From the desk of Morgan Begg, Director - Legal Rights Project
[redacted]

Institute of Public Affairs

25 November 2021

Committee Secretary
Parliamentary Joint Committee on Intelligence and Security
PO Box 6021
Parliament House
CANBERRA ACT 2600

SUBMISSION TO THE REVIEW OF THE FOREIGN INFLUENCE TRANSPARENCY SCHEME ACT 2018

Dear Committee Secretary,

Since 1943 the Institute of Public Affairs (IPA) has undertaken and published research to defend and extend the principles of individual freedom, legal rights, and the rule of law in Australia. The purpose of this letter is to share with the Parliamentary Joint Committee research of the IPA into the operation of the *Foreign Influence Transparency Scheme Act 2018* ("the Act") in the form of a submission. The submission comprises this letter as well as the following attachments:

1. Morgan Begg, "This foolish act must be repealed at one," *The Australian*, 6 November 2019.
2. Evan Mulholland, "There may be 1300 reasons this law does not work," *The Australian*, 29 November 2019.
3. Evan Mulholland, "Defang bureaucrats so they can't be used as political pawns," *The Australian*, 5 February 2020.

Institute of Public Affairs research has identified that the broad and vague powers contained in the Act immediately enabled bureaucrats to conspire with politicians to operate a system of political pressure and censorship against Australians on the basis of their political beliefs. As these powers have not been curtailed in any way, the potential for future abuses of power have not abated. The legislation must be vastly redrafted, if not repealed, to ensure the law is compatible with the intentions of parliament and consistent with the rule of law.

The Act is inconsistent with the rule of law

Institute of Public Affairs research identified as part of an audit of federal legislation, that the Act was replete with violations of fundamental legal rights, and in doing so conferred on government officials vast and coercive powers of enforcement.

The *Legal Rights Audit 2018*, published in December 2018, identified specifically that the *Foreign Influence Transparency Scheme Act 2018* contained provisions which

- Abolished requirements for department officials to observe any requirements of procedural fairness in exercising a power or performing a function under Division 3 of Part 1 of the Act. Division 3 of Part 1 of the Act deals with the Attorney-General's Department's power to issue transparency notices to persons who are assumed to be a foreign government related entity or individual.
- Removed the right to silence by making it an offence to refuse or fail to comply with a notice to give information or produce documents to the department secretary.
- Abrogates the privilege against self-incrimination where a refusal or failure to comply with a notice to give information or produce information is because doing so might incriminate the person or expose them to a penalty.[1]

Fundamental legal rights are essential to the proper administration of justice. Principles of natural justice and the right to silence are values which acknowledge the inviolable dignity of each individual and recognise that all individuals have rights relative to one another and against the coercive power of the state. A system which routinely violates the fundamental legal rights of individuals invites arbitrary enforcement of the law and deprive Australians of their ancient rights and liberties which have their antecedent in over 800-years of received tradition and history dating back to the sealing of the *Magna Carta* in 1215AD.

The Act empowers bureaucrats to target Australians because of their political beliefs

The IPA notes that the Act was introduced into the Commonwealth parliament as part of a suite of laws that were intended primarily to curtail the influence of malignant foreign powers, particularly the Chinese Communist Party.[2] Then Prime Minister Malcolm Turnbull noted in parliament when the suite of laws were introduced on 7 December 2018 that the laws were needed to counter the 'serious threat posed to Australia and our interests by covert interference and espionage'. Mr Turnbull further noted in his second reading speech to the first of the bills, the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017 as background as context of the reforms:

> "Media reports that suggested that the Chinese Communist Party has been working to covertly interfere with our media, our universities, and even the decisions of elected representatives right here in this building. We take these reports very seriously."

Mr Turnbull also cited Russia, Iran, and North Korea as the kinds of foreign powers that were the basis of this reform.

[1] Morgan Begg and Anis Rezae, *Legal Rights Audit 2018* (Institute of Public Affairs Research Report, December 2018).
[2] The suite of legislation included the Act, as well as the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017, the Foreign Influence Transparency Scheme (Charges Imposition) Bill 2017, and the Home Affairs and Integrity Agencies Legislation Amendment Bill 2017.

