
- a joint international committee formed between various NGOs [non-government organisations] and the HRCA to pursue the protection of human rights in Australia and various other countries, and
- a collaborative arrangement without funding.[44]

3.41 Addressing these concerns, the Law Council recommended amendments that would narrow what would constitute undertaking an activity 'on behalf of' a foreign principal. The amendments should ensure that 'arrangements or connections with foreign principals maintain a degree of materiality before attracting the need for registration under the scheme'.[45]

3.42 The Council proposed that a 'degree of materiality' might be achieved by adopting a more narrow approach. Drawing upon the FARA approach, the Council recommended that proposed section 11 be amended to only cover activities that are:

- undertaken as an agent, representative, or employee of a foreign principal, or in any other capacity at the order, request, or under the direction or control of, a foreign principal, or
- directly or indirectly supervised, directed, controlled, financed, or subsidised in whole or in major part by a foreign principal.[46]

3.43 This would introduce the element of direction or agency to the term 'on behalf of', which submitters considered was lacking from the Bill as drafted. This recommendation was supported by Justice Connect, which stated that such an amendment 'would considerably limit the scope of the proposed scheme and provide adequate and necessary relief to NFP [not-for-profit] and charitable organisations that would otherwise be captured'.[47]

3.44 In addition to these general concerns, stakeholders expressed significant concern with the inclusion of the following:

- 'with funding' by foreign principals, and
- 'collaborations' with foreign principals.

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44 Human Rights Council of Australia, *Submission 29*, pp. 2-3.

45 Law Council of Australia, *Submission 4*, p. 11.

46 Law Council of Australia, *Submission 4*, p. 11.

47 Justice Connect, *Submission 50*, pp. 2-3, 4. .

3.45 These two issues, as well as concerns regarding the foreign principal's knowledge of the activities, are each explored in the successive sections.

With funding by the foreign principal

3.46 Under the proposed section, an organisation or individual that receives funding from a foreign principal will have to register under the Scheme if they undertake an activity for the purpose of political or governmental influence.

3.47 This may require any organisations and any individuals within Australia who receive donations to investigate the source of funds to determine whether registration is required.[48] The Law Council challenged this requirement in circumstances 'where no direction accompanies the donation and the foreign principal exerts no influence'.[49]

3.48 A number of stakeholders provided examples of how this would require them to register, but would serve no purpose as no agency or direction accompanies the donation. For example World Vision Australia (WVA) strongly advocated that the funding it receives from foreign principals, including USAID and EUROPEAID, does not in itself mean that it acts on behalf of those foreign principals:

> We do not however act on behalf of, or at the direction of, any foreign organisation just by virtue of the fact that they have granted us money. WVA disagrees with the implication which arises from the drafting of clause 11(1)(e), namely that receipt of foreign funding means the recipient organisation 'acts on behalf' of the donor. … WVA disagrees with the implication which arises from the drafting of the Bill, that receipt of foreign funding or choosing to participate in these important global initiatives where relevant for our region or particular policy focus, means that our organisation acts on behalf of the donor or foreign principal.[50]

3.49 Similarly, the higher-education sector in Australia receives funding from foreign principals to undertake research activities. Universities Australia and

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48 Law Council of Australia, *Submission 4*, p. 12.

49 Law Council of Australia, *Submission 4*, p. 12.

50 World Vision Australia, *Submission 45*, pp. 3-4; see also The Pew Charitable Trusts, *Submission 52*, p. 2.

The Group of Eight expressed concerns about the inclusion of funding in the proposed section.[51] Universities Australia submitted:

> There are a number of generous overseas donors who have invested in Australian research and higher education. For example, the United States-based Atlantic Philanthropies has invested more than AU$500 million in Australian projects. Yet if the results of philanthropically-funded research could give rise to beneficial policy change, any communication of that research to Government could potentially be a registrable activity.[52]

3.50 To address these concerns, the ACBC recommended that the proposed section be amended to reflect the approach taken in FARA, so as to read, 'with funding or supervision of the activity in whole or major part by the foreign principal'.[53]

3.51 The Department noted the ACBC's recommendation for such an amendment.[54]

3.52 The Committee notes that the recommendation from the Law Council, endorsed by Justice Connect, discussed in the previous section (paras 3.39 and 3.40) would achieve a similar outcome, and provide transparency where there is agency, direction or influence.

In collaboration with the foreign principal

3.53 The Bill would require an organisation or individual that collaborates with a foreign principal to register if they undertake an activity for the purpose of political or governmental influence. A number of organisations expressed concern with the inclusion of collaborations in the definition of acting 'on behalf of' a foreign principal.[55]

3.54 The Bill does not define the term 'collaboration', rather the Explanatory Memorandum states it is 'intended to take its ordinary meaning, such as the

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51 Universities Australia, *Submission 9*, p. 5; The Group of Eight, *Submission 11*, pp. 3-4.

52 Universities Australia, *Submission 9*, p. 5.

53 Australian Catholic Bishops Conference, *Submission 12*, p. 8.

54 Attorney-General's Department, *Submission 5.1*, pp. 10-11.

55 Universities Australia, *Submission 9*, p. 6; The Group of Eight Australia, *Submission 11*, pp. 3-4; Australian Catholic Bishops Conference, *Submission 12*, p. 8; Australia Major Performing Arts Group, *Submission 37*, pp. 5-6; Australian Friends of the Hebrew University, Jerusalem Limited and Technion Australia, *Submission 38*, p. 1; Australian Academy of Science, *Submission 44*, p. 3; Australian Institute of International Affairs, *Submission 48*, p. 2.

person and the foreign principal working together to undertake the activity'.[56]

3.55 In its submission, the ALHR noted that 'collaboration' is not defined in the Bill nor in the *Acts Interpretation Act 1901*. Referencing the Cambridge English Dictionary definition of 'collaboration',[57] ALHR submitted:

> '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.[58]

3.56 The university sector expressed strong concerns regarding the inclusion of collaborations with foreign principals in the Bill such that a vast range of academic research partnerships would likely be captured, acknowledging that 'research and academic activity plays a significant role in helping shape public policy'.[59]

3.57 The Group of Eight outlined research that could be impacted:

> Much of our world-class research is carried out with global partners; a significant percentage of that research is cofinanced by global partners; and, in the case of medical research, it is able to be advanced to market often only with the financial assistance of global drug companies. A significant percentage of that research is carried out with the assistance of researchers from other nations. Universities are a global community and we have no borders: that is the only way that research can succeed.[60]

3.58 Further, Universities Australia provided the following example of how the international collaborative research activities might be captured by the Scheme:

> It is conceivable that any contact between Australian universities or academics and representatives of Australian governments could give rise to liability to

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56 Explanatory Memorandum, p. 34, para 180.

57 The Cambridge English Dictionary definition is: 'the situation of two or more people working together to create or achieve the same thing'; quoted in Australian Lawyers for Human Rights, *Submission 7*, p. 7.

58 Australian Lawyers for Human Rights, *Submission 7*, p. 7.

59 The Group of Eight Australia, *Submission 11*, p. 4.

60 Ms Vicki Thomson, Chief Executive, The Group of Eight, *Committee Hansard*, Canberra, 30 January 2018, p. 70.

> register under this scheme if the content of the communication had any relationship to preceding discussions with overseas collaborators or partners. Conceivably, even a short telephone discussion between an Australian academic and a public servant regarding the possibility for participating in an international research scheme could create a liability to register, given that proposed section 15 emphasises that registrable activities give liability to register, even for one-off instances.[61]

3.59 The volume of activities may serve to obscure the purpose of transparency, and constrain legitimate collaborations. These concerns were raised by the Group of Eight Australia, the Australian Friends of the Hebrew University, Jerusalem Limited and Technion Australia.[62]

3.60 In 2017, Group of Eight universities produced in excess of 23 000 publications involving collaboration with an international author, representing approximately 58 per cent of all member-university publications.[63] The understanding of The Group of Eight was that 'every one' of those publications would require its authors to be registered under the Scheme.[64]

3.61 Proposed section 14 (Purpose of activity) may provide an avenue for a court to ameliorate the effects of the inclusion of international collaborations by considering 'all of the circumstances in which the activity is undertaken'.[65] However this was considered less than ideal, particularly given the volume and value of international collaborations. Proposed section 14 is discussed later in this chapter.

3.62 Universities Australia noted that 'it would be vastly preferable for more concrete legislative guidance to be provided around how far "in collaboration with" a foreign principal should extend'.[66] It was considered that a more defined and clear approach to the term was critical to give effect to the Scheme's objective.

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61 Universities Australia, *Submission 9*, p. 6.

62 The Group of Eight Australia, *Submission 11*, pp. 3-4; Australian Friends of the Hebrew University, Jerusalem Limited and Technion Australia, *Submission 38*, p. 1.

63 The Group of Eight Australia, *Submission 11.1*, p. 2.

64 The Group of Eight Australia, *Submission 11.1*, p. 2.

65 Proposed section 14(c).

66 Universities Australia, *Submission 9*, p. 4.

3.63 The Department responded to these concerns, advising that the inclusion of collaborations was to, 'cover circumstances where the person and the foreign principal are working together, but it can not necessarily be determined that the foreign principal is directing, controlling, supervising or funding the activities of the person'.[67]

3.64 The Department also sought to address the sector's broad concerns that the proposed Scheme would stifle international research activities:

> The Scheme is not expected to stifle normal academic collaborative activities. The Scheme may have a role in regulating activities if they are undertaken in collaboration with a foreign individual or public enterprise and are a registrable activity – that is, parliamentary lobbying, general lobbying, communications activity or donor activity in Australia for the purpose of political or governmental influence. In these circumstances, the activities would continue to be permissible – the only requirement under the Scheme is to register and fulfil registrant obligations once registered.[68]

3.65 As noted previously, the FARA scheme does not extend to collaborations.[69]

Knowledge of activities to influence

3.66 The Bill provides that a person undertakes an activity 'on behalf of' a foreign principal if both the person and the foreign principal *knew or expected* that the person would undertake registrable activities.[70]

3.67 The Explanatory Memorandum states that the foreign principal 'must have an awareness of', and 'some role in facilitating', the activities. A person would not be considered to be undertaking an activity 'on behalf of' a foreign principal, where the foreign principal has 'no knowledge or awareness of' the activities, and 'it is purely coincidental that the person's actions may in some way benefit, or align with the interests of, the foreign principal'.[71]

3.68 At a hearing, the Department explained:

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67 Attorney-General's Department, *Submission 5.1*, p. 8.

68 Attorney-General's Department, *Submission 5.1*, p. 8.

69 *Foreign Agents Registration Act*, 22 U.S.C. § 611(c)(1).

70 Proposed section 11(3).

71 Explanatory Memorandum, pp. 34-35, paras 181.

> The question is whether the person who needs to register is acting on behalf of the foreign principal. There is a difference between the alignment of views, seeking views and informing oneself as to a position and in what respect to advocate and acting at the behest or on behalf of a foreign principal.[72]

3.69 At a public hearing, Mr Tony Kevin questioned how in practice the administering department would distinguish between:

- an Australian citizen covertly lobbying government officials, and
- an Australian citizen independently reaching a conclusion or judgement that a certain position should be advocated following the same contact with that foreign principal.[73]

3.70 The FARA scheme does not establish a level of knowledge required (of either the person or the foreign principal), presumably because of the more narrow approach to capture relationships where the foreign principal in some way directs the person, as their agent, to undertake those activities. Such an approach may negate the inclusion of a requirement of a standard of knowledge.

3.71 This was considered by stakeholders as a 'very low threshold' and the inclusion of a mere expectation that a person might undertake certain activities 'casts the net too broadly'.[74]

3.72 For example, ALHR questioned how a person can always be aware of a foreign principal's knowledge or expectation that certain acts would be done on their behalf, 'particularly when [it] relates to something indefinite – that is, to something that the Australian principal might or might not do'.[75]

3.73 Addressing the knowledge of the liable person, the Law Council advocated that it is 'unreasonable' for an individual or organisation to be charged with an offence for not registering in circumstances where there is no knowledge of the foreign principal's involvement.[76] The Council noted that the Explanatory Memorandum seeks to exclude circumstances that the foreign principal has no knowledge of the activities, however argued that 'this is not

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72 Ms Anna Harmer, First Assistant Secretary, Attorney-General's Department, *Private Committee Hansard*, Canberra, 16 February 2018, pp. 4-5.

73 Mr Tony Kevin, private capacity, *Committee Hansard*, Melbourne, 16 March 2018, p. 5.

74 Australian Catholic Bishops Conference, *Submission 12*, pp. 3, 8.

75 Australian Lawyers for Human Rights, *Submission 7*, p. 7.

76 Law Council of Australia, *Submission 4*, p. 12.

the effect of proposed subsection … which in its current form does not clarify that the person will not be bound by the framework if that person had no knowledge of the foreign principal's involvement'.[77]

3.74 To address these concerns, the Law Council recommended that the definition of acting 'on behalf of' a foreign principal should be amended to only cover circumstances where:

- the person and the foreign principal has actual knowledge of the order, request, direction, finance of the foreign principal, and
- the person then carries out the activity with the knowledge.[78]

Purpose of the activity

3.75 The Bill provides that the purpose of an activity may be determined by having regard to any one or more of the following:

- the intention or belief of the person undertaking the activity;
- the intention of any foreign principal on whose behalf the activity is undertaken, or
- all of the circumstances in which the activity is undertaken.[79]

3.76 Therefore, it need not be established that the purpose of influencing political or governmental decisions was the intent of either of the parties. Rather, this may be determined by having regard to 'all of the circumstances in which the activity is undertaken'.

3.77 In a submission, Foxtel applied this provision to its business:

> … the fact that Foxtel does not undertake the communications activity with the purpose of governmental influence could be irrelevant, if the foreign principal has that purpose. We can envisage a scenario where, for example, a foreign government, through its state-owned media, attempts to influence the views of other governments (including Australia's) in relation to some aspect of international trade, or a treaty, or a conflict etc. Therefore, it is possible that a registerable event could occur and, as described below, this would happen without Foxtel's knowledge.[80]

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77 Law Council of Australia, *Submission 4*, p. 11.

78 Law Council of Australia, *Submission 4*, p. 12.

79 Proposed section 14.

80 Foxtel, *Submission 27*, p. 3.

3.78 At a hearing, the Department explained registration liability will 'depend on what the potential registrant perceives as their purpose' and that it is not for the Department, as the administering agency, to prove whether a purpose of the activities is to influence political or governmental decision: 'it's for them to know and then know whether to register'.[81]

3.79 The Committee notes that the ability for the purpose of the activity to be determined by reference to the intention of the foreign principal, or to all of the circumstances, could notionally result in an outcome where a person is subject to a duty to register, but is unaware of the existence of that duty. However, the Committee also notes:

- That a person can only be prosecuted for failing to register, under the Bill, where the prosecution can demonstrate that they had knowledge of their requirement to register; and
- The existence in the Bill of a framework for the Secretary of the Attorney-General's Department to issue a person with a notice, where the Secretary reasonably suspects that the person might be liable to register, effectively drawing the potential duty to register to the person's attention.

3.80 The Committee accepts that it is appropriate that a person may be required to register, in circumstances where they undertake activities on behalf of a foreign principal, and the foreign principal plainly intends for those activities to influence Australian political or governmental processes. The Committee is concerned that removing this requirement would risk introducing a significant gap into the scheme, allowing individuals and companies to be used as tools of influence, provided that they do not share the foreign principal's purpose. The Committee has made a number of more targeted recommendations relating to the requirement to register and the media exemption to ensure the scheme operates in a manner that is proportionate to its intended outcome, without introducing such a gap.

3.81 The Committee further notes that, as a matter of practicality, a person cannot register if they are not aware of a requirement to do so, and that a person cannot be found liable for failing to register under the Bill unless they had knowledge that they were required to register. The Committee considers that this represents an appropriate balance, with the practical outcome that a person may be required to register if they undertake activities on behalf of a

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[81] Ms Tara Inverarity, Assistant Secretary, Attorney-General's Department, *Private Committee Hansard*, Canberra, 16 February 2018, p. 10.

foreign principal and are aware of the foreign principal's intent to influence Australian political or governmental processes, or if such an intent is drawn to their attention.

Registrable activities

3.82 Table 3.1 outlines the range of registrable activities. Under proposed section 21, a person acting on behalf of a foreign principal (as listed in Table 3.1) will be required to register upon engaging in the following activities, or an arrangement to undertake the following activities:

Table 3.1 Registrable activities and requisite foreign principals

Activity	On behalf of the following foreign principals
Parliamentary lobbying, in Australia, for the purpose of political or governmental influence	A foreign public enterprise, a foreign political organisation, a foreign business or an individual
General political lobbying, in Australia, for the purpose of political or governmental influence	Any kind of foreign principal
Communications activities, in Australia, for the purpose of political or governmental influence	Any kind of foreign principal
Donor activity, in Australia, for the purpose of political or governmental influence	A foreign government, or a foreign public enterprise, or a foreign political organisation

Source: Foreign Influence Transparency Scheme Bill 2017, proposed section 21

3.83 Proposed section 12 provides that an activity will be for the purpose of political or governmental influence, if a purpose of the activity (whether or not there are other purposes) is to influence, directly or indirectly, any aspect of the following:

- a federal election or designated vote;
- a federal government decision, including the Cabinet or a Minister;
- proceedings of either House of Parliament;
- a process in relation to a registered political party;

- a process in relation to an independent member of the Parliament;
- a process in relation to an independent candidate in a federal election.

3.84 As noted in Chapter 2, the list of processes provided in proposed section 12 will be expanded to include activities for the purpose of political or governmental influence of 'political campaigners'. The proposed definition of the term 'political campaigners' is provided in the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017 (the EFDR Bill).[82]

3.85 Under the EFDR Bill, persons or entities would be required to register with the Australian Electoral Commission as a 'political campaigner' if they have 'political expenditure'[83] for 'political purposes'[84] over a defined threshold. The proposed threshold is $10 000 or more over the previous three financial

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82 The EFDR Bill was referred to the Joint Standing Committee on Electoral Matters for inquiry and report. The Committee presented its report on 9 April 2018.

83 Under proposed section 287(1) of the EFDR Bill, 'Political expenditure' means expenditure incurred for 'political purposes'.

84 Under proposed section 287(1) of the EFDR Bill, 'Political purpose' inserts a new definition into the *Commonwealth Electoral Act 1918*, to mean any of the following purposes:

(a) of the public expression by any means of views on a political party, a candidate in an election or a member of the House of Representatives or the Senate;

(b) the public expression by any means of views on an issue that is, or is likely to be, before electors in an election (whether or not a writ has been issued for the election);

(c) the communicating of any electoral matter (not being matter referred to in paragraph (a) or (b)) for which particulars are required to be notified under section 321D;

(d) the broadcast of political matter (not being matter referred to in paragraph (c)) in relation to which particulars are required to be announced under subclause 4(2) of Schedule 2 to the *Broadcasting Services Act 1992*;

(e) the carrying out of an opinion poll, or other research, relating to an election or the voting intentions of electors;

except if:

(f) the sole or predominant purpose of the expression of the views, or the communication, broadcast or research, is the reporting of news, the presenting of current affairs or any editorial content in news media; or

(g) the expression of the views, or the communication, broadcast or research, is solely for genuine satirical, academic or artistic purposes.

years, or, $50 000 or more and 50 per cent of the 'allowable amount'[85] for that financial year.

3.86 The Committee has not sought to reach a conclusion on the proposed definition, and acknowledges that the matter was considered by the Joint Standing Committee on Electoral Matters. However the Committee notes that the definition has attracted significant public interest.

3.87 A number of stakeholders expressed concern with the existing ambit of the activities captured in the Bill as presently, and how those activities are defined.[86]

3.88 Mr Bret Walker SC advised that 'the broadest net' has been deliberately 'cast in order to bring within "registrable activity" contact ultimately of a communicative kind—that is, ideas from one to the other'. Mr Walker further explained that the scope of these activities has 'departed … from a colloquial understanding of … "lobbying"',[87] and that:

> It's certainly not just persuasion in the sense of seeking to induce agreement with one's view. It's for those reasons that coming into contact, communicating with someone by whatever means, will be at the heart of the kind of activity caught and, by progression, through registration.[88]

3.89 The Law Council of Australia similarly expressed concern with the breadth of the definition of 'lobby'. Proposed section 10 provides that the term includes communication, in any way, with a person or a group of persons for the purpose of influencing any process, as well as representing the interests of any person in any process. The Council concluded that the breadth of these definitions will cover a range of activities that are 'unlikely to have a tangible effect on public policy development, and yet will attract obligations that have criminal repercussions if breached'.

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85 Under proposed section 287(1) of the EFDR Bill, 'allowable amount' is any amount received by the person or entity to which they have access to in any financial year.

86 Law Council of Australia, *Submission 4*, p. 15; Human Rights Council of Australia, *Submission 29*, p. 4; Australian Academy of Science, *Submission 44*, p. 2; Mr Bret Walker SC, private capacity, *Committee Hansard*, Canberra, 16 February 2018, p. 1.

87 Mr Bret Walker SC, private capacity, *Committee Hansard*, Canberra, 16 February 2018, p. 1.

88 Mr Bret Walker SC, private capacity, *Committee Hansard*, Canberra, 16 February 2018, pp. 1-2.

3.90 The Law Council reiterated its recommendations for the Bill to be amended to narrow the application of the Scheme.[89]

3.91 Stakeholders also expressed concerns regarding the inclusion and proposed definition of 'communications activities'. Proposed section 13 makes clear that 'communications activity' includes the communication or distribution of information or material (whether oral, visual, graphic, written, electronic, digital or pictorial) and will constitute a registrable activity if conducted for the purpose of political or government influence.

3.92 The Law Council expressed concern that the provision 'will have the practical effect of deterring individuals and organisations from engaging in political and policy discussion across a range of communication platforms'.[90] The Council extended these concerns to open letters and opinion pieces that are intended to garner the attention of policy-makers, all of which are likely to be covered by the proposed scheme where there is an element of foreign involvement.[91]

3.93 The HRCA advised that as a 'communications activity' is not limited to communications with the public, an 'exceptionally wide' range of information and material will be captured by the Bill:

> As a result, [the Scheme] would require, for example, the following activities to be disclosed with respect to an unfunded collaboration with an international organisation:
>
> - Discussion between HRCA executive of the collaboration;
> - Internal emails and any publication provided to HRCA members about it;
> - Anything posted online on the HRCA's website about the collaboration;
> - Communications with other NGOs about the collaboration;
> - Communications with State or Federal government officials about the collaboration;
> - Communications with government Ministers, Members of Parliament, Parliamentary Committees;
> - Media releases; and

89 Law Council of Australia, *Submission 4*, p. 16.

90 Law Council of Australia, *Submission 4*, p. 14.

91 Law Council of Australia, *Submission 4*, p. 14.

- Social media.[92]

3.94 The Australian Academy of Science also expressed concern that the proposed definition of 'communications activity' would capture the 'dissemination of research findings, as well as sharing of raw data and subsequent analysis' and 'any presentation of science, research, data or analysis intended to have a meaningful influence on an aspect of government policy'.[93] The Academy stated:

> Dissemination of research findings is standard practice in the research community and is a requirement of those funded by public research grants such as recipients of NHMRC [National Health and Medical Research Council] or ARC [Australian Research Council] competitive grant funding.

3.95 The Academy noted that much of the standard business of scientists, researchers, representative bodies, universities and research institutions relates to the public and free-flow of information. However the Academy concluded that, without more refined definitions of registrable activities and in particular communication activities in the Bill, these could all be considered registrable activity.[94]

3.96 The activities for which registration is required under the Bill are broadly comparable with the FARA scheme, except that:

- it is not entirely clear if the FARA requires registration for parliamentary lobbying;[95]
- the FARA does not appear to extend to lobbying of a political party or a candidate in an election,[96] and
- activities registrable as donor activity are narrower under the Bill than under the FARA.[97]

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92 Human Rights Council of Australia, *Submission 29*, p. 4.

93 Australian Academy of Science, *Submission 44*, p. 2.

94 Australian Academy of Science, *Submission 44*, p. 2.

95 Whether or not there is an equivalent to 'parliamentary lobbying' in the FARA would depend on the meaning of 'Government of the United States'. The term is not defined in the FARA, but in § 614(e) a reference is made to 'any agency or official of the Government (including a Member or committee of either House of Congress)'.

96 *Foreign Agents Registration Act*, 22 U.S.C. § 611(c)(1).

97 The FARA requires registration is a person 'solicits, collects, disburses, or dispenses contributions, loans, money, or other things of value' for or in the interest of a foreign principal (*Foreign Agents Registration Act*, 22 U.S.C. § 611(c)(1)(ii)(iii)).

Former Cabinet Ministers, Ministers, members of Parliament and senior Commonwealth officials

3.97 The Bill establishes additional registration obligations on former Cabinet Ministers, Ministers, members of Parliament and other senior Commonwealth positions.

3.98 Former elected representatives and former senior Commonwealth officials will be required to register if they are employed by or act for a foreign principal (other than an individual) in the period immediately following their public role. The provisions will capture activities of these persons anywhere in the world, regardless of whether the activities impact Australian political or governmental processes. Limited exemptions apply to these categories of person.

3.99 The Bill will require the following to register:

- former Cabinet Ministers if they are employed by, or act in any capacity for, a foreign principal (other than an individual) in the *three* years following their role;[98]
- former Ministers and members of Parliament if they are employed by, or act in any capacity for, a foreign principal (other than an individual) in the *three* years following their role
  - but only where they contribute skills, knowledge, experience or contacts to their work for the foreign principal,[99] and
- former agency and deputy agency heads of Commonwealth departments and agencies to register if they are employed by, or act in any capacity for, a foreign principal (other than an individual) in the *18 months* following their role,
  - but only where they contribute skills, knowledge, experience or contacts to their work for the foreign principal.[100]

3.100 These former office holders will not be eligible for the exemption for religious activities[101] and news media activities.[102]

The FARA appears to be broader in that it applies: to solicitation and collection as well as disbursal; for all types of foreign principal and, does not include an exemption if the disbursement is required to be disclosed under another law.

98 Proposed section 22.

99 Proposed section 23.

100 Proposed section 23.

3.101 A former Cabinet Minister, Minister, member of Parliament, and senior Commonwealth officials will be able to access the following exemptions:

- humanitarian aid or assistance;[103]
- legal advice or representation;[104]
- diplomatic, consular or similar activities,[105] and
- commercial or business pursuits.[106]

3.102 This therefore provides exemptions for a broad range of activities undertaken by these former office holders. For example, a former Cabinet Minister would be exempt from registration under the Scheme where that former Cabinet Minister is:

- employed by a foreign business,[107] or
- acting on behalf of the foreign principal (though not as an employee) to pursue bona fide business or commercial interests in relation to preparing to negotiate or conclude a contract for the provision of goods or services, where that does not relate to national security, defence or public infrastructure.[108]

3.103 Mr Peter Jennings was of the view that 'insufficient safeguards' regulate post-separation employment by former Cabinet Ministers, Ministers members of Parliament and senior Commonwealth officials. Mr Jennings stated:

> My recommendation is that the Committee should test whether more stringent requirements for employment after individuals leave and Government and senior public service positions, where those individuals have had access to highly classified information. This is particularly relevant where individuals may seek to draw on their experience in classified areas of government work in a commercial role afterwards. My view is that, if individuals have had long term access to top secret national security information, then Government

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101 Proposed section 27.

102 Proposed section 28.

103 Proposed section 24.

104 Proposed section 25.

105 Proposed section 26.

106 Proposed section 29.

107 Proposed section 29(2).

108 Proposed section 29(1).

> should severely restrict their capacity to work for foreign principals outside of the Five Eyes context.[109]

3.104 Mr Jennings recommended that it 'ought not to be possible for a Minister or official to attend meetings of the National Security Committee of Cabinet one month and be working for foreign principals just months after leaving such privileged positions'.[110]

3.105 The FARA scheme does not have any equivalent registration requirement for activities undertaken by former elected officials or former senior civil servants.

3.106 The Committee sought clarification from the Department as to whether it is the intent of the Bill to make the business and commerce exemption available to former Cabinet Ministers, Ministers, members of Parliament and senior Commonwealth officials. The Department confirmed that this is the intent of the Bill.[111]

3.107 The Bill does not place similar registration obligations on former staff of members of Parliament as employed under the *Members of Parliament (Staff) Act 1984*. This is despite references in the Explanatory Memorandum that lobbying staff is an 'inherently political' activity.[112]

3.108 In response to questions from the Committee as to why staff of members of Parliament were not included in the Scheme, the Department stated:

> The public interest in knowing that a former MOPS Staff member is acting on behalf of a foreign principal is arguably less than in relation to the other categories with a significant public role. The department is of the view that MOPS Staff should not be included in the Scheme at this time, but this could be considered as part of the review required by section 70 which must take place within five years of the Scheme commencing.[113]

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109 Mr Peter Jennings, *Submission 14*, pp. 1-2.

110 Mr Peter Jennings, *Submission 14*, p. 2.

111 Attorney-Generals Department, *Submission 5.1*, p. 30.

112 Explanatory Memorandum, p. 48, para 260.

113 Attorney-General's Department, *Submission 5.1*, pp. 25-26.

Committee comment

3.109 The Committee notes the following issues were raised regarding the scope of actors and activities proposed by the Bill:

- the wide range of conduct captured is beyond the objective of the Bill and may impede the intended transparency;
- the breadth of the definition of a foreign principal:
  - the scope of foreign businesses captured, including businesses that are organised or created under Australian law;
  - including individuals who are not citizens or permanent residents despite the diversity of the Australian community, and that the number of persons falling into this category cannot be identified with precision at any time;
- the definition of undertaking activities on behalf of a foreign principal as drafted, captures a wide range of relationships which would not usually be considered to be within the commonly understood meaning for 'on behalf of' and which may not have a sufficient nexus or materiality;
- more specific concerns with the inclusion of the following terms in the proposed definition of undertaking activities on behalf of a foreign principal:
  - the inclusion of 'with funding from the foreign principal' would capture a range of relationships but serve no purpose as no agency or direction accompanies the donation;
  - 'in collaboration with the foreign principal' would require a significant number of registrations (most notably in the charities and university sector) and the volume of activities may serve to obscure the purpose of transparency, and constrain legitimate collaborations;
  - that the foreign principal had knowledge or mere expectation of the activities establishes a very low threshold and that the net is cast too broadly;
- that the provisions that determine the purpose of the activity may be inappropriately framed;
- the list of registrable activities, particularly the definition of 'lobby' and 'communications activities' will cover a range of activities that are may have little tangible effect on public policy development, and yet will attract obligations that have criminal repercussions if breached;
- the regulation of, and exemptions available to, former Cabinet Ministers, Minister, members of Parliament and senior Commonwealth officials;

- the absence of regulation of former staff of members of Parliament employed under the *Members of Parliament (Staff) Act 1984*.

3.110 A number of these concerns are addressed by the Attorney General's proposed amendments. These proposed amendments are discussed in Chapter 9.

3.111 In Chapter 10 of this report, the Committee provides its comments and discusses areas where it considers further refinements may be made to address outstanding issues, improve the clarity and proportionality of the proposed measures, and to ensure adequate safeguards are provided.

4. Exemptions

4.1 This Chapter discusses the proposed exemptions set out in Division 4 of Part 2 of the Foreign Influence Transparency Scheme Bill (the Bill). The evidence and issues presented here do not take account of the amendments proposed by the Attorney-General that were provided to the Committee on 7 June 2018.

4.2 The exemptions in the original Bill provide that activities, which would otherwise be registrable activities, are exempt from the requirement to register under the Scheme. The exemptions apply only to particular activities, and the application depends on who is undertaking, who the foreign principal is, and the purpose of the activity.

4.3 As noted in Chapter 3, the proposed breadth of registrable activities and actors 'means great reliance falls upon the seven exemptions'.[1] Broadly, the Bill proposes the following exemptions:

- activities that are for the provision of humanitarian aid or humanitarian assistance;[2]
- the provision of legal advice and representation;[3]
- where a person is entitled to diplomatic immunity or is working for the United Nations;[4]

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1 Law Firms Australia, *Submission 10*, p. 4.

2 Proposed section 24.

3 Proposed section 25.

- activities that are in accordance with the doctrines, tenets, beliefs or teachings of a religion;[5]
- certain news media activities;[6]
- activities that are bona fide commercial or business pursuits for the provision of certain goods or services,[7] and
- other circumstances, as to be prescribed in rules.[8]

4.4 A number of proposed exemptions are absolute—that is, they apply to all types of registrable activities, irrespective of who is the foreign principal or who the person is undertaking the activity.[9] Other exemptions are more limited in their application, and are restricted to certain categories of foreign principals or to certain persons undertaking the activity.[10]

4.5 This chapter discusses each of the exemptions listed above and concerns raised. A large number of submissions and witnesses at public hearings expressed concerns about both the broad construct of the Bill which then relies on exemptions and the limited scope of those exemptions.

4.6 The Attorney-General's Department (the Department) noted that any exemptions to the obligation to register under the Foreign Influence Transparency Scheme (the Scheme) should not undermine the purpose of the Bill:

> The important thing about the scheme is that it's defined by reference to the influence, not who is bringing it, so we need to be careful that we don't undermine the purpose of the scheme, which is to bring light to that influence. If there are large tracts of the body of persons and entities who may be

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4 Proposed section 26.

5 Proposed section 27.

6 Proposed section 28.

7 Proposed section 29.

8 Proposed section 30.

9 See the proposed humanitarian aid exemption at section 24, the legal advice exemption at section 25, and the United Nations and associated persons exemption at subsection 26(2) of the Bill.

10 For example, the proposed religious exemption at section 27, the diplomatic exemption at subsection 26(1) and the news media exemption at section 28 will not apply to any activities of former Cabinet Ministers, Ministers, members of Parliament, or senior Commonwealth officials. Such persons will still be required to register under the Bill.

> influencing decision-making that are exempt, that can potentially undermine [the Scheme].[11]

4.7 Similarly, the Australian Security Intelligence Organisation (ASIO) cautioned against 'blanket carve-outs' as such an approach 'would probably cause us some problems just in terms of the vulnerabilities that that might expose. … [A]ny gap or any chink does become … an exploitable vulnerability'.[12]

4.8 Each of the exemptions, and concerns raised by stakeholders, are addressed in the following sections, with comparison (where applicable) to the similar concepts in the United States' *Foreign Agents Registration Act* (FARA), as the only other comparable scheme in operation.

Humanitarian activities

4.9 Section 24 of the Bill will exempt activities that are, or relate solely to, the provision of humanitarian aid or humanitarian assistance.

4.10 This exemption will apply in all circumstances, irrespective of who is the foreign principal or who the person undertaking the activity. A former Cabinet Minister, Minister, member of Parliament or senior Commonwealth official will be able to rely on the exemption in the period immediately following their public role.

4.11 The terms 'humanitarian aid' and 'humanitarian assistance' are not defined in the Bill, though the Explanatory Memorandum indicates that the terms are intended to be construed broadly, and would extend to activities 'beyond the act of directly giving or providing humanitarian aid or assistance, such as activities relating to processes and procedures which support the provision of humanitarian aid or assistance'.[13]

4.12 This would include:

> … material and logistical assistance provided during man-made and natural disasters and crises, and during times of conflict or civil unrest … assistance where the purpose is to save lives, alleviate suffering and maintain human

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11 Ms Anna Harmer, First Assistant Secretary, Security and Criminal Law Division, Attorney-General's Department, *Committee Hansard*, Canberra, 31 January 2018, p. 26.

12 Dr Wendy Southern, Deputy Director-General, Strategy, Australian Security Intelligence Organisation, *Private Committee Hansard*, Canberra, 16 February 2018, p. 7.

13 Explanatory Memorandum, pp. 60-61, para 323.

> dignity … the provision of funds, food, water, sanitation, shelter, medical or logistical support during humanitarian crises … attending meetings, making representations, and developing and producing communication materials where those activities are undertaken solely in relation to the provision of humanitarian aid and humanitarian assistance.[14]

4.13 A number of stakeholders discussed the limited scope of the proposed exemption.[15] For example, the Law Council of Australia noted that the examples provided in the Explanatory Memorandum appear to limit the exemption to humanitarian aid after a crisis, and may not extend to welfare and welfare bodies 'more generally'.[16]

4.14 The Human Rights Council of Australia (HRCA) was of the view that the wording of the exemption, and the limitation to 'humanitarian aid or assistance' would not cover significant work undertaken by that organisation.[17] The HRCA promotes human rights in Australia, in the region and around the world, and has Special Consultative Status with the United Nations and is entitled to be present at and make statements to meetings of the United Nations Human Rights Council.[18]

4.15 Australian Lawyers for Human Rights (ALHR) noted that this Committee has previously examined similar exemptions, and issues regarding the limited scope of the wording proposed in the then Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014. ALHR stated:

> 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

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14 Explanatory Memorandum, p. 61, para 324.

15 Australian Lawyers for Human Rights, *Submission 7*, p. 9; Ms Valerie Heath, *Submission 15*, p. 4; Human Rights Council of Australia, *Submission 29*, p. 3; Justice Connect, *Submission 50*, p. 5; Australian Council for International Development, *Submission 55*, p. 1; Oxfam Australia, *Submission 57*, p. 6; World Vision Australia, *Submission 45*, p. 3; Ms Alice MacDougall, Law Council of Australia, *Committee Hansard*, 30 January 2018, p. 51.

16 Ms Alice MacDougall, Law Council of Australia, *Committee Hansard*, 30 January 2018, p. 51.

17 Human Rights Council of Australia, *Submission 29*, p. 3.

18 Human Rights Council of Australia, *Submission 29*, p. 3.

> 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.[19]

4.16 Similarly, Justice Connect expressed concern that the exemption is 'vaguely defined', and is inappropriately limited to 'response to actual crises or conflict or civil unrest'. It stated:

> This is limiting. It is widely accepted that humanitarian assistance is often provided as a way of preventing conflict or civil unrest or in response to other situations (eg. health outbreaks). We also note the difficulty of the words 'relates solely to' [and] … the definition should be extended to cover a broader range of humanitarian action than those covered by the term 'is, or relates solely to'.[20]

4.17 The Australian Council for International Development submitted that the terms used in the proposed exemptions are 'generally understood to be limited to emergency responses, and not to long-term development assistance'. The Council stated that the absence for an exemption for non-government organisations and the 'critical' long-term development work they undertake, is 'highly anomalous'.[21]

4.18 Oxfam Australia also raised concerns regarding the narrow definition which is not reflective of how aid is actually provided. It commented:

> the exemption provided in the legislation for humanitarian aid or assistance is too narrow. This exemption exists 'if the activity is, or relates solely to, the provision of humanitarian aid or humanitarian assistance'. It is extremely unlikely that anything relates solely to one thing, and certainly difficult to determine when activity relates solely to one thing. Regardless, for Oxfam, in discussing and advocating in relation to humanitarian aid or assistance, issues of entrenched poverty and systemic disadvantage are also relevant, as are issues of climate change and gender. Thus while focusing on humanitarian aid and assistance, Oxfam would likely also seek to address and highlight underlying causes which could be considered to be beyond the scope of the exemption.[22]

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19 Australian Lawyers for Human Rights, *Submission 7*, p. 9.

20 Justice Connect, *Submission 50*, p. 5.

21 Australian Council for International Development, *Submission 55*, p. 1.

22 Oxfam Australia, *Submission 57*, p. 6.

4.19 World Vision Australia agreed that the exception 'is too narrow', commenting that the terms 'humanitarian aid and 'humanitarian assistance' are generally understood to be 'limited to emergency responses and not to long term development work and assistance. We submit that this is not, and should not be an intended consequence'.[23]

4.20 In answers to questions on notice, the Department referred back to the Explanatory Memorandum which provides that 'the terms 'humanitarian aid' and 'humanitarian assistance' are intended to include material and logistical assistance provided during man-made and natural disasters and crises and during times of conflict or civil unrest'.[24]

4.21 By way of comparison, the exemption in the FARA scheme has a different focus, as it relates to the solicitation and collection of funds which is not a registrable activity under the Bill. FARA provides that a person would be exempt where they are engaged in the soliciting or collecting of funds and contributions within the United States where those funds are 'to be used only for medical aid and assistance, or for food and clothing to relieve human suffering'.[25] Therefore, while FARA applies to a wider range of activities that are not captured by the Bill, it also contains an exemption that would apply to a broader range of humanitarian purposes.

Extension of exemption to other charitable activities

4.22 A number of submissions and witnesses at public hearings expressed concern about the limited scope of the humanitarian exemption. There were concerns that the exemption did not extend more broadly to charities and the not-for-profit sector and that, given the scope of activities included, compliance could be excessively onerous.[26]

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23 World Vision Australia, *Submission 45*, p. 3.

24 Attorney-General's Department, *Submission 5.1*, p. 16; Explanatory Memorandum, p. 61, para 324.

25 *Foreign Agents Registration Act*, 22 U.S.C. § 613(d).

26 Law Council of Australia, *Submission 4*, p. 7; Australian Catholic Bishops Conference, *Submission 12*, p. 7; Valerie Heath, *Submission 15*; Our Community Group, *Submission 31*, p. 1; Australian Charities and Not-for-profit Commission, *Submission 33*, p. 5; Community Council for Australia, *Submission 34*, p. 2; RSPCA, *Submission 35*, p. 1; JMTinc, *Submission 41*, p. 1; Social Ventures Australia, *Submission 42*, p. 1; Volunteering Australia, *Submission 43*, p. 1; World Vision Australia, *Submission 45*, p. 1; The Salvation Army, *Submission 49*, p. 1; Justice Connect, *Submission 50*, p. 1; Uniting Care Australia, *Submission 51*, p. 1; The Pew Charitable Trusts, *Submission 52*, p. 1; Australian Council for International Development, *Submission 55*, p. 1; Oxfam

4.23 In a detailed submission, The Salvation Army explained its internal governance and, reflecting on the examples provided in the Explanatory Memorandum, concluded that to the extent that it its staff engage in registrable activity, 'the entire Officership and full body of employees would presently fall within the ambit of the Bill'. It suggested that the Bill did not appear to appropriately account for governance structures such as theirs, and that a key role of The Salvation Army is to engage publicly on issues of social justice:

> Whilst it is generally considered an apolitical organisation, The Salvation Army does regularly express views on matters of public interest and issues of social justice. Looking at the example given of the Catholic Priest in the Explanatory Memorandum to the Bill (in reference to the operation of section 27 of the Bill), to the extent that they engage in a registrable activity, the entire Officership and full body of employees would presently fall within the ambit of the Bill. This conclusion is reached if it is deemed by the Scheme Operator that all Officers and employees are ultimately subject to the authority of the General (who is located in the United Kingdom and is not an Australian Permanent Resident or Citizen). This conclusion is also reached if it is deemed by the Scheme Operator that all Officers and employees are ultimately subject to the authority of the Australian National Commander and he or she is a foreign principal (such as with the present National Commander). Even if (for some reason, which is hard to discern on the face of the Bill) neither of these views were taken by the Scheme Operator, to the extent that an overseas appointed Officer has subordinates reporting to him / her anywhere within the strict hierarchical structure of The Salvation Army, then all who are subordinate to him / her would need to register with the Scheme and pay the relevant fee (annually).[27]

4.24 The Salvation Army went on to detail the number of persons in their organisations who may be affected, and that the consequences of the Bill as it stands would be 'catastrophic':

> Potentially, this could mean that up to 10,225 persons within The Salvation Army in Australia would be required to register with the Scheme and pay the relevant fee annually. Such a consequence in terms of the administrative burden and cost to The Salvation Army is immediately apparent and would be catastrophic to the ability of The Salvation Army to continue to provide the role it presently plays within Australian society. Surely, this must not be the

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Australia, *Submission 57*, p. 1; WWF Australia, *Submission 58*, p. 1; The Smith Family, *Submission 60*, p. 2; 350.org, *Submission 62*, p. 1.

27 The Salvation Army, *Submission 49*, pp. 7-8.

> intent of the Parliament and needs to be addressed at this consultative stage of the draft legislation.[28]

4.25 The Australian Charities and Not-for-Profits Commission (ACNC) was established in 2012 as the national, statutory regulator of the charity and not-for-profit sector.[29] Over 55 600 charities are regulated by the ACNC, and the sector turns over more than $130 billion per annum, holds over $260 billion in assets,[30] and is supported by 2.9 million volunteers.[31]

4.26 Providing an overview of the impact of the Bill on the charities sector as a whole, the ACNC stated that the Bill 'places an unnecessary regulatory burden on charities',[32] and that,

> … the broad definitions set out in the Bill may decrease the amount of advocacy work undertaken by charities that are unable to meet the proposed regulatory burden and the risk of non-compliance.[33]

4.27 Other stakeholders shared these concerns,[34] some describing the Bill as having a 'chilling effect' on the vitally important advocacy work that charities pursue as part of their charitable purposes.[35] Further, Justice Connect expressed concerns that the Bill may dissuade charities and not-for-profit organisations from partnering with other international organisations:

> In our global world, NFPs and charities should be encouraged to work together to pursue innovative solutions to social problems – including drawing on (and being supported by) international experts and partners. … [The] scheme may result in organisations deciding not to explore beneficial

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28 The Salvation Army, *Submission 49*, pp. 7-8.

29 Australian Charities and Not-For-Profits Commission, *Submission 33*, pp. 1-2.

30 Community Council for Australia, *Submission 34*, p. 3.

31 Australian Charities and Not-For-Profits Commission, *Submission 33*, p. 2.

32 Australian Charities and Not-for-profit Commission, *Submission 33*, p. 2.

33 Australian Charities and Not-for-profit Commission, *Submission 33*, p. 4.

34 Social Ventures Australia, *Submission 42*, p. 2; Volunteering Australia, *Submission 43*, p. 1; Australian Council for International Development, *Submission 55*, p. 1.

35 Social Ventures Australia, *Submission 42*, p. 2; Australian Council for International Development, *Submission 55*, p. 1.

> (and cost effective for Australians) collaborations with overseas partners, in order to avoid the requirements proposed under this Bill.[36]

4.28 The ACNC advised that to become and remain registered under the *Charities Act 2013*, an organisation must have a 'charitable purpose', yet this charitable purpose would now require registration under the Bill. A 'charitable purpose' includes the purpose of advancing health, education, social or public welfare, religion, culture, reconciliation, mutual respect and tolerance between groups of individuals that are in Australia, promoting or protecting human rights, the security or safety of Australia or the Australian public; preventing or relieving the suffering of animals, the natural environment.[37] This also includes promoting or opposing a change to any matter established by law, policy or practice in the Commonwealth, a State or a Territory or another country as long as the advocacy is in furtherance or aiding the other charitable purposes previously identified.[38]

4.29 The ACNC noted that it is not a disqualifying purpose to distribute information, or advance debate, about the policies of political parties or candidates for political office (such as by assessing, critiquing, comparing or ranking those policies), [39] and these activities are within the meaning and public expectation of a charitable purpose.

4.30 World Vision Australia noted that the Bill intends to establish a framework to regulate 'inherently political activities', and took issue with the inclusion of such charitable activities arguing that it is 'unnecessary and inappropriate for our non-partisan advocacy activities to be caught by this Bill'.[40] The organisation explained:

> The result of the Bill is that those activities would be categorised as political in nature by implication. Politicising charities like WVA [World Vision Australia] gives the public the wrong perception of what charities such as WVA stand for, which in turn has serious implications for how we can engage with the Australian public (including in fundraising).[41]

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36 Justice Connect, *Submission 50*, p. 4.

37 *Charities Act 2013*, section 12.

38 *Charities Act 2013*, section 12; Australian Charities and Not-for-profit Commission, *Submission 33*, p. 3.

39 Australian Charities and Not-for-profit Commission, *Submission 33*, p. 2.

40 World Vision Australia, *Submission 45*, p. 4.

41 World Vision Australia, *Submission 45*, p. 4.

4.31 The Pew Charitable Trusts disputed the suggestion of control or covert influence for another purpose that was implicit in the requirement for registration. They maintained that the current regulatory framework provided oversight and ensured the integrity of charities:

> The language of such a registration would also create the impression that the government perceives strictly non-partisan charities, including ourselves and regional Indigenous organisations, to be foreign controlled and seeking improper influence in Australian politics.
>
> Pew is not aware of evidence of charities receiving international philanthropic funding posing risks for inappropriate or unlawful activities. To our knowledge, the case has not been made that such work should be restricted and regulated beyond existing oversight by the ACNC, Australian Tax Office and other financial regulators. If there is a problem with an individual charity, it can be addressed through the existing ACNC regulatory framework.[42]

4.32 A large number of stakeholders, including the Law Council, the Community Council for Australia, and the RSPCA, submitted that charities registered with the ACNC should be exempt from the Bill.[43] The Law Council noted:

> Registration with the ACNC not only necessitates a range of reporting and behavioural standards, it also precludes the entity from engaging in, or promoting, activities that are unlawful or contrary to public policy, as well as promoting or opposing a political party or a candidate for political office. A further registration step for such charitable entities would entail an unnecessary regulatory burden.[44]

4.33 The Community Council for Australia, provided evidence at a public hearing on the regulation of charities by the ACNC:

> … charities are very well-regulated in Australia. In fact, with the charities regulator, the Australian Charities and Not-for-profits Commission, charities' compliance in Australia is higher than anywhere in the world … Their bona fides have to be well-established and reported on. Any charity not pursuing its charitable purpose can be subject a complaint from anyone and the complaint

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42 The Pew Charitable Trusts, *Submission 52*, p. 2.

43 Law Council of Australia, *Submission 4*; Human Rights Council of Australia, *Submission 29;* Australian Catholic Bishops Conference, *Submission 12;* RSCPA, *Submission 35*; JMTinc, *Submission 41*, p. 1; Social Ventures Australia, *Submission 42*, p. 1; Justice Connect, *Submission 50*, p. 3; Uniting Care Australia, *Submission 51*, p. 2; The Pew Charitable Trusts, *Submission 52*, p. 2; Oxfam Australia, *Submission 57*, p. 3; The Smith Family, *Submission 60*, p. 5.

44 Law Council of Australia, *Submission 4*, pp. 13-14.

> will be investigated. Charities found not to be pursuing their purpose or seen to be pursuing a political purpose will be deregistered.[45]

4.34 The Salvation Army also advocated for a blanket exemption for its operations and any of its wholly-owned entities throughout Australia.[46] Alternatively, the Salvation Army recommended that only the foreign principal—in its case, the General and National Commander—be required to register.[47]

4.35 In advocating for an expanded advocacy exemption for charities, a number of stakeholders raised apparent inconsistencies with an exemption provided for certain commercial or business pursuits.[48]

4.36 For example, the Community Council for Australia submitted that business and industry pursuing commercial interests, and charities pursuing charitable purposes alike 'should be able to advocate for their cause and their community'.[49] It continued:

> This Bill allows any foreign company to engage in any activity in support of their international commercial interests, but seeks to restrict most others. … [It] does seem bizarre to restrict the activities of registered charities in Australia seeking to pursue their charitable purpose in accordance with the regulations and restrictions enforced by the charities regulator, while allowing any international business to pursue their vested interests without any restriction.[50]

4.37 Similarly, Justice Connect commented that it could not 'see why a business or commercial entity established by an individual for their own private benefit should be entitled to an exemption' as compared to a charitable organisation that 'is established, for example, to help people inflicted by an

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45 Mr David Crosbie, Community Council for Australia, *Committee Hansard*, 30 January 2018, p. 2.

46 The Salvation Army, *Submission 49*, p. 8.

47 The Salvation Army, *Submission 49*, p. 9.

48 Australian Lawyers for Human Rights, *Submission 7*, p. 9; Community Council for Australia, *Submission 34*, p. 6; Social Ventures Australia, *Submission 42*, p. 1; Volunteering Australia, *Submission 43*, p. 1; Justice Connect, *Submission 50*, p. 5; WWF-Australia, *Submission 58*, p. 1.

49 Community Council for Australia, *Submission 34*, p. 6.

50 Community Council for Australia, *Submission 34*, p. 6.

illness, for which the organisation does not receive a benefit but instead is for the public benefit'.[51]

4.38 WWF-Australia expressed alarm at this apparent inconsistencies, and that the provisions of the Bill seemed at odds with healthy and engaged democratic dialogue:

> In an act of surprising inconsistency, this Bill imposes onerous obligations on Australian charities pursuing their charitable purpose while allowing any company including foreign companies to engage in similar activities in support of their commercial interests without similar restrictions. As a result, any business (including overseas business) seeking to influence an Australian government or political party can set up an office in Australia and engage in direct lobbying activities with little or no accountability, and certainly no requirement to register as a 'foreign principal'.
>
> A healthy, functioning democracy requires citizens, business, industry groups, community groups and charities to engage in public policy. Where the activities of registered charities are restricted, while businesses can pursue their vested interests without any restriction, democracy cannot flourish.[52]

4.39 The ACNC expressed concern that the proposed Scheme would require charities to register and submit reports to three different government entities—the ACNC, the Australian Electoral Commission and the department responsible for administering the proposed Scheme.[53]

4.40 The ACNC noted that there is no current requirement under the *Australian Charities and Not-for-Profits Commission Act 2012* or the *Australian Charities and Not-for-Profits Regulation 2013* for charities to disclose relationships with foreign entities. However, the *Commonwealth Electoral Act 1918* already requires entities to inform the Australian Electoral Commission via an annual return where a donation over the disclosure amount has been received for the purposes of political expenditure.[54] These donations may be from foreign entities, but the annual returns are not specifically targeting such information.

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51 Justice Connect, *Submission 50*, pp. 5-6.

