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Submission: – *Telecommunications Legislation Amendment (Unsolicited Communications) Bill 2019* (Cth)

This submission responds to the invitation by the Senate Environment and Communications Legislation Committee for public comment on the *Telecommunications Legislation Amendment (Unsolicited Communications) Bill 2019* (Cth).

Summary

In summary the proposed amendments are long overdue and demonstrably will be supported by most Australians. I endorse the specific drafting rather than merely the Bill's general intent.

The amendments are an appropriate response to wide community concern about both invasive communications and about the 'fake news' phenomenon in which individuals and other entities seek an advantage through dissemination of harmful information under the guise of anonymity or pseudonymity.

Change is not contrary to the Australian Constitution or foundational international human rights agreements. It will strengthen rather than erode democratic processes and philanthropy by ordinary Australians in an era where there is increasing public disengagement.

Basis

The following paragraphs reflect my activity as a teacher of consumer protection, charity regulation, telecommunications and privacy law at the University of Canberra over the past decade and as author of numerous scholarly/practitioner publications relevant to the current inquiry.

They are consistent with submissions to a range of parliamentary committees, law reform commissions and the Australian Communications & Media Authority over that period, including comment on the performance of the *Spam Act 2003* (Cth) and misuse of the Integrated Public Number Database. Those submissions centre on privacy (on occasion as a representative of the Australian Privacy Foundation, the nation's preeminent civil society body concerned with privacy) and the regulation of digital networks to restrict spam and other unwanted messages. This submission also draws on current research examining legal frameworks in Australia, South Korea and elsewhere regarding the impacts and regulation of 'fake news'.

This submission does not represent what would be reasonably construed as a substantive conflict of interest. It is made on an independent basis. I am happy to address any of the Committee's specific concerns.

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Submission: Senate Inquiry into the *Telecommunications Legislation Amendment (Unsolicited Communications) Bill 2019* (Cth)

Introduction

The Bill offers a practical, proportionate and necessary 'truth in communication' and 'freedom from inappropriate electronic interference' mechanism that addresses a systemic weakness in Commonwealth electoral, charities and telecommunication law. That weakness has been inappropriately exploited by political parties and other entities seeking to influence the national electoral regime. It has also been exploited by entities in the philanthropic sector that mistake administrative convenience (or the commercial interests of service providers) with what is legitimate.

In strengthening a fit-for-purpose progressive political system the Bill should go further and, in the absence of a justiciable right to privacy enshrined in a national Bill of Rights, provide for a broader restriction of use by political parties of privileged access to the Integrated Public Number Database. That restriction has been recurrently highlighted by civil society highlighted over the past decade and will offset the growing democratic deficit that results in political polarisation, disengagement and deep distrust of the mainstream political parties. In terms of encouraging best practice in the charities sector the Bill might go further and enshrine an opt-in rather than the proposed opt-out scheme.

The following paragraphs address specific aspects of the Bill –

- Restriction is feasible and necessary
- Identification and enforcement to build trust
- Fakes
- Misuse of the IPND
- Charities
- Resourcing

Issue: Is restriction feasible and necessary?

As both the Australian Law Reform Commission and the Attorney-General's Department have recurrently stated there is no exhaustive freedom of communication in Australia. In a liberal democratic state, where we both respect and encourage the autonomy of capable adults, we cherish the freedom of individuals to participate in political processes (through for example membership of a registered political party or support for advocacy groups) and as a corollary to choose not to endorse or receive political communications, including print and electronic messages. People are free to shut their doors when faced by doorknockers, switch to another television/radio channel and signal that junk mail – unsolicited promotional content – should not be placed in mailboxes.

There is strong support in the community for restrictions on unsolicited voice contact via phones. That support is manifest in both the *Do Not Call Register Act 2006* (Cth), which has been the subject of a succession of inquiries by ACMA and parliamentary committees and is one of the more popular statutes of the past twenty years, and the *Spam Act 2003* (Cth),.[1]

[1] As of late 2019 some 12 million numbers were registered under the Do Not Call scheme.

Support for restriction on interruptions and other annoyance is also evident in the ongoing move by ordinary Australians – several million people – to go 'ex directory' (ie not share their numbers through the White Pages) as a way of offsetting the weakness in the 2006 Act. We see similar support for the *Spam Act 2003* (Cth), a Commonwealth enactment that is not wholly effective but is very useful in minimising electronic junk mail.[2] That is important given that all government agencies, all universities, all hospitals and most Australian businesses rely heavily on electronic mail.

