

Australian Greens Submission regarding the *Electoral Legislation Amendment (Miscellaneous Measures) Bill 2020*

The Australian Greens welcome the opportunity to comment on the *Electoral Legislation Amendment (Miscellaneous Measures) Bill 2020 (the Bill)*. The Greens support the bulk of the proposed changes, and welcome the action to clarify the public election funding entitlements for Senate group tickets after Senator Waters raised concerns regarding 'double dipping' at Senate Estimates last year.

However, we have concerns regarding the following aspects of the Bill:

- Amendments to override the tougher State-based donation regulations, such as lower disclosure thresholds, donation caps, and prohibition of donations from property developers
- Workforce flexibility arrangements
- Impact of administrative marking and non-pencil votes on scanning solutions
- Questions to voters - Voter ID

As many of the proposed amendments will change how the Australian Electoral Commission runs elections, we encourage the Committee to seek the views of the AEC regarding operational and resource implications of the changes.

SPECIFIC RECOMMENDATIONS

1. Repeal ss.302CA and 314B of the *Commonwealth Electoral Act 1918*
2. Introduce reporting requirements to trace intra-party transfers
3. Restrict delegation powers so that DRO / Acting DROs remain responsible for declaring polls
4. Ensure scrutineers can challenge the formality of a ballot with a DRO / Acting DRO, rather than a delegate
5. Requiring a register of delegations to be published, supporting by guidelines regarding training requirements for any person delegated power by the DRO
6. Ensure that any scanning solution procured for future elections will be able to operate effectively irrespective of the implement used to mark ballot papers
7. Establish guidelines for the use of administrative markings on ballot papers

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8. Amend provisions allowing flexibility of questions to determine voter eligibility to ensure that voting officers cannot require a voter to produce identification documents

The Bill also provides an opportunity to implement a number of other amendments raised in the Committee's review of the 2016 election, and further reforms to improve transparency and integrity measures. Our recommendations for further reform are outlined on page 4 of this submission.

Undermining State donation laws

We note that proposed replacement s.302CA has been drafted to address the High Court's decision in *Spence v Commonwealth*¹. While the operation of the proposed s.302CA is narrower than the provision struck down by the High Court, it still seeks to override State efforts to regulate the influence of donations and may create more confusion regarding the interaction of State and Federal laws.

Similarly, the proposed s.314B will override transparency measures implemented by State laws and circumvent stricter donation disclosure requirements. Timely disclosure and low disclosure thresholds are essential to ensure that the public has clear line of sight between donors and political influence.

To the extent that donation laws in NSW and Victoria currently exempt donations for federal purposes, the revised s.302CA has no work to do – the State and Federal laws can co-exist. Despite this, the revised provisions explicitly seek to exclude State-based restrictions on donations by influential industries and get around donation caps. Those State-based restrictions were introduced to deter corrupt behaviour and should be supported, not undermined.

In his submission², Professor Orr has noted that property developers generally seek to influence local and State government decision-making, and excluding donations made and used explicitly for 'federal purposes' from the donation bans in place in NSW and Queensland would not directly undermine efforts to curb that influence.

However, this ignores the fluid nature of both campaign finances and influence within a political party. In practice, money given for a 'federal purpose' frees up other federal income, which could be transferred to a State branch or used to indirectly assist in State campaigns. Advice from the Parliamentary library

¹ *Spence v Queensland* [2019] HCA 15; (2019) 367 ALR 587, 603–4 [55] (Kiefel CJ, Bell, Gageler and Keane JJ)

² Professor Graeme Orr, Submission to this inquiry (Submission 2)

confirms that these intra-party donations are not recorded in a systematic way, making them “essentially impossible” to identify.

Professor Joo-Cheong Tham acknowledges³ this, describing the “hydraulics” of intra-party political finances in which money donated for ‘federal purposes’ can flow back to State branches without contravening the restrictions that would have applied to a direct donation at the State level.

Unless the AEC implements mechanisms to consistently trace intra-party transfers, the ‘federal purposes’ restrictions will be ineffective and ss.302CA and 314B will provide a mechanism to circumvent State-based donations laws.

The Greens have consistently advocated for national efforts to introduce rigorous, harmonised rules for disclosure and regulation of donations. Until consistent regimes are introduced, Federal laws should not undermine State approaches that seek to ensure accountability and transparency.

We recommend that:

- Items 25 and 27 of the Bill be amended to provide for existing ss.302CA and 314B of the *Commonwealth Electoral Act 1918* to be repealed without substitution; and
- the AEC implement reporting standards that require intra-party transfers to be consistently reported and disclosed.

