



QUEENSLAND COUNCIL FOR CIVIL LIBERTIES

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Watching Them While They're Watching You

Committee Secretary
Economics and Governance Committee
Parliament House
George Street
Brisbane Qld 4000

By Email - egc@parliament.qld.gov.au

Dear Madam/Sir

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

The QCCL thanks the Committee for the opportunity to make a submission in relation to this important Bill.

1. PROCESS

Firstly, we wish to state our objection to the way this enquiry is being conducted. This Bill is of great importance. It makes major changes to our electoral laws and hence to our system of democracy. And yet, the committee has chosen to make a call for submissions on 2 December, with submissions closing at midday on 9 January. This means, that submissions must be prepared over the holiday period. In our view, this is entirely inappropriate and can only serve to reduce the input to this committee.

2. LIMITATION ON SUBMISSIONS

The QCCL is an organisation made up of volunteers. Consequently, the resources available to us to make submissions are limited. We have therefore chosen to comment only on certain aspects of this Bill. This should not be taken as meaning that we approve of any provision in the Bill upon which we do not comment.

3. THE LEGISLATION

The provisions in respect of which we make comment deal with political donations and expenditure on election campaigns. We have summarised below, the provisions in respect of which we wish to make a comment.

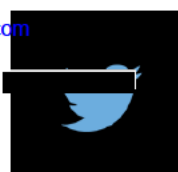
3.1 To whom the legislation applies

Central to these provisions is the concept of a participant.

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The term participant is defined to include a candidate for office, a registered political party, a registered third-party and a third-party which though not registered, incurs electoral expenditure, which would require it to be registered.

A third-party must be registered if it incurs electoral expenditure during an election period of an amount exceeding \$1000. The election period is defined to be the period of one year prior to the date of an election.

Electoral expenditure is defined to mean expenditure, "incurred for, or related to any of the following purposes:

- (a) To promote or oppose (directly or indirectly) a political party in relation to an election
- (b) to promote or oppose (directly or indirectly) the election of a candidate
- (c) to otherwise influence (directly or in or indirectly) voting at an election".

The provisions relating to donations and expenditure also apply to what are termed "associated entities" which includes entities controlled by a political party or operated wholly or to a significant extent for the benefit of a political party.

Clause 213 of the Bill imposes a duty on the members of the executive committee of all unregistered third parties to comply with all obligations in relation to donations and expenditure created by the Bill.

Those obligations include record and account keeping.

3.2 Political donations

The legislation provides for maximum amounts that can be donated to participants over the four-years prior to an election:

- (a) political parties-\$4000
- (b) candidates-\$6000
- (c) third parties-\$4000

These figures are to be adjusted for inflation.

The legislation imposes criminal penalties for breaches of these provisions. The maximum penalty for both the donor and the donee is 200 penalty units

3.3 Political expenditure

The legislation then imposes maximum amounts that participants can expend during the period of one year prior to an election. We do not make any comment on whether the amounts provided in the legislation are reasonable or not other than in relation to the requirement that a third party which incurs electoral expenditure of more than \$1000 in the period of 12 months prior to an election must register and even if they do not register, are subject to the provisions of the Act.

4. PRINCIPLES

The right to vote, is arguably the most important right that any of us holds. Discussion of public issues and debate on the suitability of candidates is fundamental to the exercise of that right. It is also important, that as far as practicable, every person's vote is equal in value.

The right to make a donation to the political party or organisation of your choice, is an aspect of the right to freedom of association. Freedom of speech would be practically meaningless without freedom of association since effective participation in the political process depends on the capacity for individuals to associate with one another for the advancement of their political beliefs and ideas. Hence, freedom of speech is indirectly impacted by controls on political donations

A law which restricts the amounts which can be spent on political communication, must be a burden on freedom of speech.

The QCCL has long supported a broad right to freedom of speech and freedom of association. However, no one maintains, that either of these rights is absolute. Interference with those rights may be justified where the state can demonstrate a sufficiently important interest it needs to protect, and it uses means to secure those interests that do not unnecessarily restrict those freedoms.

In this particular case the interest is clear- that elections are free and fair.