Despite this, a law designed to counter the malignant influence of the Chinese Communist Party in Australian society was within eight months of coming into force weaponised by bureaucrats in the Attorney-General's Department against domestic conservative activists. As revealed in a Freedom of Information request lodged by the IPA, officials from the Attorney-General's Department attended a briefing with the Hon. Mark Dreyfus, the opposition legal affairs spokesman on 22 July 2019, on the implementation of the scheme. In notes recorded by a departmental official, Mr Dreyfus

> specifically raised the upcoming Conservative Political Action Conference to be held in Sydney 9-11 August 2019, as an example of an event that may trigger registration obligations under the scheme and asked what the Department planned to do about it.

The Conservative Political Action Conference was an event co-hosted by the Australian libertarian think tank LibertyWorks, and the American Conservative Union. CPAC featured a range of speakers from Australia and overseas, including former prime minister Tony Abbott, former deputy prime minister John Anderson, and Senator for Queensland Amanda Stoker,

Subsequent to the meeting with Mr Dreyfus, a Deputy Secretary of the Attorney-General's Department wrote to Mr Cooper about the event. The letter outlined to Mr Cooper the Foreign Influence Transparency Scheme and observed that the ACU would appear to fall within the definition of a 'foreign political organisation,' and therefore would be considered by the department as a 'foreign principle,' meaning the CPAC event would amount to a 'communications event' under the Act.

Mr Cooper was therefore advised he may be required to register LibertyWorks' arrangements with the ACU under the Foreign Influence Transparency Scheme, and was issued a notice under section 45 of the Act to provide all documents 'detailing any understanding or arrangement' between LibertyWorks and the ACU. The notice also requested copies of correspondence with speakers, as well as the transcripts and recordings of the addresses given at the conference. It further noted that a failure to comply with the notice within 14 days could expose Cooper to criminal penalties, with a maximum penalty of six months imprisonment.

The Attorney-General's Department also made requests of Mr Abbott to register under the Act for appearing as a speaker at the CPAC event, and was again requested to register as an agent of foreign influence after he was invited in his private capacity to speak at a September 2019 conference organised by the government of Hungary.

Given the reported extent of Chinese influence in Australian politics it is unacceptable that those responsible for administering the Act had devoted such a significant amount of time and resources to target Australians because of their political beliefs. The abuse of power that the provisions of the Act enable is characteristic of authoritarian regimes, not of a liberal democracy that Australia has historically been.

The High Court will not fix this law

In 2020 LibertyWorks filed a complaint in the High Court of Australia arguing that the Act was invalid under the Australian Constitution on the basis that the terms, operation, or effect of the Act impermissibly burden the implied freedom of political communication; contravenes section 92 by impermissibly burdening freedom of intercourse; and was not supported by a head of power under section 51.

Although it was given an opportunity to cure the manifest defects in the operation of the law, a 5-2 majority of the High Court rejected LibertyWorks' argument in a decision handed down in June 2021. The majority found that the Act, in its requirement of registration where communications activity is undertaken on behalf of a foreign principle, burdened the implied freedom of political communication, but that this burden was justified and had a legitimate purpose. Moreover the Court found that the vague provisions were proportionate to the achievement of that legitimate purpose.[3]

It is not the responsibility of the High Court to fix the Act. This is not solely a problem of application – the problem of the Act is in the vague and broad words which allows departmental officials to exercise broad powers in a subjective way. It is only by changing the words of the Act that the problems of the Act can be addressed.

Due to this analysis the IPA argues the *Foreign Influence Transparency Scheme Act 2018* is still capable of producing absurd and draconian outcomes. Parliament introduced the Act, parliament is responsible for revising the law so that the terms, operation, and implementation of the Act is consistent with the intentions of parliament and consistent with the rule of law.

I would welcome the opportunity to discuss the research of the Institute of Public Affairs on the Act with Members of the Joint Parliamentary Committee. Please do not hesitate to contact me on [redacted]

Kind regards,

[redacted]

Morgan Begg
Director, Legal Rights Project
Institute of Public Affairs

[3] *LibertyWorks Inc v Commonwealth of Australia* [2021] HCA 18.

