



Law Council
OF AUSTRALIA

Foreign Influence Transparency Scheme Bill 2017

22 January 2018

Table of Contents

About the Law Council of Australia	3
Acknowledgement	4
Executive Summary	5
Key measures within the Bill	7
Recommended approach	7
Freedom of expression	8
The effectiveness of the scheme	9
The scope of the measures	10
Undertaking activity ‘on behalf of’ a foreign principal	10
Application to the legal sector and other professions	12
Application to the community sector	13
Communications activity and lobbying	14
The offence provisions	15
The enforceability of the measures.....	15
Interaction with espionage and foreign interference legislation	16

About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2018 Executive as at 1 January 2018 are:

- Mr Morry Bailes, President
- Mr Arthur Moses SC, President-Elect
- Mr Konrad de Kerloy, Treasurer
- Mr Tass Liveris, Executive Member
- Ms Pauline Wright, Executive Member
- Mr Geoff Bowyer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council is grateful for the assistance of Law Firms Australia, and the Law Council's National Integrity Working Group, Business Law Section, Not-for-Profit Legal Practice and Charities Group of the Legal Practice Section, National Human Rights Committee, National Criminal Law Committee, National Human Rights Committee and the Queensland Law Society in the preparation of this submission.

Executive Summary

1. The Law Council welcomes the opportunity to provide this submission to the Parliamentary Joint Committee on Intelligence and Security regarding the proposed measures contained in the Foreign Influence Transparency Scheme Bill 2017 (**the Bill**).
2. The Bill, if enacted, would establish the Foreign Influence Transparency Scheme to: require registration by certain persons undertaking certain activities on behalf of a foreign principal; require registrants to disclose information about the nature of their relationship with the foreign principal and activities undertaken pursuant to that relationship; place additional disclosure requirements on registrants during elections and other voting periods; establish a register of scheme information and provide for certain information to be made publicly available; provide the secretary with powers to obtain information and documents; and establish various penalties for non-compliance with the scheme.
3. The Bill forms part of a suite of reforms designed to address concerns regarding undisclosed foreign influence of public opinion and government policy. The Law Council supports these broad policy goals.
4. However, the Law Council queries the effectiveness of the Bill in achieving its stated aim of providing ‘transparency for the Australian Government and Australian public about the forms and sources of foreign influence in Australia’.¹ In this regard, it is noted that the majority of foreign influence in Australian public policy is benign, and can have significant positive effects on social and political development through cross-cultural engagement and understanding.²
5. While it is clearly not the intent of these measures to prevent or silence foreign influence, the Law Council is concerned that the broad scope of the measures 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.
6. The Law Council’s primary recommendation is therefore that the proposed measures be reconsidered with a view to strengthening transparency and disclosure obligations on the recipients of foreign influence (being members of parliament, senators, parliamentary secretaries and public officials).
7. In relation to the proposed measures as set out in the Bill, the Law Council makes the following key recommendations:
 - The definition of acting ‘on behalf of’ a foreign principal (proposed section 11) should be amended to only cover activities that are:
 - a) 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
 - b) directly or indirectly supervised, directed, controlled, financed, or subsidised in whole or in major part by a foreign principal.

¹ Explanatory Memorandum, Foreign Influence Transparency Scheme Bill 2017 (Cth), p. 2.

² See, Lowy Institute, ‘What problem, exactly, would a foreign agents law fix?’ (29 November 2017) <www.lowyinstitute.org/the-interpretor/what-problem-exactly-would-foreign-agents-law-fix>.

- The definition of acting 'on behalf of' a foreign principal (proposed section 11) should be amended to only cover circumstances where:
 - a) the person and foreign principal has actual knowledge of the order, request, direction, finance etc. of the foreign principal; and
 - b) the person then carries out the activity with that knowledge.
- An exemption should be provided for 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 (similar to paragraph 3.5f of the Lobbying Code of Conduct).
- The exemption for legal advice or representation (proposed section 25) should be expanded to cover actions that are incidental to the provision of legal advice or representation.
- Charitable entities registered with the Australian Charities and Not-for-Profits Commission should be exempt from the registration scheme.
- Consideration should be given to the availability of civil penalties to enforce compliance with the scheme.
- The Explanatory Memorandum to the Bill should clarify the intersection between the proposed foreign interference offences in the Bill and those in the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017.

