Human Rights Law Centre

Committee Secretary
Economics and Governance Committee
By email: egc@parliament.qld.gov.au

9 January 2019

Dear Committee

Re: Submission on the *Electoral and Other Legislation (Accountability, Integrity and Other Matters) Bill 2019*

Thank you for the opportunity to make a submission with respect to the *Electoral and Other Legislation (Accountability, Integrity and Other Matters) Bill 2019* (**Bill**).

We commend the stated purposes of Chapter 2 of the Bill, which are to:

a) improve the integrity of elections in Queensland by limiting the influence that any one person or entity can have over the political process;

b) level the playing field for election campaigning; and

c) increase public funding to candidates and political parties to provide for better quality public debate and campaigning.

Insofar as it limits donations and election spending to candidates, political parties and associated entities, this Bill is a significant step in the right direction. However, we have serious concerns with the way in which this Bill regulates third parties.

In summary, we believe the Bill will stifle advocacy by small not-for-profit community groups and charities; and simultaneously will do little to govern enormous election spends by industry associations and corporations. As a result, the Bill risks causing greater political inequality between the State's wealthiest people and ordinary Queenslanders.

Given the significant impact this Bill will have on civil society and democracy in Queensland, the consultation process undertaken by the Government has been clearly inadequate. The poor process extends to the call for submissions to this Committee. Calling for submissions over the Christmas break has limited our ability to alert and consult with impacted community groups about this complex legislation. The rushed timeline has also prevented us from scrutinising important clauses in the Bill targeting dishonest conduct by Ministers and local councillors.

The case for reform to improve Queensland's democracy

Big political donations are intended to have political influence. There is a sliding scale of influence enabled by political donations: at the lower end, a sizeable donation can ensure the donor gets access to a politician that ordinary Australians wouldn't get.[1] In the middle, is what the High Court has described as "clientelism", or a "more subtle kind of corruption… [where] officeholders will decide

[1] D Wood, K Griffiths, "Who's in the Room: Access and Influence in Australian Politics" *The Grattan Institute*, 23 September 2018.

issues not on the merits or the desires of their constituencies, but according to the wishes of those who have made large financial contributions valued by the officeholder".[2] At the far end, is "quid pro quo" corruption – illegal bribes – where politicians explicitly make promises in exchange for political donations. This last kind may be rare (although in the absence of a Commonwealth integrity commission, we do not know how rare), but the other forms of influence are inevitable in our current political system.

Further, the ever-increasing cost of election campaigns puts pressure on politicians to keep big donors happy. Nationally as well as in Queensland, the current political system ensures the needs of the very rich are given priority.

Donations to politicians should not only be transparent, but limited, so that wealth cannot translate into political influence. Caps on election campaign spending are also crucial, in order to relieve the pressure on politicians to appeal to big donors, and to ensure the rich cannot drown out the voices of everyone else by making big election spends. Effective reforms should help to restore people's trust in our democracy.

In summary, reforms are vital to:

1. **Improve democracy**: Without limits on political donations and election spends, election debates can be dominated by those with the biggest bank balance who can afford large advertising spends, not those with the best ideas.
2. **Restore equality**: Limits on political donations and election spends will create a more level playing field and help to realise a foundational principle of the Australian Constitution: that Australians should have equality of opportunity to participate in the political process.[3]
3. **Focus politicians on serving the public interest**: Limits on political donations will help to focus politicians on serving the interests of the communities they represent, not the interests of large corporate and private donors. Increased public election funding and limits on election spending will reduce the need for politicians to seek donations to build ever larger war-chests and will consequently reduce the risk of those politicians being influenced to serve the needs of those donors instead of the public interest.

However, regulation of this space is deceptively complex. Well-intentioned reforms developed without deep consultation are likely to have unintended consequences. In this case, the consequences will be felt hardest by community groups and charities, as a result of poorly thought through regulation of third parties.

