Australian lawyers association warns foreign interference laws violate rights to free speech

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The Australian Lawyers for Human Rights (ALHR) is an association of legal professionals that promotes awareness of international human rights standards. Its members include lawyers, barristers, judicial officers, legal academics and law students.

ALHR has criticised the Turnbull government's espionage and foreign interference laws and its foreign influence transparency scheme, warning that the measures "unreasonably and disproportionately violate the fundamental universal human rights to freedom of speech and freedom of expression."

The ALHR said laws, which were pushed through parliament on June 28 with the backing of the Labor Party opposition, will have a "severely chilling effect upon academic research, free speech, and particularly constitutionally-protected free political speech."

This week Dr Tamsin Clarke, chair of ALHR's Freedoms sub-committee, gave a detailed response to a series of questions from the *World Socialist Web Site* about the threat to basic democratic rights posed by the laws and forthcoming amendments to the *Commonwealth Electoral Act 1918* (Electoral Act) on funding and disclosure.

Could you further elaborate on your recent statements on the new foreign influence laws?

While there were some positive last-minute amendments to the *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018* [Espionage and Foreign Interference Act] and the *Foreign Influence Transparency Scheme Act 2018* [Foreign Influence Transparency Scheme Act] before they were passed by the Federal Parliament at the end of the last sitting, both pieces of legislation remain deeply flawed and both will have severe impacts on the human rights of Australians in many areas. Unfortunately Australians' human rights are generally not protected by law, except for the implied constitutional right to freedom of political speech, which will be itself impacted by these acts.

While the acts are said to be aimed at protecting Australian democracy, it is submitted that they will actually undermine Australian democracy because they will chill normal political speech in many respects by, in the case of the Espionage and Foreign Interference Act, imposing severe punishments on undefined and vaguely described activities, and in the case of the Foreign Influence Transparency Scheme Act , by requiring self-registration and a raft of record-keeping and reporting requirements upon persons with minimal associations with foreign 'principals' who seek to influence government or political processes, including by influencing even a small section of the Australian public about the particular issue in question—again, with the threat of lengthy prison sentences for compliance failings. These punishments are quite disproportionate to any potential risk to Australian political and governmental processes.

The acts are also disproportionate in effect in that they fail to regulate political influence by foreign businesses unless those businesses are closely related to a foreign government. Neither act includes foreign businesses not associated with government in the definition of 'foreign principal.' In the case of both Acts, this means that only a very small section of potential political or governmental influence or interference is capable of being captured by the legislation.

Counsel's advice has been received to the effect that many provisions of the Espionage and Foreign Interference Act are likely to be held unconstitutional by the High Court as breaching the implied constitutional right to freedom of political speech. If that is correct (as seems probable), then the Foreign Influence Transparency Scheme Act and the proposed changes to the Electoral Act in the *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017* [Electoral Funding and Disclosure Reform Bill], which bill comprises another key part of the 'foreign interference package,' would similarly appear to breach that implied constitutional right in many respects.

The Foreign Influence Transparency Scheme Act now includes a major exemption for Members of Parliament, and somewhat narrower exemptions for organisations registered as charities, arts bodies, lawyers and similar professionals, family members and industrial organisations. There are no exemptions for advocacy, cultural or multicultural organisations, academic or sporting groups if they are not charities (although Australian universities are generally charities and so presumably academics who are university employees will be exempt). The definition as to whether a party is acting 'on behalf of' a foreign person or entity has been narrowed a little but still remains very broad.

The Espionage and Foreign Interference Act still defines UN bodies as 'foreign principals' and therefore communication with such bodies might amount to espionage under the new Criminal Code section 91.2, including if the communicator is 'reckless' as to whether or not they are endangering Australia's 'national security' (which is now defined extremely widely, in particular by including 'economic relations' which is not defined).

How broadly can these unprecedented and vaguely defined foreign influence laws be used?

It is not possible to obtain a judgment from an Australian court as to how a particular act should be interpreted in theory. A prosecution against an individual or organisation needs to be brought under the legislation, and the courts will then consider that particular issue. While the manner in which these laws will be prosecuted and enforced therefore remains to be seen, there are a number of problems that mean that it will be difficult for Australians to know if they are breaching the legislation or not. Problems include:

• Ordinary terms like 'on behalf of' being redefined in the Foreign Influence Transparency Scheme Act so as to be given a meaning that is different to the normal meaning of the term;

• Key terms like 'influence' and 'interference' are not defined. It would seem that beneficial or positive influence or interference is prohibited just as much as negative influence or interference.

