



*Australian Council
for Civil Liberties*

PJSCEM INQUIRY

ELECTORAL FUNDING AND DISCLOSURE REFORM Bill 2017

A joint submission from:

NSW Council for Civil Liberties

Liberty Victoria

Queensland Council for Civil Liberties

South Australian Council for Civil Liberties

Australian Council for Civil Liberties

(25/01/2018)

1. The councils for civil liberties across Australia (New South Wales Council for Civil Liberties, Liberty Victoria, Queensland Council for Civil Liberties, South Australia Council for Civil Liberties and the Australian Council for Civil Liberties) are grateful for the opportunity to make this submission to the inquiry by the Parliamentary Joint Standing Committee on Electoral Matters (PJSCM) into *the Electoral Legislation Amendment (Electoral Funding And Disclosure Reform) Bill 2017* (The Bill)
2. This Bill is part of a major package of proposed legislation relating to national security and foreign intervention. Apart from the Bill under consideration in this inquiry there are the closely related *Foreign Influence Transparency Scheme Bill 2017* and the very significant *National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017* as well as the *Home Affairs and Integrity Agencies Legislation Amendment Bill 2017* before the PJSCM.
3. This Bill builds on the reforms in the Electoral and other Legislation Amendment Act 2017 and the findings and recommendations of the PJSCM's *Second interim report on the inquiry into the conduct of the 2016 federal election: Foreign Donations*.

The context: national security and foreign intervention/influence

4. The Prime minister's statements in relation to this package of national security and foreign intervention legislation suggest that we face unprecedented threats on these fronts. He references a recent report by ASIO initiated through the Prime Minister's Department which 'made significant investigative breakthroughs and delivered a series of very grave warnings'¹. It is understandable that much of such a report would need to be classified.
5. Had it been possible for the public to have some explanation of the general nature of these 'grave warnings' it may have given some tangible local substance to the description of the threat level as 'unprecedented' and supplied some justification of the necessity for proposals that appear unwarranted.

¹ PM second reading speech: Hansard 7/12/17.

6. There are some high profile overseas examples of apparent successful foreign intervention in the democratic and electoral processes. The 2016 United States Presidential election drew international attention to the issue of foreign state interference in democratic and electoral processes, and is now under investigation by US Congress and the Federal Bureau of Investigation.
7. Russian “meddling” in elections has captivated the international press, although no formal findings have yet been made by either investigation. Foreign, particularly Russian, interference in civil process is also being investigated in relation to the 2016 United Kingdom vote on British departure from the EU (Brexit), as well as the 2017 French Presidential elections .
8. Foreign interference in democratic and electoral processes is a serious issue that threatens some of the most precious civil liberties: the right to vote and to representational democracy. The CCLs accept that Australia has been, and will be increasingly subject to foreign intervention- some of which will be covert, unfriendly and hostile.

Preliminary Comments

9. The Minister in introducing the Bill explained its necessity and purpose:

Reform is necessary to support the integrity of Australia's electoral system, and Australia's sovereignty, by ensuring that only those with a meaningful connection to Australia are able to influence Australian politics and elections through political donations. It will also ensure that the Commonwealth's electoral funding and disclosure regime keeps pace with international and domestic developments and provides transparency for Australian voters.

The Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017 will improve the consistency of the regulatory treatment of all political actors. This includes political actors that have emerged in the Australian political landscape, who neither endorse candidates nor seek to form government, yet actively seek to influence the outcome of elections through their campaigning activities. While this is a positive indicator of the strength of Australian civil society and civic engagement, it

is important that these actors are subject to the public accountability of more traditional actors, such as registered political parties or candidates².