THE AUSTRALIAN

WWW.THEAUSTRALIAN.COM.AU | THE HEART OF THE NATION | 6 NOVEMBER 2019

This Foolish Act Must Be Repealed At Once

MORGAN BEGG

Bureaucrats are using Australia's foreign-influence laws to run a covert political operation out of the Attorney-General's Department to silence Australians because of their political beliefs, all under the nose of the Coalition government.

This is the kind of behaviour one would expect from the Stasi in East Germany in 1961, not in Australia today.

On Saturday, The Weekend Australian reported that Andrew Cooper, the founder and president of libertarian advocacy organisation LibertyWorks, had received a letter from the Attorney-General's Department advising him to provide all documents "detailing any understanding or arrangement" between LibertyWorks and the American Conservative Union.

LibertyWorks and the ACU co-hosted the Conservative Political Action Conference in Sydney in August, which featured a range of speakers from Australia and overseas.

The notice, issued by the deputy secretary of the department's Integrity and International Group, also requested copies of correspondence with speakers, as well as the transcripts and recordings of the addresses given at the conference.

It further noted that a failure to comply with the notice within 14 days could expose Cooper to criminal penalties, with a maximum penalty of six months' jail.

Former prime minister Tony Abbott has also been harassed by A-G's bureaucrats under the same laws. This political intimidation was enabled by the government's Foreign Influence Transparency Scheme, which came into force last December.

Under section 45(2) of the scheme, officials in the Attorney-General's Department are given broad powers to issues notices requiring a person to produce information where officials "reasonably suspect" that a person might be liable to register under the scheme.

When the Turnbull government introduced the laws into parliament in 2017, the scheme was purportedly designed to counter the "serious threat posed to Australia and our interests by covert interference and espionage". Specifically, the laws were introduced as part of a push to challenge intrusions into Australian democratic activities undertaken by the Chinese Communist Party and its agents.

The Chinese government operates an extensive influence apparatus that includes Confucius Institutes embedded within Australian universities, Chinese government-owned companies that are deeply linked to the Communist Party, and so-called community groups active in Australia but that lobby governments here on behalf of foreign powers.

However, instead of implementing careful and proportionate measures to curtail foreign influence, the Coalition government has handed the bureaucracy untrammelled power to operate a covert political operation to target Australians based on their political views.

Cooper has not been charged with a crime. The laws enable a bureaucrat to go on fishing expeditions without a warrant or court order to collect information on the mere suspicion of foreign influence. The nature of this scheme raises the question of which government parliamentarians sat down to read the bill, and how they could approve of it.

Apparently the department has sent about 500 letters to a range of individuals asking them to consider whether they need to register under the scheme. It is not an isolated problem.

Under the circumstances, the departmental secretary should be stood down so that an investigation can take place to understand why this has happened, who else has been targeted, and to ensure it does not happen again.

Observers of American politics will recognise the parallels to the Lois Lerner saga during the latter half of the Obama administration. Lerner was the head of the Internal Revenue Service division which processed applications for tax-exempt groups.

A 2013 investigation found that the IRS had singled out conservative organisations for intense scrutiny, sometimes based on such arbitrary grounds as the name of the organisation. The IRS delayed applications and improperly questioned some organisations about their donors and religious affiliations and practices.

This was the result of a massive bureaucracy becoming a power unto itself. The signs from Australia's foreign-influence laws suggest we may be heading down a similar path. The difference here is that the abuse of power is happening under the noses of an ostensibly centre-right government. This is what happens when you try to govern with a public service stacked with people who align with a green-left agenda.

These consequences were not unknowable or unforeseen. In research published in January, the Institute of Public Affairs identified that the Foreign Influence Transparency Scheme Act 2018 added to the body of laws that undermine our fundamental freedoms and betray the rule of law.

The research revealed that the legislation removes the right to silence and imposes criminal penalties for failing to give information when requested to do so under a notice. It even abolishes the privilege against self-incrimination when such information might expose the person to a penalty. Finally, natural justice is removed as departmental officials are not required to observe procedural fairness when exercising the powers granted under the act. An investigation must be launched into the Attorney-General's Department to find out how deep and widespread the potential abuses of power are. For every Andrew Cooper and Tony Abbott, who have the profile and public support to fight back, there could be thousands of conservative Australians being told to shut down and shut up.

