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

Dear Senator Reynolds,

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

Please accept this additional supplementary submission to the Committee which comments upon the amendments set out in the exposure draft published last week.

Overall, the revised Bill is a vast improvement upon the Bill as initially introduced. The definitions of 'electoral matter' and 'electoral expenditure' are clearer and the burdens imposed upon third parties have been significantly reduced.

Universities

From the point of view of universities, the exception in proposed s 4AA(5)(b) for communications 'for a dominant purpose that is a satirical, academic, educative or artistic purpose' should be effective in excluding their ordinary academic work from being caught by the Bill. The exceptions in proposed s 4AA(5)(d) and (f) for communications made to Commonwealth public officials and parliamentary committees are also important, as they prevent any expenditure related to the preparation of submissions to parliamentary committees or reports to government agencies on public policy issues being caught by the Bill.

Third parties – issues campaigns

From the point of view of charities and not-for-profit bodies that run 'issues' campaigns on matters of public policy significance, there may still be some concerns, although there have been vast improvements on the previous Bill. The definition of electoral matter in s 4AA has, as previously suggested in my earlier supplementary submission, been amended to state expressly the assumption previously made by the AEC – that it covers matter communicated 'for the dominant purpose of influencing the way electors vote in a [federal] election… including by promoting or opposing' political parties and candidates. This still includes 'issues campaigns' as long as their dominant purpose is to influence the way electors vote in an election, even if the issues campaign does not promote or oppose any political party or candidate. Most issues campaigns (eg campaigns about

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homelessness, the environment and same-sex marriage) have the purpose of influencing public policy, either directly through influencing decision-makers, parliamentarians and political parties, or indirectly by influencing voters to vote for a party that will take action to achieve the particular policy ends. Whether this can be characterised as the dominant purpose may be difficult to assess.

This may be contrasted with the *Charities Act 2013* (Cth), which permits charities to campaign to advance debate about the policies of parties and candidates, including comparing, critiquing or ranking those policies, as long as they do not promote or oppose a party or candidate. The Bill will therefore operate to classify as 'electoral matter', and accordingly 'electoral expenditure', expenditure incurred for the dominant purpose of communicating matter concerning public policy reform if it is communicated for the dominant purpose of influencing the way the electors vote in an election, unless it could be classified within the exemption for communications with a dominant purpose that is 'educative', such as a campaign that seeks to educate people by providing factual information about particular policy issues. It should also be noted that some of the factors mentioned in s 4AA(4) may also be relevant, eg if the next election is a long time away, the communication is not intended to be received by electors near a polling place, and the body making the communication is not a political entity or a political campaigner.

If an issues campaign by a charity fell within the definitions of 'electoral matter' and 'electoral expenditure', however, the consequences are not anywhere near as burdensome as under the previous version of the Bill. It is most unlikely that a charity would fall within the definition of a 'political campaigner' in proposed s 287F, as the relevant thresholds have been raised to electoral expenditure of $500,000 in any one of the previous 3 financial years or $100,000 in a financial year, amounting to at least two-thirds of the revenue of the entity for that year. It is more likely that it would fall within the definition of 'third party' in proposed s 287, as being an entity that in a financial year incurs electoral expenditure of more than the disclosure threshold of $13,800.

Third parties – reporting burdens

The primary burdens imposed on a third party are in proposed ss 314AEB and 314AEC regarding annual returns and proposed ss 302E and 302F regarding gifts to third parties from foreign donors. Proposed s 314AEB requires an annual financial return to be provided to the Electoral Commission setting out the details of the electoral expenditure incurred by the entity during the financial year and a statement concerning its compliance with s 302E. A consequence of the requirement to provide an annual return under proposed s 314AEB is that the third party must be registered on the Transparency Register for three years (s 287N). An additional annual return regarding gifts to the third party is required under proposed s 314AEC if the third party received one or more gifts over the disclosure threshold of $13,800 and these gifts were used to incur electoral expenditure. This return is required to give details as to the relevant amounts, dates, and the details of the donors. Neither requirement for an annual return appears to be overly burdensome.

