Human Rights Law Centre

Submission on proposed amendments to the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017

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Human Rights Law Centre

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1. Introduction

The regulation of third parties within Australia's electoral laws must be done in a manner that ensures that civil society is free to contribute information and ideas to public debate. This is essential to a healthy democracy. It is also important to protect Australian elections from improper foreign influence. The Human Rights Law Centre (**HRLC**) acknowledges the challenge in balancing these interests.

Regrettably, the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017 (**the Bill**) proposed a blunt and heavy-handed approach to the regulation of elections and foreign funding that would have stifled public policy debate in Australia.

In April, this committee made significant and important recommendations to address serious flaws in the Bill. To its credit, the Australian Government has considered these recommendations and listened to the concerns of charities and others and has proposed amendments to the Bill which address many of the Bill's problems.

In particular, we welcome the way the amended Bill distinguishes non-partisan policy advocacy from activities intended to influence voting and we welcome the increased expenditure thresholds to trigger compliance obligations.

We still hold concerns around some aspects of the Bill, including the complexity of the foreign funding restrictions and the requirement for some organisations to disclose political party membership of senior staff. We outline ways to address these concerns in this submission.

Finally, we note that very little time has been afforded for civil society to engage with the latest round of amendments and the explanatory memorandum in particular. Accordingly, we have been unable to address issues such as the interaction between federal and state electoral law which is dealt with in the amended Bill.

2. Recommendations

2.1 More guidance on "electoral matters"

Further consideration should be given to the definition of "electoral matter" in section 4AA, in particular by clarifying that public advocacy that criticises or praises politicians or parties may be for the dominant purpose of influencing the policy positions of politicians and parties as opposed to influencing voters.

As currently drafted, the Bill contains a presumption that the dominant purpose of any communication that is explicitly or implicitly promoting or opposing a political entity or representative is to influence the way electors vote in an election. This presumption should be removed. Often, organisations publicly criticise or praise politicians or parties to promote a particular policy position. While such public

statements may indirectly influence voters, the dominant purpose behind the communication is to secure particular policy outcomes. It is wrong for the legislation to presume that any such public statements are to influence voters. Instead, the purpose should be assessed on a case by case basis, taking into account relevant factors including those outlined in the legislation (such as proximity to an election or a polling place).

Recommendation 1:

- The Bill or the Explanatory Memorandum should provide greater clarity that public advocacy directed at politicians and political entities may not be electoral matters if it is not for the dominant purpose of influencing voters.
- The reverse onus of proof in section 4AA(3) should be removed.

2.2 Calculating "electoral expenditure"

The HRLC welcomes the definition "electoral expenditure" by reference to an "electoral matter" in the Bill and believes that this definition is well suited to distinguish issues based advocacy by charities from actions intended to "influence the way electors vote in an election". However to assist compliance, further guidance is required to enable organisations to determine what costs which are to be considered "electoral expenditure". While some items such as advertising space, hard-copy publication costs or campaigning expenses may be easily identified and valued, other internal organisational costs can be very difficult to calculate for organisations for which electoral activities are just one of a range of activities . For instance, if a charity's employee spends most of their time on service delivery but occasionally works on "electoral matters", is the charity expected to try and calculate the portion of the salary, rent, phone, IT and other internal costs that relate to electoral matters? In order to avoid uncertainty and promote consistent compliance, the Bill should provide clear guidance as to what costs are to be considered "electoral expenditure" including by expressly excluding particular internal costs.

Recommendation 2:

- Further guidance on the calculation of electoral expenditure should be provided in the Bill.

2.3 Removal of requirement to disclose political party membership

The Bill requires political campaigners to provide returns that detail the political membership of the senior staff as part of their annual return to be provided to the Australian Electoral Commission (**AEC**). This requirement is not justified and should be removed.