In the case of political finance two particular problems can arise. Firstly, to the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of representative government is undermined. The second, is the impact of the appearance of corruption stemming from public awareness of the opportunity for abuse inherent in a regime of large financial contributions. The avoidance of the appearance of improper influence is critical to the maintenance of confidence in the system of representative government.

In the context of political speech, a further consideration is that of fairness. Each citizen must have a fair opportunity to hold public office and to influence the outcome of political decisions. This is because equal participation is essential if people are to accept the outcomes of the political process i.e. the laws that govern them¹

Other considerations that come into play in considering a system to regulate political donations and expenditure include privacy and avoiding a situation where new entrants into the political system are excluded.

5. APPLICATION

5.1 Donations

The first thing that needs to be stated unequivocally, is that the QCCL does not accept the proposition, which appears to have become the law in the United States² that money is speech.

Furthermore, as noted above, we accept that there are legitimate interests which the state has in the regulation of political donations, including the prevention of corruption and the appearance of corruption.

Again, as noted above, when it comes to donations, the right which is in question is the right of freedom of association. Freedom of speech is only indirectly affected. However, the right to freedom of association is an important right and should not be restricted if the legitimate concerns of the State can be addressed in another way. In our opinion, the best way to address those issues in the context of donations is disclosure.

The former Commonwealth Electoral Commissioner, Colin Hughes, writing in 1979 argued that essential to an election finance system is “continuous comprehensive and

¹Rawls- “The Basic Structure as Subject” in *Political Liberalism* (Columbia University Press 2005) page 327 - 330

² *Citizens United v. Federal Election Commissions* 558 U.S. 310 (2010). The powerful dissent by Stevens J is compulsory reading.

total disclosure of both income and outgoings.” We would submit that this remains the case.

Like Mr. Hughes³ we are concerned that attempts to restrict the amounts of political donations will simply lead to the development of more sophisticated concealment techniques. It seems to us the most important thing is that the public knows where the money is coming from and in what amounts.

Some argue that the disclosure of donations violates the right to privacy. However, again the right to privacy is not absolute and must give way in this case to the need to prevent corruption.⁴

As we have said previously, a law requiring disclosure by political parties of donations of \$1,000.00 or \$1,500.00 appropriately balances the demand to avoid corruption in our electoral system and of privacy.⁵

That said, there is a risk that people might be victimized as a result of the disclosure. However, we are not aware of any cases of that and it can be dealt with by allowing, as is the case in the US, for an application to be excused from disclosure where a political party has evidence its members are being harassed or similarly attacked on the basis that the public disclosure of their donations has exposed their unpopular political views. If there were evidence of such a thing happening in Australia, then that particular exemption would have to be extended here.⁶

Queensland now has a system of continuous disclosure⁷ which requires that parties disclose gifts of over \$1000 to the Electoral Commission within 7 days of receipt. Details of those gifts are then posted on the Commission’s website⁸.

It is our position, that these disclosure requirements adequately address the legitimate concerns relating to corruption. We therefore oppose the provisions of this Bill which seek to impose caps on political donations.

5.2 Expenditure⁹

As noted above, restrictions on political expenditure are plainly restrictions on freedom of speech. However, as the philosopher Tim Scanlon puts it¹⁰ “it is clearly mistaken to say that freedom of expression never licenses government to restrict the speech of some in order to allow others a better chance to be heard”.

Restrictions on electoral expenditure are akin to the rules of debate in a meeting which restrict the length of speeches and provide for rights of reply. This feature of expenditure caps makes them more acceptable than donation bans or caps.

³ *Submission To The Inquiry Into Electoral And Political Funding* by the Legislative Council’s select committee on Electoral and Party Funding Parliament of New South Wales, February 2008

⁴ Even in the United States all but one Supreme Court Judge has accepted that preventing corruption justifies laws compelling the disclosure of donations.

⁵ These issues are of considerable contention in the US. But one fundamental difference between the American situation and that in Australia is that Federal law in the United States requires the disclosure of every political contribution over \$200.00 made by individual persons including the person’s name, city, postcode, employer and occupation. All of this information is then placed on the internet to be searched by everyone. We would certainly oppose public disclosure of that much personal information. That is not what happens in Queensland.