Third parties – prohibitions on gifts

Proposed s 302E prohibits gifts over the disclosure threshold of $13,800 that are received by third parties from a foreign donor from being used for the purpose of incurring electoral expenditure. A third party must therefore take action to check the status of the donor of amounts greater than the disclosure threshold. To satisfy this requirement, a person must get a written affirmation by the donor that it is not a foreign donor, it must also obtain 'appropriate donor information' under s 302P or take reasonable steps to verify that the donor was not a foreign donor, and it must not know or

have reasonable grounds to believe that the person is a foreign donor. As it is unclear what steps would be regarded as 'resonable' to verify the donor's status, it may be necessary (or at least regarded as safer) to take the steps set out in proposed s 302P.

Under proposed s 302P, a person obtains appropriate donor information if he or she checks an individual's details against the electoral roll. But most charities and other third parties would not have access to the electoral roll, so they will be required to obtain a copy of a person's passport, naturalisation certificate, visa or the like. Some persons may be reluctant to provide copies of such information because of concerns about identity theft and data breaches by charities. When the donor is incorporated, the third party will need to obtain a copy of its certificate of incorporation or its registration with ASIC. When it is not incorporated, it will need to obtain copies of three recent minutes evidencing that high-level decisions are made in Australia. While the requirement for statutory declarations have been removed, this form of checking still seems rather burdensome, so it is likely that third parties would not use donations of amounts over $13,800 for electoral expenditure, except from individuals who are easily ascertainable as Australian citizens. The new provisions, however, are certainly less burdensome than the requirement under the previous version of the Bill for statutory declarations in relation to all donations over $250.

Proposed s 302F – lack of clarity regarding knowledge

The most concerning provision is s 302F. It prohibits third parties (along with political parties, candidates and political campaigners) from receiving gifts from a foreign donor where the foreign donor's purpose is that it be used to incur electoral expenditure or where the gift was accepted with the intention of using the gift for the purposes of electoral expenditure. There is no threshold in relation to such gifts, so a gift of $2 would trigger its application. Proposed s 302F can only apply to gifts under $1000 to political parties, candidates and political campaigners, as they are otherwise prohibited under proposed s 302D from receiving gifts of at least $1000 from foreign donors unless the terms of the gift preclude it from being used for electoral expenditure. Proposed s 302F will apply to gifts of any size to third parties from foreign donors.

This raises the question of what knowledge the third party (or political party, candidate or political campaigner) must have about the status of the donor and what steps must be taken to ascertain that status. Both proposed ss 302D and 302E expressly deal with this, by providing that it is not an offence if before the end of 6 weeks after the gift was made, the donor affirmed in writing that it was not a foreign donor, checks were made pursuant to proposed s 302P or other reasonable steps were taken to verify that the donor was not a foreign donor, and the recipient did not at any time during that period know or have reasonable grounds to believe that the donor was a foreign donor. However, in s 302F the only reference to knowledge is that the recipient 'knows that the foreign donor intends the gift to be used for the purposes of incurring electoral expenditure…' It is left unclear whether the recipient must 'know' that the donor is a foreign donor before an offence is committed, or what steps must be taken to obtain such knowledge. As this provision potentially applies to *all* donations to a third party (such as $2 donations in a bucket on the street or $5 for a raffle ticket), where it is clear that the proceeds are intended to be used for the purpose of electoral expenditure, then this leads back to the concern about the original Bill as to whether the details and status of *every* donor must be ascertained.

