Human Rights Law Centre

# Submission on the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017

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## Human Rights Law Centre

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# Executive Summary

This Committee has, in its *Second interim report on the inquiry into the conduct of the 2016 federal election: Foreign Donations* in March 2017, supported "a sensible, proportionate regulation response to the risk of foreigners influencing the Australian political process, via a ban on appropriately defined foreign donations".

The Human Rights Law Centre agrees that such a response is desirable. However, in our view, the reforms proposed in *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017* do not represent a proportionate response in respect of the treatment of those who are not political parties or candidates, or closely connected to political parties or candidates (referred to as 'third parties').

Australia's electoral law already regulates third parties. However, the Bill's foreign donations restrictions with respect to third parties are a marked departure from the current law, and one which fails to properly balance the coverage of the regime, with the obligations that it places on third parties. The various dimensions: the breadth of organisations that it covers, the types of activity that it covers, the thresholds of expenditure it adopts and the broad range of donors who are not "allowable donors", combine to produce a regime that is more expansive and onerous than comparable democratic systems such as the United Kingdom, Canada and New Zealand.

In part, this imbalance is attributable to the use of the concept of "political expenditure" under the current law (relying on the same definition in substance that will enter into effect in March 2018) to define the coverage of the foreign donations ban and restrictions; a purpose for which such a broad definition is not suited. In further part, it is due to the low thresholds of "political expenditure" that trigger the ban/restrictions. But significantly, this imbalance is due to the proposed administrative regime of registration and financial controls created under the Bill, which apply irrespective of whether an organisation receives any, or any substantial, funding from foreign-sources; or whether the organisation wields any significant influence on elections. These obligations are to be enforced by hefty penalties, including up to 10 years imprisonment.

Moreover the Bill excludes from the list of "allowable donors" not only foreign governments and foreign corporations, but international philanthropic organisations and even long-term Australian residents who do not have a permanent visa.

Finally, the Bill would impose new information collection and disclosure obligations on third parties who are captured by the registration scheme, including a process for obtaining donor information that appears unworkable and a requirement that organisations publicly disclose the political party membership of senior staff.

Overall, we are concerned that the proposal in the Bill runs the risk of regulating participation in public debate on political matters at large, without sufficient connection to elections. Rather than incur the

costs or run the compliance risks built into the proposed regime, civil society organisations are likely to choose to refrain from the public expression of their views to avoid the requirement to register and all that flows from it. The pressure to refrain from engaging in activities that create compliance risks will be especially strong on smaller organisations. This would harm public debate in Australia by discouraging voices that pose no risk of undue or improper influence on Australia's system of elections.

The lack of balance in the Bill is particularly acute in the case of registered charities, who by law must be established for public benefit, who can only publicly advocate to advance their charitable purpose, who cannot be established for the purpose of promoting or opposing a political party or candidate, and who are already well regulated by the Australian Charities and Not-for-profits Commission.

The regulation of third parties within Australia's electoral laws must be done in a manner that supports a healthy civil society, in which a variety of organisations – small and large – are able to contribute information and ideas to public debate. This is essential to a healthy democracy – which is the same objective that guides electoral regulation. The Bill proposes an approach that is too blunt and heavy-handed in its treatment of the vast number of organisations who speak publicly on issues that matter to Australians, and that are likely to arise in elections. The case for such a significant change in the balance of Australia's electoral regulation of third parties has not been made out, particularly not on the grounds of any threat of foreign interference. It is undesirable for Australian democracy, and it may be unconstitutional in its impact on our freedom of political communication.

***Recommendations:***

1. **That the Bill redress the imbalanced nature of the foreign donations restrictions by adopting one or more of the following options:**

   **Option A: substantially increasing the threshold level of "political expenditure", and clarifying what types of expenditure count towards it;**

   **Option B: narrowing the political activities that trigger the foreign donations restrictions to campaigning that promotes or opposes a particular political party or candidate for office; or**

   **Option C: exempting registered charities from the foreign donations restrictions.**

2. **That the list of "allowable donors" include all Australian residents, irrespective of whether they hold a permanent visa.**
3. **That the Committee consider ways in which the administrative requirements may be lessened so as to reduce the compliance burden on "third party campaigners" and "political campaigners".**
4. **That the minimum donation for which appropriate donor information is required be increased to the "disclosure threshold" of $13,500 and that the legislated method for collection of donor information be reasonably practicable.**
5. **That the obligation to disclose political party membership of senior staff employed or engaged by a "third party campaigner" or "political campaigner" be removed.**
6. **That the change to the definition of associated entity in new subsection 287H(5) be removed.**

# Contents

# 1. Introduction

1. The Human Rights Law Centre (**HRLC**) welcomes the opportunity to comment on the *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017* (**the Bill**). One of the HRLC's focus areas is the rights and freedoms that underpin robust democratic processes. This includes protections guaranteed under the Australian Constitution, such as the implied freedom of political communication.

2. This Committee has, in its *Second interim report on the inquiry into the conduct of the 2016 federal election: Foreign Donations* in March 2017, supported "a sensible, proportionate regulation response to the risk of foreigners influencing the Australian political process, via a ban on appropriately defined foreign donations".[1]

3. The HRLC agrees that such a response is desirable. Indeed, insofar as the Bill would regulate communication on political matters, a proportionate response is constitutionally required. We note the careful exercise undertaken by the Committee in setting out the case for banning foreign donations to political parties and candidates.

4. However, in our view, the proposed reform does not represent a proportionate response **in the manner in which it affects "third parties"**, being those organisations that are not political parties or candidates, or closely connected to them ("associated entities" under the current law). Overall, we are concerned that the proposal in the Bill runs the risk of regulating participation in public debate on political matters at large, without sufficient connection to elections.

5. This submission first sets out the principles which guide our assessment of Bill (Part 2), followed by a summary of the current obligations of third parties under the *Commonwealth Electoral Act 1918* (**Electoral Act**) (Part 3). It then raises two concerns regarding the third party provisions of the Bill. The **first** relates to the scope of the proposed ban on foreign funding to third parties (Part 4). The **second** is the broad regulatory approach taken that brings a very wide range of organisations – charities, community organisations and other not-for-profits – seeking to speak on any significant policy issue, into a level of Commonwealth electoral regulation comparable to political parties (Part 5). Next, we raise concerns with the proposed broadening of the associated entity provisions to organisations that have no real connection with the political party or parties with which they are deemed to be 'associated' (Part 6). Finally, in Part 7, we discuss options available to address or mitigate these concerns.

[1] JSCEM, *Second interim report on the inquiry into the conduct of the 2016 federal election: Foreign Donations* (March 2017), [3.72].