⁶ See generally Wilcox – *Transparency and Disclosure in Political Finance- Lessons from the United States* June 2001 accessed at <http://faculty.georgetown.edu/wilcox/Disclosure.pdf> page 6.

⁷ Continuous disclosure has the advantage of disclosure at say some time during the election campaign but before polling day, in that it allows time for analysis by media, academics and civil society groups

⁸ Victoria now has a similar scheme.

⁹ as this Bill does not deal with donations apart from caps, the submission does not consider whether parallel changes should be made in relation to donations

¹⁰ “Content regulation reconsidered” in *The Difficulty of Tolerance: Essays in Political Philosophy* Cambridge University Press 2003 at page 166

In the context of political speech, the restrictions are essential to fairness, in that, the arms race between various political players is continuously increasing the cost of elections, which must necessarily result in an increasing number of people being excluded from the political process. Capping expenditure would also help to create closer financial equality between candidates at elections.¹¹

The principle argument against caps on expenditure is that they might prove ineffective and in fact be counterproductive. Professor Hughes¹² argued that such expenditure might simply encourage individuals (particularly with the increasing use of digital campaigning tools) to incur expenditure beyond the jurisdiction where the election is being held.

We appreciate this concern. On the other hand, it has not deterred other countries who currently have expenditure limits.

In the end, like Young and Tham,¹³ the Council's submission is that despite the obvious administrative and other difficulties with such a proposal, the need to take some steps to ensure that there is some level playing field between the political parties requires an attempt to be made to do so. It should also obviate the need for donation caps. Furthermore, by allowing for the continuation of private donations one means by which new entrants can enter the system remains open.

Having said that, as noted above, it is our submission that any restrictions on expenditure must be narrowly tailored so as to minimize their impact on the right to freedom of speech.

It is our submission that the expenditure provisions, in so far as they deal with third parties, are too broad in so far as:

- (a) they apply to a third party that expends more than \$1000 on electoral expenditure during the one-year period prior to an election
- (b) the election period is 12 months.
- (c) it includes expenditure by a third party, prior to an election, "to otherwise influence (directly or in or indirectly) voting at an election"

In particular, we share the concern of other civil society organisations that the third-party provisions as currently drafted will impose an unacceptable burden on advocacy groups, particularly small advocacy groups. Furthermore, given clause 213 of the Bill, non-compliance with these provisions exposes every member of the executive of a third party organisation to liability for breach of the law.

It is our submission, that applying these provisions to an organisation that expends as little as \$1000 over the one-year period is entirely unacceptable. We note that in the United Kingdom the current registration threshold for third parties in England is £20,000 and in Scotland, Wales and Northern Ireland is £10,000¹⁴ during the period of 1 year prior to a UK general election¹⁵. There are many differences between the UK and

¹¹ Young and Tham, *Political Finance in Australia: a Skewed and Secret System* – School of Social Sciences, Australia National University Report Number 7 at page 93

¹²Op Cit, Page 6

¹³Op Cit, Page 96

¹⁴ As found on the UK Electoral Commission website <https://www.electoralcommission.org.uk/non-party-campaigners-where-start/what-are-rules-non-party-campaigners/registration> (accessed 7/1/20) . In 2018 the pound sterling had a PPP value of .700 and the AUD 1.433 according to the OECD

¹⁵ The period is 4 months for Parliamentary elections in Scotland and Assembly elections in Wales and Northern Ireland

Queensland. In the UK staff and overhead costs are included in calculating the threshold, which they are not in the definition in this Bill. There are more people in England than Queensland¹⁶. However, we suggest that this information throws some light on the amount provided for in this Bill.

Ultimately, the question is what amount would a third party need to expend to influence the outcome of an election and further what is the correct balance between securing the necessary transparency and imposing an unfair regulatory burden on the organisations. We do not have access to the information to calculate this number, but it is our submission that \$1000 over 1 year is ridiculously low having regard to the factors to be considered.¹⁷

Lord Hodgson of Astley Abbotts¹⁸ also considered the election period in the United Kingdom, which was and remains 12 months. The review found no evidence of campaigning by third parties 12 months prior to the election. Having found that most voters were unlikely to be influenced by campaigning 12 months prior to the election, Lord Hodgson recommended the period be reduced to 4 months. We can see no reason for thinking voters in Queensland pay any greater attention to elections than those in the UK and submit that the registration period should be reduced to 4 months prior to the election.

