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Committee Secretary
Economics and Governance Committee
Parliament House
George Street
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By Email: egc@parliament.qld.gov.au

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Dear Committee Secretary,

**Submission – Electoral and Other Legislation (Accountability, Integrity and Other Matters)
Amendment Bill 2019**

I make this submission in my personal capacity as an Industry Fellow at the Centre for Social Impact at Swinburne University of Technology.

My research interests include the regulation of advocacy by not-for-profit organisations, and for this reason, I have an interest in how the electoral laws apply to this framework. I was closely involved in the debate around the *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2018* (Cth) and assisted with the development of amendments to that Bill after it was introduced into the Federal Parliament.

I am making this submission to provide some general comments about reforms to electoral laws which have been introduced in various State and Territory jurisdictions, and are proposed to be introduced by the *Electoral and Other Legislation (Accountability, Integrity and Other Matters) Amendment Bill 2019* (the Bill).

My comments specifically address the introduction of donation caps and expenditure limits, and focus on how they may impact not-for-profit organisations undertaking advocacy, and civil society more broadly. I also address the threshold for the disclosure of donations. Although the impact of such reforms on political parties and candidates is not the focus of the comments, the comments may nonetheless also have relevance to them. I also make some suggestions for how the potentially harmful impacts of the Bill could be mitigated.

My comments are informed by a number of factors, namely:

- That a cornerstone of our democracy is the free exchange of ideas and debate about public policies, and that such pluralism is essential to the vibrancy and health of our democracy
- The as part of our democracy, is it important to be able to hold both those with political power, and those seeking it, accountable
- Both these above activities necessitate engaging in political speech, and that engaging in political speech by undertaking advocacy and campaigning is one way that not-for-profit organisations, which are in essence collectives of people, seek to contribute to our democracy and effect change

- Although the expenditure of money does not automatically equal political speech, engaging in political speech through advocacy and campaigning often requires the expenditure of money
- Therefore, attempts to limit such expenditure may have the effect of limiting political speech through advocacy and campaigning, making it more difficult for not-for-profit organisations to contribute to our democracy
- At the same time, such limitations may not have as harmful an impact on governments or political parties, which can benefit from taxpayer funding for their activities
- However, it is in the public interest to have transparency around the funding of advocacy and campaigning by not-for-profit organisations where its dominant purpose is to influence the decisions of voters in an election
- Such transparency enables the public to make informed decisions and give proper weight to different speakers and messages, based on an understanding not only of *what* the political speech is but also by *who* is funding it, which may influence how the public react to the political speech
- Transparency can also guard against corruption, because if entities can incur significant expenditure on advocacy and campaigning anonymously (be it through donations or direct expenditure themselves), it may be easier for them to seek a *quid pro quo* from those whom they support with those activities or to exert other forms of undue influence
- However, transparency needs to be balanced against the ability of individuals and the organisations which comprise them to express their political opinions privately through the making of donations, which has relevance for determining the level at which donations should be required to be disclosed

The Introduction of Donation Caps

In recent years, some State and Territory Governments have introduced caps on the amount that can be donated towards political parties, candidates as well as entities such as third parties. The Bill proposes to do the same in Queensland.

For example, in Victoria, there is a \$4,080 general cap from any donor across the four-year parliamentary term – no donor can donate more than this amount to any combination of political parties, candidates, associated entities and third party campaigners¹.

As part of the reforms that included this cap, an increase in public funding was provided to offset the loss in funding previously obtained from donations. However, this is only available to political parties and candidates, and not third party campaigners². A similar approach is proposed to be adopted in Queensland.

Under Victorian law, a third party campaigner is a person or organisation that³:

- Receives political donations or incurs expenditure of more than \$4,000 per financial year for the purpose of helping promote or oppose a candidate, elected member or registered political party at an election, and

¹ See: <https://www.vec.vic.gov.au/CandidatesAndParties/FundingDisclosure.html>

² See: <https://www.premier.vic.gov.au/donationreform/> and <https://www.vec.vic.gov.au/Results/results-funding.html>

³ See: <https://www.vec.vic.gov.au/files/FD%20-%20Information%20for%20Third%20Party%20Campaigners-%20V1.0.pdf>

- Is not a registered political party, candidate at an election, a group, an elected member, an associated entity, or a nominated entity of a registered political party

The potential impact of such a donation cap can be illustrated using the following hypothetical example.

