

## Submission

on the

## Electoral and Other Legislation Amendment Bill 2015

to the

### Legal Affairs and Community Safety Committee

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by

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## 1. Introduction

On 27 March 2015, the Attorney-General and Minister for Justice and Minister for Training and Skills, the Hon Yvette D'Ath MP, introduced the *Electoral and Other Legislation Amendment Bill 2015* into the Queensland Parliament. The Bill was referred to the Legal Affairs and Community Safety Committee (the Committee) for detailed consideration. The Committee is required to report to the Parliament by 1 May 2015.

FamilyVoice Australia is a national Christian voice – promoting true family values for the benefit of all Australians. Our vision is to see strong families at the heart of a healthy society: where marriage is honoured, human life is respected, families can flourish, Australia's Christian heritage is valued, and fundamental freedoms are enjoyed. To this end, we have a longstanding interest in democracy, the rule of law, constitutionalism, and the integrity of the electoral system and election process.

We work with people from all major Christian denominations. We engage with parliamentarians of all political persuasions and are independent of all political parties. We have full-time FamilyVoice representatives in all states.

Submissions to this inquiry are due by 10 April 2015.

## 2. Democratic principles and electoral funding

### 2.1. Individual freedom

As Professor Lumb points out in his book *Australian Constitutionalism*, the roots of the modern Australian system of government lie in the debates and battles in earlier centuries over providing a system of effective constraints on government power.<sup>1</sup> The idea of the rule of law, or limited government, overturned the earlier doctrine of unlimited sovereignty under which people were subject to the arbitrary will of the ruler.

The core idea of the Australian system of government is recognition of the right of the citizen to freedom under the law. This fundamental freedom is expressed in many ways, including the right to stand for election and vote, and also through the right of a citizen to use his financial resources to further his political objectives. Any constraint on the freedom of a citizen to fund political candidates or parties needs to be fully justified.

Reasonable measures to encourage citizens who wish to fund political candidates or parties should be seen as a means to foster political freedom.

This recognition of individual freedom in Australia emerges from the Judaeo-Christian understanding of mankind being made in the image of God and therefore being entitled to respect and dignity.<sup>2</sup>

### 2.2. Freedom of association

Another central element of the dignity of mankind is the recognition that people are inherently relational and naturally join with others in groups of various kinds.

In a political context this involves “recognition of the fact that between the ruler and the mass of the citizenry there are a variety of groups to which the citizens belong. They may be occupational (guild, union, association), religious (church), educational (school, university), cultural and social. Certainly, in earlier periods, battles over authority and allegiance were often fought between an overweening State (Monarch) and the Church anxious to preserve the rights of its members but also at times encroaching on such rights. The concept of limited sovereignty recognises that claims to allegiance or obedience may arise from a number of groups...”<sup>3</sup>

Political parties are among the kinds of association which citizens should have the freedom to form or to join. Furthermore, political parties should have the freedom to raise funds and use them in political campaigns, subject only to constraints which have strong justification.

### **2.3. Civil society**

Freedom of association provides the basis for civil society, which has been defined by the London School of Economics Centre for Civil Society as follows:

*Civil society refers to the arena of uncoerced collective action around shared interests, purposes and values. In theory, its institutional forms are distinct from those of the state, family and market, though in practice, the boundaries between state, civil society, family and market are often complex, blurred and negotiated. Civil society commonly embraces a diversity of spaces, actors and institutional forms, varying in their degree of formality, autonomy and power. Civil societies are often populated by organizations such as registered charities, development non-governmental organizations, community groups, women's organizations, faith-based organizations, professional associations, trade unions, self-help groups, social movements, business associations, coalitions and advocacy groups.*<sup>4</sup>

The links between civil society and democracy were explored by Alexis de Tocqueville and developed by 20th century theorists like Gabriel Almond and Sidney Verba, who identified civil society as having a vital role in a democratic order.<sup>5</sup> They argued that civil organisations facilitate better awareness and a more informed citizenry, who make better voting choices, participate in politics, and hold government more accountable as a result. Such organisations also accustom participants to the processes of democratic decision making.

Consequently, election funding arrangements should facilitate, not hinder, the organisations which constitute civil society, including political parties, trade unions, business associations and advocacy groups.