• Lack of clarity in the Foreign Influence Transparency Scheme Act about what amounts to influencing a government or political process and whether that includes influencing the outcome of the process;

• Lack of clarity in the Foreign Influence Transparency Scheme Act about how influencing the public or a section of the public about a governmental or political process could influence that process;

• Lack of definitions of crucial terms in both acts (such as 'foreign political organisation,' which could well cover foreign independent advocacy bodies not aligned with any foreign government);

• Ordinary communications with United Nations bodies could amount to espionage because of the width of the definition of 'foreign principal' in the Espionage and Foreign Interference Act;

• Chilling effect on communications between Australian officials and academics, journalists etc., under the Espionage and Foreign Interference Act;

• Lack of whistleblower protection for informants and public interest defences under the Espionage and Foreign Interference Act.

Can you speak about the legal implications of the redefinitions of treason, treachery, mutiny etc., and the harsher punishments?

In relation to the harsher punishments under these laws: it is of great concern that harsh criminal law punishments of imprisonment for up to five years are able to be imposed under the Foreign Influence Transparency Scheme Act for failure to register with the regulator in relation to what the federal Attorney-General's Department itself admits is otherwise perfectly legal, non-covert behaviour. Criminal penalties are included in the legislation contrary to the federal government's own guidelines for framing criminal offences which quote the Australian Law Reform Commission recommendations that criminal penalties should only be imposed for 'repugnant' behaviour which 'invokes social censure and shame.'

The fact that criminal penalties are included in both acts is particularly concerning because an individual can be tried for a crime at any time—there is no limitation period under Commonwealth law for crimes involving imprisonment for more than 6 months—see section 15B Crimes Act. This means that individuals could have the threat of a criminal law conviction and possible imprisonment hanging over their heads for their whole lives.

The potential penalties are even greater under the Espionage and Foreign Interference Act , including jail for 25 years, even for non-covert behaviour which may amount to nothing more than communication with a UN body. Similarly the 'foreign influence' crimes under new sections 92.2 (2) and 92.3(2) do not necessarily involve covert or malicious behaviour but could incur substantial jail terms.

It is also of great concern that because of the general breadth of definitions in these acts, and/or lack of definitions, it is difficult for people to understand whether or not the legislation applies to them and whether or not they might be committing a crime. Comprehensibility of the elements of a crime, including the ability to clearly distinguish different elements of the offence, is crucial to proportionate and fair legislation.

In relation to the redefinitions of treason, treachery, mutiny etc: we understand that flaws remain in these definitions, which are generally too broad. Difficulty in understanding the meaning of a key term makes it difficult to distinguish whether all elements of a crime exist or not. Where the punishment for the crime can involve imprisonment for many years, it is entirely wrong that people may not be able to understand what behaviour is caught by the legislation.

Under the Espionage and Foreign Interference Act key terms such as 'espionage,' 'sabotage,' 'political violence' and 'foreign interference' are not defined or are not clearly defined. Nor is the term "an Australian democratic or political right or duty" defined even though it is a crucial element in the foreign influence crimes in new sections 92.2 and 92.3. Given that there is no Federal Human Rights Act one must look to implied Constitutional rights, common law rights and federal anti-discrimination legislation to find what is meant by democratic rights. This is a complex topic, as the public inquiry on 'Traditional' Rights and Freedoms demonstrated. The meaning of the phrase is not at all clear, but is a crucial element in relation to a potential offence.

Can you discuss the new powers, and consequences for basic democratic rights, under the foreign registration laws?

One new power under the Foreign Influence Transparency Scheme Act which the Law Council of Australia has rightly expressed great concern about is the 'name and shame' power (otherwise known as the 'transparency notice scheme') whereby the regulator may, without exercising procedural fairness, name persons or organisations on its website as being certain types of 'foreign principals'—either a foreign government-related entity or a foreign government-related individual. The implication is that any person connected with such entity or individual and involved in any kind of political advocacy may need to register under the Foreign Influence Transparency Scheme Act or suffer criminal penalties.

While the exemption for charities is welcome, the exemption only applies if the activity in question is undertaken in pursuit of a charitable purpose and the identity of any 'foreign principal' on whose behalf the charity is acting (bearing in mind the very broad definition of 'on behalf of' in the Foreign Influence Transparency Scheme Act is disclosed.

Because of the breadth of the act, and the considerable compliance burden it imposes, despite the various exemptions it is likely that the act will have a chilling effect on the speech of advocacy organisations, especially those which are not registered charities.