In beginning this submission I noted that there is no exhaustive freedom of communication. The High Court has found an implied freedom of political communication (something differentiated from commercial activity). In a succession of judgments that range from the so-called Adelaide Street Preachers Case[3] through to claims by gunman Man Haron Monis[4] the Court has found that restrictions on what is claimed to be political communication is permissible is proportionate and fitted to the circumstances.

The Bill offers a mechanism that strengthens rather than erodes human rights, given that privacy as a human right is in essence a freedom from inappropriate interference.

As stated in Senator Griff's speech,

> This bill gives back some power to the people. It seeks to give consumers and voters more control over unsolicited electronic and telephone communication from political parties and registered charities, which currently enjoy broad exemptions from laws that otherwise prohibit or limit telemarketing calls and spam messages.

The Bill does not prohibit the provision of information but rather provides consumers with a choice as to what information they receive, from whom they receive it and how they receive it. Neither the Universal Declaration of Human Rights nor the International Covenant on Civil & Political Rights (ICCPR) and the International Covenant on Economic, Social & Cultural Rights (ICESCR) require Australians to listen and embrace political communications – and more broadly to engage in political activity. They are not required to engage in philanthropic gifting and should be free of interference by entities engaged in fundraising. The proposed amendments enshrine choice (which as later paragraphs note might be enshrined more robustly) and build trust.

This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) and more broadly with foundational rights statutes in Queensland, Victoria and the Australian Capital Territory.

As things stand political entities are free to spam anyone who has a phone and to keep spamming those individuals on a targeted or untargeted basis. Senator Griff has aptly pointed to large-scale SMS spam by Clive Palmer. The only current constraints on that unwanted messaging are the size of the sender's wallet – apparently not a major problem for Palmer, albeit his former employees might wonder about his allocation of resources – and the sender's indifference to public criticism.[5]

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[2] *Spam Act 2006* (Cth) s 5 characterises unsolicited commercial electronic messages as encompassing communication sent via email, instant messaging, SMS and MMS.

[3] *Attorney-General (SA) v Corporation of the City of Adelaide* [2013] HCA 3. See also *Kathleen Clubb v Alyce Edwards and Anor; John Graham Preston v Elizabeth Avery and Anor* [2019] HCA 11.

[4] *Monis v The Queen* [2013] HCA.

[5] The cost of robospamming/robocalling a targeted list of recipients or every number in Australia (irrespective of whether that number is live, domestic or corporate) is fundamentally lower than the cost of traditional political mailouts. As things stand the main barrier to automated electronic messaging is recipient annoyance, not the sender's piggybank.

The Bill responds to that inappropriate freedom by requiring that any electronic electoral message must include a functional unsubscribe function, with a clear statement alerting recipients that they can unsubscribe from further electronic communications through an electronic 'opt out' link – the same model used for non-political marketing.

The Bill should provide for a review of the legislation within twelve months after a general election, allowing both the community and Parliament to evaluate whether the amendments have been effective, including for example whether parties/individuals are subverting the rules by using proxies (as has been the practice in the United States).

Issue: Identification and enforcement to build trust

It is axiomatic that electronic political messaging must correctly identify the sender and enable accountability in an era of electronic fake news. The history of misrepresentation in Commonwealth, state and territory elections – where for example voters have received statements in traditional mailouts that are clearly false – signals the need for meaningful penalties under Australian electoral legislation. A trivial fine does not deter misbehaviour.

Sadly it is no longer the case that all candidates (and all interests associated with candidates) will play fairly; deception is becoming institutionalised and accepted. I thus note the Federal Court's recent statements regarding the Ag Director of the Victorian Liberal Party –

> On the evidence we find that Mr Frost caused or authorised the printing, publishing and distribution of the corflutes which were matters or things that were likely to mislead or deceive an elector in relation to the casting of a vote. ....
>
> In our view, the corflutes are properly read, not as encouragement to vote 1 Liberal, but as a statement first, that to vote correctly (that is validly), one must vote 1 Liberal and, secondly, that there was an official instruction of the AEC that electors must cast their votes as indicated. ... [Mr Frost] had full knowledge of the essence of the misrepresentation that the corflute appeared to be a sign of the AEC. ...
>
> The deliberateness of the attempt to make the sign look like an AEC sign by someone in Mr Frost's position bespeaks a view of someone with experience in political campaigning that there was some advantage in doing so

In that instance we are concerned with a senior official, not an over-enthusiastic volunteer or naïve work experience kid. Meaningful sanctions are necessary and should be enforced.