### **2.4. Representative democracy**

Australia's system of representative democracy must be distinguished from direct democracy on the one hand and totalitarian democracy on the other.

Representative democracy is characterised by elected representatives who form a parliament charged with the responsibility of making decisions and acting in the public interest – without direct consultation with the electorate. This enables swift and resolute action in the face of changing circumstances.

Direct democracy involves decisions being made either by referendum or by delegates to a ruling body bound to vote in accordance with decisions made by a majority of their electors. Such a system is inherently slow and can be dominated by sectional interests.

In a totalitarian democracy, elected officials are bound to support an ideology independently of the views of the electorate. The ideology may be considered beyond the understanding of the electorate. The duty of the officials is to ensure that any inconsistent public or private activities are eliminated.<sup>6</sup>

Representative democracy works best when elected representatives maintain a close relationship with their constituents. While not being bound by their electorate, representatives are then able to take the views of the electorate into consideration when decisions are made in parliament.

Election funding arrangements should be designed to facilitate a close working relationship between representatives and their constituents.

## **2.5. Limitation of abuse**

While civil society has a vitally important role in a healthy democracy, some elements of society nevertheless create the potential for corruption and abuse. Political donations may be used to purchase political favours, access to decision-makers, or consideration in policy formation. Such practices could distort the democratic process and undermine faith in government.

An important element of the Judaeo-Christian perspective on human society is an understanding of frailty or sinfulness of mankind. This notion is captured in Lord Acton's famous dictum: "Power tends to corrupt and absolute power corrupts absolutely".<sup>7</sup>

Consequently, some constraints on civil society and commercial institutions are necessary for the limitation of corruption and abuse.

## **3. Disclosure of contributions and gifts**

Mandatory public disclosure of financial contributions to political parties and candidates and their campaign expenditures is an important safeguard against inappropriate influence on the political system.

Disclosure thresholds should be set to achieve an appropriate balance between encouraging participation in the democratic process through financial support to political parties and candidates, and the public interest in knowing the source of political donations, especially larger donations.

The *Electoral Act 1992* currently requires the disclosure of any donation of \$12,800 or more.

The Bill proposes to return to a threshold of \$1,000 to be indexed annually against the Consumer Price Index.

Factors supporting a relatively higher threshold for disclosure include:

- (a) preserving the privacy of citizens (and their businesses) who choose to make political donations, and
- (b) limiting the compliance costs of political parties in reporting the sources of donations over the threshold.

The disclosure threshold should be high enough to allow political parties to attract adequate private donations without an undue administrative burden of disclosure.

The main factor in limiting the threshold is the public interest, that is, enabling the public to be aware of the major supporters of political parties. A robust democracy requires openness and accountability in contributions to political parties, since those contributing large amounts could have significant influence over candidates who are elected to positions of responsibility and authority. The disclosure threshold should be set at a level that will allow the public knowledge of the source of the larger donations to political parties and candidates.

The three criteria for determining an appropriate threshold are: preserving donor privacy, limiting compliance costs, and safeguarding the public interest.

In its report on the conduct of the 2004 Federal election the Joint Standing Committee on Electoral Matters argued that:

*In supporting an increase in thresholds, the Committee is convinced that, since under the present rules 88% of the value of disclosed donations to the major parties is greater than \$10,000, even if the disclosure threshold were increased to that amount, disclosed donations would continue to be a very high proportion of all donations. Nevertheless, higher thresholds would encourage more individuals to make donations to all candidates and parties.*<sup>8</sup>

It is likely, therefore, that donations greater than the current threshold of \$12,800 account for the bulk of campaign funds raised by political parties – possibly about 90% of the total. This would satisfy the need for public transparency, without burdening the parties with the administrative overhead of tracking large numbers of small donations. It would also protect the privacy of individuals who want to make modest financial contributions to the party of their choice.