How the Bill applies to third parties

Section 197 of the *Electoral Act 1992* (Qld) (**Act**) defines third parties as individuals or entities other than candidates or political parties. The Bill regulates all third parties that incur "electoral expenditure",

[2] *McCloy v NSW* [2015] HCA 34 at [36] per French CJ, Kiefel, Bell, Keane JJ.

[3] *McCloy v New South Wales* [2015] HCA 34 at [45] (per French CJ, Kiefel, Bell and Keane JJ), citing *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 72; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 136; *Unions NSW v New South Wales* (2013) 252 CLR 530 at 578; and *Tajjour v New South Wales* (2014) 313 ALR 221 at 271.

regardless of how little they spend, although the most onerous obligations set in once the third party incurs $1,000 or more.

If the third party spends less than $1,000 on electoral expenditure, they will not be required to register (**unregistered third party**) (proposed s. 297). They will, however, still be required to keep a separate State campaign account (proposed s. 215). All electoral expenditure must be taken from this account (proposed s. 221A).

If a third party spends more than $1,000 on electoral expenditure in an election year, they will be required to register (**registered third party**). There are more onerous compliance requirements imposed on registered third parties, including:

i. Registering with the Electoral Commission of Queensland (**ECQ**) (proposed s. 297), with details that will be made available on the ECQ website (proposed s. 298);

ii. Appointing an agent (proposed s. 208);

iii. Ascertaining at the point of receiving donations – irrespective of whether this happens years out from the next election – any donations that will be used to incur electoral expenditure (**political donations**), and arranging for those donors to complete a "donor statement" to accompany each donation (proposed ss. 250 and 251). Note that this applies to donations of any amount;

iv. Notifying any donor who has made a political donation of the circumstances in which it is an offence to give a political donation (proposed s. 258). This notice applies to donations of any amount and must be provided within 14 days of receipt;

v. Paying all political donations into the State campaign account within five business days of receiving a donor statement (proposed s. 219). Donations that are not political donations may not be deposited in the State campaign account. All electoral expenditure must be paid from the State campaign account (proposed s. 221A). In practice, these provisions mean organisations that rely only on donations must only use political donations to incur electoral expenditure. There is no equivalent restriction on the use of other forms of income (other than loans) by third parties;

vi. Providing a return with the details of the third party's electoral expenditure 15 weeks after polling day (proposed s. 283). This includes providing the following details of each item of electoral expenditure: the name and business address of the person who supplied the good or service; a description of the good or service; the amount of expenditure; and when the expenditure was incurred. Note that the return must disclose details of electoral expenditure made at any time, including expenditure years out from an election;

vii. Maintaining records of all donations, including political donations and other matters (proposed s. 305); electoral expenditure incurred, including details about the printing, publishing or broadcast of an advertisement or other electoral material, as well as a copy of the advertisement or electoral material together with a description of the audience (proposed s. 305A). These records must be kept for five years (proposed s. 305D).

On top of these compliance obligations, third parties will be prohibited from receiving political donations in excess of $4,000 across the four year parliamentary term (proposed s. 252). Donors will

also be prevented from giving political donations to more than six third parties, regardless of the amount given to each (proposed s. 256).

Finally, third parties will be prohibited from incurring more than the expenditure cap of $1 million State-wide, or $87,000 per electoral district (proposed s. 281E).

The Bill will increase the relative power of corporations and industry associations, which are already politically powerful

One of the stated purposes of the Bill is to "level the playing field for election campaigning". This goal is consistent with the Australian Constitution, which protects Australians' equal opportunity to participate in our representative democracy. And yet if passed, this Bill will likely increase the relative power of industry associations, corporations and wealthy individuals over community groups, charities and, to a lesser extent, unions.