# 2. Guiding principles

6. The objective of the Bill, as stated in the Explanatory Memorandum, is to improve the integrity of Australia's electoral system.[2] Specifically, the Bill seeks to increase accountability and transparency of those involved in political finance. **The HRLC supports of this objective and recognises that transparency and fairness around political finance is a vital element of a robust democracy.**

7. The Bill also seeks to address foreign attempts to influence elections. We recognise that there is a growing realisation of attempts by particular foreign governments to interfere in the electoral processes of democratic States, and that this is a threat to be taken seriously. We recognise, and broadly support, the reasons for restricting foreign donations to Australian political parties and candidates, and their associated entities.

8. What is not clear from the available evidence is any threat with respect to illegitimate foreign interference in Australian *civil society organisations*, and how attempts by particular foreign governments (and persons associated with those governments) to interfere with democratic elections relate, if at all, to *international philanthropy*. As will be seen below**, this creates concerns as to whether banning, or restricting, donations from the range of non-Australian sources, in the manner proposed by the Bill, is proportionate to the goal of preventing undue influence on the outcomes of elections.**

9. Some electoral regulation of civil society organisations (third parties) who engage in politics may be appropriate, and indeed necessary, to ensure the integrity of a particular electoral system. However, the intensity of that regulation ought not be equal to the regulation of political parties. **Political parties and candidates seek and hold public office**. They receive public resources and funding to engage in politics. They are able to propose an overall societal model to the electorate, and gain the capacity to implement those proposals if they come into power. Because they seek to exercise public power, they are more exposed to risks of corruption and undue influence. On this basis, political parties and candidates differ from other organisations that participate in public debate, even those organisations who engage in significant political campaigning.[3] It is appropriate that political parties and candidates be more closely regulated in terms of accepting funding from private sources.

10. This submission adopts the following guiding principles to assess the proposed extension of the Electoral Act's provisions with respect to entities that are, under the current law, third parties:

[2] Explanatory Memorandum to the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017, 3.
[3] European Court of Human Rights, *Refah Partisi (The Welfare Party) and Others v. Turkey,* Application Nos. 41340/98, 41342/98, 41342/98, 41343/98, 41344/98, 13 February 2003 [87].

a) Regulation under the Electoral Act, and under the auspices of the Australian Electoral Commission, must have some nexus to elections and not simply regulate public debate at large.

b) Entities that are not political candidates, political parties or associated with political parties or candidates should not be subject to the same level of regulatory control (in terms of prohibited funding or disclosure) as those that seek and hold public office.

c) Any administrative requirements should be appropriate, and not overburden smaller organisations, or organisations that operate for a charitable purpose, who may wish to engage in public communications about their work.

d) Any changes to the Electoral Act which affect registered charities and not-for-profits should be consistent, and coherent, with the system of regulation to which they are subject under the *Charities Act 2013* and the *Australian Charities and Not-for-profits Commission Act 2012.*

e) The regulation of political communication must satisfy the requirements of the implied constitutional freedom of political communication (see **Appendix 1** for more detail).

11. Vibrant public debate from a diverse set of voices on the issues that arise in elections is vital to a healthy democracy. A robust civil society, like a free press, forms part of the checks that exist in well-functioning democracy against threats to the integrity of democratic institutions. This is, in part, what the implied freedom of political communication protects.

12. Public advocacy by civil society, including by community organisations and charities, contributes to more informed public debates and better laws and policies. Community organisations and charities run homeless shelters, women's refuges, childcare facilities, disability support services and much more. Through this work, they develop expertise and insight into how laws and policies affect many groups in society. They are well-placed to convey those insights to governments, parliaments and the public and this in turn improves laws and policies. This public role is particularly important for vulnerable groups who are less able to ensure their interests and perspectives are heard in public debates. It is also vital for interests like the protection of the environment that may otherwise lack a voice.

13. Many of the rights, laws, policies and services that we now enjoy in areas as diverse as discrimination, family violence, consumer protection, homelessness, disability and workplace safety have been secured after years and sometimes decades of public advocacy by civil society.

14. Our overarching concern therefore is that, in seeking to achieve electoral integrity, legislation does not stifle the civil society voices that are vital to the health of our democracy, particularly in the absence of any compelling evidence.

# 3. Current obligations of third parties

15. Third parties (that is, entities that are not "political parties" or "associated entities") are already subject to obligations to annually disclose certain expenditure and donations under electoral law, and have been since 2006.[4]

16. Third parties that spend more than the indexed disclosure threshold ($13,200 for financial year 2016-2017)[5] for certain specified purposes must submit an annual "**third party return of political expenditure**" to the Australian Electoral Commissioner, including the details of the expenditure incurred.[6] Those purposes are:

    (i) the public expression of views on a political party, a candidate in an election or a member of the House of Representatives or the Senate by any means;

    (ii) the public expression of views on an issue in an election by any means;

    (iii) the printing, production, publication or distribution of any material (not being material referred to in subparagraph (i) or (ii)) that is required under section 328, 328A or 328B to include a name, address or place of business;

    (iv) the broadcast of political matter in relation to which particulars are required to be announced under subclause 4(2) of Schedule 2 to the Broadcasting Services Act 1992

    (v) the carrying out of an opinion poll, or other research, relating to an election or the voting intentions of electors.7

17. Where a third party is required to submit a return, it must also report the details of **any single gift** that:

    a) is valued at or over $13,200 (indexed annually)[8]; and

    b) the third party used – wholly or partly during the financial year – to enable it to incur expenditure for at least one of the above purposes.[9]

18. For such gifts, the third party **must disclose the full name and address of the donor, the date of receipt, and the gift's value**.[10]

[4] The current third party reporting requirements were introduced into the Electoral Act by the Howard Government through the *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006* (Cth). Previously, third parties were required to file returns only after elections, rather than annually.
[5] Financial year 2017-2018 thresholds are yet to be published by Australian Electoral Commissioner.
[6] *Commonwealth Electoral Act 1918*, ss 314AEB and 314AEC.
[7] *Commonwealth Electoral Act 1918*, s 314AEB(1)(a).
[8] $13,200 for financial year 2016-2017. Financial year 2017-2018 thresholds yet to be published by Australian Electoral Commissioner.
[9] *Commonwealth Electoral Act 1918*, s 314AEC.
[10] *Commonwealth Electoral Act 1918*, s 314AEC(2).

19. Additionally, third parties are subject to the Electoral Act's disclosure requirements for any electoral advertisements that they place.[11] **The Act does not distinguish between electoral advertisements produced by "third parties" and those produced by "political parties"**: all "persons" must comply with s 328. An electoral advertisement is an advertisement, handbill, pamphlet, poster or notice that contains an electoral matter.[12] An electoral matter is a matter which is intended or likely to affect voting in an election.[13]

20. The stated rationale for the current third party regime was to ensure a consistent and transparent approach to financial reporting for all involved in the political process.[14] This approach adopts a very broad definition of "political expenditure" that extends to public communication of information, ideas, opinions, by any means (such as media, but also events, reports, public speeches, and presumably social media), limited by the requirement that the views relate to "*an issue in an election*". It therefore captures activities of all kinds of organisations, including charities, community groups, professional associations, and peak bodies, that have a nexus to issues in an election.