Key measures within the Bill

8. The Bill introduces a registration scheme for individuals or entities undertaking certain activities on behalf of a foreign principal. The object of the Bill, as set out at proposed section 3, is to improve the transparency of those activities.
9. Proposed section 10 of the Bill defines 'foreign principal' as a foreign government, foreign public enterprise, foreign political organisation, foreign business, and an individual who is neither an Australian citizen nor a permanent Australian resident.
10. A registrable activity under the scheme will include activities conducted on behalf of a foreign principal, including an agreement to undertake activities even where such activities have not been undertaken. Proposed section 11 of the Bill provides some clarity in this respect, stating that 'on behalf of' is defined as an activity:
 - a. under an arrangement with the foreign principal; or
 - b. in the service of the foreign principal; or
 - c. on the order or at the request of the foreign principal; or
 - d. under the control or direction of the foreign principal; or
 - e. with funding or supervision by the foreign principal; or
 - f. in collaboration with the foreign principal.
11. A registrable activity is defined at proposed section 21 of the Bill, and includes parliamentary lobbying, general lobbying, communications activity and donor activity. In each case activity must be conducted for the purposes of political or governmental influence to be registrable under the scheme.
12. Division 5 of the Bill contains several exemptions from registration, including exemptions for activities relating to the provision of humanitarian aid and legal advice or representation. There are also exemptions for diplomatic, religious and commercial activities, as well as for media outlets.
13. Once becoming liable to register under the scheme, a person has 14 days to apply for registration. An intentional failure to register under the scheme carries a penalty of seven-years imprisonment, with lesser penalties attached to reckless omissions.
14. 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.

Recommended approach

15. The Law Council supports the intent of these proposed measures, and endorses a disclosure regime that provides transparency in relation to foreign influence in the development of public policy. To this end, the regulation of foreign influence, both visible and covert, should be grounded in principles of maximum disclosure and full transparency of lobbying and other activities.
16. For reasons outlined in this document, it is submitted that the approach of the proposed measures to require registration for a wide range of potential foreign influences is problematic in terms of effectiveness and utility. Broader concerns are

also raised in relation to the practical effects of the scheme on freedom of expression, and in particular the potential for the communication of ideas and participation in the development of public policy to be unduly restricted or deterred.

17. The Law Council suggests that measures to further strengthen the existing framework are likely to be more effective if the onus of disclosure of approaches or representations from foreign powers is placed on members of parliament, senators, parliamentary secretaries and public officials.
18. The Law Council believes that transparency in policy development will be more effectively achieved, and it will focus attention on activities that are the source of real and tangible foreign influence in Australian politics and policy development. The Law Council's primary recommendation therefore is that the proposed measures should be reconsidered with the view to strengthening disclosure obligations on the recipients of foreign influence.

Recommendation:

- **The proposed measures should be reconsidered with the view to strengthening disclosure obligations on the recipients of foreign influence.**

19. In addition to this position, the Law Council makes the following observations and recommendations aimed at improving the proposed foreign influence transparency scheme as contained in the Bill.

Freedom of expression

20. Generally, the Law Council has concerns regarding the likelihood of the proposed measures resulting in a chilling of otherwise legitimate and constructive advocacy and public debate and discourse. The broad scope of the proposed measures together with the significant penalties attached to non-compliance may lead to an undue limitation on free speech and the communication of ideas from individuals and organisations that are beyond the intended targets of the Bill.
21. In this regard, the Law Council notes that individuals and organisations that would otherwise make contributions to a range of democratic processes, including making policy submissions or engaging in dialogue with representatives of the legislature and executive, may be reluctant to do so where there is uncertainty as to the requirement to register under the scheme. The potential silencing of such advocacy on the grounds of foreign involvement will in most cases be unjustified, and could easily serve to deprive the policy development process of critical voices with legitimate input and perspectives.
22. For many, perhaps most notably civil society, the process of determining whether registration is required under the proposed measures, or the mere prospect of registration itself, may act as a deterrent from engaging in such advocacy. This outcome, albeit unintended, is contrary to Australia's open and democratic system of government that encourages and fosters public engagement and participation.
23. In Australia, freedom of speech is recognised as a right at common law. Moreover, there is a constitutional implied freedom of communications that relate to political and governmental matters. These freedoms are not absolute, and the common law and constitutional protections of free speech recognise that freedom of expression can be subject to qualifications. Furthermore, the common law protection of this freedom may

readily be overridden by legislation, although the constitutional freedom of political communication is not amenable to alteration by legislation. 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.