10. The Explanatory memorandum flags similar drivers and places the Bill in the context of wider reform of the electoral system:

Public confidence in Australia's political processes can be enhanced by increasing the accountability and transparency of those involved in political finance, particularly in relation to election campaigns. The Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017 (the Bill) builds on the Electoral and Other Legislation Amendment Act 2017 to improve the consistency of regulation applying to the financed election campaigns of key political actors. The Bill will also reduce perceived and actual foreign influence on Australian political actors by restricting the ability of foreign money to finance domestic election campaigns, and reduce opportunities for election funding to be used for private gain.³

11. The integrity of the electoral system is fundamental to the health of Australia's democracy. The CCLs strongly support the need for significant reform in relation to the regulation of funding and full disclosure to protect the integrity of the electoral process and restore public confidence. The regulation of foreign funding and influence is one element that should be addressed, but it is not clear that this is a major – and certainly not the most significant – factor undermining the integrity and fairness of the electoral process in Australia nor is it the main factor undermining community confidence in the political system.
12. The CCLs have concerns about the potential harm to Australia's national interests that could emerge from increased foreign interference in Australia's political life-including elections. We are, for example, concerned about threats to national sovereignty posed by Investor-State Dispute Settlement agreements giving precedence to the interests of global corporations - such as were proposed in the recently reactivated TPPA. We also have concerns about the disproportionate influence that local corporations and business/industry advocacy bodies visibly exercise in our national political life and particularly during elections. Mining, media and financial corporations spring to mind.

² Senator Cormann second reading speech Hansard 7/12/17

³ Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017 Explanatory Memorandum. (EF&D Bill 2017:EM) p3

13. As noted earlier, this Bill is part of suite of current bills focussing on the threat of foreign influence to Australia's sovereignty and the national interest. The CCLs concern in relation to these bills is that while there are clear grounds for concerns about foreign intervention in Australia on a number of fronts, the current controversies around apparent Russian interference in the 2016 US Presidential elections, the UK Brexit referendum and the 2017 French Presidential election are being exploited to allow the Government to pursue other agendas.
14. In this case, the 'other' agenda appears to be the Government's long term attempt to deter major charities from public - and inextricably political - advocacy and to damage GetUp as an effective independent, progressive political player.
15. While there are aspects of this Bill that the CCLs can support, our main response is alarm at the overreach and the likely impact of key elements of the Bill on the nature of Australian democracy, on much of civil society and on freedom of political communication.
16. It would be a pity and a lost opportunity if the widespread alarm caused by aspects of this Bill were to derail the building impetus for needed reform to address the real accountability and transparency problems undermining the integrity of the national electoral system.

Main elements of the Bill

17. The current Act regulates donation and disclosure requirements for three main categories of political actors in Australia - political parties, associated entities and third parties. It does not differentiate between foreign and domestically sourced donations and does not ban foreign donations
18. The main changes proposed by the Bill are:
 - a) *establishes public registers for key non-party political actors;*
 - b) *enhances the current financial disclosure scheme in the Commonwealth Electoral Act 1918 (the Electoral Act) by requiring non-financial particulars, such as senior staff and discretionary government benefits, to be reported;*
 - c) *prohibits donations from foreign governments and state-owned enterprises being used to finance public debate;*
 - d) *requires wholly political actors to verify that donations over \$250 come from:*

- i. an organisation incorporated in Australia, or with its head office or principal place of activity in Australia; or*
- ii. an Australian citizen or Commonwealth elector;*
- e) prohibits other regulated political actors from using donations from foreign sources to fund reportable political expenditure;⁴*

Foreign donations

19. The CCLs note that there is significant agreement, including across the main political parties,⁵ that foreign influence in the Australian electoral process should be regulated and or prohibited. It is claimed that Australia is in the minority in not doing so.⁶ The Prime Minister speaking on the suite of national security and foreign intervention bills presented to Parliament in December indicated that a recent classified report revealed that Australia had cause for grave concern in this area.⁷

Political parties and political campaigners

20. The Bill proposes to prohibit political parties, candidates, senate groups and political campaigners from receiving foreign gifts over \$250. This effectively bans these bodies from receiving foreign donations. The CCLs support this effective ban on foreign donations to direct players in elections with a caveat relating to charities. As noted below, this provision may also capture some of Australia's major charities if they fall into the category of political campaigner.