21. In 2011, this Committee recommended that the limb of the definition of "political expenditure" in s 314AEB(1)(a)(ii) should be removed, so that "the public expression of views on an issue in an election by any means" is no longer a type of expenditure that leads to regulation.[15] The basis for this recommendation, which was supported by the Australian Electoral Commission, was the significant difficulty in prospectively assessing what might be an "issue in an election" as phrase is not used elsewhere in the Electoral Act.[16] This paragraph was thought to be inappropriate where third parties had to report annually (and therefore *prospectively*), rather than after an election.[17]

22. This recommendation has not been adopted. Instead, on 11 September 2017, the already problematic definition above was expanded to include:[18]

    (ii) the public expression of views, by any means, **that is, or is likely to be, before electors in an election (whether or not a writ has been issued for the election)**

    This definition will enter into effect on 14 March 2018. This would appear to broaden the definition of "political expenditure" to potentially include expenditure at any time on public comment on issues of any public significance. The Bill adopts this expanded definition for the purposes of the new proposed definition of "*political purpose*" in new section 287(1).

[11] *Commonwealth Electoral Act 1918*, s 328.
[12] *Commonwealth Electoral Act 1918*, s 328(1).
[13] *Commonwealth Electoral Act 1918*, s 4(1).
[14] Supplementary Explanatory Memorandum, Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Bill 2005.
[15] JSCEM, *Report on the funding of political parties and election campaigns* (November 2011), Recommendation 19.
[16] Ibid, [7.29]-[7.30],156 [7.43]-[7.45].
[17] Ibid, [7.53], [7.55].
[18] *Electoral and Other Legislation Amendment Act 2017.*

23. While the current regime, particularly with the new definition of political expenditure, captures a very wide range of activities by third parties (especially the public expression of views), the burden imposed on those caught by this broad definition is limited to a requirement to annually disclose the extent of spending and major gifts to enable that spending.

24. Different democracies may adopt a different regulatory mix when it comes to the electoral regulation of third parties, to ensure a balance between the **coverage** of third parties (broad vs. narrow) on the one hand, and the **obligations** placed on those third parties (heavy vs. light), on the other.

25. Based on their comparative research of third party regulation focusing on Australia, New Zealand, Canada and the United Kingdom, Associate Professor Anika Gauja and Professor Graeme Orr identify:

> Where the legislative scheme as a whole has a lighter touch (requiring, for example, only disclosure or authorisation laws) the term 'political' is very broad – encompassing any 'political object' in the sense of commentary on governmental issues. But where the regulation bites harder (for example through imposing expenditure limits), the regulation attempts to hone in on **matters that may affect or at least be intended to affect the outcome of the election or voting**.[19]

26. Accordingly, the broad scope of the regulated activity under Australian law illustrates how electoral regulation relies on **interconnected aspects that are balanced against each other** – the current expansive (and problematic) definition of "political expenditure" is logically connected to disclosure obligations, as opposed to constraints on expenditure such as limits or prohibitions.[20]

# 4. The imbalance of the proposed foreign donations restrictions on third parties

27. The Bill introduces provisions into the Electoral Act which regulate donations from various types of donors to political parties, political candidates and third parties.

28. New section 302C (*Object of this Division*) states:

> (1) The object of this Division is to secure and promote the actual and perceived integrity of the Australian electoral process by reducing the risk of foreign persons and entities exerting (or being perceived to exert) **undue or improper influence in the outcomes of elections**.

[19] Anika Gauja and Graeme Orr, "Regulating 'Third Parties' As Electoral Actors: Comparative Insights and Questions for Democracy" (2015) *Interest Groups & Advocacy* 1, 10.
[20] See ibid, 9.

(2) This Division aims to achieve this object by restricting the receipt and use of political donations made by foreign persons or entities that do not have a legitimate connection with Australia.[21]

29. Insofar as the new provisions prohibit **donations from the body politic of a foreign country** in the electoral system, this may accord with "the principles of national sovereignty and non-interference in the internal affairs of States in their electoral processes" that have been recognised and reaffirmed by the UN General Assembly.[22]

30. Insofar as the new provisions relate to influence, through political donations, to those **political parties and political candidates who seek and hold public office**, including forming government, it may be accepted that such entities (and by extension, those closely associated with them) have a special obligation to be removed from foreign influence. We do not comment in this submission on the proposed prohibition of donations to parties, candidates, or their associated entities (other than to note that the treatment of Australian residents may raise similar constitutional concerns to those raised below in Part 4.2).

31. However, it is not clear what the precise concerns are that give rise to intricate regime set up under Division 3A to prohibit or restrict donations to third parties. We note that Committee members have previously differed on the approach to be taken to the fundraising and disclosure obligations of third parties, and what would constitute a "level playing field".

32. We set out below our concerns with the manner in which this Bill proposes to regulate foreign donations to third parties. In our view, the proposed foreign donations regime with respect to third parties is imbalanced in the breadth of recipients of donations and activities which it would impact, as well as the range of donors it would disallow. For the reasons set out below, we consider it is not a proportionate response to the stated object of the proposed legislation.

## 4.1 The broad definition and low thresholds of "political expenditure" triggering the ban/restrictions on funding

33. The Bill creates two new categories of actor under the Electoral Act, "*political campaigners*" and "*third party campaigners*", for the purpose of identifying which third parties are subject to a ban or restriction on receipt of foreign donations. Each category is based on the **level of "political expenditure**" incurred by a third party[23]. The definition of "*political expenditure*"

[21] New s 302C.
[22] *United Nations Declaration on Respect for the principles of national sovereignty and non-interference in the internal affairs of States in their electoral processes,* GA Res 20/172, UNGA 50th Session, 99th plen mtg, UN Doc ID A/RES/50/172 (22 December 1995); and *United Nations Declaration on Respect for the principles of national sovereignty and non-interference in the internal affairs of States in their electoral processes,* GA Res 49/180, UNGA 49th Session, 94th plen mtg, UN Doc ID A/RES/49/180 (23 December 1994).
[23] For "political campaigners", $100,000 in a financial year within last 4 financial years or $50,000 in a financial year where equivalent to at least 50% of the "allowable amount" of the previous financial year (new s 287F). For "third party campaigners", $13,500 in a financial year (new s 287G).

refers to a new concept of "*political purpose*" which captures the purposes in the expanded definition of "political expenditure" (to come into effect in March 2018: see paragraph 22).