In Queensland, election spending by third parties is not tracked, so we cannot identify for certain who the biggest spenders have been in recent State elections. We know at Federal level however, industry associations like the Minerals Council of Australia and the Business Council of Australia are among the biggest spenders. It seems likely that Queensland-based and national industry associations – along with their member companies – will play a significant role in future Queensland elections. Furthermore, if corporations can no longer donate large sums directly to candidates and political parties, many may decide to campaign directly themselves.

Unlike community groups and charities, industry associations and corporations do not rely on donations. Industry associations receive membership fees, subscriptions and levies. Corporations draw upon commercial revenue streams to fund their election campaigning. As a result, while this Bill will see charities and community groups' income severely restricted for election-related advocacy (see below), industry associations and corporations will not be so restricted. The impact on unions will also be less as they receive their income from membership fees from workers.

The state-wide spending cap of $1 million for third parties will not achieve the Bill's aim of levelling the playing field. This is in part because multiple third parties are permitted to agree to spend up to $1 million each on a coordinated State-wide election campaign. However, the only third parties likely to raise anywhere near the cap are, to our knowledge: a very small number of not-for-profits which have a sufficiently large base of supporters who give under the donation cap; a limited number of unions and industry associations; and an unlimited number of corporations and rich individuals. It follows that the capacity to run very large-scale coordinated campaigns is in practice limited for not-for-profits and unions, but not for industry associations in collaboration with their corporate members and wealthy individuals.

This situation is exacerbated significantly, as it appears there is nothing in the Bill to prevent corporations from spending multiple millions through various subsidiaries.

In this way, the Bill raises the relative power of corporations and wealthy individuals as compared with civil society. It leaves the door open for a relatively small number of people or corporations to pressure political parties and candidates to take certain policy positions. Wealthy people or for-profit corporations or their industry associations will be able to run multi-million dollar campaigns for or against particular candidates depending on whether they have taken up their preferred policy position.

Achieving greater political equality through donation and spending caps requires a nuanced legislative solution. Third parties are diverse. Treating them the same can have perverse and unfair consequences. Further consideration is necessary to devise a system that will truly improve the integrity of Queensland's political system.

Example

It is 2024 and the Queensland State Election is approaching. An alliance of charities and community groups is campaigning for reforms to reduce the harm caused by gambling. The reforms would affect pokie venues and casinos. The charities and community groups rely on donations to fund their advocacy work. That work includes producing flyers, a website and social media advertisements to promote their reforms with score card and policy information on the candidates and parties positions on the reforms. To the extent that this work is involves electoral expenditure, the charities and community groups would need to receive specific "political donations" to fund the work and would have all of the compliance obligations that go with that under the Bill. The maximum donation someone could give for this work would be $4,000 over the 4 year term.

Each corporation that runs a pokie venue or casino would be permitted to use its own revenue and spend up to $1 million on election advertising opposing the reforms and targeting any candidates or parties that supported them. Their industry associations could raise funds through memberships, subscriptions or levies to spend up to $1 million on election advertising.

The Bill will shut down election advocacy by community groups and charities

Grassroots organising, be it through community groups, charities and other not-for-profit organisations, should be central to Queensland's democracy. Most charities and community groups are under-resourced and many are volunteer-run. Yet their advocacy is vital to the health of our democracy, whether it relates to stopping family violence, reducing homelessness, protecting Queensland's bushland or standing up for Aboriginal and Torres Strait Islander people's rights. In the lead up to an election, these groups may legitimately want to incur electoral expenditure for their advocacy to be effective. This might involve distributing flyers, producing material for social media or running an ad in a local paper about an election issue. As currently drafted, this Bill will discourage and in some circumstances prevent community groups and charities from advocating on their issues in the lead up to an election.

Across the country, there have been repeated attacks on the ability of civil society to advocate. It is critical that this Bill does not unduly further restrict the ability of civil society to speak up.

