

January 23, 2018

Committee Secretary
Joint Standing Committee on Electoral Matters
PO Box 6021
Parliament House
Canberra ACT 2600

Dear Committee Members,

Submission to the Joint Standing Committee on Electoral Matters Inquiry into the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017

Thank you for the opportunity to make a submission to this inquiry.

The Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017 proposes a new framework for the registration of political actors (political campaigners, third party campaigners, and associated entities), extends current disclosure requirements, places restrictions on foreign donations, limits public election funding to demonstrated spending, and tightens the sanctions for legislative non-compliance.

In this submission, we focus on the impact that the relevant legislative changes will have on the activities of actors (organisations and individuals) who contribute to political debate in Australia, but are not classified as political parties, parliamentarians or candidates – traditionally referred to as ‘third parties’ in the Australian electoral context. The Explanatory Memorandum refers to third parties as ‘new political actors’ or ‘key political actors’, which ‘neither endorse candidates nor seek to form government, yet actively seek to influence the outcome of elections’.¹ The Bill offers a range of new/revised categories that capture this terrain (associated entity, political campaigner and third party campaigner) with corresponding regulatory arrangements. We outline these and comment on implications. We also comment on the broader impact the proposed legislative changes might have on democratic debate and citizen participation in politics.

Understanding the rationale for regulation and the contemporary political context

While the Memorandum acknowledges the existence and activities of these political actors as ‘a positive indicator of the strength of Australian civil society and civic engagement’, it also argues that ‘these new political actors lack the public accountabilities of more traditional actors, such as registered political parties or parliamentarians’.² This statement, taken together with the explicit aim of improving the ‘consistency of regulation applying to the financed election campaigns of key political actors’, form the underlying rationale for the new regulatory scheme.

Alongside these rationales, any proposed scheme for the regulation of political activity and debate must not impinge on the rights of citizens to take part in elections and public affairs, or disproportionately limit their freedoms of expression, association and political communication. When considering the impact of the proposed legislation is it extremely important to note that in today’s society, the exercise of these rights takes place not only within the framework of traditional

¹ Parliament of the Commonwealth of Australia, The Senate. 2017-2018. *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017 – Explanatory Memorandum*, p. 3.

² *ibid.*

political actors (such as political parties) and traditional mechanisms such as voting. While periodic competitive elections among political parties are a keystone of the Australian political system, citizens participate politically through a broader range of means than just voting.

Australians have long been characterised as civil society joiners: they join, volunteer for, donate to, or actively support, a wide range of social and political organisations. Many of these organisations may express political viewpoints at either *ad hoc* moments or regularly as part of their mandate. Political engagement needs to be recognised as extending far beyond membership of either political parties or any other organisation.

Australia has a large and vibrant set of advocacy groups to which citizens and businesses belong as members or supporters, or support financially through regular or *ad hoc* donations. These groups have political lobbying and advocacy as a key organisational function. Recent work suggests the national group system comprises over 1300 groups.³ Of course, this is multiplied many times over when one takes account of State and Local based groups. While not all interests find voice through this system, it does provide an important means of raising issues, representing interests and voicing concerns between (not just during) elections.

The advent of internet-enabled forms of engagement means that it is easier than ever before to sign a petition, raise or donate money, join collectively with like-minded others, and express political views. Comparatively, Australians are more or just as likely to engage in these forms of political engagement as citizens of similar advanced democracies. New born-digital organisations have also emerged in this context whose formal membership is not based on paying annual membership fees, but instead based on being an active supporter, receiving information by email or social media, and choosing (or not) to respond to calls to action for involvement in campaign events. This can include: starting or signing a petition, fundraising or donating money for a specific event (such as placing an advertisement on television), participating offline in an event or meeting, or sharing information through social networks.

Most the funding of these new born-digital organisations comes from *ad hoc* micro-donations fundraised via campaign and issue specific calls to action. Some born digital organisations are volunteer run and do not fundraise at all, as social media platform infrastructure alone is enough to undertake their issue campaigning work.⁴ Further, many traditional groups and organisations have also adapted to the digital context and now actively use webpages and social media accounts to promote their views, and mobilise members and supporters.

Relative accountability and regulatory consistency

Given the vibrancy of Australian civil society and the relative strength and diversity of the ways in which contemporary Australians participate in politics, we argue that any framework for regulating political activity needs to take account of the fact that the political landscape in Australia is broader than just political parties and politicians. This should be reflected not only in the accountability measures placed on political actors, but also in creating equal opportunities for debate and participation (a level playing field). The proposed legislation focuses heavily on the former outcome, with relatively little regard for the latter principle. This is evident in three ways:

³ Bert Fraussen and Darren Halpin. 2016. Assessing the Composition and Diversity of the Australian Interest Group System. *Australian Journal of Public Administration*, 75(4), 476-91.