Workforce flexibility

We acknowledge the significant workload of Divisional Returning Officers (**DRO**) during the polling period and scrutiny, and the benefits of allowing this workload to be delegated. However, the proposed s.37 appears broad and unlimited. Given the significance of some of the work undertaken by the DRO, we recommend that the provision be amended to:

- reserve the power to declare the poll for a given division to the DRO/Assistant DRO of that division;
- explicitly provide for scrutineers to seek a ruling on formality of a ballot from the relevant DRO/Assistant DRO, rather than a delegate. This will aid in consistency of rulings within a district; and
- require a register of delegations to be maintained and published.

From an operational perspective, AEC guidelines should outline the training required to support a delegation. Guidelines should also provide that scrutineers must be advised of all delegations relevant to their Division and have clear instructions as to who is authorised to undertake key roles, and who to contact

³ Professor Joo-Cheong Tham, Submission to this inquiry (Submission 2), p4

to challenge any directions given by a delegate.

Writing implements and markings

We support loosening the restrictions under the *Commonwealth Electoral Act 1918* regarding the implements that can be provided by the electoral commission for the purposes of marking the ballot paper, consistent with exploring new technologies and innovative methods of casting a vote for voters with a disability. We also support the use of administrative markings to allow for easier ballot paper reconciliation by the AEC.

However, before allowing markers other than pencil to be provided, the Committee should ensure that the scanning solutions (including any tender for procurement of future scanning solutions) can demonstrate that scanning, data entry and scrutiny will not be compromised. Equally, guidelines must be implemented in relation to administrative markings to ensure consistency and minimise any risk that the markings will affect scanning of the ballot papers.

Questions to voters

We are supportive of proposed amendments to ss.73CI, 200DI and 229 to allow some flexibility in the way in which voters are asked questions to determine their eligibility. This amendment recognises that many voters have low cognitive capacity or proficiency in English and minimises the risk that such voters are inappropriately ruled ineligible or subjected to an unnecessary administrative procedure because of the inflexibility of the eligibility questions.

However, removing the prescriptive nature of the questions must not give licence to any polling officer to require a voter to produce identification to satisfy the officer of their eligibility. As noted in the Australian Greens' dissenting comments to the 2016 election review report, voter identification requirements have "serious implications for voter engagement for many groups of disadvantaged voters, including itinerant and indigenous voters as well as those escaping domestic violence."

To ensure that the objective of greater flexibility is achieved without compromising voter engagement, we recommend that each of the relevant sections be amended to include a further subsection:

(1A) Nothing in subsection (1) shall authorise a voting officer to require a voter to produce any document to verify the information in paragraphs (1)(a) and (1)(b).

Further reforms

As noted in the Explanatory Memorandum, many of the

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amendments proposed by the Bill respond to issues identified in the review of the 2016 election. A number of additional amendments should be made to address issues raised in that earlier review and by the Australian National Audit Office⁴. These include:

- improving access to the code base of counting, data entry and scanning systems used by the AEC in the conduct of federal elections;
- allowing candidates to appoint a practicable number of scrutineers during the data entry process of Central Senate Scrutiny; and
- ensuring that a strong, statistically valid end to end audit process is in place prior to the next federal election for Central Senate Scrutiny.

We expect that the final report of the ongoing inquiry into the 2019 election will also recommend a range of further reforms, and hope that those recommendations can be acted on expeditiously and implemented prior to the next election.

Beyond the amendments proposed by the Bill, the Australian Greens continue to call for a range of reforms to provide a more rigorous and transparent political donation disclosure regime, including:

- including membership fees and pay-for-access events in the definition of 'gift';
- disclosure of all donations over \$1,000 on an easy to search, public website in close to real time;
- an aggregated cap on donations of \$3,000 per parliamentary term;
- a complete ban on donations from developers, banks, mining companies and the tobacco, liquor, gambling, defence and pharmaceutical industries to political parties, candidates and associated entities, as recommended by the Senate Select Committee Inquiry into the Political Influence of Donations.

The *Commonwealth Electoral Amendments (Banning Dirty Donations) Bill 2020*, introduced by Senator Waters, would implement those objectives. Donation reforms must also be supported by a review of the system for public funding of elections, and establishment of a strong federal integrity commission.

⁴ ANAO Report 25 of 2017-18, *Australian Electoral Commission's Procurement of Services for the Conduct of the 2016 Federal Election*