34. In sum, the measures in the Bill constitute a complete ban on any or all donations totalling more than $250 in a financial year from a person that is not an "*allowable donor*" to political parties, candidates, Senate groups and the newly created category of "political campaigners" (excluding those which are registered charities or unions).[24] In this submission, we refer to this as "**the foreign donations ban**".

35. With respect to all "third party campaigners" and registered charities and unions who fall within the definition of "political campaigner", the Bill prohibits "political expenditure" in excess of their "*allowable amount*", being the donations received from "allowable donors" and funds other than donations. The Bill prohibits accepting donations from a non-allowable donor if the donation is more than $250 in a financial year and is expressly made for a *'"*political purpose*".*

36. The Bill also sets up a regime by which funds received from non-allowable donors to registered charities and unions who fall within the definition of "political campaigner" are to be quarantined from funds used for "political expenditure".[25] (We refer to these aspects of the Bill collectively as the "**foreign donations restrictions**".)

37. Financial controllers are required to be appointed by all third parties falling into either new category. If an organisation receives any donations subject to the foreign donations ban or restrictions, it has six weeks to either transfer the amount of the donation to the Commonwealth or return the donation to the donor.[26] A financial controller's failure to do so exposes them personally to severe criminal and civil penalties (up to ten years imprisonment, or a fine up to $210,000).[27]

38. The foreign donations ban and the foreign donations restrictions, as they are presently designed to apply to third parties, are more expansive and onerous than any comparable democratic system that we are aware of. This arises from the combination of:

    a) impacting a **very broad range of organisations across Australia:** the regime extends to all persons and entities (including all incorporated or unincorporated associations) in Australia;

[24] New s 302D.
[25] New s 302F.
[26] New s 302B.
[27] New ss 302B, 302D, 302E.

b) extending to the **public expression of views in any way on a potentially unlimited set of topics of public concern:** the broad definition of "political expenditure" explained above in Part 3 has the potential to encompass all contributions made by any entity to public discourse in Australia, given the increasingly broad range of issues which may come before voters in any given election;

c) imposing relatively **low thresholds of "political expenditure"** required to fall into the categories of "political campaigner" and "third party campaigner", relative to the spending of political parties who exert a substantial influence on electoral outcomes;[28]

d) **disallowing a broad set of donors** beyond foreign governments or persons/entities associated with foreign governments, that would include individual donors with no connection to any foreign government who make donations to Australia organisations, independent international philanthropic organisations who give to Australian organisations and even long-term residents in Australia (discussed further in 4.2 below); and

**EXAMPLE**

The Wellcome Trust is a major global fund that supports medical research to improve human and animal health. It funds open and accessible research and wants to ensure that medical research is as effective as possible and translates to policy. A grant from the Wellcome Trust to an Australian medical research charity for the purpose of translating the best research on early detection of life-threatening illnesses into healthcare policy and delivery in Australia is not a threat to the integrity of Australia's system of free and fair elections. However, such a grant may be prohibited entirely under the proposed regime for being for a "political purpose", or the charity may be prohibited from using the money to inform public debate, on penalty of heavy fines or imprisonment of their financial controller.

e) in the case of the foreign donations restrictions, prohibiting the use of donations from non-allowable donors for **a very broad range of public activities** that do not constitute promoting or opposing a political candidate or party, or do not even constitute communication of an "*electoral matter*" under the Electoral Act (that is, a matter which is intended or likely to affect voting in an election).

39. Turning to the guiding principles set out in paragraph 10 when these five dimensions are taken together the foreign donations regime is one which, on the premise of preventing undue influence on elections, ends up extending over Australian public debate at large, without a sufficient connection to influence within the electoral system. It imposes obligations that are

[28] This is can be illustrated when the "political campaigner" and "third party campaigner" criteria thresholds of $100,000, $50,000 or $13,500 is compared to the total expenditure of the major political parties (in FY 2015-2016, Liberal Party of Australia – approximately $66.7 million, Australian Labor Party – approximately $49.2 million). We refer to Professor Joo-Cheong Tham's submission in relation to further analysis.

substantially equivalent on political parties and political candidates, on the one hand, and a broad selection of third parties, many of which would not be widely considered to be political actors, on the other.

40. The current Australian electoral law approach to what constitutes "political expenditure", which favours overinclusion, triggers a limited form of public disclosure only.[29] There are at least two problems with using that *same* definition for the purpose of the foreign donations regime proposed by the Bill:

a) the activities and entities covered by the foreign donations ban (or restrictions) **may have no substantial impact in influencing electoral outcomes**; and

b) the definition is not sufficiently precise to allow organisations to easily identify and quantify "political expenditure". In turn, this makes it **difficult to know what amounts an entity needs to count, or apportion, towards the "political expenditure" threshold** (for example, does it mean external spending on advertising and media or does it also extend to internal costs of staff or premises).

41. Accordingly, the definition of "political expenditure" adopted by the Bill is not fit-for-purpose – in terms of breadth and uncertainty – to apply across civil society organisations for the purpose of restrictions and prohibitions on receipt of funding. This is particularly so where the consequence of meeting a particular threshold and failing to comply with the proposed electoral funding regime attracts severe criminal penalties, including long terms of imprisonment. (Meeting the thresholds for "political campaigner" and "third party campaigner" also triggers substantial administrative obligations, which we discuss further in Part 5 below).

42. Canada[30] and the UK[31] provide some examples for regulation of foreign donations to third parties, but those measures are targeted to electioneering expenditure (for example, donations to fund electoral advertisements or activities intended to influence electoral outcomes or when proximate to the timing of the election). Consequently, the proposed foreign donations ban/restrictions depart substantially from the approach in these comparable jurisdictions in their reach over civil society and public debate in general.

43. It appears very likely that the Bill burdens the implied freedom of political communication because it reduces the resources available to third parties to communicate on political matters.[32] It is therefore constitutionally necessary that the Bill be "reasonably appropriate and adapted" to advance a legitimate object. While protecting the integrity of Australia's elections from undue and improper influence may be a legitimate object, for the reasons set out above,

[29] See paragraph 23 above.
[30] *Elections Act,* SC 2000, c 9, ss 319, 349 and 353.
[31] *Political Parties, Elections and Referendums Act 2000* (UK) c. 41, ss 84(5), 88 and 94.
[32] See *McCloy v State of New South Wales* [2015] HCA 34 (7 October 2015) per French CJ, Kiefel Bell and Keane JJ at [2]-[5]; *Unions NSW v New South Wales* [2013] HCA 58. See also *Brown v Tasmania* [2017] HCA 43 (18 October 2017).

the regime as it presently applies to third parties would have an unclear, and potentially marginal, effect on that object. Accordingly, there are risks that the Bill is unconstitutional.