⁴ Ariadne Vromen. 2017. *Digital Citizenship and Political Engagement: The Challenge from Online Campaigning and Advocacy Organisations*. London: Palgrave Macmillan.

1. An erroneous assumption that new political actors ‘lack the public accountabilities of more traditional actors’
2. A contestable assumption that consistency of regulation is desirable
3. A clear discrepancy in the regulatory benefits that accrue to political parties relative to other political actors

New political actors lack public accountability

It is difficult to understand how new political actors might lack public accountability when third party disclosure requirements have been in place at the federal level since 1983. Under the current Electoral Act, third parties that incur political expenditure of the threshold amount must lodge annual returns with the Australian Electoral Commission and specify the type of political expenditure undertaken. In 2015/16, this provision elicited a relatively small number of submissions of just 55 returns. This should not be interpreted as a measure of non-compliance, but rather an illustration of the fact that the vast majority of groups spend less than the current threshold on political expenditure. Under the proposed legislation, the only substantive change to disclosure requirements for political actors (political campaigners, third party campaigners and associated entities) is the requirement to provide details of the party membership of senior staff and discretionary benefits received from the Commonwealth. We suggest that a more effective, unambiguous way of enhancing public accountability could be to lower the disclosure threshold for all political actors (including parties) to bring Commonwealth legislation more in line with State and Territory provisions.⁵

Consistency of regulation

The Table below outlines the registration and regulatory burdens placed upon the four main categories of political actor delineated in the proposed legislation: political party, political campaigner, third party campaigner and associated entity. Each of these actors must be registered and are subject to very similar disclosure requirements.

⁵ For example, the disclosure threshold in NSW is \$2,000, and \$1,000 in Queensland and the ACT.

	Basis for Registration	Threshold for Registration	What is included on the register	Benefits of registration	Requirements
Political Party	Not mandatory; but desirable to receive benefits of ballot labelling and public funding	500 members or one MP	Name of party; Registered officers & correspondence address; Logo	Election funding if party or candidate receives more than 4% of first preference vote; capped at actual expenditure incurred (292G)	Disclosure of donations above threshold (each financial year) Disclosure of political expenditure (each financial year) – amounts received and paid
Associated Entity	Connection with a political party 287H(1)	Must meet the definition in 287H(1) or 287H(5)	Name of entity; Name of financial controller; Names of parties entity is associated with; a statement that the entity is also on other registers	n/a	Disclosure of donations above threshold Disclosure of political expenditure (each financial year)
Political Campaigner	Political Expenditure	Political expenditure more than \$100,000 for that financial year, or previous three years; or within one financial year political expenditure greater than \$50,000 and constitutes more than 50% of allowable amount.	Name of person/entity; Name of 'financial controller'; Statement that group also an Associated Entity (if applicable) and party or parties associated with	n/a	Disclosure of donations above threshold Disclosure of political expenditure (each financial year) – amounts received and paid
Third Party Campaigner	Political Expenditure	Political expenditure is more than disclosure threshold for that financial year	Name of person/entity; Name of financial controller; Statement that group also an Associated Entity (if applicable) and party or parties associated with	n/a	Disclosure of donations above threshold Disclosure of political expenditure (each financial year): 'details of expenditure incurred'

As an instrument modelled on political party regulation, the regulation and registration of political campaigners, third party campaigners and associated entities captures a potentially wide variety of organisations and individuals and will cover both issue advertising and electoral advocacy. However, the rationale for distinguishing between political campaigner and third party campaigner is not at all clear. The registration burdens differ in very few respects, so we would argue that if the two categories are to be kept in the legislation then more clarification is required. Consideration also needs to be given to the fact that the legislation will inevitably produce different administrative burdens and uncertainties for different political actors, according to their resources, mandate and activities.

Discrepancies between the regulatory benefits that accrue to political parties relative to other actors

From the table above it is also clear that while third party campaigners, political campaigners and associated entities must be registered, they accrue no benefits from this status. This stands in stark contrast to the situation of political parties, for whom registration is not mandatory, and brings significant benefits, including public funding of their election campaigns. This begs the question that if both parties and other political actors subject to the same (if not stricter) disclosure and registration requirement, why are political actors not correspondingly resourced? While we are not suggesting that political actors (associated entities, political campaigners, and third party campaigners) should receive public funding for their electoral expenditure, it is important to note that these groups face significant compliance costs in meeting their regulatory obligations (beyond those of political parties) and should therefore be resourced or compensated for it.

Definitional ambiguities

There are two sections of the proposed legislation that are particularly ambiguous and will no doubt create problems for political actors in determining whether they fall within the scope of the legislation. The first is the amended definition of political expenditure, in which the meaning of expenditure for a 'political purpose' has been expanded from 'views on an issue in an election' to 'views on an issue that is, or is likely to be, before electors in an election'. The blurred distinction here between ordinary expression on public political matters and electoral communication is problematic, and many organisations will struggle with the foresight required to determine what may be on a future election agenda.

