



## Electoral Commissioner

Committee Secretary  
Joint Standing Committee on Electoral Matters

By email: [em@aph.gov.au](mailto:em@aph.gov.au)

Dear Committee Secretary,

### **Supplementary submissions to JSCEM on potential reforms to the authorisation requirements to address changing communication methods and technology.**

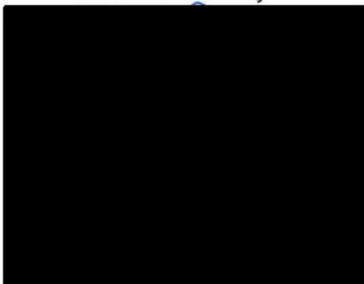
The Australian Electoral Commission (AEC) welcomes the opportunity to make a supplementary submission to the Joint Standing Committee on Electoral Matters' (JSCEM) inquiry into the conduct of the 2025 federal election.

This supplementary submission is intended to assist JSCEM to consider the inquiry term of reference: *to inquire into the suitability of the current authorisation framework and requirements, having regard to the evolution of communication methods and technology.*

Following two recent court decisions, *Laming v Electoral Commissioner* [2025] HCA 31, and *Electoral Commissioner v McQuestin* [2025] FCAFC 188, on the interpretation of section 321D of the *Commonwealth Electoral Act 1918* (Electoral Act), the AEC asks the JSCEM to consider the effectiveness of the civil penalty regime for authorisations. In particular to consider whether the enforcement requirements in the Electoral Act are sufficient to deter non-compliance and to address the seriousness of certain non-compliance with the authorisation requirements.

Please find enclosed the AEC's supplementary submission, to support our submission of 15 October 2025. I look forward to assisting the Committee in your deliberations of this matter.

Yours sincerely





## Supplementary submission

### Reforms to Part XXA of the *Commonwealth Electoral Act 1918* (Cth) to make the authorisation requirements more suitable to address changing communication methods and technology

Further to the Australian Electoral Commission's (AEC) initial submission to the Joint Standing Committee on Electoral Matters (JSCEM) inquiry into and report on all aspects of the conduct of the 2025 federal election, the AEC submits that the current authorisation framework, set out in Part XXA of the *Commonwealth Electoral Act 1918* (Cth) (**Electoral Act**) is not adequately suitable for regulating evolving electoral communication methods and technologies. Two recent Court decisions have demonstrated deficiencies with the authorisation requirements.

The effect of the decisions of the High Court in *Laming v Electoral Commissioner of the Australian Electoral Commission* [2025] HCA 31 (**Laming**) and the Full Federal Court in *Electoral Commissioner v McQuestin* [2025] FCAFC 188 (**McQuestin**), is that the authorisation requirements, and the quantum of penalties that a Court is able to impose, do not have the regulatory effect intended by Parliament when the Electoral Act was amended to establish a civil penalty regime in 2018. The penalties for not complying with the authorisation requirements do not establish a sufficient deterrent to discourage people or entities (including political parties) from communicating unauthorised electoral matter. Justice Edelman wrote in his dissent in *Laming* that the High Court has now interpreted digital communications as distinct from physical or "old media" type communications, which in his view was contrary to Parliament's intention at [130]:

*Unless or until any amendment is made by the Commonwealth Parliament, there will now be a radical change in the digital equivalent of the treatment, which has endured for more than a century, of a political campaigner who would have committed 1,000 offences by dropping 1,000 contravening pamphlets in letterboxes. The political campaigner of today will commit only a single contravention by an electronic message transmitted and received by 1,000, 10,000, 100,000 or 1,000,000 unique profiles on Facebook, or on TikTok, Reddit, or any other social media. The same reasoning applies, by necessary analogy, to transmissions by text message or email; indeed, as is plain from the passages quoted from JSCEM Report in the introduction to these reasons, Facebook posts were intended to be treated in the same way as text messages. The democratic roadblock presented by today's interpretation of s 321D, from which I dissent, can be appreciated without speaking of the penalty of \$25,200 for a single contravention of that provision having become "an acceptable cost of doing business".*

The majority's decision in *Laming* means that electoral communications made on social media, the fastest growing, easiest and most cost-effective platform for electoral participants to communicate to electors, may be subject to lesser regulatory consequences for failing to comply with the authorisation requirements than for printed communications. For the 2025 Federal Election, the AEC reviewed complaints about 7,418 electoral communications, of which 2,606 related to social media communications (approximately 35% of communications reviewed). Compared to the 2022 Federal Election, the AEC reviewed complaints regarding 192 social media communications out of a total of 900 communications reviewed (approximately 21% of communications reviewed).