Recommendation 1

The CCLs do not oppose the proposed ban on political parties and political campaigners receiving foreign funds over \$250 - subject to amendments to ensure that large charities are not captured as political campaigners.

⁴ . (EF&D Bill 2017:EM) p p3-4

⁵ PJSCM's *Second interim report on the inquiry into the conduct of the 2016 federal election: Foreign Donations*. (PJSCM Second interim report 2016)

⁶ New Zealand, Canada, the United Kingdom and the United States all have legislative bans or limits on foreign donations. Most OECD countries ban foreign donations to political parties and candidates (PJSCM Second interim report 2016) paras 3.18-3.19.

⁷ PM second reading speech Hansard 7/12/17

Third party foreign donations

21. An entity or a person is required to register as a third party campaigner if their political expenditure during that financial year exceeds the disclosure threshold –which is set at \$13500⁸.
22. The Bill proposes that third party campaigners –mainly charities- will not be prohibited from accepting foreign donations, but they will not be allowed to use this money for expenditure on political activity.⁹
23. The core problem with this restriction is that the meaning of ‘expenditure on political activity’ is so open –ended it ensures that many charities will be defined as third party campaigners because much of their advocacy work will be defined as reportable ‘political expenditure.’ They will also be prohibited from spending foreign donations on their core advocacy work because much of it will be inappropriately defined as ‘expenditure on political activity’.
24. The CCLs do not consider this restriction on charities serves any public good.

Recommendation 2

The CCLs urge the exclusion of charities registered as third party entities from the ban on expenditure of foreign donations on ‘political activity’ which, as currently defined, is likely to capture expenditure on legitimate political advocacy central to their core charity role.

New category - political campaigners

25. The Bill proposes a new category for what is describes as political campaigners.

Entities other than political parties are required to register under this category of “political campaigners’ if they have spent \$100,000 or more over the previous four years on “political’ expenditure¹⁰. These entities will be subject to a ban on accepting foreign donations above \$250. This includes donations from local residents who are not permanent residents.

⁸ (EF&D Bill 2017) 287G(1). No change from the current threshold when inflation taken into account.

⁹ (EF&D Bill 2017)

¹⁰ Bill 287F

26. These organisations are required to appoint a financial controller or agent, who can be subject to serious personal penalties for breaches of the legislation.
27. If a registered charity falls into the category of a political campaigner because of expenditure of \$100000 or more on political activities special provisions apply. Political campaigners, that are also registered charities, are required to place donations from foreign sources in separate accounts and return them to the donor or pay them to the Commonwealth.
28. The CCLs do not see the sense or the public benefit of this requirement given the nature of most charities work.

Recommendation 3

The CCLs urge the exclusion of charities registered as political campaigners from the ban on expenditure of foreign donations on 'political activity' which, as currently defined, is likely to capture expenditure on legitimate political advocacy central to their core charity role.

29. However, the central issue of concern embedded in the proposal is not that of foreign donation, but the intersecting definitions (and understandings) of 'political activity', 'political purpose' and 'political campaigner' that will likely force most major charities to be registered as 'political campaigners'.
30. These definitions (with the amendments proposed by this Bill) are so broad and so contorted that it is hard not to read them as being purposefully constructed to capture major charities and GetUp .
31. With or without intention, the Bill will create deep unease in the charity sector in relation to its critical advocacy and education work.
32. The CEO of St Vincent de Paul Society is justified in his accusation that:

The ostensible reason for introducing this Bill is to deal with the threat of foreign powers interfering with our elections. There is no evidence that our major charities are a vehicle for foreign powers."

