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Senator Linda Reynolds
Chair
Joint Standing Committee on Electoral Matters
Parliament House,
Canberra, ACT, 2600

Dear Senator Reynolds,

Supplementary Submission to Inquiry into the *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017*

It has been brought to my attention that the Australian Electoral Commission (AEC) has provided a response to the Committee in relation to some issues that I raised in my oral evidence and submission before the Committee. I would like to make some observations in relation to that response.

The AEC has noted that the proposed definition of political expenditure (which is tied to ‘political purpose’) in the Bill is the same as that made in the 2017 Amendment Act, which amended s 314AEB of the *Commonwealth Electoral Act*. The earlier 2006 definition of public expenditure in s 314AEB(1)(a)(ii) applied to expenditure incurred on ‘the public expression of views on an issue in an election by any means’. It was amended in 2017 to become ‘the public expression by any means of views on an issue that is, or is likely to be, before electors in an election (whether or not a writ has been issued for the election)’. This same definition is included in the current Bill. The AEC has taken the view that both definitions cover exactly the same field, but that the latter definition clarifies the meaning of the earlier one.

On reading the 2006 definition, I was struck by both its lack of clarity and its potentially extraordinary breadth. What is meant by ‘an issue in an election’? As a matter of English, it barely makes sense. Sense can only be made of it by adding words. It presumably means an issue that is the subject of public debate during an election period because it may influence the way that electors may vote in an election. For example, it would be unreasonable to interpret it as applying to the public expression of views on an issue that arises during an election period but is irrelevant to how people may vote, such as a controversy concerning a local celebrity.

No temporal guidance was given at all in the 2006 definition as to which election or when the public expression of views must occur in relation to that election. It could have covered the public expression of views on an issue in a previous election, or an election that may occur 2 years hence or 20 years in the future. The most reasonable interpretation of the phrase is that it is intended to apply to public expressions of views on an issue that is the subject of public debate

because it may influence how electors vote during a current election period (i.e. in the period commencing upon the issue of the writs). This is because it is only at this time that one can know that it actually is an issue during that election.

The AEC, however, has taken a different view. It has interpreted the 2006 provision as applying to the public expression of views at any time between one election and the next, even though one cannot know at the time that the public expression occurs when the next election will be held and what will be the issues that may influence electors in how they vote at that election. In my view, this is an unreasonable interpretation of the 2006 provision as it gives rise to far too much uncertainty and has a breadth that would appear to go well beyond the purpose of the provision and the Act in which it is situated. I would have expected a court to read down the provision so that it was only applicable to expressions of views during the period of an election. The phrase ‘issue in an election’ provides textual support for such an interpretation. The principle of legality, which supports the common law right of freedom of speech, and the need to interpret legislation in a manner consistent with the implied freedom of political communication, would also support such an interpretation.

Presumably other lawyers took this view too, which is why many organisations that would otherwise be caught according to the AEC’s interpretation of s 314AEB did not provide annual returns under that provision. For example, there does not appear to have been a rush of businesses or other organisations that incurred public expenditure of \$13,000 or more (as indexed) on the issue of same-sex marriage in the past couple of years to submit annual returns under s 314AEB, despite the fact that at the time that expenditure was incurred it was likely that it would be an issue at the next election.¹

The fact that s 314AEB was read by others differently from the way the AEC interpreted it would appear to be supported by the fact that it was considered necessary to amend it to make its application clearer. The 2017 amendment partially addressed the temporal problem by omitting ‘in an election’ and substituting ‘that is, or is likely to be, before electors in an election (whether or not a writ has been issued for the election)’. The Explanatory Memorandum said that this amendment ‘clarifies that to give rise to a need for a return, the public expression of views must relate to an upcoming election rather than a past election’. However, it does much more than that. It makes it clear that it is not confined to the election period by stating ‘whether or not a writ has been issued for the election’. It also makes clear that it applies at a stage when it can only be assessed that an issue is ‘likely’ to be before electors in an election, because that election period has not commenced.

