QUEENSLAND COUNCIL FOR CIVIL LIBERTIES
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The Research Director
Legal Affairs and Community Safety Committee
Parliament House

By Email: lacsc@parliament.qld.gov.au

Dear Madam/Sir

Electoral and Other Legislation Amendment Bill 2015

Kindly accept this submission in relation to the above Bill.

The Council is a voluntary organisation which receives no government funding for its day-to-day operations.

The Council has as one of its objectives to uphold the Universal Declaration of Human Rights ("UDHR").

Article 21 of the UDHR provides relevantly:-

1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives;

2. The will of the people shall be the basis of authority of government; this shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

This Bill seeks to return the law to where it was prior to the amendments made by the previous government in 2013 concerning:-

1. Disclosure of donations; and

2. Voter identification.

The QCCL opposed both these changes and broadly speaking welcomes the return of the law to its previous condition.

Donations

The former Commonwealth Electoral Commissioner, Colin Hughes, writing in 1979 argued that essential to an election finance system is "continuous comprehensive and total disclosure of both income and outgoings." We would submit that in general terms this remains the case.

Like Mr. Hughes[1] 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.

[1] *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

What is in fact needed is as Hughes has observed a system of *continuous* disclosure. Under the current and proposed laws, disclosure is quite often too old or too late to be of any benefit to anybody. Fortunately modern technology enables us to have regular disclosure posted on the internet as has been demonstrated by the system operated by the New York City Campaign Finance Board. For the Committee's assistance the following disclosure rules are extracted from the Board's website:

(a) Semi-annual disclosure statements are due on January 15 and July 15 in each year of the election cycle and on January 15 in the year after the election;

(b) Pre-election disclosure statements must be lodged 32 and 11 days before the election and March 15 and May 15 in the year of the election;

(c) Post-election disclosure statements are required 27 days after the election;

(d) If a candidate: (1) accepts a contribution or contributions from a single source or loan in excess of $1,000; or (2) makes an expenditure in excess of $20,000; during the 14 days preceding an election, the candidate shall report such contributions, loans, and expenditures to the Board in a disclosure, received by the Board within 24 hours after it is accepted or made.

Although disclosure does not automatically lead to the detection of campaign finance violations it does make the process of detection easier. Whilst direct bribery appears to have been largely eliminated from our political system the fact that it has increases the likelihood that the campaign finance system will be the location of rent seeking behaviour. Whilst disclosure is of course not fool proof the existence of reports that can be audited by the government and scrutinised by the media and other community groups increases the prospect of irregularities being identified.

It is often argued that in effect these sort of issues do not figure large in the minds of voters. To borrow a phrase beloved of Ben Chifley in the end elections are decided by the "hip pocket nerve". For better or worse there is much to be said of that view. However despite that cynical view we would strongly submit that the last election in this State was partly decided on factors on other than the "hip pocket nerve".

No doubt for the system of disclosure to work there must be bodies be it other political parties or civil society groups who are prepared to analyse the data collected and provide information to the public. And whilst it might be true that individual acts of corruption or subservience to rent seekers may not affect voters there is evidence to support the proposition, once again supported by the last election in this State, that voters are influenced by the overall fairness of the system or at least the apparent fairness of the system. Proper disclosure laws which are effectively enforced must contribute to this overall faith in the system which is in itself essential to its proper functioning.[2]

This anti-corruption rationale for disclosure was accepted by the US Supreme Court in its seminal decision in *Buckley v Valeo* 424 US 1. It continues to be accepted by the majority of judges of that Court including those in the well known *Citizens United*[3] case where the only member of the court who argued that disclosure laws were an unconstitutional violation of freedom of speech was Justice Clarence Thomas.

One fundamental difference between the American situation and that in Queensland is that Federal law in the United States requires the disclosure of every political contribution over $200 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.[4] We would certainly oppose public disclosure of that much personal information. That is not what happens under this legislation.

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[2] See generally Wilcox –*Transparency and Disclosure in Political Finance- Lessons from the United States* June 2001
[3] *Citizens United v FEC* 130 S Ct 876
[4] *Mrs McIntyre's Checkbook: Privacy Costs of Political Contribution Disclosure* 6 Journal of Constiutional Law 1

Perhaps there is a reasonable argument for suggesting that $1,000 is too low. But certainly in our submission the current figure of $12,000, which would buy you a small car, is far too high and $1000 is in the vicinity of the appropriate number. To come to a final conclusion about whether $1,000 is too low we would need to have access to information about average donation amounts the like. As a purely voluntary organisation we do not have the time to consider those sorts of figures in detail.