While I have no expertise with respect to criminal law (so the Committee may wish to seek more expert views than mine on this point – although I have consulted two Professors of Criminal Law on this point), it appears that the *Criminal Code* would apply. Section 5.1 provides that a fault

element for a particular physical element [of an offence] may be intention, knowledge, recklessness or negligence. Section 5.6(2) provides that if the law creating the offence does not specify a fault element for a physical element that consists of a circumstance or a result, recklessness is the fault element for that physical element. I assume for present purposes that the fact that a person is a foreign donor is a physical element of the offence in proposed s 302F that is categorised as a 'circumstance'. If so, the fault element is 'recklessness'. Section 5.4 of the *Criminal Code* provides that a person is reckless with respect to a circumstance if he or she is aware of a substantial risk that the circumstance exists or will exist and having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

Whenever a third party, such as a charity, fund-raises for the purposes of running an issues campaign (eg a trivia night or a lamington stall to support a campaign to save an endangered species, or stop fracking, or increase school funding to a particular sector) there is going to be a substantial risk that one or more of the persons attending or donating will be a person who is neither an Australian citizen nor a permanent resident. The third party will then have to take a difficult decision as to whether that risk is 'unjustifiable' or whether it should check the status of everyone donating.

It would be preferable if such matters were clarified on the face of the law so that such judgments do not have to be made. Either it could be made clear that s 302F applies if the person receiving the gift 'knows' that the donor is a foreign donor, and there is no obligation to make inquiries to acquire that knowledge, or the person could be required to make such inquiries only when the donation was at least equal to the disclosure threshold of $13,800, which would make it consistent with the obligations in ss 302D and 302E. It would certainly help if at least something was done to make the application of this provision clearer and not overly burdensome.

My criminal law colleagues also point out that the *Criminal Code* provisions concerning fault elements do not apply in relation to the civil penalty in proposed s 302F(5). Hence, the only fault element that would need to be established would be that expressly included in proposed s 302F(1)(d). Consideration might be given as to whether it should be required that the recipient knew that the donor was a foreign donor.

Federalism

I note that the definition of 'electoral expenditure' in proposed s 287AB is tied to 'electoral matter' in s 4AA, which is tied to influencing the way electors vote in elections for the House of Representatives and the Senate. This is necessary as it is doubtful that the Commonwealth Parliament has the power to make laws regulating political donations with respect to State elections.

There are two provisions, proposed ss 302CA and 314B, which are intended to create an inconsistency under s 109 of the Constitution with State laws that would otherwise impinge upon donations in relation to Commonwealth election campaigns. While it is valid and appropriate for the Commonwealth to legislate to prevent State laws from regulating the making or disclosure of political donations with respect to Commonwealth elections, it appears that the provisions go too far. Under proposed s 314B, if a State law requires a donation to be disclosed, but the Commonwealth law does not, and the donation is required to be used, or 'may be used', for the purpose of incurring electoral expenditure in relation to a Commonwealth election, then the Commonwealth law applies and the State law is inoperative to the extent of the inconsistency.

The issue here is the phrase 'may be used'. Proposed s 314B(5) extends this to include an amount where the 'person or entity providing the amount does not set terms relating to the purpose for which the amount can be used. Thus, donors to State political parties may, when donating with respect to State elections, choose simply to 'not set terms relating to the purpose for which the amount can be used', so as to avoid the stricter State laws concerning disclosure. Where the amount is actually used to fund State political expenditure, the purported application of the Commonwealth law to avoid disclosure would involve inappropriate and arguably unconstitutional interference by a Commonwealth law with a State election.

The same issue arises with proposed s 302CA which provides that if a State law prohibits the giving or receipt of a gift (eg a gift by a property developer), but the Commonwealth law does not prohibit it, and the gift is required to be or 'may be used' for incurring electoral expenditure in relation to a federal election, then the Commonwealth law prevails. Thus a property developer in NSW could avoid the ban on making political donations with respect to State elections merely by contributing to the State branch of a political party but leaving the terms relating to the purpose of the donation open, even though the amount was in fact used for funding political expenditure with respect to a State election.

These provisions need to be altered to ensure that the Commonwealth law does not purport to override the State law where the donation concerned is used for the purpose of State electoral expenditure. Certainly, if it is used for Commonwealth electoral expenditure, then the Commonwealth law should prevail over the State law. However, if the donation is used to fund a State electoral campaign, then constitutional difficulties are likely to arise with respect to the Commonwealth's power to enact such a law interfering with State elections, as noted in my first submission to this Committee on the original Bill.

If you would like any further information, please contact me.

Yours sincerely,

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