52 WWF-Australia, *Submission 58*, pp. 1-2.

53 Australian Charities and Not-For-Profits Commission, *Submission 33*, p. 4.

54 The current donations threshold is $13 200.

4.41 Charities registered by the ACNC are required to complete an annual information statement, which is due within six months of the end of the charity's annual reporting period.[55] Charities must also submit returns to the Australian Electoral Commission within 16 weeks of the end of the financial year.[56]

4.42 However, not all stakeholders supported the extension of an exemption to the charity sector. For example, Mr Peter Jennings considered that the Bill currently sets out appropriate safeguards for the interests of the community.[57] He went on to note that exempting charities would be a 'green light' to foreign intelligence organisations, highlighting the avenues through which they could continue to exert, or redirect their efforts to influence Australian political, governmental and public decision-making.[58]

4.43 Responding to recommendations to extend an exemption to ACNC-registered charities, the Department stated that 'any exemptions … must be such that the Scheme's transparency objectives are not inadvertently undermined'.[59] The Department went on to note:

> …that a charity is regulated in one context does not mean that it ought not to be the subject of obligations in another context. Those obligations are for a separate purpose. The purpose here is to bring transparency to their dealings.[60]

4.44 The Department submitted:

> Registration with the ACNC and registration under the Scheme seek to achieve different purposes. The ACNC maintains a register of charitable entities for the purpose of maintaining, protecting and enhancing public trust and confidence in the charities sector through increased accountability and transparency. In contrast, registration under the Scheme seeks to provide decision-makers and the Australian public with an understanding of the level

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55 Australian Charities and Not-For-Profits Commission, *Submission 33*, p. 5.

56 Australian Charities and Not-For-Profits Commission, *Submission 33*, pp. 5-6.

57 Mr Peter Jennings, private capacity, *Committee Hansard*, Canberra, 30 January 2018, p. 66.

58 Mr Peter Jennings, private capacity, *Committee Hansard*, Canberra, 30 January 2018, p. 66.

59 Ms Anna Harmer, First Assistant Secretary, Security and Criminal Law Division, Attorney-General's Department, *Committee Hansard*, Canberra, 31 January 2018, p. 17.

60 Ms Anna Harmer, First Assistant Secretary, Security and Criminal Law Division, Attorney-General's Department, *Committee Hansard*, Canberra, 31 January 2018, p. 27.

> and extent to which foreign actors are seeking to influence Australian political and governmental processes, often in ways that are legitimate and lawful.[61]

and

> [A] charity that engages in registrable activities in Australia on behalf of a foreign principal for the purpose of political or governmental influence would be required to register under the Scheme. … [The Department] anticipates that, although all charities engage in advocacy, it is likely that not all do so on behalf of a foreign principal. Groups and entities who advocate on their own behalf, or on behalf of a domestic principal, would not need to register under the Scheme.[62]

4.45 However, the Department also advised that the definition of 'charitable purpose' in the *Charities Act 2013* 'may provide a basis on which such an exemption could be crafted … [where] the sole purpose for which the activity is undertaken is a charitable purpose'.[63]

4.46 The FARA scheme does not have a directly comparable exemption, however it does provide exemptions for activities that are private and non-political that are 'not serving predominantly a foreign interest'.[64]

Legal advice and representation

4.47 Proposed section 25 of the Bill will exempt activities that are solely, or solely for the purposes of, the provision of legal advice or legal representation in judicial, criminal or civil law enforcement inquiries, investigations or proceedings.

4.48 The exemption will apply in all circumstances, irrespective of who the foreign principal is or who the person undertaking the activity is. A former Cabinet Minister, Minister, member of Parliament or senior Commonwealth official will be able to rely upon the exemption in the period immediately following their public role.

4.49 The Explanatory Memorandum notes the exemption is only intended to exempt,

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61 Attorney-General's Department, *Submission 5.1*, p. 10.

62 Attorney-General's Department, *Submission 5.1*, p. 16.

63 Attorney-General's Department, *Submission 5.1*, p. 6.

64 *Foreign Agents Registration Act*, 22 U.S.C. § 613(d).

> … those activities that relate to judicial, criminal or civil law enforcement inquiries, investigations or proceedings. Therefore, if a foreign principal engaged a legal practitioner to undertake activities such as parliamentary lobbying or communications activities for the purpose of political or governmental influence, and those activities were not protected by legal professional privilege, then that legal practitioner would be required to register with the scheme.[65]

4.50 At a public hearing, the Department outlined that the goal of the exemption was to ensure that professional services that may be subject to legal professional privilege would not qualify as registrable activities.[66] The Department further stated:

> To the extent that lawyers may be involved in other types of activities to which that type of privilege does not attach, we don't see why they shouldn't be subject to the scheme in the same way as everybody else.[67]

4.51 Some submissions and witnesses at public hearings expressed concern about the narrow scope and potentially limited utility of the exemption.[68] Concerns centred upon two main issues:

- the exemption being constrained to judicial, criminal or civil law enforcement inquiries, investigations or proceedings, and
- uncertainty about whether the exemption would extend to activities that are incidental to the provision of legal advice or legal representation.

4.52 The Law Council submitted that limiting the exemption to judicial, criminal or civil law enforcement inquiries, investigations or proceedings 'is unnecessary and should be omitted'.[69]

4.53 The Law Council and Law Firms Australia provided a number of examples of circumstances in which a legal professional could provide legal advice or representation other than in judicial, criminal or civil law enforcement

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65 Explanatory Memorandum, pp. 61-62, para 328.

66 Ms Tara Inverarity, Assistant Secretary, Attorney-General's Department, *Committee Hansard*, Canberra, 31 January 2018, pp. 35-36.

67 Ms Tara Inverarity, Assistant Secretary, Attorney-General's Department, *Committee Hansard*, Canberra, 31 January 2018, pp. 34-35.

68 Law Council of Australia, *Submission 4*; Australian Lawyers for Human Rights, *Submission 7*, p. 9; Law Firms Australia, *Submission 10,* pp. 4-6.

69 Law Council of Australia, *Submission 4*, p. 13.

inquiries, investigations or proceedings.[70] These activities were characterised as falling outside of the scope of the exemption, and so would require the legal professional to register under the Bill. These examples ranged across commercial, administrative and contractual law, including responding to a Commonwealth tender, lodging a debtor's petition to the Official receiver, and applying to the Australian Securities and Investment Commission to incorporate a proprietary company.[71]

4.54 Law Firms Australia also submitted it was important that the requirements of the Bill do not conflict with legal professional privilege obligations, and that it should explicitly be stated that compliance with the Scheme does not result in any waiver or forfeiture of legal professional privilege, nor a breach of legal or professional obligations to the client (where the client is a foreign principal).[72]

4.55 Law Firms Australia put forward two alternative amendments to address the concerns outlined in their submission. These were:

- amend the proposed definition of 'lobby' at section 10 of the Bill to exclude representations made to government in the normal course of professional services,[73] or
- expand the legal advice or representation by omitting reference to judicial, criminal or civil law enforcement inquiries, investigations or proceedings.

4.56 The Law Council also recommended the exemption be expanded to read 'activities undertaken on behalf of a foreign principal if the activity is, or is incidental to, the provision of legal advice or legal representation'.[74] The

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70 Law Council of Australia, *Submission 4*, p. 12; Law Firms Australia, *Submission 10,* pp. 4-6.

71 Law Firms Australia, *Submission 10,* pp. 4-6.

72 Law Firms Australia, *Submission 10*, p. 7.

73 This is the approach taken in the Lobbying Code of Conduct and Register. 'Lobbyist' is defined at paragraph 3.5 of the Code to exclude members of professions, such as doctors, lawyers or accountants, and other service providers, who make occasional representations to Government on behalf of others in a way that is incidental to the provision to them of their professional or other services.

74 Law Council of Australia, *Submission 4*, p. 13. Law Firms Australia also submitted that 'actions that are incidental to the provision of legal advice or representation, for instance providing commercial advice, should not prevent law firms from relying upon the exemption (*Submission 10*, p. 7).

effect of this would be to remove any limitation to judicial, criminal or civil proceedings.

4.57 Although the Department advised that the intention of the exemption 'is to cover all legal advice', it also was of the view that the exemption 'should remain limited to legal representation in relation to judicial, criminal or civil law enforcement inquiries, investigations or proceedings'.[75] The Department elaborated:

> The department's view is that 'legal advice' would encapsulate services incidental to the provision of legal advice, as the term is to be construed broadly and includes include professional legal advice provided by a legal practitioner whether in oral or written form. It may not be appropriate to extend the exemption relating to legal representation to incidental services, as this may defeat the transparency objective of the Scheme.[76]

4.58 The FARA scheme contains a broadly equivalent exemption.[77]

Extension to other professions

4.59 The Bill does not currently contain an exemption for members of, or activities in connection with, certain professions. The Committee received a number of submissions and heard evidence at public hearings about the desirability of including an exemption of this nature.[78]

4.60 The Law Council provided an example of a medical practitioner advocating for policy reform on behalf of a class of patients who are foreign principals, submitting that, as presently drafted, the medical practitioner may be required to register under the Scheme.[79]

4.61 For example, the existing Commonwealth's Lobbying Code of Conduct exempts certain professions (such as tax agents, customs brokers and liquidators) where representations to government are part of the 'normal day-to-day work of people in that profession'.[80] The Code of Conduct also exempts members of professions, such as doctors, lawyers or accountants,

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75 Attorney-General's Department, *Submission 5.1*, p. 5.

76 Attorney-General's Department, *Submission 5.1*, p. 5.

77 *Foreign Agents Registration Act*, 22 U.S.C. § 613(g).

78 Law Council of Australia, *Submission 4*; Law Firms Australia, *Submission 10*.

79 Law Council of Australia, *Submission 4*, p. 12.

80 Department of the Prime Minister and Cabinet, *Australian Lobbying Code of Conduct*, para 3.5(e).

who make occasional representations to government on behalf of others in a way that is incidental to the provision to them of their professional or other services.[81]

4.62 The Law Council recommended that, 'at a minimum, it would be appropriate to include an equivalent exemption [to that in the Lobbying Code of Conduct] in the Bill'.[82] Alternatively, the recommendation provided by Law Firms Australia, that the proposed definition of 'lobby' at section 10 of the Bill be amended to 'exclude representations made to government in the normal course of professional services' may also provide a solution.[83]

4.63 The Department responded to the Law Council's recommendation, and submitted the following response:

> The department accepts that requiring registration of persons who make only occasional representations to Government on behalf of others in a manner than is incidental to their professional or other services may impose an unnecessary regulatory burden. However, it is important that any exemption is not crafted so broadly as to allow people to avoid registration obligations under the Scheme where they undertake registrable activities on behalf of a foreign principal.[84]

4.64 The FARA does not contain an exemption for professional services, however it does exempt activities where the person has registered under the *Lobbying Disclosure Act 1995* in connection with the person's representation of that foreign principal.[85]

Diplomatic, consular and similar activities

4.65 Proposed section 26 of the Bill will exempt any activities that are undertaken on behalf of a foreign government if the person undertaking the activity:

- is entitled to certain diplomatic, consular or similar privileges and immunities, or
- is a United Nations (UN) or associated person.

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81 Department of the Prime Minister and Cabinet, *Australian Lobbying Code of Conduct*, para 3.5(f).

82 Law Council of Australia, *Submission 4*, p. 12-13.

83 Law Firms Australia, *Submission 10*, p. 6.

84 Attorney-General's Department, *Submission 5.1*, p. 5.

85 *Foreign Agents Registration Act*, 22 U.S.C. § 613(h).

4.66 The exemption will only apply to activities that are within the scope of the functions that entitle the person to the privileges and immunities,[86] or that the person undertakes in the person's capacity as a United Nations or associated person.[87]

4.67 The exemptions will also only apply where the activity is undertaken on behalf of a foreign government. If an activity is undertaken on behalf of a foreign public enterprise, a foreign political organisation, a foreign business (which includes foreign organisations) or a foreign individual, the exemptions will not apply.

4.68 A person who is a former Cabinet Minister, former Minister, former member of Parliament or former senior Commonwealth official will not be able to rely upon the diplomatic, consular or other privileges and immunities exemption at section 26. Accordingly, if a person who occupied one of these roles goes on to work in a foreign embassy, consulate, or diplomatic mission, they will still be required to register under the Scheme despite the existence of this exemption.[88] The Explanatory Memorandum does not provide reasons as to why the exemption does not extend to these categories of persons.

4.69 However, if a former Cabinet Minister, former Minister, former member of Parliament or former senior Commonwealth official goes on to work for the UN, they will have access to that exemption.

Diplomatic, consular and mission officers

4.70 The Bill exempts the activities of persons entitled to privileges and immunities under the *Consular Privileges and Immunities Act 1972*, the *Diplomatic Privileges and Immunities Act 1967* and the *Overseas Missions*

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86 Proposed section 26(1)(d).

The domestic legislation comprises the *Consular Privileges and Immunities Act 1972*, the *Diplomatic Privileges and Immunities Act 1967* and the *Overseas Missions (Privileges and Immunities) Act 1995*.

87 Proposed section 26(2)(c).

88 Proposed section 26(1)(c) provides that the exemption will only apply to registrable activities covered by proposed sections 20 (parliamentary lobbying on behalf of a foreign government) and 21 (activities in Australia for the purpose of political or governmental influence). Therefore, the exemption will not extend to registrable activities under former Cabinet Ministers, Ministers, MPs and senior Commonwealth officials).

(Privileges and Immunities) Act 1995, if the activities are within the scope of the functions that entitles the person to the privileges and immunities.[89]

4.71 The Explanatory Memorandum states that the exemption is intended to apply where consular officials, diplomatic officials or staff members are performing any of the official functions, responsibilities or duties of their role.[90] The Explanatory Memorandum provides:

> Engagement by these officials with members of Parliament and the broader Australian Government is a core component of their roles as consular or diplomatic officials. Such activities commonly involve representing the views of the foreign government and seeking to influence the Australian Government's position on various matters. Such engagement is also transparent in that there is no uncertainty about the fact that consular or diplomatic officers represent the interests of a foreign government.[91]

4.72 The terms 'privileges' and 'immunities' are not defined in the Bill. However, the privileges and immunities Acts referred to above give meaning to these terms, as do the Vienna Conventions on Consular and Diplomatic Relations.[92] These include personal inviolability, the right to communicate with the authorities of the receiving State, and immunity from jurisdiction (criminal, civil and administrative jurisdiction).[93]

4.73 For certain diplomatic, consular and other officials, privileges and immunities are absolute—they apply to all activities of the person, whether or not they are undertaken in a personal or a professional capacity.[94]

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89 Proposed section 26(1)(b).

90 Explanatory Memorandum, p. 63, para 335.

91 Explanatory Memorandum, p. 63, paras 335-336.

92 Explanatory Memorandum, p. 64, para 339. This is a reference to the *Vienna Convention on Consular Relations* (1963), though no reference is made to the *Vienna Convention on Diplomatic Relations* (1961).

93 The *Vienna Convention on Diplomatic Relations 1961*, the *Vienna Convention on Consular Relations 1963*, and the privileges and immunities Acts described above set out the privileges and immunities of diplomatic, consular and similar officers. These relevantly include matters such as personal inviolability; immunity from jurisdiction; communication with the authorities of the receiving State; and exemption from taxation.

94 This is the case for most diplomatic officials. See the Department of Foreign Affairs and Trade's website, *Operation of the diplomatic and consular conventions in Australia*, http://dfat.gov.au/about-us/publications/corporate/protocol-guidelines/Pages/5-1-operation-of-the-diplomatic-and-consular-conventions-in-australia.aspx).

4.74 For other officials, including officers who are nationals or permanent residents of the receiving State, privileges and immunities will only apply to activities undertaken in the course of that person's official functions and duties. This is known as 'functional immunity'. The proposed exemption will, in effect, 'mirror' the extent to which absolute or functional immunity applies to a diplomatic, consular or other official.

United Nations and associated persons

4.75 The Bill also exempts activities of persons who are UN or associated persons which are performed in the course of their capacity as a UN or associated person. The term 'UN or associated person' is defined in subsection 71.23(1) of the *Criminal Code Act 1995* to mean 'a person who is a member of any UN personnel or associated personnel'.[95]

4.76 The definition of UN or associated person is confined to personnel carrying out activities in support of a UN operation, and officials and experts present in an official capacity in the area where a UN operation is being conducted. The definition of 'UN operation' is limited to operations for the purpose of maintaining or restoring international peace and security or where the Security Council or General Assembly has declared that there exists an exceptional risk to the safety of the personnel engaged in the operation. The exemption does not therefore apply to activities of a UN employee or associated person that are not directly related to a specific UN operation.

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[95] Under that definition, the following persons will be exempt from registration under the Scheme:

- persons assigned by a government, or an intergovernmental organisation, with the agreement of the competent organ of the UN to carry out activities in support of the fulfilment of the mandate of a UN operation;
- persons engaged by the Secretary General of the United Nations, a specialised agency or the International Atomic Energy Agency to carry out activities in support of the fulfilment of the mandate of a UN operation;
- persons deployed by a humanitarian non-governmental organisation or agency under an agreement with the Secretary General of the United Nations, a specialised agency or the International Atomic Energy Agency to carry out activities in support of the fulfilment of the mandate of a UN operation;
- persons engaged or deployed by the Secretary General of the United Nations as members of the military, police or civilian components of a UN operation, or
- any other officials or experts on mission of the UN, its specialised agencies or the International Atomic Energy Agency who are present in an official capacity in the area where a UN operation is being conducted.

4.77 The Explanatory Memorandum notes that the exemption is intended to apply where a UN or associated person could 'be considered to be acting on behalf of a foreign government which has provided funding to the UN'.[96]

4.78 The Explanatory Memorandum further notes that 'little transparency would be gained' in requiring UN and associated persons to register 'when they are clearly acting within their official functions, responsibilities or duties'.[97]

4.79 In questions in writing to the Department, the Committee sought clarification as to why the exemption was not extended to other international organisations to which Australia is a member. The Department responded:

> UN officials neither represent nor advance the interests of particular foreign principals but are instead concerned with the international community. To the extent that other international organisations represent the interests of the international community, it may be appropriate to exempt these officials from the registration requirements under the Scheme. However, it is important that any additional exemptions in the FITS Bill be appropriately limited so as not to undermine the Scheme's transparency objective.[98]

4.80 The exemption for diplomatic and consular activities appears to be narrower in the FARA scheme as it appears to exclude certain types of diplomatic and consular staff. The FARA exemption does not apply to public-relations counsel, publicity agents, or information-service employees.[99]

Religion

4.81 Proposed section 27 of the Bill will exempt from registration activities that are undertaken on behalf of a foreign government if they are, or are solely for the purposes of, acting in accordance with the doctrines, tenets, beliefs or teaching of the particular religion of the foreign government.

4.82 The Explanatory Memorandum states that this exemption:

> … seeks to avoid the activities of the churches affiliated with foreign government, such as the Catholic Church, being registrable under the scheme. This exemption is intended to exclude the activities of religious bodies which

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96 Explanatory Memorandum, p. 65, para 348.

97 Explanatory Memorandum, p. 65, para 349.

98 Attorney-General's Department, *Submission 5.1*, p. 34.

99 *Foreign Agents Registration Act*, 22 U.S.C. § 613(c).

> have such a clear and transparent relationship with a foreign government that registration under the scheme would not achieve additional transparency.[100]

4.83 The Explanatory Memorandum goes on to state that the exemption will cover circumstances where representing the teachings of the church is 'akin to representing the views of the government'.[101]

4.84 The exemption is not a blanket exemption. It will only apply where the activities are undertaken on behalf of a foreign principal that is a foreign government. As such, it will not be available to religious activities on behalf of a foreign public enterprise, a foreign political organisation, a foreign business or an individual who is neither an Australian citizen nor a permanent Australian resident.

4.85 Further, the exemption will not apply to persons who are former Cabinet Ministers, Ministers, members of Parliament or senior Commonwealth officials. The Explanatory Memorandum provides that this is an appropriate limitation as:

> … such persons are distinguished from other individuals or entities because of the influence they have by virtue of their previous roles. There is merit in the Australian public and government decision makers knowing when and in what circumstances such persons are acting on behalf of a foreign government.[102]

4.86 The Committee received a number of submissions, and received evidence from a number of witnesses, criticising the religious exemption.[103] These criticisms focussed on the mischaracterisation of the Catholic Church in Australia as being 'an agent' of a foreign government, namely of the Vatican City.

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100 Explanatory Memorandum, p. 66, para 352.

101 Explanatory Memorandum, p. 66, para 354.

102 Explanatory Memorandum, p. 66, para 359.

103 Australian Catholic University, *Submission 6*; Australian Catholic Bishops Conference, *Submission 12*; Bishop Robert McGuckin, Spokesperson, Australian Catholic Bishops Conference, *Committee Hansard*, Canberra, 30 January 2018, pp. 7-13; Mr Francis Xavier Moore, Executive Director Administration, Catholic Archdiocese of Melbourne, appearing for the Australian Catholic Bishops Conference, *Committee Hansard*, Canberra, 30 January 2018, pp. 7-13; Mrs Suzanne Greenwood, Chief Executive Officer, Catholic Health Australia, appearing for the Australian Catholic Bishops Conference, *Committee Hansard*, Canberra, 30 January 2018, pp. 7-13.

4.87 The ACBC provided a detailed submission explaining the legal standing of the Catholic Church in Australia, and the legal standing of the Pope as head of the Church and head of the Vatican City. The ACBC submitted that the characterisation of the Catholic Church in Australia as being affiliated with the foreign government of Vatican City is a common misunderstanding.[104]

4.88 The ACBC also submitted that while the Pope is the supreme head of the Catholic Church, Bishops are not delegates of the Pope and each govern the particular Church as the 'vicar and ambassador of Christ'.[105] Similarly, during the public hearings, Bishop McGuckin emphasised:

> I want to be clear in rejecting the characterisation of the Catholic Church found in the explanatory memorandum. Catholics are followers of Jesus Christ. We are not agents of a foreign government.[106]

4.89 As the Catholic Church does not act on behalf of a foreign government, proposed section 27 will have no effect on the Catholic Church in Australia.

4.90 While submitters emphasised that the Catholic Church and Catholics within Australia do not act on behalf of a foreign government, concern was expressed about whether the Pope or other church officials outside of Australia could nonetheless be considered to be a foreign principal (as an individual who is neither an Australia citizen nor a permanent Australian resident) under the Bill.[107] This could have wide-ranging implications for Catholics and the Catholic Church in Australia.

4.91 Proposed paragraph 10(e) of the Bill defines 'foreign principal' to mean an individual who is neither an Australian citizen nor a permanent Australian resident. If the Catholic Church in Australia, clergy, officials and lay Catholics could be said to be acting on behalf of the Pope or a church official as a foreign individual, they may be required to register under the Scheme. This is because the proposed religious exemption is limited to foreign principals that are 'foreign governments' and therefore, does not apply to individuals who are not Australian citizens or permanent residents.

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104 Australian Catholic Bishops Conference, *Submission 12*, p. 6; see also Australian Catholic University, *Submission 6*, p. 1.

105 Vatican II, *Dogmatic Constitution on the Church* n.27, as referenced by the Australians Catholic Bishops Conference, *Submission 12*, p. 6.

106 Bishop Robert McGuckin, Spokesperson, Australian Catholic Bishops Conference, *Committee Hansard*, Canberra, 30 January 2018, p. 7.

107 Australian Catholic Bishops Conference, *Submission 12*, p. 2.

4.92 If this were the case, the ACBC expressed concern that the Bill would require,

> … every bishop, priest, deacon, religious sister, brother, lay person or Catholic-controlled legal entity advocating or communicating in relation to public policy to register and report on their activities under the terms of the Bill. More than 5.2 million Australians identified as Catholic in the 2016 Census.[108]

4.93 The ACBC therefore recommended expanding the exemption at section 27 to cover, amongst other things, activities done 'in good faith for predominantly religious, philanthropic, educational, scientific or artistic purposes'. This would be irrespective of the whether foreign principal is an individual, government or organisation.[109] This wording would align with the approach taken in the FARA, with applies regardless of the type of foreign principal and therefore, whether or not the religion in question is the religion of any particular government.[110]

4.94 In response to questions from the Committee on the availability of the FARA exemption, the ACBC advised that the United States Conference of Catholic Bishops and the Catholic Health Association of the United States of America reported that 'they were not aware of any instances where the exemption had not been effective to exempt Catholic persons and services from the operation of the FARA'. The ACBC re-iterated the recommendation for an alternative wording to the proposed religious exemption to mirror that which exists in the United States.[111]

4.95 However Ms Valerie Heath advocated against the inclusion of an exemption for religious activities, commenting that 'the purpose or rationale for this exemption is not evident.'[112] She went on to state that the 'Australian government is secular and freedom from religion is as important to the

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108 Australians Catholic Bishops Conference, *Submission 12*, p. 2.

109 Australian Catholic Bishops Conference, *Submission 12*, p. 8.

110 *Foreign Agents Registration Act*, 22 U.S.C. § 613(e).

111 Australian Catholic Bishops Conference, *Submission 12.1*, p. 1.

112 Ms Valerie Heath, *Submission 15*, p. 4.

Australian polity as individual freedom to practice religion'.[113] This position was also made by Justice Connect.[114]

4.96 In answers to questions from the Committee, the Department noted that in light of evidence from the ACBC, the Catholic Church in Australia 'may not have a foreign principal, in which case registration is not required'.[115] It would appear from this response that the Department has limited its examination of the ACBC's evidence to that organisation's concerns regarding the exemption's applicability to the Pope as a head of the Church and the head of a foreign government.[116]

4.97 The Department's response did not engage with ACBC's concerns that the exemption would not extend to the Pope as either a non-citizen nor a permanent Australian resident. If the Catholic Church in Australia, clergy, officials and lay Catholics could be said to be acting on behalf of the Pope or a church official (in their capacities as a foreign principal), they may be required to register under the Scheme.

News and media

4.98 The Bill establishes that communications activities undertaken within Australia on behalf of a foreign principal for the purpose of influencing a political or governmental process will be registrable activities.[117]

4.99 The term 'communications activity' is broadly defined to cover all forms of communication on behalf of a foreign principal, including via newspapers, magazines and editorials.[118] This category of registrable activity has the potential to capture an extensive range of actors and activities, including media organisations.

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113 Ms Valerie Heath, *Submission 15*, p. 4.

114 Justice Connect, *Submission 50*, p. 5.

115 Attorney-General's Department, *Submission 5.1*, p. 10.

116 Attorney-General's Department, *Submission 5.1*, pp. 9-10.

117 See item 3 of the table set out at subsection 21(1).

118 The Explanatory Memorandum provides that the definition is 'intended to cover all circumstances in which information or materials are disseminated, published, disbursed, shared or made available in any way' (see p. 39, para 203).

4.100 Proposed section 28 of the Bill will exempt from registration activities that are solely, or solely for the purposes of, 'reporting news, presenting current affairs or expressing editorial content in news media'.[119]

4.101 The terms 'reporting news,' 'presenting current affairs' and 'expressing editorial content in news media' are not defined in the Bill. However, the Explanatory Memorandum states that 'expressing editorial content in news media' is intended to refer to editorial content that is 'selected and presented by media professionals including journalists, editors and producers and is intended to apply to traditional news sources such as print and online newspapers, television news and radio'.[120]

4.102 The Explanatory Memorandum further provides that 'reporting news' and 'presenting current affairs' is intended to refer to news that is investigated, selected and presented by media professionals including journalists, editors and producers and is intended to apply to traditional news sources. These terms do not extend to 'capture the presentation of information about current events by members of the general public, such as through social media'.[121]

4.103 The exemption will only apply to activities undertaken on behalf of a foreign principal that is a foreign business or a foreign individual.[122] In effect, this will exempt private news media from registration, but not State-owned media or media with any other link to a foreign government, foreign public enterprise or a foreign political organisation.[123]

4.104 In addition to being limited to certain kinds of foreign principals, the exemption will also not apply to the employment or activities of former

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119 Proposed section 28(1).

120 Explanatory Memorandum, p. 68, para 365.

121 Explanatory Memorandum, p. 68, para 365.

122 Proposed section 28(1)(a)(i) and (ii).

123 The Explanatory Memorandum states 'this exemption is intended to ensure privately owned news and press services operating within Australia will not be required to register under the scheme for undertaking activities at the direction of their foreign owner or director … but ensures that attempts to influence Australia's political and governmental processes on behalf of a foreign government, including through a state-owned media organisation, will remain registrable' (p. 67, paras 63-67).

Cabinet Ministers, Ministers, members of Parliament or senior Commonwealth officials.[124]

4.105 A number of submitters and witnesses at public hearings expressed significant concern about the breadth and application of news and media communications included, and the limited scope of the proposed exemption.[125]

4.106 A large group of media organisations, comprising Australian Associated Press, Australian Subscription Television and Radio Association (ASTRA), Bauer Media Group, Commercial Radio Australia, Community Broadcasting Association of Australia, Fairfax Media, Free TV Australia, HT&E, Media Entertainment and Arts Alliance, News Corp Australia, and The West Australian, provided a joint submission to the inquiry (Joint Media Organisations submission). The submission made two key recommendations:

- that the Bill be limited in its application to foreign governments, or businesses/individuals operating on behalf of foreign governments, and
- that a broad exemption for media organisations be included.[126]

4.107 Foxtel endorsed the submission from the Joint Media Organisations, further stating that a 'broadly framed exemption' would 'not be inconsistent with the Government's intention to ensure transparency of influence'.[127] Similarly Network Ten supported the recommendation for a broad exemption.[128]

4.108 While proposed subsections 13(3) and (4) provide that a broadcaster, carriage service provider or publisher does not engage in communications activity merely because they distribute or publish information via their

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124 Proposed section 28(2) explicitly provides that the exemption will not apply to any activities within the meaning of sections 22 or 23 of the Bill.

125 Joint Media Organisations (comprising News Corp Australia, Free TV Australia, Commercial Radio Australia, Fairfax Media, The West Australian, aap, Media Entertainment and Arts Alliance, ASTRA Subscription Media Australia, HT&E, Bauer Media Group and Community Broadcasting Association of Australia), *Submission 19*, p. 1; Joint Media Organisations, *Submission 19.1*, p. 1; Commercial Radio Australia, *Submission 21*, p. 1; Foxtel, *Submission 27*, p. 1; Free TV Australia, *Submission 47*, p. 1; Network Ten, *Submission 56*, p. 1.

126 Joint Media Organisations, *Submission 19*, p. 1.

127 Foxtel, *Submission 27*, p. 1.

128 Network Ten, *Submission 56*, p. 1.

services, media organisations expressed concern that they will not be able to rely upon this exception for many of their activities and arrangements.

4.109 The drafting of proposed section 13 and the Explanatory Memorandum make clear that a broadcaster or publisher would be required to register if they have an arrangement with a foreign principal to undertake communications activities for the purpose of political or governmental influence—as opposed to 'merely' publishing or distributing content.[129]

4.110 The Joint Media Organisations suggested that the drafting did not appropriately take into account their standard business operations and sector arrangements. They commented:

> the drafting of the exemptions is flawed, and appears to suggest a serious misunderstanding of both the nature of media organisations' businesses and the chain of relationships which form in the business of content distribution. … Broadcasters in TV and radio and their digital counterparts may write and/or design advertisements at the request of advertisers, thereby exercising a modest level of control over the advertising content, ostensibly pushing it upside of the Bill's exemptions.[130]

4.111 Commercial Radio Australia (CRA) also noted that the Bill indicated a lack of understanding of the sector and so may incorrectly capture activities which are transparent business transactions:

> … it is extremely common practice throughout the commercial radio industry for stations to write and produce advertisements directly for clients. In some regional stations, as many as 80 per cent of advertisements broadcast are written and produced by copywriters within the station. CRA's concern is that the act of writing/producing/editing the advertisement—on the instruction of the foreign principal—may mean that the broadcaster is not able to rely on the exemption under section 13(3). [131]

4.112 In a later supplementary submission the Joint Media Organisations submitted that 'the Bill is fundamentally flawed and cannot be "fixed" through the current process'.[132] The CRA contended that the Bill will

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129 Explanatory Memorandum, p. 40, para 210.

130 Joint Media Organisations, *Submission 19*, pp. 3-4.

131 Commercial Radio Australia, *Submission 21*, p. 1.

132 Joint Media Organisations, *Submission 19*, p. 4; Joint Media Organisations, *Submission 19.1*, p. 2.

encourage foreign companies to go to agencies for many services, severely damaging the income stream of domestic radio broadcasters.[133]

4.113 The Department did not support a complete exemption for media organisations under the Scheme. It stated:

> It is essential that there is transparency where communications activities are undertaken on behalf of a foreign principal for the purpose of political or governmental influence. This is especially important for communications activity targeting the public. Such activities can be very powerful in affecting the views and opinions of persons involved in Australia's political and governmental processes, as well as influencing a person's vote in a federal election or designated vote.[134]

4.114 The FARA exemptions and the Bill's proposed exemptions for news media are difficult to compare. The FARA exemption might operate more broadly as it applies to 'bona fide news or journalistic activities, including the solicitation or acceptance of advertisements, subscriptions, or other compensation', which may capture a broader range of activity than activity 'solely, or solely for the purposes of, reporting news, presenting current affairs or expressing editorial content in news media'.[135]

4.115 However, for the FARA exemption to be available, the news service must satisfy the proportion of local ownership or the citizenship of officers and directors. To qualify, the news service:

- must be at least 80 per cent owned by citizens of the United States, and
- its officers and directors, if any, are citizens of the United States, and
- is not owned, directed, supervised, controlled, subsidised, or financed, and none of its policies are determined by any foreign principal.[136]

4.116 If applied in Australia, the FARA exemption would not exempt Channel Ten from registration.

Application to social media platforms

4.117 In response to questions in writing from the Committee, the Department advised that the obligations apply regardless of the medium used to

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133 Commercial Radio Australia, *Submission 21*, p. 2.

134 Attorney-General's Department, *Submission 5.1*, pp. 12-13.

135 *Foreign Agents Registration Act*, 22 U.S.C. § 613(d).

136 *Foreign Agents Registration Act*, 22 U.S.C. § 613(d),

undertake activities on behalf of a foreign principal, in Australia, for the purpose of political or government influence.

4.118 'Communications activity' is defined to mean communication or distribution of information or material.[137] The Department stated that this is intended to cover 'all circumstances in which information or materials are disseminated, published, disbursed, shared or made available in any way'.[138]

4.119 The Committee sought clarification from the Department regarding under what circumstances a social media platform could be required to register under the Scheme. Further, the Committee's questions in writing asked whether a platform's algorithms which target certain areas of the community with certain news coverage, would be sufficient to fall within the definition of undertaking activities on behalf of a foreign principal.

4.120 The Department provided the following answer:

> The department's view is that it is unlikely that algorithms would fall within the definition of 'communications activity' in section 13.[139]

Commercial or business pursuits

4.121 Proposed section 29 of the Bill sets out two exemptions for certain commercial or business pursuits. The first is for the negotiation and conclusion of contracts for the provision of goods and services, and the second is for the commercial or business pursuits of entities operating under the name of the foreign principal, or as employees of a foreign principal.

4.122 Both are examined below.

Commercial negotiations

4.123 Proposed subsection 29(1) will exempt activities that are solely, or solely for the purposes of, the pursuit of bona fide business or commercial interests in relation to preparing to negotiate, negotiating, or concluding, a contract for the provision of goods and services.

4.124 The exemption will only apply to business or commercial negotiations on behalf of foreign businesses or a foreign individual.[140] In effect, any

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137 Proposed section 13.

138 Attorney-General's Department, *Submission 5.1*, p. 29.

139 Attorney-General's Department, *Submission 5.1*, p. 30.

140 Proposed section 29(1)(a).

registrable activities that involve commercial or business negotiations on behalf of a foreign government, foreign political organisation or a foreign public enterprise would still be liable to register under the Scheme.

4.125 The exemption is further limited in that it will not apply if the business or commercial negotiations in any way relate to national security, defence, or public infrastructure (within the meaning of Division 82 of the *Criminal Code*).[141] The Bill does not define 'national security' or 'defence,' though the Explanatory Memorandum provides that the terms are intended to take their ordinary meanings. The rationale for providing this limitation to the exemption is that,

> … it is appropriate that any foreign involvement in these areas is transparent. There is a public interest in knowing when foreign businesses or individuals are involved in contract negotiations relating to national security, defence or public infrastructure, and as such persons acting on behalf of such foreign principals should not be able to take advantage of the exemption.[142]

4.126 AFMA advised that the exemption is very limited and is 'of no assistance in moderating the [Bill's] impact', as the public policy advocacy that AFMA undertakes as an industry association never relates to the negotiation of a particular contract.[143] This concern was shared by a number of representative and industry associations,[144] and will be examined in a later section of this chapter.

4.127 The FARA also contains an exemption for commercial or business pursuits, though it is arguably broader in scope. That exemption applies to any activity to further bona fide trade or commerce (is not restricted to a specific contract) and does not include the restrictions proposed in the Bill in relation to national security, defence and public infrastructure.[145]

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141 Proposed section 29(1)(c).

142 Explanatory Memorandum, p. 70, para 377.

143 Australian Financial Markets Association, *Submission 3*, p. 4.

144 American Chamber of Commerce, *Submission 8*; Financial Services Council, *Submission 16*; Joint submission of the Australian Bankers Association, Australian Private Equity & Venture Capital Association Limited, Financial Services Council and Insurance Council of Australia, *Submission 18*; Property Council of Australia, *Submission 20*; The Australian Industry Group, *Submission 32*; Free TV Australia, *Submission 47*, p. 2.

145 *Foreign Agents Registration Act*, 22 U.S.C. § 613(d).

4.128 However, the FARA exemption is limited to 'private and non-political activities'.[146] As a result, the Bill's proposed exemption captures a broader range of registrable activities though this will only apply in the narrow context of preparing to negotiate negotiating, or concluding a contract for the provision of goods or services.

Commercial or business pursuits of employees or subsidiaries

4.129 Proposed subsection 29(2) will exempt commercial or business pursuits undertaken on behalf of a foreign public enterprise or a foreign business where:

- they are undertaken by an individual in his or her capacity as an employee of the foreign principal,[147] or
- they are undertaken by the person under the name of the foreign principal.[148]

4.130 The term 'commercial or business pursuit' is not defined in the Bill, though the Explanatory Memorandum states that the phrase is intended to be given its ordinary meaning to include activities relating to trade, commerce, buying, selling, dealing and marketing.[149]

4.131 The exemption will only apply to activities undertaken on behalf of foreign public enterprises and foreign businesses. It will not apply for activities undertaken on behalf of foreign governments, foreign political organisations or foreign individuals.

4.132 Certain categories of persons are not able to access certain exemptions under the Bill. For example, proposed section 27 provides that the religious exemption does not extend to recent Cabinet Ministers or recent Ministers, members of Parliament and other holders of senior Commonwealth positions. However, the business and commerce exemption is available to all categories of persons. For example, a former recent Cabinet Minister, Minister, member of Parliament, or senior Commonwealth public official will be exempt from registration for activities undertaken on behalf of foreign businesses where they are employees of that business.

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146 *Foreign Agents Registration Act*, 22 U.S.C. § 613(d).

147 Proposed subparagraph 29(2)(b)(i).

148 Proposed subparagraph 29(2)(b)(ii).

149 Explanatory Memorandum, p. 72, para 387.

4.133 The Explanatory Memorandum provides that actions of subsidiaries or companies operating under the same business name as the foreign principal were described as being 'sufficiently transparent,' such that registration under the Scheme would not be justifiable.[150]

4.134 The FARA exemption for private and non-political activities in furtherance of bona fide trad or commerce of a foreign principle as discussed in the preceding section is also available to employees or companies operating under the same business name of the foreign principal.

Representative and industry associations

4.135 Neither the Bill nor the Explanatory Memorandum explicitly addresses how the Bill is intended to apply, if at all, to representative or industry associations that act in the interests of members (any or all of whom may be foreign principals).

4.136 The proposed Scheme would require separate registration in respect of each separate foreign principal on whose behalf a registrable activity is undertaken. In circumstances where a representative or industry association represents tens, hundreds and potentially thousands of members—some of whom may fall within the proposed definition of 'foreign principal'—the question arises as to whether hundreds or thousands of individual registrations could or should be required under the Bill.

4.137 A number of submitters and witnesses expressed concern about the potential application of the Bill to representative associations.[151] It was noted that extending registration obligations to such associations seemed beyond the policy intent of the proposed Scheme.[152]

4.138 AFMA submitted that the Bill appeared to have been drafted with a 'simple bilateral relationship in mind' between a lobbyist and a foreign principal and simple one off instances of communication. AFMA went on to note that

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150 Explanatory Memorandum, p. 71, para 384.

151 Australian Financial Markets Association, *Submission 3*; American Chamber of Commerce, *Submission 8*; Financial Services Council, *Submission 16*; Joint submission of the Australian Bankers Association, Australian Private Equity & Venture Capital Association Limited, Financial Services Council and Insurance Council of Australia, *Submission 18*; Property Council of Australia, *Submission 20*; The Australian Industry Group, *Submission 32*; Free TV Australia, *Submission 47*, p. 2.

152 Australian Bankers Association, Australian Private Equity & Venture Capital Association Limited, Financial Services Council and Insurance Council of Australia, *Submission 18*, p. 1.

public policy advocacy by industry member organisation is very different, undertaken on behalf of members, representing a diverse range of member views.[153] Of its existing membership (103 organisations), AFMA advised that approximately 25 firms would meet the definition of a 'foreign principal'.[154] The Association would be required to register for each separate foreign principal on whose behalf it acted.[155]

4.139 The Financial Services Council endorsed the position of the AFMA and also submitted that, as an industry body, they do not act on behalf of any individual member, but on behalf of the collective interests of the entire membership.[156] They put forward the view that requiring industry bodies to register would not achieve the policy objectives of transparency because there is already transparency and regulation around their activities.

4.140 The Australian Industry Group also objected to the proposition of being 'categorised' as a lobbyist if they undertake activities to further the interests of members, some of whom may be foreign principals.[157]

4.141 In advocating for an additional exemption, a number of submissions pointed to the fact that not-for-profit associations or organisations constituted to represent the interests of their members are exempted from the Commonwealth Government's Lobbying Code of Conduct.[158] Both AFMA and the Property Council of Australia recommended that a similar exemption be included in the Bill that would ensure associations and membership bodies that act in the collective interests of their members would not be required to register under the Scheme.[159]

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153 Australian Financial Markets Association, *Submission 3*, pp. 4-5.

154 Australian Financial Markets Association, *Submission 3*, pp. 2-3.

155 Proposed section 16(1); Explanatory Memorandum, p. 43, para 224.

156 Financial Services Council, *Submission 16*, p. 1; see also the Property Council of Australia, *Submission 20*, p. 1.

157 The Australian Industry Group, *Submission 32*, p. 1.

158 Department of the Prime Minister and Cabinet, *Lobbying Code of Conduct*, paragraph 3.5(b).

See Australian Financial Markets Association, *Submission 3*; Joint submission of the Australian Bankers Association, Australian Private Equity & Venture Capital Association Limited, Financial Services Council and Insurance Council of Australia, *Submission 18;* Property Council of Australia, *Submission 20*, p. 1.

159 Australian Financial Markets Association, *Submission 3*, p. 7; Property Council of Australia, *Submission 20*, p. 2.

4.142 In answers to questions on notice, a number of representative industry associations advised the Committee of the percentage of their membership which would fall within the definition of a 'foreign principal'. They advised the following:

- Australian Private Equity and Venture Capital Association advised 4 per cent of its membership (179 total members) may fall within the definition of a foreign principal;[160]
- Financial Services Council advised 42 per cent of its membership (47 total members) may fall within the definition of a foreign principal;[161]
- Australian Bankers' Association advised 12.5 per cent of its membership (24 total members) may fall within the definition of a foreign principal;[162]
- Insurance Council of Australia was 'unable to determine with certainty' which of its members would fall within the definition of a foreign principal, as 'it is not clear that a corporate entity under Australian law with a parent entity legally incorporated in a foreign country is intended to be treated as a foreign business'. The Council noted however that approximately 50 per cent of its members operate in Australia as an Australian branch office or Australian subsidiary of a foreign-incorporated general insurer.[163] The Insurance Council of Australia has 49 members.[164]

4.143 The Department responded to the recommendation for an additional exemption for representative and industry associations, the Department stated:

> The suggestion that has been made to exempt industry bodies would not support the transparency objectives of the scheme. An exemption for collective advocacy would allow the scheme to be too easily subverted and an organisation that actually represents foreign influences could avoid registration by also representing domestic industry views.[165]

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160 Australian Private Equity and Venture Capital Association, *Submission 18.1*, p. 1.

161 Financial Services Council, *Submission 18.3*, p. 1.

162 Australian Bankers' Association, *Submission 18.4*, pp. 1-2.

163 Insurance Council of Australia, *Submission 18.2*, p. 2.

164 Insurance Council of Australia, *Our Members*, <http://www.insurancecouncil.com.au/about-us/our-members> last accessed 26 February 2018.

165 Ms Anna Harmer, First Assistant Secretary, Security and Criminal Law Division, Attorney-General's Department, *Committee Hansard*, Canberra, 31 January 2018, p. 17.

Universities, academics and research activities

4.144 The Bill does not provide an exemption for universities, academics, or research institutes. This is contrasted to the broad exemption for activities done in furtherance of bona fide scholastic, academic or scientific pursuits or of the fine arts under FARA.[166]

4.145 The Committee received a number of submissions and evidence from witnesses expressing concern about the potential impact of the Bill on the higher education sector in Australia.[167] Concerns included that the Bill:

- has the potential to stifle innovation and academic research and compromise the ability of Australian universities to develop a philanthropic culture;[168]
- could severely limit Australian academics in their capacity to carry out essential and mandated activities, or provide expert advice in the public domain in response to legitimate public interest,[169] and
- may lead to unwelcome and unwanted impediments to scholarly collaboration and exchange.[170]

4.146 A number of submissions highlighted that international funding and collaboration is a vital and increasingly successful research model across a diverse range of fields, enabling Australian researchers and innovators access to facilities and expertise not available in Australia.[171] This research was described as injecting funds into the Australian economy, as well as enhancing the quality of life in Australia.[172] Universities Australia submitted:

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166 *Foreign Agents Registration Act 1938*, 22 U.S.C. § 613(f).

167 Universities Australia, *Submission 9*; Group of Eight, *Submission 11*; Professor Anne McLaren, Submission 22; Australian Academy of Science, *Submission 44*, p. 1; Australian Institute of International Affairs, *Submission 49*, p. 2; Ms Catriona Jackson, Deputy Chief Executive, Universities Australia, *Committee Hansard*, Canberra, 30 January 2018, pp. 70-79; Ms Vicki Thomson, Chief Executive, The Group of Eight, *Committee Hansard*, Canberra, 30 January 2018, pp. 70-79; Professor Andrew Vann, Deputy Chair, Universities Australia, *Committee Hansard*, Canberra, 30 January 2018, pp. 70-79.

168 Universities Australia, *Submission 9*, p. 1.

169 Group of Eight, *Submission 11*, p. 1.

170 Professor Anne McLaren, *Submission 22*, p. 1.

171 Universities Australia, *Submission 9*, p. 2.

172 The Group of Eight provided a number of examples of international research partnerships that have improved outcomes in Australia, including researchers on brain-machine interface

> International engagement and collaboration is not an optional extra in higher education and research. World-leading teaching relies on strong links with regional and global partners, ensuring that Australian universities provide both Australian and international students with globally-relevant skills and knowledge.[173]

4.147 As noted in Chapter 3, specific concerns were raised about the inclusion of the terms 'in collaboration with' and 'with funding or supervision' by a foreign principal in the proposed definition of 'on behalf of' at section 11 of the Bill. These terms were described as being the primary way through which universities and the research sector may be subject to the proposed registration requirements under the Bill.

4.148 Universities Australia recommended that the Bill be amended to exempt activities that are predominantly academic or scholastic in nature,[174] while the Group of Eight recommended the Bill exempt activities done for 'academic purposes.'[175] The Group of Eight recommended that 'academic purposes' be defined consistent with the proposed definition in the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017, which is:

> The bona fide publication or communication of:
> (a) research
> (b) an opinion
> (c) a comment, or
> (d) other activities
> in the context of a discipline in which the author has recognised expertise, or where the activity is undertaken in the fulfilment of a legitimate university purpose.

4.149 The Australian Institute of International Affairs also supported a general exemption for activities that are 'predominantly academic or scholastic in nature'.[176]

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technology that could be used to help para- and quadriplegics walk again; research on treatments for rheumatoid arthritis and research into cabin disease transmission (*Submission 11*, p. 2).

173 Universities Australia, *Submission 9*, p. 2.

174 Universities Australia, *Submission 9*, p. 2.

175 Group of Eight, *Submission 11*, p. 1.

176 Australian Institute of International Affairs, *Submission 48*, p. 2.

4.150 Similarly, the Australian Academy of Science expressed the view that 'without clearer exemptions the draft legislation would negatively impact on the conduct of research and on business innovation that relies on science and research'. The Academy stated that science is,

> international in nature. International collaboration—at an individual or institutional level, or with international agencies—is standard practice among scientists, and are critical for a small country such as Australia to access and benefit from knowledge generated by much larger programs of research around the world. International networks provide vital knowledge sharing, data, access to international scientific infrastructure, professional development, and research support. It is simply not possible to conduct scientific research in the modern era without an element of international collaboration.[177]

4.151 To address these concerns, the Australian Academy of Science recommended specific exemptions for:

- academic, scientific, scholarly and research activities;
- provision of scientific evidence for the purpose of informing public policy, and
- legitimate advocacy on behalf of visiting academics, international students and other groups, such as temporary workers.[178]

4.152 Universities Australia also noted that the 350 000 international students in attending Australian universities would meet the definition of a 'foreign principal'. The organisation noted that if a university was to make representation to government on their behalf, this could potentially become registrable conduct.

4.153 As a result, Universities Australia recommended that 'legitimate advocacy on behalf of international students and other vulnerable groups (such as temporary workers) be exempted'.[179] Professor Anne McLaren also recommended that the Bill exempt assistance provided by universities that relates to the well-being of students, some of whom may be foreign principals (as foreign individuals) for the purposes of the proposed Scheme.[180]

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177 Australian Academy of Science, *Submission 44*, p. 1.

178 Australian Academy of Science, *Submission 44*, p. 3.

179 Universities Australia, *Submission 9*, p. 7.

180 Professor Anne McLaren, *Submission 22*, p. 3.

4.154 In contrast to recommendations for a blanket exemption for the education sector, Professor McLaren submitted that Australia's higher education sector should only be given a limited exemption.[181] Professor McLaren stressed the importance of avoiding 'the perception that participants [the education sector] could potentially be suborned by funds or resources from foreign principals, or could be subject to pressure or intimidation by foreign players'.[182]

4.155 Professor McLaren submitted that an exemption should apply for activities that:

- are solely, or solely for the purposes of, the pursuit of bona fide academic collaboration; and
- are within the scope of regular academic exchange;[183] and
- involve the use of internal research funding; and
- do not involve the acceptance of foreign funds or resources for the establishment of centres or institutes, the provision of infrastructure, and the payment of salaries for academic or executive appointments.[184]

4.156 The Department noted that they had considered the concerns about the application of the scheme to academic activities, stating:

> Receipt of funding from foreign sources will not in and of itself be sufficient to trigger a registration requirement under the scheme. The scheme is not intended to capture bona fide or genuine academic pursuits undertaken in collaboration with foreign principals for academic purposes that are not for political influence.[185]

4.157 Responding to stakeholder's recommendations for a broad exemption for bona fide scholastic, academic, or scientific pursuits, the Department was of

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181 Professor Anne McLaren, *Submission 22*, p. 1.

182 Professor Anne McLaren, *Submission 22*, p. 2.

183 Professor McLaren described 'routine academic exchange' to include such things as a university inviting and funding a foreign scholar to visit Australia, or an Australian scholar accepting a funded post as visiting scholar in a foreign country for the purpose of scholarly exchange or research collaboration. It could also include funds to set up a conference involving foreign participants. Routine funding refers to funds that are provided within the scope of annual university research funding and does not generally come from non-university sources (*Submission 22*, p. 2).

184 Professor Anne McLaren, *Submission 22*, p. 2.

185 Ms Anna Harmer, First Assistant Secretary, Security and Criminal Law Division, Attorney-General's Department, *Committee Hansard*, 31 January 2018, p. 17.

the view that such an exemption 'is not appropriate in the Australian context'. It explained:

> Registration by academics and scholars, if undertaking registrable activities on behalf of a foreign principal for the purpose of political or governmental influence, would provide useful information to decision-makers and the public about the influences behind the positions being advanced by the academics or scholars in relation to a particular decision or process.[186]

Arts and cultural activities

4.158 The Bill does not provide an exemption for certain arts or cultural activities. As noted above, this is contrasted to the broad exemption for such activities done in furtherance of the fine arts under FARA.[187]

4.159 The Committee received submissions from the Australian Major Performing Arts Group (AMPAG) and the Chamber of Arts and Culture Western Australia.[188] Both submissions expressed concern regarding the application of the Bill to collaborations with foreign counterparts. AMPAG reasoned:

> The Bill potentially ensnares many federally funded arts organisations who develop international partnerships to contribute to Australia's artists vibrancy, international cultural exchange and diplomacy. … [The] Bill in its current form, will require every arts organisation in receipt of federal funding and engaged in international activities of any sort, to register and keep up to date every foreign principal along with details on the nature of that engagement in accordance with the Bill.[189]

4.160 The Chamber of Arts and Culture Western Australia provided similar commentary,[190] and explained how the Bill would capture such activities:

> The activities of Western Australian arts companies who collaborate with foreign arts companies or individuals (some of whom are also subsidised by their own government) under this Bill would, we believe, be considered as engaging in activities 'for the purpose of political or governmental influence'. This is because Section 12 of the Bill defines activities for the purpose of

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186 Attorney-General's Department, *Submission 5.1*, p. 8.

187 *Foreign Agents Registration Act 1938*, 22 U.S.C. § 613(e).

188 Australian Major Performing Arts Group, *Submission 37*; The Chamber of Arts and Culture, Western Australia, *Submission 54*.