While this clarifies some aspects of the provision, it also widens its application and therefore opens up more temporal uncertainties. How does one assess, at a time two years before an election, what is ‘likely’ to be an issue before electors in that election? Does it matter at all whether it in fact later becomes such an issue, or is it enough that at the time the expenditure was made, it was ‘likely’ to be before the electors at the next election? Is that likelihood to be assessed by reference to a reasonable person, or subjectively, or upon what basis? What if that likelihood is contingent upon

¹ Curiously, an exemption was given in s 10(5) of the *Marriage Law Survey (Additional Safeguards) Act 2017* (Cth) from submitting a return under s 314AEB where the obligation to do so arose from the requirements of s 314AEB(1)(a)(iv) concerning the requirement to make authorisation announcements for the radio or television broadcasting of political matter at the request of another, as imposed by cl 4(2) of Sched 2 of the *Broadcasting Services Act 1992* (Cth). But this exemption was limited to expenditure on broadcasts from 14 September 2017 to 15 November 2017, and it did not extend to any obligation arising under s 314AEB(1)(a)(ii) concerning the public expression of views on an issue in an election. Hence, this is not an answer.

future events? For example, when corporations and other organisations expressed public views in relation to same-sex marriage in 2017, it was ‘likely’ that it would be a matter before the electors at the next election *if* it was not resolved by a plebiscite and/or legislation. If legislation authorising same-sex marriage had not been passed, it would have been ‘likely’ that it would have continued to be an issue at the next election. Now, well after that public expenditure has been incurred, it is more likely that it will not be an issue at the next election. However, it is still possible that it may be an issue in those electorates where the majority voted one way in the plebiscite, but the member voted a different way in Parliament. The point is that it is extremely difficult to assess, at the time expenditure is made on the expression of a public view, whether or not it is likely to be before electors at an election, as this is contingent on numerous unknowable factors.

The AEC has stated that in assessing ‘what issues are before electors, the approach that has been taken by the AEC since the commencement of these provisions in 2006 has been’ to apply seven factors. The first is:

Section 314AEB is interpreted in a way that confines its operation to situations where the “primary or dominant purpose” of the particular expenditures is one of the categories of purposes listed in subsection 314AEB(1).

First, the Act does not say this. It appears to be an invention of the AEC. Secondly, it doesn’t help in working out what is an issue before the electors, because on its face, the AEC was simply asking whether the primary or dominant purpose of the expenditure is ‘the public expression of views on an issue in an election by any means’. This provides no aid to interpretation as it is circular in nature.

It is probable, however, that the AEC is suggesting that the primary or dominant purpose of the expenditure must be the public expression of views for the purpose of seeking to influence the election, rather than for another purpose, such as an academic one or the reporting of current affairs. If so, this is now contradicted by the new definition of ‘political purpose’ set out in the Bill. It excludes expenditure from falling within ‘political expenditure’ if:

- (f) the sole or predominant purpose of the expression of the views, or the communication, broadcast or research, is the reporting of news, the presenting of current affairs or any editorial content in news media; or
- (g) the expression of the views, or the communication, broadcast or research, is solely for genuine satirical, academic or artistic purposes.

If a ‘primary or dominant purpose’ test applied to paragraphs (a) to (e) of the definition, then paragraph (f) would be redundant and paragraph (g) would be providing a much higher hurdle for academics, artists and satirists to meet than anyone else, which would seem an implausible interpretation. On the contrary, the fact that paragraph (g) excludes satirical, academic or artistic purposes when this is the ‘sole’ purpose, shows that the AEC’s test of primary or dominant purpose is incorrect. This is also supported by the fact that the text expressly provides for an exemption based on a ‘sole or predominant purpose’ in paragraph (f) while making no mention of such a test in relation to paragraphs (a) to (e).

The Explanatory Memorandum to the Bill states with respect to the exemptions in paragraphs (f) and (g):

These exemptions are intended to ensure that the press, academia, artists and entertainers are not required to register as a political actor by virtue of carrying on their core business. In order to meet these exemptions, the person incurring the expenditure must not do so in order to affect voting in an election. The news media exemption requires that the sole or predominant purpose must be the reporting of news, or presentation of current affairs and editorial content. The satire, academic and artistic exemption is narrower, requiring that the sole purpose must be those activities. In the event that there are multiple purposes, then the communication cannot be solely for genuine satirical, academic or artistic purposes.