A. The regulatory burden introduced by this Bill will deter community groups and charities from doing issues-based advocacy in the lead up to a State election

(a) Ambiguity of the definition of electoral expenditure

Many obligations and criminal penalties apply to third parties that incur electoral expenditure. These apply to a third party that spends just a single dollar on electoral expenditure, but they particularly apply to those that incur more than $1,000 in electoral expenditure. The definition of what counts as "electoral expenditure" in the Bill is therefore crucial, and it is vital that the definition be as clear as possible.

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Currently, the definition provided in proposed s. 199 of the Bill is vague and will be difficult for many groups to negotiate. Determining whether any single communication on an election issue is for the dominant purpose of directly or indirectly influencing a vote in an election, as opposed to merely raising public awareness of an issue, will at times require legal advice. This is neither a viable nor desirable outcome for community groups and charities engaging in advocacy in the lead up to an election.

There is no clear line between awareness-raising or pressuring politicians to take a better position on an issue, and indirectly influencing votes in an election. The definition in proposed section 199 – including when read together with the Explanatory Notes (at page 26) – does not assist groups in making this calculation.

The following examples illustrate situations in which it is unclear whether common expenditure will meet the definition of "electoral expenditure":

- In the lead up to the election, an independent Queensland MP announces their support for a policy to reduce homelessness. A charity that focuses on eradicating homelessness wants to seize this moment to encourage the major parties to adopt the same position. The charity pays for radio ads in the electorate, congratulating the independent and urging the major parties to adopt the same position.
- A volunteer group wants to create a scorecard comparing local candidates' positions on a developer's proposal to build a new hotel over wetlands. The group considers the scorecard to be a simple and effective way of informing the public about which candidates support the casino. The group provides the scorecards at community stalls and on their Facebook page, but do not distribute them at voting booths.
- A charity makes a television ad about the benefits of renewable energy. It makes no reference to candidates, political parties or voting. However, the ad is shown more often in the lead up to a State election.
- A church group writes a newsletter to its members in the lead up to an election criticising a proposal to approve a new gambling venue in the area that is supported by the local MP.

(b) Obligations and liability that flows from incurring electoral expenditure

Appointing an agent: Before becoming registered third parties, charities and not-for-profit groups will be required to appoint an agent. The agent will be liable to pay a significant penalty of 200 penalty units (currently $26,690) if they fail to take all reasonable steps to ensure the third party is aware of its obligations and complies with those obligations (proposed s. 306B). This potential liability would be a significant deterrent for community groups and charities – particularly those that are volunteer-run – wanting to engage in election-related advocacy.

Requiring "donor statements": Charities that rely on many small donations rarely know at the time of receipt precisely how those donations will be spent. This is, in part, for the obvious reason that it is impossible to predict what opportunities for advocacy may arise prior to an election year. Requiring groups to predict the amount in donations they need to raise for electoral expenditure, and in turn asking each donor for a donor statement for that purpose, will be an impractical burden for many groups. This is exacerbated by the vagueness of the definition of "electoral expenditure".

If a key moment for advocacy unpredictably arises – such as a major policy announcement – in the lead up to an election, a group that did not seek any or sufficient political donations in advance will have to do so at short notice. This may effectively prevent them from incurring electoral expenditure – i.e. advocating in the way they deem most effective.

Donation and expenditure disclosure obligations: The disclosure and record-keeping obligations associated with incurring electoral expenditure will be incredibly difficult for community groups and charities to comply with. Currently under the Act, charities must disclose the name and address of donors who provide as little as $5 per week, if *any amount* of the total given (e.g. $1) has been used on electoral expenditure (see s. 263 of the Act). These relevant donations must be disclosed within seven business days of their having been used (reg. 8B *Electoral Regulation 2013* (Qld)).

Under the Bill, these groups will also have to keep records of every political donation and donor statement, regardless of the size of the donation, as well as copies of every single Facebook ad, church newsletter and leaflet that may meet the definition of electoral expenditure for five years.