189 Australian Major Performing Arts Group, *Submission 37*, p. 1.

190 The Chamber of Arts and Culture, Western Australia, *Submission 54*, p. 2.

political or governmental influence to include an activity that influences, directly or indirectly, any aspect (including the outcome) of, among other listed areas:

- 1(b) a process in relation to a federal government decision;

And this is further clarified:

- A federal government decision includes:
  - 3(d) Commonwealth entity (within the meaning of the *Public Governance, Performance and Accountability Act 2013*) or a subsidiary of a Commonwealth entity (within the meaning of that Act).[191]

4.161 Both organisations recommended an additional exemption to ensure arts and related cultural activities are excluded from the Scheme.[192] The Chamber of Arts and Culture, Western Australia argued that 'none of these activities are remotely connected to the hidden political influences that the Bill sets out to capture'.[193]

Application of exemptions to 'arrangements'

4.162 The Bill provides that a person is liable to register if they undertake activities on behalf of a foreign principal, or enters into registrable arrangements with a foreign principal. This would require a person to register under the Scheme where there is an agreement between the person and a foreign principal to undertake certain activities, but where those activities are not yet performed.[194]

4.163 The Office of the Australian Small Business and Family Enterprise Ombudsman noted that the proposed exemptions included in the Bill apply only to activities, and therefore would not be available to those persons who have arrangements but are yet to undertake activities.[195] The Ombudsman

191 The Chamber of Arts and Culture, Western Australia, *Submission 54*, pp. 5-6.

192 Australian Major Performing Arts Group, *Submission 37*, p. 2.

193 The Chamber of Arts and Culture, Western Australia, *Submission 54*, p. 7.

194 Proposed section 18.

195 Office of the Australian Small Business and Family Enterprise Ombudsman, *Submission 36*, p. 1.

recommended the extension of the exemptions to liable arrangements, or that the matter be clarified in the Explanatory Memorandum.[196]

4.164 In response to questions in writing from the Committee on this issue, the Department advised that the exemptions will apply 'regardless of whether a person has a registrable arrangement with a foreign principal or undertake registrable activities on behalf of a foreign principal'.[197] The Department sought to explain this interpretation:

> Consistent with section 18, a person is liable to register if the person enters a registrable arrangement with a foreign principal. A registrable arrangement is defined in section 10 to mean an arrangement between a person and a foreign principal for the person to undertake an activity that, if undertaken by the person, would be registrable in relation to the foreign principal. Therefore, an arrangement to undertake registrable activities enlivens the requirement to register for activities listed in sections 20, 21, 22 and 23 and the exemptions in Division 4.[198]

Committee comment

4.165 The Committee notes the following issues were raised regarding the availability of exemptions to the Scheme:

- the limited availability of the proposed humanitarian exemption such that only activities which solely relate to humanitarian assistance would be exempt, noting that often such assistance is provided to address other matters such as gender inequality;
- that the humanitarian exemption would only be available to respond to actual crises, conflict or civil unrest, despite that such assistance is often provided to avoid such cries;
- charities would be largely captured under the Scheme despite existing regulation under the *Charities Act 2013* that prevents registered charities from engaging in certain political activities;
- recommendations for an additional exemption to be provided that would exempt charities that are registered with the Australian Charities and Not-for-profit Commission from the Scheme;

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196 Office of the Australian Small Business and Family Enterprise Ombudsman, *Submission 36*, pp. 1-2.

197 Attorney-General's Department, *Submission 5.1*, p. 24.

198 Attorney-General's Department, *Submission 5.1*, p. 24.

- the narrow scope of the legal representation exemption to apply to representation in judicial, criminal or civil law enforcement inquiries, investigations or proceedings, and recommendations to exempt all legal representation on behalf of foreign principals;
- extending exemptions to other professions such as tax agents, medical professionals, or excluding from the definition of 'lobby' representations made in the normal course of professional services;
- whether consideration should be given to extend the diplomatic, consular and missions officers to other international organisations to which Australia is a member;
- concerns regarding the availability of the religious activities exemption should the heads of religion be captured by the definition of a foreign principal (whether that be a foreign government or an individual who is neither a citizen nor a permanent resident);
- the availability of the new media exemption particularly to broadcasters and the producers of content;
- the application of the Scheme to content distributed on social media platforms;
- the availability of the commercial or business pursuits exemptions and concerns that representative and industry associations would be required to register for each foreign principal;
- the application to universities, academics and research activities and recommendations for a broad exemption to that sector to enable international collaborations and representations on behalf of foreign students (as foreign principals), and
- the ambiguity of the availability of the exemptions to registrable arrangements with foreign principals (prior to activities being undertaken).

4.166 A number of these concerns are addressed by the Attorney General's proposed amendments. These proposed amendments are discussed in Chapter 9.

4.167 In Chapter 10 of this report, the Committee provides its comments and discusses areas where it considers further refinements may be made to address outstanding issues, improve the clarity and proportionality of the proposed measures, and to ensure adequate safeguards are provided.

5. Parliamentary privilege

Application of parliamentary privilege to registrable activities

5.1 This chapter considers the application and interaction parliamentary privilege with the proposed Scheme. The evidence and issues presented here do not take account of the amendments proposed by the Attorney-General that were provided to the Committee on 7 June 2018.

5.2 As noted in previous chapters, the Foreign Influence Transparency Scheme Bill (the Bill) establishes a range of registrable activities that will intersect with the workings of parliamentarians, including:

- *parliamentary lobbying*,[1] such that an person acting on behalf of a foreign public enterprise, foreign political organisation, foreign business or individual, engaging in that activity for the purpose of political or governmental influence, would be subject to the Scheme;[2]

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1 The Bill defines 'parliamentary lobbying' as lobbying both members of Parliament as well as staff employed under sections 13 and 20 of the *Members of Parliament (Staff) Act 1984* (Proposed section 10).

The Bill defines 'lobby' is defined to include representing the interests of a person 'in any process' and communicating 'in any way, with a person or a group of persons for the purpose of influencing any process, decision or outcome' (Proposed section 10).

2 Proposed section 21, Item 1.

- *communications activities*[3] in Australia, such that a person acting on behalf of any foreign principal, engaging in those activities for the purpose of political or governmental influence, would be subject to the Scheme;[4]
- *donor activity*[5] in Australia, such that a person acting on behalf of a foreign government, a foreign public enterprise or foreign political organisation, engaging in that activities for the purpose of political or governmental influence, would be subject to the Scheme.[6]

5.3 The Bill establishes that an activity will be for the purpose of 'political or governmental influence' if **a** purpose (whether or not there are other purposes) is to influence, directly or indirectly, any aspect (including the outcome) of a number of processes and proceedings. This includes proceedings of a House of the Parliament and a process in relation to a federal government decision such as decisions of Cabinet.[7]

5.4 Therefore the Bill seeks to regulate a wide range of activities of, and persons engaged with, the proceedings of parliament. It will require those engaged with the parliament—including, in some circumstances, members of Parliament themselves[8]—to register their name, the name of the foreign principal and the nature of the lobbying activities that will be undertaken. The Bill and Explanatory Memorandum makes clear that the intent of the Bill is to extend to all types of engagement with parliamentarians,[9] from appearing before a parliamentary committee, to meeting privately with an individual member of Parliament. This would encompass activities that many Australians may regard as 'their right' to engage with the Parliament

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3 The Bill provides that a person undertakes 'communications activities' if the person communicates or distributes information or material. Information or materials includes information or materials in any form, including oral, visual, graphic, written, electronic, digital and pictorial forms. (Proposed section 13).

4 Proposed section 21, Item 3.

5 The Bill defines 'donor activity' as activities where a person distributes money or things of value and neither the person nor the recipient of the disbursement is required to disclose it under Division 4, 5 or 5A of Part XX of the *Commonwealth Electoral Act 1918* (Proposed section 10).

6 Proposed section 21, Item 4.

7 Proposed section 12.

8 Ms Tara Inverarity, Assistant Secretary, Attorney-General's Department, *Private Committee Hansard*, Canberra, 16 February 2018, p. 4.

9 For example, Explanatory Memorandum, p. 73, para 396.

and members of parliament in policy making and to represent their views or business or professional interests.

5.5 For example, a professional association body that represents a foreign business would be required to register under the Scheme within 14 days of commencing parliamentary lobbying activities (including appearing before parliamentary committees) where that foreign business has engaged the association to lobby on their behalf.

5.6 As a result, the Bill's proposed regulation of interactions with members of Parliament may, in many circumstances, engage parliamentary privilege.

Parliamentary privilege and immunities

5.7 The term parliamentary privilege refers to special legal rights and immunities which apply to each House of the Parliament, its committees and Members.

5.8 Parliamentary privilege exists for the purpose of enabling the houses of the Parliament to carry out effectively their functions to inquire, to debate and to legislate.[10] At the Commonwealth level, the law of parliamentary privilege provides 'procedural and legal protections to those who participate in parliamentary proceedings'.[11]

5.9 In 2010, the Senate Committee of Privileges discussed the role of parliamentary privilege in the following terms:

> As a result of this principle, the Houses and committees, members and witnesses of the Parliament are able to operate without their proceedings being questioned or interfered with in any way. Any statutory provision which seeks to limit this freedom is therefore fundamentally obnoxious to this general principle. It would only be in the rarest and most extraordinary of cases that the Parliament would decide to set some limit on its own operations, and legislate so as to limit itself in some way.[12]

5.10 Appearing before the Committee in relation to this Bill, Mr Bret Walker SC noted that the purpose of parliamentary privilege is not 'a personal benefit' for parliamentarians, but rather the people:

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10 Clerk of the House of Representatives, *Submission 66*, p. 1.

11 Clerk of the Senate, *Submission 67*, p. 2.

12 Senate Committee of Privileges, *144th report – Statutory secrecy provisions and parliamentary privilege*, June 2010, paras 2.1-2.3; see also Clerk of the Senate, *Submission 67*, p. 2.

> It's not for the protection of the members. If it's seen as protection for the members then the whole endeavour is wasted. Privilege is not a personal benefit. It's for us, by which I mean the people, that you have the privilege. Seen in that light—and that's the traditional and contemporary understanding of the purpose of parliamentary privilege—an entrenchment on it is in reality a reduction in the efficacy of the system of parliamentary government, which is for the people, not the parliamentarians.[13]

5.11 Parliamentary privilege is derived from Article 9 of the United Kingdom's *Bill of Rights 1688*. It states that 'the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament'.[14] Article 9 therefore sets out three criteria for privilege to apply:

- 'proceedings in Parliament'; and
- the usage of the material must be for the purpose of 'impeaching or questioning'; and
- that questioning needs to be in 'any court or place outside of Parliament'.[15]

5.12 It was inherited by the Commonwealth Parliament in 1901 through section 49 of the Australian Constitution. The principle has been since codified in section 16 of the *Parliamentary Privileges Act 1987.* The Clerk of the Senate advised that section 16 of the *Parliamentary Privileges Act* 'represents only a partial codification of privilege'.[16] Mr Walker similarly advised that the *Parliamentary Privileges Act* does not lessen the protection of parliamentary privilege as existing prior to its enactment and is 'not exhaustive' as to the consequences of breaches of privilege.[17]

5.13 Employing the same language as the *Bill of Rights*, section 16 of the *Parliamentary Privileges Act* declares the scope of freedom of speech in 'parliamentary proceedings'.[18] The term 'parliamentary proceedings' is

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13 Mr Bret Walker SC, private capacity, *Committee Hansard*, Canberra, 16 February 2018, p. 5.

14 Article 9, *Bill of Rights 1688*; see also Clerk of the House of Representatives, *Submission 66*, p. 2.

15 Clerk of the House of Representatives, *Submission 66*, p. 2.

16 Clerk of the Senate, *Submission 67*, p. 3.

17 Mr Bret Walker SC, private capacity, *Committee Hansard*, Canberra, 16 February 2018, pp. 5-6.

18 Proceedings' are defined in subsection 16(2) of the *Parliamentary Privileges Act* as:

recognised as being drawn very broadly.[19] The practical effect of this is that those taking part in proceedings in Parliament enjoy absolute privilege.

5.14 In advice to the Committee, the Clerk of the Senate explained the potential scope of 'parliamentary proceedings' that may attract parliamentary privilege:

> Giving evidence to a parliamentary committee clearly comes within the definition and attracts the protection of privilege. A court will readily accept that such evidence should be excluded. For other actions, the connection to parliamentary business may be less certain and the question whether parliamentary privilege applies will depend on the individual circumstances of the case. … [For example,] tweeting support for a bill would not ordinarily be taken to be within the definition of 'proceedings in parliament'; petitioning a House, or making a submission to a parliamentary committee, in support of the same bill, would fall within the scope of that definition.[20]

5.15 The Clerk of the House of Representatives noted the limits of parliamentary privilege and that 'much of the records, correspondence and actions of parliamentarians do not fall within the definition of "proceedings in Parliament" and so would not enjoy any special protection'.[21] For example, the Clerk of the House of Representatives considered that this would not extend to constituency interactions where there is often no connection either direct or incidental with the business of a House or a parliamentary committee.[22]

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all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of a House or of a committee, and, without limiting the generality of the foregoing, includes:

(a) the giving of evidence before a House or a committee, and evidence so given;

(b) the presentation or submission of a document to a House or a committee;

(c) the preparation of a document for purposes of or incidental to the transacting of any such business; and

(d) the formulation, making or publication of a document, including a report, by or pursuant to an order of a House or a committee and the document so formulated, made or published.

19 Clerk of the Senate, *Submission 67*, p. 3.

20 Clerk of the Senate, *Submission 67* pp. 3-4.

21 Clerk of the House of Representatives, *Submission 66*, p. 2.

22 Clerk of the House of Representatives, *Submission 66*, p. 2.

5.16 Importantly, the Clerk of the House of Representatives advised the Committee that the two remaining criteria for privilege to apply, must also be satisfied: that the material must be used for the purpose of 'impeaching or questioning' and 'in any court or place out of Parliament'.[23]

5.17 In the contemporary setting, the Clerk of the Senate explained that 'a place out of Parliament' may be interpreted as including entities which can compel evidence so as to protect materials 'closely connected to the parliament from the use of coercive powers'. An example is in the execution of search warrants on members of Parliament and their staff.[24]

5.18 For some matters, the Parliament has developed procedures where the Executive seeks to exercise certain coercive powers, such as search warrants. A protocol between the Executive Government and the Commonwealth Parliament for the purpose of search warrants provides an 'appropriate level of procedural protection to parliamentarians and to material in their possession which is closely connected to parliamentary business'.[25] The Clerk of the Senate explained:

> These protections comprise an opportunity for parliamentarians to raise claims of privilege and a mechanism respecting the right of the relevant House to determine those claims. Material subject to a claim is temporarily withheld from investigation; material determined to be privileged is returned to the parliamentarian.[26]

Interaction of the Scheme with parliamentary privilege

5.19 The Parliament's powers, privileges and immunities are generally presumed not to be affected by legislation except by express intent.[27] It therefore follows that if a bill does not by express words affect those powers, privileges and immunities there 'is no need for a non-derogation clause (or savings provision) because the parliament's privileges are not disturbed'.[28]

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23 Clerk of the House of Representatives, *Submission 66*, p. 2.

24 Clerk of the Senate, *Submission 67*, p. 3.

25 Clerk of the Senate, *Submission 67*, p. 3.

26 Clerk of the Senate, *Submission 67*, p. 3.

27 Clerk of the House of Representatives, *Submission 66*, p. 4; Clerk of the Senate, *Submission 67*, p. 4; see also Professor Geoffrey Lindell, 'Parliamentary inquiries and government witnesses', *Melbourne University Law Review*, vol 20, 1995, p. 408.

28 Clerk of the Senate, *Submission 67*, p. 4.

5.20 The Department noted this presumption, and advised that 'there is no express intention [in the Bill] … to override privilege'.[29]

5.21 Nevertheless, Mr Walker advised the Committee that 'there's no doubt in my mind that these are provisions which … will successfully affect parliamentary privilege—cut it back in every case'.[30]

5.22 Although Mr Walker found it difficult to reach a view on whether an actual registration requirement in and of itself would engage privilege,[31] he was of the firm view that there were in the Bill serious implications for parliamentary privilege. He outlined that the most serious concerned the reporting and enforcement provisions.[32]

5.23 The Bill grants the Secretary powers to require a person whom the Secretary reasonably suspects is liable to register, to produce information that they should not be registered (proposed section 45).[33] Further the Secretary may require information of a third party that relates to the operation of the Scheme (proposed section 46).[34]

5.24 Mr Walker identified proposed section 46 as 'a very confronting section for the traditional view of parliamentary privilege'.[35] He explained that the power is likely to be used to verify the accuracy of a registrant's annual report on their activities of influence:

> It takes two to tango. So there's the person who has to put in the report about what he or she has done and there are the objects of that person's attempted influence. Those objects explicitly include parliamentarians and their staff.
>
> … [T]hen of course, under section 46 there is a power given to a member of the executive, under ministerial direction, to require a parliamentarian or a parliamentarian's staff to give their side or their version of a dealing by a lobbyist. It's for those reasons that, on any view, it is inescapable that it cuts into a kind of zone which in contemporary terms is really important[:] … the

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29 Ms Anna Harmer, First Assistant Secretary, Security and Criminal Law Division, Attorney-General's Department, *Private Committee Hansard*, Canberra, 16 February 2018, p. 5.

30 Mr Bret Walker SC, private capacity, *Committee Hansard*, Canberra, 16 February 2018, p. 2.

31 Mr Bret Walker SC, private capacity, *Committee Hansard*, Canberra, 16 February 2018, p. 6.

32 Mr Bret Walker SC, private capacity, *Committee Hansard*, Canberra, 16 February 2018, p. 1.

33 Proposed section 45.

34 Proposed section 46.

35 Mr Bret Walker SC, private capacity, *Committee Hansard*, Canberra, 16 February 2018, p. 2.

> capacity to be compelled to expose the dealings you have with somebody who comes to you and says, 'I have information which I believe is important to the public interest, and I want you, my local member, to consider raising it in the House.' That's right at the core of a contemporary—there's nothing 17th-century about that—concern of privilege.[36]

5.25 Mr Walker advised the Committee that, in his view, the Bill,

> … manifestly is intended to affect the scope of the immunity … that [parliamentarians] have from executive requirement or compulsion to disclose the content of dealings you have with people … for the purposes of or incidental to proceedings in parliament.[37]

5.26 The Clerk of the Senate agreed 'entirely' with Mr Walker's view that parts of the Bill are,

> … confronting to the traditional scope of privilege, particularly where coercive powers given to an executive office under the bill appear intended to operate in the parliamentary sphere.[38]

5.27 The Clerk of the House of Representatives was of the view that these issues extent beyond privilege and relate more to the separation of powers, namely to concerns about the intrusion of executive government into the affairs of the Parliament.[39]

5.28 The Clerk of the Senate advised:

> Proper recognition of the protection which should be afforded to parliamentary material is … warranted … given the overlap in conduct sought to be regulated by that scheme and the proceedings protected by privilege.[40]

5.29 The Clerk of the Senate noted the potential for conflict between the Scheme and parliamentary privilege. This was particularly so in situations where a parliamentary committee resolves to receive evidence in camera, or where parliamentarians receive information in confidence with the intention to raise matters in proceedings of a House or a committee.[41]

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36 Mr Bret Walker SC, private capacity, *Committee Hansard*, Canberra, 16 February 2018, p. 2.

37 Mr Bret Walker SC, private capacity, *Committee Hansard*, Canberra, 16 February 2018, pp. 3-4.

38 Clerk of the Senate, *Submission 67*, p. 1.

39 Clerk of the House of Representatives, *Submission 66*, p. 5.

40 Clerk of the Senate, *Submission 67*, p. 3.

41 Clerk of the Senate, *Submission 67*, p. 4.

5.30 Mr Walker also discussed circumstances in which interactions between parliamentarians could be captured under the Bill. Mr Walker recommended that the Bill clarify that it is not intended to apply to interactions between parliamentarians and their staff, describing such an obligation as 'absolutely ridiculous'.[42]

5.31 The Clerk of the House of Representatives concluded that although it may be unusual, 'one could envisage scenarios when all three aspects [of parliamentary privilege] could be engaged'.[43] The Clerk further noted that, although the circumstances would likely be infrequent, the Bill may lead to circumstances in which a possible contempt of parliament could arise as a result of the operation of the Bill amounting to an improper interference in the work of a parliamentarian.[44]

5.32 It was noted that, to the extent that the Bill does engage with parliamentary privilege in its design, the Parliament can legislate 'so as to entrench upon the extent of privilege already existing' and also to extend privilege.[45] Subject to the constraints of the Constitution, it is also possible for the Parliament to enact legislation which varies an existing right or immunity or create a new immunity. That is, within the framework set by the Constitution, it is within the competence of each House to expound the law of privilege and apply that law to the circumstances of each case as it arises.[46]

Potential amendments identified in evidence

5.33 The Clerk of the House of Representatives indicated that a savings clause, stating that the provisions do not override the operation of parliamentary privilege, could address some of these concerns. The Clerk also suggested that a supplementary explanatory memorandum to the Bill or Ministerial statement on the Bill clarifying the Parliament's intent on the supremacy of privilege may be useful.[47]

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42 Mr Bret Walker SC, private capacity, *Committee Hansard*, Canberra, 16 February 2018, p. 2.

43 Clerk of the House of Representatives, *Submission 66*, p. 3.

44 Clerk of the House of Representatives, *Submission 66*, p. 3.

45 Mr Bret Walker SC, private capacity, *Committee Hansard*, Canberra, 16 February 2018, p. 1.

46 *House of Representatives Practice*, 6th Edition, pp. 734-735.

47 Clerk of the House of Representatives, *Submission 66*, p. 4.

5.34 Mr Walker cautioned that a savings provision may lead to further interpretive arguments and so not resolve satisfactorily the tensions of the Bill with parliamentary privilege. As the Bill intends to apply to the business of parliamentarians,[48] Mr Walker advised that an amendment that asserted that it was not intended to affect parliamentary privilege will likely 'produce an argument of a kind which, unfortunately, will end up in a court'.[49]

5.35 Additionally, Mr Walker outlined the inherent tension that parliamentary privilege has with the judiciary, which is further challenged if the Bill's provisions put 'parliamentary proceedings' before the courts for adjudication:

> The really important thing about parliamentary privilege is that at the moment it is characterised by a tension, unresolved in detail, between the courts and the houses, and that's a good thing. The more you legislate, the more you dissolve that tension and hand all the power to the courts.[50]

5.36 The Clerk of the Senate similarly contended:

> While purists might argue that the language does not of necessity affect privilege, it certainly raises doubts as to the parliament's intentions here. Those doubts are unlikely to be answered by a savings provision – a provision that legislation does not affect the powers, privilege and immunities of the Houses, their committees and members – because the bill deals directly with the conduct of members, and contains provisions which may be used to compel the production of information which may form part of 'proceedings in parliament'. … A presumption that privilege is not affected, or a savings provision to that effect, is no answer here.[51]

5.37 In providing that advice, the Clerk of the Senate outlined possible approaches to amendments that would preserve parliamentary privilege, namely, that:

- an additional exemption be included in Part 2 Division 4 of the Bill for material that forms part of proceedings as defined in the *Parliamentary Privileges Act*, noting that this would also remove reporting requirements; and

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48 Mr Bret Walker SC, private capacity, *Committee Hansard*, Canberra, 16 February 2018, p. 2.

49 Mr Bret Walker SC, private capacity, *Committee Hansard*, Canberra, 16 February 2018, p. 7.

50 Mr Bret Walker SC, private capacity, *Committee Hansard*, Canberra, 16 February 2018, p. 7.

51 Clerk of the Senate, *Submission 67*, pp. 4-5.

- a provision that would 'curb' the power of the Secretary to require information where that information forms part of proceedings in parliament, so that these powers are exercised subject to similar procedures as exist in search warrant protocols.

5.38 Responding to the Clerk of the Senate's first proposal, the Clerk of the House of Representatives advised that he had 'no objection' to the proposal if … it is considered the most effective way of achieving the objective'.[52]

5.39 In regards to the second possible amendment, the Clerk of the Senate explained that a provision curbing the Secretary's powers would enable parliamentarians to,

> … raise any claims of privilege in respect of section 46 (or other) notices directed to them or their staff, and respecting the right of the relevant House to determine such claims. The search warrant protocol operates in accordance with an MOU [Memorandum of Understanding] between the Executive Government and the Presiding Officers.[53]

5.40 The Clerk of the House of Representatives, in a supplementary submission, similarly advised that 'an appropriate framework for the protection of parliamentary privilege' be developed.[54] Such a framework would be a matter for the Houses to determine what steps to take to enhance transparency in relation to parliamentary proceedings.[55]

5.41 The Clerk of the House of Representatives also proposed a protocol could be agreed between the Presiding Officers and the relevant Minister, modelled on the execution of search warrants processes. The Clerk noted:

> This could operate specifically to protect records that may fall within the ambit of 'proceedings in Parliament' and which may be subject to notices requiring information to be provided under clauses 45 and 46 of the Bill and subject to penalty provisions under clause 59.[56]

5.42 To the extent that parliamentary privilege is engaged, both Clerks supported opportunities for the respective Privileges Committees of both Houses to be

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52 Clerk of the House of Representatives, *Submission 66.1*, p. 1.

53 Clerk of the Senate, *Submission 67*, p. 5.

54 Clerk of the House of Representatives, *Submission 66.1*, p. 1.

55 Clerk of the Senate, *Submission 67*, p. 6.

56 Clerk of the House of Representatives, *Submission 66*, p. 5.

consulted in the development of an appropriate framework for achieving the Bill's transparency objectives where privilege is engaged.[57]

5.43 Mr Walker also supported a process by which privileged matters and claims of parliamentary privilege were received and managed by the Parliament, as opposed to a court determination on the application of the *Parliamentary Privileges Act* to the relevant sections of the Bill.[58] In supporting internal governance by the Houses of these matters,[59] Mr Walker stated that 'courts of law are not the best places for the subtleties, the political significance and the social importance of parliamentary privilege to be worked out'. He stated:

> [W]hen it comes to matters of parliamentary privilege and immunities, which will often be in relation to torts and crimes, bright lines have to exist. It's not for courts to invent. I can't urge you too much that the houses of parliament have a unique capacity to promulgate their own governance. Standing orders are just one way they do it. If you want to entrench upon, by which I mean reduce the scope of parliamentary privilege, may I suggest that you keep that within your own grasp always by having it imposed by each chamber's internal governance. The sanction is pretty tremendous that would be visited against a member who knowingly omitted to cooperate with the house's own officers acting under the authority of the house through its presiding officer in requesting, for example, details of foreign lobbyists that called on you last year in order to check whether the foreign lobbyists had in turn complied with their obligations to do so.[60]

5.44 At a hearing, the Department stated that it had not considered in detail the application of parliamentary privilege to the Bill, nor had it consulted with the clerks of either house.[61] In response to questions taken on notice from that hearing, the Department advised:

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57 Clerk of the House of Representatives, *Submission 66.1*, p. 1; Clerk of the Senate, *Submission 67*, p. 6.

58 Mr Bret Walker SC, private capacity, *Committee Hansard*, Canberra, 16 February 2018, p. 4.

59 Mr Bret Walker SC, private capacity, *Committee Hansard*, Canberra, 16 February 2018, p. 7.

60 Mr Bret Walker SC, private capacity, *Committee Hansard*, Canberra, 16 February 2018, p. 5.

61 Ms Tara Inverarity, Assistant Secretary, Attorney-General's Department, *Private Committee Hansard*, Canberra, 16 February 2018, p. 4; Ms Anna Harmer, First Assistant Secretary, Security and Criminal Law Division, Attorney-General's Department, *Private Committee Hansard*, Canberra, 16 February 2018, p. 6.

> There is no intention to abrogate parliamentary privilege, or any other privilege, by virtue of the information-gathering powers [of the Secretary]. ... The Bill does not include any search, seizure or covert powers that would potentially interfere with a person's ability to raise a claim of privilege prior to the information or documents being accessed or obtained.[62]

5.45 The Department stated that as with other intrusive powers such as search warrants, 'it would be open to the Attorney-General to enter into a protocol with the Presiding Officers to ensure that information-gathering powers under the Scheme do not improperly interfere with the functioning of Parliament'.[63] The Department also identified other existing savings provisions in Commonwealth legislation that the Committee was open to consider, seeming to suggest that even though the Bill had been drafted without one, the policy intent could be adapted to accommodate such a provision if recommended.[64]

5.46 At a later hearing, the Department advised that 'an amendment may be required to restrict the secretary's powers to request information where it forms part of proceedings in Parliament. That would address the issues that have been raised'.[65]

5.47 Although the Department 'did not intend to override parliamentary privilege',[66] it stated that the intention is for the Scheme to apply to parliamentarians. In response to questions regarding the Scheme's application to members of Parliament, the Department stated:

> The express intention of the bill is that in circumstances where there is a registrable activity on behalf of a foreign principal that would require registration. The exclusion that we would propose is to not require the production of material that would be subject to parliamentary privilege.[67]

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62 Attorney-General's Department, *Submission 5.2*, pp. 1-2.

63 Attorney-General's Department, *Submission 5.2*, p. 2.

64 Attorney-General's Department, *Submission 5.2*, p. 2.

65 Ms Anna Harmer, First Assistant Secretary, Security and Criminal Law Division, Attorney-General's Department, *Committee Hansard*, Melbourne, 16 March 2018, pp. 36, 55-56.

66 Ms Anna Harmer, First Assistant Secretary, Security and Criminal Law Division, Attorney-General's Department, *Committee Hansard*, Melbourne, 16 March 2018, p. 55.

67 Ms Anna Harmer, First Assistant Secretary, Security and Criminal Law Division, Attorney-General's Department, *Committee Hansard*, Melbourne, 16 March 2018, p. 56.

5.48 It was not clear from the evidence provided whether such an amendment would be in addition to, or instead of, a savings provision (which could operate to exempt members of Parliament entirely from registration), and accompanying protocols between the Attorney-General and Presiding Officers.

Committee comment

5.49 The Committee notes the following issues were raised regarding the interaction of the Bill with parliamentary privilege:

- it is only in the rarest and most extraordinary of cases that the Parliament would decide to set some limit on its own operations, and the purpose of parliamentary privilege is not a personal benefit for parliamentarians, but rather the people they represent;
- the Parliament's powers, privileges and immunities are generally presumed not to be affected by legislation except by express intent, however, the clear intent of the Bill is to engage with the Parliament's proceedings and therefore a court may perceive that the Parliament is seeking to regulate its own operations;
- the ability for an officer of the Executive to issue a notice to a parliamentarian with fear of criminal sanction, conflicts with parliamentary privilege;
- possible amendments to clarify the primacy of parliamentary privilege include:
  - a savings provision, though this may be insufficient were a court be required to determine the application of parliamentary privilege to information or activities conducted;
  - a provision that would 'curb' the power of the Secretary to require information where that information forms part of proceedings in parliament, so that these powers are exercised subject to similar procedures as exist in search warrant protocols.

5.50 A number of these concerns are addressed by the Attorney General's proposed amendments. These proposed amendments are discussed in Chapter 9.

5.51 In Chapter 10 of this report, the Committee provides its comments and discusses areas where it considers further refinements may be made to address outstanding issues, improve the clarity and proportionality of the proposed measures, and to ensure adequate safeguards are provided.

6. Registrants' obligations and operation of the Scheme

6.1 Preceding chapters of this report examined the circumstances in which a person would be liable to register under the Foreign Influence Transparency Scheme (the Scheme). This chapter will examine obligations once liability exists and how the Scheme will operate and be administered by the Secretary.

6.2 The evidence and issues presented here do not take account of the amendments proposed by the Attorney-General that were provided to the Committee on 7 June 2018.

Registration and responsibilities

The process of registration

6.3 A person would become liable in relation to a foreign principal if the person,

- undertakes an activity on behalf of a foreign principal that is registrable in relation to the foreign principal, or
- enters a registrable arrangement with a foreign principal (an arrangement to undertake an activity that would be registrable).[1]

[1] Proposed section 18(1).

6.4 The onus is on the person to determine whether or not the activity or arrangement is being undertaken for the purpose of political or governmental influence.[2]

6.5 The Committee questioned whether the Department would develop and publish guidance on its website, or provide advice through other means, so that potential registrants could be more aware of their obligations. Further, the Committee asked whether this information would be available prior to the date at which the Scheme was operational.

6.6 The Department provided the following response:

> Upon passage of the Bill, the department will develop guidance material and an education and outreach program. Guidance material will be available online. The Department also intends to provide support to persons who are unsure if they need to register under the Scheme. The Bill provides that the Scheme will commence on a date to be proclaimed within twelve months of the Act receiving Royal Assent (section 2). This is to allow sufficient time to establish the administrative and other arrangements that will support the operation of the Scheme. It is intended that guidance materials would be uploaded onto the department's website during this time. Education and outreach activities would also occur during this time.[3]

6.7 A person must apply to the Secretary no later than 14 days after becoming liable to register.[4]

6.8 A person would be liable to register for each foreign principal with whom they have a registrable arrangement or on whose behalf they undertake registrable activities.[5] The Explanatory Memorandum provides the following example:

> If a person undertakes registrable activities on behalf of foreign principal X on 1 January 2020, that person must apply for registration in relation to foreign principal X by 15 January 2020. However, if the same person also undertakes registrable activities on behalf of foreign principal Y on 10 January 2020, they

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2 Attorney-General's Department, *Submission 5.1*, p. 28.

3 Attorney-General's Department, *Submission 5.1*, pp. 38-39; see also Ms Tara Inverarity, Assistant Secretary, Attorney General's Department, *Committee Hansard*, Melbourne, 16 March 2018, p. 51; Ms Anna Harmer, First Assistant Secretary, Security and Criminal Law Division, Attorney-General's Department, *Committee Hansard*, Melbourne, 16 March 2018, p. 51.

4 Proposed section 16(1).

5 Proposed section 16(1); Explanatory Memorandum, p. 45, para 224; Attorney-General's Department, *Submission 5.1*, p. 41.

must also complete a separate application for registration in relation to foreign principal Y by 25 January 2020.[6]

6.9 Applications for registration must be in writing and accompanied by any information or documents required by the Secretary.[7] The Bill does not specify what information would be required for registration, for example: the person's name, the foreign principal's name, the nature of activities, or any other information. It is understood these matters will be prescribed in regulations.

6.10 In response to questions from the Committee, the Attorney-General's Department (the Department) advised that the information that a registrant 'is likely to be required to provide' includes the following:

- the name of the person and general details (address, occupation, citizenship status and any prior government employment, including position and term of employment);
- the name of the foreign principal and general details (contact details, nationality, type of foreign principal and general description of business/activities);
- high level details of the nature of the relationship between the registrant and the foreign principal (for example, whether there is a contract in place, an informal agreement or otherwise) and whether the person has received / is receiving financial benefits from the foreign principal, and
- issues of interest which the registrant intends to pursue on behalf of the foreign principal (such as environmental issues, defence contracts, a particular vote or policy).[8]

6.11 A registration fee will apply to new registrations and annual renewal of registration.[9] The Bill does not specify a registration fee amount, rather this will be provided in regulations.

6.12 Foreign Influence Transparency Scheme (Charges Imposition) Bill 2017 (the Charges Imposition Bill) was introduced by the Prime Minister on the same day as the present Bill. The Charges Imposition Bill proposes that the

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6 Explanatory Memorandum, p. 45, para 224.

7 Proposed section 16.

8 Attorney-General's Department, *Submission 5.1*, p. 38.

9 Proposed section 63.

amount will be prescribed by regulation, which may do any or all of the following:

- prescribe an amount or a method for working out an amount;
- prescribe different amounts or methods for different circumstances, or
- prescribe a nil amount for prescribed circumstances.[10]

6.13 In answers to questions in writing from the Committee, the Department advised that 'a small fee will apply to the reporting requirement' which it anticipates will be less than that charged for registration under the United States' *Foreign Agents Registration Act* (FARA), (US$305 for the initial filing and for each mandatory-supplemental statement).[11] However, on another occasion, the Department advised the Committee that the fee applicable in the United States is US$610.[12]

6.14 In another answer to question in writing, the Department advised that 'fees will be charged for initial registration and annual renewal of registration, not in relation to keeping records'.[13]

Registrants responsibilities

6.15 A person will be registered from the day a valid application is given to the Secretary.[14]

6.16 Once registered, a registrant will be required to give the Secretary notice:

- if there is a material change in the person's circumstances (such as starting to undertake another kind of registrable activity) within 14 days of the change;[15]
- if the person undertakes 'donor activity' on behalf of a foreign principal for the purpose of political or governmental influence, and the total value of the money or things of value disbursed during that activity reaches the 'electoral donations threshold' within 14 days of the activity;[16]

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10 Foreign Influence Transparency Scheme (Charges Imposition) Bill 2017, proposed section 6.

11 Attorney-General's Department, *Submission 5.1*, p. 39.

12 Attorney-General's Department, *Submission 5*, p. 8.

13 Attorney-General's Department, *Submission 5.1*, p. 21.

14 Proposed section 18.

15 Proposed section 34.

16 Proposed section 35.

- confirming or updating the person's registration if a voting period begins for a federal election (other than a by-election) or for a designated vote within 14 days of the issuing of the writs,[17] and
- if the person undertakes certain activities on behalf of a foreign principal at any time during the voting period for a federal election (other than a by-election) or for a designated vote, where the activity relates to that election or vote. Such a notice will be required within seven days of the activity.[18]

6.17 A registrant will be required to make a disclosure if the person undertakes communications activity on behalf of a foreign principal for the purpose of political or governmental influence.[19] Regulations will provide that the rules may prescribe instances of communications activity, when and how disclosures are to be made, the content, form and manner of disclosures, and circumstances in which a person is exempt from making a disclosure.[20]

6.18 Registrants will be required to either renew their registration each year or give the Secretary a notice advising of end of liability to register before the end of the renewal period each year.[21]

6.19 As noted above, a fee will be charged for renewal of registration.[22]

6.20 Registrants will be required to keep records of particular matters, including registrable activities and information or material forming communications activity, while registered under the Scheme and for five years afterwards.[23]

6.21 The following records must be kept for that period:

- registrable activities that a person undertakes on behalf of a foreign principal;
- benefits provided to the registrant by the foreign principal;
- information or material forming part of any communications activity that is registrable in relation to the foreign principal;

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17 Proposed section 36.

18 Proposed section 37.

19 Proposed section 38.

20 Proposed section 71.

21 Proposed section 39.

22 Proposed section 63.

23 Proposed section 40.

- any registrable arrangement between the person and the foreign principal, and
- any other information or material communicated or distributed in Australia on behalf of the foreign principal.[24]

6.22 The Bill proposes a number of offences for conduct in relation to records. This is discussed further in Chapter 7.

6.23 The Explanatory Memorandum states that the recording keeping obligation,

> … supports the transparency objectives of the scheme by ensuring that current and accurate information is maintained in relation to arrangements or activities undertaken on behalf of foreign principals.[25]

6.24 Further, it provides that the requirement to maintain records for a five-year period following the end of registration is 'intended to ensure that any investigations or prosecutions under the scheme are not undermined'. The Explanatory Memorandum states:

> Activities undertaken on behalf of a foreign principal within the last five years may also continue to have implications for decision-making and public policy in Australia. It is important that such records are not destroyed, and there is an ability for the Secretary or law enforcement to be able to request or obtain access to this information.[26]

6.25 A person will cease to be liable to register where they have provided a notice to the Secretary to that effect, and where no registrable arrangement exists with a foreign principal.[27] The notice to the Secretary must be in writing and accompanied by any documents required by the Secretary.[28]

Stakeholder concerns

6.26 A large number of organisations expressed significant concerns regarding the administrative burden on registrants proposed by the Bill.[29] Broadly, these concerns were in regards to:

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24 Proposed section 40(2).

25 Explanatory Memorandum, p. 88, para 492.

26 Explanatory Memorandum, p. 89, para 494.

27 Proposed section 19.

28 Proposed section 31.

29 Australian Financial Markets Association, *Submission 3*, pp. 4-5; Law Firms Australia, *Submission 10*, p. 7; Australian Professional Government Relations Association, *Submission 13*, p. 9; Financial

- initial process of registration (scope of information that might be required to register, and the imposition of registration fees and annual renewals);
- ongoing reporting obligations (exposure of sensitive information and potential frequency of updates to material changes), and ongoing record keeping obligations (capturing a vast array of information and communications);
- absence of a publicly-available Regulatory Impact Statement, and
- duplication of existing regulation under the Lobbying Code of Conduct and Register of Lobbyists.

6.27 Each of these concerns is addressed below.

Concerns regarding initial registration

6.28 As noted above, the Bill does not specify what information will be required of liable persons upon registration. It is understood these matters will be prescribed in regulations. In the absence of a list of required information contained in the primary legislation, Law Firms Australia was concerned that the obligation to provide information at registration 'is potentially a very burdensome provision'.[30]

Services Council, *Submission 16*, pp. 2-3; Australian Bankers' Association, Australian Private Equity & Venture Capital Association, Financial Services Council and Insurance Council of Australia, *Submission 18*, p. 2; Foxtel, *Submission 27*, pp. 1, 3-4; Australian Charities and Not-for-profit Commission, *Submission 33*, pp. 5-6; Australian Major Performing Arts Group, *Submission 37*, p. 1; Social Ventures Australia, *Submission 42*, p. 1; Australian Academy of Science, *Submission 44*, p. 2; Justice Connect, *Submission 50*, pp. 6-7; The Chamber of Arts and Culture Western Australia, *Submission 54*, p. 3; Australian Council for International Development, *Submission 55*, p. 3; Network Ten, *Submission 56*, p. 1; WWF-Australia, *Submission 58*, p. 2; Federation of Ethnic Communities' Councils of Australia, *Submission 59*, pp. 2-3; 350.org Australia, *Submission 62*, p. 1; Mr David Crosbie, Chief Executive Officer, Community Council for Australia, *Committee Hansard*, Canberra, 30 January 2018, pp. 1-2; Mrs Suzanne Greenwood, Chief Executive Officer, Catholic Health Australia, appearing for the Australian Catholic Bishops Conference, *Committee Hansard*, Canberra, 30 January 2018, p. 12; Dr Craig Latham, Deputy, Office of the Australian Small Business and Family Enterprise Ombudsman, *Committee Hansard*, Canberra, 30 January 2018, p. 15; Mr David Lynch, Chief Executive Officer, Australian Financial Markets Association, *Committee Hansard*, Canberra, 30 January 2018, p. 20; Mr Les Timar, President, Australian Professional Government Relations Association, *Committee Hansard*, Canberra, 30 January 2018, pp. 29, 32; Mr Mitch Hiller, Executive Director, Law Firms Australia, *Committee Hansard*, Canberra, 30 January 2018, p. 35; Mr Morry Bailes, President, Law Council of Australia, *Committee Hansard*, Canberra, 30 January 2018, p. 42; Professor Andrew Vann, Deputy Chair, Universities Australia, *Committee Hansard*, Canberra, 30 January 2018, p. 76.

30 Law Firms Australia, *Submission 10*, p. 7.

6.29 Concerns were also raised regarding the imposition of registration fees. The Salvation Army and Justice Connect recommended that charities—where they would not qualify for an exemption—be exempt from the imposition of registration fees.[31] Justice Connect noted that 'increased regulation and compliance costs mean less time and money spent on achieving purpose—which brings with it reduced benefit to the public'.[32]

6.30 In questions in writing, the Committee proposed such an exemption for charitable and not-for-profit organisations. The Department provided the following answer:

> All registrants will be liable to pay a fee for initial registration and renewal of registration under the Foreign Influence Transparency Scheme (Charges Imposition) Bill 2017, but there is flexibility in relation to the amount of charges payable under the Scheme. … The regulations [may] prescribe a nil amount in certain circumstances allows for flexibility in a situation where there are special circumstances, or where it is otherwise not appropriate to charge under the Scheme for a certain activity.[33]

Ongoing reporting and record keeping obligations

6.31 The ongoing reporting and record keeping obligations proposed in the Bill attracted significant criticisms by a large number of stakeholders.[34] For example, the Australian Professional Government Relations Association (APGRA) described these obligations as 'highly burdensome'.[35]

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31 The Salvation Army, *Submission 49*, p. 9; Justice Connect, *Submission 50*, p. 3;

32 Justice Connect, *Submission 50*, p. 7.

33 Attorney-General's Department, *Submission 5.1*, p. 39.

34 Australian Financial Markets Association, *Submission 3*, pp. 4-5; Law Firms Australia, *Submission 10*, p. 7; Australian Professional Government Relations Association, *Submission 13*, p. 9; Financial Services Council, *Submission 16*, pp. 2-3; Australian Bankers' Association, Australian Private Equity & Venture Capital Association, Financial Services Council and Insurance Council of Australia, *Submission 18*, p. 2; Foxtel, *Submission 27*, pp. 1, 3-4; Australian Charities and Not-for-profit Commission, *Submission 33*, pp. 5-6; Australian Major Performing Arts Group, *Submission 37*, p. 1; Social Ventures Australia, *Submission 42*, p. 1; Australian Academy of Science, *Submission 44*, p. 2; Justice Connect, *Submission 50*, pp. 6-7; The Chamber of Arts and Culture Western Australia, *Submission 54*, p. 3; Australian Council for International Development, *Submission 55*, p. 3; Network Ten, *Submission 56*, p. 1; WWF-Australia, *Submission 58*, p. 2; Federation of Ethnic Communities' Councils of Australia, *Submission 59*, pp. 2-3; 350.org Australia, *Submission 62*, p. 1.

35 Australian Professional Government Relations Association, *Submission 13*, p. 9.

6.32 Law Firms Australia described the reporting obligations as 'particularly onerous' for law firms, explaining changes to costs agreements can be a 'regular occurrence' and the Bill would require reporting of all increases in estimates and cost agreements. It questioned how providing such information 'increases transparency with respect to foreign influence on governmental, parliamentary or political affairs'. The organisations noted that reporting 'should only be as great as to ensure that information necessary to reveal covert foreign influence is provided'.[36]

6.33 Foxtel also expressed concern regarding proposed obligations to report on registrable 'communications activities', noting that the burden would also in effect, apply to the state-owned channels providing the broadcaster with content. Foxtel was of the view that reporting obligations were so vast that they would have commercial and supply implications:

> Given the sheer volume of content on the Foxtel platforms, Foxtel cannot monitor each program put to air on supplied channels, nor do we have the expertise in international relations to recognise where an attempt at influence may be occurring. … Even were Foxtel to request the state owned channels notify us of content and the intentions behind it, it is likely the channels would deem this to be so burdensome as to call into question the worth of supplying the channels into Australia. Foxtel may also come to the same conclusion, given the uncertainties in the Bill, the burdensome compliance requirements and the substantial consequences of breach (which are strict liability provisions).[37]

6.34 A number of stakeholders also expressed specific concern about the record keeping obligations.[38] For example, the Australian Financial Markets Association (AFMA) was of the view that the Bill would require detailed record keeping of telephone calls, in person conversations and other ephemeral communications, even where initiated by a government official. AFMA continued, noting the relevant offence and the costs of compliance:

> Many if not all of our activities are captured by the concept of acting on behalf of a foreign business and will be the subject of national security surveillance. Failure to meet the record keeping requirement is subject to a strict liability

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36 Law Firms Australia, *Submission 10*, p. 7.

37 Foxtel, *Submission 27*, p. 3.

38 For example: Australian Financial Markets Association, *Submission 3*, pp. 4-5; Law Firms Australia, *Submission 10*, p. 7; Australian Professional Government Relations Association, *Submission 13*, p. 9; Financial Services Council, *Submission 16*, pp. 2-3.

> offence with a penalty of $12,600. … AFMA will need to look at acquiring a costly … information management system of the type that would not normally be needed or warranted by the scale of a small not-for-profit organisation with minimal resources.[39]

6.35 At a public hearing, AFMA expanded on its concerns noting that as a professional industry body, it acts on 'an ongoing basis over many years' for the same organisations, some of whom would be foreign principals. The Association was of the view that the record keeping obligations in such relationships would amount to a 'semi-perpetual record-keeping obligation under this legislation'.[40] AFMA questioned whether the record-keeping to the level required in the Bill was necessary to achieve the Bill's transparency objective.[41]

6.36 The Committee questioned whether the Department had considered the impact of the Bill's proposed record keeping obligations on business and particularly, the not-for-profit sector. The Department submitted:

> The existence of adequate records is essential to the effective administration of the Scheme and will allow for appropriate investigations into potential non-compliance with the Scheme. To achieve the transparency objectives of the Scheme, certain information relating to a person's registration must be collected.[42]

6.37 The Department was of the view that the record keeping obligations 'strike an appropriate balance between the impact on business and the need for records to be kept to uphold the effective administration' of the Scheme.[43] The Department indicated that it would develop guidance materials to assist registrants identify the types of records they will need to keep for the purposes of the Scheme, prior to the Scheme's commencement.[44]

6.38 While a large number of stakeholders expressed concerns at what they saw as a significant and ongoing regulatory burden arising from their day-to-day

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39 Australian Financial Markets Association, *Submission 3*, pp. 4-5.

40 Mr David Love, General Counsel and International Adviser, Australian Financial Markets Association, *Committee Hansard*, Canberra, 30 January 2018, p. 22.

41 Mr David Love, General Counsel and International Adviser, Australian Financial Markets Association, *Committee Hansard*, Canberra, 30 January 2018, p. 25.

42 Attorney-General's Department, *Submission 5.1*, p. 40.

43 Attorney-General's Department, *Submission 5.1*, p. 41.

44 Attorney-General's Department, *Submission 5.1*, p. 40.

activities, the Department described the Bill as imposing a 'small regulatory burden'. It further advised:

> The scheme has been designed, to the extent compatible with the transparency objectives, to minimise the burden on registrants, requiring limited information upfront coupled with the power to seek supplementary information in the event that it is required.[45]

Regulatory Impact Statement

6.39 Regulatory Impact Statements (RIS) set out matters including how many individuals and organisations are expected to be impacted by a regulatory scheme and the estimated costs for them of complying with that regulation. Contrary to regular practice, a RIS has not been published on the Bill.

6.40 WWF-Australia recommended that a detailed RIS be completed, stating 'the full impact and compliance costs of any changes can then be properly assessed and considered, and charities can be properly excluded from any amendments which should not apply to them'.[46] The Australian Charities and Not-for-Profit Commission made a similar recommendation.[47]

6.41 The Committee sought clarification from the Department as to why a RIS was not included in the Explanatory Memorandum. The Department submitted the following answer:

> The regulatory impacts of the Scheme were carefully considered by the Government when determining the scope of the Scheme.[48]

Interaction with the existing regulation

6.42 Some stakeholders clarified the apparent duplication with the existing Lobbying Code of Conduct (the Code) and associated Register of Lobbyists (Lobbyist Register) as administered by the Department of the Prime Minister and Cabinet.[49]

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45 Ms Anna Harmer, First Assistant Secretary, Security and Criminal Law Division, Attorney-General's Department, *Committee Hansard*, Canberra, 31 January 2018, p. 17.

46 WWF-Australia, *Submission 58*, p. 2.

47 Australian Charities and Not-for-profit Commission, *Submission 33*, p. 6.

48 Attorney-General's Department, *Submission 5.1*, p. 39.

49 Australian Financial Markets Association, *Submission 3*, p. 5; Australian Professional Government Relations Association, *Submission 13*, p. 2

6.43 For example, AFMA was concerned that the Scheme's interaction with the existing Code and Lobbyist Register is not clear:

> Why is it administratively efficient to run two parallel registers which have the same objective of providing transparency in public administration? It is also very confusing to the public unfamiliar with the Australian Government's complex organisation to have to search on two different registers. This increases opacity rather than transparency to the public.[50]

6.44 Similarly, the APGRA was of the view that 'the Scheme duplicates many of the requirements already set out in the Australian Government's Lobbying Code of Conduct and associated Register'.[51]

6.45 The Code and Lobbyist Register was introduced in 2008 to ensure 'that contact between lobbyists and Commonwealth Government representatives is conducted in accordance with public expectations of transparency, integrity and honesty'.[52]

6.46 The Lobbyist Register contains the following information about lobbyists who make representations to Government on behalf of their third-party clients:

- the business registration details and trading names of each lobbying entity including, where the business is not a publicly listed company, the names of owners, partners or major shareholders, as applicable;
- the names and positions of persons employed, contracted or otherwise engaged by the lobbying entity to carry out lobbying activities, and
- the names of clients on whose behalf the lobbying entity conducts lobbying activities.[53]

6.47 In February 2018, the Australian National Audit Office (ANAO) tabled a performance audit of the management of the Register of Lobbyists in the

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50 Australian Financial Markets Association, *Submission 3*, p. 5; Australian Professional Government Relations Association, *Submission 13*, p. 2.

51 Australian Professional Government Relations Association, *Submission 13*, p. 2.

52 Department of the Prime Minister and Cabinet, *About the Register*, <http://lobbyists.pmc.gov.au/>, last accessed 26 February 2018.

53 Department of the Prime Minister and Cabinet, *About the Register*, <http://lobbyists.pmc.gov.au/>, last accessed 26 February 2018.

Parliament.[54] The audit found while the administration of the Code and Lobbyist Register by the Department of the Prime Minister and Cabinet is consistent with the framework agreed by Government, 'improvements could be made to communications, compliance management and evaluation'. Specifically, the ANAO concluded that:

- the effectiveness of the department's compliance monitoring approach has been reduced by:
  - the lack of strategy around advice to Government representatives of their compliance monitoring responsibilities,
  - reliance on reports of non-compliance to drive compliance activities, and
- the approach adopted to manage compliance has not been informed by an assessment of risks.[55]

6.48 APGRA was of the view that extending the proposed Scheme to those persons already registered under the Code 'would expand this compliance burden considerably and for minimal and questionable benefit'.[56] Similarly, AFMA recommended that the two schemes be rationalised into a single body.[57]

6.49 Seeking to address these concerns, the Department noted that the Code does not have a legislative basis and as a result, is not supported by enforcement measures.[58] It stated:

> The scheme is intended to complement the Commonwealth lobbying code of conduct and to impose more stringent requirements and stronger enforcement options to reflect the need for greater transparency in relation to foreign influence as opposed to domestic influence.[59]

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54 Australian National Audit Office, *Management of the Australian Government's Register of Lobbyists*, 14 February 2018, <https://www.anao.gov.au/work/performance-audit/management-australian-government-register-lobbyists>, last accessed 5 March 2018.