If the Victorian Government proposed to establish a toxic waste dump in regional Victoria, the local community may seek to oppose this proposal on environmental and other grounds, and may form an organised campaigning group for this purpose. They may decide that the best way to stop the proposal proceeding is to oppose the re-election of the local Member of Parliament, who is a member of the Government, and support candidates who will oppose the proposal.

Running an effective campaign requires resourcing. However, any individual or organisation that would like to donate to the campaigning group will be limited to donating \$4,080 over the entire four-year parliamentary term. Some members of the community will likely only be able to donate far less than this amount, and in their case, the limit will not pose a problem. However, there may be other individuals who have a greater capacity to support the campaigning group and/or for whom this is a particularly important cause. But they will be limited by the donation cap.

Compared with third parties, the Government can use taxpayer-funded resources to promote their policy proposal before the election campaign commences and the local Member of Parliament may be able to use their various publicly funded allowances to promote the policy proposal. Political parties also benefit from additional public funding to compensate them for the loss of funding from donations, which they can use to fund their activities, as pointed out above.

No public funding is available for the campaigning group opposing the proposal, and they must rely solely on donations from their supporters.

If the Bill is enacted, this same problematic scenario will also be a prospect in Queensland.

It is particularly worth noting that because the definition of electoral expenditure under section 199 of the Bill is broader than that which applies in Victoria, more organisations may be classified as third parties under s297 of the Bill, and consequently the impacts of the approach proposed in Queensland may be even harsher than those in Victoria.

The focus of donation reform is often on 'big business' seeking to influence political parties.

However as this hypothetical case study above illustrates, a donation cap can have the effect of limiting political speech that would normally be considered the type of 'grassroots' activity that is indicative of a vibrant democracy. It can:

- Make it more difficult to raise funds to undertake community based campaigning activities
- Shift the balance of power further towards government and away from citizens acting together
- Reduce the ability of citizens acting together to hold the government to account for its decisions

In addition, donation caps disproportionately impact third parties that are dependent on donations, such as campaigning groups, compared with those dependent on membership fees, such as business, unions and other similar interest groups.

For these reasons, I have major reservations regarding the introduction of any such restrictions, as the Bill proposes to do in Queensland. If introduced, then any donation cap should be sufficiently large to not stifle the ability of third parties to undertake campaigns.

However, there would still be an incentive for governments to reduce the donation cap over time and increase public funding for political parties, at the expense of third parties.

Given the size of the cap proposed by the Bill, and the fact that it applies across the entire term between elections, I have major concerns that the proposed cap will have the potential to stifle the ability of third parties to participate in the democratic process in Queensland.

The Introduction of Expenditure Limits

In recent years, some State and Territory Governments have also introduced limits on the expenditure that can be incurred in relation to an election. These can apply to political parties, candidates, associated entities and third parties. The Bill proposes to do the same in Queensland.

For example, in the Australian Capital Territory (ACT), the expenditure limit for third party campaigners for the 2016 election was \$40,000. The limit covers expenditure on various forms of advertising, direct mail printing and postage, consulting fees and opinion polling, that is intended or likely to affect voting at an election if it contains an express or implicit reference to, or comment on the election, the government or opposition, candidates and political parties, or any other issue before electors in the election.

The limit applies to any expenditure between 1 January in an election year until the end of polling day (the third Saturday in October)⁴. The cap is adjusted each year for CPI, and in 2020 (an election year in the ACT) will amount to \$42,045 plus CPI⁵.

If a campaigning group wanted to bring an important issue to the attention of ACT voters, be it about education, health, the environment or another issue, then an expenditure limit of \$42,045 places an extreme restriction on its activities and severely limits its ability to undertake an organised campaign. Such an amount would be quickly expended merely by sending direct mail to a relatively small proportion of ACT voters.

The experience of the ACT Law Society is highly illustrative in this regard. In the run up to the 2012 election, it campaigned against changes to third-party insurance arrangements for motorists in the ACT, and was found to have breached the expenditure limit (which was then set at a higher amount of \$60,000). As a result, it was effectively penalised for engaging in too much political speech⁶.

Notably, communications funded by the ACT Legislative Assembly are exempt from the expenditure cap, as are taxpayer-funded communications by the ACT Government before the election.

A similar situation exists in New South Wales (NSW), where the electoral district expenditure limit for a third-party campaigner is \$26,700⁷. The state-wide third party campaigner expenditure limit was struck down by the High Court in its decision in *Unions NSW v New South Wales (2019)*⁸, and it is understood that the NSW Government is currently considering its response to the decision and what level to set the limit at.

