What should Australia do about...

its foreign interference and espionage laws?

by Melissa Conley Tyler and Julian Dusting

The espionage threat against Australia is at an unprecedented level, according to the Australian Security Intelligence Organisation (ASIO), with the People's Republic of China (PRC) a major source of this threat. Australia also faces wider issues around foreign interference by the PRC including United Front work and intimidation of Chinese Australians by PRC nationalists.

To respond to this threat, Australia has put in place three key pieces of legislation: the National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018 ("Espionage and Foreign Interference Act"); the Foreign Influence Transparency Scheme Act 2018 ("FITS"); and Australia's Foreign Relations (State and Territory Arrangements) Act 2020 ("Foreign Relations Act"). While the laws were drafted to be country-neutral, political announcements have made it clear that the PRC is a prime target. Former Prime Minister Turnbull, in 2018, explicitly described the first two laws as the Australian people "standing up" to the PRC.

These three laws are flawed. They are too widely cast – subjecting large new areas of activity to national security scrutiny – and poorly focused – scrutinising links and connections, rather than improper conduct. They have had demonstrable negative impacts on Australia-PRC relations and on individual Chinese Australians.

These laws should be tightened and other, more positive mechanisms, introduced to increase the resilience of Australia's democracy.

What is the problem?

There are two main flaws with these laws: the width of their scope and their focus on links and connections with foreigners instead of improper conduct.

First, despite their differences, each defines its scope too widely, covering a broad range of activities rather than pinpointing serious threats. This is most problematic in the Espionage and Foreign Interference Act, which replaces four espionage offences tightly focused on information regarding security and defence with 27 new offences. Information that concerns Australia's national security is now broadly defined to include anything relating to Australia's "political, military or economic relations with another country". Crimes punishable by 20 years of imprisonment can be committed recklessly, with no intention. The offence of preparing for espionage could apply to actions such as purchasing a laptop or linking on social media.[1]

This problem extends to the laws that create transparency mechanisms. FITS established a public register of activities undertaken in Australia on behalf of a foreign principal. Activities that have required registration include former Prime Minister Abbott speaking at conferences funded by the United States and Hungary and former Prime Minister Rudd doing interviews on state-owned broadcasters like the BBC and Radio NZ.

Similarly, the 2020 Foreign Relations Act established a register of international agreements made by state and territory governments, local councils and public universities. This includes activities such as school exchanges, cultural tours and trade delegations as well as academic conferences and semester abroad agreements if the partner university does not pass an institutional autonomy test. Requiring the Minister for Foreign Affairs to scrutinise activities like a library agreement or visual artist exchange is unnecessary and time-wasting.

The second flaw is that the laws focus on links and connections with foreigners, not improper

conduct. The Foreign Relations Act regulates the existence of connections. It creates a category of activities that are deemed to be sufficiently suspect that they require scrutiny and can be cancelled by the Minister with no right of appeal.

This is also the case with FITS, which applies where there is a connection with a foreign principal. There is evidence that stigma is attached to its public register: three former politicians – a trade minister, a foreign minister and a Victorian premier – all resigned from roles related to a PRC entity just prior to the legislation coming into force. The greatest danger is in the Espionage and Foreign Interference Act, where suspicion of a criminal act can arise from attending a function or training course with "connections" to the PRC's United Front or even from just having contact on LinkedIn. ASIO's public communication campaign warning about foreign spies has focused on connections with the tagline "think before you link".

The overall effect of the laws has been to stigmatise international engagement, so that what was previously normal practice – forming international links – has been made problematic.

When ASIO warns that "almost every sector of Australian society is a potential target of foreign interference" this sends a signal that conflates international engagement with threat. But it is important to differentiate between foreign influence and foreign interference. All governments, including Australia's, try to influence discussion and opinion abroad as part of their public diplomacy. Australia, for example, cultivates positive impressions of Australia through tools like a special visitors program, media visits, scholarships and awards. Australian diplomats promote Australia's point of view through speeches, media appearances, social media and one-on-one conversations with influential people in other countries. This is a normal part of international relations.

Is the legislation effective?

As the rationale for these laws was a specific threat to Australia's security, they should first be assessed on their effectiveness in countering foreign interference and espionage. They would fail this test if, for example, pre-existing laws were sufficient to prosecute illegitimate behaviour; if the resources to enforce the laws were out of proportion to the threat; or if the foreign attempts at interference were never likely to succeed. These three criteria are difficult to assess given that there is no mechanism to measure how well Australia's counter foreign interference laws are working, but legitimate arguments can be made that the legislation has failed on all three counts.[2]

First, it is possible that Australia could have countered the PRC's most serious interference attempts even without such wide-ranging legislation. Australia's traditional preference has been to rely on a "catch and deport" system for foreign spies, with hardly any prosecutions brought under past espionage laws. Under the three new laws, only one prosecution has been brought to date and ASIO has confirmed that visa laws have continued to be used to deal with suspected foreign agents. This suggests that the new legislation is not a favoured tool and will only be used for people that Australia cannot easily deport. Overall, it appears that the government is continuing to respond to serious threats as it previously did: expelling suspects under visa laws.