The right to freedom of association protects the right of all persons to join political parties. The obligation to disclose 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. Accordingly, this provision may deter senior staff wishing to be members of political parties. The ability to privately hold a political affiliation is a pillar principle of our democracy and should not be restricted lightly. Any perceived benefit in obtaining this information is outweighed by the impact on freedom of association and by the dangerous precedent it would set around governments forcing organisations to disclose party membership.

Recommendation 3:

- The requirement to disclose party membership of senior staff should be removed.

2.4 Foreign donation due diligence for "political campaigners"

The current provisions regulating foreign funding to third parties and political campaigners are unnecessarily complex and there are particular problems with section 302F and the way it interacts with other provisions.

We do not object to sections 302D and 302E which establish the core foreign funding ban for third parties and political campaigners in connection with electoral expenditure and electoral matters.

(a) Third parties must not use large foreign donations for electoral expenditure or electoral matter

Section 302E creates an offence if an organisation that is a third party accepts and retains (after 6 weeks) a gift of at least $13,800 (indexed) from a foreign donor if the organisation uses the gift for the purposes of incurring electoral expenditure or for the dominant purpose of creating or communicating electoral matter.

This offence does not apply if the organisation did not know the donor was a foreign donor and:

- the donor confirmed in writing that they are not a foreign donor; and
- the organisation within 6 weeks of receiving the gift, obtained "appropriate donor information" (eg: passport) confirming the donor was not foreign or otherwise took reasonable steps to verify that they are not foreign.

(b) Political campaigners must not accept foreign donations over $1,000

Section 302D creates an offence if a political campaigner accepts and retains (after 6 weeks) a gift of at least $1,000 from a foreign donor.

The offence does not apply if the financial controller of the political campaigner did not know the donor was a foreign donor and:

- for gifts $1,000 to $13,800 (indexed), the donor confirmed in writing that they are not a foreign donor; or
- for gifts over $13,800 (indexed), the financial controller, within 6 weeks of receiving the gift, obtained "appropriate donor information" (eg: passport) confirming the donor was not foreign or otherwise took reasonable steps to verify that they are not foreign.

Further, the offence does not apply if using the gift for the purposes of incurring electoral expenditure, or creating or communicating electoral matter, would be inconsistent with the terms of the gift (with the

evidentiary onus on the person seeking to rely on this defence). This would allow the political campaigner to receive foreign grants and donations that expressly must not be used for electoral expenditure (eg: a grant for medical research).

(c) Section 302F must be removed or significantly amended

Despite the foreign funding ban in sections 302D and 302E, the Bill also has an additional section which bans foreign funding in certain situations.

Section 302F makes it an offence for a third party or political campaigner to receive and retain (after 6 weeks) a gift of any value from a foreign donor, even if that organisation has no knowledge that the gift is from a foreign donor, if the donor intends the gift to be used for electoral expenditure or electoral matter or if the organisation intends to use the gift for electoral expenditure or electoral matter.

This section has the effect of requiring a third party or political campaigner to undertake due diligence on every donation that may be allocated or directed electoral expenditure or electoral matter, otherwise the organisation risks contravening the section if they do not undertake "acceptable action" within 6 weeks.

The lack of an expenditure threshold triggering this section is inconsistent with the regime established in sections 302D and 302E and it is not clear why the exceptions set out in those sections (written affirmation, appropriate donor information or reasonable steps to verify) have not been included in section 302F. The overall impact of section 302F is to create unnecessary complexity and serious compliance problems for third parties and political campaigners. The section will also mean that organisations may commit offences even if they do not know a donor is foreign and even if they take steps to verify donors because there is no knowledge element required in the offence.

Finally, section 302F is inconsistent with the terms of section 302P (which provides in the note that a person may not commit an offence if they obtain appropriate donor information) and the terms of the Explanatory Memorandum which states that offence applies when to organisations that "knowingly receive a gift from a foreign donor."

It appears that the drafting of section 302F does not capture what may have been the policy intent of creating an offence where the organisation knows the donor is foreign and still uses the gift for electoral expenditure.

