Senate Finance & Public Administration Committees
PO Box 6100
Parliament House
Canberra ACT 2600

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Commonwealth Electoral Amendment (Donation Reform and Other Measures) Bill 2020

This submission responds to the Finance & Public Administration Committees' invitation to comment on the *Commonwealth Electoral Amendment (Donation Reform and Other Measures) Bill 2020* (Cth).

Summary

The Bill represents a positive effort to address matters of increasing community concern, evident in studies that demonstrate widespread public distrust of politicians, political parties and government. That distrust is unsurprising given the performance of politicians at the national and state/territory levels alongside systemic failures in public administration such as RoboDebt and recurrent problems highlighted by the Australian National Audit Office.

Australia's political machines have chosen not to effectively self-regulate, for example by refusing donations from corporations in the tobacco sector that result in public harm, proactively emphasising transparency and not exploiting privileges under the *Privacy Act 1988* (Cth) and *Spam Act 2003* (Cth). Regulation under statute, underpinned by timely scrutiny by both the Australian Electoral Commission and an independent national integrity watchdog, is necessary to address a deepening democratic deficit.

The Bill has been attacked as unnecessary, a claim that may comfort apparatchiks but is at odds with each week's headlines about branch stacking and influence buying. Implementation of the Bill would require expenditure. Such spending should be welcomed by politicians as consistent with funding of courts, tribunals and the legislatures.

Basis

The submission is independent of any political party or advocacy body. It reflects my teaching of law as an Asst Professor at Canberra Law School (University of Canberra) and complements submissions to other parliamentary inquiries at the national/state level regarding integrity and interference in political processes. The submission does not represent what would be reasonably construed as a substantive conflict of interest.

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Senate Finance & Public Administration Committees' inquiry into the *Commonwealth Electoral Amendment (Donation Reform and Other Measures) Bill 2020* (Cth)

Sunlight is be the best disinfectant for corruption, inefficiency and fears. That statement was true over one hundred years ago during a time when members of the public where disquieted about the self-seeking nature of politicians and the activity of political machines. It remains relevant today. The *Commonwealth Electoral Amendment (Donation Reform and Other Measures) Bill 2020* (Cth) under consideration by the Senate Finance & Public Administration Committees is a step forward to providing greater transparency and thereby rebuilding trust in both Australian politicians and political processes.

This submission, made on an independent basis, discusses why the Bill should be supported and addresses specific criticisms. Those criticisms lack substance.

Context

The Bill is under consideration at a time where there are weekly reports regarding –

- branch stacking,
- corruption at the state and local government levels,
- questions about the integrity of leading federal MPs,
- controversy over the behaviour of figures such as Clive Palmer and the influence of Rupert Murdoch,
- unashamed exploitation of regulatory exemptions in the *Spam Act 2003* (Cth) and *Privacy Act 1988* (Cth),
- egregious disregard by the Home Affairs Minister of the Federal Court,
- a politicised bureaucracy, and
- opposition to an effective national integrity commission.

(Just as disquietingly, the past week has seen revelations about patterns of predatory behaviour within the legal profession, exemplified by allegations regarding a former High Court justice.)

It is also under consideration at a time where voters have seen large-scale failures in public administration (notably RoboDebt and inadequate supervision by the TGA of joint, pelvic and other implants) for which there has been no accountability, alongside a succession of damning reports by the Australian National Audit Office (most recently *Management of the Australian Government's Lobbying Code of Conduct: Follow-up Audit* and *Referrals, Assessments and Approvals of Controlled Actions under the Environment Protection and Biodiversity Conservation Act 1999*).

There is increasing empirical data regarding responses by Australians to the 'Canberra Bubble' (and corresponding problems with the Macquarie Street Bubble, Spring Street Bubble and other governments). The 2019 Australian National University *2019 Australian Election Study* for example reported that satisfaction with democracy is at its lowest level since the constitutional crisis of the 1970s, with trust in government having reached its lowest level on record.