Guidance around this definition might reasonably be expected to come from the regulator – in this case the AEC. Yet, the present regime of assessing political expenditures that falls with the AEC is in practice reliant on actors self-assessing accurately, as there are inadequate resources to pro-actively investigate the large number of 'potential' actors engaged in political expenditure. The proposed provisions in this Bill would exacerbate the problem, as the ambiguous definition of 'political purpose' will expand the number of 'potential' political actors substantially.

A similar ambiguity is raised by the requirement for an organisation to register as an 'associated entity' if its political expenditure is used to oppose a candidate in an election in a way that benefits one or more political parties (287H). How, for example, will it be determined that an entity is 'promoting' or 'opposing' a candidate? How is electoral benefit to be calculated?

Consider the current routine practices of advocacy groups around elections. The last Federal election campaign saw many of the larger groups generate a Policy Manifesto, outlining policies they would

like to see from an incoming Australian government (research shows that over 60 groups from the top 300 national organisations generated some kind of Policy Priority document).⁶ Many groups – spanning trade unions, business bodies, citizen groups and professional associations – survey parties on the key policy priorities to their members, and publish responses through internal publications, web sites and so on. Are these routine activities to be deemed a ‘political purpose’? If one expands this *beyond* purely election orientated activities (as the new definition seems to do), the problem is multiplied: does the cost of maintaining a media and policy team to routinely produce submissions to inquiries, issue press releases on ‘issues of the day’ or indeed comment on policy proposals through social media, constitute expenditure on ‘political purposes’?

Administrative burdens and the subsequent impact on public debate

These definitional ambiguities potentially have a real chilling effect on political debate if organisations and individuals withdraw from these activities due to uncertainty surrounding the scope of the law. This was the experience in New Zealand in 2007 with short-lived reforms to the Electoral Finance Act 2007. In addition, following the passage of the *Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014* (UK), an online survey of third-party campaigners and a series of roundtables conducted by the UK Electoral Commission found that participants did not feel confident that they understood the rules on third-party campaigning, owing to the complexity of the legislation, what activities were covered, and how regulation impacted on support for existing campaigns working in coalition with other groups or working with elected representatives.⁷ Not all political actors have the resources to obtain independent legal advice on the parameters of the law. The resource inequalities within the advocacy sector are such that this burden is likely to disproportionately impact on the representation of minorities, the vulnerable, and marginalised groups within Australian society.

Actors that are registered as third party campaigners or political campaigners will also be caught by the new restrictions on foreign donations (s 286A). A third party or political campaigner (which could be a charity or registered organisation) that receives a donation from a non-allowable source (e.g. a foreign resident) of more than \$250 must not use that money for political purposes. Gifts to such charities and organisations from non-allowable donors must be kept in a separate account. This would obviously involve significant compliance costs on the part of the organisation, both in ascertaining the identity and geographical location of donors and keeping two separate accounts. This measure is likely to disproportionately impact on organisations whose agenda addresses issues with international dimensions, and for whom a large volume of relatively small online donations form a key foundation of their funding. For instance, organisations focused on the environment, human rights, aid and development, and peace. It will also potentially affect organisations that are the local, Australian-based arm of an international network of organisations.

Regulation of political lobbying and transparency measures

The Bill seems to be addressing some elements of what is a broader agenda on transparency and regulation of political influence. Elections are an important, yet episodic, component of the political system. It would be better to address the concerns with transparency more directly through reconsideration of provisions regarding the regulation of lobbying in the Lobbying Code of Conduct and Australian Government Register of Lobbyists. Building on the current arrangements, this could

⁶ Darren Halpin. 2018. Interest Group Policy Agendas, Working Paper.

⁷ Anika Gauja and Graeme Orr. 2015. Regulating ‘third parties’ as electoral actors: Comparative insights and questions for democracy. *Interest Groups and Advocacy* 4(3): 249-271.

include expanding the definition of lobbyists and advocates that are required to register (beyond the current focus on mainly commercial lobbyists and their in-house staff), and include disclosure provisions on who was lobbied, the content of the interaction, and expenditure.⁸ There is also potential for MPs and other senior government policymakers to make their meeting diaries available regularly, or even publish via real-time live updates. For example, the Transparency Register in the European Commission makes visible what interests are being pursued, by whom, and with what budgets. Importantly, it also requires Commissioners, their cabinet members and Directors-General to publish information on meetings held with organisations or self-employed individuals. Meetings on policy-making and implementation in the EU can only take place if the interest representatives are registered in the EU transparency register.

We hope that you find our analysis useful.

Yours sincerely,

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⁸ Darren Halpin and John Warhurst. 2016. Commercial lobbying in Australia: Exploring the Australian Lobby Register. *Australian Journal of Public Administration* 75(1): 100-11.