55 Australian National Audit Office, *Management of the Australian Government's Register of Lobbyists*, 14 February 2018, <https://www.anao.gov.au/work/performance-audit/management-australian-government-register-lobbyists>, last accessed 5 March 2018.

56 Australian Professional Government Relations Association, *Submission 13*, p. 5.

57 Australian Financial Markets Association, *Submission 3*, p. 5; Australian Professional Government Relations Association, *Submission 13*, p. 2.

58 Attorney-General's Department, *Submission 5.1*, p. 18.

59 Ms Anna Harmer, First Assistant Secretary, Security and Criminal Law Division, Attorney-General's Department, *Committee Hansard*, Canberra, 31 January 2018, p. 17.

Secretary's powers

Power to publish or withhold publication of information

6.50 The Secretary will be required to keep a register that includes certain information and documents relating to a person or organisation's registration in relation to each foreign principal for whom they act on behalf of.[60] This register is not publicly available.

6.51 The Secretary will be required to publish certain information online for public access,[61] including:

- the name of each person registered and the name of the foreign principal;
- a description of the kind of registrable activities the person undertakes on behalf of the foreign principal, and
- any other information prescribed by the rules.[62]

6.52 The Bill does not require the Secretary to publish information within a certain timeframe. This is in contrast to registrant's obligations to provide information within certain timeframes, particularly during voting periods.[63]

6.53 In response to questions from the Committee, the Department stated that it is 'intended that information collected … is placed on the public website as soon as practicable'. The Department informed the Committee that it would 'defeat the purpose of the Scheme for there to be extended delay in providing visibility as to the level and extent of foreign influence in Australian political and governmental processes'.[64]

6.54 The Department was also confident that 'to the extent possible, the unit will be resourced to ensure timely publishing of information online'. It indicated that it will 'work flexibly to ensure that any additional resources are available in times of peak activity, including during election periods'.[65]

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60 Proposed section 42.

61 Proposed section 43.

62 Proposed section 71 provides that the Minister may make rules for the purpose of the Scheme by legislative instrument.

63 See proposed sections 34-40.

64 Attorney-General's Department, *Submission 5.1*, p. 41.

65 Attorney-General's Department, *Submission 5.1*, p. 40.

6.55 The Secretary will not be required to make information publicly available if he or she is satisfied that it is commercially sensitive, affects national security or is of a kind prescribed by the rules.[66] The rules may also prescribe circumstances in which the Secretary is to remove publicly available information from the website.[67]

6.56 The Committee sought clarification from the Department regarding the matters that the Secretary would consider before making a decision to publish or not publish content on the public register. The Department noted in its answer that the term 'commercially sensitive' is not defined in the Bill, and therefore, the Secretary,

> … could consider whether, if particular information was revealed, it would cause detriment to the parties or expose sensitive information relating to a company's operations, expenditure or employees. If a document is marked 'commercially sensitive', but it is not clear to the Secretary that it falls within this category, he or she may seek further information from the registrant to satisfy himself or herself that the information is commercially sensitive.

6.57 Similarly, the Department stated that the term 'national security' is not defined in the Bill. The Department stated that on this matter, the Secretary,

> … could consider matters relating to the protection of Australia and its people from threats and harm, including in relation to espionage, foreign interference, terrorism and political violence, as well as matters relating to the defence and protection of the integrity of Australia's borders and information relating to the activities of security, intelligence and law enforcement agencies. The Secretary may seek further information from security, intelligence and/or law enforcement agencies in deciding whether the information relates to national security.[68]

Powers to obtain information

6.58 The Bill proposes to grant the Secretary power to require the production of information in two circumstances:

- if the Secretary reasonably suspects that a person is liable to register but has failed to do so, the Secretary may issue a written notice requiring the

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66 Proposed section 43(2).

67 Proposed section 43(3).

68 Attorney-General's Department, *Submission 5.1*, p. 42.

person to provide 'any information that may satisfy the Secretary' as to whether they are liable to register,[69] and

- if the Secretary reasonably believes that a person (whether or not a registrant) has information that is relevant to the operation of the Scheme.[70]

6.59 The scope of what might be captured under the words 'information that is relevant to the operation of the Scheme' is not clear. The Explanatory Memorandum does not detail what information might be included within the term, and the Department did not provide further evidence.

6.60 It is likely that these words would be interpreted in line with the object of the Bill, that is to 'improve the transparency' of persons who undertake certain activities on behalf of foreign governments, foreign businesses and other foreign principals.[71] As a result, the scope of information able to be requested by the Secretary could be very broad given the broad framing of the objective.

6.61 To issue such a notice, the Secretary must reasonably believe that the person has information or documents that are 'relevant to the operation of the scheme'. The term 'reasonably believes' is not defined in the Bill. However the Explanatory Memorandum provides that this is 'a higher standard than the 'reasonable suspicion' required under the proposed section 45, and the Secretary must believe that the person holds information or documents and this belief must be reasonable and have a rational basis.

6.62 The Explanatory Memorandum reasons that 'it is appropriate for this higher standard to apply here because section 46 allows the Secretary to request information from any person, regardless of whether they have any connection to the foreign principal or a registrant'.[72]

6.63 The written notice may prescribe a time period (no less than 14 days) and the manner and form of the information that is to be supplied. The Secretary must consider the costs of complying with the notice that would likely be incurred.[73]

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69 Proposed section 45.

70 Proposed section 46.

71 Proposed section 3.

72 Explanatory Memorandum, p. 97, para 544.

73 Proposed section 45(5) and 46(5).

6.64 The Bill establishes that failing to comply with either notice is an offence and would attract a penalty of 6 months imprisonment for individuals, or $31 500 for bodies corporate.[74] The Bill's proposed enforcement mechanisms are discussed in Chapter 7.

Self-incrimination

6.65 A person is not excused from providing information requested by the Secretary on the basis that it may incriminate the person or expose them to penalty.[75] In the case of an individual, information provided upon the request of the Secretary[76] is not admissible in evidence against the individual in most criminal and civil proceedings.[77]

6.66 However, this information can be used for proceedings for an offence of providing false or misleading information (either the offence in s 60 of the Bill, or against sections 137.1 and 137.2 of the *Criminal Code*).

6.67 The Explanatory Memorandum explains that the common law privilege against self-incrimination protects a natural person from complying with a requirement to disclose information 'unless the privilege is expressly or impliedly overridden'.[78] It states that overriding the privilege against self-incrimination is 'appropriate and supports the scheme's objective of transparency'.[79] Further, the Explanatory Memorandum provides,

> … by collecting information on persons undertaking activities on behalf of foreign principals in Australia and making it available to government and the public … they are better able to understand and assess the actions of those registered, the foreign principals whose interests they are representing and the types of influence being bought to bear.[80]

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74 Proposed section 59.

75 Proposed section 47(1).

76 Proposed sections 45-46.

77 Proposed section 47(2).

78 Explanatory Memorandum, p. 99, para 555.

79 Explanatory Memorandum, p. 99, para 558.

80 Explanatory Memorandum, p. 99, para 557.

Power to share information

6.68 Scheme information may be shared with a broad range of government agencies and bodies outlined in the table below (Table 6.1).[81] Additional persons and purposes for sharing information could be prescribed in rules.[82]

6.69 The Bill does not specify matters that the Secretary must consider before sharing Scheme information.

6.70 Table 6.1 outlines when the Secretary may share information and with whom that information can be shared.

Table 6.1 Secretary's powers to share information and with whom

Information can be shared for the purpose of …	**May be shared with**
An enforcement related activity of an 'enforcement body' within the meaning of the *Privacy Act 988*	The enforcement body
The protection of public revenue	Any of the following that has functions in relation to the purpose: (a) a Department, agency or authority of the Commonwealth, a State or a Territory; (b) an Australian police force.
The protection of security within the meaning of the *Australian Security Intelligence Organisation 1979*	Any of the following that has functions in relation to the purpose: (a) a Department, agency or authority of the Commonwealth, a State or a Territory; (b) an Australian police force
A purpose prescribed by the rules	A person prescribed by the rules

Source: Foreign Influence Transparency Scheme Bill, proposed sections 50-55

81 Proposed section 53.

82 Proposed section 53(2).

6.71 The first item listed in Table 6.1 provides for the sharing of scheme information for the purposes of an 'enforcement related activity' within the meaning of the *Privacy Act 1988*. Under that Act, 'enforcement related activity' means:

- the prevention, detection, investigation, prosecution or punishment of:
  - criminal offences; or
  - breaches of a law imposing a penalty or sanction; or
- the conduct of surveillance activities, intelligence gathering activities or monitoring activities; or
- the conduct of protective or custodial activities; or
- the enforcement of laws relating to the confiscation of the proceeds of crime; or
- the protection of the public revenue; or
- the prevention, detection, investigation or remedying of misconduct of a serious nature, or other conduct prescribed by the regulations, or
- the preparation for, or conduct of, proceedings before any court or tribunal, or the implementation of court/tribunal orders.[83]

6.72 When that purpose test is satisfied, the Secretary may share information with the following enforcement bodies as provided in the *Privacy Act 1988*:

- the Australian Federal Police; or
- the Integrity Commissioner; or
- the Australian Crime Commission; or
- the Immigration Department; or
- the Australian Prudential Regulation Authority; or
- the Australian Securities and Investments Commission; or
- the Office of the Director of Public Prosecutions, or a similar body established under a law of a State or Territory; or
- another agency, to the extent that it is responsible for administering, or performing a function under, a law that imposes a penalty or sanction or a prescribed law; or
- another agency, to the extent that it is responsible for administering a law relating to the protection of the public revenue; or
- a police force or service of a State or a Territory; or
- the New South Wales Crime Commission; or
- the Independent Commission Against Corruption of New South Wales; or

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83 *Privacy Act 1988,* section 6.

- the Law Enforcement Conduct Commission of New South Wales; or
- the Independent Broad-based Anti-corruption Commission of Victoria; or
- the Crime and Corruption Commission of Queensland; or
- the Corruption and Crime Commission of Western Australia; or
- the Independent Commissioner Against Corruption of South Australia; or
- another prescribed authority or body that is established under a law of a State or Territory to conduct criminal investigations or inquiries; or
- a State or Territory authority, to the extent that it is responsible for administering, or performing a function under, a law that imposes a penalty or sanction or a prescribed law, or
- a State or Territory authority, to the extent that it is responsible for administering a law relating to the protection of the public revenue.[84]

6.73 Of note, is the inclusion of any another agency, to the extent that it is responsible for administering, or performing a function under, a law that imposes a penalty or sanction or a prescribed law. This will capture an even broader range of agencies at the Commonwealth and state and territory levels.

6.74 The Committee sought clarification from the Department as the Bill does not specify any matters that the Secretary must have regard to before sharing information. The Committee questioned whether regulations or guidance would be developed to regulate the Secretary's decision. The Department provided the following answer:

> The department anticipates consulting with the Information Commissioner and other relevant stakeholders in the development of rules under the Scheme, including in relation to the sharing of Scheme information. The department will also prepare information materials for internal use in determining when to share Scheme information.[85]

Delegation power

6.75 The Secretary may delegate all or any of his or her functions or powers under the Scheme to a Senior Executive Service (SES) employee, acting SES employee or an acting Executive Level 2 or equivalent position in the

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84 *Privacy Act 1988*, section 6.

85 Attorney-General's Department, *Submission 5.1*, p. 42.

department.[86] The delegation power is not limited to certain decisions or administrative functions, meaning the decision to request information, withhold publication of information or share information with other agencies could be made by an acting Executive Level 2 officer.

6.76 At a public hearing, the Committee sought clarification from the Department about the delegation power. The Department advised:

> Those powers that are being exercised are ones which might be in the nature of writing a letter, identifying and saying, 'We notice … there are activities taking place and writes out to request information[']. That is the type of administrative function that is not uncommonly delegated to senior executive officers of a department who may exercise powers on behalf of a secretary to request certain information.[87]

6.77 While some information requests may relate to more minor matters, the requested information could also relate to highly sensitive information—in some cases, privileged information—and this power may be delegated.

Stakeholder concerns

Secretary's powers

6.78 Few stakeholders engaged with the provisions relating to the Secretary's powers to publish information, request more information or share information with other agencies. This may be reflective of stakeholders primarily raising issues about the scope and extent of the Bill, and that the breadth of the Bill may impede its objective and operation.

6.79 Ms Valerie Heath advised that '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'.[88] Ms Heath further noted that '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 the Secretary's power to withhold publication of information.[89]

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86 Proposed section 67.

87 Ms Anna Harmer, First Assistant Secretary, Security and Criminal Law Division, Attorney-General's Department, *Committee Hansard*, Canberra, 31 January 2018, p. 30.

88 Valerie Health, *Submission 15*, p. 3.

89 Ms Valerie Heath, *Submission 15*, p. 3.

6.80 The Australian Information Commissioner noted that additional rules could be prescribed so as to allow the Secretary power to share Scheme information, including personal information, for a purpose and with such persons as prescribed in delegated legislation.[90] In line with previous submissions to this Committee, the Australian Information Commissioner advocated that a Privacy Impact Assessment be undertaken.

6.81 The Department advised that it will undertake a Privacy Impact Assessment 'prior to the commencement of the Scheme', but did not commit to undertaking the assessment prior to the Bill's passage through the Parliament.[91]

6.82 The Commissioner also recommended that:

> Where discretionary powers or rules could authorise collections, uses or disclosures of personal information that have an impact on individuals' privacy, the mechanisms for future authorisations or requirements may more appropriately occur through primary legislation. Alternatively, it may be appropriate to include obligations in the primary legislation to ensure that privacy is given appropriate consideration in the development of those rules.[92]

6.83 The Department responded to this proposal, advising the Committee that it 'anticipates consulting with the Information Commissioner and relevant stakeholders in the development of rules under the Scheme'. The Department stated that consultation with the Office of the Australian Information Commissioner will occur in the implementation of the scheme and did not consider that it would not ordinarily be prescribed by legislation in this context.[93]

6.84 Noting the volume of particularly sensitive and potentially highly political information that may be held under the Scheme, the Committee sought advice from the Department on options to assure independence. The Committee sought clarification from the Department as to any impediments to establishing an independent commissioner to administer and enforce the Scheme. The Department responded:

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90 Proposed section 53, Item 4.

91 Attorney-General's Department, *Submission 5.1*, p. 15.

92 Office of the Australian Information Commissioner, *Submission 17*, p. 6.

93 Attorney-General's Department, *Submission 5.1*, p. 15.

> The department's view is that it is appropriate for the Secretary of the Attorney-General's Department to administer the Scheme. It is common for regulatory powers to be vested in a Secretary of a department. For example, the Secretary of the Department of Home Affairs has regulatory powers in relation to AusCheck which conducts background checking for Aviation and Maritime Security Identification Cards. Decisions made by the Secretary under the Scheme will be made in accordance with proper administrative decision making principles, including in relation to procedural fairness, and will be reviewable under the *Administrative Decisions (Judicial Review) Act 1977*.[94]

Resourcing and administration of the Scheme

6.85 The resourcing and timely administration of the Scheme was also discussed by stakeholders. The Law Council noted the experience in the United States, where, in its view, a similar registration scheme under the *Foreign Agents Registration Act* has 'produced questionable results' due to its resourcing.[95] The Council stated:

> The experience in the United States confirms that a registration scheme aimed at bringing transparency to foreign influence will only be effective if the integrity and veracity of the register is maintained and adequate resources are allocated to its enforcement. Those issues identified with the overseas FARA regime suggests that there are significant challenges with ensuring that registrations are timely, accurate and ultimately achieving the aim of increased transparency.[96]

6.86 The Government has allocated $3.2 million over four years to partially fund the Scheme costed on the basis of 500 registrations within the first year.[97] This includes capital costs for a dedicated information technology system to store and manage initial registration and registration renewal applications, reports and other information collected under the Scheme, as well as expenditure for staffing.[98]

6.87 The Committee notes the evidence presented in previous chapters that has indicated that the number of registrations might be significantly higher than the Department's estimate. During this inquiry, a large number of

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94 Attorney-General's Department, *Submission 5.1*, p. 46.

95 Law Council of Australia, *Submission 4*, p. 10.

96 Law Council of Australia, *Submission 4*, p. 11.

97 Attorney-General's Department, *Submission 5.1*, p. 40.

98 Attorney-General's Department, *Submission 5.1*, p. 40.

stakeholders have detailed their organisational or business structures and activities, and indicated to this Committee that they are likely required to register.

6.88 The Committee has also received a submission advising that the Scheme's costs have been underestimated. The Australian Financial Markets Association stated:

> This is a simple average staffing level calculation for one senior executive with two support staff and allocation of office expenses over 4 years. It does not appear to take into account the capital cost of the IT build for the database and website development and then ongoing maintenance. Given the broad capture of registrable activities, compliance surveillance and enforcement, public education and the scale and sophistication of the IT database system that is needed to deliver the information, an annual budget of $800,000 is misleading.[99]

6.89 The budget and staffing allocation within the United States Department of Justice for the administration and enforcement of the *Foreign Agents Registration Act* is unknown.

Committee comment

6.90 The Committee notes the following issues were raised regarding registration and ongoing responsibilities:

- the Bill does not specify what information registrants will be required to provide;
- the registration fees, annual renewal fee and reporting fee are not specified in the Bill, with some stakeholders recommending exemptions for charities and not-for-profit organisations from the imposition of charges;
- ongoing reporting obligations may expose sensitive information and require frequent updates of immaterial changes;
- ongoing record keeping obligations capture a vast array of information and communications, and will be costly for organisations to maintain for the required duration;
- the absence of a publically-available RIS for persons to understand the impact of the registration requirements and ongoing responsibilities, and

[99] Australian Financial Markets Association, *Submission 3*, p. 6.

- the perceived duplication of existing regulation under the Lobbying Code of Conduct and Register of Lobbyists.

6.91 The Committee notes the following issues were raised regarding the proposed operation of the Scheme and the proposed powers of the Secretary:

- the breadth of the Secretary's powers to publish or withhold from publication information on the public register, and that the Bill does not provide much guidance on the matters to consider prior to such a decision;
- that the Secretary is not obliged to publish Scheme information within a set period, particularly during election periods;
- the Secretary's powers to request information from third parties that is 'relevant to the operation of the Scheme', noting that the term is not defined within the Bill and may be interpreted broadly, capturing a wide array of conduct and persons;
- the breadth of agencies with whom the Secretary can share Scheme information, most notably, any agency, to the extent that it is responsible for administering, or performing a function under, a law that imposes a penalty or sanction or a prescribed law;
- the absence of a Privacy Impact Assessment to assess the engagement with registrants' privacy rights and the information held by the Secretary;
- that the collection, use or disclosure of personal information that has an impact on individuals' privacy is more appropriately provided in primary legislation, rather than discretionary rules,
- the appropriateness of the Secretary administering a Scheme which will manage highly-sensitive information and decisions regarding its handling, or issuing a notice to request further sensitive information;
- the ability for all of the Secretary's powers to be delegated to an acting Executive Level 2 officer, and
- the under-estimation of the number of registrations and potentially, the under-resourcing of the administration of the Scheme, impacting on the integrity and veracity of the Scheme.

6.92 A number of these concerns are addressed by the Attorney General's proposed amendments. The proposed amendments are discussed in Chapter 9.

6.93 In Chapter 10 of this report, the Committee provides its comments and discusses areas where it considers further refinements may be made to

address outstanding issues, improve the clarity and proportionality of the proposed measures, and to ensure adequate safeguards are provided.

7. Enforcement

7.1 This chapter outlines the offences and enforcement measures established by the Foreign Influence Transparency Scheme Bill 2017 (the Bill). The evidence and issues presented here do not take account of the amendments proposed by the Attorney-General that were provided to the Committee on 7 June 2018.

7.2 The Bill contains a number of offences. These offences target persons and organisations:

- that are not registered but should be; and
- that are registered, but fail to comply with reporting requirements and other obligations.

7.3 Penalties for the offences range from 60 penalty units ($12,600) for strict liability offences, through to seven years imprisonment for intentionally failing to register ($441,000 for bodies corporate).

Offences for liable persons failing to register

7.4 The Bill establishes five new offences for failing to register under the proposed Scheme where the person was aware of the liability.

7.5 Table 7.1 lists the proposed offences, what the prosecution will be required to prove to establish the offence and the maximum penalty which a court could apply to the offence.

7.6 An offence can be committed by an individual as well as bodies corporate.

Table 7.1 Offences for liable persons who fail to register

Proposed section	Offence	What must be proved	Maximum penalty
Failing to register or renew registration			
57(1)	Intentional failure to register or renew registration – and registrable activity is undertaken	The prosecution must prove that the person knew they were required to register or renew registration; they intentionally omitted to do so, and they went on to undertake a registrable activity.	7 years imprisonment ($441,000 for bodies corporate)[1]
57(3)	Reckless failure to register or renew registration – and registrable activity is undertaken	The prosecution must prove that the person knew they were required to register or renew registration; they were reckless in omitting to do so, and they went on to undertake a registrable activity.	5 years imprisonment ($315,000 for bodies corporate)
57(4)	Intentional or reckless failure to register or renew registration (knowing it is required) – but no activity is undertaken	The prosecution must prove that the person knew they were required to register or renew registration; they intentionally or recklessly omitted to do so. *NOTE: There is no requirement to prove that the person then went on to undertake any registrable activities*	12 months imprisonment ($63,000 for bodies corporate)
Intentionally cancelling registration when still liable to register			
57(2)	Intentional	The prosecution must prove	7 years

[1] All pecuniary penalties for bodies corporate have been calculated in accordance with section 4B of the *Crimes Act 1914* (Pecuniary penalties–natural persons and bodies corporate).

	cancellation of registration when still liable to register – and registrable activity is undertaken	that the person intentionally gave the Secretary notice cancelling their registration; that the person did this knowing that a registrable arrangement was still in existence and in fact was still in existence (and therefore that they were still required to be registered); and they went on to undertake a registrable activity.	imprisonment ($441,000 for bodies corporate)
57(5)	Intentional cancellation of registration when still liable to register – but no activity is undertaken	The prosecution must prove that the person intentionally gave the Secretary notice cancelling registration; and that the person did this knowing that a registrable arrangement was still in existence and in fact was still in existence (and therefore that they were still required to be registered). *NOTE: There is no requirement to prove that the person then went on to undertake any registrable activities*	12 months imprisonment ($63,000 for bodies corporate)

Source: Foreign Influence Transparency Scheme Bill 2017, proposed section 57.

7.7 All of the offences regarding failing to register or failing to renew registration require the prosecution to prove beyond reasonable doubt that the individual or organisation knew that they were required to be registered. In effect, this will mean that a person or organisation must also know that an exemption does or does not apply to their activities.

7.8 This is a high threshold for proving the offences, particularly with questions around how law enforcement agencies will be able to gather evidence about a person's knowledge as to liability created by the Bill.

7.9 There are no offences in the Bill that criminalise conduct where a person or organisation fails to register or renew their registration where they are reckless or negligent as to their liability.

7.10 The Committee questioned the Department about an additional offence where a person was reckless as to their liability to register. The Department stated:

> The obligation will be on the individual to determine whether they are liable to register under the scheme. Given this, the department does not consider it appropriate that a person could be liable to offences with penalties of up to seven years imprisonment unless they know of the existence of the requirement to register or renew registration. The department does not consider it necessary to include offences with recklessness or negligence as the fault element, particularly given the Bill includes strict liability offences to deal with less serious conduct.[2]

7.11 Box 7.1 provides a range of scenarios to demonstrate how the offences may arise.

Box 7.1 Scenarios: Offences for failing to register

Offence of intentionally failing to apply or maintain registration

Person A is engaged by a foreign government to lobby members of Parliament on Australian Government policy on foreign direct investment. The Australian Government has publicly dismissed the foreign government's views as uninformed and Person A wants to hide the connection to the foreign government so as to have a fresh opportunity to convince the Australian Government of the foreign government's position. Person A knows that they are required to register with the scheme on entering into an arrangement with the foreign government and prior to undertaking activities on behalf of the foreign government. Despite knowing their registration obligations, Person A intentionally decides not to register with the scheme and undertakes the lobbying activities on behalf of the foreign government.[3]

Offence of recklessly omitting to apply or maintain registration (knowing one should be registered)

[2] Attorney-General's Department, *Submission 5.1*, p. 44.

[3] Explanatory Memorandum, p. 109, para 620.

On 20 January 2020, Person D enters into a registrable arrangement with a foreign public enterprise to lobby members of the Parliament on a Bill that is soon to be voted on. Person D registers under the scheme on 5 February 2020 and undertakes activities on behalf of the foreign public enterprise. Person D knows that they are required to renew their registration sometime towards the start of 2021 and that they will continue to undertake activities on behalf of the foreign public enterprise. However, Person D does not check the date for registration renewal and fails to renew his or her registration by 4 March 2021 as is required under the scheme. In the period after Person's D registration has lapsed, Person D continues to lobby members of the Parliament on behalf of the foreign public enterprise.[4]

Offence of giving notice cancelling registration when still liable to register (registrable activity undertaken) – proposed section 57(3)

Person B has registered under the scheme in relation to an arrangement with a foreign political organisation to lobby a range of stakeholders for the purpose of influencing government policy. Person B's registration is due to be renewed in seven days but the registrable arrangement is due to continue for the next two years. Person B has been publicly criticised for acting on behalf of the foreign political organisation, which is publicly known due to the registration under the scheme. Person B wants to be able to continue to undertake lobbying for the foreign political organisation without it being publicly known. Person B submits a notice to the Secretary under section 31 that Person B has ceased to undertake activities on behalf of the foreign political organisation and specifying that the registrable arrangement will cease in four days, before registration renewal is required. Despite knowing their registration renewal obligations, Person B intentionally continues to engage in lobbying activity on behalf of the foreign political organisation.[5]

Offence of giving notice cancelling registration when still liable to register (no activity undertaken) - proposed section 57(5)

Person E, a registrant under the scheme, notifies the Secretary in accordance with section 31 that their arrangement to provide

4 Explanatory Memorandum, p. 116, para 660.

5 Explanatory Memorandum, pp. 112-133, para 639.

parliamentary lobbying services to Country X has ceased. Person E submits the notice, knowing that the cessation date included in the notice is incorrect and that the correct cessation date is actually one month later. Person E does not undertake registrable activities on behalf of Country X after the incorrect cessation date listed in the notice.[6]

Offences that apply to registrants

7.12 The Bill establishes six new offences for failing to fulfil reporting responsibilities once registered under the proposed Scheme. Table 7.2 lists the proposed offences, what the prosecution will be required to prove to establish the offence and the maximum penalty which a court could apply to the offence.

7.13 Strict liability applies for all of the following offences, meaning that the prosecution need not prove intention, recklessness or negligence in a registrants' failure to meet reporting obligations.

7.14 An offence can be committed by an individual as well as bodies corporate.

Table 7.2 Strict liability offences for failing to fulfil reporting responsibilities

Proposed section	Offence	What must be proved	Maximum penalty
58(1)	Failing to report material change of circumstances	The prosecution must prove that the person was required to give the Secretary notice advising of a material change in circumstances within 14 days of the change occurring (see s 34), and the person failed to give the notice in accordance with the requirements of the Bill.	60 penalty units ($12,600 for individuals, and $63,000 for bodies corporate)
58(1)	Failing to report on donor activity (outside of and during voting	The prosecution must prove that the person was required to give the Secretary notice advising that the threshold	60 penalty units ($12,600 for individuals, and $63,000 for bodies

6 Explanatory Memorandum, p. 122, para 696.

	period)	for donor activity had been reached ($13,500) (see ss 35 and 37), and the person failed to give the notice in accordance with the requirements of the Bill.	corporate)
58(1)	Failing to update registration when a voting period begins	The prosecution must prove that the person was required to review and update registration details within 14 days of a voting period beginning (see s 36), and the person failed to do this in accordance with the requirements of the Bill.	60 penalty units ($12,600 for individuals, and $63,000 for bodies corporate)
58(1)	Failing to report when undertaking activities during voting period	The prosecution must prove that the person was required to report when certain activities were undertaken in a voting period within 7 days of their occurring (see s 37), and the person failed to do this in accordance with the requirements of the Bill.	60 penalty units ($12,600 for individuals, and $63,000 for bodies corporate)
58(2)	Failing to make a disclosure in communications materials	The prosecution must prove that the person undertook a registrable communications activity on behalf of a foreign principal, and the person failed to make a disclosure in the communications material (see s 38) in accordance with the requirements if the Bill.	60 penalty units ($12,600 for individuals, and $63,000 for bodies corporate)
58(3)	Failing to keep records	The prosecution must prove that the person was required to keep records (see s 40), and the person failed to do	60 penalty units ($12,600 for individuals, and $63,000 for bodies

	this.	corporate)

Source: Foreign Influence Transparency Scheme Bill 2017, proposed section 58

7.15 Box 7.2 provides a range of scenarios to demonstrate how the offences may arise.

Box 7.2 Scenarios: Offences that apply to registrants

Failing to report a material change in circumstances

Person A is registered under the scheme as undertaking parliamentary lobbying activities on behalf of Country X. Person A is required, under section 32 of the Act, to notify the Secretary of any material changes in circumstances in relation to his or her registration. Person A is subsequently engaged by Country X to develop and distribute communications materials designed to influence the Australian Government's immigration policy, in addition to the parliamentary lobbying activities. Person A does not update their registration to report this change in circumstances.[7]

Failing to make a disclosure in communications activity

Person B in a media company has a contract with Country X to undertake communications activities on behalf of Country X in Australia. Person B is registered under the scheme. Person B broadcasts a television advertisement criticising the Australia Government's approach to climate change. Person B fails to make a disclosure about the foreign principal. [8]

Other offences

7.16 The Bill establishes three other offences where a registrant, a person who may be liable to register, or a third party, fails to comply with a notice from the Secretary to provide information. Table 7.3 lists the proposed offences, what the prosecution will be required to prove to establish the offence and the maximum penalty which a court could apply to the offence.

7.17 An offence can be committed by an individual as well as bodies corporate.

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7 Explanatory Memorandum, p. 125, para 714.

8 Explanatory Memorandum, p. 127, para 729.

Table 7.3 Offences in response to a request for information

Proposed section	Offence	Requires proof of:	Maximum penalty
60(1)	Providing false or misleading information in response to a request for information or documents by the Secretary	The prosecution must prove the person was given a notice request information or documents (see ss 45 and 46), and the person gives information or documents knowing that the information or documents is misleading, or omits a matter without which it is misleading. *NOTE: There is a defence where the information or document is not false or misleading in a material particular (s 60(2))*	5 years imprisonment ($315,000 for bodies corporate)
59(1)	Failing to comply with a request for information by the Secretary	The prosecution must prove that a person was given a notice requesting the provision of information or documents (see ss 45 and 46), the person failed to comply with the notice within the time specified by the Secretary. *NOTE: The person does not commit an offence if the person took all reasonable steps to prove the information or document in the time specified, but provided it as soon as practicable after the end of the period (s 59(2)).*	6 months imprisonment ($31,500 for bodies corporate)

61(1)	Intentional destruction of records to avoid liability, or defeat the transparency objectives of the Bill	The prosecution must prove that the person (a registrant or a third-party) intentionally does an act or omits to do something, and that person intended to avoid or defeat the object of the Bill/the Scheme, and the act or omission results in the damage, concealment or destruction of a record which is required to be kept.	3 years imprisonment ($189,000 for bodies corporate)

Source: Foreign Influence Transparency Scheme Bill 2017, proposed sections 59-61.

7.18 As noted in Table 7.3, the Bill creates an offence for providing false or misleading information in response to a request from the Secretary for information or documents. This offence attracts a maximum penalty of five years imprisonment. In comparison, the *Criminal Code* contains an offence for providing false or misleading information to a Commonwealth entity, which attracts a maximum penalty of twelve months imprisonment.

7.19 The National Security Legislation Amendment (Espionage and Foreign Interference) Bill creates an aggravated offence for providing false or misleading information in a security clearance process, which will also attract a penalty of five years imprisonment (the justification being the serious security risks that could flow from the provision of that information in that process).

7.20 In questions to the Department, the Committee clarified the proposed imprisonment term, noting that it is five times that contained in the *Criminal Code* for the same conduct. The Department provided the following answer:

> Consistent with Commonwealth criminal law policy, the maximum penalty for an offence should be set appropriately for the worst case scenario. The department considers the penalty of five years imprisonment to be appropriate given the serious implications of the provision of false or misleading information or documents under the Scheme, and the fact that the person is deliberately seeking to defeat the transparency objectives of the Scheme. It also seeks to ensure that persons who are issued notices to produce information provide accurate information, therefore ensuring the scheme

holds information that accurately reflects the scale and scope of foreign influence activities in political and governmental processes. The penalty recognises the serious implications that unchecked and unknown forms and sources of foreign influence can have on Australia's democratic system of government.[9]

7.21 Box 7.3 provides a range of scenarios to demonstrate how the offences may arise.

Box 7.3 Scenarios: Offences in response to a request for information

Giving false or misleading information in response to a notice to produce

Person X is engaged by Country Y to undertake parliamentary lobbying and communications activities on its behalf. Person X completes and submits a registration under the scheme but omits information about some of the activities he or she will undertake on behalf of Country Y. The Secretary gives Person X a notice under section 46 of the Act requesting further information and documents about Person X's relationship with Country Y, including the nature of activities undertaken on behalf of Country Y. Person X receives the notice and responds by providing information about the parliamentary lobbying activities he or she is undertaking on behalf of Country Y, but intentionally omits information about distributing communications materials which has the effect of making such information misleading.[10]

Failing to comply with notice requiring information or documents

Person A is undertaking registrable activities on behalf of foreign political organisation B but has not registered under the scheme. On 1 July 2019, the Secretary issues a notice to Person A under section 45 as the Secretary reasonably suspects that person A might be liable to register under the scheme in relation to the foreign political organisation. The notice requests Person A provide relevant information and documents by 31 July 2019. Person A does not respond to the notice.[11]

9 Attorney-General's Department, *Submission 5.1*, p. 44.

10 Explanatory Memorandum, p. 135, para 776.

11 Explanatory Memorandum, p. 132, para 759.

International comparisons

United States

7.22 As noted earlier in this report, the Bill is based on the United States' *Foreign Agents Registration Act* (FARA). FARA imposes both civil and criminal penalties upon conviction for the following conduct:

- wilfully violating any provision of the Act attracts a penalty of $10,000, five years imprisonment, or both, and
- providing false or misleading information attracts a penalty of $10,000, five years imprisonment, or both.[12]

7.23 In addition to criminal offences, FARA enables the federal Attorney-General to obtain an injunction to stop or prevent a person from engaging in conduct that would violate the requirements of the Act.[13]

7.24 It is also an offence for a public official in the executive, legislative, or judicial branch of the Government or in any agency to act as an agent of a foreign principal without registering under FARA or as a lobbyist under the *Lobbying Disclosure Act of 1995.* The offence attracts a maximum penalty of US$10,000 or a maximum imprisonment of two years, or both.[14]

7.25 In 2016, the Inspector-General of the Department of Justice released an audit of that Department's administration and enforcement of FARA. The Inspector-General noted that there have been limited successful criminal prosecutions under the FARA scheme since 1966, concluding this was as a result of difficulty in proving that a person (individual or organisation) is a foreign agent seeking to improperly influence domestic policy in the United States.[15]

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12 United States' *Foreign Agents Registration Act 1938*, 22 U.S.C. § 618(a).

13 United States' *Foreign Agents Registration Act 1938*, 22 U.S.C. § 618(f).

14 United States Department of Justice, FARA Enforcement, <https://www.fara.gov/enforcement.html>, last accessed 5 March 2018.

15 Department of Justice, *Audit of the National Security Division's Enforcement and Administration of the Foreign Agents Registration Act*, p. 8, <https://oig.justice.gov/reports/2016/a1624.pdf>, last accessed 5 March 2018.

Canada

7.26 Although Canada has not introduced legislation for regulating foreign influence, it has a strong domestic lobbying scheme under the *Lobbying Act*.[16] The Lobbying Act includes provisions for the development of a Lobbyists Code of Conduct and requires the registration of both consultant (third-party) lobbyists and in-house lobbyists for corporations and organisations.

7.27 That Act establishes a range of offences for failing to register, maintain registration, or knowingly provide false or misleading information which attracts a penalty of:

- a fine of $50,000, six months imprisonment, or both (on summary conviction), or
- a fine of $200,000, 2 years imprisonment, or both (on proceedings by way of indictment).[17]

Stakeholders concerns

7.28 Although the Scheme will require enforcement mechanisms,[18] a number of stakeholders expressed concern about the severity of the proposed enforcement penalties.[19]

7.29 For example, the Australian Financial Markets Association commented that the proposed penalties are 'extremely harsh for what … is purely red-tape'.[20] Similarly, the Financial Services Council described the proposed penalties as 'draconian and disproportionate'.[21]

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16 *Lobbying Act* (Can), RSC 1985, c. 44.

17 *Lobbying Act* (R.S.C. 1985, c. 44), ss 14(1).

18 Mr Bret Walker SC, private capacity, *Committee Hansard*, Canberra, 16 February 2018, p. 2.

19 Australian Financial Markets Association, *Submission 3*, p. 5; Law Council of Australia, *Submission 4*, p. 15; Australian Lawyers for Human Rights, *Submission 7*, p. 12; Australian Professional Government Relations Association, *Submission 13*, p. 10; Justice Connect, *Submission 50*, p. 2; Australian Council for International Development, *Submission 55*, p. 4; Federation of Ethnic Communities' Councils of Australia, *Submission 59*, p. 2.

20 Australian Financial Markets Association, *Submission 3*, p. 5.

21 Financial Services Council, *Submission 16*, p. 2.

7.30 Australian Lawyers for Human Rights noted that all offences would apply irrespective of whether or not harm has actually been caused by the activity. The organisation stated:

> 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.[22]

7.31 The Human Rights Council of Australia noted that in New South Wales, an offence punishable by a maximum penalty of seven years imprisonment is classified as a 'serious indictable offence'.[23]

7.32 The Law Council of Australia noted that, in many cases, it will be difficult to prove to a criminal standard that activities have been conducted on behalf of a foreign principal, particularly in instances where there is 'little evidence to link a person's actions or representations with a foreign party'.[24] In making these comments, it noted the 2016 audit of the FARA Scheme in the United States by the Inspector-General of the Department of Justice which found the lack of enforcement of that Scheme was as a result of a similar evidentiary requirement as proposed in this Bill.[25]

7.33 The Law Council of Australia also questioned the effectiveness of the proposed enforcement provisions to address covert influence:

> While financial trails and written authorisations may assist in enforcement, in many cases foreign influence may be extended under less identifiable arrangements, creating significant enforcement hurdles. In this regard, the ability to circumvent the measures, most notably by those foreign powers that are the primary target of the measures, should be further considered. … There are concerns that sophisticated and clandestine influencers will not be deterred by these measures, rather than the full force of the scheme will be felt by benign, law-abiding entities with overseas links.[26]

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22 Australian Lawyers for Human Rights, *Submission 7*, p. 12.

23 Human Rights Council of Australia, *Submission 29*, p. 3.

24 Law Council of Australia, *Submission 4*, p. 15.

25 Law Council of Australia, *Submission 4*, p. 15.

26 Law Council of Australia, *Submission 4*, p. 15.

7.34 Noting the evidentiary challenges of establishing a breach of the proposed measures at a criminal standard, the Law Council advocated consideration of the availability of civil penalties to enforce non-compliance.[27]

7.35 The imposition of civil penalties rather than criminal offences was supported by the Australian Professional Government Relations Association, which stated that 'it is inappropriate and disproportionate for strict liability to apply in relation to any offence provisions'.[28]

7.36 The Committee sought clarification from the Department as to why civil penalties had not been included in the Bill. The Department responded:

> The department does not consider it necessary to include civil penalty provisions in the Bill at this time. Criminal offences are considered the most appropriate way to deter non-compliance with the registration requirements under the Scheme, and provide a meaningful enforcement mechanism should a person who is liable to register not be registered under the Scheme. According to the Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers, criminal offences may be included in legislation where warranted due to the degree of malfeasance or the nature of the wrongdoing involved. An example of such conduct is dishonest or fraudulent conduct.[29]

7.37 The Department went on to advise that:

> The Scheme includes a suite of measures to encourage compliance, including powers to compel production of information and documents, and tiered offences which distinguish between intentional and reckless conduct for a range of offences including undertaking registrable activities while not being registered, failing to fulfil other responsibilities under the Scheme, and providing false or misleading information or destroying records in connection with the Scheme.[30]

7.38 The Department indicated that the appropriate mechanisms for enforcement of the Scheme would be examined as part of the legislated review of the

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27 Law Council of Australia, *Submission 4*, pp. 15-16.

28 Australian Professional Government Relations Association, *Submission 13*, p. 10.

29 Attorney-General's Department, *Submission 5.1*, p. 6.

30 Attorney-General's Department, *Submission 5.1*, pp. 45-46.

Scheme, including whether it would be necessary to supplement the criminal offences with civil penalties.[31]

Interaction with proposed espionage and foreign interference offences

7.39 As noted in earlier chapters, the Bill was introduced by the Prime Minister as a package of measures to address foreign influence and foreign interference in Australia, including the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017 (Espionage and Foreign Interference Bill).

7.40 In evidence to the Committee, the Department described the two Bills as 'complementary measures'[32] but responding to 'distinct concepts'.[33]

7.41 The Law Council of Australia expressed concern regarding the possible interaction of the proposed foreign interference offences in the Espionage and Foreign Interference Bill with the offences proposed under the present Bill. The Council explained:

> Strict liability offences are in place for registrants that fail to notify the Secretary of material changes, report on certain activities, or keep adequate records of activities. A person who is found guilty for one of these strict liability offences may be considered to be operating in a 'deceptive' manner for the purposes of the proposed foreign interference offences in the [National Security Legislation (Espionage and Foreign Interference) Bill 2017].[34]

7.42 The Council therefore recommended that the Explanatory Memorandum make clear that a finding of guilt in relation to the proposed Scheme will not necessarily amount to a finding of guilt in relation to the proposed foreign interference offences in the Bill.[35]

7.43 The Department responded to the Council's concern and recommendation, advising:

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31 Proposed section 70 would require a review of the Scheme to be completed within 5 years. This is further discussed in Chapter 8.

32 Ms Anna Harmer, First Assistant Secretary, Security and Criminal Law Division, Attorney-General's Department, *Committee Hansard*, Canberra, 31 January 2018, p. 19.

33 Ms Anna Harmer, First Assistant Secretary, Security and Criminal Law Division, Attorney-General's Department, *Committee Hansard*, Canberra, 31 January 2018, p. 16.

34 Law Council of Australia, *Submission 4*, p. 16.

35 Law Council of Australia, *Submission 4*, p. 16.

> The offences in the FITS Bill do not address foreign interference … [Those offences] are designed to deter non-compliance with the registration requirements under the Scheme, and provide a meaningful enforcement mechanism should a person who is liable to register not be registered under the Scheme.
>
> The conduct which the proposed foreign interference offences in the National Security Legislation Amendment (Espionage and Foreign Interference) Bill … seek to address is different. Foreign interference is harmful conduct undertaken by foreign principals using covert or deceptive means to damage or destabilise the government or political processes of a country, either to harm that country's national interests or to create an advantage for the foreign country.
>
> In contrast … the offences in the FITS Bill apply where a person is undertaking registrable activities on behalf of a foreign principal and fails to register or comply with their registration obligations under the Scheme. The penalties are tiered, with the most serious penalties applying where a person engages in registrable activities without registering under the Scheme, despite knowing of their obligation to do so.[36]

7.44 At a later public hearing, the Department noted that:

- the two Bill's 'complement' one another as if a person's conduct 'doesn't fall within the foreign interference offence, it may be picked up as a transparency requirement';[37] and
- 'the foreign influence scheme is not simply intended to catch those people who are engaging in foreign interference'.[38]

7.45 The Department further advised that a finding of guilt for an offence under the Scheme would not constitute a finding of guilt for other offences, stating that the offences contained in the Bill 'are not options for alternative verdicts for the foreign interference offences as the elements of the offences are sufficiently different'.[39]

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36 Attorney-General's Department, *Submission 5.1*, pp. 6-7.

37 Ms Tara Inverarity, Assistant Secretary, Attorney-General's Department, *Committee Hansard*, Melbourne, 16 March 2018, p. 52.

38 Ms Anna Harmer, First Assistant Secretary, Security and Criminal Law Division, Attorney-General's Department, *Committee Hansard*, Melbourne, 16 March 2018, p. 53.

39 Attorney-General's Department, *Submission 5.1*, pp. 6-7.

7.46 The Crimes Act would prevent a person being prosecuted for both an offence under the present Bill and a foreign interference offence.[40]

7.47 The Committee sought similar clarification from the Department in its questions in writing. Specifically, the Committee questioned whether:

- the offences could provide an alternative to the more evidentiary challenging offences proposed in the Espionage and Foreign Interference Bill, and
- the strict liability offences could be used to establish an intent element to the proposed offences in the Espionage and Foreign Interference Bill which apply where a person's conduct is overt or deceptive, involves threats or menaces, or *does not disclose the fact that the person undertakes the conduct on behalf of a foreign principal*.[41]

7.48 The Department stated:

> The offences in the Bill and the proposed espionage and foreign interference offences in the National Security Legislation Amendment (Espionage and Foreign Interference) Bill are designed to complement each other rather than overlap and provide a suite of investigative options for agencies.
>
> It is not clear to the department how the commission of an offence under the Bill could be used to establish an intent element for one of the proposed offences in the National Security Legislation Amendment (Espionage and Foreign Interference) Bill.[42]

7.49 Further, the Committee sought clarification on whether the Secretary's powers to request information under the Bill could be used to:

- establish intent for the proposed offences in the Espionage and Foreign Interference Bill; and
- overcome evidentiary challenges to the proposed offences in the Espionage and Foreign Interference Bill.

7.50 The Department responded:

> Section 53 allows the Secretary to communicate scheme information to a law enforcement body for an enforcement related activity within the meaning of

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40 *Crimes Act 1914*, section 4C.

41 National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017, Schedule 1, Division 92, Subdivision B, proposed sections 92.2-92.4 into Part 5.2 of the *Criminal Code*.

42 Attorney-General's Department, *Submission 5.1*, p. 23.

the *Privacy Act 1988*. It is not possible to comment on how such information might be used by a law enforcement body in the performance of its functions, as this will depend on the nature of the particular investigation or matter.

The Secretary's powers to request information are limited to situations where:

- the Secretary reasonably suspects that a person might be liable to register under the Scheme (subsection 45(1)), or
- the Secretary reasonably believes that a person has information or a document that is relevant to the operation of the Scheme (subsection 46(1)).[43]

7.51 During a hearing, the Department advised that the proposed offences in relation to the Scheme may be used as an alternative to prosecution under the Espionage and Foreign Interference Bill:

> I wouldn't want to say that the only purpose for creating a transparency scheme is to create an offence which is a backstop for the inability to demonstrate other more serious offences. There is a genuine objective in providing transparency to the public about who is acting on behalf of whom. But you are correct: the failure-to-register offences could potentially be used where somebody is engaging in activities and would have had an obligation to register, and did not do so. That may arise in circumstances where they are seeking to engage in covert and deceptive conduct for influencing purposes.[44]

Committee comment

7.52 The Committee notes the following issues were raised regarding the proposed enforcement provisions:

- whether an additional offence is required to respond to circumstances where a liable person was reckless or negligent as to their liability to register under the Scheme;
- the proposed penalty for providing false or misleading information in response to a request from the Secretary for information or documents is five times that contained in the Criminal Code for the same conduct;
- the proposed penalties for the offences are broadly higher than those in comparable jurisdictions;

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43 Attorney-General's Department, *Submission 5.1*, p. 23.

44 Ms Anna Harmer, First Assistant Secretary, Security and Criminal Law Division, Attorney-General's Department, *Private Committee Hansard*, Canberra, 16 February 2018, pp. 8-9.

- significant stakeholder concern regarding the severity of the proposed penalties, including strict liability offences;
- proposals for civil penalties as opposed to criminal sanction;
- evidentiary problems with proving to a criminal standard the conduct proposed to be subject to criminal sanction;
- the interaction with proposed espionage and foreign interference offences, namely:
  - whether the offences proposed in this Bill could be used to establish an intent element for offences contained in the Espionage and Foreign Interference Bill, and
  - whether the Secretary's powers could be used to overcome evidentiary challenges to the proposed offences in the Espionage and Foreign Interference Bill.

7.53 A number of these concerns are addressed by the Attorney General's proposed amendments. These proposed amendments are discussed in Chapter 9.

7.54 In Chapter 10 of this report, the Committee provides its comments and discusses areas where it considers further refinements may be made to address outstanding issues, improve the clarity and proportionality of the proposed measures, and to ensure adequate safeguards are provided.

8. Oversight and Review

Oversight

8.1 This chapter considers the oversight and review measures set out in the Foreign Influence Transparency Scheme Bill 2017 (the Bill). The evidence and issues presented here do not take account of the amendments proposed by the Attorney-General that were provided to the Committee on 7 June 2018.

8.2 As discussed in the previous chapters, the Bill proposes that the Secretary have broad powers to administer and enforce the Scheme. This includes broad power to request information of suspected persons who have failed to register, and any third party that may have information relevant to the operation of the Scheme.

8.3 While the Auditor-General will be able to audit the Scheme,[1] the Bill does not provide for any standing oversight of the Secretary's administration of the Scheme.

8.4 In questions from the Committee, the Department advised that the only other oversight mechanism it considered during the development of the Bill was the availability of judicial review. Decisions made by the Secretary

[1] The Auditor-General will have jurisdiction to audit the Scheme without the need for specific legislative amendments.

under the Scheme will be subject to the usual operation of the *Administrative Decisions (Judicial Review) Act 1977*.[2]

Annual report to Parliament

8.5 The Bill requires the Minister to present a report to the Parliament at the end of each financial year.[3] The matters to be addressed in the annual report will be prescribed by rules.[4]

8.6 In questions in writing to the Department, the Committee sought clarification as to what matters would be included in the Minister's Annual Report to the Parliament. The Department advised that, while not being prescriptive of what matters might be included, the following could be addressed:

- the total numbers of persons registered, foreign principals and their country of origin and the nature of activities engaged in on behalf of foreign principals;
- the total numbers of persons who ended their registration in the previous 12 months;
- if applicable, any additional reporting in relation to a voting period within the previous 12 months;
- the total number of times the Secretary exercised his/her powers to obtain information and documents under section 45 (Notice requiring information to satisfy Secretary whether a person is liable to register under the scheme) and section 46 (Notice requirement information relevant to the scheme); and
- any activities undertaken by the administering unit to educate on and encourage compliance with the registrant obligations under the Scheme (such as public awareness activities, production of educational materials).[5]

8.7 The Department advised that the ability for matters to be prescribed by the rules 'allows flexibility in determining what should be contained in the

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2 Attorney-General's Department, *Submission 5.1*, p. 42.

3 Proposed section 69(1).

4 Attorney-General's Department, *Submission 5.1*, p. 42.

5 Attorney-General's Department, *Submission 5.1*, p. 43.

report once operational arrangements to support the administration of the scheme have been established'.[6]

8.8 Mirroring the limitations placed on publishing information on the public Register, the Bill prevents the report from containing any information that the Secretary determines is 'commercially sensitive' or affects 'national security'.[7]

8.9 The term '*commercially sensitive*' is not defined in the Bill. The Explanatory Memorandum indicates that it is intended to cover information such as details that are contained in commercial contracts, where if that detail was revealed it would cause detriment to the parties, or would expose sensitive information relating to a company's operations, expenditure or employees.[8]

8.10 Similarly, the term '*national security*' is not defined in the Bill. The Explanatory Memorandum states that 'national security' may cover information relating to the protection of Australia and its people from harm from threats such as espionage, foreign interference, politically motivated violence or the promotion of communal violence. It may also cover information that relates to defence or the protection of the integrity of Australia's borders or information relating to activities by security and law enforcement agencies.[9]

8.11 However, both terms 'are intended to operate flexibly as matters that may relate to national security change over time'.[10]

8.12 In a submission, Mr Peter Jennings commented on the paucity of public information about foreign influence, and the more targeted subset of foreign interference in Australia. Mr Jennings was of the view that this could be addressed by way of an annual report to the Parliament on the state of efforts to counter espionage, sabotage and foreign interference.[11]

8.13 The Committee put Mr Jennings' proposal to the Department and whether such information could be provided in the Minister's annual report. It responded with the following answer:

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6 Attorney-General's Department, *Submission 5.1*, p. 42.

7 Proposed section 69(2).

8 Explanatory Memorandum, p. 147, para 859.

9 Explanatory Memorandum, p. 147, para 859.

10 Explanatory Memorandum, p. 147, para 860.

11 Mr Peter Jennings, *Submission 14*, p. 1.

> Section 69 provides that the Annual Report is to contain information on the operation of the Scheme. While the matters to be addressed in the Annual Report will be prescribed by rules, it is intended that these be limited to administrative matters. Discussion of the state of counter-foreign interference efforts in Australia would be beyond the scope of the Annual Report.[12]

Review

8.14 The Bill proposes a review of the Scheme within five years of the commencement of the Scheme. The Bill does not specify the person or body that will undertake the review though it requires the Minister to table the report within 15 sitting days after receiving it.[13]

8.15 The Explanatory Memorandum states that a review will ensure that 'the scheme is operating as intended, is not creating any unintended consequences, and strikes an appropriate balance between transparency and regulatory burden'.[14] It also provides that the time period is intentionally flexible, such that 'if practical issues are identified early in the life of the scheme, the formal review could be undertaken after 12 months'.[15]

8.16 The Bill does not specify who is to undertake the review, and therefore it could be the administering department undertaking the review.

