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Committee Secretary
Joint Standing Committee on Electoral Matters
Parliament House
Canberra ACT 2600

By email: em@aph.gov.au

Tuesday, 6 February 2018

Dear Committee Secretary,

The Human Rights Law Centre appeared before the Joint Standing Committee on Electoral Matters last Friday, in relation to its inquiry into the *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017* (the **Bill**).

The change to the definition of "political expenditure"

Attached to this letter is a short memorandum explaining the change to the definition of "political expenditure". As set out in our evidence on Friday, there is a material difference between the definition of "political expenditure" that has been in force, and administered by the AEC since 2006, and the definition of "political expenditure" employed in the Bill (Schedule 1 Item 7).

We also note the AEC's own evidence before this Committee in 2011 was that the definition of "political expenditure" that has been in force since 2006 is vague and difficult to administer.[1] This difficulty will be compounded under the new expanded definition that will come into force in March 2018.

Addressing the concerns raised by the Bill

Further to our evidence before the Committee, we write regarding the Committee's queries about potential amendments to the Bill to address the concerns that we have raised in our submission.

As we stated on Friday and in our written submission, we have not been able to identify a neat way to address all the difficulties with the way in which the regime in the Bill is designed as it stands. There are

[1] See AEC, Supplementary Submission 19.1 to JSCEM 2011 *Inquiry into the funding of political parties and election campaigns* and referred to by JSCEM in *Report on the funding of political parties and election campaigns*, 2011 [7.30], [7.37] and [7.44].

certain provisions that certainly should be removed: for instance, as several submitters have identified, the proposed new subsection 287H(5) (expanded definition of "associated entity") is nonsensically broad, and the obligation to disclose political party membership of senior staff is unnecessarily intrusive (see recommendations 5 and 6 of our submission of 29 January 2018).

We appreciate members of the Committee clarifying their understanding that the Bill is not intended to capture general issue-based participation in public debate in this country by charities, community groups, businesses and others. Yet that is precisely what the Bill as it is presently designed does, by employing the definition of "political expenditure" as the basis for third party regulation and foreign funding restrictions. We do not see how minor amendments can address this problem. Rather, the basis for triggering the application of the foreign funding restrictions needs to be more closely anchored in electioneering activities to meet the purpose that members of the Committee stated, of ensuring that improper foreign funds do not find alternative means of influencing Australian electoral outcomes.

It appears to us that addressing this concern will require one or both of the following two steps:

(i) substantial redrafting of the definition of "political expenditure" to narrow its scope; or
(ii) a significant raising of the threshold of "political expenditure" to effectively remove most organisations in Australia from the regime in this Bill.

Moreover, as we noted in our evidence, even the current definition of political expenditure is problematic. We recommend that this definition be clarified to extend to external spending on campaigning, that is, that it be made specific to expenditure on advertising, media, printing and distribution of campaigning materials. It should be made clear that calculating political expenditure does not require organisations to apportion staff and overhead expenditure incurred in the course of their ordinary activities, and in the case of a charity, in the performance of their charitable purposes.

However, it is not at all apparent to us that, even with one of these changes, the Bill sets out desirable and constitutional electoral reform in Australia.

There are questions to be answered as to what the best approach to ensure fair elections is. We echo concerns from other submitters that the Bill creates avenues for the foreign funding restrictions to be easily avoided, for instance, by multinational companies. We have raised serious reservations about the broad range of non-allowable donors, including Australian residents and international philanthropic organisations, who have a legitimate and valuable role to play in democratic debate in this country. We are also concerned that administrative measures, for the laudable purpose of increasing transparency, would generate heavy regulatory burdens on a potentially unlimited set of organisations that contribute to

public discourse in this country and should be subject to sensible, deliberative consultation *before a Bill is drafted*.

Parliament should legislate an enduring regime that is fit to serve Australian democracy into the future. The current Bill is clearly not fit for purpose in its application to third parties.