24. Internationally, Australia is a party to the *International Covenant on Civil and Political Rights (ICCPR)* and is committed to the protection of freedom of expression as contained within the ICCPR. Again, while such freedoms may be legitimately restricted on grounds such as national security or public order, the Bill, in its current form, fails to justify the necessity or proportionality of the proposed reforms.
25. The intent of these measures is not to prevent or silence public discourse or foreign influence more generally. However, the potential for a muting of public policy engagement from stakeholders with foreign connections is exacerbated by the potentially broad scope of the proposals, together with the significant penalties contained within the Bill, including the potential for a seven-year imprisonment term to be imposed on a person seeking a meeting without registering as an agent of foreign influence under the scheme.
26. In the view of the Law Council, the strict application of these penalties, together with the broad scope of the measures has the very real likelihood of muting public debate and dialogue, an outcome that is unsatisfactory and beyond the objects of the Bill.

The effectiveness of the scheme

27. The Law Council acknowledges concerns of covert influence within the Australian political sphere by foreign powers, and notes the comments of the Australian Security Intelligence Organisation (**ASIO**) in its 2016/17 annual report in which it 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. These activities—undertaken covertly to obscure the role of foreign governments—represent a threat to our sovereignty, the integrity of our national institutions and the exercise of our citizens' rights.³

28. Despite this recognised and ongoing threat of subversive foreign influence in Australian domestic policy, the Law Council is concerned as to whether the proposed measures contained within the Bill represent a proportionate reaction to this issue, and queries whether the approach is the most effective policy response.
29. In particular, the Law Council is concerned that the Bill's attempt to identify foreign interference through the imposition of a criminally sanctioned registration scheme may be easily circumvented by malicious insiders that are the primary targets of such measures, while proving unreasonably burdensome on law-abiding and benign entities seeking to make legitimate contributions to policy development.
30. The Law Council notes the experience in the United States where the effectiveness of a similar registration scheme under the Foreign Agents Registration Act (**FARA**) has produced questionable results. In this regard, the Law Council understands that there

³ Australian Security Intelligence Organisation, *Annual Report 2016/17*, available online at <www.asio.gov.au/sites/default/files/Annual%20Report%202016-17.pdf>.

have been limited successful criminal prosecutions under the FARA scheme since 1966, predominantly due to the difficulty in proving that an organisation or person is a foreign agent seeking to improperly influence domestic policy.⁴ Further, a 2016 audit by the Department of Justice determined that half of FARA registrations and 62 percent of initial registrations were filed late, and 15 percent of registrants simply stopped filing for periods of six months or more.⁵

31. 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.⁶ It is suggested that such challenges are likely to arise under the proposed measures and Australia should be cautious in basing its scheme on the FARA model without considering alternative approaches.
32. Based on an analysis of the Bill and the above observations of the experience with comparable FARA regime in the United States, the following concerns are maintained in relation to the effectiveness of the proposed measures in their current form.

The scope of the measures

33. The effective criminalisation of unregistered foreign influence as proposed by these measures is likely to hinge on the clarity and scope of definitions and exemptions within the Bill. Of particular concern to the Law Council is the broad definitions of key terms in the proposed measures. In this respect, the Law Council considers it essential that the measures be certain and well-defined, particularly given the severe criminal sanctions attached to the proposed offences. In this regard, the Law Council's Rule of Law Principles assert that 'offence provisions should not be so broadly drafted that they inadvertently capture a wide range of benign conduct'.⁷
34. It is submitted that the potentially broad application of these measures is inconsistent with this principle, and the scope of the Bill should be narrowed considerably both to provide greater certainty, and ensure it is directed primarily towards influence that is contrary to the public interest. These are discussed in greater detail below.