"Rather, this Bill is aimed at muting the voice of charities and others who have been critical of the government. It is dangerous legislation that is not only a threat to charities, but to

democracy itself.¹¹

33. The detailed illustration of the effect on St Vincent de Paul provides a powerful critique of the sense of the provisions.

34. St Vincents has a high profile on advocacy around social justice issues and its expenditure on this advocacy exceeds the \$100,000 threshold. This advocacy will inevitably fall under the definition of 'political expenditure' because the definition is wide enough to capture almost any public statement on any social justice issue. For example, the definition references expenditure for a 'political purpose' which includes as one element:

"The public expression of any 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)".¹²

35. St Vincent's quantum of advocacy (or 'political') expenditure is *"less than one hundredth of one per cent of total Society revenue for a year"*.¹³ Given the complexity and magnitude of the social problems this organisation deals with, this quantum of advocacy expenditure would seem to be reasonable and responsible.

36. Again one must ask, what is the benefit to the public good of forcing charities into an inappropriate political category, which then forces them to implement cumbersome and unclear administrative, recording and reporting arrangements in relation to foreign donations- which in most cases are marginal to their overall donations. A number major charities who do receive a significant amount of foreign donations will have their funding and capacity seriously and unwarrantedly compromised as they are usually involved in advocacy work of global significance. Examples cited in the media include World Wildlife Fund's calls to preserve Antarctica and Results International's work to advocate for improved funding for Aids screening and tuberculosis immunisation in Australia and the South Pacific.

¹¹ St Vincent de Paul website 10/1/18

¹² (EF&D Bill 2017) s 287.1

¹³ Briefing Paper : St Vincent de Paul website 10/1/18

37. It has been noted that the practical effect of this proposal will be to force such bodies to choose between needed foreign donations or their advocacy work. The CCLs can detect no benefit to the public good from such an outcome.
38. The CCLs do not see a threat to Australia's sovereignty or national security from charities receiving foreign donations. There may be benefit in ensuring that the accountability requirements for third party entities distinguish between foreign and local donations. This can be done with a less cumbersome method than the proposed identification of the source of all donations. It should be sufficient to identify the source of foreign donations only.
39. It is clear that these proposed laws will have an adverse impact on local charities which will have to choose between advocacy on important issues and international funding.
40. Charities are perfectly entitled to participate in the political debate. The CCLs reject the narrow view that the role of charities is simply to attend to the immediate needs of those they seek to help. Charities should be entitled to participate in the political debate flowing from their core work. They bring a valuable perspective on the underlying causes and structural issues that need to be addressed to solve the problems they are dealing with.
41. The CCLs agree that the underlying problem is the apparently determined conflation of the advocacy activities of "independent non-partisan civil society groups" with 'the electioneering of political parties'.¹⁴
42. The most disturbing likely impact of these proposals is that charities will become uneasy about whether or not their advocacy work will be seen as 'political expenditure' and retreat from it to avoid the regulatory burden including the cost. This unease will be strengthened by the significant penalties that apply for non-compliance.
43. The Minister assured Parliament that this would *"not restrict the ability of charities to receive foreign gifts for non-political purposes. Nor does it restrict the political activities that*

¹⁴ Saffron Zomer, Australian Conservation Foundation quoted in 'Paul Karp: Charities warn Australia's foreign donation laws will strangle advocacy. The Guardian 11/1/18

*charities can engage in with contributions from Australians.*¹⁵ The level of outrage and dissent across civil society groups and from Australia's major charities suggests the Minister's assessment of the impact of the Bill is seriously awry.¹⁶

44. While we have focussed on the impact on charities, it remains to be seen what other organisation may be captured by the very broad definitions of political activity, purpose and expenditure. Other civil society groups and professional organisations such as the various Law Societies, the Australian Medical Association and the National Farmers Federation may also be required to register.

Implied freedom of political communication

45. The discouragement of charities from participation in political debate in the electoral process is not in the public interest. It may also be an infringement of the implied freedom of political communication. There is a clear issue as whether or not it could properly be seen as a proportionate limitation to political communication.