8.17 In questions in writing to the Department, the Committee sought clarification whether it is intended that an independent person be appointed to undertake the review. The Department provided the following answer:

> The Bill is not prescriptive as to who should undertake the Review under section 70 – this will be a matter for Government to determine at the time it commissions the Review.[16]

Committee comment

8.18 The Committee notes the following issues were raised regarding the Bill's oversight and review:

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12 Attorney-General's Department, *Submission 5.1*, p. 43.

13 Proposed section 70.

14 Explanatory Memorandum, p. 147, para 862.

15 Explanatory Memorandum, p. 147, para 863.

16 Attorney-General's Department, *Submission 5.1*, p. 43.

- as drafted, the Bill limits oversight to the Australian National Audit Office and judicial review under the *Administrative Decisions (Judicial Review) Act 1977*;
- an annual report to the Parliament will be presented by the Minister each financial year, though matters covered in the report will be prescribed in rules and are not provided in the primary legislation;
- an annual report to Parliament would be limited to administrative matters, and not the state of efforts to counter espionage, sabotage and foreign interference;
- a review will be undertaken within five years, though it will be a matter for Government as to who undertakes that review.

8.19 A number of these concerns may be addressed by the Attorney General's proposed amendments. These proposed amendments are discussed in Chapter 9.

8.20 In Chapter 10 of this report, the Committee provides its comments and discusses areas where it considers further refinements may be made to address outstanding issues, improve the clarity and proportionality of the proposed measures, and to ensure adequate safeguards are provided.

9. Attorney-General's proposed amendments

Referral to the Committee

9.1 The Bill was referred to the Committee by the Prime Minister on 8 December 2017. The Committee received a number of submissions and conducted public hearings in January, February and March 2018.

9.2 On 7 June 2018, the Attorney-General wrote to the Committee and proposed a number of amendments to the Bill.[1] The Attorney-General's proposed amendments, and a copy of his letter, were accepted as submissions, and posted to the Committee's website.

9.3 In his letter, the Attorney-General stated that these amendments are intended to:

- narrow the scope of the scheme by limiting the definition of 'foreign principal' only to foreign governments, foreign political organisations and other persons who are closely related to foreign governments and foreign political organisations;
- amend key definitions including 'on behalf of' and 'activity for the purpose of political or governmental influence';

[1] Attorney-General, *Submission 84* and *84.1*.

- introduce new exemptions for industry representative bodies, and individuals making personal representations and expanding other exemptions;
- increase the period within which former Cabinet Ministers bear additional obligations from three years to ten years;
- extend the additional registration requirements for former senior officials to specifically cover former Ambassadors and High Commissioners;
- increase the period within which former Ministers, members of Parliament and senior officials bear additional obligations from 18 months to seven years;
- introduce a transparency notice scheme, allowing the Secretary [of the Attorney-Generals' Department] to issue a notice that a particular entity or individual is related to a foreign government, and
- introduce new and revised criminal offences.[2]

9.4 A supplementary Explanatory Memorandum did not accompany the proposed amendments that were provided to the Committee, though the Department advised that one will be prepared to support the introduction of the proposed amendments into the House of Representatives.[3]

9.5 The Committee published the Attorney-General's proposed amendments on 8 June 2018 and sought submissions by 15 June 2018. The Committee subsequently held three public hearings (all scheduled on 18 June 2018). The Committee thanks all stakeholders for their engagement in the inquiry and the time taken to provide the Committee with advice in reviewing the proposed amendments and the original Bill. The Committee greatly appreciates stakeholders' contributions.

9.6 Stakeholders broadly supported the Attorney-General's proposed amendments, with many commending the proposal's narrowing of the scope of the Scheme.[4] The refinements proposed by the Attorney-General

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2 Attorney-General, *Submission 84,* p. 2.

3 Ms Tara Inverarity, Assistant Secretary, Attorney-General's Department, *Proof Committee Hansard*, Canberra, 18 June 2018, pp. 39-40.

4 Law Council of Australia, *Submission 4.2*, p. 3; Australian Lawyers for Human Rights, *Submission 7.2*, p. 1; Universities Australia, *Submission 9.1*, p. 2; Law Firms Australia, *Submission 10.2*, p. 2; Joint Media Organisations, *Submission 19.3*, p. 1; Australian Industry Group, *Submission 32.1*, p. 1; Australian Charities and Not-for-profit Commission, *Submission 33.2*, p. 3; Community Council for Australia, *Submission 34.1*, p. 2; Australian Council for International Development, *Submission 55.1*, p. 2; The Smith Family, *Submission 60.1*, p. 1; Dr Luke Beck, *Submission 68.1*, p. 1;

were also viewed as 'bolstering the constitutional validity of the proposed law, as it will be easier to argue that its provisions are appropriate and adapted to serve the legitimate end'.[5]

9.7 The Committee welcomes the Attorney-General's careful consideration of the concerns identified by stakeholders during the Committee's review and the assistance he has provided to the Committee in presenting proposed amendments for its consideration.

9.8 This Chapter discusses those proposed amendments in detail, and reviews the evidence the Committee has received on those amendments. The structure of this Chapter broadly mirrors the structure of the preceding chapters, as follows:

- scope of actors and activities proposed to be covered by the Scheme,
- exemptions,
- the application of parliamentary privilege to the Bill,
- registrants' obligations and operation of the Scheme,
- enforcement provisions, and
- oversight and review.

Scope of actors and activities

9.9 In this section the following amendments are discussed:

- Section 10—Definition of 'foreign principal'
- Section 11—Undertaking activity on behalf of a foreign principal
- Section 12—Activity for the purpose of political or governmental influence
- Section 13—Communications activity
- Extension of obligations for Cabinet Ministers, Ministers and former senior Commonwealth office holders

9.10 A large number of stakeholder concerns regarding scope and activities covered by the Scheme (as discussed in Chapter 3) are addressed by the

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change.org, *Submission 90*, p. 3; Chemistry Australia, *Submission 91*, p. 1; Ms Catriona Jackson, Chief Executive, Universities Australia, *Proof Committee Hansard*, Canberra, 18 June 2018, p. 1; Mr David Crosbie, Chief Executive Officer, Community Council for Australia, *Proof Committee Hansard*, Canberra, 18 June 2018, p. 6; Mr Arthur Moses, SC, President-elect, Law Council of Australia, *Proof Committee Hansard*, Canberra, 18 June 2018, p. 14;

5 Professor Anne Twomey, *Submission 82.1*, p. 1. The Committee discusses the constitutional validity of the Bill as introduced by the Prime Minister in Chapter 2 of this Report.

Attorney-General's proposed amendments. This was reflected in evidence to the Committee on the Attorney-General's proposals.

9.11 In short, the Attorney-General's proposed amendments refine the central definitions of:

- '**foreign principal**' – section 10
  - *Remove* 'a foreign business';
  - *Remove* 'foreign public enterprise' and *replace* with 'foreign government related entity';
  - *Remove* 'an individual who is neither an Australian citizen nor a permanent Australian reside' and *replace* with 'a foreign government related individual'.
- '**undertaking activities on behalf of a foreign principal**' – section 11
  - *Remove* the words 'under control of' the foreign principal
  - *Remove* 'with funding or supervision by the foreign principal'
  - *Remove* 'in collaboration with the foreign principal'.
- '**activity for the purpose of political or governmental interference**' – section 12
  - Clarify that the purpose must be the 'sole or primary purpose' or a 'substantial purpose'
- '**communications activities**' – section 13
  - *Exclude* broadcasters, carriage service providers and publishers from the definition where they merely edit information or materials produced by a foreign principal

9.12 The following paragraphs provide more detail on the Attorney-General's proposed amendments to the Scheme's scope and the evidence received.

Section 10—Definition of 'foreign principal'

9.13 There are three significant changes with respect to the definition of a 'foreign principal':

- Remove 'a foreign business';
- Remove 'foreign public enterprise' and replace with 'foreign government related entity';
- Remove 'an individual who is neither an Australian citizen nor a permanent Australian reside' and replace with 'a foreign government related individual'.

9.14 In referring the amendments, the Attorney-General noted:

> Limiting the range of foreign principals in respect of whom registration is required serves two important objectives. First, this amendment will ensure the scheme is more closely focussed on promoting transparency in relation to foreign government influence on Australian political and government processes. The effect of these amendments will be that a person will only need to be required to register if they undertake registrable activities on behalf of:
>
> - a foreign government
> - a foreign political organisation, or
> - a foreign entity or individual that is closely-related to a foreign government or political organisation
>
> Second, this amendment will assist to ensure that the regulatory burden imposed by the scheme is reasonable and proportionate, by reducing the circumstances in which registration will be required.[6]

Removal of 'foreign business' and 'foreign public enterprise'

9.15 The Attorney-General's proposal to remove the term 'foreign business' from the definition of a 'foreign principal' was strongly supported by stakeholders.

9.16 The Committee considers that the proposed amendment to remove 'foreign business' from the definition of a 'foreign principal', substantially addresses the concerns raised in evidence on the original Bill. This is discussed in Chapter 3 at ***paragraphs 3.15-3.23.*** The term 'foreign public enterprise' was not discussed in evidence on the original Bill.

9.17 However, the introduction of the term 'foreign government related entity' in the Attorney-General's proposed amendments raised some limited concerns similar to those expressed about the inclusion of the term 'foreign business'. These concerns are addressed in the following section.

Proposed definition of a 'foreign government related entity'

9.18 The Attorney-General has proposed to include a new term within the definition of a 'foreign principal': a 'foreign government related entity'.

9.19 The amendments propose to define 'foreign government related entity' as 'a person, other than an individual, who is related to a foreign principal that is a foreign government or a foreign political organisation'. Certain threshold

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[6] Attorney-General, *Submission 84*, p. 3.

requirements are also proposed to measure the relationship between the entity and the foreign principal.

9.20 In his letter providing the proposed amendments to the Committee, the Attorney-General stated:

> The key implication of this change is that persons will not be required to register if they undertake activities on behalf of a foreign business … unless that business … is ***closely related to*** a foreign government or foreign political organisation'. … Limiting the range of foreign principals will ensure the scheme is more closely focused on promoting transparency in relation to foreign *government* influence on Australian political and government processes.[7]

9.21 An entity will be a 'foreign government related entity' where it satisfies certain threshold requirements. Different thresholds apply to measure the close relationship to a foreign principal for companies, non-companies and, if the person is a person other than a body politic and the foreign principal is a foreign political organisation.

9.22 **For companies**, the following thresholds apply:

- the foreign principal holds more than 15 per cent of the issued share capital of the company; or
- the foreign principal holds more than 15 per cent of the voting power in the company; or
- the foreign principal is in a position to appoint at least 20 per cent of the company's board of directors; or
- the directors (however described) of the company are under an obligation (whether formal or informal) to act in accordance with the directions, instructions or wishes of the foreign principal; or
- the foreign principal is in a position to exercise, in any other way, total or substantial control over the company.

9.23 **If a person is not a company,** it will fall within the definition of a 'foreign government related entity' where either of the following are satisfied:

- the members of the executive committee (however described) of the person are under an obligation (whether formal or informal) to act in accordance with the directions, instructions or wishes of the foreign principal, or

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[7] Attorney-General, *Submission 84*, p. 3.

- the foreign principal is in a position to exercise, in any other way, total or substantial control over the person.

9.24 **Where the relevant foreign principal is a foreign political organisation, and the person is a person other than a body politic**, the following thresholds must be met to satisfy the definition of 'foreign government related entity':

- a director or officer or employee of the person, or any part of the person, is required to be a member or part (however described) of that foreign political organisation, and
- that requirement is contained in a law, or in the constitution, rules or other governing documents by which the person is constituted or according to which the person operates.

9.25 In his letter to the Committee, the Attorney-General stated that the threshold 'reflects the reality that a foreign government or political organisation need not have absolute control over a company to be able to exercise significant influence, or even actual control, over its activities'.[8]

Evidence received

9.26 The Committee received the following evidence on the proposed term and its thresholds.

9.27 Professor Anne Twomey welcomed the refinements to the Bill's scope, noting that the proposed amendments ameliorate the concerns expressed by universities and academics on the application to collaborations and joint research undertakings. Chief among the assisting amendments was the narrowing of the definition of 'foreign principal' to exclude foreign companies, foreign bodies and foreign nationals (unless they are closely related to a foreign government or foreign political organisation).[9] Universities Australia similarly supported these amendments and provided similar evidence to the Committee at the public hearing.[10]

9.28 However, Professor Twomey noted that the proposed term of 'foreign government related entity' may nonetheless capture universities and academics, while acknowledging that certain research collaborations should

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8 Attorney-General, *Submission 84*, p. 3.

9 Professor Anne Twomey, *Submission 82.1*, p. 1.

10 Ms Catriona Jackson, Chief Executive, Universities Australia, *Proof Committee Hansard*, Canberra, 18 June 2018, p. 1.

be registered under the Scheme. According to her analysis, some foreign universities are likely to satisfy the definition of 'foreign government related entity' (such as universities in China), whilst others are private institutions (such as Harvard, Stanford, MIT and Columbia). Professor Twomey also commented that other universities are public bodies to the extent that they are partly funded and regulated but exercise a high degree of independence from government (such as UCLA, UC Berkley and most universities in the United Kingdom).[11]

9.29 Similar analysis was provided by the Australian Major Performing Arts Group (AMPAG) with respect to foreign performing arts institutes.[12] The Department sought to address this concern: 'the department does not consider that collaboration between Australian and foreign arts organisations would fall with the definition of undertaking activities on behalf of a foreign principal in section 11 of the Bill'.[13]

9.30 The Law Council submitted that this definition does not align with other relevant Commonwealth legislation: *(Corporations Act 2001* (Cth), *the Foreign Acquisitions and Takeovers Act 1975* (Cth) and the *Financial Sector (Shareholdings) Act 1998* (Cth)). Each of those Acts specify 20 per cent as the level at which control is assumed. The Law Council stated:

> The policy objectives of the *Foreign Acquisitions and Takeovers Act 1975* (Cth) and the Bill are similar in that they seek to 'regulate' foreign activities in Australia.[14]

9.31 The Council therefore recommended that the proposed threshold for companies be amended to 20 per cent ownership to align with other Commonwealth regulation.[15] This recommendation was re-iterated at the public hearing on the proposed amendments, with the Council further explaining:

> It doesn't create a legal problem but it does create a problem in terms of certainty, I think, for business and the management of corporations. I think if you have a shifting sands approach to what the parliament defines as

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11 Professor Anne Twomey, *Submission 82.1*, p. 2.

12 Australia Major Performing Arts Group, *Submission 37.1*, p. 2.

13 Attorney-General's Department, *Submission 5.5*, p. 18.

14 Law Council of Australia, *Submission 4.2*, p. 3; see also Mr Arthur Moses, SC, President-elect, Law Council of Australia, *Proof Committee Hansard*, Canberra, 18 June 2018, p. 14.

15 Law Council of Australia, *Submission 4.2*, p. 3.

> something which deals with, as it were, foreign control in different legislation, it does end up, I think, causing potential unnecessary confusion and individuals coming along when they are caught out to say, 'Well, they thought it was actually what aligned with other pieces of legislation.' We see that in other areas of law when we are called upon to be prosecutors or to defend people in terms of explanations being put forward on a number of fronts. I would have thought you'd want legislation to be consistent in terms of foreign control.
>
> So why pick 15 per cent rather than 20 per cent? I don't know. That's something within the gift of the parliament, and you're elected for that very reason. I would have thought you would have legislation that is similar across the board when you're dealing with concepts of foreign control. But, to answer your question, Senator, directly, there is nothing legally wrong with that. There is nothing constitutionally wrong with that. But, from a legal perspective—and we see this when we prosecute or defend—when you have a shifting sands approach to these matters in different pieces of legislation, it creates confusion and potential unnecessary excuses being brought up.[16]

9.32 The Department advised that the percentage set was to establish that a company *relates to* the foreign government and not its *control*, which is arguably a higher threshold. In a supplementary submission responding to the recommendation of the Law Council, the Department stated:

> The threshold of 15% represents the level of government involvement at which a company can be considered to be related to a foreign government or foreign political organisation (as opposed to controlled). This threshold is consistent with Schedule 1 of the Broadcasting Services Act 1992. The thresholds in that Act apply in relation to the deemed control of companies that hold broadcasting and other licences, with the express object of inter alia encouraging 'diversity in the control of the more influential broadcasting services'. While ultimately a matter of judgment, the objects of the Broadcasting Services Act and FITS Bill are closely aligned, as both are directed at regulating influential activities.[17]

9.33 The Department provided similar advice at the public hearing stating that it is not seeking to limit the term only to entities owned by a foreign

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16 Mr Arthur Moses, SC, President-elect, Law Council of Australia, *Proof Committee Hansard*, Canberra, 18 June 2018, p. 16.

17 Attorney-General's Department, *Submission 5.5*, pp. 2-3; see also Ms Anna Harmer, First Assistant Secretary, Attorney-General's Department, *Proof Committee Hansard*, Canberra, 18 June 2018, p. 4.

government, noting that ownership can indicate a level of control or relatedness to the foreign government.[18]

9.34 The Australian Professional Government Relations Association was of the view that the proposed amendment should be further amended to clarify that the definition does not apply to entities which may satisfy the thresholds specified (particularly companies) where those entities are independent of government and 'in no way subject to government direction'. The Association provided the example of a foreign pension fund to advance its concerns.[19]

9.35 The Australian Charities and Not-for-profit Commission commented that 'foreign government related entity' will require organisations (such as charities) to ascertain ownership or control structures of entities, and allegiance or obligations of individuals. This may be difficult for many organisations and individuals.[20]

9.36 As noted in Chapters 3 and 4, the Committee received significant evidence on the Bill's application to charities and not-for-profits in Australia. The Community Council for Australia, had expressed significant concern regarding the scope of the Bill as introduced by the Prime Minister—identifying a 'chilling effect' on charities' advocacy of their charitable purpose. However, at the public hearing on the Attorney-General's proposed amendments, the Community Council for Australia stated:

> I want to start by commending the government, the opposition and people on this committee for listening to the concerns of charities. We certainly welcome the amendments that have been made. There's no doubt that most charities will no longer face the risk of having to register as foreign agents. Many of the anomalies have been addressed.[21]

9.37 Nevertheless, the Council did note some continuing concerns regarding the proposed term 'foreign government related entity', particularly as many

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18 Ms Tara Inverarity, Assistant Secretary, Attorney-General's Department, *Proof Committee Hansard*, Canberra, 18 June 2018, p. 16.

19 Australian Professional Government Relations Association, *Submission 13.1*, p. 2.

20 Australian Charities and Not-for-profit Commission, *Submission 33.2*, p. 2.

21 Mr David Crosbie, Chief Executive Officer, Community Council for Australia, *Proof Committee Hansard*, Canberra, 18 June 2018, p. 6.

foreign partner-charities receive funding from foreign governments that may satisfy the threshold set in the definition.[22]

9.38 The Department responded to these ongoing concerns of the charities sector in a supplementary submission and at the public hearing on the proposed amendments.

9.39 On the concern expressed by the Australian Charities and Not-for-profit Commission with regards to the obligations on charities to ascertain ownership or control structures of entities they work collaboratively with, the Department submitted:

> The potential registrant will be in the best position to make decisions about their requirement to register, including the purpose of the activity or arrangement. The Attorney-General has stated that the onus is on a registrant to do his or her own due diligence.[23]

9.40 While acknowledging there would be an increased regulatory burden, the Department asserted that the proposed amendment to narrow the definition of foreign principal would go some way to ameliorate these impacts as:

- fewer charities will ultimately need to register
- to the extent that individual charities may be required to register, they will need to register in relation to fewer foreign principals, and
- overall, the regulatory burden will be significantly decreased.[24]

> … the Scheme is designed as a transparency mechanism, rather than a punitive enforcement framework. Following passage of the Bill, the department will create guidance material and an education and outreach program. Guidance material will be made available online. The department also intends to provide support to persons who are unsure if they need to register under the scheme.[25]

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22 Mr David Crosbie, Chief Executive Officer, Community Council for Australia, *Proof Committee Hansard*, Canberra, 18 June 2018, pp. 6-7.

23 Attorney General's Department, *Submission 5.5*, p. 16; see also Ms Anna Harmer, First Assistant Secretary, Attorney-General's Department, *Proof Committee Hansard*, Canberra, 18 June 2018, p. 8; Ms Tara Inverarity, Assistant Secretary, Attorney-General's Department, *Proof Committee Hansard*, Canberra, 18 June 2018, p. 17.

24 Attorney General's Department, *Submission 5.5*, p. 16.

25 Attorney-General's Department, *Submission 5.5*, p. 16; see also Ms Anna Harmer, First Assistant Secretary, Attorney-General's Department, *Proof Committee Hansard*, Canberra, 18 June 2018, p. 8;

9.41 At the public hearing, the Department noted that the Bill requires only for a person to undertake due diligence and so make reasonable inquiries to ascertain the relatedness of a person with a foreign government. The Bill does not establish a positive or strict obligation, such as required in the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*:

> The distinction we were seeking to draw was simply with a positive obligation—as, for example, in the anti-money-laundering and counterterrorism framework—in which an entity is put to a substantial obligation of positively confirming or identifying a customer, client et cetera. The obligations here are certainly ones that would require a person to make a reasonable inquiry. They don't require a person to, for example, go and obtain proof—records of incorporation, shareholder registers or the like. They should make reasonable inquiries, but they don't impose an obligation like those in the AML/CTF legislation.[26]

9.42 To assist persons who may be unsure if they are required to register, the Department also confirmed that guidance material would be available online, as well as education and outreach programs.[27]

9.43 In response to concerns raised regarding companies meeting the threshold of share capital, the Department drew a distinction between foreign funding and ownership of issued share capital:

> So receiving more than 15 per cent of your funding from a foreign government is not the same as more than 15 per cent of your issued share capital being owned. Therefore, I don't think we would see that subparagraph (a)(i) would have any operation if it were only foreign funding that were the link to a foreign government. If there was another element of direction or control within one of the other subparagraphs that would be a different situation. But simply receiving foreign funding would not fall within the definition.[28]

Ms Tara Inverarity, Assistant Secretary, Attorney-General's Department, *Proof Committee Hansard*, Canberra, 18 June 2018, p. 17.

26 Ms Anna Harmer, First Assistant Secretary, Attorney-General's Department, *Proof Committee Hansard*, Canberra, 18 June 2018, p. 18.

27 Attorney General's Department, *Submission 5.5*, p. 16.

28 Ms Tara Inverarity, Assistant Secretary, Attorney-General's Department, Proof Committee Hansard, Canberra, 18 June 2018, p. 16.

Proposed definition of a 'foreign government related individual'

9.44 The Attorney-General's proposed amendments would remove the term 'an individual who is neither an Australian citizen nor a permanent Australian resident' and replace it with 'foreign government related individual'.

9.45 The amendments propose to define 'foreign government related individual' as follows:

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

Evidence received

9.46 The Australian Council of Trade Unions (ACTU) submitted concerns that the proposed amended definition of a 'foreign government related individual' would be satisfied 'merely by a person being subject to the law and administrative authority of their home country'.[29]

9.47 The Department responded to the ACTU's concerns, stating:

> It is not clear to the department that the individuals to whom the ACTU submission refers would fall within this definition. If the individuals do not meet these criteria, the registration requirements of the scheme will not arise. If the individuals do meet these criteria then it is not clear to the department why the activities mentioned in the ACTU submission should be exempt from the registration requirements.[30]

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29 Australian Council of Trade Unions, *Submission 86*, p. 2.

30 Attorney-General's Department, *Submission 5.5*, p. 25.

9.48 Universities Australia supported the appropriateness of the proposed amended definition. It advised the Committee:

> These make it clear that an ordinary individual not connected with a foreign government will not be considered a foreign principal. This will allow universities to assist international students and staff in their dealings with government, which can assist with the welfare of these groups without being captured by the scheme, which I think is entirely appropriate.[31]

Retention of 'foreign political organisation'

9.49 The Attorney-General's proposed amendments do not amend the definition 'foreign political organisation', which forms part of the definition of 'foreign principal'.

9.50 As introduced by the Prime Minister, the term 'foreign political organisation' is defined as follows:

> ***foreign political organisation*** includes a foreign political party.

9.51 The Explanatory Memorandum provides:

> The definition is not intended to be limited to registered political parties. If an organisation operates as a political organisation in a foreign country or part of a foreign country, or if a foreign country does not have a system of registration for political parties, the organisation would be captured under this definition.[32]

9.52 The proposed definition is an inclusive definition and is not exhaustive in the types of organisations that may be 'foreign political organisations'.[33]

9.53 A number of organisations expressed concern about the proposed definition, with some advising that it may extend to 'relationships that charities have with international partners or counterpart (sister) organisations'.[34]

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31 Ms Catriona Jackson, Chief Executive, Universities Australia, *Proof Committee Hansard*, Canberra, 18 June 2018, p. 1.

32 Explanatory Memorandum, p. 26.

33 Ms Anna Harmer, First Assistant Secretary, Attorney-General's Department, *Proof Committee Hansard*, Canberra, 18 June 2018, p. 14.

34 Australian Conservation Foundation, *Submission 40.1*, p. 1; Oxfam Australia, *Submission 57.1*, p. 3; GetUp!, *Submission 63.1*, p. 3; Greenpeace, *Submission 72.1*, p. 1; Humane Society International, *Submission 89*, p. 1.

9.54 The Australian Council for International Development recommended that the term be amended to expressly exclude international charities or advocacy groups.[35] It stated:

> Many ACFID member organisations are part of international confederations or alliances, or routinely work with like-minded global organisations or groups to advance issues of global importance. We address issues that transcend national boundaries such as poverty, gender equality, climate change and responding to humanitarian crises. It is therefore appropriate that ACFID member organisations collaborate with international partner organisations and advocacy groups – some of which may be defined as political organisations. As has been done for the EFI [Espionage and Foreign Influence] Bill, we propose that the FITS Bill makes it clear that 'political organisation' does not include international charities or advocacy groups.[36]

9.55 Similarly GetUp! raised concerns with the term 'foreign political organisation' and recommended that it be defined to include only organisations that field candidates in parliamentary elections.[37] GetUp! Noted that the 'current non-exhaustive definition could include independent international advocacy groups and think tanks that operate independently from all foreign governments, which is inappropriate.'[38]

9.56 The Australian Council of Trade Unions expressed similar concerns stating that the term 'may capture foreign unions (or at least those that might have affiliations to political parties in their home countries) or international union organisations.[39]

9.57 The Department noted comparisons made with the Committee's report on the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017, which recommended that a definition be provided to clarify what foreign political organisations may be covered by the term 'foreign political organisation'.[40] Responding to concerns about the retention

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35 This recommendation was echoed by Oxfam Australia, *Submission 57.1*, p. 3; GetUp!, *Submission 63.1*, p. 3; Greenpeace, *Submission 72.1*, p. 1; Humane Society International, *Submission 89*, p. 1

36 Australian Council for International Development, *Submission 55.1*, p. 2.

37 GetUp!, *Submission 63.1*, p. 3.

38 GetUp!, *Submission 63.1*, p. 3.

39 Australian Council of Trade Unions, *Submission 86*, p. 3.

40 Parliamentary Joint Committee on Intelligence and Security, *Advisory report on the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017*, 7 June 2018, Recommendation 6, para 3.88.

of the term 'foreign political organisation' and the perceived ambiguity in its definition, the Department stated:

> The FITS Bill and National Security Legislation Amendment (Espionage and Foreign Interference) Bill serve very different purposes. The department does not accept that in all cases the definitions across the two bills should be identical.
>
> In each bill, foreign principal and foreign political organisation have different operations in their respective (and distinct) contexts. The definitions in the Espionage and Foreign Interference Bill define the scope of an espionage or foreign interference offence, which is then criminal conduct. The definitions in the FITS Bill establish the context in which activities should be the subject of greater transparency.

9.58 In relation to political advocacy, the Department noted that the 'explanatory memorandum does draw the strong implication that it would be a political party or something akin to a political party rather than any organisation in the ordinary course of its business'.[41] The Department suggested that this 'does not support an interpretation that the definition extends to international advocacy organisations where they are not operating politically.' [42]

9.59 The Department acknowledged that clarity could be brought by inserting this interpretation in the Explanatory Memorandum or in the Bill, stating 'as to which one of those is preferred, ultimately it's a matter for policy decision or the views of the committee'.[43]

9.60 Responding to a suggestion by change.org for there to be a register of organisations deemed to be 'foreign political organisations', the Department confirmed that there was no intention to create such a register. Instead, guidance material and support will be made available.[44]

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41 Ms Tara Inverarity, Assistant Secretary, Attorney-General's Department, *Proof Committee Hansard*, Canberra, 18 June 2018, p. 4.

42 Attorney-General's Department, *Submission 5.5*, pp. 19, 21, 22, 23; see also Ms Anna Harmer, First Assistant Secretary, Attorney-General's Department, *Proof Committee Hansard*, Canberra, 18 June 2018, p. 3;

43 Ms Tara Inverarity, Assistant Secretary, Attorney-General's Department, *Proof Committee Hansard*, Canberra, 18 June 2018, p. 15.

44 Attorney-General's Department, *Submission 5.5*, p. 27.

Section 11—Undertaking activity on behalf of a foreign principal

9.61 The Attorney-General has proposed narrowing the definition 'undertaking activity on behalf of a foreign principal' under section 11 of the Bill.

9.62 The amendments remove references to activities that are undertaken:

- under the control of the foreign principal;
- with funding or supervision by, the foreign principal; and
- in collaboration with, a foreign principal.

9.63 In his letter to the Committee, the Attorney-General stated:

> In combination with the amendments to reduce the range of foreign principals in respect of whom registration is required, the effect of these amendments to section 11 will be to ensure that, for example:
>
> - academics are not required to register where they collaborate with counterparts working for foreign state universities or research institutes, or are supervised by such counterparts, and
> - charities are not required to register solely because they receive funding from foreign governments of foreign government related entities.[45]

9.64 The Attorney-General has also proposed inserting a new subsection 11(4) as follows:

> An activity undertaken by a company registered under the *Corporations Act 2001* is not undertaken ***on behalf of*** a foreign principal merely because the company is a subsidiary (within the meaning of the *Corporations Act 2001*) of a foreign principal.[46]

9.65 The effect of the new subsection will be that Australian subsidiaries will not be required to register under the Scheme merely because a parent company meets the definition of a 'foreign government related entity'. However, as with any other company, entity or individual, a subsidiary may be required to register if it undertakes registrable activities for the purpose of political or governmental influence at the direction of its parent company.[47]

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45 Attorney-General, *Submission 84*, p. 5.

46 Attorney-General, *Submission 84.1*.

47 Optus provided a submission expressing concern that the proposed definition of a 'foreign government related entity' may establish liability for registration as it is a wholly owned subsidiary of Singtel, which is majority owned by the investment arm of the Government of Singapore. Optus, *Submission 87*, p. 1. The Department responded to this concern at

Evidence received

Retention of 'arrangement' in proposed subsection 11(1)(a)

9.66 As discussed in Chapter 3, a significant number of stakeholders expressed concern with the inclusion of 'with funding or supervision by, the foreign principal' and 'in collaboration with, a foreign principal' in the definition. A number of stakeholders were therefore supportive of the proposed removal of these terms from the definition of 'undertaking activity on behalf of a foreign principal'.[48]

9.67 For example, the Law Council of Australia considered the proposed amended definition an improvement as it

> narrows the instances where a person will be taken to be acting under the influence of a foreign principal by removing the term 'control' and removing the concept of 'funding or supervision' and 'collaboration' with a foreign principal. As the Committee may recall, the Law Council recommended a definition aligned with the laws of agency, which is similar to the current proposal.
>
> The removal of 'funding' in proposed paragraph 11(1)(e) assists charities (as well as the narrowing of the definition of foreign principal) as it is now clear that the charity would need to be following orders or a direction of a foreign principal and the foreign principal is connected with a foreign government. This also addresses the concern that the Law Council raised regarding the person not having any knowledge of the foreign principal's involvement (e.g. in the case of a fundraising campaign where donations are received from multiple sources).[49]

9.68 However, a number of stakeholders also identified that the retention of 'under an arrangement with the foreign principal' (proposed section 11(1)(a)) may nonetheless capture the types of collaborations and funding

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Attorney-General's Department, *Submission 5.5*, p. 26; see also Ms Tara Inverarity, Assistant Secretary, Attorney-General's Department, *Proof Committee Hansard*, Canberra, 18 June 2018, p. 17.

48 For example, Ms Catriona Jackson, Chief Executive, Universities Australia, *Proof Committee Hansard*, Canberra, 18 June 2018, p. 1.

49 Law Council of Australia, *Submission 4.2*, p. 2.

sources that were proposed to be removed by the Attorney-General's amendments.[50]

9.69 'Arrangement' is defined in proposed section 10 of the Bill as follows:

> ***arrangement*** includes a contract, agreement, understanding or other arrangement of any kind, whether written or unwritten.[51]

9.70 The definition is an inclusive definition and is not exhaustive of all of the types of relationships that may exist between a person and a foreign principal that are captured by the Scheme.[52]

9.71 A 'registrable arrangement' is similarly defined in proposed section 10 of the Bill as follows:

> ***registrable arrangement*** means an arrangement between a person and a foreign principal for the person to undertake an activity that, if undertaken by the person, would be registrable in relation to the foreign principal.[53]

9.72 Professor Anne Twomey noted that while the Attorney-General's letter states that the effect of the proposed amendments will be to ensure that 'academics are not required to register where they collaborate with counterparts working for foreign state universities or research institutes, or are supervised by such counterparts', there is

> … still the possibility that they might be caught if the foreign university is regarded as a foreign principal, the research cooperation involves an 'arrangement' with that foreign university, and a substantial purpose of the research is governmental influence (eg a project aimed at influencing governments to apply better ways of dealing with drought or soil salinity). Of course if the foreign principal sought to control or influence the outcome of the research collaboration, then it would fall within the category of arrangements that should be registered. If, however, the foreign university's arrangements simply involved the provision of facilities, the exchange of staff

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50 Australia Major Performing Arts Group, *Submission 37.1*, p. 3; Australian Council for International Development, *Submission 55.1*, pp. 2-3; Oxfam Australia, *Submission 57.1*, p. 3; GetUp!, *Submission 63.1*, p. 3; Australian Council of Trade Unions, *Submission 86*, p. 3; Ms Rachel Ball, Head of Public Policy and Advocacy, Oxfam Australia, *Proof Committee Hansard*, 26 June 2018, Canberra, pp. 26-27;

51 Foreign Influence Transparency Scheme Bill 2017, proposed section 10.

52 Ms Anna Harmer, First Assistant Secretary, Attorney-General's Department, *Proof Committee Hansard*, Canberra, 18 June 2018, p. 20.

53 Foreign Influence Transparency Scheme Bill 2017, proposed section 10.

> or the funding of conferences, without any influence over the research outcomes, then it would not meet the purposes of the Act to require registration.[54]

9.73 Accordingly, Professor Twomey was of the view that it would be preferable for the term 'arrangement' to be clarified. According to her analysis, the term as defined in proposed section 10 could potentially include the funding arrangements and collaboration arrangements that the government has already agreed to remove from the provision.

9.74 Professor Twomey was of the view that it would be consistent with the other revisions of the Bill and aid its clarity if the term 'arrangement' was defined 'more narrowly so that it only applied to arrangements that involve "an obligation (whether formal or informal) to act in accordance with the directions, instructions or wishes of the foreign principal" (consistent with the definition of foreign government related individual)'.[55]

9.75 At the public hearing, the Department responded to Professor Twomey's recommendation for further amendment, stating that 'those suggestions are not consistent with the policy outcome that's intended to be achieved here. There isn't equivalency between the concepts that have been used there'.[56]

9.76 However Universities Australia supported Professor Twomey's recommendations, noting:

> it would still be useful to ensure that 'under an arrangement with' more closely reflects the intended targeting of the scheme – that is, where the foreign principal exercises some control or direction, through the arrangement, to lobby or conduct communications activities in its interest.[57]

9.77 In supporting this recommendation, Universities Australia was of the view that it is important to distinguish those situations where an 'arrangement' exists with an intention on behalf of the foreign principal to have an Australian proxy act in the interests of the foreign principal, from those

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54 Professor Anne Twomey, *Submission 82.1*, p. 2.

55 Professor Anne Twomey, *Submission 82.1*, p. 2.

56 Ms Anna Harmer, First Assistant Secretary, Attorney-General's Department, *Proof Committee Hansard*, Canberra, 18 June 2018, p. 6; see also Ms Anna Harmer, First Assistant Secretary, Attorney-General's Department, *Proof Committee Hansard*, Canberra, 18 June 2018, p. 20.

57 Universities Australia, *Submission 9.1*, p. 2; see also Ms Catriona Jackson, Chief Executive, Universities Australia, *Proof Committee Hansard*, Canberra, 18 June 2018, p. 1.

situations where an Australian entity acts in its own interests, albeit whilst having a partnership with a foreign entity.[58]

9.78 The Department responded to these comments, clarifying its interpretation of the meaning of an arrangement:

> The department considers that an arrangement between two parties indicates a level of consideration, structure and planning about the proposed activities. Even though those activities may go beyond the scope of the other matters listed in section 11, the department considers it appropriate for arrangements to continue to fall within the definition of undertaking activity on behalf of a foreign principal in section 11, without further qualification or limitation.[59]

9.79 The Department further explained that the term 'arrangement' will involve a shared understanding and a degree of structure in the agreement between the person and the foreign principal:

> To arrive at an understanding there need to be some concepts which have become the subject of said understanding. The understanding comes from something, and so the concept to be covered here is the arrangement. The arrangement may be in the form of an understanding—it may be documented; it may not be—but to arrive at an understanding there needs to be some commonality or sharing of views on an approach, issue or the like and, in this instance, we're referring to an arrangement. That's how it's been defined.[60]

9.80 The Committee notes that the effect of paragraph 18(1)(a) of the Bill is that a person is only required to register if they 'undertake an activity on behalf of a foreign principal that is registrable in relation to the foreign principal'. The paragraph requires that the registrable activity, such as 'general political lobbying', be conducted 'on behalf of' the foreign principal, for example because the activity is conducted 'under an arrangement'. The plain effect of the paragraph is that it is not sufficient that a person have an arrangement with a foreign principal and separately engages in registrable activities for the purpose of political or governmental influence; the activities must be engaged in under the arrangement referred to in paragraph 11(1)(a), or under one of the other limbs in subsection 11(1).

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58 Universities Australia, *Submission 9.1*, p. 2; see also Ms Catriona Jackson, Chief Executive, Universities Australia, *Proof Committee Hansard*, Canberra, 18 June 2018, p. 1.

59 Attorney-General's Department, *Submission 5.5*, p. 25.

60 Ms Anna Harmer, First Assistant Secretary, Attorney-General's Department, *Proof Committee Hansard*, Canberra, 18 June 2018, p. 20.

Retention of proposed subsection 11(3)

9.81 Following receipt of the Attorney-General's proposed amendments, a number of organisations sought clarification on the effect of proposed subsection 11(3). Subsection 11(3) remains unamended by the Attorney-General's proposed amendments.

9.82 Section 11(3) provides:

> Without limiting subsection (1), a person undertakes an activity on behalf of a foreign principal if both the person and the foreign principal knew or expected that:
>
> (a) the person would or might undertake the activity; and
>
> (b) that the person would or might do so in circumstances set out in section 20, 21, 22 or 23 (whether or not the parties expressly considered the existence of the scheme).

9.83 Some stakeholders were of the view that proposed subsection 11(3) would be in addition to the requirements at proposed subsection 11(1) (as opposed to a limitation on subsection 11(1)) which list the range of relationships discussed above.[61] For example, the Australian Charities and Not-for-profit Commission stated:

> However, while section 11(1) of the Bill has been amended, the ACNC notes that no changes have been made to section 11(3). The ACNC is still of the view that section 11(3) means that simply discussing activities for the purpose of political or governmental influence with a foreign principal could mean that such activities may be considered to be undertaken on behalf of the foreign principal. We would encourage the Committee to consider ways of amending section 11(3) in particular to ensure that more than simply knowledge on the part of both parties means that a person is undertaking activity on behalf of a foreign principal.[62]

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61 Australian Charities and Not-for-profit Commission, *Submission 33.2*, p. 2; Australian Council for International Development, *Submission 55.1*, p. 2; Oxfam Australia, *Submission 57.1*, p. 3; GetUp!, *Submission 63.1*, p. 3; Mr David Crosbie, Chief Executive Officer, Community Council for Australia, *Proof Committee Hansard*, Canberra, 18 June 2018, pp. 10-11; Ms Rachel Ball, Head of Public Policy and Advocacy, Oxfam Australia, *Proof Committee Hansard*, 18 June 2018, Canberra, p. 27;

62 Australian Charities and Not-for-profit Commission, *Submission 33.2*, p. 2.

9.84 The Australian Council for International Development described the impact of the retention of proposed section 11(3) if it were to be considered an additional 'gateway' for liability under the Scheme:

> Section11(3) has also not been deleted, which provides that even knowledge by the foreign principal that lobbying or other activity to influence government policy might take place by the civil society group is the basis for an activity being determined to be 'on behalf of'. If 11(3) is not deleted, then it is conceivable that should a civil society group make a presentation to a foreign government that includes a plan of its future work, then it must register as an agent of that government if it then undertakes those activities.[63]

9.85 At the public hearing on the proposed amendments, Oxfam Australia provided its reasoning as to how proposed subsection 11(3) is viewed as an alternative test to that provided in proposed subsection 11(1). It noted the beginning words in subsection 11(3)—*'Without limiting subsection (1)*—and provided the following summary:

> As an additional filter I don't think that there's any problem with section 11(3). Our concern is that it be read not as an additional filter but another way in which a person or organisation could be seen as acting on behalf of. So even knowledge by the foreign principal of that lobbying or other activity to influence government policy might take place is a basis for determining that that activity is taken on behalf of, as defined by the act.[64]

9.86 The Department disagreed with this reading and sought to clarify the purpose of the provision:

> Obviously some submitters have understood that provision to broaden the scope of the meaning of undertaking activity 'on behalf of'. We don't read it that way. The purpose of the provision is to ensure that both the person and the foreign principal need to know or expect that the person would or might undertake the activity. This is intended to ensure that where a person—there is a coincidental overlap between what they end up doing and the desires of the foreign principal, but it's not reasonable to draw a causal link between those two. If a person is really acting on their own because they think that it would be of benefit to the foreign principal, but the foreign principal has never heard of them, doesn't know about them and has no reason to expect that they would go and undertake the lobbying they undertook, it's supposed to ensure

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63 Australian Council for International Development, *Submission 55.1*, p. 3.

64 Ms Rachel Ball, Head of Public Policy and Advocacy, Oxfam Australia, *Proof Committee Hansard*, 18 June 2018, Canberra, p. 27.

> that that is not falling within the definition. So we read it the opposite way to how some of the submitters have.

9.87 At the public hearing, the Committee sought further clarification from the Department on the particular phrasing *'Without limiting subsection (1)'*.[65]

Section 12—Activity for the purpose of political or governmental influence

9.88 Under section 12 of the Bill, the Attorney-General has proposed to narrow the definition of 'activity for the purpose of political or government influence' to required that the sole or primary purpose, or a substantial purpose, of the activity is to influence any aspect of a political or governmental process, as opposed to it being a purpose of the activity.

9.89 This proposed amendment was welcomed by a number of stakeholders.[66] For example, the Law Council stated:

> The definition of 'activity for the purpose of political or governmental influence' (proposed section 12) is also an improvement as it narrows activity to the 'sole or primary purpose, or a substantial purpose' of influencing political matters. The introduction of a sole, primary or substantial purpose into proposed section 12 is positive, although there may be some ambiguity as to what amounts to 'a substantial purpose'.[67]

9.90 Universities Australia noted that the changes would assist in addressing concerns about the application of the Scheme to research collaborations in the tertiary sector:

> We also welcome the changes to the definition of 'political purposes'. These make it clear that where research results in policy relevant outcomes, the communication or dissemination of these results will not trigger the requirements to register even where the research is conducted in partnership with an international colleague or institution.[68]

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65 Ms Tara Inverarity, Assistant Secretary, Attorney-General's Department, *Proof Committee Hansard*, Canberra, 18 June 2018, p. 22.

66 Law Council of Australia, *Submission 4.2*, p. 2; Australia Major Performing Arts Group, *Submission 37.1*, p. 4; Professor Anne Twomey, *Submission 82.1*, p. 1; Ms Catriona Jackson, Chief Executive, Universities Australia, *Proof Committee Hansard*, Canberra, 18 June 2018, p. 1.

67 Law Council of Australia, *Submission 4.2*, p. 2.

68 Ms Catriona Jackson, Chief Executive, Universities Australia, *Proof Committee Hansard*, Canberra, 18 June 2018, p. 1.

9.91 The Law Council suggested however that consideration be given to replacing the term 'substantial' with 'dominant'.[69]

9.92 The Department responded to this recommendation, advising the Committee that 'references to 'dominant' in legislation have the same meaning as 'primary' and referred to advice from the Office of Parliamentary Counsel that 'primary' is the preferred, modern form of drafting'.[70]

9.93 At the public hearing on the amendments, the Committee sought evidence on the scope of decisions that may be captured by the term 'federal government decisions' as included in the list of activities that will be for the purpose of political or governmental influence (proposed section 12(1)(b)). The Community Council for Australia expressed concern that a breadth of activities may be captured:

> I think a process related to a federal government decision, clause 12(1)(b), is something that many charities are actively engaged in. While it has been narrowed, I think that the whole of clause 12—a person undertakes an activity for the purpose of political or governmental influence—says sole or primary purpose or substantial purpose. It often is a substantial purpose to try and improve government investment in housing or drug treatment or addressing United Nations development goals. It's often a key part of what people are doing. [71]

9.94 In response to the Committee's questions at the public hearing, the Department advised that it had not considered any options to limit proposed subsection 12(1)(b).[72]

Section 13—Communications activity

9.95 The Attorney-General's proposed amendments to section 13 (Communications activity) provide that broadcasters, carriage service

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69 Law Council of Australia, *Submission 4.2*, p. 2.

70 Attorney-General's Department, *Submission 5.5*, p. 2; see also Ms Tara Inverarity, Assistant Secretary, Attorney-General's Department, *Proof Committee Hansard*, Canberra, 18 June 2018, p. 30.

71 Mr David Crosbie, Chief Executive Officer, Community Council for Australia, *Proof Committee Hansard*, Canberra, 18 June 2018, p. 7.

72 Ms Tara Inverarity, Assistant Secretary, Attorney-General's Department, *Proof Committee Hansard*, Canberra, 18 June 2018, p. 21.

providers and publishers are not required to register, merely because they edit information or materials produced by a foreign principal to ensure:

- compliance with Australian media laws and regulations, or
- the information or materials can be re-transmitted or published, for example by shortening a television program by a few seconds so that it fits into an allocated timeslot.

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

9.97 In a submission to the Committee, the Attorney-General explained:

> The purpose of limiting the exemption in subsection 13(3) by including a requirement that the identity of the producer is apparent from the information or material disseminated, or is otherwise disclosed in accordance with the rules, is to ensure that the exemption does not inadvertently enable foreign governments, political organisations, and related entities and individuals to exploit our free press as a vehicle for covert foreign influence.[73]

9.98 The Attorney-General's submission also stated that media organisations and publishers 'will not be required to register if the identity of the principal is already transparent'.[74] Examples of this would include:

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

9.99 However, the Attorney-General's submission also reasoned that registration would be required in instances such as:

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

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73 Attorney-General, *Submission 84*, p. 6.

74 Attorney-General, *Submission 84*, p. 6.

> broadcasts that content, as though it were the Australian organisation's own editorial position.[75]

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

9.101 The specific exemption for carriage service providers in current subsection 13(3) has been retained in revised subsection 13(4), as carriage service providers do not communicate or distribute information or material in the ordinary course of their business, but rather provide the means by which concern service providers communicate information or material.[76]

Evidence received

9.102 The Joint Media Organisations supported the Attorney-General's proposed amendments (to proposed sections 13 and 28) commenting:

> By significantly narrowing the scope of the Bill the amendments substantially improve the Bill and markedly reduce the unintended consequences for media organisations as they undertake the ordinary course of their businesses.[77]

9.103 Similarly, the Law Council noted the refinement offered by the Attorney-General's proposed amendments. It stated:

> 'Communications activity' has also been limited so that broadcasters, carriage service providers and publishers will not be required to register where they are undertaking their ordinary business on behalf of newly defined foreign principals. As the Committee may recall, the Law Council noted that while there were exemptions for publishers and broadcasters, there were concerns as to how it would interact with platforms such as social media. The amendments to 'communications activity' and the limiting of foreign principals appear to at least partly ameliorate these concerns.[78]

9.104 However, the Organisations recommended that additional clarifications be provided in the Explanatory Memorandum which, in its view, would 'ensure the Government's intention regarding some matters is expressly understood. This would further assist media organisations in managing

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75 Attorney-General, *Submission 84*, p. 6.

76 Attorney-General, *Submission 84*, p. 6.

77 Joint Media Organisations, *Submission 19.3*, p. 1.

78 Law Council of Australia, *Submission 4.2*, p. 3.

compliance with the Bill'.[79] More specifically, the Organisations sought clarification in the Explanatory Memorandum on the following:

- Section 13(3) (as per the proposed amendments) – a possible clarification to express that 'producer' has a general meaning and denotes the person or organisation generally responsible for the content. This is as opposed to the media industry definition of 'producer', which specifies a person with a defined role within the content creation process, and
- Section 13(3) (as per the proposed amendments) – a possible clarification that 'ordinary course of the disseminator's business' includes circumstances where a broadcaster broadcasts a channel, program or stream under an arrangement (content supply agreement) with a foreign principal.[80]

Extension of obligations for Cabinet Ministers and Commonwealth position holders

'Former Cabinet Ministers'

9.105 The Bill, as introduced by the Prime Minister in December 2017, imposes additional registration requirements on recent Cabinet Ministers for a period of three years after they cease to be a Member of Parliament or a holder of a senior Commonwealth position.

9.106 Under the Attorney-General's proposed changes, the definition of 'recent Cabinet Minister' under section 10 of the Bill has been replaced with 'former Cabinet Minister'. A former Cabinet Minister, within the meaning of the Bill, will be a person who was a member of the Cabinet in the past 10 years and who is not presently a designated position holder, such as a former Cabinet member who remains a member of the Parliament.

9.107 In his submission to the Committee explaining the amendments, the Attorney-General provided:

> Increasing this period to 10 years reflects a considered judgment that the reasons for imposing these additional registration requirements on former Cabinet Ministers, as outlined in the Explanatory Memorandum, remain germane for a longer period of time than is presently reflected in the Bill.[81]

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79 Joint Media Organisations, *Submission 19.3*, p. 2.

80 Joint Media Organisations, *Submission 19.3*, p. 2.

81 Attorney-General, *Submission 84*, p. 4.

9.108 The Attorney-General reflected the definition change to former Cabinet Ministers in section 22 of the Bill, which proposes to capture that an activity a person undertakes on behalf of a foreign principal is registrable in relation to the foreign principal if the person is a former Cabinet Minister, the activity is not registrable in relation to the foreign principal under another provision of the Division, and the person is not exempt under Division 4 (exemptions) in relation to the activity.

Recent designated position holder

9.109 As introduced by the Prime Minister, the Bill imposes additional registration requirements on former junior Ministers, members of Parliament, Secretaries and Deputy Secretaries of Commonwealth departments, and the heads and deputy heads of other Commonwealth agencies for a period of 18 months after they cease to hold such positions. The Attorney-General's amendments propose to extend these obligations to Ambassadors or High Commissioners.[82] These positions are collectively re-defined as part of the Attorney-General's proposed amendments to 'a recent designated position holder'.

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

- a Minister;
- a member of the Parliament;
- an Agency Head (within the meaning of the *Public Service Act 1999*), a deputy agency head (however described);
- the holders of an office established by or under a law of the Commonwealth and equivalent to that of Agency Head or deputy agency head, and
- the holder of an office of the Commonwealth as an Ambassador or High Commissioner, in a country or place outside Australia.[83]

9.111 In his submission to the Committee explaining the amendments, the Attorney-General provided:

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82 See proposed amendment to include a definition of 'designated position holder' in proposed section 10.

83 See proposed definitions of 'designated position holder' and 'recent designated position holder' in proposed section 10.

> The inclusion of former Ambassadors or High Commissioners in the concept of recent designated position holder recognises that such persons play a unique role in Australia's foreign relations and that, when acting on behalf of a foreign government, political organisation, or related entity or individual in their retirement or upon ceasing their role as Ambassador or High Commissioner, such persons have the potential to be uniquely influential. Accordingly, it is appropriate and in the public interest to require transparency from such individuals.[84]

9.112 Further, the Attorney-General's amendments propose to increase the period for which recent designated position holders are subject to additional registration obligations from 18 months to seven years after ceasing in a particular role. The Attorney-General submitted that the proposed extension 'reflects a considered judgment that the reasons for imposing these additional requirements remain germane for a longer period of time than is presently reflected in the Bill'.[85]

9.113 The Attorney-General reflected the definition change to recent designated position holder in section 23 of the Bill, which proposes to capture that an activity a person undertakes on behalf of a foreign principal is registrable in relation to the foreign principal if:

- The person is a recent designated position holder, and
- In undertaking the activity, the person contributes experience, knowledge, skills or contacts gained in the person's former capacity ad a designated position holder, and
- The activity is not registrable in relation to the foreign principal under another provision of the this Division, and
- The person is not exempt under Division 4 in relation to the activity.