In *McQuestin*, the majority of the Court (2:1) determined that the arguably modest penalty ordered for contraventions of section 321D of the Electoral Act was within the scope of Parliament's intention for deterring such contraventions. Notably, the majority of the Court ruled:

*The maximum penalty of \$26,640 may be regarded as modest in relative terms to maximum penalties imposed under other Commonwealth regulatory regimes. It may be*

*that the quantum of the maximum penalty here bears no relationship to the expenditure that major political parties may be expected to, and do, outlay in the running of a federal election campaign...Nevertheless, Parliament has enacted the maximum penalty that it has.*

In his dissenting judgment, Justice Rangiah made two significant observations. First, in the context of the total amount paid for the four advertisements (\$14,000), the total receipts of the Liberal Party of Victoria for 2021/2022 totalling \$21.1 million, and the total payments made in the same financial year totalling \$24.4 million for which Justice Rangiah inferred much of which must have been for discretionary political advertising:

*... an aggregate penalty of \$40,000 does not seem adequate to achieve specific deterrence, nor deterrence of like contraventions by other major political organisations.*

And secondly:

*A contravention of s 321D of the Electoral Act must be regarded as more serious when it involves the default of a major political party than, for example, a similar contravention by an individual acting without the support and resources of a major political party...The appropriate penalty to be imposed on Mr McQuestin must be determined by reference to the conduct of a sophisticated political organisation.*

The effect of the majority decision in McQuestin highlights two related, but distinct, issues with the current application of the civil penalty regime for contraventions of section 321D of the Electoral Act. First, the penalties available to the Court are not sufficient to achieve specific and general deterrence against future contraventions in the current and future communications environment. Second, that major political parties attract a lesser penalty that incorporated associations by virtue of their constitutions that outlines they are unincorporated associations thus requiring court proceedings to be commenced against and penalties to be applied to the individual officer that authorised the non-compliant material. Contraventions by such entities should, subject to the particular circumstances, be considered egregious by professional and regular communicators of electoral matter.

The AEC's first submission to JSCEM, at paragraph 70, highlighted nine issues with the authorisation scheme for JSCEM to consider. The courts' decisions in Laming and McQuestion go towards the second of the nine issues, being:

*b) clarifying the nature of contraventions of the authorisation requirements and/or strengthening penalties for unauthorised electoral communications, particularly having regard to the recent High Court decision in Laming v Electoral Commissioner of the Australian Electoral Commission [2025] HCA 31*

The AEC further submits in relation to that point that Part XXA of the Electoral Act could be amended to ensure the same authorisation requirements apply to all communications of electoral matter, digital or by traditional media, and that penalties available to the Court are of a sufficient deterrent value to discourage non-compliance. Such amendment would seek to address the deficiencies with the authorisation requirements arising from the decisions in Laming and McQuestin and promote transparency in the communication of electoral matter at future federal elections.

To ensure the authorisation requirements in Part XXA of the Electoral Act can achieve transparency about the source of electoral communications by regulating evolving communication methods and technology, s 321D of the Electoral Act could be amended in one or more of the following ways.

- i. **Clarify that section 321D is contravened each time a communication is transmitted (i.e. received, viewed or read) or intended to be transmitted to another person in contravention of the requirements, rather than each time a communication is approved without compliant authorisation particulars**

Such an amendment would enable a court to penalise contraventions at a level which reflects the actual harm caused by non-compliant communications, particularly where social

media posts can go viral or be communicated to thousands of followers with the single click of a button and expand broader than the original intended audience, and a newspaper advertisement can be printed in thousands of copies (and be seen by thousands of persons).

While this amendment would increase the number of contraventions, the principle that civil penalty regimes are to be applied having regard to concepts such as totality, parity and course of conduct would be expected to have a substantial ameliorating effect on any ultimate penalty imposed. Similarly to other regulators utilising a fair and reasonable regulatory approach, the AEC would anticipate making submissions to the Court in a relevant case that it is appropriate to group contraventions into courses of conduct such that the penalty sought is referable to the whole of the wrongdoing. The maximum penalty available to be imposed for the course of conduct would be higher however than the statutory maximum penalty for a single contravention.

**ii. Increase the maximum penalty from 120 penalty units**

The current maximum penalty of 120 penalty units for an individual (\$39,600 for contraventions on or after 7 November 2024) or 600 penalty units for a body corporate (\$198,000 for contraventions on or after 7 November 2024) is arguably insufficient to provide general and/or specific deterrence to ensure compliance with the authorisation requirements in section 321D. This is of particular concern where the courts consider communication of unauthorised electoral matter to one or many electors will only amount to one contravention if the communication arises from a single act. Comparatively, where a broadcast licensee broadcasts unauthorised electoral communications, they are subject to maximum civil penalties of 2,000 penalty units, under section 140A (read with ss 205F(4) and 139) of the *Broadcasting Services Act 1992* (Cth). This is a substantial difference; a broadcaster of an unauthorised political communication is liable for a penalty of up to 16 times higher than a disclosure entity where an unauthorised communication of electoral matter is broadcast on television or radio.