Just 25% of Australians believe people in government can be trusted, 56% believe government is run for 'a few big interests' and only 12% believe the government is run for 'all the people'. That disquiet is increasing, with for example a 27% decline since 2007 in stated satisfaction with how Australia's democracy is working. Overall trust in government has declined by nearly 20% since 2007; three quarters believe that people in government are looking after themselves.

There is disenchantment with infighting at the state/territory and national level within political parties, exemplified by popular disquiet about the replacement of leaders and with leaked reports of what Coalition MPs in NSW say about each other and what ALP MPs in Victoria say about each other.

There is no single and immediate solution to an increasing democratic deficit, in which people respond by disengaging from conventional politics and the justice system (evident in the contemporary United States and the re-emergence of extremist fringe parties across the globe).

However, greater transparency regarding both political processes and public administration will serve to re-engage voters with government. That transparency requires a rethinking – and better resourcing – of the national freedom of information regime, strengthening of whistleblowing (evident in the Law Council's recent statement regarding prosecution of Bernard Collaery and the chilling raid on Annika Smethurst), establishment of an independent national integrity commission and amendment of the *Commonwealth Electoral Act 1918* (Cth).

The *Commonwealth Electoral Amendment (Donation Reform and Other Measures) Bill 2020* (Cth) is one step forward and should be supported on that basis.

The Bill

It has been regrettably common for members of parliament and senior officials to justify mandatory erosion of privacy by stating 'if you have nothing to hide you have nothing to fear'. Australians want politicians (and the party machines that often determine the actions of elected representatives) to behave with integrity. As indicated above, many Australians have come to believe – with good reason – that integrity is often lacking.

Strengthening disclosure under the Electoral Act is achievable. It should be welcomed by all MPs at the national level (and emulated by their state/territory peers) because it should provide evidence that –

- MPs (and candidates) indeed have nothing to fear on the basis that they have done no wrong and that their funding by local/overseas interests is beyond reproach
- allows parties to confidently expel or disendorse sitting members and candidates who have done wrong.

It should further provide more timely access by journalists and other observers to whose money is speaking most loudly in the corridors of parliament. That sunlight is necessary and might even dissuade parties from accepting gifts, and thereby being influenced, by corporations that pay little if any tax, employ few Australians but make substantial profits through the sale of harmful products such as cigarettes. (I note for example that overseas-based tobacco group Philip Morris donated $56,500 to the Nationals and $40,000 to the Liberal Democrats. That generosity was presumably not out of altruism, given responsibilities under Australian corporations law.)

Constitutionality

The Bill is not contrary to the implied freedom of political communication under the national Constitution. It does not preclude entities from providing funding; it instead updates reporting regarding that funding. It is axiomatic that reporting is appropriate and should be welcomed by political entities.

I note the Liberal Party's submission that

> The Liberal Party does not support changes to these arrangements that would unnecessarily add to the already considerable administrative and compliance burdens placed on political parties. The Liberal Party does not support changes which fail to recognise that political parties are broad-based organisations with large volunteer wings and limited resources.

Every business or other entity that significantly affects the lives of Australians can expect some scrutiny and some compliance burdens. That is particularly the case with parties and political candidates, given that they determine Australian law and are at the heart of the accountability that underpins any liberal democratic state. Costs associated with reporting are reasonable. Claims that they would be administratively burdensome or otherwise inconvenient for candidates/parties and the Australian Electoral Commission should be scrutinised; it is incumbent on the various parties to identify the extent of the supposed burden rather than simply asserting a burden is bad.

Inefficiencies in an entity's reporting mechanisms are not a justification for hiding from sunlight.