Undertaking activity 'on behalf of' a foreign principal

35. The expansive definition of 'foreign principal' at proposed section 10 of the Bill includes not just foreign governments or businesses, but also individuals who are not Australian citizens or permanent residents. This inclusion may have the effect of capturing activity that is well beyond the intent of the measures, and will apply to a very wide range of individuals that currently engage in dialogue on Australian domestic

⁴ Department of Justice, *Audit of the National Security Division's Enforcement and Administration of the Foreign Agents Registration Act* <<https://oig.justice.gov/reports/2016/a1624.pdf>>, p. 8.

⁵ Ibid, p. 14.

⁶ Ibid.

⁷ Law Council of Australia, *Policy Statement on Rule of Law Principles* (2011), available online at <<https://www.lawcouncil.asn.au/docs/f13561ed-cb39-e711-93fb-005056be13b5/1103-Policy-Statement-Rule-of-Law-Principles.pdf>>.

policy either directly or through a third-party entity, including as a client, member or financial supporter.

36. With such a broad definition of foreign principal within the Bill, the scope of what will constitute acting 'on behalf of' such a party will be critical. While the Explanatory Memorandum does provide some guidance as to what will constitute activity on behalf of a foreign principal⁸ there remains uncertainty as to just how broadly proposed section 11 (undertaking activity on behalf of a foreign principal) could be interpreted.
37. Currently, proposed section 11 of the Bill provides that the mere receipt of funding or an existence of an arrangement (including an arrangement 'of any kind') with a foreign principal will be enough to constitute 'acting on behalf of that principal. It is recommended that if the expansive definition of 'foreign principal' is retained, there should be a narrowing of what will constitute 'undertaking activity on behalf of' such entities, to ensure that arrangements or connections with foreign principals maintains a degree of materiality before attracting the need for registration under the scheme.
38. In this regard, we note that the aforementioned FARA scheme in the United States appears to take a narrower approach to determining when an activity will be on behalf of a foreign principal, by defining 'agent of a foreign principal' as:

*... any person who acts as an agent, representative, employee, or servant, or any person who 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.*⁹

39. The Law Council is of the view that proposed section 11 of the Bill should be narrowed to only cover activities that are materially connected to the will of a foreign principal, in-line with approach adopted under the FARA scheme.

Recommendation:

- **The definition of acting 'on behalf of' a foreign principal (proposed section 11) should be amended to only cover activities that are:**
 - (a) 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**
 - (b) directly or indirectly supervised, directed, controlled, financed, or subsidised in whole or in major part by a foreign principal.**

40. It is further noted that the Explanatory Memorandum to the Bill suggests that the definition of 'on behalf of' is 'not intended to cover circumstances where a person undertakes an activity with no knowledge, awareness or direction from the foreign principal or where the relationship between the person's activities and the foreign principal's interests is merely coincidental'.¹⁰ However, this is not the effect of proposed subsection 11(3), 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.

⁸ Explanatory Memorandum, Foreign Influence Transparency Scheme Bill 2017 (Cth), p. 33.

⁹ *Foreign Agents Registration Act* 22 U.S.C § 611(c)(1).

¹⁰ Explanatory Memorandum, Foreign Influence Transparency Scheme Bill 2017 (Cth), p. 28-29.

41. It is the view of the Law Council that in circumstances where, for example, a fundraising campaign receives donations from a number of sources, and where no direction accompanies the donation and the foreign principal exerts no influence, it is unreasonable to require the recipient of the funding to investigate the source of funds to determine whether it needs to register under this framework. It is also unreasonable for that organisation to be charged with an offence for not registering in circumstances where there is no knowledge of the foreign principal's involvement.
42. As such, is the Law Council recommends that the Bill be further amended to ensure only activities that are known to be on behalf of a foreign principal be captured by the scheme.