Committee comment

9.114 The Committees notes that the amendments proposed by the Attorney-General substantially address most issues raised by submitters during the Committee's inquiry. In Chapter 10, the Committee provides its recommendations in response to these proposed amendments.

9.115 There are also some outstanding issues which the Committee considers warrant examination and these are discussed in Chapter 10.

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84 Attorney-General, *Submission 84*, p. 4.

85 Attorney-General, *Submission 84*, p. 4.

Exemptions

9.116 In this section the following amendments are discussed:

- Humanitarian exemption (section 24)
- Legal advice or representation exemption (section 25)
- Religion exemption (section 27)
- Government, commercial or business pursuits (section 29)
- Industry representative bodies (section 29A)
- Personal representation in relation to administrative process etc (section 29B)

9.117 The Attorney-General's proposed amendments engage with a number of the issues raised in submissions and public hearings on the exemptions provisions contained in Part 2 of the Bill.

9.118 Some of these concerns have been addressed through redefining the term foreign principal, with the Attorney-General noting 'the amendments … to remove foreign individuals from the range of foreign principals in respect of whom registration is required will largely resolve [the issue of making representation on behalf of individuals]'.

9.119 For example, the exemption for news media only applied if the foreign principal was a foreign business or individual. As these persons no longer form part of the definition of foreign principal, an exemption for news media is no longer required.

9.120 However, in addition to changing the definition of foreign principal, the Attorney-General proposed several changes to Part 2, Division 4 (exemptions) of the Bill that were identified through submissions and public hearings as being of concern.

9.121 These proposed amendments include:

Humanitarian exemption (section 24)

9.122 The Attorney-General's proposed amendments broaden the humanitarian exemption. The Attorney-General's proposal—to replace the word 'solely' with 'primarily'— means that the exemption would extend to 'a person in relation to an activity the person undertakes on behalf of a foreign principal if the activity is, or relates primarily to, the provision of humanitarian aid or humanitarian assistance'.

Legal advice or representation exemption (section 25)

9.123 The Attorney-General proposed two amendments on exemptions for legal advice or representation. Proposed section 9A, as discussed above, contains a savings provision for legal professional privilege, and clarifies that the Secretary's powers to request information do not extend to privileged documents.

9.124 Proposed section 25 has been amended to broaden activity 'solely' relating to legal representation to 'primarily' relating to legal representation. The proposed amendment also captures legal representation in relation to an administrative process of a government involving the foreign principal.

Evidence received

9.125 The Law Council of Australia supported the broader exemption for legal advice and legal representation (proposed section 25).[86] However the Law Council also recommended

> a further change be made to the exemption for legal advice or representation to make it consistent with the federal Lobbying Code of Conduct—namely, that the words 'or relates primarily to' should be replaced [with] 'or is incidental to' [to] ensure that the test in the exemption is consistent with the language at clause 3.5 subparagraph (f) of the federal Lobbying Code of Conduct.[87]

9.126 Similarly Law Firms Australia supported the proposed amendments, and suggested the words 'or relates primarily to' should be replaced by 'or is incidental to' to ensure consistency with the language of the Federal Lobbying Code of Conduct.[88]

9.127 The Department responded noting that

> incidental activities would fall within the legal advice and representation exemption (at proposed new section 25 … as long as the incidental activity relates primarily to the provision of legal advice or representation (as defined in section 25).[89]

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86 Law Council of Australia, *Submission 4.2*, p. 2.

87 Mr Arthur Moses, SC, President-elect, Law Council of Australia, *Proof Committee Hansard*, Canberra, 18 June 2018, p. 14.

88 Law Firms Australia, *Submission 10.2*, p. 2.

89 Attorney-General's Department, *Submission 5.5*, p. 2.

9.128 In regard to the use of the term 'primarily', the Department—including reference to advice from the Office of Parliamentary Counsel—said that it is the preferred modern drafting term and that 'primarily' for the purpose of legal advice would also include those activities that are incidental to the delivery of such legal advice.[90]

9.129 Australian Lawyers for Human Rights welcomed the expansion of the exemption in relation to legal advice and representation, but suggested the exemption should also cover:

> work that is incidental to providing legal advice or representation, and
>
> all forms of legal representation without limit as to the type of matters in question.[91]

9.130 The Department considered this unnecessary, and maintained that the limited exemption for legal representation is deliberate and necessary. The Department stated that:

> If a foreign principal engages a lawyer to represent them in lobbying activities that are not connected to a legal process, and the other requirements of the scheme are met, it would be appropriate for that lawyer to be required to register'.[92]

Religion exemption (section 27)

9.131 The Attorney-General proposed simplifying section 27 of the Bill to put the religion exemption 'beyond doubt'. Under the proposed changes, 'a person is exempt in relation to a religious activity the person undertakes, in good faith, on behalf of a foreign principal'.

Evidence received

9.132 The Australian Catholic Bishops Conference submitted that the proposed new exemption for religion did 'not offer certainty or clarity and so may have the effect of discouraging legitimate public policy comment by

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90 Ms Anna Harmer, First Assistant Secretary, Attorney-General's Department, *Proof Committee Hansard, 18 June 2018*, p.31.

91 Australian Lawyers for Human Rights, *Submission 7*, p. 5.

92 Attorney-General's Department, *Submission 5.5*, p. 7.

religious groups'.[93] They suggested that the exemption should be amended to read either that

> 'a person is exempt in relation to an activity the person undertakes in good faith primarily for religious purposes'
>
> or,
>
> 'a person is exempt in relation to an activity the person undertakes in good faith in accordance with the doctrines, tenets, beliefs or teachings of the person's religion or primary purpose of that religion.

9.133 In response, the Department confirmed that the proposed section 27, as amended, 'clearly places all religious activity undertaken on behalf of a foreign principal outside the scope of the scheme'.[94] At a subsequent public hearing, the Department noted that

> the amendment we've included here was, in fact, actually intended to give effect to or to respond to the concerns articulated by the Australian Catholic Bishops Conference in its previous submissions and evidence to this committee. We certainly were under the impression we had faithfully given effect to that and had mirrored the exemption in the United States Foreign Agents Registration Act that they had referenced in their submissions. To the extent that there's any residual concern that that is not the effect achieved by the amendments, then we are open to either of those form of words to make that very clear.[95]

Government, commercial or business pursuits (section 29)

9.134 The Attorney-General proposed adding 'government' to section 29 of the Bill, which has also been expanded to cover activities undertaken by individuals on behalf of a foreign government in the individual's capacity as an officer or employer of the foreign government.

9.135 The Attorney-General noted 'such activities are inherently transparent, so there would be little benefit in requiring individuals acting in their official capacity as an employee or officer of a foreign government to register'.

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93 Australian Catholic Bishop's Conference, *Submission 12.2*, p. 1.

94 Attorney-General's Department, *Submission 5.5*, p. 10.

95 Ms Anna Harmer, First Assistant Secretary, Attorney-General's Department, *Proof Committee Hansard, 18 June 2018*, p. 31.

Evidence received

9.136 The Australian Professional Government Relations Association (APGRA) supported the intent of the proposed amendment, but suggested it lacked clarity:

> It appears clear that it would apply where the activity relates to a contract for the provision of goods or services (although it would be useful to confirm this). It is unclear, however, whether the exemption would apply to activities relating to a regulatory approval relevant to a commercial transaction or project. Similarly, where change is sought to legislation or public policy in pursuit of the bona fide commercial or business objectives of the foreign government related entity.

9.137 The Attorney-General's Department responded by noting the Explanatory Memorandum 'indicates that the term is intended to be interpreted broadly and includes activities that are related to trade and commerce'. The Department went on to say,

> If the activity related to lobbying in relation to broader legislation or public policy of interest to a foreign government related entity then this would not be considered to be a 'commercial or business pursuit'. This type of lobbying is intended to fall within the scope of the scheme, so that there is transparency for decision-makers and the public about such activities being undertaken on behalf of a foreign principal. This can be clarified in the Supplementary Explanatory Memorandum.[96]

9.138 At a public hearing, the Committee questioned the Department about section 29—exemption: commercial business pursuits—and its operation. Subsection (2) of that section currently exempts an individual from having to register where the individual undertakes activities that are a commercial or business pursuit undertaken in the individual's capacity as a director or officer or employee of a foreign government-related entity. This provision does not require that the individual employment relationship with the foreign government-related entity be disclosed in order for the individual to come within the exemption in section 29(2).

9.139 This differs from officers and employees of foreign governments, dealt with in section 29(1), which requires the activity be undertaken in the name of the foreign principal. The Committee queried whether there was a risk of a person undertaking otherwise registrable activities on behalf of foreign

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[96] Attorney-General's Department, *Submission 5.5*, p. 10.

government-related entities while failing to disclose their employment relationship.

9.140 The Department confirmed this, stating that:

> The provision does not require them to be doing something 'in the name of', but it does require them to be doing it in their capacity as an employee also. If they were operating in their personal capacity, they would not attract the exemption. So they need to be engaging in their official duties to attract that exemption. [97]

9.141 The Committee further queried whether the exemption should apply only where the employment relationship is clear on the face of the otherwise registrable activity undertaken by the individual. This would ensure that a person who appropriately conducts activities overtly on behalf of a foreign government-related entity is not treated in the same manner as a person who fails to disclose their relationship with a foreign principal.

9.142 In response, the Department indicated that a reference to 'in the name of the relevant foreign principal' could be added to the provision to place the matter beyond doubt.[98]

Industry representative bodies (section 29A)

9.143 The Attorney-General proposed adding section 29A to the Bill in order to exempt entities formed in Australia from registering in cases where a person is representing the interests of business or industry, the entity is not solely representing foreign interests, and the activity is or primarily relates to, representing the interests of business.

Evidence received

9.144 The proposed exemption was supported by Universities Australia.[99] Similarly, Chemistry Australia and Australian Industry Group welcomed

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97 Ms Anna Harmer, First Assistant Secretary, Attorney-General's Department, *Proof Committee Hansard*, 18 June 2018, pp. 8-9.

98 Ms Anna Harmer, First Assistant Secretary, Attorney-General's Department, *Proof Committee Hansard,* 18 June 2018, pp. 8-9.

99 Ms Catriona Jackson, Chief Executive, Universities Australia, *Proof Committee Hansard*, Canberra, 18 June 2018, p. 2.

the Government's 'good faith effort' to respond to and address the concerns that industry expressed about the initial Bill.[100]

9.145 However, both Chemistry Australia and Australian Industry Group submitted that proposed subsection 29A(d) created ambiguity and did not achieve the purpose. Chemistry Australia acknowledged the sound intention of the amendment, but contended that:

> clause (d) is extremely ambiguous in the context of the day-to-day activities of an industry representative body and provides a real likelihood of unintended consequences on all of its members and activities.

9.146 Both submitters suggested either deleting proposed section 29A(d), or providing further guidance in the Bill or Explanatory Memorandum on the kinds of activities that are included and excluded by proposed section 29A(d).

9.147 The Attorney-General's Department responded to Chemistry Australia and the Australian Industry Group maintaining that

> paragraph 29A(d) is needed. The Attorney-General stated in Submission 84.1:
>
> *This (section 29A) addresses concerns raised in the Committee's inquiry by professional industry bodies that the Bill as introduced imposes an unnecessary regulatory burden on such entities by requiring them to register as they do not represent the interests of any particular foreign principal member. Rather, the professional industry body represents the interests of the industry as a whole, not the interests of the foreign principals who may form part of its membership. If a professional industry body were to lobby on behalf of one of its foreign members (rather than on behalf of the industry as a whole), it may still be required to register.*
>
> Deleting paragraph 29A(d) would not achieve the policy intention of the exemption.

Personal representation in relation to administrative process etc (section 29B)

9.148 The Attorney-General's proposed section 29B provides a broad exemption for individuals where the foreign principal is also an individual, where the two individuals are members of the same family or know each other personally, or where the activity relates to an administrative government process or affects the personal welfare of the foreign individual.

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100 Chemistry Australia, *Submission 91;* The Australian Industry Group, *Submission 32.1.*

9.149 The Attorney-General's proposed amendments remove an individual from the definition of a 'foreign principal'. This has been replaced with a 'foreign government related individual'. While it may be unlikely that a 'foreign government related individual' would be raising a personal matter, the proposed amendment place this exemption beyond doubt.

Charities - evidence received

9.150 The proposed change to limit the definition of 'foreign principal' in proposed section 10 was strongly supported by community, charity and not-for-profit groups, with the Charities and Not-for-profits Commission noting that 'these are welcome amendments which, in our initial assessment, would reduce the number of charities likely to be required to register with the Scheme'.[101]

9.151 However, a number of submitters identified concerns that an exemption has been proposed in the Bill for industry representative bodies, but not charities. The Community Council for Australia (CCA) noted that,

> the exclusions given to peak industry bodies and businesses have not been provided to peak charity bodies and charities. Charities face real and enforceable restrictions on their capacity to participate in political activities, restrictions that business and industry peak bodies do not have to comply with. CCA does not believe charities pose such a risk to national security that they should be identified as a higher risk than businesses or industry peak bodies.[102]

9.152 Similarly, Oxfam noted the exemption provided to professional industry bodies which is not available to charities:

> The amendments proposed by the Attorney General include an exemption for professional industry bodies which represent the collective interests of members, and have both domestic and foreign entities within their membership. The exemption has been proposed in response to concerns raised by industry bodies that the Bill would impose an unnecessary regulatory burden, as they do not represent the interest of any foreign principles who may form part of their membership.

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101 Australian Charites and Not-for-profits Commission, *Submission 33.2*, p. 2.

102 Community Council for Australia, *Submission 34.1*, p. 4.

> Australian charities and public interest not-for-profits that work with 'foreign principals' are in a similar position in cases where international relationships and partnerships inform domestic advocacy, but do not direct it.[103]

9.153 At a public hearing, the CCA suggested that some definitions could be further refined, and a number of charities will remain concerned and uncertain about their registration requirements, particularly given the degree of international collaborations.[104]

9.154 CCA went on to note that

> a lot of the work that charities do—not most charities, but a substantial number of charities—involves international collaboration with organisations that have substantial government involvement. Whether or not they will be captured I'm unsure, and that's the issue. It remains uncertain. Given that most charities are very risk averse in terms of their reputation—most charities trade in trust—the idea of having to go on a foreign register if they engage in those activities or if when they come back to Australia they advocate for positions that those global groups may have supported I think is a real issue.[105]

9.155 The Attorney-General's Department responded to the requests for an exemption for charities with the following:

> It is not necessary to include such an exemption because charities will only be required to register to the extent that they engage in registrable activities on behalf of a foreign principal for the purpose of political or governmental influence. The definitions of foreign principal and undertaking activities on behalf of a foreign principal are proposed to be significantly narrowed by the amendments.
>
> Therefore, any charity that is not operating on behalf of a foreign government, foreign political organisation, foreign government related entity or foreign government related individual will simply not be affected by the registration requirements of the scheme. [106]

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103 Oxfam, *Submission 57*, p. 3

104 Mr David Crosby, Community Council of Australia, *Proof Committee Hansard*, Canberra, 18 June 2018, p. 6.

105 Mr David Crosby, Community Council of Australia, *Proof Committee Hansard*, Canberra, 18 June 2018, p. 7.

106 Attorney-General's Department, *Submission 5.5*, p. 17.

9.156 At a public hearing, clarifying why a charity that was pursuing its publicly stated and registered purpose would need to register, the Department responded:

> It comes back to the objects of the scheme. We're not seeking to regulate particular sectors—charities, businesses et cetera. Rather, the bill seeks to provide transparency to certain types of dealings on behalf of certain entities to achieve certain effects, with some limited exemptions thereof. So it's not the case that the bill specifies that charities are subject to a particular obligation. Rather, it says that, broadly, where persons and entities engage in registrable activities on behalf of a foreign principal for the purpose of political government influence—which has been that narrowed-down concept that some charities may engage on behalf of a foreign principal and some businesses may do work on behalf of a foreign principal—that's where the scheme comes in.[107]

Other exemptions – evidence received

9.157 The ACTU raised a number of concerns with the Bill and proposed that 'it seems that the clearest pathway to resolving our concerns would be to insert an appropriately drafted exemption for trade union related activity in Division 4 Part 2 of the Bill'.[108]

9.158 In response, the Attorney-General's Department submitted that,

> It is not clear how trade union activities may be captured by the Bill, and to the extent they are, the basis on which should be exempt. Where a registrable activity is covered, it is because it is undertaken in Australia on behalf of a foreign principal for the purposes of political or government influence. Where that is the case, the policy intent is that the activity be registrable.[109]

9.159 AMPAG raised concerns that many Australian arts organisations looking to collaborate internationally would be required to register and maintain up-to-date entries, which would generate an 'unproductive administrative burden on the organisation'.[110] AMPAG recommended that the Bill be further

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107 Ms Anna Harmer, First Assistant Secretary, Attorney-General's Department, *Proof Committee Hansard*, 18 June 2018, p. 24.

108 Australian Council of Trade Unions, *Submission 86*, p. 4.

109 Attorney-General's Department, *Submission 5.5*, p. 26.

110 Australian Major Performing Arts Group, *Submission 37.1*, p.5.

amended to clarify that it does not cover this kind of arts activity and 'an additional exclusion for the arts be added to Division 4'.[111]

9.160 Optus made a submission that the Committee 'consider possible exemptions being granted … where a relationship makes a positive contribution to Australia's national interest. This could be applied to companies which have a strong, established, positive relationship in Australia'.[112]

9.161 The Attorney–General's Department responded to this submission with the following:

> The department does not consider such an exemption to be necessary given the amendment to section 11 to insert new subsection 11(4). If a foreign government related entity is directing a subsidiary to engage in registrable activities in Australia for the purpose of political or governmental influence, the department considers that there is a public interest in such activities being transparent.[113]

Parliamentary privilege

Savings provision

9.162 The Attorney-General has proposed adding section 9A (Relationship of this Act to certain privileges and immunities) to clarify that the Bill does not affect the law relating to Parliamentary privilege or legal professional privilege.

9.163 Proposed section 9A(3) (Effect on Secretary's power to obtain information and documents) ensures the Secretary's powers to obtain documents and information under sections 45 and 46 of the Bill do not extend to requiring a person to give information or documents where the information or documents are protected by privilege or immunity, or where complying with the requirement would involve a breach of a privilege or immunity.

9.164 Reflecting the proposed amendments at section 9A (Relationship of this Act to certain privileges and immunities), the Attorney-General's amendments also provide that where a notice is issued by the Secretary under:

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111 Australian Major Performing Arts Group, *Submission 37.1*, p.5.

112 Optus, *Submission 87*, p. 1.

113 Attorney-General's Department, *Submission 5.5*, p. 26.

- proposed section 45 (Notice requiring information to satisfy Secretary whether person is liable to register under the scheme) or
- proposed section 46 (Notice requiring information relevant to scheme),

the notice must set out:

- the effect of section 9A (relationship of this Act to certain privileges and immunities) in relation to the notice; and
- the effect of section 60 of this Act and sections 137.1 and 137.2 of the *Criminal Code* (false or misleading information).

9.165 The proposed amendments include a note (under both section 45 and section 46) stating that a notice issued by the Secretary for further information does not override those privileges and immunities that are provided for in section 9A.

9.166 In a joint supplementary submission responding to the proposed amendments, the Clerk of the House of Representatives and the Clerk of the Senate noted that the amendment 'appears to largely address the concerns raised in our earlier submissions, particularly by placing appropriate boundaries on the Secretary's powers under the bill'.[114]

9.167 The Clerks added that the provisions 'endorse an interpretation that respects the traditional scope of privilege', and that the provisions would be 'bolstered' by section 16 of the *Parliamentary Privileges Act 1987*, which prohibits forensic examination of parliamentary proceedings in courts and tribunals.[115]

9.168 The Clerks also noted that the proposed narrowing of the definition of 'undertaking activity on behalf of a foreign principal' to remove the concept of 'collaboration' addressed concerns that this concept was 'potentially problematic' for interactions with members and senators.[116]

9.169 Mr Bret Walker SC, appearing before the Committee to address the proposed amendments, described the proposed addition of section 9A as a 'commendable step in the right direction'.[117] However, he considered that the new section 'doesn't go far enough' in that it would not deal with all the

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114 Clerk of the House of Representatives and Clerk of the Senate, *Submission 85*, p. 2.

115 Clerk of the House of Representatives and Clerk of the Senate, *Submission 85*, p. 2.

116 Clerk of the House of Representatives and Clerk of the Senate, *Submission 85*, p. 2.

117 Mr Bret Walker SC, *Proof Committee Hansard*, Canberra, 18 June 2018, p. 1.

kinds of activities that members of parliament may undertake outside formal parliamentary proceedings.[118]

9.170 Mr Walker also noted that, due to the small number of cases that have been considered by the courts, there was a lack of clarity in the definition of 'parliamentary proceeding', which meant that the scope of proposed section 9A would be uncertain.[119] He noted, however, that parliamentarians' offices would

> need to be very sure about the connections of really every new person with whom you have dealings. They need not be overtly foreign dealings: they may be dealings with people, social groupings within Australia, who have foreign connections. Bearing in mind the largely migrant nature of us and our immediate ancestors in the large majority of this population, that's a lot of people.[120]

9.171 Responding to an example put forward by the Committee, Mr Walker confirmed that if a member of parliament who was the chair of a parliamentary friendship group were to discuss a certain issue relating to foreign policy at a meeting with the ambassador of a foreign country, and subsequently raise that issue with the Minister for Foreign Affairs, then it was likely that the member would be required to register under the FITS Bill.[121]

9.172 Mr Walker indicated that, to address these issues, the Bill would need to be amended to provide that the 'provisions of the Bill do not apply to members or senators in relation to their parliamentary office'.[122] Following this, Mr Walker considered that each of the houses should

> devise, as they see fit, an appropriate amendment to their standing orders to ensure that they remain in full control of the kind of disclosures that they think appropriate for their members to make to the world about their arrangements with what I call foreign principals.[123]

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118 Mr Bret Walker SC, *Proof Committee Hansard*, Canberra, 18 June 2018, p. 1.

119 Mr Bret Walker SC, *Proof Committee Hansard*, Canberra, 18 June 2018, p. 3.

120 Mr Bret Walker SC, *Proof Committee Hansard*, Canberra, 18 June 2018, p. 2.

121 Mr Bret Walker SC, *Proof Committee Hansard*, Canberra, 18 June 2018, p. 3.

122 Mr Bret Walker SC, *Proof Committee Hansard*, Canberra, 18 June 2018, p. 2.

123 Mr Bret Walker SC, *Proof Committee Hansard*, Canberra, 18 June 2018, p. 2.

9.173 Mr Walker noted that the registers of interests for members and senators, conducted under the standing orders for each house, provided an 'exact analogy' for how the dealings of members and senators should be treated.[124] He considered that such an approach would avoid

> the very unseemly prospect of public servants—part of the executive branch of government—purporting to hold to account members and senators for their arrangements with people with respect to their parliamentary office.[125]

9.174 The Committee sought the Attorney-General's Department's views on Mr Walker's evidence at a subsequent public hearing. The Department noted that the intent of proposed section 9A was not to exclude members of parliament from the operation of the scheme, but rather to ensure that the Bill does not abrogate parliamentary privilege.[126] The Department noted that the question of whether members of parliament should be 'carved out' of the Bill, and standing orders amended to create an appropriate registration requirement for members, was a policy question.[127] The Department stated, however, that there was no impediment to such a carve-out being implemented in the Bill if that was the desired policy outcome.[128]

Committee comment

9.175 The Committees notes that the amendments proposed by the Attorney-General substantially address most issues raised by submitters during the Committee's inquiry. In Chapter 10, the Committee provides its recommendations in response to these proposed amendments.

9.176 There are also some outstanding issues which the Committee considers warrant examination and these are discussed in Chapter 10.

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124 Mr Bret Walker SC, *Proof Committee Hansard*, Canberra, 18 June 2018, p. 1.

125 Mr Bret Walker SC, *Proof Committee Hansard*, Canberra, 18 June 2018, p. 1.

126 Ms Anna Harmer, First Assistant Secretary, Attorney-General's Department, *Proof Committee Hansard*, Canberra, 18 June 2018, p. 27.

127 Ms Anna Harmer, First Assistant Secretary, Attorney-General's Department, *Proof Committee Hansard*, Canberra, 18 June 2018, p. 29.

128 Ms Tara Inverarity, Assistant Secretary, Attorney-General's Department, *Proof Committee Hansard*, Canberra, 18 June 2018, pp. 29–30.

Registrants' obligations and operation of the Scheme

9.177 In this section the following amendments are discussed:

- Registrants' obligations
- Operation of the Scheme
  - Delegation power
  - Publishing sensitive information on the register
  - Evidentiary certificates
  - Transparency notices

Registrants' obligations

9.178 The Attorney-General's proposed amendments do not seek to amend registrants' obligations under the Bill.

9.179 The Australian Professional Government Relations Association (APGRA) provided a supplementary submission to the proposed amendments. APGRA raised concerns regarding the disclosure and publication of information:

> We submit that the broad publication of any information beyond the name of the parties and a general descriptor of the type of activity undertaken is not required from a public interest perspective and would serve to prejudice the legitimate interests of a foreign government related entity and their professional advisers.

9.180 AGPRA submitted that the information disclosed under the Scheme should be 'limited to details disclosed under the Lobbying Code of Conduct, a system that is currently working well.[129] Further, reporting should only be required once per quarter as a 'more reasonable compliance burden'.[130]

9.181 The Department responded to these recommendations advising:

> To achieve the transparency objectives of the Scheme, certain information relating to a person's registration must be collected. The information that is collected is intended to capture the essential details relevant to a person's registration, to ensure that an accurate and comprehensive record is kept.
>
> The information that a registrant is likely to be required to provide includes:

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129 Australian Professional Government Relations Association, *Submission 13.1*, p. 2.

130 Australian Professional Government Relations Association, *Submission 13.1*, p. 3.

- the name of the person and general details (address, occupation, citizenship status and any prior government employment, including position and term of employment)
- the name of the foreign principal and general details (contact details, nationality, type of foreign principal and general description of business/activities)
- high level details of the nature of the relationship between the registrant and the foreign principal (e.g. whether there is a contract in place, an informal agreement or otherwise) and whether the person has received / is receiving financial benefits from the foreign principal, and
- issues of interest which the registrant intends to pursue on behalf of the foreign principal (i.e. environmental issues, defence contracts, a particular vote or policy).[131]

9.182 In regards to the reporting requirements, the Department suggested that:

> The reporting obligations are intended to facilitate the timely provision of current and accurate information to the Scheme.
>
> The potential compliance burden associated with the scheme has been substantially reduced, by narrowing the range of foreign principals in relation to which registration is required. Timely and accurate information is particularly important in relation to activities undertaken, for the purpose of political or governmental influence.[132]

Operation of the Scheme

Delegation power

9.183 As discussed in Chapter 6, the Secretary may delegate all or any of his or her functions or powers under the Scheme to a Senior Executive Service (SES) employee, acting SES employee or an acting Executive Level 2 or equivalent position in the department.[133] The delegation power is not limited to certain decisions or administrative functions, meaning the decision to request information, withhold publication of information or share information with other agencies could be made by an acting Executive Level 2 officer.

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131 Attorney-General's Department, *Submission 5.5*, p. 11.

132 Attorney-General's Department, *Submission 5.5*, p. 13.

133 Foreign Influence Transparency Scheme Bill 2017, proposed section 67.

9.184 While some information requests may relate to more minor matters, the requested information could also relate to highly sensitive information—in some cases, privileged information—and this power may be delegated.

9.185 The Attorney-General proposed an amendment to section 67 (Delegations) to remove the Secretary's ability to delegate the following:

- coercive information gathering powers (proposed sections 45 and 46), and
- powers relating to communication of Scheme information (proposed section 52).

9.186 The Law Council noted that the amendments would not prevent the Secretary from delegating her or her powers to publish or withhold from publication Scheme information (proposed sections 43 and 67). The Council commented:

> Decisions about what to include for the purposes of registration on the website may include deciding what matters are 'commercially sensitive', affect 'national security' or are of a kind otherwise prescribed (proposed subsection 43(2)). Such matters are appropriately handled at the highest political or governmental level. The suggestion that such matters can be undertaken by less senior officials is of concern to the Law Council.[134]

9.187 The Council also noted that the Bill retains the ability for other matters to be prescribed in rules that would require the Secretary to withhold Scheme information from publication on those grounds (proposed subsection 43(2)(c)). The Council commented:

> The Law Council would appreciate the opportunity to comment on what is contained in any Rules. Given their potential significance, for example, exclusion of reasons for inclusion on the register, matters which in the context of commercial sensitivity and national security could well have an adverse impact on individuals, this is the kind of detail on which the Law Council and other organisations might offer valuable views.[135]

Publishing sensitive information on the register

9.188 The Attorney-General has also proposed an amendment to section 43(2) to clarify that the website 'must not include information that the Secretary is satisfied' is commercially sensitive, or affects national security.

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134 Law Council of Australia, *Submission 4.2*, p. 5.

135 Law Council of Australia, *Submission 4.2*, p. 5.

9.189 The terms 'commercially sensitive' and 'national security' are not defined in the Bill. The Attorney-General's letter to the Committee did not explain the reason for the proposal.

Evidentiary certificates

9.190 The Attorney-General also proposed an amendment relevant to the operation of the Scheme which removes the provision of evidentiary certificates. Proposed sections 51(2) and 51(3) provide that the Minister is able to sign a certificate stating that a specified person was a scheme official.

9.191 The Explanatory Memorandum to the Bill states:

> Whether or not a person is, or was at a specified time, a scheme official is a technical matter of fact. The use of an evidentiary certificate is an efficient means to establish the fact that a person is, or was, a scheme official. The evidentiary certificate is only prima facie evidence of the fact that the person was a scheme official at a particular time. The use of a prima facie evidentiary certificate will allow a defendant to adduce evidence to the contrary, that the person was not a scheme official, was not a scheme official at the particular time. Therefore, the use of a prima facie evidentiary certificate will not prevent a defendant from contesting the question of whether the person in question was a scheme official.[136]

9.192 The Attorney-General's letter to the Committee did not explain the reason for proposed sections 51(2) and 51(3).

Transparency notices

9.193 The amendments proposed by the Attorney-General also include new Division 3—Transparency notices. These amendments propose to grant the Secretary the power to issue, vary or revoke transparency notices (proposed sections 14A to 14E). If a notice is issued, the person or entity named in the notice will be a foreign principal for the purposes of the Scheme.

9.194 This issue was not identified in evidence during the Committee's review of the Bill. In a submission referring to the his proposed amendments, the Attorney-General explained that the framework 'may be of utility in cases where,

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136 Explanatory Memorandum, p. 104, para 591.

- … there is some genuine uncertainty about whether a company or individual is related to a foreign government – a declaration-making power may provide clarity for putative registrants, and
- a company or individual is attempting to conceal their relationship with a foreign government'.[137]

9.195 At the public hearing, the Department further explained the purpose of the transparency notice scheme:

> The benefit of inserting the transparency notice regime is that, if a notice is issued, then the entity or person named in it is a foreign principal. That will provide clarity to a potential registrant. If there is a notice and they are working with or for that particular entity or individual, they will at least know that, for that part of the various steps that need to be taken, there is a foreign principal.[138]

9.196 Under proposed section 14A (Issuing transparency notices), the Secretary may issue a notice that the person is a 'foreign government related entity' or a 'foreign government related individual' if satisfied that the person meets the relevant legislative definition of either term.

9.197 In his letter to the Committee proposing the amendments, the Attorney-General identified the key features of the notice-system as follows:

- the notice must be in writing and be made publicly available (proposed subsection 14A(2));
- the notice comes into force when it is issued and remains in force until it is revoked (proposed subsection 14A(4));
- the Secretary may vary a notice if he or she is satisfied that the details in the notice should be updated or corrected (proposed subsection 14C(1));
- the Secretary must revoke a notice if he or she ceases to be satisfied that the person is a 'foreign government related entity' or a 'foreign government related individual' (proposed subsection 14C(2));
- the decision of the Secretary to issue, vary or revoke a notice may be reviewed by the Administrative Appeals Tribunal (proposed section 14D);
- the Secretary's powers to issue, vary or revoke a notice cannot be delegated (proposed amendments to section 67), and

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137 Attorney-General, *Submission 84*, p. 8.

138 Ms Tara Inverarity, Assistant Secretary, Attorney-General's Department, *Proof Committee Hansard*, Canberra, 18 June 2018, p. 34.

- the notice, as well as variation or revocation, is not a legislative instrument (proposed subsections 14A(5), 14C(5)).

9.198 When considering whether to issue a notice the Secretary needs only to have a state of satisfaction before issuing a 'transparency notice' (proposed section 14A). The satisfaction must meet administrative law standards. In being satisfied that a person is a foreign government related entity/individual, the Secretary must only consider relevant information and not act arbitrarily, in bad faith, or unreasonably.[139]

9.199 The effect of a transparency notice is to deem the person named in it to be a foreign government related individual/entity.

9.200 In a prosecution for an offence, the practical effect of a notice will be, effectively, to shift onto the accused the evidentiary burden of establishing that he/she is not a foreign government related individual/entity.

9.201 The amendments also propose that the Secretary can use the information-gathering powers under proposed section 46 (Notice requiring information relevant to the scheme) to be satisfied about whether a person is a 'foreign government related entity' or 'foreign government related individual' (proposed subsection 14A(1) – Note 2).

9.202 As discussed in Chapter 6, section 46 is a considerable information-gathering power. If the Secretary reasonably believes that a person (including a third party) has information or a document that is relevant to the operation of the Scheme, the Secretary may issue a notice to that person to produce that information. Failure to comply with such a notice is a criminal offence punishable by six months imprisonment (section 59).

9.203 The publication of the transparency notice will not be subject to consideration of other matters (Section 43 provides that the Secretary may withhold publication on commercially-sensitive or national security grounds). That is, once the Secretary has issued a transparency notice, it must be published, even if that publication is prejudicial to national security or exposes commercially-sensitive material. As the decision to issue a transparency notice is not subject to consideration of certain matters, it is possible therefore, that a transparency notice will not be issued where it may, for example, prejudice national security.

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139 Law Council of Australia, *Submission 4.2*, pp. 3-4.

9.204 To effect this requirement the Attorney-General has also proposed two minor amendments which list additional items the Secretary must include on the register under section 42(3) of the Bill. These items—included to reflect the proposed addition of transparency notices, above—are:

- any transparency notices issued under section 14A, and
- any revocation or variation of a transparency notice under section 14C.

9.205 Under the Attorney-General's amendments, the Secretary would not be required to observe procedural fairness in issuing, varying or revoking a notice (proposed subsections 14A(3) and 14C(4)). Procedural fairness traditionally involves two requirements: the fair hearing rule and the rule against bias.[140]

9.206 The hearing rule requires a decision maker to afford a person an opportunity to be heard before making a decision affecting their interests.[141] The rule against bias ensures that the decision maker can be objectively considered to be impartial and not to have pre-judged a decision.

9.207 The Attorney-General's letter to the Committee providing the amendments, does not provide explanation as to why procedural fairness is not to be provided. At the public hearing, the Department stated:

> The transparency notice doesn't create any rights or obligations in relation to the person who's named in it. Being named as a foreign principal doesn't create anything for that person. It provides clarity to a potential registrant, but the person or entity named in the notice doesn't have to do anything differently because of being named in the notice. The potential registrants, if they were the ones to whom we were to provide procedural fairness, would be highly unlikely to be able to be identified. They may be a very large class. It would be administratively impossible to provide procedural fairness to potential registrants of persons who might be named in such a notice. I would also note that, by their very nature, persons and entities who may be named in a notice will be outside of Australia's jurisdiction and therefore providing meaningful procedural fairness to them may not be possible. So, for those reasons, procedural fairness has been excluded, but merits review is available

140 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, [25] (Gleeson CJ).

141 *Kioa v West* (1985) 159 CLR 550, 563, quoting Mason J in *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342, 360

to any person who is able to demonstrate that they are affected by the decision.[142]

9.208 A decision by the Secretary under proposed section 14A is reviewable by the Administrative Appears Tribunal (AAT) under proposed section 14D. As such, the reasons for that decision can be requested (*Administrative Appeals Tribunal Act 1975* (Cth) section 28) and, subject to meeting certain exemptions, including a certificate by the Attorney-General, must be provided (*Administrative Appeals Tribunal Act 1975* (Cth) subsection 28(1)). In turn a decision of the AAT may be reviewed on a question of law by the Federal Court (*Administrative Appeals Tribunal Act 1975* (Cth) subsection 44(1)) and on further review by the High Court.[143]

9.209 Under the proposed amendments, a transparency notice is 'prima facie' evidence of the matters in the notice and further evidence can be presented. Accordingly, in an AAT review on the merits, further evidence can be adduced as to the basis on which the Secretary was 'satisfied'. In a judicial review, the Federal Court will also apply administrative law standards, such as whether the state of satisfaction has been reasonably formed.

9.210 The Attorney-General's proposed amendments also include provisions which will protect the Commonwealth (including a Minister, Secretary, department or other agency) from defamation because the Secretary has issued, revoked or varied a notice, or has made the notice publicly available.

Evidence received

9.211 The Law Council of Australia expressed concern that the proposed transparency notice scheme does not align with general administrative law principles.[144] The Council made the following recommendations for further amendment:

- that the proposed subject be given notice of the proposal for the Secretary to issue a transparency notice and a statement of the material facts on the basis of which the Secretary is satisfied that the person is a foreign-government related entity or individual

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142 Ms Tara Inverarity, Assistant Secretary, Attorney-General's Department, *Proof Committee Hansard*, Canberra, 18 June 2018, pp. 34-35.

143 Law Council of Australia, *Submission 4.2*, p. 4.

144 Law Council of Australia, *Submission 4.2*, p. 4.

- that the Secretary should be required to accept and take into account submissions from the subject and a reasonable period should be allowed for submissions;
- that the Secretary be required to provide a copy of the notice to the subject of the notice.[145]

9.212 Law Firms Australia made similar recommendations for further amendment, commenting that the same requirements could apply to any variation of the transparency notice considered by the Secretary.[146]

9.213 The Law Council was also of the view that the provisions should be further amended to make clear the matters to be considered by the Secretary when considering to issue a transparency notice, which should include any submissions from the subject of the proposed notice. The Law Council stated:

> the problem with section 14A, which is the state of satisfaction provision, is that it doesn't limit what the secretary may have regard to or where the secretary gets her or his information from in order to issue that transparency notice.[147]

9.214 The Law Council considered it may be appropriate for these procedures (notifying the person, providing reasons, and seeking their comment) to be waived 'if the Secretary reasonably considers that the need for the notice is so urgent that it should be issued without the notification process'. In such a case, the Law Council was of the view that the Secretary should be required to provide the information to the subject along with the notification to the subject that the transparency notice has been made.[148] Law Firms Australia provided similar evidence.[149]

9.215 Responding to these recommendations, the Department advised:

> Section 28 of the *Administrative Appeals Tribunal Act 1975* allows any person who is entitled to apply to the Administrative Appeals Tribunal (AAT) for a review of the decision to request the person who made the decision to give the

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145 Law Council of Australia, *Submission 4.2*, p. 4.

146 Law Firms Australia, *Submission 10.2*, p. 4.

147 Mr Arthur Moses, SC, President-elect, Law Council of Australia, *Proof Committee Hansard*, Canberra, 18 June 2018, p. 18.

148 Law Council of Australia, *Submission 4.2*, p. 4.

149 Law Firms Australia, *Submission 10.2*, p. 4.

> applicant a statement in writing setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision. The person who made the decision is required to give such a statement to the applicant within 28 days of receiving the request. Including a similar provision in the FITS Bill is unnecessary as it would be duplicative of the existing law.[150]

9.216 The Department similarly responded to the Law Council's recommendation for a copy of the transparency notice to be provided to the subject of that notice:

> The department does not consider this necessary, given that the persons or entities who may be subject to a transparency notice are not themselves the subject of obligations under the scheme. The entities will, in many cases, not be located within Australia. The subjects will, in any, event have access to the notifications published online.[151]

9.217 Although it acknowledged that the person could seek reasons for the decision under the AAT,[152] the Law Council nonetheless stated that 'it is essential for effective rights of review that the Secretary provides reasons containing an adequate explanation for these decisions'.[153]

9.218 At the public hearing on the proposed amendments, the Law Council explained its position as to why additional procedural fairness is required

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150 Attorney-General's Department, *Submission 5.5*, p. 3.

151 Attorney-General's Department, *Submission 5.5*, p. 4.

152 Mr Arthur Moses, SC, President-elect, Law Council of Australia, *Proof Committee Hansard*, Canberra, 18 June 2018, p. 19.

The *Administrative Appeals Tribunal Act 1975* provides:

Section 28 Person affected by decision may obtain reasons for decision

Request for statement of reasons

(1) Subject to subsection (1AAA), if a person makes a decision in respect of which an application may be made to the Tribunal for a review, any person (in this section referred to as the applicant) who is entitled to apply to the Tribunal for a review of the decision may, by notice in writing given to the person who made the decision, request that person to give to the applicant a statement in writing setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision, and the person who made the decision shall, as soon as practicable but in any case within 28 days after receiving the request, prepare, and give to the applicant, such a statement.

153 Law Council of Australia, *Submission 4.2*, p. 4.

despite the access to reasons provided in the *Administrative Appeals Tribunal Act 1975*:

> I think where we are probably at odds is this question of what happens prior to the notice being issued. ... I think our concern, and where we probably differ, is that step before the notice is issued, and that is the procedural fairness point. That not only makes for good law; it also makes for good business climate in this country to know that before you have something being issued against you that may impact upon your commercial interests, you will be given an opportunity to be heard. … We do know that from time to time … bureaucrats can stuff up and stuff up badly. So it's better that they have an information package before them from both sides before a decision is made.[154]

9.219 The Department acknowledged that 'a person could perceive that it is not ideal for them to be named in such a notice',[155] and the notice could impact relationships—including business relationships—with Australian persons.[156] However the Department referred back to transparency as the purpose of the Scheme:

> I think the point that you made in your question is that there might be dire consequences and potentially losing business as a result of the fact of the making of a transparency notice. On that point, it remains the case that the purpose of the scheme is about transparency in respect of foreign influence and there is not, notwithstanding the different interpretation that certain sectors have taken, an adverse inference to be drawn from the fact of an entity seeking to engage in a foreign influence.[157]

9.220 The Law Council also noted that there may be circumstances where a person affected by a transparency notice applies to the Secretary to vary or revoke it. Proposed section 14C gives the Secretary power to vary or revoke a notice, however the Secretary may also refuse an application to vary or

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154 Mr Arthur Moses, SC, President-elect, Law Council of Australia, *Proof Committee Hansard*, Canberra, 18 June 2018, p. 20.

155 Ms Tara Inverarity, Assistant Secretary, Attorney-General's Department, *Proof Committee Hansard*, Canberra, 18 June 2018, p. 35.

156 Ms Anna Harmer, First Assistant Secretary, Attorney-General's Department, *Proof Committee Hansard*, Canberra, 18 June 2018, p. 35.

157 Ms Anna Harmer, First Assistant Secretary, Attorney-General's Department, *Proof Committee Hansard*, Canberra, 18 June 2018, p. 35.

revoke the notice. The Law Council recommended that such a refusal decision should be subject to review by the AAT.[158]

9.221 The Department acknowledged that the first opportunity that the subject of the transparency notice will have to raise concerns regarding that notice will be after the fact, and via the AAT process.[159] In response to concerns raised by the Law Council, the Department indicated that 'merits review of a refusal to vary or revoke a transparency notice is necessary. Judicial review would be available under the *Administrative Decisions (Judicial Review) Act 1977*'.[160]

9.222 Given that a transparency notice deems the subject of that notice to be a foreign government related individual or entity, the Law Council described the practical effect of that notice effectively as to 'shift onto the accused the evidentiary burden of establishing that he/she is not a foreign government related individual/entity. Given that this fact is a critical element of the various offences, the defendant should not bear that burden'.[161]

9.223 Accordingly, the Law Council therefore recommended that the Bill be amended to state that a transparency notice does not reverse or affect any burden of proof that would otherwise apply.[162] Law Firms Australia provided similar advice on the effect of the transparency notice and provided the same recommendation for further amendment.[163]

9.224 The Department refuted these concerns and outlined the processes available:

> If the person affected by the notice wishes to challenge the notice, merits review will be available in the AAT.
>
> If a transparency notice has been issued, the prosecution will be entitled to rely on it. If the person wishes to challenge the validity of that notice in a prosecution then they will be able to do so, in accordance with the ordinary processes for collaterally challenging administrative decisions in the course of a prosecution, where the validity of the decision is relevant to the question of

158 Law Council of Australia, *Submission 4.2*, p. 4.

159 Ms Anna Harmer, First Assistant Secretary, Attorney-General's Department, *Proof Committee Hansard*, Canberra, 18 June 2018, p. 38.

160 Attorney-General's Department, *Submission 5.5*, p. 4.

161 Law Council of Australia, *Submission 4.2*, pp. 4-5.

162 Law Council of Australia, *Submission 4.2*, pp. 4-5.

163 Law Firms Australia, *Submission 10.2*, p. 4.

> criminal liability. Collateral challenges will generally be permitted in the course of a prosecution: '[O]nly the clearest language in a statute should be held to have taken away the right of a defendant in criminal proceedings to challenge the lawfulness of an administrative decision made against him where the prosecution is premised on its validity' (*Gray v Woollahra Municipal Council* per Whealy J at [111]); nothing in the Bill purports to limit the right of a defendant to challenge the issuance of a notice in a prosecution. If they succeed, the prosecution will be required to prove beyond a reasonable doubt that the entity or person named in the notice is a foreign principal.[164]

9.225 At the public hearing on the proposed amendments, the Law Council argued strongly for further amendments to provide for procedural fairness, clarifying that they did not oppose the transparency notice scheme:

> What we are suggesting is that the rules of natural justice or procedural fairness ought to apply so that if a notice is to be issued, rather than what the bill provides at the moment, which is issuance without notice, notice be provided to the recipient and the recipient, rather than having the notice come into effect instantly or immediately, be given an opportunity to make a submission and that the secretary be obliged to take those matters into account and then provide reasons..[165]

9.226 The Law Council also considered it reasonable that there be capacity to issue an immediate notice in urgent circumstances.[166] Expanding on their concerns with regard to procedural fairness, the Law Council further reasoned:

> The question … is that under the present terms of the bill, these notices can be issued without people being given an opportunity to be heard first. The problem with that, as politicians would know and other members would know, is that if something is published about you in circumstances where you haven't been the subject of being given an opportunity to respond to it, and it then impacts upon either your standing or your business, that will have a detrimental impact on individuals. All we are really seeking is there be procedural fairness accorded before the secretary issues that notice to enable a person to be heard.[167]

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164 Attorney-General's Department, *Submission 5.5*, p. 9.

165 Mr Morry Bailes, President, Law Council of Australia, *Proof Committee Hansard*, Canberra, 18 June 2018, p. 18.

166 Mr Morry Bailes, President, Law Council of Australia, *Proof Committee Hansard*, Canberra, 18 June 2018, p. 18.

167 Mr Arthur Moses, SC, President-elect, Law Council of Australia, *Proof Committee Hansard*, Canberra, 18 June 2018, p. 18.

Committee comment

9.227 The Committees notes that the amendments proposed by the Attorney-General address some issues raised by submitters during the Committee's inquiry. In Chapter 10, the Committee provides its recommendations in response to these proposed amendments.

9.228 There are also several outstanding issues which the Committee considers warrant examination and these are discussed in Chapter 10.

Enforcement

9.229 The Attorney-General's proposed amendments engage with a number of the issues raised during the public hearings on the enforcement provisions. In particular, the Attorney-General has proposed introducing a tiered range of offences that include the element of recklessness.

9.230 The Bill contains five offences with an additional four proposed in the Attorney-General's amendments:

- Section 57 contains five offences for failing to apply for or renew registration:
  - Intentional omission to apply or renew knowing required to do so and registrable activity undertaken
  - Intentional omission to apply or renew reckless as to requirement to do so and registrable activity undertaken
  - Reckless omission to apply or renew knowing required to do so and registrable activity undertaken
  - Reckless omission to apply or renew reckless as to whether required to do so and registrable activity undertaken
  - Reckless omission to apply or renew knowing required to do so, whether or not registrable activity undertaken
- Section 57A proposes to introduce four similar offences capturing circumstances in which a person gives notice of the end of their liability to register while still being liable to register:
  - Notice given knowing arrangement still exists, and registrable activity undertaken
  - Notice given reckless as to whether arrangements still exist, and registrable activity undertaken
  - Notice given knowing arrangement still exists, whether or not registrable activity undertaken

– Notice given reckless as to whether arrangement still exists, whether or not registrable activity undertaken

9.231 A key concern of submitters on the enforcement provisions was the severity of the penalties. The Attorney-General's amendments propose reducing the maximum sentence under the Bill from seven to five years, and reducing some other penalties.

9.232 A table of the offences and penalties, as proposed by the Attorney-General's amendments, under section 57 and 57A is as follows:

Proposed section	Offence	What must be proved	Maximum penalty
Failing to apply for or renew registration			
57(1)	Intentional omission to apply or renew knowing required to do so and registrable activity undertaken	The prosecution must prove that the person knew they were required to register or renew registration; they intentionally omitted to do so; and undertake a registrable activity.	5 years imprisonment ($315,000 for bodies corporate)[168]
57(2)	Intentional omission to apply or renew reckless as to requirement to do so and registrable activity undertaken	The prosecution must prove that the person was required to register or renew registration [and was reckless as to whether required to do so]; intentionally omits to do so; and undertake a registrable activity.	3 years imprisonment ($189,000 for bodies corporate)
57(3)	Reckless omission to apply or renew knowing required to do so and registrable activity	The prosecution must prove that the person knew they were required to register or renew registration; they were	3 years imprisonment ($315,000 for bodies corporate)

[168] All pecuniary penalties for bodies corporate have been calculated in accordance with section 4B of the *Crimes Act 1914* (Pecuniary penalties–natural persons and bodies corporate).

	undertaken	reckless in omitting to do so; and undertake a registrable activity.	
57(3A)	Reckless omission to apply or renew reckless as to whether required to do so and registrable activity undertaken	The prosecution must prove that the person was required to register or renew registration [but was reckless as to whether required to do so]; recklessly omitted to do so; and undertake a registrable activity.	2 years imprisonment ($189,000 for bodies corporate)
57(4)	Reckless omission to apply or renew knowing required to do so, whether or not registrable activity undertaken	The prosecution must prove that the person knew they were required to apply or renew registration; they recklessly omitted to do so. *NOTE: There is no requirement to prove that the person then went on to undertake any registrable activities*	12 months imprisonment ($63,000 for bodies corporate)
Giving notice of end of liability to register while still liable to register			
57A(1)	Notice given knowing arrangement still exists, and registrable activity undertaken	The prosecution must prove that the person gave the Secretary notice cancelling their registration and at the time they did this, a registrable arrangement still exists; that the person knows that a registrable arrangement still in existence on the day the person's registration in relation to the foreign principal is to cease; and	5 years imprisonment ($315,000 for bodies corporate)

		they went on to undertake a registrable activity after that day.	
57A(2)	Notice given reckless as to whether arrangements still exist, and registrable activity undertaken.	The prosecution must prove that the person gave the Secretary notice cancelling their registration and at the time they did this, a registrable arrangement still exists; that the person did this [reckless] as to whether a registrable arrangement will still be in existence on the day the person's registration in relation to the foreign principal is to cease, and the person undertakes a registrable activity after that day.	3 years imprisonment ($189,000 for bodies corporate)
57A(3)	Notice given knowing arrangement still exists, whether or not registrable activity undertaken	The prosecution must prove that the person gave the Secretary notice cancelling their registration; at the time a registrable arrangement was still in existence, and the person knows the registrable arrangement will still be in existence on the day the person's registration in relation to the foreign principal is to cease. *NOTE: There is no requirement to prove that the person then went on to undertake any registrable*	12 months imprisonment ($63,000 for bodies corporate)

		activities	
57A(4)	Notice given reckless as to whether arrangement still exists, whether or not registrable activity undertaken	The prosecution must prove that the person gives the Secretary notice cancelling their registration; and at the time a registrable arrangement was in existence, and will still be in existence on the day the person's registration in relation to the foreign principal is to cease. *NOTE: There is no requirement to prove that the person then went on to undertake any registrable activities*	6 months imprisonment ($31,500 for bodies corporate)

9.233 No changes were proposed to section 58 of the Bill (failure to fulfil responsibilities under the scheme).

9.234 The offence for providing false or misleading information in response to a request from the Secretary for information or documents (s.60) carried a five year maximum penalty under the Bill. Submitters and witnesses noted this was five times the penalty under the *Criminal Code* for a similar offence. The Attorney-General's amendments propose lowering this penalty to three years. The penalty for section 61 (destruction etc. of records) is proposed to be lowered from three to two years.

9.235 The Attorney-General's amendments also propose to impose absolute liability with respect to the majority offences with respect to the person undertaking activities on behalf of the foreign principal. The effect of that is that a person may not intend, or otherwise be reckless as to, whether they undertook activities on behalf of a foreign principal after the end of the applicable period. Further, that person will not have a defence available of mistaken fact.

9.236 The letter from the Attorney-General did not explain the rationale for its inclusion.

Evidence received – section 57 and 57A

9.237 The Law Council of Australia noted that the Attorney-General's proposed section 57 of the Bill 'has the potential to be unworkable and does not appear to make sense'.[169] In particular, the Law Council raised concerns with the introduction of absolute liability in sections 57(5) and 57A(5) of the Bill. Unlike the inclusion of strict liability offences in section 58 of the Bill, absolute liability does not allow a defence of honest and reasonable mistake of fact to be raised.