Second, resources allocated to police the legislation's wide scope could have been better spent concentrating on serious threats. In the highest profile investigation by the 65-person foreign interference enforcement unit – of a staffer to a member of the NSW parliament – the suspect's ability to influence political decisions in Australia in ways favourable to Beijing was – to quote James Laurenceson – "marginal to non-existent".[3] The $25 million spent to scrutinise foreign arrangements could have been better spent at a time when funding for the Department of Foreign Affairs and Trade (DFAT) was the lowest in Australia's history.

Third, it may be that the PRC's attempts were doomed to fail, and no new laws were needed. Judged in terms of influence on policy and public debate, the PRC's interference attempts have been spectacularly unsuccessful. The PRC has failed to persuade Australian elites or to shape Australian public perceptions or federal policy in its favour. Structural problems may restrict the PRC's ability to project soft power and influence political opinion in Western countries; if so, Australia should have more faith in the resilience of its democracy.[4]

What are the negative impacts?

As well as evaluating its success in achieving its stated aims, the legislation should be assessed on any negative effects, such as the impact on Australian democracy and civil liberties and on trade and international relations.

The legislation has failed the test of defending and supporting social cohesion and individual rights.[5] Chinese Australians report feeling that they are guilty until proven innocent under the legislation given how it stigmatises international links and connections.[6] Media scrutiny of connections has intensified this. This has had real detrimental effects on engagement by Chinese Australians in politics and public debate.[7]

The laws – and particularly the way they were presented – have also caused harm to trade and diplomatic ties with the PRC. While it is often difficult to determine a causal relationship, in this case the PRC has explicitly stated that these three laws were a significant factor in the downward spiral of relations. In the 14-point list of grievances released by the PRC's Embassy in Canberra in November 2020, almost half concerned the legislation and related media coverage. This harm could have been minimised by a different approach.

Finally, by enacting domestic legislation, an element of relationship management was put into the hands of domestic law enforcement whose primary duty is not international relations. Investigations can have significant flow-on effects for Australia-PRC relations. For example, when raids on PRC journalists in Australia were followed by the evacuation of Australian journalists in the PRC, this left no Australian media outlets reporting from the PRC for the first time since the 1970s. In this scenario, DFAT officers in Canberra were relegated to the role of a "complaints desk" for PRC diplomats.[8] Dennis Richardson – former head of DFAT, Defence and ASIO – has publicly warned against "national security cowboys" running the show.[9]

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The overall effect of the laws has been to stigmatise international engagement, so that what was previously normal practice – forming international links – has been made problematic. Blanket suspicion of international engagement is contrary to Australia's interests.

Are there better ways?

The PRC conducts foreign interference and espionage in Australia, and so Australia needs to protect itself. The question is: are there more effective ways for Australia to respond?

As Rory Medcalf notes, the challenge for countries like Australia is how to protect democratic institutions in ways consistent with national interests and values, distinguishing between foreign interference and mere influence by designing suitable instruments of policy in response.[10] Some parts of the legislation achieve this: for example, the new offence of engaging in violence, intimidation or threats that interferes with political rights and duties in Australia. The problem is that the legislation is not sufficiently focused and fails to distinguish between foreign interference and mere influence.

Australia has other options to strengthen its democracy, including against foreign powers. These range from real-time reporting of political donations and strengthened anti-corruption bodies to cultivating a more diverse media landscape. Overall, as Linda Jaivin puts it, the best way to deal with PRC autocracy cannot be to move in a similar direction.[11]

Recommendations

- The scope of the 2018 Espionage and Foreign Interference Act and FITS should be narrowed when they come up for review in December by the Independent National Security Legislation Monitor and the Parliamentary Joint Committee on Intelligence and Security. Both reviews should look at tightening expansive definitions and focusing more clearly on the most damaging interference efforts.
- The 2020 Foreign Relations Act should be amended to remove the requirement for all arrangements to be notified. Instead, it should give the Foreign Minister the power to request information on, and then cancel, any specific international arrangement. This would retain the Minister's power while dramatically reducing the compliance burden and the associated stigmatisation.
- Government messaging on foreign interference should distinguish clearly the dividing line between influence and interference. Information campaigns should focus on examples of improper behaviour, rather than cautioning against forming any international connection.
- Positive measures to increase the health and resilience of Australia's democracy should be developed. These include real-time reporting of political donations, strengthened power for anti-corruption and oversight bodies, and support for a robust independent media landscape. Concretely, the Australian Government should establish a strong federal independent commission against corruption and the Australian National Audit Office should receive additional funding.

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