The Foreign Influence Transparency Scheme Act 2018 must be repealed. If the government fails to act swiftly, it could find that s45(2) becomes the new s18C.

THE AUSTRALIAN
WWW.THEAUSTRALIAN.COM.AU | THE HEART OF THE NATION | 29 NOVEMBER 2019

There May Be 1300 Reasons This Law Does Not Work

EVAN MULHOLLAND

There are potentially 1300 smoking guns pointing to evidence that the Attorney--General's Department has been using the power of the commonwealth to target conservatives in Australia.

It is not acceptable for bureaucrats to be running a covert political operation out of the Attorney-General's Department to silence Australians because of their political beliefs, but they are able to under the Foreign Influence Transparency Scheme legislation.

On October 2, public servants in the Attorney-General's Department issued a notice that Andrew Cooper, founder and president of libertarian advocacy organisation LibertyWorks, provide all documents "detailing any understanding or arrangement" between LibertyWorks and the American Conservative Union.

Cooper was given 14 days to respond to the demands, after which criminal penalties could apply. Despite facing possibly six months' jail, he refused to co-operate.

Last August, LibertyWorks and the ACU co-hosted the Conservative Political Action Conference in Sydney. It featured speakers from Australia and overseas. CPAC is a mainstream right-of-centre conference that in the past few years has branched out to international locations such as Japan and Australia.

One CPAC speaker was former prime minister Tony Abbott, who controversially was invited to register as an agent of foreign influence under the Foreign Influence Transparency Scheme for addressing it.

Abbott rejected the request and labelled it absurd.

Attorney-General Christian Porter has admitted that there has been a "lack of common sense to date" in the scheme's application.

Following the subsequent scandal, the Institute of Public Affairs lodged a Freedom of Information request asking for documents and correspondence between senior executive service-level public servants in the Integrity and International Group between March and November that mentions Cooper, Abbott, CPAC or the ACU.

This is a straightforward request. It potentially could clear the public servants of any wrongdoing or expose if there was anything more untoward. If there was nothing seriously amiss, you would imagine the bureaucrats would be forthcoming, keen to clear up the incident.

The Attorney-General's Department responded to the IPA this week with what is known as a "practical refusal notice".

The Integrity and International Group in the Attorney-General's Department that oversees the Foreign Influence Transparency Scheme employs only eight staff, yet says a preliminary search has identified more than 1300 documents relevant to the request.

More than 1300 documents and correspondence relating to Abbott, Cooper, CPAC and the ACU captured from eight full-time public servants across a seven-month period hardly seem the actions of one rogue employee, which is how the government has portrayed the targeting of Cooper.

Rather, it possibly suggests a co-ordinated surveillance operation being run by unelected and unaccountable bureaucrats under the Attorney-General's nose.

The department needs to release these documents. Innocent Australians have a right to know if they are being monitored by the state.

In giving the notice of practical refusal, the department states that the work of processing the request would substantially and unreasonably divert the resources of the department from its other operations due to its scope. Yet this same department gave Cooper just a fortnight to comply with onerous demands of supplying potentially thousands of documents relating to the CPAC conference.

Given the extent of Chinese influence reported in the media this week, it is unacceptable that Australian public servants in the Attorney-General's Department have devoted such a significant amount of time and resources to targeting Australians because of their political beliefs.

It seems the Foreign Influence Transparency Scheme legislation may not be being applied impartially or in good faith. Porter has suggested that the staff overseeing the scheme will be moved, which is hardly adequate. They also have shrugged off suggestions that they need foreign-speaking officials overseeing the scheme.

As reported in The Weekend Australian, Porter was angry to learn of the notice being issued to Cooper. But the bluntness of the legislation and its worrying powers were foreseeable.

The IPA's Legal Rights Audit 2018 warned that the Foreign Influence Transparency Scheme Act 2018 was found to remove procedural fairness, the right to silence and the privilege against self-incrimination.

