

The atrocious foreign interference law – It doesn't add up

[Ian Cunliffe](#) *Pearls and Irritations* - [7 September 2020](#)

<https://johnmenadue.com/ian-cunliffe-the-atrocious-foreign-interference-law-it-doesnt-add-up-%e2%80%8b/>

When, for example, the Australian Strategic Policy Institute (ASPI) receives grants from the US State Department to undertake research projects it is an admission that it is engaging in conduct on behalf of a foreign principal.

The first raids and interrogations under the foreign interference laws that Federal Parliament passed two years ago occurred in June 2020. Officers from ASIO and the federal police descended on NSW upper house Labor member Shaoquett Moselmane and a member of his staff, John Zhang. Foreign interference is punishable by up to 20 years' imprisonment.

Attorney-General Christian Porter used typically alarmist language in rushing the adoption of the new offence, talking about the unprecedented scale of foreign interference activity undermining Australia's national security, open system of government and sovereignty.

Explanatory material from Home Affairs and the Attorney-General's Department only muddies the waters. It draws a distinction between "foreign interference", which is bad, and "foreign influence", which they say is legitimate.

According to the Home Affairs website:

"All governments, including Australia's, try to influence discussions on issues of importance. When conducted in an open and transparent manner it is foreign influence ... and are a welcome part of international engagement.

"Foreign interference, in contrast, is activity that is:

- carried out by, or on behalf of, a foreign actor
- coercive, corrupting, deceptive, clandestine
- contrary to Australia's sovereignty, values and national interests.

"Foreign actors ... are pursuing opportunities to interfere with Australian decision makers at all levels of government and across a range of sectors.

However what matters legally is what the Criminal Code says. It doesn't even use the word "interfere"; rather the code refers to a person seeking to "influence".

It doesn't refer to corrupting activity. It doesn't say that to be a crime, activity must be contrary to Australia's sovereignty, values or national interests. It doesn't talk about interference with Australian decision makers. That is all just alarmist clap-trap posing as guidance.

What is foreign interference?

If a person is at risk of spending 20 years in the slammer, it is incumbent on the Government to be clear about what is and is not criminal and that legislation be understood by those who are bound by it. The foreign interference laws are as complicated and as imprecise as any I have analysed in more than half a century.

The core of the foreign interference offence is that the accused “engages in conduct ... on behalf of, or in collaboration with, a foreign principal or a person acting on behalf of a foreign principal” with the intention to “influence a political or governmental process”; or “to influence the exercise ... of an Australian democratic or political right or duty”; and “any part of the conduct is covert or involves deception”; or if the accused “fails to disclose to the target” that the person is “acting on behalf of, or in collaboration with, a foreign principal”.

“Foreign Principal”

The Criminal Code says that a “foreign principal” includes foreign governments, foreign political organisations and public international organisations. The Code does not use the more common drafting approach of confining the meaning of foreign principal to those listed things. So arguably individuals could also be foreign principals. The Explanatory Memorandum supports that conclusion by referring to activity “undertaken by foreign actors”; and, in the abstract, to “foreign influence”.

“Foreign” is not defined. Does it extend to a permanent resident of Australia, for example?

Furthermore, various defined terms are given greatly extended meaning by other defined terms. Foreign governments are defined to include companies controlled by a foreign government. The definitional provisions build further on that by saying a company is regarded as controlled by a foreign government if that government is in a position to exercise control over the company.

In the debate about Huawei, anti-Chinese commentators have argued that the Chinese Government can exercise control over Huawei. The same is arguably the case for any Chinese company – indeed for virtually every foreign company. That is the case because the government of a country can control companies established there, even if it has to change its laws – governments are legally in a position to exercise control over companies established in the country in question.

Some defined terms are vague. For example, a “foreign political organisation“ is defined to include a foreign organisation “that exists primarily to pursue political objectives”, but that term is not defined. All sorts of organisations pursue political objectives – Greta Thunberg’s people, Greenpeace, Amnesty International, Oxfam, the World Health Organisation and so on.