This also seems to contradict the AEC's answer to Mr Morton's question. He asked whether the public expression of views would capture things like a submission to a parliamentary inquiry, and the costs associated with travelling to and attending an inquiry. The AEC responded: 'The dominant and subjective purpose of the public expression of views in this scenario would result in it not giving rise to a disclosure obligation under section 314AEB of the Electoral Act.' Even if that was the case under s 314AEB (which is doubtful), it is clearly not the case under the Bill in question. Paragraph (g) provides that only if the 'sole' purpose of the submission was academic² would a parliamentary submission be exempted. Clearly most, if not all, parliamentary submissions are for multiple purposes, including the purpose of influencing members of the Committee in relation to policy or legislation, and are therefore not solely for academic purposes. According to the Explanatory Memorandum multiple purposes will not result in an exemption.

In the AEC's list of seven factors, the second is that 'incidental expenditure or expenditure for a variety of purposes of which only a minor aspect falls within one of the specified purposes will not be required to be included'. On its website, the AEC states that expenditure on 'administration or travel' is not political expenditure. However, the Act does not say this. It is at least conceivable that expenditure on travel for the sole purpose of attending a venue to publicly express a view (eg before a political rally or before a parliamentary committee or at a public lecture) is expenditure incurred for the purpose of the public expression of views on an issue that is likely to be before the electors in an election. Given that the penalty for getting these types of assessments wrong is 10 years in prison, it is understandable that people will be cautious. It is also incumbent on legislators to make the law as clear as possible in circumstances where the penalties are so high. If it is intended that matters such as travel, administration, salaries and the like are to be excluded, then it would be better to say so rather than rely on the opinion of the AEC.

In its fourth factor the AEC states that there is a distinction between an 'issue before electors in an election' and other 'public issues', but it does not state what that difference is or how one can tell, well before an election, which public issues will be issues before electors in an election. Its fifth factor states that in the absence of an election being called, 'to determine whether or not a matter is likely to be before electors involves an assessment of how topical the issue is and the difference, if any, between the policy platforms of each party'. This may be a particularly difficult assessment to make, because what is 'topical' changes from time to time, dependent on events, and political parties frequently leave it until a short period before an election before announcing their policies. It is not stated who makes this assessment and whether it must be objective or subjective in nature.

² I am assuming for current purposes that parliamentary submissions are not for satirical or artistic purposes and are not for the purpose of reporting news or presenting current affairs.

The sixth factor listed by the AEC is the most interesting. It asserts that ‘an assessment is required to ascertain the subjective purposes behind a specific public expression of the relevant issue’. Hence, what is being considered here is not the assessment of whether an issue will be likely to be before electors at the next election, but rather what is the purpose of making the public expression of a view. These are two different things. This exposes a major drafting flaw in the existing Act and the Bill. The term ‘political expenditure’ is defined as expenditure incurred for one or more ‘political purposes’. However, the definition of ‘political purposes’ is directed not at purposes, but rather actions. It says a ‘political purpose’ means ‘any of the following purposes’, but instead lists actions not purposes, including the public expression by any means of views on an issue that is or is likely to be, before electors in an election. The AEC and the Explanatory Memorandum both seem to read in an assumption that such an act must be for the purpose of seeking to influence voters in the election. This is not, however, stated on the face of the Bill or the Act as amended (at least as far as I have been able to find).

If the Bill instead defined political expenditure as expenditure incurred for the purpose of influencing voters in an election by the means of publicly expressing views on issues before the electors in an election campaign, and clearly defined the period of the campaign,³ then that would resolve quite a few of the problems. If, as the AEC seems to think, public expressions of views are excluded from the definition of ‘political purpose’ when they are made for some ‘primary or dominant purpose’ other than influencing voters in an election, then that should be stated in the Act too and the exceptions in paragraphs (f) and (g) altered accordingly.

There appears to be a gulf between what the AEC thinks the Bill does and what the words on the page say. Words are the servants of intention, so if the intention is different, then the words in the Bill must be altered to reflect them.

Yours sincerely,

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³ For example, it could be defined as a period commencing 6 months before the issue of the writs and concluding on the polling day. In the absence of fixed-term elections, reporting measures would have to be adjusted so that reporting with respect to that 6 month period would occur after the election, so that the precise timing of this period was known. Such a period would provide greater certainty and would be consistent with the AEC’s 7th factor which states that the nearer in time the ‘public expression’ is to the date of the holding of the election, the more likely it will meet the subjective intention of placing an ‘issue before electors in an election’.