# PJCIS Inquiries into the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017 and the Foreign Influence Transparency Scheme Bill 2017

## Attorney-General's Department Responses to Questions on Notice and Written Questions from Senator Jenny McAllister

### Questions on Notice – Evidence of Bret Walker SC

*Question*

**Senator McAllister:** But, back to the question of privilege, you perhaps do need to come back to us, and you might want to review Mr Walker's evidence. His concern was, even if, from a policy perspective, government wished to infringe upon privilege in this way so that it could collect evidence from parliamentarians about other parties who had failed to register, the appropriate mechanism to do that would not be in legislation that was then to be adjudicated by courts but by the various chambers in their standing orders and privilege resolutions.

**Ms Harmer:** Perhaps what we might do is obtain the *Hansard* of Mr Walker's evidence. We can take that away and then get back to you. I'm not sure it's necessarily the case that legislation is not the right spot. There are other obligations under which members of parliament may be required to report things under Commonwealth legislation. But I think it's worth us taking that point, going and having another look and responding to specific issues Mr Walker has raised. I'm sorry I can't give more detail at the moment, but we're very happy to look at it.

*Answer*

There is no intention to abrogate parliamentary privilege, or any other privilege, by virtue of the information-gathering powers in Division 3 of Part 4 of the Foreign Influence Transparency Scheme Bill.

Under section 45 of the Bill, the Secretary may, by written notice given to the person, require the person to provide information or documents. The Secretary may issue a notice under section 45 if he or she reasonably suspects that a person might be liable to register under the Scheme in relation to a foreign principal and the person is not registered under the Scheme in relation to that foreign principal. Under section 46 of the Bill, the Secretary may, by written notice given to the person, require the person to provide information or documents. The Secretary may issue a notice under section 46 if he or she reasonably believes that a person (whether or not a registrant) has information or a document that is relevant to the operation of the Scheme.

These powers require the Secretary to issue a written notice to the person. This provides the recipient of the notice with an opportunity to raise a claim of parliamentary privilege (or any other privilege) in relation to the information or documents. 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.

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 and that members of parliament and their staff are given a proper opportunity to raise claims of privilege in relation to information and documents.

If the Committee holds the view that the primary Act should clarify the interaction between the information-gathering powers in the Bill and parliamentary privilege, the Committee may wish to consider subsection 58(1) of the *Independent Parliamentary Expenses Authority Act 2017* which clarifies that where information or a document is the subject of parliamentary privilege, the Authority cannot require its production under Part 3 of the Act.

> **58 Relationship of information-gathering powers to other laws[1]**
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> (1) The operation of this Part is limited by laws of the Commonwealth relating to the powers, privileges and immunities of:
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> (a) each House of the Parliament; and
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> (b) the members of each House of the Parliament; and
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> (c) the committees of each House of the Parliament and joint committees of both Houses of the Parliament.

Finally, the department notes that the Senate Standing Committee of Privileges is currently inquiring into parliamentary privilege and the use of intrusive powers, with a reporting date of 28 March 2018. The department will closely consider any recommendations from this inquiry.

## Responses to Written Questions from Senator McAllister

The request for responses requests that the department provide an analysis of the below issues for each scenario:

- who is and is not a 'foreign principal'
- what actions are and are not considered to be taken 'on behalf of' a foreign principal
- which actors are required to register, and the extent of their subsequent obligations, and
- the extent to which any of these answers are uncertain or ambiguous.

The department has been unable to undertake this analysis, as each case will depend on a range of facts, circumstances and details that are not provided in the hypothetical scenarios. The department has sought to assist by providing answers, to the extent possible, to the direct questions posed in relation to each scenario.

**Scenario 1: Officials, parliamentarians and ordinary members from a UK political party come to Sydney to meet with counterparts from their Australian sister party and discuss gender equity issues. They jointly resolve to try to influence their respective party platforms in specific ways.**

[1] A similar provision addressing the intersection between Commonwealth laws and legal professional privilege is found in section 69 of the *Australian Securities and Investments Commission Act 2001.*

*Are the UK visitors 'foreign principals' by virtue of their nationality / association with a foreign political party?*

Yes. The UK political party would fall within the definition of foreign political organisation under section 10 of the Foreign Influence Transparency Scheme Bill (the Bill) and the officials, parliamentarians and ordinary members would be foreign principals if they are neither an Australian citizen nor a permanent Australian resident.

*Does the agreement to influence their party platforms constitute 'collaboration'?*

Possibly. This will depend on the facts and circumstances. The Australian citizens may have decided to try to influence their own party of their own volition, rather than due to the joint resolution.

*Which of the Australians present have to register – parliamentarians, party officials, party members? What records will they be required to keep?*

The obligation to register is on the person or entity that has an arrangement with a foreign principal, or undertakes registrable activities on behalf of a foreign principal. In this scenario, it is not clear that anyone will need to register. However, it is not possible to provide a more definitive answer without a full understanding of all the relevant facts and circumstances.

The matters in relation to which records must be kept are exhaustively listed in section 40, and include:

- any registrable activities a person undertakes on behalf of a foreign principal
- any benefits provided to the registrant by the foreign principal
- information or material forming part of any communications activity that is registrable in relation to a foreign principal
- 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.