B. The donation cap will silence charities that rely on philanthropic donations for their advocacy

The onerous compliance burden aside, the donation cap itself will mean any charities and not-for-profit groups that rely on a small number of large philanthropic grants will be effectively silenced from engaging in election-related advocacy. As a result of this Bill, only third parties that do not rely on donations or those that can bring in a large number of small donations specifically for election-related advocacy will have a significant voice at elections.

Recommendations

Recommendation 1: Have a more limited definition of "electoral expenditure" for small community groups and charities

The compliance burden and inequity of this Bill are so severe, that raising the threshold for registration and the donation cap alone will not be sufficient to protect civil society from its worst effects. What is required, is a narrower and clearer definition of electoral expenditure that will be workable for small community groups and charities.

The purpose of applying disclosure requirements and donation caps on third parties is to prevent political parties and candidates from circumventing donation caps by funnelling political donations through them. The risk of this occurring with very small organisations and charities, is extremely low.

Groups with a small income – say, $50,000 per annum – are very unlikely to have a decisive impact on a State election, even at electorate-level. We note that there would also be little incentive for wealthy individuals and corporations to set up multiple small third parties to avoid the compliance obligations under the Bill, as they can already do so using their personal wealth, up to $1 million. In any case, an anti-avoidance provision could be drafted to prevent people from circumventing the laws.

Charities are, according to the *Charities Act 2013* (Cth), required to work in the public interest and prevented from having a purpose of promoting or opposing candidates and political parties. That is, charities are both legally required to ensure that *all* their activities serve their charitable purpose, and legally prevented from engaging in partisan work or acting as a conduit for political donations.

The Bill should be amended to protect these groups. An example of language that such an amendment could adopt is provided below, borrowing from the Victorian definition of "political expenditure".

Insert in proposed s. 199, after subsection (5):

> *(6) Expenditure incurred by a third party registered under the Australian Charities and Not-for-profits Commission Act 2012 or with an annual income of less than $50,000, is only electoral expenditure if material is published, aired or otherwise disseminated and refers to—*
>
> *(d) a candidate or a political party; and*
>
> *(e) how a person should vote at an election.*

Recommendation 2: Rethink how to regulate industry associations and corporations

The current Bill does little to regulate the biggest players in Queensland's elections. More research would inform a more nuanced policy solution, perhaps looking into ways in which corporate income to be used on electoral expenditure could be restricted or, at the very least, disclosed transparently. In addition, differential spending caps could be designed to take account of the inequality that arises because those with vast personal wealth may spend the same amount as those who pool small contributions.

Recommendation 3: Amend the existing donation disclosure provisions to remove the anomaly

The existing anomaly by which donors who give $1,000 over four years must have their details disclosed if just $1 or less of the total donation is used to incur electoral expenditure, but a donor who gives $999 for electoral expenditure need not, should be changed through this Bill. Proposed amending section 263 of the Bill should make clear that only donors who have given over $1,000 in *political donations* should have their details published on the ECQ website.

Recommendation 4: Exclude communications with third parties' members from the definition of "electoral expenditure"

All third parties should be permitted to communicate with their members on issues without being concerned that the communication may be captured as "electoral expenditure". The definition should exclude communications with third parties' members.

Recommendation 5: Remove the restriction on third parties from having signage at polling booths

Given time constraints, we have not had the opportunity to look in detail at the restrictions to signage around polling booths introduced by the Bill. However, we echo concerns in other submissions that these restrictions may be in breach of the implied freedom of political communication.

Recommendation 6: The threshold for registering as a third-party campaigner should be raised.

HRLC supports increasing the threshold of electoral expenditure for registering as a third-party campaigner to $6000 so as not to prohibit small community groups from participating in public interest advocacy activities around elections.

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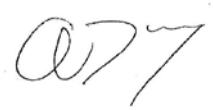
If the Committee has any questions regarding this submission, we would be pleased to provide it.

Yours sincerely

Hugh de Kretser
Executive Director
[redacted]



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