We turn now to the inclusion in the definition of electoral expenditure, of expenditure incurred for the purpose of influencing, “directly or indirectly voting at an election”. We are concerned that this is an extremely broad concept. It seems to us arguable, that it includes any advocacy in support of a policy, which may be supported by one political party or candidate but opposed by another.

It is our submission, that this provision therefore goes too far. The requirement for registration should be limited to promoting or opposing (directly or indirectly) the election of a political party or candidate.

We note that this proposal goes further than that which is permitted in American law. Under the American Constitution disclosure laws can only apply to political communication which expressly advocates the election or defeat of candidates. This approach has been rightly criticised as permitting so called “issue” ads which whilst missing any statement expressly advocating the election of a candidate, are functionally equivalent of an ad containing such a statement.

It is our submission, that by extending the reach of the provision to ads which indirectly promote or oppose the election of a candidate or party, the proposed legislation deals with this issue. But does not go so far as to make it impossible for an organisation to continue to advocate for a particular policy, which also happens to be the same policy advocated for by a political party or candidate.

Alternatively, if the current categories of expenditure are to be retained, it is submitted that the legislation should be amended to make it clear that the law only applies if it is the actual intention of the person undertaking the activity that a party or candidate be elected or to influence the vote. The current draft refers to expenditure “incurred for, or related to any of the following purposes”. It might well be, that the word “purposes” will be interpreted by the courts as requiring a subjective intention. However a review of various decisions on the interpretation of the word “purpose” or “Purposes” or “for the purposes of”, finds that there is no consistent approach by the courts on this point.

¹⁶ We note that the population of Scotland is approximately 5.5 million, approximately a million people more than in Queensland. Though again, costs in Queensland will be affected by the vastly greater distances in this State than in Scotland.

¹⁷ In this regard we refer to the review of the regulation of third party campaigners in the United Kingdom by Lord Hodgson of Astley Abbotts CBE *Third Party Election Campaigning – Getting the Balance Right* (March 2016) especially at paragraphs 7.26-7.29

¹⁸ *ibid* paras 4.80-4.90

This could be achieved by amending the definition of electrical expenditure as follows:

expenditure, incurred with a view to

- (a) promoting or opposing a political party in relation to an election
- (b) promoting or opposing the election of a candidate
- (c) otherwise influencing voting at an election”.

This proposed amendment has two important benefits. Firstly, it focuses the legislation on what it is intended to deal with, that is activity which is intended to influence the outcome of an election. Secondly, it is consistent with the principles of criminal responsibility usually advocated by this organisation, that criminal responsibility should usually be limited to the intentional conduct of a person.¹⁹

6. OTHER ISSUES

As the Explanatory Notes, correctly state, there are a number of provisions in this legislation which reverse the onus of proof in relation to offences under it. Those are the provisions, of which section 219 is an example, which create an offence and then provide that a person does not commit the offence, if they have a reasonable excuse.

The reason given in the explanatory note for this reversal seems to be that in the situations covered by the offences the defendant is likely to have exclusive knowledge of the matters of defence. We do not have time to determine whether this is correct or not. Whether that statement is true or not, whilst this might be a legitimate reason for reversing the burden of proof in relation to a civil matter, it is in our opinion not a basis for reversing the burden of proof in a criminal matter. As the High Court has repeatedly stated²⁰, our criminal justice system is an accusatorial system, in which as part of the principled asymmetry between the prosecution and the defendant, the burden of proof lies at all times on the prosecution. For this reason, we oppose all these provisions.

We trust this is of assistance to you in your deliberations.

Yours faithfully



Michael Cope
President
For and on behalf of the
Queensland Council for Civil Liberties
9 January 2020

¹⁹ *ibid* pages 25-29

²⁰ *Eg Carr v Western Australia* (2007) 232 CLR 138 at para 103 per Kirby J