Ban on donations from foreign political entities

47. The Bill proposes to ban all donations from foreign political entities if the entity is: a body politic of a foreign country or part of a foreign country or a foreign public enterprise.¹⁷ This is a sensible proposal.

Recommendation 4

The CCLs support the ban on donations from foreign political entities as an appropriate protection of Australia's sovereignty.

Extended definition of associated entities

48. The current Act regulates 'associated entities'. The Bill proposes changes to the current definition. This proposal is controversial and raises major issues about the place of independent political advocacy in Australia's political life.

¹⁵ 2R speech Hansard

¹⁶ List some reports

¹⁷ (EF&D Bill 2017) s287AA(3)

49. Entities (other than a registered political party or a State branch of a registered political party) are required to register as an associated entity if:
- (a) the entity is controlled by one or more registered political parties;
 - (b) the entity operates wholly, or to a significant extent, for the benefit of one or more registered political parties
 - (c) the entity is a financial member of a registered political party;
 - (d) another person is a financial member of a registered political party on behalf of the entity;
 - (e) the entity has voting rights in a registered political party;
 - (f) another person has voting rights in a registered political party on behalf of the entity.¹⁸

50. This definition is clearly and appropriately meant to capture organisations which have a structural relationship with one or more registered political parties or operate 'wholly, or to a significant extent, for the benefit of one or more registered political parties.'

51. Clause 1 (b) is the only element which has a less than tangible structural 'association' criterion. This would presumably be the element under which the Electoral Commission in 2017 has signalled that GetUp may be required to register as an associated entity. GetUp refused to register and was preparing for a court challenge.¹⁹

52. The current Bill proposes to greatly extend the meaning of associated entity by elaborating on the meaning of 1 (b):

- (5) *Without limiting paragraph (1)(b), an entity is, for the purposes of this Part, taken to be an entity that operates wholly, or to a significant extent, for the benefit of one or more registered political parties if:*
- (a) *the entity, or an officer of the entity acting in his or her actual or apparent authority, has stated (in any form and whether publicly or privately) that the entity is to operate:*
 - (i) *for the benefit of one or more registered political parties; or*
 - (ii) *to the detriment of one or more registered political parties in*

¹⁸EF&D Bill 2017 . 287H (i)

¹⁹ "Earlier in 2017 the Australian Electoral Commission warned GetUp that it may have to register as an associated entity of Labor and the Greens because its 2016 election activities benefited those parties. GetUp refused, stressing it is independent of them" Reported in the Guardian 2/1/18 .

- a way that benefits one or more other registered political parties; or*
- (iii) for the benefit of a candidate in an election who is endorsed by a registered political party; or*
- (iv) to the detriment of a candidate in an election in a way that benefits one or more registered political parties; or*
- (b) the expenditure incurred by or with the authority of the entity during the relevant financial year is wholly or predominantly political expenditure, and that political expenditure is used wholly or predominantly:*
 - (i) to promote one or more registered political parties, or the policies of one or more registered political parties; or*
 - (ii) to oppose one or more registered political parties, or the policies of one or more registered political parties, in a way that benefits one or more other registered political parties; or*
 - or*
 - (iii) to promote a candidate in an election who is endorsed by a registered political party; or*
 - (iv) to oppose a candidate in an election in a way that benefits one or more registered political parties.²⁰*

53. The Minister has described this as clarifying an ambiguity about the meaning of 'operating for the benefit of a political party' and an extension of scope in the definition. His comments make it clear that GetUp is a target for this 'clarification':

"GetUp is plainly a political campaigning organisation engaged in political activity and incurring political expenditure," Cormann said, adding it was "entirely appropriate" it be subject to the same disclosure requirements as other political actors".²¹

54. The CCLs are not privy to the inner workings of GetUp. From what is publically visible it appears clear that it is not structurally associated with any registered political party and is an independent progressive political advocate. The CCLs consider it to be a very different kind of player in Australia's political life from a structurally associated entity or a political party.