**Scenario 2:** **A local branch of an Australian political party organises to have a Canadian political representative come and speak at a branch meeting. The time and location of the meeting is changed to accommodate her flights.**

*Does this amount to influence of an aspect of a process related to the administrative / financial affairs of a registered political party at the request of a foreign principal [see sections 12(1) and 12(5)(a)(iv) of the Bill]? Who is required to register – just the organiser, or any member of the branch who voted to change the time and place of the meeting?*

It is not clear to the department that the Canadian representative speaking at a branch party constitutes a 'registrable activity' under the Bill, defined as

parliamentary lobbying, general political lobbying, communications activity or donor activity. The activities relating to logistical arrangements for the meeting do not appear to fall within any of the relevant definitions and are not considered registrable. Simply speaking to a branch of an Australian political party is unlikely to fall within the definition of activity for the purpose of political or governmental influence at section 12 of the Bill.

In the absence of a registrable activity, no registration requirements would be triggered under the Scheme.

**Scenario 3:** **An environmental organisation is headquartered overseas, but operates locally through country branches. The organisation undertakes a global letter writing campaign aimed at urging governments to commit to a particular climate target. The well-known global head of the organisation drafts an email, which the Australian branch sends on to its members using its mailing list. The email asks Australian members to write to their relevant minister and a large proportion of the Australian members do this.**

*Did the Australian members write to their minister at the request of a 'foreign principal'? Are they liable to register?*

The Australian branch would not be a foreign principal for the purposes of the Scheme. The members would not be required to register.

*Is the Australian branch liable to register?*

Possibly, depending on the facts and circumstances.

- The international parent organisation may fall within the definition of foreign principal under section 10 of the Bill if it is either constituted or organised under a law of a foreign country or of 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. The 'global head of the organisation' may, depending on the circumstances, be a foreign individual and therefore also within the definition of foreign principal in section 10.
- Sending an email to the members of the Australian branch asking them to write to a Minister could constitute 'communications activity' under section 13 of the Bill.
- It is not clear to the department that the activity is being undertaken 'on behalf of' the foreign principal, as it is not clear whether there was a specific request to undertake the activity. It is not possible to provide a more definitive answer without a full understanding of all the relevant facts and circumstances.

*Does its relationship with its foreign headquarters mean it, too, is a foreign principal?*

No.

**Scenario 4:** **An Australian faith group attends a meeting in the US with similar foreign faith groups. They resolve to undertake advocacy on certain social issues and jointly fund the preparation of materials. Members of the faith group subsequently send that material to their local MPs as well as letterboxing in their local community.**

*Is this collaboration?*

Possibly. This will depend on the facts and circumstances. The Australian faith group may have decided to undertake advocacy of its own volition, rather than due to the discussion in the meeting or the involvement of the foreign faith group.

*Do the activities of the members of the faith group constitute 'communication' and/or lobbying?*

The production and dissemination of printed material falls within the definition of 'communications activity' at section 13. It could also constitute 'parliamentary lobbying' in section 10 of the Bill, as the activity is communicating with MPs for the purpose of influencing a process, decision or outcome.

*Would any of these answers change if there were members of a US political party present at the meeting?*

The involvement of a US political party would not necessarily make a difference, other than that a foreign political party clearly falls within the definition of 'foreign principal' in section 10 of the Bill. More information about the US political party's involvement in the meeting would be required for the department to make an assessment about whether the activities were undertaken on their behalf.

**Scenario 5:** **The foreign grandmother of an Australian permanent resident asks him to write a letter to the relevant minister in respect of his foreign cousin's pending application for a student visa.**

*Is the Australian permanent resident required to register?*

As the Bill is currently drafted, the Australian permanent resident would be required to register under the Scheme.

However as noted on page 9 of the department's supplementary submission to the Committee's inquiry, it may be desirable for an exemption for individual representations to be included in the Bill.

**Scenario 6:** **A foreign celebrity with a large social media following encourages her followers to tweet to increase their country's foreign aid. A large number of Australians tweet at the relevant minister. The celebrity's tweet was later retweeted by a New Zealand government minister.**

*Is this direct enough to constitute a request to act by a foreign principal? Did the celebrity's followers undertake communication activity and/or lobbying? Do they*

*need to register? Does the New Zealand minister's retweet make a difference? Is it relevant if a particular Australian tweeted before or after his retweet?*

An individual who is not an Australian citizen or permanent resident is considered a foreign principal under section 10 of the Bill – depending on the status of the foreign celebrity, she appears to fall within this category.

The activity in this scenario – directly tweeting a relevant Australian minister – may fall within the definition of parliamentary lobbying in section 10 of the Bill, as it is a form of communication. The activity could also fall within the definition of communications activity in section 13 of the Bill.

The requirement that the activity is 'on behalf of' the foreign principal is intended to form a close connection to the foreign principal. Without that connection the requirement to register under the Scheme does not arise. Under section 11(3), both the person and the foreign principal must know or expect that the person would or might undertake the activity, and that the person would or might do so in the circumstances falling within the scope of sections 20, 21, 22 or 23 of the Bill (registrable activities). This ensures that a person does not need to register simply because their views align with those of the foreign principal. While the foreign celebrity has encouraged her followers to tweet to achieve a certain purpose, the department does not consider this to be a sufficiently close connection with the foreign principal merely on account of the influence of his or her social media platform.

The department considers that the New Zealand Minister's retweet makes no difference - a retweet by another foreign individual (regardless of status) does not provide the sufficient nexus for the action to be considered 'on behalf of' a foreign principal. It is also not clear to the department how a particular Australian tweeting before or after the Minister's retweet would fall within the scope of the Scheme – there does not appear to be a sufficiently close connection with either the foreign celebrity or the New Zealand Minister.