9.238 The Law Council identified that proposed section 57(1) required a person to know they are required to apply or renew registration under the scheme. Further, it must be proved that the person undertook a registrable activity after the end of the period. The Law Council noted that undertaking such an activity involves voluntariness (a wilful or intentional action) which cannot be excluded by a provision purporting to attach absolute liability. The prosecution would still need to prove that the person voluntarily undertook the stated activity, and that 'absolute liability adds nothing to the normal requirements that the defendant engaged in some prohibited act'.[170]

9.239 At a public hearing, the Law Council noted that

> The issue … with the absolute liability provisions, as we read it, is that a person could be guilty of an offence here even if there was no intention to commit a crime. If it was strict liability, the defence of a mistake of fact is available. With absolute liability, a mistake of fact is not a defence[171]

9.240 Further, Australian Lawyers for Human Rights submitted that there 'is no reason in principle why a defence of honest and reasonable mistake of fact should not be permitted under the Bill … to impose absolute liability is both undesirable and inconsistent with Commonwealth Guidelines'.[172]

9.241 The Department responded to the Law Council's submission stating that it considers absolute liability to be appropriate.

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169 Law Council of Australia, *Supplementary to submission 5*, p. 5

170 Law Council of Australia, *Supplementary to submission 5*, p. 5

171 Mr Arthur Moses, SC, President-elect, Law Council of Australia *Proof Committee Hansard, Canberra, 18 June 2018* p. 23.

172 Australian Lawyers for Human Rights, *Submission 7.2*, p. 8.

> Absolute liability only applies to the part of the physical element which requires the activity the person undertakes on behalf of the foreign [principal] to be undertaken after the end of the period.
>
> If absolute liability did not apply to the part of the physical element … then the prosecution would need to prove knowledge and recklessness in relation to the same fact, which would be anomalous.
>
> The department notes that in all cases, the prosecution is still required to prove the relevant fact and fault element. The application of absolute liability simply ensures the prosecution does not need to prove two fault elements, or does not need to prove the fault element twice for different paragraphs of the offence.[173]

Evidence received – criminal versus civil penalties

9.242 The Law Council of Australia, Australian Lawyers for Human Rights, and the APGRA raised concerns that some penalties in the enforcement provisions remained criminal rather than civil. The Law Council said it maintained the view

> that consideration should be given to the availability of civil penalties to enforce compliance with the scheme rather than criminal penalties. However, if criminal penalties are to be employed, absolute liability should not be a basis for the proposed offences and the appropriate defences should be considered.[174]

9.243 The Law Council also offered that:

> For our part, we haven't seen any evidence that would suggest that having a civil penalty regime would make it more attractive for somebody to breach this law than if there were criminal provisions.[175]

9.244 Australian Lawyers for Human Rights submitted that 'appropriate penalties should be civil, not criminal' and that penalties should be harm-based.[176]

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173 Attorney-General's Department, *Submission 5.5*, p. 5.

174 Mr Arthur Moses, SC, President-elect, Law Council of Australia *Proof Committee Hansard, Canberra,* 18 June 2018, p. 15.

175 Mr Arthur Moses, SC, President-elect, Law Council of Australia *Proof Committee Hansard, Canberra,* 18 June 2018, p. 23.

176 Australian Lawyers for Human Rights, S*ubmission 7.2*, p. 5.

9.245 APGRA noted that there were 'real questions of proportionality raised by the specification of significant imprisonment terms for failures to comply under the Scheme' and advised that the Bill should be 'amended to impose appropriate civil penalties for the offences included'.[177]

9.246 In response, the Attorney-General's Department argued that

> For civil penalties to be effective, the department would effectively need to have the powers of a regulator. We would need to vastly expand our investigative powers in order to be able to gather the evidence to rely on for such an action to be taken. The department's position is that the criminal offences in the bill are appropriate and that the enforcement of the bill is appropriately done by law enforcement agencies using their powers, which have been obviously the subject of detailed consideration over many years.[178]

Evidence received – self-incrimination

9.247 The Law Council also raised concerns regarding self-incrimination and noted that proposed section 47(2) of the Bill was:

> your classic use immunity. But there's no derivative use immunity here. There is nothing that would then prevent that information being able to be used by investigators to further lines of inquiry in order to obtain information or to give to the prosecution so they deploy it to work out what your defence is.[179]

9.248 The Law Council went on to confirm that proposed section 47(2) did not contain a derivative immunity, referring to 47(2)(a), (b) and (c) which are not permissible in evidence against the individual but noting that the Bill does not then prohibit the use in proceedings:

> This is really about trying to protect and safeguard the operation of the legislation so nobody can come down the track later and say, 'Well, this impacts upon the right to a fair trial because they're obtaining this information and being able to deploy it through derivative use, so people will actually know how and what they're going to do in relation to matters.' … But this

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177 Australian Professional Government Relations Association, *Submission 13,* p. 3.

178 Ms Tara Inverarity, Assistant Secretary, Attorney-General's Department, *Proof Committee Hansard, 18 June 2018*, p. 39.

179 Mr Arthur Moses, SC, President-elect, Law Council of Australia, *Proof Committee Hansard, Canberra*, 18 June 2018, p. 22.

> provision, if I can assure you, is a use immunity, not a derivative use immunity. They're two separate concepts.[180]

9.249 Responding to the Law Council, the Department stated:

> Section 47 in our view does provide a derivative use immunity. A derivative use immunity clause restricts any self-incriminating information or documents provided by a person from being used to investigate unlawful conduct by him or her. Subsection 47(2) provides that information given or the document or copy produced will not be admissible in evidence against the individual in criminal and civil proceedings, except for proceedings where it's alleged that they've provided false or misleading information or for perjury-type offences. So that has the effect that any document that the person is required to produce can't be used against them in any other criminal proceedings. Our understanding is that the provision that's included in the bill is the standard derivative use immunity provision that the Office of Parliamentary Counsel use when establishing such immunities. The discussion that I've just referred to is set out in the explanatory memorandum to section 47.[181]

Evidence received – false or misleading information

9.250 The Attorney-General's proposed amendments lower the penalty for providing false or misleading information from five to three years imprisonment.

9.251 However, this penalty remains three times that in the *Criminal Code* for a similar offence. Section 137.1 of the *Criminal Code* provides a 12 month imprisonment sentence for providing false or misleading information. The existing defences available under the *Criminal Code* and the Bill are identical for provision of false or misleading information.

9.252 The Committee questioned the Attorney-General's Department on the reason for this discrepancy at a public hearing on 18 June 2018. The Department explained the differences as follows:

> the purpose of the scheme is to bring transparency to things that can damage our democracy, whereas providing a false or misleading document to another type of agency might have a financial impact on the Commonwealth or some other impact but doesn't get to the purpose of the scheme, which is preventing

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180 Mr Arthur Moses, SC, President-elect, Law Council of Australia, *Proof Committee Hansard, Canberra*, 18 June 2018, pp. 22-23.

181 Ms Tara Inverarity, Assistant Secretary, Attorney-General's Department, *Proof Committee Hansard*, 18 June 2018, pp. 2-3.

> Australia from being the subject of foreign influence without transparency. So hence the higher penalty.[182]

Implementation and commencement

9.253 The Committee did not seek substantial evidence on the Bill regarding the implementation of the scheme (other than that guidance material be developed to clarify the scope of the Scheme), and as a result, it is has not been examined in earlier chapters of this report.

9.254 However, submitters provided some evidence on implementation matters following receipt of the Attorney-General's proposed amendments.

9.255 Universities Australia reflected on the implementation of the *Defence Trade Controls Act 2012* which, following a process of legislative improvement was now an operational and workable scheme with proactive compliance. Universities Australia referred to the usefulness of specialist advice under that scheme to removing barriers to compliance:

> the university sector has noted the effective role played by the regulator (the Defence Export Controls Office) in assisting universities to understand and comply with their obligations under the scheme. Members have noted the helpful and professional attitude of the regulator's staff, who have made it significantly easier to comply with the scheme, particularly with their provision of specialist advice on matters related to the control scheme.
>
> We would strongly suggest that a similar approach could work well in the implementation of this scheme, particularly the provision of a dedicated contact point with ready access to advice on compliance. This would have the advantage of making the scheme more effective through reducing barriers to compliance.[183]

9.256 At the public hearing on the amendments, Universities Australia reiterated:

> The reason we mentioned the Defence Trade Controls Act is that there was a very constructive process through its implementation. It was not a simple thing to do—it was complex and there were substantial obligations on universities—but it was a very constructive process. There was a lot of ground covered. We just thought that it is a very good model to put up as one that the committee might like to not only know about but also make a

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182 Ms Tara Inverarity, Assistant Secretary, Attorney-General's Department, *Proof Committee Hansard*, 18 June 2018, p. 39.

183 Universities Australia, *Submission 9.1*, p. 3.

> recommendation on in relation to or at least consider. That was, as I said, a complex set of interactions between the parliament, regulators and universities. After a lengthy process of discussion—it was lengthy—we are actually now in a position where, as I understand it from the last briefing I had, universities are over-reporting. We are being very careful to do exactly what is required. In fact, in many cases, we are doing a bit more than what is required. So all those reportable instances are not just being reported adequately but there is a very good relationship between universities and the officials in Defence who run the scheme.[184]

9.257 The Department responded to the recommendation stating:

> The Attorney-General's Department will administer the scheme. The department thanks Universities Australia for this useful suggestion and will work with the Department of Defence to benefit from its experience in relation to the *Defence Trade Controls Act 2012*.[185]

9.258 Proposed section 2 provides that the Scheme may commence at a date fixed by Proclamation or within 12 months of its Royal Assent. At the public hearing on the proposed amendments, the Department advised that implementation of the Scheme may take some months:

> Commencement by proclamation is intended to provide the opportunity to make regulations that are necessary to give effect to the scheme as well as the administrative arrangements that are necessary to administer the transparency register. … The nature of the arrangements that we require are going to depend on the scheme that is obviously enacted by the parliament. I wouldn't wish to presume that it was passed in a particular form but, depending on the form that it takes, as passed by the parliament, that'll inform the nature and extent of the administrative arrangements that we'd need to make. However, I would anticipate that those would take a number of months.[186]

Committee comment

9.259 The Committees notes that the amendments proposed by the Attorney-General substantially address issues raised by submitters during the

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184 Ms Catriona Jackson, Chief Executive, Universities Australia, *Proof Committee Hansard*, Canberra, 18 June 2018, pp. 4-5.

185 Attorney-General's Department, *Submission 5.5*, p. 8.

186 Ms Anna Harmer, First Assistant Secretary, Attorney-General's Department, *Proof Committee Hansard*, Canberra, 18 June 2018, p. 40.

Committee's inquiry. In Chapter 10, the Committee provides its recommendations in response to these proposed amendments.

9.260 There are also some outstanding issues which the Committee considers warrant examination and these are discussed in Chapter 10.

10. Committee comment and recommendations

10.1 In this Chapter the Committee presents its findings and recommendations in relation to the Foreign Influence and Transparency Scheme Bill 2017 (the Bill).

10.2 The Committee commenced its inquiry into the Bill in December 2017, receiving submissions and conducting hearings in January, February and March. Through this consultation period, stakeholders raised substantial concerns with the Bill – in particular with the breadth of actors and activities which would be covered in the scope, the limited exemptions available, and the consequent administrative burden for individuals, organisations and businesses. Chapters 2 to 8 review the evidence received and issues raised regarding the Bill.

10.3 On 7 June 2018, the Attorney-General submitted to the Committee a set of proposed amendments and the Committee sought additional submissions and conducted additional public hearings. Chapter 9 summarises the evidence received and issues raised regarding the proposed amendments.

10.4 The Committee notes that a substantial number of the issues raised regarding the Bill have been addressed by the Attorney-General's proposed amendments. The Committee is pleased to recommend the implementation of the proposed amendments. In some instances the Committee also seeks to

refine the proposed amendments to strengthen the integrity and effectiveness of the Scheme.

10.5 In addition, the Committee has identified certain residual issues and, consistent with the scrutiny approach to considering other bills, makes recommendations to ensure the integrity and proportionality of the proposed measures, the clarity and effectiveness of their application and operation, and to strengthen provisions and provide adequate safeguards.

10.6 This Chapter considers the amendments proposed by the Attorney-General and certain residual issues, and makes recommendations in relation to:

- scope of actors and activities,
- exemptions,
- registrant obligations,
- operation of the scheme,
- enforcement, and
- oversight, review and implementation.

Scope of actors and activities

Section 10—Definition of a foreign principal

Proposed removal of foreign business, foreign public entity and foreign individual

10.7 As noted in Chapter 9, the Attorney-General has proposed amendments which would remove the following terms from within the definition of a 'foreign principal':

- 'foreign business',
- 'foreign public enterprise' and
- 'an individual who is neither an Australian citizen nor a permanent Australian resident'.

10.8 Evidence to the Committee on the Bill indicated concern regarding the expansive breadth of a definition that did not require any close foreign 'nexus'.[1] As a result, the amendments proposed by the Attorney-General

[1] Tony Kevin, *Submission 1*, pp. 11-12; Australian Financial Markets Association, *Submission 3*, p. 3; Law Council of Australia, *Submission 4*, p. 6; Australian Catholic University, *Submission 6*, p. 1; Australian Lawyers for Human Rights, *Submission 7*, p. 1; American Chamber of Commerce in Australia, *Submission 8*, p. 2; The Group of Eight, *Submission 11*, p. 1; Australian Professional Government Relations Association, *Submission 13*, p. 2; Financial Services Council, *Submission 16*,

were welcomed by many stakeholders as an appropriate refinement of the Bill's scope to address the identified—and stakeholder supported—objective of bringing transparency to Australia's democratic processes.

10.9 The Committee is of the view that the proposed amendments define a more appropriate scope to the Scheme. As such these amendments will strengthen the proportionality of the measures and will aid in its effective operation and intent to address covert influence in Australia. Therefore the Committee supports the amendments as proposed by the Attorney-General to remove the terms 'foreign business', 'foreign public entity' and 'an individual who is neither an Australian citizen nor a permanent Australian resident', from the definition of the term 'foreign principal'.

Recommendation 1

10.10 The Committee recommends the implementation of the Attorney-General's proposed amendments to remove from the definition of 'foreign principal' in section 10 of the Bill, the terms

- **'foreign business',**
- **'foreign public entity', and**
- **'an individual who is neither an Australian citizen nor a permanent Australian resident'.**

10.11 In a further refinement to the Bill's original scope, the Attorney-General has proposed the introduction of two new terms within the definition of a foreign principal:

- a 'foreign government related entity', and
- a 'foreign government related individual'.

10.12 The combined effect of the amendment will be to ensure the Scheme is more closely and appropriately focussed on promoting transparency in relation to

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p. 1; Community Council for Australia, *Submission 34*, p. 2; Australian Major Performing Arts Group, *Submission 37*, p. 1; JMTinc, *Submission 41*, p. 1; Social Ventures Australia, *Submission 42*, p. 1; World Vision Australia, *Submission 45*, p. 2; Free TV Australia, *Submission 47*, p. 2; Justice Connect, *Submission 50*, p. 3; The Chamber of Arts and Culture Western Australia, *Submission 54*, p. 2; Oxfam Australia, *Submission 57*, p. 5; WWF-Australia, *Submission 58*, p. 1; Federation of Ethnic Communities' Councils of Australia, *Submission 59*, p. 2; The Smith Family, *Submission 60*, p. 4; GetUp!, *Submission 63*, pp. 2-3.

foreign government influence on Australian political and government processes.

Proposed definition of a 'foreign government related entity'

10.13 The Committee notes that the proposed term was supported by stakeholders to provide the appropriate nexus back to a foreign government.

10.14 Some concerns were expressed on the thresholds set by the proposed amendment, most notably on the thresholds that apply to companies.

10.15 The Committee considers that some of these concerns may have arisen due to the lack of accompanying detailed explanation on the application of the proposed definition.

10.16 For example, the mere funding of an organisation by a foreign government—as the Department correctly noted—will not be sufficient to engage the threshold as set under the definition. The relevant clause requires the foreign government to hold 15 per cent of the ***issued share capital*** of the company.

10.17 For clarity on this point, the Committee is of the view that the supplementary Explanatory Memorandum to support the introduction of the proposed amendments should clearly express that mere funding (regardless of the amount) is not sufficient to engage the threshold as set in the definition.

10.18 The Committee also notes the concerns expressed by the Law Council with regards to consistency of the relevant threshold across Commonwealth law. As noted in Chapter 9, the Council was of the view that the threshold should be set at 20 per cent, to mirror the threshold set in *Corporations Act 2001* (Cth), the *Foreign Acquisitions and Takeovers Act 1975* (Cth) and the *Financial Sector (Shareholdings) Act 1998* (Cth).

10.19 However, the Committee considers that the threshold, as proposed by the Attorney-General, is appropriate as it is not seeking to measure the level of control the foreign government may exercise over that company. The relevant test—to meet the very title of the term—is ***relatedness***.

10.20 The Committee therefore is satisfied that the term, as proposed, is appropriate to meet the policy intent of the Bill.

Recommendation 2

10.21 The Committee recommends implementation of the Attorney-General's proposed amendments to introduce the term 'foreign government related entity' (as defined in those amendments) within the definition of a 'foreign principal' in section 10 of the Bill.

The Committee further recommends the Explanatory Memorandum is amended to expressly set out that mere funding from a foreign government is not sufficient to satisfy the threshold requirements for the term's application to companies.

Recommendation 3

10.22 The Committee recommends that the Attorney-General's proposed definition of a 'foreign government related entity' be further amended so as to include those entities where the directors or members of the executive committee are accustomed to act in accordance with the directions, instructions or wishes of a foreign government or a foreign political organisation, even if they are under no obligation to do so.

Proposed definition of a 'foreign government related individual'

10.23 The second term proposed to be introduced into the definition of a 'foreign principal' is a 'foreign government related individual'.

10.24 The Committee notes the concern raised by the Australian Council of Trade Unions with respect to its conclusion that foreign individuals who merely comply with the law and administrative authority of their home country, may be captured by the term.

10.25 The Committee is of the view that the Australian Council of Trade Unions interpretation is not correct, and that the term is appropriately defined.

10.26 The Committee notes that the definition of the term was supported by Universities Australia, who commented that it would not prohibit universities from undertaking similar advocacy to that identified as a concern by the Australian Council for Trade Unions.

10.27 Again, the Committee considers that some of these concerns may have arisen due to the lack of accompanying detailed explanation on the application of the proposed definition.

10.28 The Committee recommends that the proposed term 'foreign government related individual' be included in the definition of a 'foreign principal'.

Recommendation 4

10.29 The Committee recommends the implementation of the Attorney-General's proposed amendments to introduce the term 'foreign government related individual' (as defined in those amendments) within the definition of a 'foreign principal' in proposed section 10.

Recommendation 5

10.30 The Committee recommends that the Attorney-General's proposed definition of a 'foreign government related individual' be further amended so as to include those individuals who are directors or members of an executive committee, who are accustomed to act in accordance with the directions, instructions or wishes of a foreign government or a foreign political organisation, even if they are under no obligation to do so.

Retention of 'foreign political organisation'

10.31 The Committee notes that the amendments proposed by the Attorney-General do not address concerns raised regarding the perceived ambiguity of the term 'foreign political organisation'.

10.32 As noted in Chapter 9, stakeholders who provided supplementary submissions to the Committee's review of the proposed amendments, expressed concern about the scope of organisations which may be covered by the definition.

10.33 On their analysis, a number of Australian-based international advocacy groups concluded that the term could be interpreted to include their international partners or counterpart (sister) organisations.

10.34 The Committee notes that the term, read in combination with the Explanatory Memorandum, provides that the term would not cover international advocacy organisations that do not operate politically. This interpretation was supported by the Department's understanding of the interpretation of the term.

10.35 However, the Committee notes that clarity is important—particularly for a significant new Scheme that imposes an ongoing administrative burden and carries significant penalties for non-compliance.

10.36 The Committee notes that the definition is inclusive and is not exhaustive of the types of organisations that may fall within the term. This is appropriate, as providing an exhaustive list of the vast types of organisations that may operate to influence the Australian polity, is not feasible for legislation or appropriate for the policy intent.

10.37 Nonetheless, and noting its preference for increased clarity in the Scheme's scope, the Committee is of the view that refinement of the term would substantially aid compliance with the Scheme and its obligations. This clarity will in turn improve the effectiveness of the Scheme in achieving the intent of bringing greater transparency and identifying foreign influence.

10.38 Therefore, the Committee is of the view that the Bill should retain its current inclusive definition of a 'foreign political organisation'. However, the Committee recommends that the Bill be amended to provide greater specificity by including a subparagraph to the definition which provides 'a foreign organisation that exists primarily to pursue political objectives'. This will reinforce that the definition is limited to inherently political organisations.

Recommendation 6

10.39 The Committee recommends that the Bill retain the current inclusive definition of a 'foreign political organisation' but be amended to provide that 'foreign political organisation' includes:

- **a foreign political party, and**
- **a foreign organisation that exists primarily to pursue political objectives.**

Section 11—Undertaking an activity on behalf of a foreign principal

Subsection 11(1)—Removal of 'under the control of', 'with funding or supervision by' and 'in collaboration with'

10.40 As noted in Chapter 3, the Bill as introduced captures a wide breadth of relationships which may not usually be considered to be within the commonly understood meaning of 'on behalf of'. Many stakeholders argued

that the approach taken 'goes beyond the usual meaning of the phrase',[2] and that it extends beyond 'normal agency relationships'.[3]

10.41 The proposed sections that were identified of greatest concern to stakeholders were:

- (e) with funding or supervision by the foreign principal; and
- (f) in collaboration with the foreign principal.

10.42 The Attorney-General's proposed amendments would address the stakeholders concerns about these subsections by removing them from the definition of 'undertaking activity on behalf of a foreign principal.

10.43 The proposed removal of these two terms was strongly supported by stakeholders, and the Committee considers the proposal an appropriate refinement of the Scheme's scope.

Recommendation 7

10.44 The Committee recommends implementation of the Attorney-General's proposed amendments to remove, from the definition of 'undertaking activity on behalf of a foreign principal' in section 11 of the Bill, the terms

- **'with funding or supervision by the foreign principal', and**
- **'in collaboration with the foreign principal'.**

Subsection 11(1)—Retention of 'arrangement'

10.45 The Committee notes that stakeholders continue to hold concerns regarding the retention of the term 'arrangement' in proposed subsection 11(1)(a). The Committee is concerned that the lack of clarity around this term may diminish the effectiveness and integrity of the Scheme, and result in either non-compliance or an undue administrative burden.

10.46 The Committee accepts that it is appropriate that subsection 11(1)(a) and the definition of 'arrangement' extend to informal arrangements and understandings, to ensure that prospective registrants and foreign principals cannot evade the scheme by setting up informal arrangements. Similarly, limiting subsection 11(1)(a) to situations where there is an obligation for the

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2 World Vision Australia, *Submission 45*, pp. 2-3.

3 GetUp!, *Submission 63*, p. 4; see also Human Rights Council of Australia, *Submission 29*, pp. 2-3

person to engage in registrable activities would allow parties to avoid registration by drafting contracts that allow the potential registrant discretion as to whether to engage in such activities, notwithstanding that there may be a real understanding between the potential registrant and foreign principal that they will engage in such activities.

10.47 The Committee further notes that the definition of an 'arrangement' in section 10 of the Bill would involve a shared understanding or commonality as well as degree of structure in the contract, agreement or understanding between those parties. The Committee notes evidence from the Department that this was the intended reading of the term.

10.48 The Committee notes that its recommendation, below, to amend subsection 11(3) will have the effect of crystallising the intended reading of the term 'arrangement'. The requirement for both parties to know or expect that the activity would be undertaken under the arrangement places beyond doubt that the arrangement—and the parties to the arrangement—must contemplate the undertaking of registrable activities, in Australia, for the purpose of political or governmental influence. In the Committee's view, this is the kind of arrangement that should appropriately be captured by the Scheme.

Subsection 11(3)—Knowledge of activities

10.49 The Committee acknowledges stakeholder concerns regarding the wording of subsection 11(3), and whether it is an additional avenue to establishing that an activity is undertaken on behalf of a foreign principal, or, as the Department asserts, a limiting factor on subsection 11(1).

10.50 The Department advised the Committee that it is the policy intent of subsection 11(3) to limit subsection (1). That is, there must be both a circumstance set out in subsection 11(1) and the knowledge or expectation on behalf of the person and the foreign principal in subsection 11(3).

10.51 The Department was of the view that subsection 11(3) could be amended to provide that a person only undertakes an activity on behalf of a foreign principal within the meaning of subsection 11(1) if both the person and the foreign principal knew or expected that the person would or might undertake the activity, and that the person would or might do so in

circumstances falling within sections 20, 21, 22 or 23 of the Bill (whether or not the parties expressly considered the existence of the scheme).[4]

10.52 The Committee is of the view that the Department's proposed amendment will aid clarity and address the concern of stakeholders. Consequently the Committee recommends that subsection 11(3) be amended.

Recommendation 8

10.53 The Committee recommends that subsection 11(3) of the Bill be amended to provide that a person only undertakes an activity on behalf of a foreign principal *within the meaning of subsection* 11(1) if both the person and the foreign principal knew or expected that:

- **the person would or might undertake the activity, and**
- **the person would or might do so in circumstances falling within sections 20, 21, 22 or 23 of the Bill (whether or not the parties expressly considered the existence of the scheme).**

Subsection 11(4)—Subsidiaries of foreign principals

10.54 The Attorney-General's proposed amendment to introduced new subsection 11(4) makes clear that the activities undertaken by a company registered under the *Corporations Act 2001* will not be undertaken on behalf of a foreign principal merely because the company is a subsidiary (within the meaning of the *Corporations Act 2001*) of that foreign principal.

10.55 The Committee notes that this amendment merely proposes to move the original exemption for such subsidiaries to an exemption for subsidiaries registered under the *Corporations Act 2001*. The Committee addressed in Chapter 9 concerns raised by Optus regarding the proposed definition of a 'foreign government related entity'.

10.56 As noted earlier, the Committee considers that some stakeholder concerns would have been allayed by an accompanying detailed explanation on the application of the proposed amendments.

10.57 The Committee supports the Attorney-General's proposed amendments to introduce new subsection 11(4) to make clear that a subsidiary company,

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4 Attorney-General's Department, *Submission 5.6*, p. 2.

registered under the *Corporations Act 2001*, will not be required to register for registrable activities on behalf of their parent company.

Recommendation 9

10.58 The Committee recommends the implementation of the Attorney-General's proposed amendment to introduce new subsection 11(4) to the Bill.

Section 12—Activities for the purpose of political or governmental influence

Subsection 12(1)—Amendment to require that the purpose must be the sole or primary purpose, or a substantial purpose

10.59 The Committee considers that the proposed amendment addresses concerns raised regarding the Bill, and supports its implementation.

10.60 The Committee notes that the Law Council proposed a minor amendment, to replace the word 'substantial' with 'dominant'. The Department referred to advice from the Office of Parliamentary Counsel that this is the preferred modern form of drafting.

Recommendation 10

10.61 The Committee recommends implementation of the Attorney-General's proposed amendments to proposed subsection 12(1) of the Bill, which require that the activity must be for the sole or primary purpose, or a substantial purpose, of influencing political or governmental processes.

Section 13—Communications activity

10.62 The Committee considers that the proposed amendment addresses concerns raised regarding the Bill, and supports its implementation.

10.63 The Committee also notes that critical stakeholders spoke to the need for a revised Explanatory Memorandum to clarify the Bill's application to media in light of the proposed amendments.

Recommendation 11

10.64 The Committee recommends implementation of the Attorney-General's proposed amendments to section 13 of the Bill which provide that broadcasters, carriage service providers and publishers are not required to register, merely because they edit information or materials produced by a foreign principal.

10.65 The Committee also notes that several stakeholders provided supplementary submissions on the Attorney-General's proposed amendments in relation to communications activity. The Committee considers that this indicates the need for specific and detailed guidance to be developed on the application of the revised Bill to online publishers and platforms.

10.66 Noting the number of online publishers and platforms, the Committee is of the view that guidance should be developed prior to the commencement of the Scheme, to provide clarity to those entities on their liability to register.

Recommendation 12

10.67 The Committee recommends that the Attorney-General's Department prepare and publish prior to the commencement of the Foreign Influence Transparency Scheme, detailed guidance material to assist online publishers and platforms with clarity as to their liability to register under the Scheme.

Section 14—Purpose of activity

10.68 Noting the concerns raised in subsection 11(3) with regards to the relevant knowledge of the person and the foreign principal, and reflecting the stakeholder evidence on the Bill as originally introduced, the Committee considers it advisable that subsection 14 be similarly amended.

10.69 The Department advised the Committee that it is the policy intent for both the person and the foreign principal to have the knowledge or expectation that the person would undertake activities on behalf of the foreign principal.[5]

10.70 The Committee has identified that, to meet this stated intent, an amendment is necessary to subsection 14 to make clear that the purpose of the activity

[5] Attorney-General's Department, *Submission 5.6*, p. 2.

must be determined by the intention or belief of person undertaking the activity.

10.71 Noting that it may not be possible, or relevant, to determine whether the foreign principal intended for the purpose of activity to influence a process provided in section 12, the Committee considers it appropriate that, in addition to the person's intention or belief, reference may be had to, either:

- the intention of any foreign principal on whose behalf of the activity is undertaken, *or*
- any of the circumstances in which the activity is undertaken.

Recommendation 13

10.72 The Committee recommends that proposed section 14 of the Bill be amended to clarify that the *purpose of an activity* may be determined by having regard to the intent or belief of the person undertaking the activity and

- **the intention of any foreign principal on whose behalf the activity is undertaken, <u>or</u>**
- **all of the circumstances in which the activity is undertaken.**

Part 2, Division 3—Registrable activities

Extension of relevant time period for former Cabinet Ministers and recent designated position holders

10.73 The Committee notes that the Attorney-General's proposed amendments seek to extend the additional obligations of former Cabinet Ministers (from three to ten years) and recent designated position holders (from 18 months to seven years).

10.74 The Committee considers additional obligations on former Cabinet Ministers are appropriate as they reflect the ongoing positions of influence these former officer holders occupy—despite leaving office—in the Australian polity.

10.75 The Committee notes that these are additional obligations to those that arise under the remainder of the Scheme, and considers that the imposition of these additional obligations is appropriate.

10.76 However, the Committee is of the view that these office holders remain influential beyond the period proposed by the Attorney-General. The Committee therefore recommends further amendment to the Attorney-General's proposed amendments that would extend the relevant timeframes as follows:

- for a former Cabinet Minister, the time period of ten years should be removed altogether, such that these additional obligations would extend in perpetuity; and
- for recent designated position holders, the time period be amended from seven years to 15 years.

Recommendation 14

10.77 The Committee recommends the implementation of the Attorney-General's proposed amendments with regard to additional obligations for former Cabinet Ministers and recent designated position holders in section 22 and proposed section 23 of the Bill, with further amendments as follows:

- **for a former Cabinet Minister, the time period of ten years should be removed altogether, such that these additional obligations would extend in perpetuity; and**
- **for recent designated position holders, the time period be amended from seven years to 15 years.**

Recommendation 15

10.78 The Committee recommends that the Government consider amending the definition of 'recent designated position holder' in the Attorney-General's proposed amendments to include individuals employed under the *Members of Parliament (Staff) Act 1984* at the rank of Senior Adviser or above within the Ministry, so that the additional duties in section 23 (Registrable activities: recent designated position holders) apply to such people after they leave their employment.

10.79 The Committee also considers that that former Cabinet Ministers and recent designated position holders should not be able to access the exemption as amended under proposed section 29 (Exemption: government, commercial or business pursuits).

10.80 The Committee is of the view that this should be set out in amendments to proposed sections 22 and 23.

Recommendation 16

10.81 The Committee recommends that proposed section 22 (Registrable activities: former Cabinet Ministers) and 23 (Registrable activities: recent designated position holders) of the Bill be amended so that the individuals to whom those provisions apply cannot rely upon the exemptions in proposed section 29 (Exemption: government, commercial or business pursuits) to avoid what would otherwise be their registration obligations.

Exemptions

10.82 The Committee notes that a number of submissions and witnesses raised concerns with proposed Part 2, Division 4—Exemptions. These concerns—summarised in Chapter 4 of this report—include the limited availability of the proposed humanitarian exemption; no exemptions for charities, non-for-profit organisations, industry representative bodies, or arts and cultural organisations; a narrow scope to legal representation exemptions; and, the potential the Bill would capture religious activities.

10.83 The Committee considers that many of these concerns were addressed through the Attorney-General's change to proposed Part 1, Division 2—Definitions, and changes to the exemptions provisions in the Bill.[6] However, supplementary submissions and public hearings responding to the Attorney-General's proposed amendments raised some residual concerns in the exemption provisions.

Section 24—Exemption: humanitarian aid or assistance

10.84 The Committee notes the Attorney-General recommended amending the exemption for humanitarian aid or assistance (proposed section 24) to cover 'a person undertaking activity on behalf of a foreign principal primarily for the provision of humanitarian aid or assistance'. The Committee is satisfied that this amendment will provide a greater degree of flexibility to ensure that the exemption is not restricted to cases where the activity solely relates

6 Attorney-General, *Submission 84.1*.

to the provision of humanitarian aid or assistance, as was the case in the original drafting of the Bill.

10.85 The Committee notes submitters' concerns that the terms used in the proposed exemption are 'generally understood to be limited to emergency responses, and not to long-term development assistance'.

10.86 However, the Committee considers that the Explanatory Memorandum provides a degree of flexibility as to what is encompassed by the terms 'humanitarian aid' and 'humanitarian assistance', which are

> intended to be construed broadly, to apply to all aspects of humanitarian aid and assistance where the purpose is to save lives, alleviate suffering and maintain human dignity.[7]

10.87 The Explanatory Memorandum further states the term 'provision of' is also

> intended to be construed broadly, to capture both direct forms of humanitarian aid and assistance, including through donating funds and delivering in country humanitarian assistance such as medical services, as well as activities beyond the act of directly giving or providing humanitarian aid or assistance, such as activities relating to processes and procedures which support the provision of humanitarian aid or assistance.[8]

10.88 The Committee considers the broad interpretation of these terms, along with the proposed amendment to replace 'solely' with 'primarily', ensures that the exemption covers the provision of preventative and long-term humanitarian aid or humanitarian assistance, as well as emergency responses.

10.89 However, the Committee notes the Explanatory Memorandum could be expanded to capture examples of preventative humanitarian aid and assistance; and to clarify that long-term development assistance is also included under the exemption.

Recommendation 17

10.90 The Committee recommends implementation of the Attorney-General's proposed change to section 24 of the Bill.

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7 Explanatory Memorandum, p. 60.

8 Explanatory Memorandum, pp. 60-61.

The Committee further recommends that the Explanatory Memorandum is revised to clarify the circumstances under which the humanitarian aid and assistance exemption applies. In particular, the Committee recommends the exemption should not be limited to responsive humanitarian aid or assistance, but rather capture preventative and long-term humanitarian aid and assistance.

Section 25—Exemption: legal advice or representation

10.91 The Committee accepts the Attorney-General's proposed amendments to proposed section 25, and notes that it 'is an improvement and accords with the [Law Council] and Law Firms Australia's alternative position'.[9]

10.92 However, the Committee notes that supplementary submissions from both the Law Council and Law Firms Australia identified that the phrase 'or relates primarily to' used in proposed section 25 is inconsistent with clause 3.5(f) of the Federal Lobbying Code of Conduct, which uses the words 'or is incidental to'.[10]

10.93 The Committee notes advice from the Department that the term 'primarily' simply 'reflects modern drafting practice', and it would not make 'a lot of practical difference' if the terms 'incidental' and 'primary' were interchanged. The Law Council also advised that 'it can be fairly said … that's the intent of these amendments, but it would be good if they were aligned in order to ensure there is no inconsistency'.[11]

10.94 The Committee notes the importance of providing consistent definitions between various acts and codes, and if the result of replacing the term 'relates primarily to' in the Bill will make little 'practical difference', then the preference is to replace it for clear and consistent wording to aid clarity.

Recommendation 18

10.95 The Committee recommends implementation of the Attorney-General's proposed amendments to section 25 of the Bill, subject to the Government

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9 Law Council of Australia, *Submission 4.2*, p. 2.

10 Law Council of Australia, *Submission 4.2*, p. 2; Law Firms Australia, *Submission 10.2*, p. 2.

11 Mr Arthur Moses, SC, President-elect, Law Council of Australia, *Proof Committee Hansard*, Canberra, 18 June 2018, p. 14.

considering amending the section to also apply to activities that are 'incidental to' the matters currently listed in paragraphs (a) to (c).

Section 26—Exemption: diplomatic, consular or similar activities

10.96 The Committee notes that the Attorney-General did not propose amendments to section 26.

Section 27—Exemption: religion

10.97 The Committee accepts initial concerns that the exemptions under proposed section 27 of the Bill may not apply to religious groups such as the Catholic Church in Australia.

10.98 The Committee notes the Attorney-General's proposed amendments to proposed section 27 exempts a person in relation to a religious activity the person undertakes, in good faith, on behalf of a foreign principal. The Committee recognises that the amendment was proposed in order to put concerns by the Catholic Church 'beyond doubt'.[12]

10.99 However, the Committee notes further concerns from the Australian Catholic Bishops Conference, which submitted that the 'proposed new exemption for religion does not offer certainty or clarity and so may have the effect of discouraging legitimate public policy comment by religious groups'.[13] The Australian Catholic Bishops Conference proposed amending the exemption, as discussed in Chapter 9.

10.100 At a public hearing, the Department noted:

> the amendment … was, in fact, actually intended to give effect to or to respond to the concerns articulated by the Australian Catholic Bishops Conference in its previous submissions and evidence to this committee. We certainly were under the impression we had faithfully given effect to that and had mirrored the exemption in the United States Foreign Agents Registration Act that they had referenced in their submissions. To the extent that there's any residual concern that that is not the effect achieved by the amendments, then we are open to either of those form of words to make that very clear. ... We are seeking to exclude religious activities from the effects of the bill.[14]

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12 Attorney-General, *Submission 84.1*, p. 6.

13 Australian Catholic Bishop's Conference, *Submission 12.2*, p. 1.

14 Ms Anna Harmer, First Assistant Secretary, Attorney-General's Department, *Proof Committee Hansard*, 18 June 2018, p. 31.

10.101 The Committee acknowledges the concerns raised by Australian Catholic Bishops Conference and the representations they have made to the Committee. The Committee fully supports an exemption for religious institutions and activities they may undertake in good faith primarily for religious purposes.

10.102 The Committee also notes evidence from the Department that it is the clear policy intent for religious activities to be exempt from the Scheme. Further, the Committee received strong evidence from the Department that the amendment was drafted specifically to give effect to this. It is the view of the Committee that section 27 (as amended by the Attorney-General) will provide the necessary breadth of exemption for such activities and the Committee further notes that other charitable activities that these institutions may undertake will be exempt under other recommendations of this Report.

10.103 While it is the view of the Committee that this is given effect under the proposed amendments, the Committee recommends that the Explanatory Memorandum be amended to ensure clarity.

Recommendation 19

10.104 The Committee recommends implementation of the Attorney-General's proposed amendment to section 27 (Exemption: religion) of the Bill, and that the Explanatory Memorandum be amended to reflect the Government's intention that religious institutions are exempt.

Section 28—Exemption: news media

10.105 The Committee notes the Attorney-General's proposed narrowing of the scope of the Bill through changes to the definitions to ensure that an exemption for news media is no longer required under section 28 of the Bill.

Recommendation 20

10.106 The Committee recommends implementation of the Attorney-General's proposed amendment to delete section 28 of the Bill.

Section 29—Exemption: government, commercial or business pursuits

10.107 The Committee supports the Attorney-General's proposed amendments to section 29 of the Bill, subject to minor amendments.

10.108 The Committee acknowledges the potential issue with proposed section 29(2) applying more broadly than intended. The Committee therefore agrees that subsection 29(2) should be amended so that the exemption applies only where an individual's position as a director, officer or employee is obvious on the face of the otherwise registrable activity undertaken by the individual.

10.109 The Committee further notes that the exemptions applied in proposed section 29(2)(b) in relation to commercial and business pursuits require further clarity in the Explanatory Memorandum.

10.110 At a public hearing, the Committee questioned whether the proposed section 29(2) exemption would apply in the case of a company—related to a foreign government—that might be trying to influence a purchasing decision worth billions of dollars.

10.111 The Department noted that 'there are many other ways in which those types of tendering arrangements are transparent to the public' but that 'the purpose was that, for certain commercial pursuits, there is not the same level of engagement in Australia's democracy as the other processes that are listed in the definitions in the Bill'.[15]

Recommendation 21

10.112 The Committee recommends implementation of the Attorney-General's proposed amendments to section 29 of the Bill, with further amendments to subsection 29(2) so that the government, commercial or business pursuits exemption applies only where an individual's position as a director, officer or employee is obvious on the face of the otherwise registrable activity undertaken by the individual.

15 Ms Tara Inverarity, Assistant Secretary, *Proof Committee Hansard*, Canberra, 18 June 2018, p. 26.

Recommendation 22

10.113 The Committee recommends that the Explanatory Memorandum be amended to clarify the intent of the amended section 29 of the Bill and the circumstances under which commercial and business pursuits would be exempt.

Section 29A—Exemption: industry representative bodies

10.114 The Committee considered submissions on the Attorney-General's proposed inclusion of section 29A of the Bill—an exemption for industry representative bodies. The Committee appreciates Chemistry Australia and The Australian Industry Group's concerns that the proposed section 29A exemption created ambiguity in relation to section 29A(d)—the requirement that the activity the person undertakes in relation to a foreign principal 'is, or relates primarily to, representing the interests of business, or the particular sector as a whole'.[16]

10.115 The Committee understands that Australian industry is, by its nature, fragmented, and that there are sectors and subsectors within industry that are predominantly foreign government owned. Further, individual issues or feedback may only relate to a narrow subset of members, or a single member.

10.116 However, given the Department's 'strong view' that proposed section 29A(d) not be deleted, the Committee considers that further guidance should be provided in the Explanatory Memorandum on the kinds of activities that are included and excluded by proposed section 29A(d).

10.117 The Committee therefore recommends that the Explanatory Memorandum be amended to provide further guidance to industry representative bodies on the circumstances under which section 29A(d) applies. In particular, the Explanatory Memorandum should address situations in which a narrow subset of members' interests are dealt with by an industry representative body, and situations in which a single member's interests are dealt with.

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16 Chemistry Australia, *Submission 91*; The Australian Industry Group, *Submission 32.1*.

Recommendation 23

10.118 The Committee recommends implementation of the Attorney-General's proposed amendment to provide an exemption for industry representative bodies in section 29A of the Bill.

The Committee recommends the Government amend the Explanatory Memorandum to provide clarity to industry representative bodies as to what types of activities would be included and excluded under proposed section 29A(d) of the Bill.

Section 29B—Exemption: personal representation in relation to administrative process etc.

10.119 The Committee notes concerns that the Bill does not provide exemptions for matters of a personal nature. In response, the Attorney-General suggested amendments to introduce proposed section 29B.

10.120 The Committee received no supplementary submissions to the review on this section. However the Committee considers the proposed section enhances the exemptions by allowing for activity on behalf of family members; in circumstances where the individuals know each other personally and the activity is undertaken because of this in a personal capacity; and where the activity relates primarily to, representing in good faith the interests of the foreign principal in relation to an administrative process or matters affecting the personal welfare of the foreign principal.

Recommendation 24

10.121 The Committee recommends implementation of the Attorney-General's proposed section 29B exemption for personal representation in relation to administrative process etc.

Exemption for charities

10.122 The Committee acknowledges the important contribution the charity and non-for-profit sector contributes to Australia, and notes that in 2016 half of the registered 55,600 charities had no paid staff, and the sector was supported by 2.9 million volunteers.[17]

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17 Australian Charities and Non-for-profits Commission, *Submission 33.2*, p. 5.

10.123 The Committee notes the Attorney-General's proposed changes to the definition of foreign principal under section 10 of the Bill, and to the definition of 'undertaking activity on behalf of a foreign principal' in section 11. These proposed amendments address many of the concerns raised by the charity and non-for-profit sector, and provide greater clarity and certainty to charities on registration requirements.

10.124 The Committee considers that charities and not-for-profits will be largely exempt under the scheme by virtue of the proposed amendments to the definitions in the Bill. However, the Committee accepts that some charities and not-for-profits may still be within the scope of the Scheme as proposed.

10.125 The Committee therefore recommends that the Bill be amended to provide a limited exemption for charities from the Scheme. This recommendation appears in the following paragraphs.

Exemption for the arts and cultural activities

10.126 The Committee notes that there is no exemption in the Bill for arts and cultural activities. The Department advised that it does not consider that collaboration between Australian and foreign arts organisations would fall within the definition of undertaking activities on behalf of a foreign principal in section 11 of the Bill.

10.127 Nevertheless, the Committee is of the view that there may be some relationships between Australian arts bodies and foreign governments that may be captured under the Scheme. The Committee therefore recommends that the Bill be amended to provide for a limited exemption for arts organisations.

10.128 This recommendation appears in the following paragraphs.

Exemption for industrial associations

10.129 The Committee notes that there is no exemption in the Bill for industrial associations. The Committee has considered evidence from the Australian Council of Trade Unions regarding the relationships it has with organisations that may be considered foreign political organisations.

10.130 The Committee notes that it has recommended amendments to the definition of 'foreign political organisation'.

10.131 However the Committee considers it necessary for a limited exemption in line with that of charities and artistic groups.

Recommendation 25

10.132 The Committee recommends the Bill be amended to provide exemptions for charities, arts organisations and industrial associations, which would operate to relieve those organisations of an obligation to register when they are making routine representations in accordance with their respective purposes, and where the relationship with the foreign principal is well known or a matter of public record.

Exemption for other professions for representations made in the normal course of professional services

10.133 The Committee notes concerns that the Bill does not provided an exemption for members of, or activities in connection with, certain professions. The Committee considers that a number of the Attorney-General's proposed amendments have substantially addressed these concerns.

10.134 Despite these significant improvements, the Committee identifies that an exemption is warranted.

Recommendation 26

10.135 The Committee recommends that the Bill be amended to provide a limited exemption for professions (such as tax agents, customs brokers and liquidators) where representations to government are parts of the normal day-to-day work of the people in that profession, and where the activity is such a regular day to day representation in the name of a foreign principal.

Availability of exemptions for registrable arrangements

10.136 The Committee recognises that ambiguity may arise where a person has entered into an arrangement to undertake registrable activities, but the activities are not yet performed. The proposed exemptions only apply to activities, and would not cover persons who have entered into arrangements, but not yet performed activities.

10.137 The Committee notes the Department's advice that the exemptions apply regardless of whether a person has a registrable arrangement with a foreign principal or undertake registrable activities on behalf of a foreign principal.

10.138 The Committee considers the Department's advice should be included in the Explanatory Memorandum to provide certainty.

Recommendation 27

10.139 The Committee recommends the Bill be amended to clarify that the proposed exemptions provisions apply to both arrangements and activities.

Members of parliament and parliamentary privilege

10.140 The application of the Bill to members of parliament was a significant matter of concern raised in the Committee's inquiry.

10.141 Parliamentary privilege—that is, the special rights and immunities that apply to each House of the Parliament, its committee and its members—is derived from the United Kingdom's Bill of Rights 1688, was inherited by the Commonwealth Parliament in 1901 through section 49 of the Constitution, and was partially codified in the Parliamentary Privileges Act 1987. It continues to be an important feature of Australia's democratic system.

10.142 The Committee notes that the Bill, as originally drafted, does not explicitly seek to abrogate parliamentary privilege. However, as the Bill expressly covers a range of activities likely to be undertaken by members of parliament in the course of their duties, including in relation to 'proceedings of a House of the Parliament' (proposed section 12(c)) and 'parliamentary lobbying' (proposed section 21), the interaction of the scheme with parliamentary privilege is unclear.

10.143 The Committee therefore welcomes the Attorney-General's proposal to insert a 'savings provision' into the Bill in the form of proposed section 9A. This provision will make clear that the Bill does not affect the law relating to the powers, privileges and immunities of the parliament, its members or its committees. The Committee also welcomes amendments that will provide that a notice issued by the Secretary under sections 45 or 46 does not extend to requiring a person to produce information or documents covered by privilege, and that any such notices will make the effect of section 9A clear to the recipient.

10.144 The Committee notes advice from the Clerk of the House of Representatives and the Clerk of the Senate that the proposed amendments appear to 'largely address' their earlier concerns.

10.145 However, the Committee also notes advice from eminent barrister, Mr Bret Walker SC, that the proposed amendments do not go far enough. In particular, the Committee notes that there are a range of activities undertaken in the course of a member of parliament's duties that are unlikely to be covered by privilege, or are not sufficiently closely linked to formal parliamentary proceedings for the member to know whether registration is required. The Committee considers it important that this uncertainty is addressed.

10.146 The Committee further notes that, in circumstances where the conduct of a member of parliament is not considered to be covered by parliamentary privilege, a separation of powers issue arises. That is, a member of parliament would be required to report certain activities to the Department—part of the executive branch—and the Secretary of that Department would have the ability to compel the member of parliament to provide certain information or documents, or face possible criminal sanctions.

10.147 Moreover, the Committee notes the clear advice from the Attorney-General's Department that it is intended that members of parliament be subject to transparency disclosure requirements. While noting the appropriateness of the amendment expressly not applying to conduct covered by parliamentary privilege, the extent to which transparency would be achieved in relation to foreign influence on parliamentary decision-making is unclear.

10.148 Members of parliament perform a range of duties that bring them into contact with foreign governments and entities, including, for example:

- as members of parliamentary committees engaging with their counterparts in foreign countries,
- on parliamentary study tours, and
- representing their constituencies, in relation to issues such as foreign investment.

10.149 Although it is important that parliamentary privilege is not abrogated, the Committee considers that members of parliament should not as a result be excused from the transparency obligations placed on other members of the public. The Committee strongly endorses the principle that Senators and MPs should be transparent about when they are representing foreign government and related interests. However, given the unique nature of Parliamentarians' work, and the unique status of the Parliament and its

privileges, it is more appropriate that the Parliament establish its own registers.

10.150 For these reasons, the Committee support proposals for the House of Representatives and the Senate to establish a parliamentary foreign influence transparency scheme. The parliamentary transparency scheme should impose on members and senators similar transparency obligations to the Bill, appropriately adapted for the parliamentary environment. That is, members of parliament should be required to report on any registrable activities, or arrangements entered into, on behalf of a foreign principal. Similar to the Bill, the scheme should provide for the ability of its administrator to require information to be provided, and allow for penalties to be imposed for non-compliance.

10.151 Noting the potential for uncertainty in the interpretation of 'parliamentary proceedings'—and to avoid members of parliament being potentially required to register under two separate schemes—the Committee considers that members of parliament should not be subject to the scheme established by the Bill. The parliamentary transparency scheme should accordingly be extended to cover the full range of activities engaged in by parliamentarians, whether or not these are covered by parliamentary privilege.

10.152 This will provide greater clarity and ensure a more effective, all-encompassing scheme. Given the role of members of parliament, an all-encompassing scheme is preferable to that proposed under the Bill and the Attorney-General's amendments.

10.153 The Committee considers it appropriate that, similarly to existing registers of interests, the scheme be administered from within the Parliament. The Committee recognises, however, the level of complexity and sensitivity that could arise in relation to the obligations under the scheme—including in relation to decisions as to what information is made publicly available. In developing the scheme, the Houses may therefore wish to consider whether an independent officer of the Parliament should be appointed to administer the scheme.

10.154 The Committee notes that the Auditor-General and the Parliamentary Budget Officer provide current examples of independent officers being established with particular functions on behalf of the Parliament. The Committee also notes that the independent Commissioner of Lobbying, established by the Parliament of Canada to ensure transparency and

accountability in the lobbying of public office holders, may provide a useful model for the development of an Australian independent administrator.

10.155 Regardless of the model of administration developed by the Houses, the Committee recognises that additional resources will need to be allocated to support the administration of the scheme.

10.156 While members of parliament would be exempted from the Bill, the Committee considers that it would be beneficial to retain proposed section 9A in the Bill in order to clarify the application of parliamentary privilege in relation to the interactions other persons with parliamentary proceedings. Noting that without section 9A the Bill could potentially be seen to limit parliamentary privilege, and noting the Department's advice that such a limitation was not intended, the Committee further considers that subsection 9A(1) should be prefaced with the words 'To avoid doubt …'. This would be consistent with drafting techniques commonly employed in relation to privilege matters.[18]

Recommendation 28

10.157 The Committee recommends implementation of the Attorney-General's proposed amendments to clarify the interaction of the Bill with parliamentary privilege, including by the insertion of a 'savings provision' in section 9A of the Bill and limiting the application of the Secretary's powers to obtain information or documents.

However, the Committee recommends that subsection 9A(1) be prefaced with the words 'To avoid doubt'.

Recommendation 29

10.158 The Committee recommends that the Bill be amended to provide that the Foreign Influence Transparency Scheme does not apply to members of the House or Representative or Senators.

The Committee further recommends that the House of Representatives and the Senate develop a parallel parliamentary foreign influence transparency scheme, imposing on Members and Senators similar

18 See, for example, *Parliamentary Privileges Act 1987*, section 16(1).

transparency obligations to those in the Bill, but appropriately adapted for the parliamentary environment.

In developing that parallel scheme, the Houses should consider all conduct undertaken by Members and Senators in the course of their duties as parliamentarians, including conduct not directly related to proceedings in the Parliament. The scheme should be administered independently within the Parliament, and include

- **an obligation to report registrable activities undertaken on behalf of a foreign principal, or registrable arrangements with a foreign principal, appropriately adapted for the parliamentary environment,**
- **a power for the administrator to obtain information and documents, and**
- **appropriate sanctions for non-compliance.**

Registrants' obligations

Section 16—Requirement to register

10.159 The Bill as introduced does not set out in the primary legislation the information that must be required to affect registration (section 16). Rather, these requirements are proposed to be set out in rules.