“In collaboration with”

Under the Criminal Code, the conduct of the accused does not have to be *on behalf of* a foreign principal but only “in collaboration with” the foreign principal. The accused would

commit the offence just by coordinating the timing of his/her action with the timetable of the foreigner. Every Australian child aged 10 or over who joins one of the Greta Thunberg school strikes for climate change would seem to be guilty of foreign interference. By going to a rally on a day set by Thunberg, they are acting in collaboration with her. (Ten years old being age at which children in Australia are criminally responsible).

“A democratic or political right or duty”

The expressions “political process” and “governmental process” seem very wide. Prohibited conduct would include such things as urging the improvement of the MyGov website, that the Senate ballot paper be changed, and that the tax year be the same as the calendar year.

It follows that you are liable for 20 years imprisonment if you engage in conduct with the intent of influencing any of those things, if you have acted on behalf of or in collaboration with a foreign principal, and if any part of your conduct is covert or involves deception or a “failure to disclose”. Such conduct might be, for example, writing a letter to the paper or your MP, or signing a petition or urging that people go to a lawful protest.

The expressions “the exercise of an Australian democratic right or duty”, and “the exercise of an Australian political right or duty” would bring into the frame activities such as tweeting on anything considered political.

“Any part of the conduct is covert or involves deception” or “fails to disclose”

One required element to establish the offence is that “any part of the conduct is covert or involves deception”. This element includes any “failure to disclose” the connection with the foreign principal.

This includes any conduct on behalf of a foreign principal etc., undertaken with the intention to “influence a political or governmental process”; or “to influence the exercise ... of an Australian democratic or political right or duty”. Tweeting under a pseudonym would be enough for the conduct to be covert. Sending a document on modern slavery taken from the website of a UK advocacy group to your local politician without disclosing the source is covert conduct. Twenty years for what at worst is plagiarism!

The Foreign Influence Transparency Scheme

Attorney-General Christian Porter said in *The Guardian* that the Foreign Influence Transparency Scheme is meant to work in tandem with the foreign interference offences. Under that scheme, persons who act on behalf of foreigners are required to register with their details.

There is also no exemption from the foreign interference offences if a person registers as an agent under the foreign influence transparency scheme.

So for example, when ASPI receives grants from the US State Department to undertake research projects (as it says on the Register it has) it is an admission that it is engaging in conduct on behalf of a foreign principal. If that research work is intended to influence a political or governmental process – including, the thinking of the Australian Government and

people – and any part of ASPI’s conduct is covert or involves deception, its people are committing the very serious crime of foreign interference.

I expect revelation will come as a great surprise to ASPI and the many other people and organisations on the Register.

ASPI’s conduct would involve covert or deceptive conduct if in making one of its frequent public comments, it failed to disclose that it is being paid by a foreign principal to push that line; or if ASPI includes recommendations from its work without disclosing they are drawn from work done for the US State Department.

The same conclusions apply in relation to the work ASPI does for the Embassy of Japan, the Kingdom of the Netherlands, and the UK Foreign and Commonwealth Office.

Christian Porter calls the shots

Foreign interference offences cannot be prosecuted without Porter’s consent. Rather than being a safeguard, that provision is in fact the nail in the coffin of this law, given the Machiavellian way Porter exercises power, as shown in the case of former ACT Attorney-General Bernard Collaery and Witness K.

So ASPI and Tony Abbott should be alright. But the children participating in school strikes for climate change, Collaery, K, Shaoquett Moselmane, John Zhang and others who are in Porter’s sights should be worried.

The foreign interference law is a thoroughly bad law. Drafted in atrociously broad terms, it could criminalise tens of thousands of ordinary, honest Australians. Porter, who is no friend of human rights, rushed the law through Parliament, with support from the ALP, which is as spineless as ever on anything said by the Government to be required for national security. The law should urgently be repealed or drastically revised.

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