We also note that in the United States it is possible to make 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.[5]

The American legislation also provides a complete exemption from disclosure where a political candidate does not spend more than a specific amount. Once again an exemption from public disclosure of donations to a political candidate spends lower than a specified amount, as opposed to disclosure to the Commission, might be worthy of consideration.

In short, in principle, we support these amendments although we would argue that the rate of disclosure is inadequate and should be changed to reflect that which takes place in New York as described above.

Voter Identification

The QCCL supports this amendment. Voter identification requirements were a solution in search of a problem.

Voting rights involve two competing interests. On the one hand is the fundamental right to vote which in our submission the State is required not only to protect but to facilitate. The other and competing interest is that the government must play an active role in the regulation and management of elections to ensure that they are fair and honest. As a consequence election laws will invariably impose some burden upon individual voters.

In accordance with its framework for analysis the first question that the QCCL asks of any law which seeks to place a burden on a recognised civil liberty or right is whether it is necessary.

That requires the proponent of the burden, in this case the State,[6] to demonstrate the need for the law. In this case the alleged purpose of the law is to prevent fraud. The only type of fraud that identification can prevent is in-person impersonation voter fraud. Not one jot of evidence was produced to show that this is a serious problem in Queensland. The previous government's own discussion paper stated that, "There is no specific evidence of electoral fraud in this area."

In a very useful paper entitled *Voter Id* by Brenton Holmes published by the Australian Parliamentary Library on 4 August 2014 the author produces a table at page 9 which says that in each of the years listed below the number of cases of multiple voting referred to the DPP were:

1. 1993 – 1

2. 1996 – 29

3. 1998 – 5

[5] Wicox opcit page 6

[6] The QCCL starts from the proposition that it is the person seeking to burden a recognised civil right or civil liberty to establish the need for that restriction.

4. 2001 – 28

5. 2004 – 5

6. 2007 – nil

7. 2010 – nil

In addition, we can see no evidence of public disquiet about the functioning of the electoral system being affected by fraud.

It is useful to quote at some length from the dissenting Opinion of Justice Souter with whom Justice Ginsburg agreed in *Crawford*.[7]

> "The state responds to the want of evidence with the assertion that in-person voter impersonation fraud is hard to detect. But this is like saying the 'the man who wasn't there' is hard to spot and to know whether difficulty in detection accounts for the lack of evidence one at least has to ask whether in-person voter impersonation is (or would be) relatively harder to ferret out than other kinds of fraud the answer seems to be no; there is reason to think that 'impersonation of voters is…the most likely type of fraud to be discovered'…this is in part because an individual who impersonates another at the polls commits his fraud in the open under the scrutiny of local poll workers who may well recognise a fraudulent voter when they hear who he claims to be. …the relative ease of discovering in-person voter impersonation is also owing to the odds that any such fraud will be committed by 'organised groups such as campaigns or political parties' rather than individuals acting alone…it is simply not worth it for individuals acting alone to commit in-person voter impersonation which is relatively ineffectual for the foolish few who may commit it. If an imposter gets caught he is subject to severe criminal penalties…that single extra vote is not worth the price…a vote in a political election rarely has an *instrumental value* since **elections for political office at the state or federal level are never decided by just one vote**. In sum, fraud by individuals acting alone, however difficult to detect, is unlikely. While there may be greater incentives for organised groups to engage in broad gauged in-person voter impersonation fraud…it is also far more difficult to conceal large enterprises of this sort." (footnotes and citations omitted) (emphasis added).

Moreover, there is a fundamental difference between our voting system and those other countries. It is that we have compulsory voting. They do not. Because of the compulsory enrolment requirements of our system it is submitted that it is better to focus efforts on preventing this type of fraud at that stage of the process where restrictions on the right of a person to vote are not likely to prevent a person from actually voting because they will have time to attend to any concerns.

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

Yours faithfully

[redacted]

Michael Cope
President
For and on behalf of the
Queensland Council for Civil Liberties
10 April 2015

[7] *Crawford v Marion County Elections Board* 128 S.CT 1610 pages 19 - 21