Are there currently comparable laws in other countries, or comparisons in Australian political history?

From our own researches we have not been able to find legislation anywhere else in the world which is as far-reaching as the Foreign Influence Transparency Scheme Act. While it is said that this legislation reflects the United States *Foreign Agents Registration Act* there are in fact many dissimilarities and the US legislation is narrower in many respects, effectively requiring a direct agency relationship to exist between foreign principal and local agent (which is not the case under the Australian legislation).

The forthcoming proposed changes to the Electoral Act, (Electoral Funding and Disclosure Reform Bill), restricting the political speech of charities and other civil society organisations, mirror provisions which have been adopted in third world repressive regimes, Russia, China and some first world common law countries.

On the other hand, first world civil law countries, based on human rights regimes with respect for the rule of law and the international rules-based system, protect rather than repress the speech of their civil organisations as being essential to democracy.

Alarmingly, Australia's proposed legislation appears to be even more repressive than that of Russia, with 10 year jail sentences for the treasurers of charities and the like which have an error in their reports—as opposed to Russia where the equivalent 'crime' apparently involves a fine, community work or jail for no more than 2 years. And some smaller countries such as the Kyrgyz Republic and Kazakhstan have rejected the repressive Russian-style legislation. Indeed, it seems that Costa Rica, Lebanon and Morocco protect their civil society organisations better than will Australia under the proposed Electoral Act amendments.

Do you see any connection between these measures and the increasing amount of media coverage and claims by government authorities on so-called Chinese political influence in Australia?

Given the close structural connections between many Chinese businesses and universities with the Chinese government, there is no doubt that the definitions of 'foreign principal' in both acts are more likely to capture Chinese businesses and universities than the businesses and universities of other countries.

The definitions are so wide that it is quite possible that many publicly-listed companies with substantial Chinese shareholdings will also be caught by the acts. There is presently no exemption for such companies.

Whether the acts will actually be effective in limiting any negative Chinese influence or interference is unclear because of the many exemptions in the Foreign Influence Transparency Scheme Act and the lack of clarity in the key terms of both acts.

Certainly some of the activities in recent years about which the government has expressed so much concern would be exempt under section 25A of the Foreign Influence Transparency Scheme Act, which provides that current members of State or Federal Parliament are exempt from that act in relation to any activity they undertake on behalf of a foreign principal. This would seem to apply whether or not the activity amounts to an attempt to influence the parliament or any government process. And of course an activity on behalf of an Australian citizen, even if they are of foreign origin, would not be caught by the Foreign Influence Transparency Scheme Act.

Do you have any comments about the bi-partisan character of parliament support for this and the fact that a majority of Australians have little knowledge of these anti-democratic measures and their implications?

Yes, although ALHR appreciates that the Federal Opposition spent considerable effort in identifying and proposing remedies for many of the worst features of these acts, and congratulates both major parties on working together to remove some of those features, at the same time ALHR is very disappointed that these acts were passed at all. The acts represent a severe attack on Australians' political freedoms and reflect a complete lack of understanding of the necessity of free political speech for a vibrant democracy. The legislation is muddled and impractical and imposes severe penalties irrespective of whether or not any harm is intended or actually occurs.

What should be done to (1) alert the population about the laws and (2) challenge them?

It's important for all Australians to keep discussing this legislation, particularly in the light of the forthcoming proposed changes to the Electoral Act, (Electoral Funding and Disclosure Reform Bill), which will also have a severely repressive effect upon free political speech. In relation to the proposed Electoral Act amendments, we note that the legislation would constantly regulate individuals and civil society organisations routinely involved in public 'political speech' even when an election is not on foot, while failing to regulate media in the same way. This type of regulation of civil society is a prominent feature of repressive regimes. It is not a feature of open democracies. It amounts to a significant further breach of the implied constitutional right to free political speech—particularly bearing in mind that these 'foreign interference' restrictions on free speech all have a cumulative effect.

Our legal system does not allow for theoretical challenges to legislation in the absence of an offence having been committed. A prosecution would need to be brought by the federal government against an individual or organisation before the courts could consider the impact of the legislation, and the courts would only be able to consider that part of the legislation that related to the particular offence. It is therefore possible that this vague and overreaching legislation could remain on the books, unexamined, for years to come.

(This article is not intended to be relied upon as a substitute for legal or other advice that may be relevant to the reader's specific circumstances [ALHR].)