The following example demonstrates these problem with the current drafting.

(d) Example

A large housing charity wants to promote greater investment in public housing in the lead up to a federal election. It creates an advertisement ranking the parties on their housing policies. The charity reaches out to its supporter base and on social media to call for donations to enable the charity to fund mobile billboards which will be displayed in capital cities before the election.

Under the bill, spending on these ads may be "electoral expenditure" so the cautious approach for compliance purposes is to assume that it is. On that basis, under section 302F, the charity intends to use the donations for the purpose of electoral expenditure.

The charity receives donations via its online donation page, which includes a tick box to affirm that the donor is an Australian citizen or resident. Under section 302F however, that affirmation is no defence to the offence if a foreign donor ticks the box. Nor is it even a defence that the charity obtained appropriate donor information (which in any event is completely impractical for smaller donations).

We note that there are apparently around 650,000 New Zealand citizens living in Australia, most of whom do not have permanent visas and so are treated as "foreign donors" under the Bill. Accordingly, many people may genuinely not know if they are an "Australian resident" under the Bill and may incorrectly affirm that they are.

Further, if the charity receives a cheque in the mail or an electronic funds transfer to its account, it has no way of verifying whether the donor is foreign, and so to protect it from committing an offence, would have to take "acceptable action" by returning the donation or transferring the money to the Commonwealth, even if the amount is small because section 302F is triggered by gifts of any amount.

Recommendation 4:

- Section 302F should be removed.
- In the alternative, it should be redrafted so that that offence does not apply if:
    - the gift is less than the disclosure threshold;
    - the recipient does not know or have reasonable grounds to believe that gift has been made by a foreign donor;
    - the donor affirmed in writing that they are not a foreign donor (this would not be necessary if the offence only applied to gifts above the disclosure threshold); or
    - the recipient obtained appropriate donor information or took reasonable steps to verify that the donor is not foreign.

2.5 Disclosure of charitable donations and double disclosure

The Bill requires organisations that are political campaigners to disclose the name and address of large donors (over $13,800 indexed) regardless of whether those donors contributed to electoral expenditure or completely unrelated activities.

For a large charity, this means there is a significant and unjustified disincentive to undertaking electoral activities that would make it become a political campaigner, particularly if its spending on electoral matters would be a fraction of its spending on other activities to advance its charitable purpose.

As a political campaigner, the charity would need to disclose the names and addresses of all large donors whether or not they contributed to electoral activities. Many charity donors want to remain anonymous or at least not have their address disclosed.

Further, under the Bill, large donors to political campaigners must themselves submit information to the AEC, even though the political campaigner is also required to disclose the donor's details. In the example above, the charity would need to disclose its large donors to the AEC and those donors would themselves have to submit information to the AEC.

So an Australian philanthropist who gives $15,000 for Aboriginal education services to a large Australian charity that spends over $500,000 in a year on electoral advocacy around Aboriginal and Torres Strait Islander welfare, must have their name and address disclosed to the AEC and must themselves also submit a return to the AEC.

This will be a significant disincentive to donors and will mischaracterise charitable donations as political contributions. It is also unclear how duplicating donation disclosure obligations increases transparency or assists the Bill's aims of ensuring only Australians are influencing Australian elections.

One option to address this to exempt the disclosure of non-electoral donations where the organisation's electoral expenditure in a financial year is less than a nominated percentage of its total expenditure (for example one-third). A measure of this nature would avoid the disclosure of a donors who donate for non-electoral purposes to charities which undertake electoral activities as only a small part of other charitable activities.

Recommendation 5:

- Remove the obligation for political campaigners to disclose donations which are unrelated to electoral expenditure (at least for organisations for which electoral expenditure is less than a prescribed percentage of their annual expenditure).

Recommendation 6:

- Remove the obligation for donors to political campaigners to provide information to the AEC in addition to the disclosures required to be provided by political campaigners.