Recommendation:

- **The definition of acting 'on behalf of' a foreign principal (proposed section 11) should be amended to only cover circumstances where:**
 - (a) the person and foreign principal has actual knowledge of the order, request, direction, finance etc of the foreign principal; and**
 - (b) the person then carries out the activity with that knowledge.**

Application to the legal sector and other professions

43. Further to the above points regarding the Bill's broad approach to 'acting on behalf of' a foreign entity, the Law Council is concerned that the provisions in their current form will have application to a range of organisations and individuals that are beyond the intended targets of the measures, resulting in exposure to additional administration, costs and possible criminal charges.
44. By way of example, a lawyer or advocate seeking to make representations to government on behalf of a foreign client, perhaps an asylum seeker in detention, may be able to rely on the exemption afforded for legal advice or representation at proposed section 25. However, this is a narrow exemption, only extending to advice or representation in judicial, criminal, or civil law enforcement proceedings.
45. There are a number of other activities regularly undertaken by lawyers that are likely to be registrable activities if the Bill is enacted that will not fall within the exemptions. In the commercial context, these include where a foreign business instructs a law firm to prepare or make an application in response to a tender for Commonwealth Government work or infrastructure proposals, or perhaps where a foreign business instructs a law firm to prepare or make a general application to the Commonwealth Government or a Commonwealth Government entity.¹¹
46. Where submissions are made in a commercial or administrative context, or are more generally seeking changes to current policy, it appears likely that these activities will require registration under the proposed scheme. The same concerns relate to other professions such as medical practitioners, who may seek to advocate for policy reform on behalf of a class of patients deemed foreign principals under the measures.
47. The Federal Lobbying Code of Conduct has an exemption for members of professions, such as doctors, lawyers or accountants, and other service providers,

¹¹ The Law Council of Australia is grateful to Law Firms Australia for this input.

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 (see paragraph 3.5f of the *Lobbying Code of Conduct*). At a minimum, it would be appropriate to include an equivalent exemption in the Bill.

48. In addition, it is submitted that the legal advice or representation exemption at proposed section 25 should be expanded as the terms 'solely by way of' and 'solely for the purposes of' legal advice or representation are unduly restrictive. Given that the client in receipt of legal advice or representation will always be clear, actions that are incidental to the provision of legal advice or representation, for instance providing commercial advice, should not prevent lawyers from relying on the exemption contained at proposed section 25.
49. Furthermore, the narrow application of the exemption to 'judicial, criminal or civil law enforcement inquiries, investigations or proceedings' is unnecessary and should be omitted. It is therefore submitted that this exemption should be amended to the effect that a lawyer is exempt in relation to an activity the lawyer undertakes on behalf of a foreign principal if the activity is, or is incidental to, the provision of legal advice or legal representation.¹²

Recommendation:

- **An exemption should be provided for 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 (similar to paragraph 3.5f of the Lobbying Code of Conduct).**
- **The exemption for legal advice or representation (proposed section 25) should be expanded to cover actions that are incidental to the provision of legal advice or representation.**

Application to the community sector

50. It is conceivable that entirely benign community organisations, such as those with cultural promotion or advancement objectives, could fall within the proposed scheme where they engage with local parliamentarians. The same can be said for most membership based not-for-profit entities that receive financial support or membership fees from individuals who may not be Australian citizens or permanent residents, and have some form of engagement with public officials.
51. Finally, there is the very real possibility that in its current form, the Bill will have application to charitable entities that receive funding from foreign charitable foundations or philanthropists to carry out activities and purposes that have otherwise been approved as beneficial to the public by the Australian Charities and Not-for-Profits Commission (**ACNC**). It is noted that 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.¹³

¹² The Law Council of Australia is grateful to Law Firms Australia for this input.

¹³ *Charities Act 2013* (Cth), s. 11.

52. A further registration step for such charitable entities would entail an unnecessary regulatory burden. Subjecting organisations within civil society to additional registration requirements on top of existing reporting, disclosure and transparency obligations owed to regulators including the ACNC and the Australian Taxation Office (in place by virtue of their incorporated status, fundraising activities or registration as a charitable institution) is excessive and unjustified.
53. While a narrowing of proposed section 11 in line with the Law Council's earlier recommendations is likely to address many of these concerns, there are additional precautions that will be appropriate to ensure that the proposed measures are not exceeding their stated objects. The Law Council submits that entities that charitable institutions registered with the ACNC are already subjected to adequate regulation focussed on transparency and accountability, and should therefore be exempt from the scheme.