**Recommendation 1:**

***Since the current threshold for disclosure of political donations of \$12,800 is likely to provide transparency for the bulk of donations to political parties – possibly about 90% of total donations – this threshold should be retained and not reduced to \$1000 as proposed.***

### **3.1. Retrospective legislation**

Retrospective legislation and the problems that it may cause have been discussed in the book by former law professor Geoffrey de Q. Walker titled *The Rule of Law: Foundation of Constitutional Democracy*. On this subject Professor Walker states:

*A statute cannot be certain if it is retroactive. Such a law can never in any real sense be promulgated. It cannot guide a person's conduct and therefore cannot be obeyed.*<sup>9</sup>

Indeed, legal certainty should be a key objective of our legal system, so that people can take current laws into account when making decisions. In the context of this bill, changing the donation threshold from \$12,800 to \$1,000 with a need to report retrospectively is a breach of trust for those who made political donations of amounts in that range. Those donors knew that the current law enabled their privacy to be respected. Reducing the threshold with retroactive effect is a violation of the privacy of these donors.

Furthermore, reducing the threshold in this way will make little difference to revealing undue voter influence. Since most of the campaign funding raised by parties and candidates comes from large donations, above the \$12,800 threshold, the influence of donors of amounts in the \$12,800 to \$1000

range is minimal. The modicum of increased transparency does not justify retrospective legislation that breaches the vitally important principle of legal certainty.

Consider a scenario in which Tom makes a \$5,000 donation to the Happy Party during the last election, understanding that it would not be disclosed. Under the proposed new retrospective legislation, the Happy Party would have to disclose Tom's donation with potential consequences for Tom. His job or business may be adversely affected if his political preferences became known. Tom may have made a different decision about donating to the Happy Party, had the lower threshold applied.

In light of the important principle of legal certainty, the minimal benefit of increased transparency cannot be considered a significant enough reason to warrant this breach of trust.

***Recommendation 2:***

***No amendments to the Electoral Act should be retrospective as the minimal benefit of increased transparency cannot be considered significant enough reason to warrant this breach of trust.***

## **4. Proof of identity: integrity of the voting process**

The process of voting can be considered to have integrity if two conditions are satisfied. Firstly, the identity of each voter should be correct, i.e. the person voting should be the elector whose name is marked as having voted. Secondly, each voter should vote only once.

Many electorates have 20 or more polling booths. Suppose Melville knows the full name and address of Bill who lives in his electorate and the polling booth at which Bill intends to vote.

Currently, Melville can go to the same polling booth as Bill to cast his own vote, and then go to the other 19 or more polling booths and vote under Bill's name, thus voting 20 or more times in the election. In a marginal electorate, if several people cast fraudulent votes in this way, the outcome of the election could be changed.

The current ECQ processes will quickly identify that Bill has voted multiple times when the lists of voters at each polling booth are compared after voting closes. However that will only lead the ECQ and the police to Bill, who has done nothing wrong and is completely unaware of Melville's dishonest voting.

Although the number of extra votes could be identified, they could not be removed from the count because there is no way of knowing which candidate gained the invalid votes. If the number of extra votes were sufficient to change the result of the election, the best that the losing party could hope for is an appeal to the Court of Disputed Returns, which may or may not order another election. The process of having another election is time and resource consuming, and a hassle for everyone involved. The hassle may also affect the voting of the electorate, which may prejudice the party that sought another election.

In a close election, such a disputed outcome could affect which party was able to form government.

The 1989 Queensland state election provides an example of the importance of appropriate voter identification. In this instance, the electoral roll at Bribie Island had hundreds of fictitious names added to it which simply didn't exist.<sup>10</sup> Consequently, the integrity of the election could not be

ensured. Had proper identification been required it is arguable that such fraudulent activity would not have occurred.

Another example of electoral roll fraud took place in the 1995 federal electorate of Macquarie, NSW. Here, it was discovered that hundreds of addresses listed were found after the election to be holiday houses without occupants, vacant blocks, and houses outside the electorate. Added to this were the names of 140 Seventh Day Adventists and 175 Plymouth Brethren (who don't vote on religious grounds) being marked on the roll as having voted.<sup>11</sup>

These examples reinforce the need for proof of identity requirements to be kept to the same standard that other institutions (such as banks) require. The overall transparency and integrity of the electoral process should be considered as being of the highest importance by the Queensland Government. Any watering down or removal of voter identity requirements may give a poor public impression of the Government's intent.