A requirement for transparency will presumably disquiet some campaign staff, on the basis that identification takes up 'real estate' in messages and minimises opportunities for mischief. A rejoinder to such criticism is the Government's recurrent justification for the erosion of privacy (and thus ongoing disregard of human rights and disrespect of Australian citizens): *if you have nothing to hide you have nothing to fear*.

In terms of electoral activity if you are obfuscating or deceiving Australian voters and observers are legitimately entitled to question both what is going on and – thus informed – to deny you their support. Sunlight remains the best disinfectant for the dishonesty that results in political disengagement.

In building trust political parties might voluntarily go further and on a timely basis release details of the scale, targeting, content and cost of their electronic messaging. Such disclosure is within their capacity and gives depth to what might otherwise be a purely formal regime given the derisory scale of penalties under the *Commonwealth Electoral Act 1918* (Cth). Parties in respecting both liberal democratic political processes and electors should have no hesitation in fully disclosing how they operate and who funds them.

Issue: Fakes

The Bill appropriately seeks to amend the *Commonwealth Electoral Act 1918* (Cth) to require actors performing in electoral voice calls to be identified as actors. That requirement is again a matter of trust. It should be endorsed by the Committee, bearing in mind the responsibility of Committee members is to the people of Australia rather than to their political parties. It is not an amendment that is constitutionally impermissible, that will impede inordinate cost or otherwise inhibit legitimate political communication.

As the Senator aptly comments, if parties have to rely on pretence (and implicitly on fear) – a feature of the US robocalling 'polls' and ' scare ads'[6] – their arguments lack merit and we should be unsurprised if voters generally regard both candidates and the parties with an increasing degree of contempt or disengagement, evident in studies indicating that politicians have the same trust rating as used-car or aluminium cladding salespeople, in contrast to ambos, firies, nurses and primary school teachers.

Issue: Misuse of the IPND

The proposed amendments are modest and regrettably, but perhaps understandably, does not address the elephant in the committee room: the extraordinary access by politicians and associates to the Integrated Public Number Database (IPND) under telecommunications law alongside the wholesale exemption under privacy law.[7]

As things stand there is privileged access to the 'master directory' (including silent numbers) for

> research regarding an electoral matter conducted by a registered political party, a political representative, a candidate in an election for a parliament or a local government authority or a person on behalf of such a party, representative or candidate, where the research is not conducted primarily for a commercial purpose

'Research' is not defined.

Politicians have a range of mechanisms to identify and engage with party members, with people who have expressed an interest in particular issues and with members of the broader community. The current regime regarding the IPND is disrespectful of privacy, as highlighted by the Australian Law Reform Commission and the Australian Privacy Foundation among others. It is administratively convenient for political parties and associates but that convenience is not a persuasive justification, particularly given concerns that all major parties are emulating practice in the United States by compiling and using comprehensive sophisticated databases of voter interests.

It is desirable that Australia restrict political use of the IPND. A first step should be disclosure by candidates/parties of how the IPND is being used. Transparency will increase trust in political processes and reduce disengagement.[8]

Voters should have enforceable rights of access under the *Privacy Act 1988* (Cth) to information that relates to them and is held by political parties or the service providers who assist those parties/candidates. Other than inconvenience there is no reason why individuals

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[6] See for example Glenn Kefford and Linus Power, 'Robo-call usage by Australian political parties' (2014) 47(1) *Communication, Politics & Culture* 1.

[7] *Privacy Act 1988* (Cth) s 7C provides an exemption from the Act for politicians or political organisations, and their contractors, subcontractors and volunteers, in relation to electoral matters

[8] Colin Bennett and Smith Oduro Marfo, 'Privacy, Voter Surveillance and Democratic Engagement: Challenges for Data Protection Authorities' in (2019) International Conference of Data Protection and Privacy Commissioners (ICDPPC).

cannot see what information about them is held by political entities and gain a sense of how that information is used.

Issue: Charities

The public response to recent floods and bushfires has demonstrated that ordinary Australians, unconcerned about 'charity-washing'[9] their personal/corporate reputations or gaining another advantage, are prepared to reach into their pockets and gift generously to what they deem to be worthy causes.[10]

The response also demonstrates a growing wariness among ordinary Australians about potential misuse of money and other assets gifted during charitable fundraising campaigns, including concern that some charities are 'banking' funds for use in their ongoing operation (in some instance their administration) rather than directing money quickly and efficiently to people in need as per promotional statements during those campaigns.