44. The conclusion that the proposed ban/restrictions are not well-adapted to protecting the integrity of our electoral system is only strengthened by the fact that this ban extends to third parties' *public* communications, but not private communications (such as lobbying) undertaken by third parties. Yet there is no reason that we know of to believe that contributions that third parties make to public debate are more likely to be a source of undue or improper foreign influence than private meetings. In fact, it would appear that the risks of undue or improper influence would be greater behind closed doors, than as part of the free flow of ideas in public debate.

45. Given the interconnected nature of the concerns identified above, we are unable to recommend a specific change that would address the disproportionate nature of the proposal in the Bill. However, we identify some options for the Committee to consider that would improve the Bill, in Part 7 below.

## 4.2 The range of donors to be disallowed

46. The Bill does not specify what constitutes being a "foreign donor" or what constitutes an undue or improper influence on Australian elections via third parties. Nor does it limit the foreign donations ban/restrictions to foreign property. Instead, it adopts the approach of allowing specific categories of donors ("*allowable donors*") who are permitted to give donations to political parties and candidates, associated entities, and third parties who engage in "political expenditure".

47. In addition to foreign governments and foreign public enterprises and corporations, the following persons and entities are **not** **"**allowable donors" under the Bill:

- foreign-based philanthropic organisations;
- global philanthropic organisations;
- individuals who reside overseas and are not citizens or permanent visa holders of Australia;
- Australian residents who do no hold a permanent visa.[33]

48. Beyond the imprecise statement that "foreign-sourced political funds amount to undue influence in a domestic public debate",[34] the explanatory materials do not explain the nature or basis for any threat to Australia's electoral system posed by "foreign" donors to civil society organisations. Yet, the Bill proposes to disallow a broad set of donors beyond foreign governments or persons/entities associated with foreign governments. Non-allowable donors would include individual donors or organisations based overseas with no suspect connection

[33] New s 287AA(3), together with new s 287(1).
[34] Explanatory Memorandum, p 7.

to any foreign government who make donations to Australian organisations. It would include independent global philanthropic organisations who give to Australian organisations as well as giving internationally. It would even include long-term residents in Australia who give to organisations that they value and whose donations are made out of wages earned in Australia.

49. There is simply **no evidence provided of a need to keep such a wide range of donations from Australian organisations who do not seek or hold any public office and particularly registered charities**.

50. The Bill refines "Australian resident" to only mean a person who holds a permanent visa. This is inconsistent with residency for the purposes of other federal legislation.[35] Moreover, the Bill would give the Special Minister of State the power to, by legislative instrument, determine that even permanent residents are not "allowable donors".[36]

51. Great caution should be exercised before passing legislation that, under the guise of addressing an imprecise threat of "undue or improper foreign influence", deems that many residents of Australia have no legitimate connection to government or policy in Australia, and no legitimate role to play in participating in public debate or donating to the vast range of civil society organisations that participate in public life. **This is a very dangerous road for the Parliament of this country to embark on**. Residents of Australia who are not (or not yet) citizens play many valuable roles and are as entitled to enjoy rights to freedom of expression and freedom of association as those who hold Australian citizenship, even if they are not entitled to vote or stand for office.

52. The definition of "allowable donor", particularly the excluded or precarious status given to Australian residents who do not hold citizenship, risks itself infringing on the implied freedom of political communication. In *Unions NSW v New South Wales*, the High Court of Australia declared certain provisions of the *Electoral Funding, Expenditure and Disclosures Act 1981* (NSW) that prohibited, amongst others, residents who were not on the electoral roll from making donations to political parties or candidates, to be invalid for infringing the implied freedom. The majority judgment rejected the notion that only those who have the right to vote have a legitimate interest in the political process, explaining that:

> **There are many in the community who are not electors but who are governed and are affected by decisions of government**. While not suggesting that the freedom of political communication is a personal right or freedom, which it is not, it may be acknowledged that **such persons and entities have a legitimate interest in governmental action and the direction of policy**. The point to be made is that they, as well as electors, may seek to influence the ultimate choice of the people as to who should govern. They may do so directly or indirectly through the support of a party or a candidate who they consider best represents or expresses their viewpoint. In turn, political parties and candidates may seek to influence such

[35] See for example the *Income Tax Assessment Act 1997* which considers factors including intention to reside, and time spent in Australia.
[36] New s 287AA(2).

> persons or entities because it is understood that they will in turn contribute to the discourse about matters of politics and government.[37]

53. Even greater caution ought to be exercised where what is sought to be restricted is not only donations to political parties and candidates, but support to *any* type of organisation that engages in, for instance, "the public expression of views by any means that is, or is likely to be, before electors in an election".

54. We recommend that the list of "allowable donors" in new section 287AA include all Australian residents (that is, the definition of Australian resident under the Electoral Act include those who are lawfully resident in Australia irrespective of whether they hold a permanent visa); and that new subsection 287AA(2) be removed.

# 5. Additional registration, disclosure and financial controls on third parties

55. In Part 4 we set out how the definition of "political expenditure", combined with low thresholds of such expenditure, has the potential to capture a very large range of Australian organisations into the categories of "political campaigner" and "third party campaigner".[38]

56. Even **apart from the foreign donations ban and foreign donations restriction**, the Bill would impose a series of administrative compliance requirements on organisations that fall into these categories: registration, the appointment of a financial controller, disclosure obligations and collection of donor information.[39] **These requirements apply irrespective of whether the organisation receives any foreign-sourced donations.**

## 5.1 Registration as a "political"/"third party campaigner" and its consequences

57. Under the proposed amendments, within 28 days of meeting the definition of "political campaigner" and "third party campaigner" organisations are required to **register** with the Electoral Commissioner accordingly for each relevant financial year.[40] The Electoral Commissioner must establish and maintain a public Register of Political Campaigners and a public Register of Third Party Campaigners.[41]

58. Failure to comply with the registration requirements attracts **substantial civil penalties**.[42] Contraventions of these registration provisions are also continuing contraventions, meaning that for each day that a person is required to register as a "third party campaigner" or "political

[37] *Unions NSW v New South Wales* [2013] HCA 58; [30] (emphasis added).
[38] We address the category of "associated entity" separately in Part 6.
[39] The obligations arise from new Part XX Division 1A and new Part XX Division 3A proposed in the Bill.
[40] New ss 287F, 287G.
[41] New s 287N.
[42] The maximum penalties for failing to register range from 120 penalty units to 240 penalty units: new ss 287F, 287G, 287H.

campaigner", this will count as a separate contravention.[43] The financial controller of an entity may personally contravene of these provisions.