Following *McQuestin*, a person communicating electoral matter, who fails to comply with the authorisation requirements, may argue that a penalty well below the current statutory maximum will be of sufficient deterrent value, reflecting the modest maximum penalty prescribed by section 321D(5). By increasing the maximum penalty prescribed in section 321D(5) of the Electoral Act, Parliament will ensure that the regulatory requirements in Part XXA carry sufficient deterrent value for non-compliance.

**iii. Introduce an aggravated penalty provision that multiplies the penalty units in certain circumstances**

Another option that could better deter non-compliance with the authorisation requirements would be to increase the maximum penalties in specific aggravating circumstances. An aggravated penalty provision that either:

- i) considers the amount spent on the contravening communication by the entity (where it is known), or
- ii) considers specific circumstances that Parliament assesses as raising the seriousness of a contravention,

would enable a court to impose a penalty that more appropriately responds to the contravening conduct and would be a greater deterrent to contravening section 321D.

An aggravated penalty provision would allow a court to consider whether certain conduct of an individual or entity was so egregious as to warrant a determination that the appropriate penalty order be multiplied by a factor to reflect the seriousness of the offending.

Examples of aggravated penalty provisions in other regulatory schemes are:

- the *Fair Work Act 2009* (Cth) (Fair Work Act), applies a higher maximum penalty for serious contraventions of certain provisions of the Fair Work Act. The maximum penalties set for serious contraventions are 10 times that of ordinary contraventions; and
- the *Privacy Act 1988* (Cth) (Privacy Act) deems that a serious interference with the privacy of an individual attracts a penalty of up to \$2.5 million for an individual or up to 20 times this amount for a body corporate (up to \$50 million). This is significantly more than the standard penalty for interference with the privacy of an individual of up to 2,000 penalty units (currently \$660,000).

Section 557A of the Fair Work Act, defines “serious contraventions” as contraventions involving a person or entity knowingly contravening an offence or being reckless as to whether the contravention would occur.

Section 13G of the Privacy Act sets out eight factors that a court may consider in determining whether a person or entity has engaged in a serious interference with the privacy of an individual.

The funding and disclosure regulatory requirements in Part XX of the Electoral Act establish maximum penalties for non-compliance with the relevant civil penalty provisions as a set number of penalty units or, where the information is known and proven to a court, an amount that is three times the dollar amount (or equivalent) of what has not been disclosed to the AEC as required. A court can apply the higher of those two amounts in considering the appropriate maximum penalty. This would be another way to deter non-compliance with section 321D through an aggravated penalty provision consistent with other parts of the Electoral Act (as described at iii(i) above).

Establishing a regime that substantially increases the penalties for contraventions of Part XXA of the Electoral Act would enable a court to impose penalties that are proportional to the offence and ensure sufficient deterrence against other non-compliance. The options presented above would bring the penalty options in Part XXA in line with Part XX of the Electoral Act and/or with other civil penalty schemes in Commonwealth legislation. For electoral communications, striking the appropriate balance between a sufficient and deterrent penalty and the implied constitutional freedom of political communication will be important. A legislative framework that enables a Court to exercise its judgment and flexibly apply such considerations could achieve such a balance.

**iv. Clarify that certain disclosure entities that do not meet the definition of a body corporate (i.e. many political parties) face the same penalties as a body corporate**

Under the current civil penalties in Part XXA of the Electoral Act, the current maximum penalty for an individual is 120 penalty units for an individual, and 5 times this amount for a body corporate (by application of the *Regulatory Powers (Standard Provisions) Act 2014*). Political parties are generally unincorporated bodies and are not legal persons. As such, the AEC may not bring civil proceedings against an unincorporated political party and rather must file proceedings against the relevant officer or member of a political party who engaged in the contravening conduct e.g. the individual responsible for approving electoral matter on behalf of the political party.

This may be contrary to electors’ expectations that political parties, as active participants in the electoral process, are held to the highest standard in ensuring compliance with the regulatory requirements in the Electoral Act.

Amending the Electoral Act to ensure that the penalties applying to body corporates, would also apply to a notifying entity that is a particular kind of disclosure entity (such as a political party) would significantly address the issues arising in *McQuestin*. This amendment would ensure higher

penalties are able to be imposed where an entity with significant financial means is responsible for communications which do not contain compliant authorisation particulars.