It is prudent to retain integrity provisions that minimise the likelihood of electoral fraud, rather than open the door to fraud and wait for it to occur.

The integrity of the voting system requires that a person vote only once, and as themselves. Having some personal identification, such as a driver's licence, rates notice, or electricity or gas account is a reasonable requirement. Banks routinely require some personal identification when making over-the-counter withdrawals. Election officials should be able to apply a similar system.

In the absence of adequate personal identification, the current alternative is for the voter to complete a *declaration vote* – as Antony Green explains in his blog:

*But if an elector does not have acceptable proof of Id, they will still be allowed to vote. The elector will be directed to a different desk where they will be given a declaration vote, in the same way absent and silent voters complete a declaration vote.*<sup>12</sup>

This involves the voter placing the completed ballot paper in an envelope with the person's name address and signature on the envelope. The entitlement of the person to vote can then be checked before the envelope is opened and vote included in the count. This alternative ensures no one is unfairly disenfranchised. .

With such provisions enforced, it would be very difficult for one person to claim to be someone else and vote as that person. With a requirement to show adequate personal identification in place, a person could only vote multiple times as themselves, and would be identified by existing ECQ processes.

**Recommendation 3:**

***To prevent a person from voting either multiple times or under another name, the current provisions requiring each person to provide adequate personal identification to the officials at polling booths prior to casting their vote should be retained.***

**Recommendation 4:**

***In the absence of personal identification, the current alternative of a person stating their name and address on the envelope of the ballot paper should be retained. This ensures no one is unfairly disenfranchised.***

## 5. Conclusion

The Australian system of parliamentary democracy and representative government is vitally important for the peace, security and good governance of the Australian people. As a significant part of this system, the Queensland Parliament should ensure that the highest standards of integrity apply to the maintenance of the electoral roll, the process of voting, the active involvement of civil society in the campaign process and the minimisation of opportunities for fraud or improper influence on government.

Achieving these objectives requires adequate safeguards for the integrity of the electoral roll and voter identity during elections. The privacy of voters should be respected, not only in the polling booth when voting, but also when making modest donations to candidates and political parties, for which the current reporting threshold of \$12,400 represents a fair balance. Protection against undue influence on candidates and governments should be secured by mandatory and prompt reporting of large donations (over the reporting threshold) to candidates and political parties.

## 6. Endnotes

1. Lumb, RD, *Australian Constitutionalism*, Butterworths, 1983, Ch 1.
2. Genesis 1:27.
3. Lumb, *op cit*, p 5.
4. *What is civil society?* Centre for Civil Society, London School of Economics, 1 January 2004.
5. Almond, G, & Verba, S, *The Civic Culture: Political Attitudes And Democracy In Five Nations*, Sage, 1989.
6. See the 1952 book *The Origins of Totalitarian Democracy* by Israeli historian J. L. Talmon.
7. "Letter to Mandell Creighton, 5 April 1887", in *The Life and Letters of Mandell Creighton*, 1904, p 372; also "Letter to Mandell Creighton", 5 April 1887, in *Essays on Freedom and Power*, Gertrude Himmelfarb (ed.) (World Publishing, 1948), pp 335-336.
8. Joint Standing Committee on Electoral Matters (JSCEM), 2005, *Report of the Inquiry into the Conduct of the 2004 Federal Election and Matters Related Thereto*, para. 13.71:  
<http://www.aph.gov.au/house/committee/em/elect04/report/chapter13.pdf>
9. Geoffrey de Q. Walker, *The Rule of Law: Foundation of Constitutional Democracy*, 1988.
10. Australians for Honest Elections, "The 1989 Queensland State Election – Bribe Island",  
<http://www.afhe.org.au/bribe-island.html>, accessed 10 April 2015.
11. Australians for Honest Elections, "Electoral Roll Abuse", <http://www.afhe.org.au/electoral-roll-abuse.html>, accessed 10 April 2015.
12. Antony Green, "Do Electors Need Proof of Id to Vote at the Queensland Election?", Antony Green's Election Blog, ABC Elections, 10 January 2015: <http://blogs.abc.net.au/antonygreen/2015/01/do-electors-need-id-to-vote-at-the-queensland-election.html>