For this reason, we have reached the view that the Committee should recommend that the regime in this Bill, as it applies to third parties, be subject to consultation and redrafting before being returned to the Parliament for its consideration and passage. It is neither practical, nor appropriate, for us to recommend amendments to a Bill that has been subject to so little stakeholder engagement and has such wide and manifest implications for freedom of political communication.

Yours sincerely,

Dr Aruna Sathanapally

Director of Legal Advocacy

Human Rights Law Centre

Enclosed: Memorandum re: “public expression of views” in the definition of political expenditure

"Public expression of views" in the definition of political expenditure

Current, incoming and proposed definitions

Section 314AEB(1)(a): A person must provide a return for the financial year *"if the person incurred expenditure for the following purposes during the year…"*

Current law – in force since 2006	**Incoming law (to enter into force in March 2018):**
" (ii) the public expression of views on an issue in an election by any means;"	*"(ii) the public expression of views on an issue* ***that is, or is likely to be, before electors in an election (whether or not a writ has been issued for the election)*** *by any means;"*

The Bill in paragraph (b) of the definition of "political purpose" in new s 287(1) is substantially similar:

> *"the public expression by any means of views on an issue* ***that is, or is likely to be, before electors in an election (whether or not a writ has been issued for the election)****;"*

The definition under the current law is already problematic:

1. There has been **no judicial interpretation** of the phrase. Whatever approach the AEC takes, this is no substitute for clarity in the statute, or an authoritative judicial interpretation. The AEC's interpretation may change over time (as it appears to have done), and is contained, at best, in policy, not in legislation.
2. In 1983, the phrase "*issue in the* election" was introduced into a scheme of **retrospective reporting after an election** by political parties, candidates and third parties. In 1991, the phrase was changed to "issue in *an* election". In 2006, this phrase was transferred into an **annualised reporting** requirement.
3. In the JSCEM 2011 inquiry, the AEC had **said that the lack of clarity stemmed from the use of terms**, such as 'the public expression of views on an issue in an election' that are **not seen elsewhere in the Electoral Act**, which makes it difficult to determine the precise scope of the section.[1] The AEC has argued that in reading section 314AEB(1)(a)(ii) in the context of the other types of expenditure that are covered, **it was not clear what additional forms of political expenditure it aimed to cover**.[2]

[1] JSCEM, *Report on the funding of political parties and election campaigns*, [7.30].
[2] Ibid, [7.37].

4. Previous AEC guidance stated that to provide certainty of this same provision, the AEC adopted a "dominant purpose test" to assess applicability on a case-by-case basis.[3]
5. **Current AEC guidance does not provide any further clarity** as to:
    - the purposes set out in 314AEB;
    - how to calculate/account for "political expenditure" (ie whether it includes internal expenses (salaries, rent of office space etc) or merely external expenses (eg printing, advertisement and production costs)); and
    - the timing (ie to which election the "issue in an election" criterion relates).

In fact, **the removal of (ii) was recommended by JSCEM 2011**.

> The matters of the frequency of third party disclosure and the definition of what must be disclosed are inextricably intertwined**. If third party disclosure is to remain on an annual basis, an appropriate definition must be devised that will be able to be administered effectively by the AEC and that will capture and release information into the public arena that is informative and conducive to the principles of transparency and accountability that the scheme seeks to uphold.**[4]

Instead the definition, as amended the *Electoral and Other Legislation Amendment Act 2017*, **broadens the definition**:

- By including "is, or is likely to be", the issue has a lesser connection with any actual election and creates a requirement of speculation. The EM states that it is intended to make the provision operate prospectively, not retrospectively.
- By including "whether or not a writ has been issued for the election", this exacerbates the lack of certainty of object. Further, it removes any pre-existing temporal limit of the term "election".

[3] See AEC, Supplementary Submission 19.1 to JSCEM 2011 *Inquiry into the funding of political parties and election campaigns* and AEC, *Election Funding and Disclosure Report – Federal Election 2007*, 17 and 35.
[4] JSCEM, *Report on the funding of political parties and election campaigns*, [7.44] (emphasis added).