As with donations caps, it is therefore submitted that expenditure limits can also have the effect of:

⁴ See:

https://www.elections.act.gov.au/funding_and_disclosure/funding_expenditure_and_disclosure_faq/electoral_expenditure_and_disclosure_faq

⁵ See: <https://legislation.act.gov.au/ni/2018-658/>

⁶ See: <https://www.canberratimes.com.au/story/6158834/act-poll-funding-breaches-incur-fines/>

⁷ See: <https://www.elections.nsw.gov.au/Funding-and-disclosure/Electoral-expenditure/Caps-on-electoral-expenditure/What-are-the-expenditure-caps-for-State-elections>

⁸ See: <http://eresources.hcourt.gov.au/showCase/2019/HCA/1>

- Shifting the balance of power further towards government and away from citizens acting together
- Reducing the ability of citizens acting together to hold the government to account for its decisions

It is acknowledged that there is concern about the very large expenditure made by Clive Palmer at the most recent Federal election, and its influence on the outcome of the election, a concern which I share. However, it also needs to be recognised that the expenditure by Clive Palmer may well be a one off occurrence.

Given the issues outlined above, I also have major reservations regarding the introduction of expenditure limits in Queensland, as the Bill proposes.

Although the expenditure limits for third parties proposed by the Bill are higher than those in the ACT or NSW, they are still low and rather arbitrary. Section 281E of the Bill proposes a statewide cap of \$1 million and an electorate cap of \$87,000.

If a third party wants to undertake some relatively standard campaigning activities, such as using direct mail and promotional billboards either in a single electorate or across the state, the amount of the limit will be reached relatively quickly.

Donation Disclosure

There is a question as to whether the current donation disclosure threshold in Queensland, of \$1,000, is set an appropriate level.

Whilst there is a benefit from transparency associated with donations used for electoral expenditure, including those made to third parties, such transparency should be balanced against the fact that individuals and organisations should be able to make what are still quite modest (in relative terms) donations whilst retaining their privacy.

The making of such donations is effectively an expression of a political opinion, and unless there are other considerations at play, individuals and organisations should be able to express their political opinions without having to disclose them publicly and without having their details entered on what amounts to a government-run and publicly accessible database.

Such 'other considerations' include the need to guard against possible corruption and also enabling the public to understand who the more significant funders of particular organisations are, so that the public can assess the political speech of those organisations accordingly. For this reason, individuals and organisations cannot expect that a donation of any value can be kept private. A certain level of transparency is appropriate and necessary.

It is difficult to argue that a donation of \$1,000 poses a major risk in terms of corruption. Given the costs of campaigning, it is also difficult to argue that an individual or organisation that makes a donation of this size is likely to represent a significant funder. Therefore, I believe that a disclosure threshold of \$1,000 is too low, and would place an undue burden on donors being able to express political opinions with their privacy protected.

Although it is difficult to make a judgement about what is an appropriate level for the disclosure threshold, I would suggest a cumulative amount in the order of \$5,000 per year reflects a more suitable figure.

Amendments to Mitigate the Potentially Harmful Impacts of the Bill

Although I have pointed out major concerns with both donation caps and expenditure limits, I do recognise that they reflect the policy of the Queensland Government, and that it intends to implement this policy through the Bill.

However, in order to mitigate the potentially harmful impacts of the Bill as currently drafted, I would suggest the following amendments be considered:

- Considerably narrowing the definition of electoral expenditure under section 199. Specifically, section 199 (1)(c), which relates to 'otherwise influencing' voting at an election, should be removed given its breadth and vagueness.
- Considerably increasing the threshold after which a third party must register under section 297 (1). I would suggest increasing it to at least \$20,000, in order to remove small 'grassroots' organisations from the framework imposed by the Bill.
- Considerably increasing both the donation caps and expenditure limits, at least as they apply to third parties.
- Providing an exemption for charities registered with the Australian Charities and Not-for-profits Commission from some or all of the requirement imposed by the Bill. Under the *Charities Act 2013* (Cth), registered charities are limited in terms of the partisan political activities which they can undertake.

I also draw the Committee's attention to the submission made by the Queensland Law Society.

I hope that my comments are of assistance to the Committee, and I would welcome the opportunity to assist the Committee further.

Yours Sincerely,



Krystian Seibert