International Obligations

The Bill is more broadly not contrary to Australia's obligations under international human rights frameworks. There is no requirement under for example the Universal Declaration of Human Rights and associated Conventions that funding be secret or that disclosure of funding be quarantined for several years. Greater transparency will instead substantiate Australia's commitment to best practice regarding 'Open Government', a commitment recurrently voiced by Prime Ministers but in practice only weakly implemented.

Scope

The Bill seeks to extend the definition of reporting entities to include political entities, campaigners, associated entities and third parties.

That extension is appropriate given the emphasis on transparency highlighted above and what appears to be practice, modelled on the United States, in which special interests rely on 'astroturfing' to influence voters, commentators, decisionmakers with government agencies and politicians.

The Bill seeks to lower the political donation disclosure threshold from $14 000 to $2 500. There has not been a comprehensive demonstration of why that reduction would be onerous. An observer might be forgiven for thinking that in essence it is simply a matter of a few more keystrokes in a database, rather than something requiring a significant reorganisation of administration or recruitment of new staff in electorate and other offices. (Presumably the 'broad-based organisations with large volunteer wings' will be able to cope.)

Reporting

Prima facie there is no reason to object to a requirement for disclosure by reporting entities and donors when the sum of the gifts and donations provided by the same donor to the same reporting entity is greater than the disclosure threshold. That requirement minimises efforts to 'game the system', which we see in several overseas jurisdictions and is discernible in mechanisms such as raffles, the sale of tickets to fundraising dinners with the Minister or related events (addressed under the Bill).

Given the importance of timeliness for community understanding (and for potential enforcement by the Australian Electoral Commission and other entities such as a national integrity commission) the Bill seeks an amendment to require disclosure by reporting entities within seven days of a reportable gift being made and disclosure within seven days of any subsequent gifts until the end of the reporting period. Such reporting should be endorsed by donors and recipients. The compliance burden need not be onerous and is, ultimately, an acceptable burden in terms of deepening public trust and encouraging accountability.

A requirement for reporting entities to lodge half-yearly returns (including details of the nature and source of all reportable donations and other receipts) is consistent with the notion of timeliness and should be enforced.

In the absence of a national integrity commission it is difficult to see the basis for a substantive objection to reporting entities needing an electoral expenditure account with an authorised deposit-taking institution, from which all electoral expenditure must be paid. Such an arrangement is a matter of good governance. It addresses concerns that entities can rely on 'a tin under the bed' or private 'money jar' approach, in contrast to many not-for-profit entities that may bring joy to their members but do not have the legal/social impact of reporting entities.

Establishment of an Australian Electoral Commission Disclosure Portal (through which disclosures must be lodged and made publicly viewable) is commended.

As noted above, such transparency does not prohibit donations and does not comprehensively address community concerns regarding 'influence buying' but does shine a light on where money is coming from and who it is going to. It will require effort to establish but there are no indications that the effort is disproportionate.

The AEC

The Australian Electoral Commission is a bulwark of democracy. Proposals to strengthen its access to information and its sharing of information with the community on a timely basis are strongly commended, particularly if data about funding is provided in ways that are readily searchable (eg not as unsearchable hand-written PDFs, a weakness of the MP personal interest register regime).

The Explanatory Memorandum for the Bill states

> It is anticipated that any additional expenditure required of the AEC will be met from within existing appropriations, and offset against savings from improved efficiencies relating to the new automation of disclosures and simplified reporting regime.

The assumption that existing appropriations will be sufficient is at odds with the history over the past decade of the Government adding tasks while reducing agency resources on an ongoing basis through the Efficiency Dividend regime and one-off cuts, to the point that several agencies experience regulatory incapacity. Ultimately we get the democracy (and Australian Electoral Commission) that we are prepared to pay for. In strengthening

accountability I suggest that the Committee should note the appropriateness of additional funding for the Australian Electoral Commission or for a national integrity commission on the basis of referral from the AEC.

I endorse the proposed Schedule 4 infringement notices and civil penalty provisions for reporting entities that fail to meet their disclosure obligations.