59. Organisations in these categories must submit **annual returns** to the AEC within 16 weeks after the end of financial year.[44] These returns require substantial detail including:

- for "political campaigners", the organisation's finances, including the total amount received and spent by the organisation;[45]
- particulars of any donations from a donor exceeding the "disclosure threshold" in sum (and in the case of "third party campaigners" who receive donations in sum exceeding the "disclosure threshold", particulars of all donors[46]);[47]
- any senior staff employed or engaged by or on behalf of the "campaigner", in its capacity as a campaigner, and their political party membership;[48]
- any discretionary benefits received by the organisation from the Commonwealth, State or Territory during the financial year;[49]
- for "political campaigners", an auditor's report;[50] and
- for "political campaigners" which are charities or unions, a statement by the financial controller confirming compliance with provisions regarding international donations.[51]

60. Additionally, all entities that are registered as "political campaigners" would also have to obtain "*appropriate donor information*" for all gifts above $250 in order to ensure gifts are from "allowable donors". Appropriate donor information is defined as a **statutory declaration** declaring that the donor is an "allowable donor", or information prescribed by the regulations (which, pursuant to new section 302P(2) may determine that even a statutory declaration is not appropriate donor information).[52] It is difficult to see how the requirement in the present Bill is at all workable for organisations who rely on numerous small donations rather than large grants from funding bodies. For example, an organisation would need to obtain a statutory declaration from a person when an individual signed up for a $25/month donation online or over the phone.

61. Additionally, as referred to above, registered charities and unions which are "political campaigners" are also required to maintain at least two separate bank accounts: one for "political expenditure" and one for other expenditure. These entities are not to pay gifts from

[43] New ss 287F(4), 287G(4).
[44] New ss 314AB-314AEC.
[45] New s 314AB.
[46] New ss 314AEC(1)(c)(ii) and (2)(b).
[47] New s 314AB(2)(a)(i), referring to new s 314AC.
[48] New ss 314AB(2)(b), 314AEB(1).
[49] New ss 314AB(2)(b)(ii), s 314AEB(1).
[50] New s 314ABA.
[51] New s 314AB(d).
[52] New s 302P.

persons who are not "allowable donors" into an account from which "political expenditure", or gifts to political entities or "political campaigners", are made.[53]

62. Contravention of the donor information and the various financial control obligations placed on both "third party campaigners" and "political campaigners" not only exposes the entity and its financial controller to civil penalties, but exposes the financial controller to prosecution for a serious criminal offence, carrying a maximum term of 10 years imprisonment. [54]

63. **The cumulative effect of these provisions is the imposition of a burdensome set of compliance obligations on a wide range of third party organisations, ranging from large to small organisations. For those organisations, engaging in activities – including the public expression of views – which would constitute "political expenditure" as defined by the Bill, would come with significant consequences.**

64. Some aspects of these administrative obligations, such as the duty to obtain "appropriate donor information", may be understood to support the implementation of the foreign donations ban. However, the Bill does not place these obligations only on those organisations which receive donations captured by the ban or restrictions. Organisations which do not receive any donations from foreign sources would still have to comply with the new compliance regime.

65. Moreover, such onerous obligations with respect to obtaining donor information and separate accounts for gifts at such a low threshold appear out of proportion with the object of the financial donations regime. In implementing the foreign donations regime, this Bill would impose costs on a range of organisations who pose no risk of being conduits for foreign interference. Enforcing those obligations with the threat of imprisonment of financial controllers highlights the heavy-handedness of the Bill.

66. These cumbersome administrative requirements will divert vital resources away from public benefit services that community organisations and charities deliver, such as homelessness or disability support services.

67. More seriously, these compliance requirements, and the accompanying costs and penalties, have the potential to harm the health of public debate in Australia, by affecting the willingness of a wide range of organisations of all sizes to participate in public debate (including contributing their experience and expertise). Rather than incur the costs or run the compliance risks built into the proposed electoral regulation, organisations may choose to refrain from the public expression of views, and thereby avoid being caught by the requirement to register and all that flows from it. The pressure to refrain from engaging in activities that create compliance risks will be especially strong on smaller organisations. This would serve to impoverish public

[53] New s 302K.
[54] New ss 302D, 302E, 302K, 302L.

debate in Australia by discouraging voices that pose no risk of undue or improper influence on Australia's system of elections.

68. We recommend that the Committee consider ways in which the administrative requirements placed on "political campaigners" and "third party campaigners" may be substantially lessened, so as to reduce the compliance burden on civil society organisations. At a minimum, we recommend that the minimum donation for which appropriate donor information is required be increased to the "disclosure threshold" as defined by the Electoral Act (currently $13,500), and that new section 302P be amended to instead specify the precise donor information to be obtained in a manner that is practicable (for example, donor's name, address and a statement confirming that the donor is an "allowable donor").

## 5.2 Disclosure of staff political party membership

69. Other aspects of the administrative burdens imposed on third parties bear little connection to the implementation of the foreign donations regime, and instead appear directed more generally to the regulation of third party participation in electoral activities and public debate.

70. The disclosure obligation in relation to senior staff's political party membership is one example, and it raises particular concerns. The right to freedom of association protects the right of all persons to join political parties.[55] The obligation to disclose staff's party membership impacts on this right for two reasons. First, a person may wish to keep their party membership private for a range of valid reasons. If their membership is to be exposed, they may choose to resign their membership rather than to have it be publicly available. Secondly, a staff member may choose to resign (or not take up) party membership out of concern for reputational risks to their employer. This provision would constitute a significant deterrent to senior staff wishing to be members of political parties.

71. Non-disclosure of political party membership is consistent with current practice in Australia and comparable international jurisdictions. In the context of political party registration in *Mulholland v Australian Electoral Commission* [2004] HCA 41, Justice McHugh recognise concerns in relation to freedom of political association in protecting the identities of political party members.[56] Similarly, Justices Gummow and Hayne commented on the protection of privacy and noted that the Electoral Commissioner is restrained from disclosing membership.[57] While both the United Kingdom, Canada and New Zealand regulate third parties, neither of them goes so far as to require disclosure of staff political party membership.[58]

[55] The Attorney-General's guide to the right to freedom of assembly and association correctly identifies this: <https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/PublicSectorGuidanceSheets/Pages/Righttofreedomofassemblyandassociation.aspx#4what>. See also Parliamentary Joint Committee on Human Rights, Report 4 of 2017, Appendix 2: [4.37].
[56] *Mulholland v Australian Electoral Commission* [2004] HCA 41, McHugh J [113]-[117].
[57] Ibid, Gummow and Hayne JJ [173]-[177].
[58] *Political Parties, Elections and Referendums Act 2000* (UK); *Elections Act,* SC 2000, c 9; *Electoral Act 1993* (NZ).