That wariness is unsurprising given recognition by many Australians, whether through discussion with service providers (eg the rent-a-collector 'chuggers' who accost people in public places)[11] or through media reports about corruption and misuse of resources in entities that range from the NSW RSL through to Belle Gibson, that much giving is absorbed by 'administrative costs' or otherwise wasted.[12] Trust and generosity are exploited. That exploitation is often inadequately addressed by the national Australian Charities & Not-for-Profits Commission.

Wariness coexists with the pervasive annoyance highlighted by the Senator regarding telemarketing by charities. Much of that marketing primarily benefits commercial service providers. It is founded on exemption of the philanthropic sector from restrictions faced by other marketers. The Bill accordingly and legitimately offers people a mechanism to protect themselves from interference. It does not prevent registered charities from contacting supporters. It will instead allow people to opt out, through the Do Not Call scheme,[13] from receiving unsolicited and unwanted messages from charities or their proxies. That opt out as a privacy mechanism is consistent with research indicating that charities are the main source of unwanted calls and that ordinary people consider that the contact is especially annoying.

There is no reason to believe that removing the exemption enjoyed by charities will fundamentally reduce charitable giving, imperilling the operation of philanthropic bodies or tacitly shifting burdens to taxpayers. Instead, the proposed amendment will serve to encourage a shift to best practice. It will be welcomed by consumers and build trust in those organisations that are prepared to engage respectfully and on occasion creatively with donors.

It is important to note that the proposed amendments will not stop *all* electronic contact by charities (directly or service providers) with potential/actual supporters. It will instead allow

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[9] Charity-washing is a phenomenon akin to Greenwashing, with wealth individuals and corporations sanitise their personal/institutional reputations or otherwise gain an advantage through highly visible gifting to worthy causes or disadvantaged individuals. It is not altruistic, in contrast to most gifting by ordinary people. It is instead a manifestation of marketing and of seeking benefit from governments in relation to decision-making about matters such as approval of project development.

[10] The Australian Charities & Not-For-Profits Commission recently claimed for example that the sector raises $140 billion per year. Philanthropy Australia in contrast claimed 14.9 million Australian adults (80.8%) gave an aggregate $12.5 billion to charities and NFP organisations over 12 months in 2015-16.

[11] Disregard of best practice by leading charities is evident in their use of Appco Group and Australian Sales & Promotions which have gained attention in connection with sham contracting litigation and penalties under the auspices of the Australian Competition & Consumer Commission.

[12] It remains surprising that charities are not required to use the free National Standard Chart of Accounts.

[13] *Do Not Call Register Act 2006* (Cth).

people to indicate that they do not want to be contacted. That indication will require action on the part of recipients of messages from charities. The default position will be that messages are accepted and can be sent unless the consumer indicates otherwise.

It is also important to note that charities will continue to have many opportunities to promote their services and differentiate their activity from that of their competitors. The Bill simply allows consumers to protect themselves from electronic interference, consistent with the recognition in international human rights law of the personal sphere – a part of life in which people should legitimately be able to turn off.

In practice the Bill offers a wake-up call to the Australian philanthropic sector. It challenges both individual charities and the overall sector to move to best practice. There are better ways of seeking gifts from generous Australians than pestering everyone by phone. Charities that look beyond such blunt-force approaches will in my view be better placed to secure ongoing/special support than their lazier peers.

As with the above comments the amendment should be publicly evaluated after it has been in operation. That evaluation offers a mechanism for determining whether an opt-in scheme is desired by most consumers, in other words people indicating that they welcome fund-raising SMS, MMS, voicecalls (by robots or callcentre staff) or email. It is likely that the philanthropic sector will be disquieted by evidence that Australians are generous but so do not want to be pestered that they opt out of contact.

Resourcing

The Bill is appropriately silent about funding of the regime, in other words does not attempt to mandate special funding of the ACMA or another agency.

In moving to a progressive communications regime that addresses evident community concern regarding messaging by political and philanthropic entities it is however important to consider the experience of Australian watchdogs such as the Office of the Australian Information Commissioner and Therapeutic Goods Administration. The performance of those regulators has been significantly inhibited by ongoing under-resourcing, which among other things results in delayed responses or non-responses to complaints and queries by consumers.

If the Bill is enacted it is essentially that ACMA be appropriately staffed. A failure to do so will result in ‘potemkin legislation’, ie a regime that looks good on paper but is ineffective in practice and thereby results in disillusionment on the part of consumers alongside disregard by opportunistic enterprises. Funding of regulators is a legitimate and necessary cost of any regulatory regime that addresses an environment where self-regulation has been ineffective.