Recommendation:

- **Charitable entities registered with the ACNC should be exempt from the registration scheme.**

Communications activity and lobbying

54. The Bill's definition of 'communications activity' as a registrable activity has a potentially broad reach. Proposed section 13 of the Bill makes it clear that 'communication activity' encompasses 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.
55. As stated in the Explanatory Memorandum, the breadth of 'communications activity' is 'intended to capture the various ways in which information or materials can be communicated, including as technologies and practices change over time.'¹⁴
56. While there are exemptions for publishers and broadcasters, there are concerns as to how this provision will interact with platforms such as social media, where individuals and entities engage with matters of public policy through comments and dissemination of information in a manner that is, for the most part, consistent with Australia's open democratic system of government and implied right of free political and governmental communication. The Law Council is concerned that the proposals will have the practical effect of deterring individuals and organisations from engaging in political and policy discussion across a range of communication platforms.
57. The same concerns extend 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. Similarly, reputable 'think tanks' with tenuous foreign links could be inadvertently caught within undertaking 'communication activity' in the many forms of communications distributed on matters of public policy.

¹⁴ Explanatory Memorandum, Foreign Influence Transparency Scheme Bill 2017 (Cth), p. 24.

58. The Law Council also has concern with the potentially broad definition of 'lobby' within proposed section 10 of the Bill. Here, to 'lobby' will include communication, *in any way*, with a person or a group of persons for the purpose of influencing any process.
59. The effect of these broad definitions is that a wide range of activities will be likely to fall within the type of conduct that may amount to a registrable activity under the proposed measures. Many of these activities are unlikely to have a tangible effect on public policy development, and yet will attract obligations that have criminal repercussions if breached.
60. As a result of these concerns and the difficulty in distinguishing minor communications activity from that which generates significant influence, the Law Council reiterates the need for the Bill to narrow the application of the scheme consistent with the above recommendations.

The offence provisions

The enforceability of the measures

61. In addition to the need for certainty, the effectiveness of the proposed registration scheme will be in a large part reliant on its enforceability. As previously noted, a number of criticisms have been made against the United States' FARA regime, most notably with respect to its ability to be applied, with enforcement being described as both 'patchy and inadequate.'
62. As noted above, the Law Council considers many of the definitions within the scheme too broad, most notably the definition of 'foreign principal' and 'acting on behalf of' such a party. In addition to earlier concerns regarding the potential for this to capture or discourage legitimate activity, or bring such activities into question, there is a reasonable likelihood that the terms of the Bill make enforcement difficult, even in relation to activities the Bill is intended to capture. In this regard, it is submitted that the intentionally broad definitions throughout the Bill as highlighted in the previous section may provide potential registrants the ability to argue for noncompliance, as the measures apply across an expansive list of circumstances.
63. 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. While financial trails and written authorisations may assist enforcement, in many cases foreign influence may be exerted under less identifiable arrangements, creating significant enforcement hurdles.
64. 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. Whether by utilising one of the exemptions in the Bill, such as the pursuit of commercial or business pursuits, or by garnering influence through a third-party policy think tank, there are concerns that sophisticated and clandestine influencers will not be deterred by these measures, rather the full force of the scheme will be felt by benign, law-abiding entities with overseas links.
65. In light of the difficulty in establishing a breach of the proposed measures at a criminal standard, consideration should be given to the availability of civil penalties to enforce non-compliance.

Recommendation:

- **Consideration should be given to the availability of civil penalties to enforce compliance with the scheme.**

Interaction with espionage and foreign interference legislation

66. The Law Council is concerned about the possible interaction of the proposed foreign interference offences in the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017 (**NSLA Bill**) with the Bill. If enacted, that Bill would create criminal offences for intentionally or recklessly not registering under the scheme.
67. 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 NSLA Bill.
68. The Law Council considers that the Explanatory Memorandum to the Bill should make clear that a finding of guilty in relation to the Foreign Transparency Scheme Bill 2017 will not necessarily amount to a finding of guilt in relation to the proposed foreign interference offences in the Bill. The intersection between the two Bills should be clarified in the Explanatory Memorandum.

Recommendation:

- **The Explanatory Memorandum to the Bill should clarify the intersection between the proposed foreign interference offences in the Bill and those in the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017.**