72. In our view, this burden on freedom of association is unjustified given the breadth of organisations captured by this regime. The Explanatory Memorandum does not explain the rationale for this requirement. All employees owe their employers a duty to act in good faith in the interests of the employer. The Bill seems to assume that a staff member's personal political beliefs will control how they carry out their duties as an employee, and that party members will be biased, or attempt to use the organisations they work for to benefit the parties of which they are members. Additionally, while this measure may deter affected staff from joining parties, it will not affect their political beliefs.

73. We recommend that the obligation to disclose the political party membership of senior staff employed or engaged by a "third party campaigner" or "political campaigner" (in new sections 314AB(2)(b)(i) and 314AEB(2)(a)(ii)) be removed.

## 5.3 Treatment of registered charities

74. In respect of registered charities, these organisations are already subject to separate regulatory obligations pursuant to the *Charities Act 2013* (**Charities Act**), and the *Australian Charities and Not-for-profits Commission Act 2012*, administered by the Australian Charities and Not-for-profits Commission (**ACNC**).

75. By law, charities must be not-for-profit and must only be established for charitable purposes (such as advancing health, education or the environment) that are for the public benefit.[59] Charities cannot have a "purpose of promoting or opposing a political party or candidate for political office."[60]

76. As set out above, public advocacy by charities (and other community organisations) is a vital element of a healthy democracy. The High Court has recognised that engaging in the public expression of views aimed towards legislative and political change is a lawful charitable purpose.[61] This is now reflected in the list of charitable purposes in the Charities Act, which includes the "the purpose of promoting or opposing a change to any matter established by law, policy or practice" in furtherance of any of the charitable purposes listed in the Act.[62] Guidance issued by the ACNC supports public advocacy so long as it is directed at achieving a charity's charitable purpose, which must be for the public benefit.[63]

[59] See the ACNC guidance here: www.acnc.gov.au/ACNC/Register_my_charity/Who_can_register/Char_def/ACNC/Edu/Edu_Char_def.aspx

[60] *Charities Act 2013*, s 11(b).

[61] *Aid/Watch Incorporated v Commissioner of Taxation* (2010) 241 CLR 539, 556-557.

[62] *Charities Act 2013*, s 12.

[63] See the ACNC guidance here: www.acnc.gov.au/ACNC/Register_my_charity/Who_can_register/What_char_purp/ACNC/Reg/Advocacy.aspx

77. The Bill would characterise as "political expenditure" activities that are within the lawful purposes of registered charities. Where charities incurred "political expenditure" over the relevant low threshold it would require these charities to register as either "political campaigners" or "third party campaigners", and place a significant compliance burden on their collection of donations. Additionally, the Bill, in the manner it defines "political purpose" would treat the (permissible) public expression of views by charities as constituting a political purpose, which sits uncomfortably with the prohibition on charities (under charities regulation) from promoting or opposing political candidates or parties.

78. In our view, for charities in particular, the Bill is completely disproportionate. Charities are already subject to regulation that keeps them at a certain distance from electoral campaigning and electoral outcomes, and that monitors whether these entities pursue the activities for which they were established. They are in turn particularly dependent on donations, presenting charities with a real disincentive to engage in types of activities included in the definition of "political expenditure", including the public expression of views on the issues to which they are dedicated. This burden on the freedom of political communication across all types of charities has not been justified, particularly in the absence of any evidence of a threat of foreign interference in Australian elections exerted through charitable organisations.

79. We recommend that charities should be exempt from the foreign donations regime proposed in this Bill, which applies equally to philanthropic donors. This recommendation is explained further within the options for rebalancing the foreign donations ban/restrictions, set out in Part 7 below.

# 6. Associated entities

80. Under the current law, an associated entity is defined as:

(a) an entity that is controlled by one or more registered political parties; or

(b) an entity that operates wholly, or to a significant extent, for the benefit of one or more registered political parties; or

(c) an entity that is a financial member of a registered political party; or

(d) an entity on whose behalf another person is a financial member of a registered political party; or

(e) an entity that has voting rights in a registered political party; or

(f) an entity on whose behalf another person has voting rights in a registered political party.

81. The Bill proposes to expand the category of associated entity in new section 287H, by specifying when an entity will be deemed to be operating "wholly, or to a significant extent, for the benefit of one or more registered political parties" (new subsection 287H(5)).

82. New subsection 287H(5) provides, in effect, that an entity will be deemed an associated entity of one or more political parties if certain circumstances are met. These circumstances include:

a) the entity, or an officer of the **entity acting in his or her actual or apparent authority, has stated (in any form and whether publicly or privately)** that the entity is to operate:

(i) for the benefit of one or more registered political parties; or

(ii) to the detriment of one or more registered political parties in a way that benefits one or more other registered political parties; or

(iii) for the benefit of a candidate in an election who is endorsed by a registered political party; or

(iv) to the detriment of a candidate in an election in a way that benefits one or more registered political parties; or

b) the expenditure incurred by or with the authority of the entity during the relevant financial year is wholly or predominantly political expenditure, and that political expenditure is used wholly or predominantly:

(i) to promote one or more registered political parties, **or the policies of one or more registered political parties**; or

(ii) to oppose one or more registered political parties, **or the policies of one or more registered political parties, in a way that benefits one or more other registered political parties**; or

(iii) to promote a candidate in an election who is endorsed by a registered political party; or

(iv) to oppose a candidate in an election in a way that benefits one or more registered political parties.

83. The concept of an "associated entity" is necessary to capture and regulate entities that are not political parties, but are closely associated to one such that they are engaged in influencing electoral outcomes. Without regulation of associated entities, parties would be free to evade regulation by setting up shadow organisations to undertake partisan activity on their behalf.

84. However, the Bill would extend the definition of associated entity to organisations with no connection in terms of control, membership, finances or voting rights to the political party to which it is deemed to be "associated". The language of new subsection 287H(5) is such that an organisation may not have ever communicated with the particular political party, or even be aware of the existence of the particular political party, yet be required by law to register as an associated entity of that political party.

85. For example, taking new subsection 287H(5)(b): promoting or opposing a party's policies (or multiple parties' policies) could trigger classification as an associated entity. Many issues on which say a charity or a community group may express views could be said to promote or

oppose a particular party's policies, particularly given the vast number of registered political parties that exist in Australia. Consider the following examples:

- A charity set up in the memory of cyclist killed on the road engages in a public campaign for better protections for cyclists in road rules nationally. This promotes the policies of the Australian Cyclists Party.
- A religious charity campaigns against the decriminalisation of abortion. This promotes the policies of the Christian Democratic Party, and others.
- A think-tank publishes and publicises social research supporting a certain model of education funding that is substantially different to the Gonski funding reforms. This opposes the policies of the Australian Labor Party, in a way that may benefit other parties.