²⁰ EF&D Bill 2017 287H5

²¹ The Guardian 2/1/18

55. We therefore disagree with the Minister's statement that it is '*entirely appropriate*' that it *be subject to the same disclosure requirements as other political actors*'.²²
56. There is a very important difference between an independent political advocacy entity and a political party or an appropriately defined "associated entity". The independent political entity takes advocacy positions on the basis of support for or opposition to policy matters not on the basis of support for or opposition to political parties. Support of a policy position may result in 'benefit' or 'detriment' to one or more parties or '- but this outcome does not define the political agenda of the entity.
57. For example, civil liberties bodies regularly campaign against proposed policy changes from the Government of the day (as on issues such as mandatory sentencing, corrections policy, and/or privacy reform for example) and according to the broad proposed definition, this could be seen as advantaging the opposition party of the day notwithstanding that the civil liberties bodies have no party political affiliation.
58. This clear distinction is critical. The definition of an 'associated entity' must reflect this distinction if it is not to do damage to the vibrancy of political debate in Australia. The proposed clarification does not do this and effectively conflates the activities of all independent political advocates with that of an associate of a political party. The addition of reference to support or opposition to the 'policies of one or more registered political parties' in (b)(i) and(ii) seems designed precisely to achieve this conflation.
59. If this expansion of the definition of an associated entity proceeds, it has the potential to capture most independent political advocacy groups in Australia. This would be an entirely unjustified and potentially dangerous intrusion into political speech. Independent groups are entitled to express views on public policy. The fact that an organisation advocates for a policy, which also happens to be the policy of a candidate or party, does not require that they are redefined as associated entities. Policies are not of the property of a political party or candidate.
60. One of the claimed objectives for this Bill is to modernise the enforcement and compliance regime for political finance regulation and to include '*political actors that have emerged in*

²² The Guardian 2/1/18

the Australian political landscape, who neither endorse candidates nor seek to form government, yet actively seek to influence the outcome of elections through their campaigning activities.”²³

61. Independent political players like GetUp are already regulated under the current act. If they meet the political expenditure threshold they will be more tightly regulated under the new category of ‘political campaigners’.
62. The forcing of independent political advocacy groups into the associated entity category will do nothing to enhance the integrity of or public trust in the electoral process. Such bodies will be sufficiently regulated as to transparency and accountability re donations and expenditure as third party campaigners or as ‘political campaigners’ under the proposed new category- if it proceeds.
63. The most likely effect of defining bodies like GetUp as associated entities will be to undermine their reputation. The base of the strong support for independent political bodies is –of course- their independence from traditional political parties.
64. This may be the intended outcome, but it will be not be in the public interest and certainly will not generate increased confidence in the electoral system.
65. The CCLs strongly oppose the expansion of the definition of associated entities which significantly changes the meaning and ambit of the category.

Recommendation 5

The CCLs do not support the proposed extended definition of ‘associated entities’ and recommend the removal of new subsection 287H(5) which significantly expands the current meaning of ‘an entity that operates wholly, or to a significant extent, for the benefit of one or more registered political parties’.

²³ Minister Cormann 2R speech Hansard 7/1/18

If this is not accepted, the CCLs recommend the removal of references to “the policies of one or more registered political parties” in 287H(5)(b)(i) and(b)(ii).

CONCLUDING COMMENTS

66. The joint CCLs trust that these preliminary comments will be of assistance to the PJSCM in its assessment of the *Electoral Legislation Amendment (Electoral Funding And Disclosure Reform) Bill 2017* (The Bill)

This submission was written by Dr Lesley Lynch, Vice President of the NSW Council for Civil Liberties on behalf of the joint CCLs with input from the Executives from the other CCLs.

With regards

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