10.160 The Department noted that it intends that rules will provide that the following information will be required to affect registration:

- the name of the person and general details (address, occupation, citizenship status and any prior government employment, including position and term of employment),
- the name of the foreign principal and general details (contact details, nationality, type of foreign principal and general description of business/activities),
- high level details of the nature of the relationship between the registrant and the foreign principal (for example, whether there is a contract in place, an informal agreement or otherwise) and whether the person has received / is receiving financial benefits from the foreign principal, and

- issues of interest which the registrant intends to pursue on behalf of the foreign principal (such as, environmental issues, defence contracts, a particular vote or policy).

10.161 To provide the necessary flexibility, the Committee considers that should there be a requirement for additional information in the future, this should be set out in regulations and subject to a disallowance period.

Section 34—Reporting material changes in circumstances and section 35—Reporting disbursement activity in Australia for the purpose of political or governmental influence (other than in voting period)

10.162 The Committee notes that stakeholders raised significant concerns regarding the regulatory burden imposed by requirements under the Bill.

10.163 The Committee is satisfied that many of these concerns have been alleviated by the Attorney-General's proposed amendments to refine the scope of the Scheme.

10.164 Further, the Committee is satisfied that the Attorney-General's amendments will substantially reduce the regulatory burden associated with the Scheme, and timely reporting in relation to foreign influence that emanates from a foreign government or closely-related entities is of particular importance.

Recommendation 30

10.165 The Committee recommends that the review required under proposed section 70 of the Bill specifically consider the appropriateness of the reporting requirements in light of the experience garnered through the operation of the Scheme.

10.166 The Committee also considers it appropriate that registrants be required to report more regularly during significant periods where the impact of their activities to influence outcomes is greater. In Australia's democratic system, elections are a period where a significant volume of information is distributed and activities undertaken in an attempt to influence voters. In the vast majority of cases, this is legitimate activity as regulated under the Commonwealth Electoral Act.

10.167 However, the potential for foreign influence in elections and our democratic systems must be appropriately guarded against. Accordingly the Committee considers it appropriate that registrants are required to provide more

regular updates during these periods (as proposed in sections 36 and 37). The Committee does not therefore, seek any amendment to those provisions.

Section 38—Disclosure in communications activity

10.168 The Committee notes that the obligations set out in proposed section 38 will require a person to not only register under the Scheme, but also provide disclosure of any communications activities undertaken on behalf of a foreign principal. As drafted, the Bill provides that these disclosure obligations will be provided in rules.

10.169 The Explanatory Memorandum foreshadows that the rules may extend to requiring that disclosure be made on the materials communicated, and in a certain size font, that identifies that the foreign principal and the arrangement under which the communication materials were developed.[19]

10.170 The Committee considers a disclosure requirement on the materials is appropriate, however notes that these materials may well be captured under existing regulation provided by the *Commonwealth Electoral Act 1918*, including Part XX of that Act.

10.171 Noting that there may be considerable overlap—which, in practice may require two disclosures to be made on the same material to satisfy both the *Commonwealth Electoral Act 1918* and the requirement under the Bill—the Committee is of the view that consideration should be given to aligning the obligations.

10.172 Certain electoral communications are legally required to be accompanied with a statement of who authorised their distribution. The purpose of such statements is to promote 'free and informed voting at elections' by enhancing:

- the transparency of the electoral system, by allowing voters to know who is communicating electoral matter;
- the accountability of those persons participating in public debate by making those persons responsible for their communications; and
- the traceability of communications, by ensuring that obligations imposed by the Electoral Act in relation to those communications can be enforced.[20]

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19 Explanatory Memorandum, pp. 85-86, para 477.

20 Australian Electoral Commission, 'Electoral Backgrounder: Electoral communications and authorisation requirements', updated 6 March 2018,

10.173 These purposes are broadly similar with some of the purposes identified for the Bill, and so provide a comparable objective for imputing a similar disclosure requirement into the Bill.

10.174 In March 2018, a range of new authorisation requirements entered into force regarding electoral communications (Part XX of the *Commonwealth Electoral Act*). The new authorisation requirements apply to an expanded range of communications containing 'electoral matter' including all publicly communicated material. This includes printed material, social media, voice calls (including robocalls) and text messaging (for example, bulk text messaging). These authorisation requirements are not limited to voting periods, but apply perpetually.

10.175 The new requirements provide a tiered system of disclosure obligations based on who has authorised it (a registered political party, an associated entity, current members of Parliament carry greater disclosure obligations), and the type or method of communication.

10.176 The Committee is of the strong view, that the principles adopted by the Joint Standing Committee on Electoral Matters' report should be considered in the development of the disclosure rules under the Scheme. The principles that have guided the Joint Standing Committee on Electoral Matters' (JSCEM) reports are:

- *Transparency* via visible and timely disclosure;
- *Clarity* about what is required and by whom;
- *Consistency* of regulations, so that they capture all participants and support a level playing field; and
- *Compliance* through enforceable regulations with minimal, practicable compliance burdens.[21]

10.177 In line with the principles articulated by the JSCEM, the Committee supports the additional *transparency* that is proposed to be provided to decision-makers (which may include voters) under section 38 of the Bill. However, the Committee is of the view that the Government should consider providing *clarity* in the rules about what is required to be disclosed, and that where appropriate this should be *consistent*, or align, with the

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https://www.aec.gov.au/About_AEC/Publications/Backgrounders/authorisation.htm (last accessed 20 June 2018).

21 Joint Standing Committee on Electoral Matters, *Advisory report on the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017*, April 2018, para 1.12

existing obligations contained in electoral law. The Committee is of the view that clarity and consistency are significant drivers of *compliance*, but accepts that differences in the context and operation of the scheme may require some appropriate adaptations.

Recommendation 31

10.178 The Committee recommends that the rules should provide clarity about the disclosure requirements, and that the Government should consider the existing obligations contained under the *Commonwealth Electoral Act 1918* when developing these rules.

Section 40—Record keeping

10.179 The Committee notes the significant concern expressed by stakeholders regarding record keeping requirements under the Bill. Although the Committee considers some of these concerns may be ameliorated by the refined scope of the Bill, as proposed by the Attorney-General, some concerns still remain.

10.180 The Committee acknowledges the considerable regulatory burden created by section 40 of the Bill and notes that the Attorney-General's proposed amendments have not sought to engage with the record keeping obligations.

10.181 The Committee is of the view that stakeholder concerns should be addressed by providing clarity on the types of records that will be required to be kept by registrants. The proposed section provides a wide range of matters that may require records to be kept. To provide clarity and certainty for stakeholders, the Committee recommends guidance be developed on the types of records required to be kept, and that this guidance be publicly available prior to the commencement of the Scheme. The Committee considers this guidance is essential for the compliance and integrity of the Scheme.

Recommendation 32

10.182 The Committee recommends that the Attorney-General's Department prepare, and publish prior to the commencement of the Scheme, detailed guidance on the types of records that are required to be kept for the purpose of section 40 (Keeping records) of the Bill.

Recommendation 33

10.183 The Committee recommends that section 40 of the Bill be amended to lower the period a person is required to retain records from five years to three years after registration ends, and that the Government consider an amendment that would provide that records of ten years or more are no longer required to be retained by a registered person.

Section 63—Charges

10.184 As noted by the Department, in many instances foreign influence is 'quite legitimate'. The intent of the Bill is not to diminish or quell lobbying activities, but to bring transparency to these interactions and engagements.

10.185 Moreover, in a representative democracy, the Committee is of the view that seeking access to elected representatives should not be accompanied by the imposition of a fee. Therefore the Committee considers that charges for initial registration, renewal and any reporting lodgement should be removed from the Bill. This would aid compliance and ensure that legitimate activities are not adversely impacted by the Bill. The Committee recommends that the section 63 be removed from the Bill.

10.186 The Committee also notes that the Foreign Influence Transparency Scheme (Charges Imposition) Bill 2017—which was not referred to the Committee—will also need to be withdrawn to give effect to the Committee's recommendation.

Recommendation 34

10.187 The Committee recommends that the Bill be amended to remove section 63, and the Foreign Influence Transparency Scheme (Charges Imposition) Bill 2017, be withdrawn.

Relationship with the Lobbying Code of Conduct and Register of Lobbyists

10.188 The Committee notes that many of the lobbying activities captured by the Scheme will already be regulated under the Lobbying Code of Conduct and the Register of Lobbyists.

10.189 In February 2018, the Auditor-General released a performance audit report on the management of the Australian Government's Register of Lobbyists.

The Auditor-General concluded that improvements could be made to communications, compliance management and evaluation for the Code and the Register.

10.190 Critically, the audit found the effectiveness of the Department's compliance monitoring approach has been reduced by the lack of strategy around advice to Government representatives of their compliance monitoring responsibilities and reliance on reports of non-compliance to drive compliance activities.

10.191 The Committee also notes the evidence received to the Bill which called for exemptions to be provided for those persons already registered on the Register of Lobbyists.

10.192 The Committee considers that it would be inappropriate for an exemption to be provided to the legislative scheme proposed by the Bill, based on the Lobbying Code of Conduct or the Register of Lobbyists.

10.193 However the Committee considers it appropriate to consider better aligning the Lobbying Code of Conduct and the Register of Lobbyists with the proposed Scheme.

Recommendation 35

10.194 The Committee recommends that, following the passage of this Bill, the Government introduce measures to:

- **better align the Lobbying Code of Conduct and the Register of Lobbyists with the proposed Foreign Influence Transparency Scheme, and**
- **amend the Lobbying Code of Conduct to provide an exemption for registration where a person is registered under the Foreign Influence Transparency Scheme.**

Operation of the Scheme

Section 43—Certain information to be made publicly available

10.195 The Secretary will be required to publish certain information online for public access unless the information is 'commercially sensitive', 'affects national security' or is of a kind prescribed by rules.

10.196 The Committee supports the prohibition on the Secretary publishing matters that are commercially sensitive or affect national security. Publishing such information would not be appropriate.

10.197 The Committee is of the view that that greater clarity and direction should be provided to the Secretary in this decision through amending the Explanatory Memorandum to further explain these two terms. Greater direction will also aid the integrity and safeguards of the Scheme.

Recommendation 36

10.198 The Committee recommends that the Explanatory Memorandum be amended to provide clarity about the terms 'commercially sensitive' and 'national security'.

10.199 The Foreign Influence Transparency Scheme is intended to provide the public with 'sunlight' on the source of foreign influence in Australia's government and political decision making. However, it will only achieve that objective through timely publication of the required registration and reporting requirements as set out in the Bill.

10.200 Despite this, the Secretary administering the Scheme is not required to publish Scheme information within any set time period, merely that the information be made available to the public, on a website (section 43 of the Bill).

10.201 The Committee is of the view that the transparency provided by the public register will be informative and beneficial, particularly during election periods where it may be reasonably expected that the number and scale of registrable activities will be higher.

10.202 To achieve the stated policy intent, the Committee therefore recommends that section 43 of the Bill be amended to clearly set out time periods for the publication of information listed in subsection 43(1). The Committee considers the following timeframes would be appropriate:

- four weeks for information provided outside of a voting period (under proposed sections 34 and 35), and
- 48 hours for information provided within a voting period (under proposed sections 36 and 37).

10.203 There is precedent in the *Commonwealth Electoral Act 1918* Part XX (Division 4 and 5) to require an administrator to make public returns submitted by relevant entities. The administrator (in this case the Electoral

Commissioner) is required to publish entities' disclosure of donations on an annual basis and within a set period following electoral events (including by-elections).

Recommendation 37

10.204 The Committee recommends that section 43 of the Bill be amended to require the Secretary to publish information listed in section 43 within a period of four weeks of receiving the information from a person liable to register under the Scheme.

Further, the Committee recommends that for information provided during voting periods, as required under proposed section 36 and 37, the Secretary should be required to publish relevant information within 48 hours of its receipt.

However, there should be a limited ability for the Secretary to take longer to publish information in circumstances where he or she is considering whether one of the grounds for non-publication applies.

10.205 The Committee notes the Australian Information Commissioner recommended that a Privacy Impact Assessment be undertaken and the Department agreed that this would be undertaken 'prior to the commencement of the scheme'.

10.206 The Committee recommends such an assessment should take place at the earliest possible opportunity and prior to the commencement of the Scheme to ensure information both requested and shared by the Secretary is undertaken in compliance with an individual's right to privacy.

Recommendation 38

10.207 The Committee recommends a Privacy Impact Assessment is undertaken at the earliest possible opportunity and prior to the commencement of the Scheme to ensure information both requested and shared by the Secretary is undertaken in compliance with an individual's right to privacy.

Sections 45 and 46—Notices requiring information

10.208 The Committee notes the scope of the Secretary's powers to request additional information from both a person suspected of being liable to

register, and a third party who may have information relevant to the Scheme.

10.209 The Committee is concerned that information that is the subject of a notice issued under these provisions may be used to prove an intent element in an offence under the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017. The Committee considers that this would not be appropriate.

Recommendation 39

10.210 The Committee recommends that the Bill be amended to clarify that the Secretary's powers cannot be used to compel evidence from a person in order to obtain evidence from that person that is then admissible in a prosecution of that person for an offence contained in the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017.

Section 53—Authorisation—other purposes

10.211 The Committee notes the range of persons with whom, and purposes for which, the Secretary may share Scheme information. The Committee acknowledges the breadth of purposes and agencies proposed.

10.212 However, the Committee is concerned that additional purposes and persons may be prescribed in rules, without additional oversight or consideration by the Parliament.

10.213 The Committee considers that this is inappropriate, and recommends that any expansion of the list of purposes and persons be referred to this Committee for review.

Recommendation 40

10.214 The Committee recommends section 53 of the Bill be amended to provide that any additional persons with whom, or purposes for which, Scheme information may be shared, be referred to the Parliamentary Joint Committee on Intelligence and Security for its review and approval.

Section 67—Delegations

10.215 The Committee welcomes the Attorney-General's proposed amendments to section 67 which seek to limit the matters which may be delegated to a junior officer in the Attorney-General's Department, to exclude the following:

- any functions or powers to issue a transparency notice under Part 1, Division 3, and
- any functions or powers to issue a notice requesting information under Part 4, Division 3, and
- any functions or powers to share Scheme information under proposed section 53.

10.216 These proposed amendments respond to concerns raised in evidence on the Bill, and these amendments are supported by the Committee.

10.217 However, the Committee considers there should be similar amendments to limit the delegation of decisions to publish, or withhold from publication, information under proposed section 43 (Certain information to be made publicly available).

10.218 As noted in evidence by the Law Council on the proposed amendments, decisions about what matters are 'commercially sensitive' or relate to 'national security' are appropriately handled at the highest political or governmental level. The suggestion that such matters can be undertaken by less senior officials is of concern.

10.219 The Committee therefore recommends that section 67 be further amended to provide that decisions by the Secretary under section 43 should not be delegated to an officer who is below the level of a Senior Executive Service officer.

Recommendation 41

10.220 The Committee recommends implementation of the Attorney-General's proposed amendments to section 67 of the Bill that limit the powers and functions that the Secretary may delegate.

Further, the Committee recommends that section 67 be amended to provide that decisions by the Secretary under section 43 should not be delegated to an officer who is below the level of a Senior Executive Service officer.

The position of the Secretary

10.221 The Committee notes that there are a range of options which could be considered as to who administers the Scheme. As noted in earlier chapters, Canada has recently established the position of an independent Commissioner of Lobbying, established by the Parliament to ensure transparency and accountability in the lobbying of public office holders. The Committee considers that position may provide a useful model for the development of an Australian independent administrator for the Scheme.

10.222 It is important to ensure that the public has faith in the integrity and independence of the Scheme administrator. The Scheme may risk a perception of insufficient distance and the Committee is keen to ensure there is transparency in the Scheme itself and in its operation. The Committee is of the view that an independent Scheme administrator—similar to that adopted in Canada—could provide a useful model for the future operation of the Scheme.

10.223 The Committee notes the Secretary will administer the Scheme, however recommends that after an initial period of operation, the Government give consideration to the Scheme being administered by an independent statutory officer.

Recommendation 42

10.224 The Committee recommends that after an initial period of operation, the Government give consideration to the Scheme being administered by an independent statutory officer, as an alternative to it being administered by the Secretary of the Attorney-General's Department .

Resourcing

10.225 The Committee considers that if the Scheme is to achieve its transparency objective, it is important that it be appropriately resourced.

10.226 The Committee recognises that the Scheme places onerous requirements on individuals and groups required to register, particularly in relation to giving notice within an election period (seven days under section 37 of the Bill); reporting material changes in circumstances (14 days under section 34); reporting disbursement activity (14 days under section 35); and, reporting on registration review when a voting period begins (14 days under section 36).

10.227 The Committee considers that if the Scheme requires registrants to respond within short timeframes, the administrator of the Scheme must similarly be required to promptly discharge his or her duties in administering the Scheme.

10.228 Consequently, and as recommended above, the Committee considers that required timeframes should be set out for the Secretary with regards to making information available to the public on a website.

10.229 The Committee notes early stakeholders concerns that the Scheme would likely attract a larger number of registrants than anticipated. The Committee is satisfied that, taking into account the Attorney-General's proposed amendments, the scope of the Scheme has been sufficiently narrowed such that the number of registrants is likely to be significantly reduced.

10.230 The Committee states its expectation that, regardless of the number of registrants, the Scheme will be adequately resourced by the Government to ensure the Secretary's obligations are met and the public is given a level of assurance and transparency in both the process of administering and reporting on the Scheme.

10.231 While the Committee has yet to receive details on how the Scheme would be implemented, the Committee states its expectation that the Department will have a sufficient number of appropriately trained staff to develop guidance material, answer registration requirement questions, and assist in administering the Scheme, particularly during its commencement period.

Part 1, Division 3—Transparency notices

10.232 The Committee supports the Attorney-General's proposed amendments that would provide clarity on the status of a 'foreign government entity' and a 'foreign government individual'.

10.233 As noted elsewhere in this Chapter, the Committee has sought to prioritise clarity, noting the intended integrity and transparency objectives of the Scheme.

10.234 The Committee notes that transparency notices will be reviewable—on merits—by the Administrative Appeals Tribunal and that as a result a person may seek reasons from the Secretary for that decision. However, the Committee received significant evidence that expressed ongoing concern regarding the lack of procedural fairness that is afforded to a subject of a notice.

10.235 The Committee considers that the transparency notice framework as proposed by the Attorney-General should be split to include:

- a 'provisional' transparency notice, and
- a 'final' transparency notice.

10.236 The Committee puts forward the following amended process. The Secretary must first issue a provisional notice in the same fashion as he or she would issue a notice under the present Bill. After 28 days, the provisional notice should become final by force of law. During the 28 day period, the Secretary must consider any submission made by the entity or individual that is the subject of the notice, and may issue a revocation notice. Consistent with the Bill as it stands, the Secretary would not be required to observe procedural fairness in deciding whether to issue a revocation notice. There would be no difference in the legal effect of a provisional notice and a final notice.

10.237 However the Committee considers that the introduction of a provision notice framework would:

- clearly signal that the notice is not 'final' and merely represents the Secretary's provisional view, mitigating potential reputational impacts of the notice, and
- allow the entity or individual to make representations to the Secretary before the notice becomes final.

Recommendation 43

10.238 The Committee recommends implementation of the Attorney-General's proposed amendments to the Bill which establish new Part 1, Division 3—Transparency notices, subject to the following further amendments. The Committee recommends that the transparency notice framework as proposed by the Attorney-General be separated to include:

- **a 'provisional' transparency notice, and**
- **a 'final' transparency notice, and**

the following technical amendments be implemented to:

- **provide that the notice comes into force when it is made public, rather than when it is made, and**

- **clarify what 'details' (mentioned in subsection 14C(1)) must be included in a notice.**

10.239 The Committee has also identified a tension between proposed subsections 14B(2) and14B(1), and in any case section 14B(2) appears unnecessary given there is a presumption that administrative decisions are valid.

Recommendation 44

10.240 The Committee recommends that the Attorney-General's proposed amendments for 14B(2) of the Bill, not be implemented.

Enforcement

10.241 The Committee considered a number of issues raised regarding the proposed enforcement provisions in Part 5 of the Bill. The recurring issues raised by submitters and witnesses centred on the severity of the criminal penalties, the inclusion of strict liability offences, and the lack of civil penalties as opposed to criminal sanction.

10.242 The Attorney-General's proposed amendments—outlined in Chapter 9 of this report—address some of these issues. However, several organisations provided supplementary submissions to suggest that further amendments to the enforcement provisions should be considered.[22]

Proposed sections 57 and 57A

Penalties under proposed sections 57 and 57A

10.243 The Committee notes submissions received to the Bill were critical of the magnitude of the criminal penalties under section 57. The Attorney-General's proposed amendments lowered some of these penalties, with the new maximum proposed penalty under the Bill decreasing from seven years to five. The Committee supports these amendments.

10.244 The Committee notes that the proposed five year penalty is now comparable with the United States' Foreign Agents Registration Act (FARA), which

[22] Law Council of Australia, *Submission 5.1*; Australian Lawyers for Human Rights, *Submission 7.1*; Australian Professional Government Relations Association, *Submission 13.1*; Getup, *Submission 63.1*.

imposes a maximum penalty of $10 000, five years imprisonment, or both for wilfully violating any provision of FARA.

10.245 The Committee notes that some submitters considered that offences under the Bill should be civil rather than criminal. The Committee also notes evidence from the Department stating that, 'fundamentally, the acts that are described in this Bill are not criminal and nor should any adverse inference be drawn from a requirement to register under the Foreign Influence Transparency Scheme'.[23] The offences apply only in the event of an intentional or reckless failure to register.

10.246 The Committee also notes the evidence of the Department that 'Criminal offences are considered the most appropriate way to deter non-compliance with the registration requirements under the Scheme'.[24]

Recommendation 45

10.247 The Committee recommends implementation of the Attorney-General's proposed amendment to lower penalties under sections 57 and 57A of the Bill.

Absolute and strict liability

10.248 The Committee notes that the proposed inclusion of absolute liability in sections 57 and 57A caused concern from submitters, and according to the Law Council of Australia 'adds nothing to the normal requirements that the defendant engaged in some prohibited act'.[25]

10.249 The Committee further notes concerns that the inclusion of absolute liability would prevent the defence of honest and reasonable mistake of fact in relation to the subsections in 57 and 57A to which it applied. The Committee sees no reason to prevent this defence for these offences. As such, and in order to ensure sections 57 and 57A are workable, the Committee recommends removing proposed sections 57(5) and 57A(5) (absolute liability) from the sections 57 and 57A offences.

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23 Ms Anna Harmer, First Assistant Secretary, Attorney-General's Department, *Proof Committee Hansard*, 18 June 2018, p. 3.

24 Attorney-General's Department, *Submission 5.1*, p. 6.

25 Law Council of Australia, *Submission 4.2*, p. 5.

10.250 The Committee also recommends that the Government consider removing proposed subsection 61(2) (absolute liability), so that it does not apply to section 61 (Destruction of records etc.).

10.251 The Government further notes concerns with strict liability applying to offences in section 58 (Failure to fulfil responsibilities under the scheme). The Committee recommends that section 58 offences be amended to remove strict liability.

Recommendation 46

10.252 The Committee recommends that the Bill be amended to remove absolute liability from sections 57, 57A and 61.

Recommendation 47

10.253 The Committee recommends that the Bill be amended to remove strict liability from section 58.

False and misleading information

10.254 As noted in Chapter 9, the Attorney-General proposed lowering the penalty for false or misleading information or documents under section 60 of the Bill to three years imprisonment. The Committee notes submitters' concerns that the original five years penalty was five times the penalty for committing a similar offence under section 137.1 of the Criminal Code. The Committee notes that the penalty of three years is still three times that of the Criminal Code penalty.

10.255 The Committee questioned the Department on the reason for the discrepancy between the Bill and the Criminal Code penalty. The Committee accepts the Department's response that the purpose of the scheme is to

> bring transparency to things that can damage our democracy, whereas providing a false or misleading document to another type of agency might have a financial impact on the Commonwealth or some other impact but doesn't get to the purpose of the scheme, which is preventing Australia from being the subject of foreign influence without transparency.[26]

[26] Ms Tara Inverarity, Assistant Secretary, Attorney-General's Department, *Proof Committee Hansard*, 18 June 2018, p. 39.

10.256 The Committee agrees that providing false and misleading information in this context may justify a higher penalty. The Attorney-General has proposed further amendments to the enforcement provisions under proposed section 61 and 61A. The Committee supports these proposals.

Recommendation 48

10.257 The Committee recommends implementation of the Attorney-General's proposed amendments to

- **lower the penalty in proposed section 60 of the Bill from five to three years,**
- **lower the penalty under proposed section 61—destruction etc. of records—from five years to three years, and**
- **introduce section 61A—geographical jurisdiction of offences.**

Self-incrimination

10.258 The Committee notes that section 47 of the Bill creates an immunity for information provided under sections 45 and 46. Such information is inadmissible in criminal proceedings, other than for an offence against section 60, or in sections 137.1 and 137.2 of the Criminal Code, concerning false or misleading information or documents.

10.259 The Committee notes evidence from the Department that section 47 is intended to create a derivative use immunity. A derivative use immunity protects a person who is required to give self-incriminating evidence from that evidence being used to gather other evidence against that person.

10.260 However, the Committee heard contradictory evidence from the Law Council, suggesting that section 47 did not achieve the intent of providing a derivative use immunity.

10.261 As such and to reduce uncertainty the Committee suggests clarification, by way of a note to the provision, that section 47 provides a derivative use immunity. The Committee understands this notation may not be required under the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.

Oversight, review and implementation

Annual report

10.262 The Committee supports the requirement in section 69 of the Bill for the Secretary to provide an annual report on the operation of the scheme to the Minister, for presentation to the Parliament.

10.263 The Committee notes, however, that the Bill does not specify the matters that should be included in the report. Rather, the matters that must be included are proposed to be prescribed by rules.

10.264 The Committee accepts that there is a need for flexibility to determine what should be contained in the report once operational arrangements to support the Scheme have been established. The initial operation of the Scheme will help inform the type of information that should be included, for example, the nature of activities engaged in on behalf of foreign principals, and public awareness activities undertaken by the Department administrating the Scheme. Additional information may also be required for reporting periods that encapsulate voting periods.

10.265 However, to ensure that there is an appropriate level of transparency and oversight of the operation of the scheme from year-to-year, the Committee considers that it would be desirable for the Bill to set out certain minimum requirements for the annual report. The rule-making power should be retained to enable these minimum requirements to be expanded where appropriate.

Recommendation 49

10.266 The Committee recommends that section 69 of the Bill be amended to specify minimum requirements for inclusion in the annual report on the operation of the Scheme. These requirements should include:

- **the numbers of new and ceased registrations, and reports provided to the Secretary,**
- **the number of transparency notices issued, varied or revoked,**
- **the number of written notices issued by the Secretary under sections 45 and 46, and the number of documents obtained by the Secretary as a result of section 46 notices,**

- **the number of occasions a subject of a provisional transparency notice issued under Part 1—Division 3 makes submissions to the Secretary,**
- **a statement of compliance with the obligations under section 42 of the Act (register of scheme information),**
- **the number of occasions on which Scheme information has been shared, including which agencies are obtaining Scheme information,**
- **the number of persons charged with offences under Part 5 of the Act, and the number prosecutions before the courts,**
- **information on fees collected under the Scheme, and**
- **any other matter prescribed by the rules for the purposes of the section.**

Statutory review

10.267 The Committee supports the inclusion in the Bill of a requirement for the Scheme to be reviewed within a specified time after commencement. The Bill as drafted specifies this time period to be five years. The Committee considers a three year time limit to be more appropriate, and accordingly recommends that section 70 be amended.

10.268 The Committee notes that a review will provide an opportunity for any issues arising during the Scheme's implementation and initial operation to be identified and rectified.

10.269 The Committee notes that the Bill remains silent as to who will undertake the review, other than a person nominated by the Minister. The Committee suggests the most appropriate body to undertake such a review is the Parliamentary Joint Committee on Intelligence and Security.

Recommendation 50

10.270 The Committee recommends that section 70 of the Bill be amended to provide that the Parliamentary Joint Committee on Intelligence and Security initiate a review within three years of the commencement of the Scheme.

10.271 The Committee considers that it appropriate for there to be oversight during the both implementation phase and early operation of the Scheme. Accordingly, the Committee is of the view that the administrator of the Scheme should provide a report to the Parliamentary Joint Committee on Intelligence and Security outlining the implementation progress and strategy. This should be provided to the Committee six months after Royal Assent of the Bill, or prior to the commencement of the Scheme, whichever occurs first.

10.272 Eighteen months following commencement of the Scheme, the administrator of the Scheme should provide to the Committee a report on the Scheme's operation. The administrator of the Scheme should be available to brief the Committee following presentation of each report.

Recommendation 51

10.273 The Committee recommends that the Parliamentary Joint Committee on Intelligence and Security is provided with reports by the administrator of the Scheme, as follows:

- **a report detailing the Scheme's implementation progress and strategy, to be provided to the Committee six months after Royal Assent of the Bill, or prior to the commencement of the Scheme, whichever occurs first, and**

- **a report detailing the Scheme's early operation to be provided to the Committee within 18 months of its commencement.**

The administrator should be available to brief the Committee following the presentation of each report.

Ongoing oversight

10.274 The Committee notes that the Bill confers a range of significant decision-making powers on the Secretary of the Attorney-General's Department, including powers to obtain information and documents, issue transparency notices and to communicate information to other government agencies.

10.275 The Committee notes that there is no specific oversight function included in the Bill to ensure the integrity of the Secretary's handling of these powers. As noted in Chapter 8, the Secretary's decisions will be subject to the usual operation of the *Administrative Decisions (Judicial Review) Act 1977*.

Additionally, it would be within the remit of the Auditor-General to conduct a performance audit of the implementation and operation of the Scheme once it has been established.

10.276 There are a range of mechanisms that could potentially be used to provide increased oversight over the Secretary's decision-making powers, including, potentially, a role for an independent commissioner. Taking into account the other reporting and review requirements noted above, the Committee is of the view that the existing mechanisms are likely sufficient. However, noting that it is a new scheme and that many of its aspects are yet to be developed, the Committee considers that the adequacy of oversight mechanisms should be given detailed consideration during the Parliamentary Joint Committee on Intelligence and Security's statutory review.

Implementation

10.277 The Committee considers the remaining amendments proposed by the Attorney-General to be more technical amendments. The Committee notes that no issues have been raised regarding these proposed amendments and the Committee supports their implementation.

10.278 Subject to implementation of the recommendations made here, the Committee recommends that the Bill be passed.

Recommendation 52

10.279 Subject to implementation of the Committee's recommendations, the Committee recommends that the Foreign Influence Transparency Scheme Bill 2017 be passed.

Mr Andrew Hastie MP

Chair

A. Submissions

1 Tony Kevin

- 1.1 Supplementary
- 1.2 Supplementary

2 Ernst Willheim

3 Australian Financial Markets Association

- 3.1 Supplementary

4 Law Council of Australia

- 4.1 Supplementary
- 4.2 Supplementary
- 4.3 Supplementary

5 Attorney-General's Department

- 5.1 Supplementary
- 5.2 Supplementary
- 5.3 Supplementary
- 5.4 Supplementary
- 5.5 Supplementary
- 5.6 Supplementary
- 5.7 Supplementary
- 5.8 Supplementary

6 Australian Catholic University

7 Australian Lawyers for Human Rights

- 7.1 Supplementary
- 7.2 Supplementary

8 American Chamber of Commerce in Australia

9 Universities Australia

- 9.1 Supplementary

10 Law Firms Australia

- 10.1 Supplementary
- 10.2 Supplementary

11 The Group of Eight

- 11.1 Supplementary

12 Australian Catholic Bishops Conference

- 12.1 Supplementary
- 12.2 Supplementary

13 Australian Professional Government Relations Association

- 13.1 Supplementary

14 Mr Peter Jennings

15 Ms Valerie Heath

16 Financial Services Council

17 Office of the Australian Information Commissioner

18 Australian Bankers' Association, Australian Private Equity & Venture Capital Association, Financial Services Council and Insurance Council of Australia

- 18.1 Australian Private Equity & Venture Capital Association
- 18.2 Insurance Council of Australia
- 18.3 Financial Services Council
- 18.4 Australian Bankers' Association

19 Joint media organisations

- 19.1 Supplementary
- 19.2 Supplementary
- 19.3 Supplementary

20 Property Council of Australia

21 Commercial Radio Australia Limited

22 Professor Anne McLaren

23 Epoch Times

24 Falun Dafa Association of Australia Inc

- 24.1 Supplementary

25 Australian Values Alliance

26 John Fitzgerald

27 Foxtel

28 Dr Anne-Marie Brady

29 Human Rights Council of Australia

30 Alexander Nilsen

31 Our Community Group

32 The Australian Industry Group (Ai Group)

- 32.1 Supplementary

33 Australian Charities and Not-for-profits Commission

- 33.1 Supplementary
- 33.2 Supplementary

34 Community Council for Australia

- 34.1 Supplementary

35 RSPCA Australia

36 Australian Small Business and Family Enterprise Ombudsman

37 Australian Major Performing Arts Group

- 37.1 Supplementary

38 Australian Friends of the Hebrew University, Jerusalem Limited and Technion Australia Inc.

39 Linda Jakobson

40 Australian Conservation Foundation

- 40.1 Supplementary

41 JMTinc

42 Social Ventures Australia

43 Volunteering Australia

44 Australian Academy of Science

45 World Vision Australia

46 Chinese Community Council of Australia

- 46.1 Supplementary

47 Free TV Australia

48 Australian Institute of International Affairs

49 The Salvation Army

50 Justice Connect

51 UnitingCare Australia

52 The Pew Charitable Trusts

- 52.1 Supplementary

53 The Federation of Chinese Associations (Vic)

54 Chamber of Arts and Culture WA

55 Australian Council for International Development

- 55.1 Supplementary

56 Network Ten

57 Oxfam Australia

- 57.1 Supplementary

58 WWF-Australia

59 Federation of Ethnic Communities' Councils of Australia

60 The Smith Family

- 60.1 Supplementary

61 Ethnic Communities' Council of Victoria

62 350.org Australia

63 GetUp

- 63.1 Supplementary

64 Professor Rory Medcalf

65 *Confidential*

66 Clerk of the House of Representatives

- 66.1 Supplementary

67 Clerk of the Senate

68 Dr Luke Beck

- 68.1 Supplementary

69 Australia China Business Council

70 Ausfilm

71 Chartered Accountants Australia and New Zealand

72 Greenpeace Australia Pacific

- 72.1 Supplementary

73 William Ho

74 Joint submission from scholars of China and the Chinese diaspora

75 Eve Trpak and 502 others with similar wording

76 Richard White and 509 others with similar wording

77 Neil Richters and 511 others with similar wording

78 Ric Wallis and 498 others with similar wording

79 Jonathan and Josephine Peter, and 520 others with similar wording

80 Scholars of China, the Chinese diaspora, China-Australian relations and Australia's relations with Asia

81 Mr E. J. Bushell

82 Professor Anne Twomey

- 82.1 Supplementary

83 Whistleblowers Australia

84 Attorney-General

- 84.1 Supplementary

85 Clerk of the House of Representatives and Clerk of the Senate

86 Australian Council of Trade Unions

87 Optus

88 Multicultural Communities Council of NSW

89 Humane Society International Australia

90 Change.org

91 Chemistry Australia

92 Global Health Alliance Melbourne

B. Hearings

Monday, 29 January 2018 (private hearing)

Parliament House, Canberra

Attorney-General's Department

- Ms Anna Harmer, First Assistant Secretary
- Ms Tara Inverarity, Assistant Secretary
- Ms Laura Marson, Director

Australian Federal Police

- Assistant Commissioner Debbie Platz
- Commander Justine Gough
- Mr Tony Alderman, Manager, Government and Communications

Australian Security Intelligence Organisation

- Mr Peter Vickery, Deputy Director-General
- Dr Wendy Southern, Deputy Director-General
- First Assistant Director-General, Office of Legal Counsel
- First Assistant Director-General, Counter-Espionage and Interference
- Director

Tuesday, 30 January 2018 (public hearing)

Parliament House, Canberra

Australian Catholic Bishops Conference

- Ms Suzanne Greenwood
- Bishop Robert McGuckin
- Mr Francis Xavier Moore

Australian Financial Markets Association

- Mr David Lynch, Chief Executive Officer
- Mr David Love, General Counsel

Australian Private Equity and Venture Capital Association

- Mr Christian Gergis, Policy and Research Manager, Australian Private Equity and Venture Capital Association

Australian Professional Government Relations Association

- Mr Les Timar, President
- Ms Feyi Akindoyemi, Secretary

Community Council for Australia

- Mr David Crosbie, Chief Executive Officer

Group of Eight

- Ms Vikki Thomson, Chief Executive

Individuals

- Mr Peter Jennings

Joint media organisations

- Mr Paul Murphy, Chief Executive, Media, Entertainment and Arts Alliance
- Ms Georgia-Kate Schubert, Head of Policy and Government Affairs, News Corp Australia
- Mr Bruce Meagher, Group Director, Corporate Affairs, Foxtel
- Ms Holly Brimble, Manager, Policy and Regulatory, Australian Subscription Television and Radio Association
- Ms Sarah Waladan, Head of Legal and Regulatory Affairs, Free TV Australia

Law Council of Australia

- Mr Arthur Moses, President-elect
- Mr Morry Bailes, President
- Dr Natasha Molt, Deputy Director of Policy
- Ms Alice Macdougall

Law Firms Australia

- Mr Mitch Hillier, Executive Director
- Mr Stephen Mason, Special Counsel

Office of the Small Business and Family Enterprise Ombudsman

- Mr Craig Latham, Deputy

Universities Australia

- Ms Catriona Jackson, Deputy Chief Executive Officer
- Professor Andrew Vann, Deputy Chair

Wednesday, 31 January 2018 (public hearing)

Parliament House, Canberra

Attorney-General's Department

- Ms Anna Harmer, First Assistant Secretary
- Ms Tara Inverarity, Assistant Secretary
- Ms Laura Marson, Director

Australian Federal Police

- Assistant Commissioner Debbie Platz
- Mr Tony Alderman, Manager, Government and Communications

Australian Human Rights Commission

- Mr Edward Santow, Human Rights Commissioner
- Mr John Howell, Lawyer

Australian Security Intelligence Organisation

- Mr Peter Vickery, Deputy Director-General
- Dr Wendy Southern, Deputy Director-General

Department of Home Affairs

- Ms Kelly Williams, Acting First Assistant Secretary, National Security and Law Enforcement Division, Policy Group

Individuals

- Professor Clive Hamilton

Office of the Commonwealth Ombudsman

- Ms Jaala Hinchcliffe, Acting Ombudsman
- Ms Doris Gibb, Acting Deputy Ombudsman

Office of the Inspector-General of Intelligence and Security

- Mr Jake Blight, Deputy Inspector-General
- Ms Christina Raymond, Investigation and Review Officer

Thursday, 15 February 2018 (public hearing)

Parliament House, Canberra

Individuals

- Professor Anne-Marie Brady

Friday, 16 February 2018 (public hearing)

Parliament House, Canberra

Australian Charities and Not-for-profit Commission

- Dr Garry Johns, Commissioner

Individuals

- Mr Bret Walker SC

Joint media organisations

- Mr Paul Murphy, Chief Executive, Media, Entertainment and Arts Alliance
- Ms Georgia-Kate Schubert, Head of Policy and Government Affairs, News Corp Australia
- Mr Bruce Meagher, Group Director, Corporate Affairs, Foxtel

- Ms Sarah Kruger, Head of Legal and Regulatory Affairs, Commercial Radio Australia
- Ms Sarah Waladan, Head of Legal and Regulatory Affairs, Free TV Australia

Office of the Australian Information Commissioner

- Mr Timothy Pilgrim, Information Commissioner
- Ms Angelene Falk, Deputy Commissioner

Friday, 16 February 2018 (private hearing)

Parliament House, Canberra

Attorney-General's Department

- Ms Anna Harmer, First Assistant Secretary
- Ms Tara Inverarity, Assistant Secretary
- Ms Laura Marson, Director

Australian Security Intelligence Organisation

- Dr Wendy Southern, Acting Director-General
- Acting Deputy Director-General
- First Assistant Director-General, Counter-Espionage and Interference

Friday, 16 March 2018 (public hearing)

St Andrews Place, East Melbourne

Attorney-General's Department

- Ms Anna Harmer, First Assistant Secretary
- Ms Tara Inverarity, Assistant Secretary
- Ms Laura Marson, Director

Australian Security Intelligence Organisation

- Mr Duncan Lewis, Director-General
- Mr Peter Vickery, Deputy Director-General

Individuals

- Mr Tony Kevin

Joint media organisations

- Mr Paul Murphy, Chief Executive, Media, Entertainment and Arts Alliance (MEAA)
- Ms Georgia-Kate Schubert, Head of Policy and Government Affairs, News Corp Australia

Law Council of Australia

- Mr Morry Bailes, President
- Dr David Neal SC, Member, National Criminal Law Committee
- Dr Natasha Molt, Deputy Director of Policy

Monday, 18 June 2018 (public hearings)

Parliament House, Canberra

Attorney-General's Department

- Ms Anna Harmer, First Assistant Secretary
- Ms Tara Inverarity, Assistant Secretary
- Ms Laura Marson, Director

Community Council for Australia

- Mr David Crosbie, Chief Executive Officer

Individuals

- Mr Bret Walker SC

Law Council of Australia

- Mr Arthur Moses SC, President-elect
- Mr Morry Bailes, President
- Dr Natasha Molt, Deputy Director of Policy

Oxfam Australia

- Ms Rachel Ball, Head of Public Policy and Advocacy

Pew Charitable Trusts

- Mr Patrick O'Leary, Senior Officer

Universities Australia

- Ms Catriona Jackson, Chief Executive

C. Comparative table: Foreign Influence Transparency Scheme and Foreign Agents Registration Act

As prepared by the Attorney-General's Department

Note: The table does not take account of the amendments proposed by the Attorney-General that were provided to the Committee on 7 June 2018.

Table 3.1 Foreign Influence Transparency Scheme and Foreign Agents Registration Act

	Foreign Influence Transparency Scheme	United States' Foreign Agents Registration Act
Scope		
Application	The scheme will require persons or entities undertaking certain activities on behalf of a foreign principal to register and provide information about those activities. Specifically, section 19 requires that any person who undertakes certain activities on behalf of a foreign principal, or enters a registrable arrangement with a foreign principal to undertake certain activities on behalf of a foreign principal, becomes liable to register under the scheme. Person is defined in section 3 to mean an individual, organisation or association, body corporate or politic, partnership or any body prescribed by the rules of the scheme.	Under 22 U.S.C. § 611, FARA applies to individuals, partnerships, associations, corporations, organisations or any other combination of individuals who: (a) act as an agent, representative, employee or servant of a foreign principal, *or*, (b) act under the order, request, control or direction of, or whose activities are directly or indirectly supervised, directed, controlled, financed or subsidised in whole or substantial part by a foreign principal (including a foreign country, person or organisation outside the US) *and* undertakes certain activities on behalf of the foreign principal within the US.
Activities to which the scheme applies	Registration will be required where: (a) a person engages in parliamentary lobbying within Australia on behalf of a foreign government (section 20)	Under 22 U.S.C. § 611 (c), the FARA applies to a person or entity who acts on behalf of a foreign principal within the US and: (a) engages in political activities;

	(b) a person engages in activities within Australia for the purposes of influencing a political or governmental system or process (section 21). These activities are (i) parliamentary lobbying (on behalf of a foreign principal that is not a foreign government) (ii) general political lobbying (iii) communications activity, and (iv) donor activity (c) a former Cabinet Minister is employed by, or acts in any capacity for, a foreign principal in the three years following their role as a Cabinet Minister (section 22) (d) a former Minister or member of Parliament is employed by, or acts in any capacity for, a foreign principal in the three years following their role as a Minister or MP, where they contribute skills, knowledge, experience or contacts which have been gained through their former role (section 23); (e) a former senior Commonwealth public official is employed by, or acts in any capacity for, a foreign principal in the eighteen months following their	(b) acts as a public relations counsel, publicity agent information service employee or political consultant; (c) solicits, collects, disburses or dispenses contributions, loans, money or other things of value, or (d) makes representations to US government agencies or officials. FARA also applies to the dissemination of information materials, which are materials produced on behalf of the foreign principal and transmitted to two or more persons (22 U.S.C. § 616(a))

	public role, where they contribute skills, knowledge, experience or contacts which have been gained through their former role (section 23).	
Definition of 'foreign principal'	Defined in section 10 to mean: (a) a foreign government (b) a foreign public enterprise (c) a foreign political organisation (d) a foreign business, and (e) a foreign individual who is neither an Australian citizen nor a permanent Australian resident.	Foreign principal is defined in 22 U.S.C. § 611(b) to include: (a) a government of a foreign country and a foreign political organisation, (b) a person outside the United States, and (c) a partnership, association, corporate, organisation or any other combination of persons organised under the laws of or having its principal place of business in a foreign country.
Exemptions	Division 4 outlines a number of targeted exemptions will apply to certain categories of activities and persons. These are: (a) activities done for the sole purpose of, or which solely relate to, the provision of humanitarian aid or humanitarian assistance (section 24); (b) activities done for the sole purpose of, or which solely relate to, the provision of legal advice or legal representation (section 25); (c) activities of diplomats, consular and UN officials	22 U.S.C § 613 sets out a number of exemptions to FARA registration requirements. These include for: (a) diplomats, consular officers, officials of foreign governments and staff members of diplomatic or consular officers; (b) persons solely engaged in private and non-political activities in furtherance of the bona fide trade or commerce of a foreign principal, activities not predominantly serving a foreign interest, or activities providing purely humanitarian

	while performing official functions, duties and responsibilities of that role (section 26); (d) activities done for the sole purpose of, or which solely relate to, religious pursuits regarding the religion of a foreign government (section 27); (e) activities done for the sole purpose of, or which solely relate to, reporting news, presenting current affairs or expressing editorial content in news media on behalf of a foreign business or individual (section 28); (f) certain business and commercial activities (section 29), including: (i) the negotiation or conclusion of contracts for the provision of goods or services, and (ii) activities of employees within Australia of foreign businesses.	assistance; (c) persons engaging in bona fide religious, scholastic, academic, artistic or scientific pursuits or the fine arts; (d) persons whose foreign principal is a government of a foreign country, and the US President has deemed the defence of that foreign country as vital to the defence of the US; (e) persons engaged as lawyers for a foreign principal provided that the purpose of legal representation does not include attempts to influence or persuade agency personnel or officials other than in the course of judicial, criminal or civil law enforcement enquiries, investigations or proceedings; and (f) persons engaged in lobbying activities and who have registered under the *Lobbying Disclosure Act 1995*.
Registration requirements		
When does registration occur?	A person or entity must register with the scheme within 14 days of undertaking certain activities or entering into an arrangement with a foreign	Individuals or entities must file an initial registration statement with the Attorney-General within 10 days of becoming an agent of a foreign

	principal to undertake activities (section 16).	principal (22 U.S.C. § 612 (a)).
What information is provided to the scheme when registering?	Section 16 outlines the requirement to register under the scheme within a certain period. This section also notes that an application to register must be in writing and in an approved form. Section 71 allows the Minister to make rules prescribing matters necessary or convenient for carrying out or giving effect to the Act. The rules will prescribe the information that a registrant must provide when registering such as the registrant's name and address, the name of the foreign principal and the types of activities that will be undertaken, as well as any necessary accompanying documents or information.	22 U.S.C. § 612(a)(1) outlines what must be included on a person's registration statement. The statement must include details such as the registrant's name and addresses and the identity of the foreign principal for whom the registrant is acting, assuming or purporting to act or has agreed to act. Details to be provided under the registration statement vary according to the nature of the agent and foreign principal relationship. If the registrant is acting on behalf of a foreign government, the registration statement should detail the relevant branch or agency with which the registrant engages, and the public official with whom the registrant deals. If the registrant is acting on behalf of a foreign political party, the registration statement should detail the party's principal address, political aim and the official with whom the registrant deals. If the registrant is acting on behalf of a foreign organisation that is not a foreign government or political party, the registration statement should detail any supervision, ownership, direction, control, financing or subsidising a foreign government or political party may exercise over

	such an organisation. Each partner, officer, director, associate, employee and agent of a registrant is required to file a short form registration statement unless he or she engages in no activities in furtherance of the interests of a registrant's foreign principal or unless the services he or she renders to the registrant are secretarial, clerical or in a related capacity. The short form registration must include: (a) the applicant's name, date of birth, occupation, residential and business addresses, and nationalities; (b) identities of foreign principals for which the applicant renders services in support of the primary registrant; (c) identities of foreign principals for which the applicant renders services, separately than through the primary registrant; (d) details of the services rendered must also be provided, and (e) the nature and amount of contributions, income, money or thing of value that the applicant has received from or given to the foreign principal.

Registration obligations	Registrants will have a number of responsibilities under the scheme. These include: (a) reporting material changes in circumstances within 14 days (section 34); (b) reporting when donor activity occurs within 14 days of the electoral donations threshold, or a multiple of that threshold being reached (section 35); (c) updating registration details within 14 days of a voting period for a federal election or for a designated vote (section 36); (d) reporting any registrable activity undertaken during a voting period for a federal election or designated vote within 7 days of the activity taking place (section 37); (e) making disclosure in communications activity about the foreign principal on whose behalf the communications activity is undertaken (section 38); (f) renewing registration on an annual basis if the person continues to act on behalf of the foreign principal (section 39), and (g) keeping records in relation to registration under	There are a number of obligations on registrants under FARA. These include: (a) providing supplementary registration statements every six months that provide details of the registrant's activities over that reporting period, any changes to contact details and the relationship between the individual and the foreign principal, any informational material disseminated on behalf of foreign principal and any funding received, contributed to or disbursed on behalf of foreign principals Registrants are required to submit supplementary registration statements within 30 days of every expiry (22 U.S.C. §612(b)). (b) including an identity statement on any informational material disseminated stating that the materials are being distributed on behalf of a foreign principal and specifying the foreign individual or entity (22 U.S.C. §614(b)), (c) providing any informational materials must be submitted to the administering body within 48 hours of that material being transmitted (22 U.S.C. §614(a)), and (d) keeping books of account and other records

	the scheme (section 40).	relating to his or her activities as an agent of a foreign principal (22 U.S.C. §615).
Publicly available information	Certain information will be made publicly available on a website for each person/entity that is registered in relation to a foreign principal (section 43). The publicly available information will include: (a) the name of the registrant and the foreign principal for whom the registrant is acting; (b) a description of the kind of registrable activities the person undertakes on behalf of the foreign principal, and (c) any other information that is prescribed by the scheme's rules. Certain information may not be made public if the information is commercially sensitive, affects national security, or has been prescribed by the rules of the scheme as being exempt from being made available (subsection 43(2)).	A comprehensive range of information is publicly available on a public-facing database for each person/entity registered in relation to a foreign principal. The information available on the website includes the full registration statement, plus any additional documentation that is provided by the registrant.
Enforcement		
Powers	The Secretary will have the power to request and compel the provision of information and documents that is relevant to whether a person is required to	Limited enforcement powers are available. The administering unit primarily seeks to ensure compliance with FARA requirements on a

	register under the scheme (section 45). The Secretary will be able to compel such information or documents from persons who the Secretary reasonably suspects may be liable to register under the scheme and have not done so, and from persons (whether or not a registrant) who are reasonably believed to have information or documents relevant to the operation of the scheme (section 46).	voluntary basis and send letters of inquiry advising a person of the existence of FARA and their possible obligations. The administering unit can also conduct compliance inspections, which cover every aspect of a registrant's relationship with a foreign principal including financial records, contracts and all correspondence between the registrant and the foreign principal (22 U.S.C. §615). However, compliance with inspections cannot be compelled. FARA does not otherwise have any power to compel documents or information.
Offences and penalties	Part 5 of the Bill contains a range of offences which provide a meaningful and serious deterrent for non-compliance with the scheme, and provide the scheme with sufficient means to pursue a person who is deliberately undermining the transparency objective of the scheme. These include: These include offences for: (a) failing to apply for, or maintain registration under the scheme (section 57); (b) failing to fulfil responsibilities under the scheme (section 58);	There are a number of criminal penalties under 22 U.S.C. §618 that apply in relation to FARA. It is an offence under the Act to: (a) wilfully violate any provision of the Act, or any regulations under it; (b) wilfully make a false or misleading statement of a material fact on a registration statement or any other document provided under the Act (c) wilfully omit a material fact or material document provided under the Act. Depending on the circumstances in which the

	(c) failing to comply with a notice from the Secretary requiring information (section 59); (d) providing false or misleading information or documents (section 60); (e) destroying, damaging, concealing or preventing a registrant from keeping records required to be kept under the scheme (section 61). The penalties range from 60 penalty units (for example, for failing to report a material change in circumstances), through to seven years imprisonment (for example, for intentionally omitting to register under the scheme when required to do so).	offence is committed, penalties range from a fine of US$5,000 or a term of imprisonment of six months (or both) to a fine of US$10, 000 or a maximum term of five years imprisonment. It is also an offence for a public official of the US in the executive, legislative or judicial branch of the Government, or in any agency of the US to act on behalf of a foreign principal without registering. This offence attracts a penalty of a maximum fine of US$10,000 or a maximum term of imprisonment of two years (or both).
Costs		
Fees	The scheme will be partially cost recovered – it is not intended that any amount charged will generate revenue. The Foreign Influence Transparency Scheme (Charges Imposition) Bill 2017 provides legislative authority to impose charges under the scheme. The amount that will be charged has not yet been determined and will be set in accordance with the Australian Government Charging Framework.	Both initial registrations and supplemental registration statements incur a filing fee of US$305.

Administration		
Which agency administers the scheme?	Attorney-General's Department	The US Department of Justice

Source: Attorney-General's Department, Submission 5*, pp. 30-38.*