86. The application of paragraph (b) is limited by the requirement that the entity's expenditure be wholly or predominantly "political expenditure". However, the definition of "political expenditure" is now so broad (as we explain below) that an organisation which regularly engages in public communication may meet this requirement with ease.

87. Paragraph (a) is also likely to capture organisations which are not genuinely connected with political parties. By its terms, a private statement made outside an officer's actual authority may suffice. It raises the risk that statements made by a senior staff member, said privately and not endorsed by the organisation, could trigger the organisation's classification as an associated entity.

88. It is unclear what is gained, within the scheme of the Bill, by capturing such a broad spectrum of entities in the definition of associated entity. Such organisations are very likely to be "third party campaigners" or "political campaigners". As such, they will already be subject to the obligations to register, to file annual returns and appoint a financial controller, as well as disclosure of the amount of their "political expenditure" and the identities of major donors. The proposed extension of the definition of associated entity would introduce confusion and disrupt the scheme of the Electoral Act, for little evident practical benefit within the regime proposed by the Bill.

89. We recommend that new subsection 287H(5) be removed from the Bill.

# 7. Recommendations

90. We have not identified a simple recommendation to redress the excessive nature of the foreign donations regime set out in the Bill to regulate third parties. This is because the problem is an imbalance in adopting a broad capture of third parties, and then placing heavy obligations on those organisations with severe penalties for non-compliance. That is, the

disproportion of the Bill arises from the interaction of its provisions rather than any single provision alone.

91. However, we are able to identify three options for the Committee to consider as to how the measures in the Bill may be rebalanced.

92. The **first option** is to:

a) substantially increase the threshold of expenditure for inclusion in the foreign donations ban/restriction; and

b) clarify the types of expenditure that are captured within "political expenditure".

93. In respect of (a): this change would produce a more proportionate measure by narrowing the organisations who would be captured by the requirements of registration, disclosure and the foreign donations ban/restrictions. This would at least mean that the Bill would be more targeted towards third parties with substantial electoral influence, and with the resources to absorb the compliance costs of the proposed regulation. We are not convinced that there is a need for two categories ("political campaigners" and "third party campaigners"); one category would appear to be sufficient. We do not suggest a specific threshold but note the submission of Professor Joo-Cheong Tham, who suggests a minimum threshold of $2 million based on his analysis of electoral spending.

94. In respect of (b): we recommend that the definition of "political expenditure", at least for the purposes of third parties, be clarified as applying only to funds spent externally on media, the distribution of materials, advertising and similar categories of spending.

95. The **second option** is to impose the foreign donations ban/restrictions not on the basis of an entity's "political expenditure" but on a narrower basis, that is, expenditure incurred to promote or oppose a political party or a candidate for political office. Under this option, the foreign donations ban and restriction would apply to a narrower set of organisations than those capture by the disclosure obligation under the current law.

96. A regime governing third parties set up on this basis would have a far clearer nexus to election outcomes, posing far less of a risk of regulating the resources available for the public expression of views at large. This second option would also neatly deal with the position of registered charities: registered charities are not permitted to promote or oppose a political party or candidate for office, and therefore would sit outside the regime.[64]

97. It is evident that this second option will not capture an entity that campaigns powerfully on an important electoral issue, which influences electoral outcomes, but does not promote or oppose a particular party or candidate. However, the disclosure regime under the current law operates on the basis of the concept of "political expenditure" (which is already problematic in

[64] Charities Act, s 11(b).

breadth). Accordingly, disclosure as required by the Electoral Act currently will serve to identify whether, in response to the foreign donations ban on political parties, candidates and associated entities, and the foreign donations ban on third parties which promote or oppose a political party or candidate for office, substantial foreign money is directed towards *other* third parties who engage in issue-based campaigning. This would allow Parliament to identify the scope of any threat of foreign interference through civil society organisations, to allow for the proper (and constitutional) targeting of any further restrictions. Disclosure will also itself serve to counter any undue influence, as electors will be able to identify the extent and source of substantial funds (including foreign funds), and reach their own view on the weight to be given to the public expression of views by different actors accordingly.

98. The third option is that, if it is proposed to maintain the broad definition of political expenditure as it stands in the Bill, then at a minimum registered charities be exempt from the foreign donations restrictions and the accompanying requirements with respect to collecting donor information and maintaining separate bank accounts. As set out above, registered charities are subject to a separate regulatory regime which requires them to act for the public benefit and limits their involvement in electoral politics. Any acceptance of internationally-sourced funding must already comply with this regime, administered by a specialist regulator. Moreover, charities are especially reliant on donations, such that additional compliance burdens on gifts would take a particular toll.

99. The elements of these three options may be combined to produce a more proportionate legislative response. We recognise that Bill sets out an intricate scheme with intersecting elements, such that there is no simple fix to the concerns above, and care must be taken to identify the best path forward. We would be pleased to discuss this further with the Committee.

100. Regardless of which option is taken up, we recommend the specific changes to the Bill set out in paragraphs 54, 68, 73 and 89 above.

# Appendix 1: Implied constitutional freedom of political communication

Australia's Constitution partially protects freedom of expression by protecting the implied freedom of political communication. It is not recognised as a personal right or freedom, but instead it is a "freedom of communication between the people concerning political or government matters which enables the people to exercise a free and informed choice as electors".[65] It arises by implication from sections 7 and 24 and related provisions to the Constitution relating to the process of choosing parliamentarians.

The first step to a freedom of political communication analysis is to identify whether a law effectively burdens the implied freedom in its terms, operation or effect.

If the implied freedom is burdened, in order for the law to be constitutional, its purpose must be legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.[66]

Further, to implement the legitimate and compatible purposes, a law that burdens the freedom must be "reasonably appropriate and adapted" to advance a legitimate object.[67] This proportionality test considers whether the law is justified as:

1. suitable (a rational connection to the purpose of the provision),
2. necessary (without an obvious alternative means which would achieve the same objective in a less rights-restrictive way); and
3. adequate in its balance (involving a judgment as to the balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom).[68]

[65] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 559-560. See also: *Coleman v Power* [2004] HCA 39; *McCloy v New South Wales* [2015] HCA 34 and *Brown v Tasmania* [2017] HCA 43.
[66] *Brown v Tasmania* [2017] HCA 43.
[67] *Lange v Australian Broadcasting Corporation* (1997) 189 520; *Coleman v Power* (2004) 220 CLR 1.
[68] See *McCloy v State of New South Wales* [2015] HCA 34 (7 October 2015) per French CJ, Kiefel, Bell and Keane JJ at [2]-[5]. See also *Brown v Tasmania* [2017] HCA 43 (18 October 2017).