The scheme should be repealed or recast so that vaguely worded legislation cannot be abused. And there should be answers as to why commonwealth public servants were potentially misusing their power. The state targeting people due to political affiliation or belief is a feature of authoritarian regimes, not a liberal democracy.

THE AUSTRALIAN
WWW.THEAUSTRALIAN.COM.AU | THE HEART OF THE NATION | 5 FEBRUARY 2020

Defang bureaucrats so they can't be used as political pawns

EVAN MULHOLLAND

The revelations about how former prime minister Tony Abbott and other conservative activists were pursued by the federal Attorney-General's Department at the behest of Labor legal affairs spokesman Mark Dreyfus represents a failure of our democracy and the rule of law.

A Freedom of Information request lodged by the Institute of Public Affairs uncovered further details about how the organiser of the Conservative Political Action Conference, Andrew Cooper, and conservative speakers at that conference, including Abbott, were required to register as agents of foreign influence by the Attorney-General's Department.

Last July 22, Dreyfus attended a briefing with senior representatives of the Integrity and Security Division, the bureaucrats from the Attorney-General's Department who were responsible for enforcing the Foreign Influence Transparency Scheme. This occurred just days before Kristina Keneally's speech to the Senate which sparked a media frenzy about the CPAC conference.

The FITS scheme was introduced into federal parliament in December 2017 and came into force a year later. The purpose of the Dreyfus briefing was to inform him about the implementation of the scheme.

In notes recorded by an A-G's departmental official, Dreyfus "specifically raised the upcoming Conservative Political Action Conference to be held in Sydney 9-11 August 2019, as an example of an event that may trigger registration obligations under the scheme and asked what the Department planned to do about it".

It is clear the bureaucrats went straight to work following up Dreyfus's request, and by August 2 last year they had sent letters to Abbott, inviting him to register as an agent of foreign influence, as well as Andrew Cooper, who as president of conservative advocates LibertyWorks was the co-organiser of CPAC.

What is also clear from the FOI request is that the departmental bureaucrats busily monitored the speaker list of the CPAC Australia website each day so that they could also invite others to register as agents of foreign influence.

On October 22, the department sent Cooper a letter demanding he turn over all documents regarding the CPAC conference within 14 days, with the threat of being imprisoned for six months if he failed to comply.

It was clear from reporting in The Australian at that time that Attorney-General Christian Porter was unaware of the actions of bureaucrats in his department. He said he had made it "clear to my department that I expect it to demonstrate a focus on the most serious instances of non-compliance".

He then added what might be seen as an understatement: "I'm not persuaded this focus has been perfectly demonstrated to date."

The bluntness of this legislation was foreseeable. The IPA's Legal Rights Audit 2018 warned that the Foreign Influence Transparency Scheme Act 2018 removed procedural fairness, the right to silence and the privilege against self-incrimination.

The very people responsible for protecting our democracy from political interference have been actively undermining it. Using the power of the state to target political opponents is behaviour you expect only in authoritarian regimes. Yet this is what Dreyfus apparently sought to do.

Australians understand that foreign interference in our politics is a serious issue and one that our laws should seek to prevent. It was shameful of Dreyfus to seemingly try to harass his political opponents by using a law designed to address the genuine issue of political interference by communist China. If it was found that a Coalition MP had tipped off bureaucrats under the guise of national security legislation to investigate the links between an Australian progressive activist organisation co-hosting a conference with a US organisation there would be wall-to-wall outrage at the ABC and The Guardian. Rightly so.

Yet some mainstream media outlets have been all but silent when it comes to reporting revelations of the misuse of national security apparatus to hound their ideological opponents.

In any other liberal democracy, to require a person to hand over any information where the consequence of refusing is jail time would require these bureaucrats to stand before a judge and secure a warrant. Not here.

A recent poll by Dynata, commissioned by the IPA, found 64 per cent of Australians believed unelected bureaucrats had too much control over our lives. The Dreyfus revelations show Australians are right to be worried.

The FITS legislation needs to be recast to defang the bureaucrats as well as opportunistic politicians such as Dreyfus who apparently use it target enemies.