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Committee Secretary
Joint Standing Committee on Electoral Matters

By email: em@aph.gov.au

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Dear Committee

Commonwealth Electoral Amendment (Real Time Disclosure of Political Donations) Bill 2019

Thank you for the opportunity to make a submission in response to Ms Rebekha Sharkie MP's private members bill, *Commonwealth Electoral Amendment (Real Time Disclosure of Political Donations) Bill 2019* (Cth) (**Bill**).

Transparency and accountability with respect to the role that political donations play in our democracy is vital, and amendments to ensure that they are disclosed in real time is a step in the right direction. We commend the purpose of this Bill insofar as it applies to politicians and political parties, subject to some significant concerns with the drafting of the Bill.

The Bill has the potential to be a regressive step for our democracy insofar as it captures political campaigners. Political campaigners is a category that covers charities and not-for-profits as well as industry groups and corporations. Only charities and not-for-profits rely on donations. Treating all political campaigners the same could have unintended consequences for charities' ability to advocate on their issues, without achieving any greater transparency for industry groups, which are among the biggest political players.

This unequal treatment is particularly aberrant given that charities are already bound by law to advocate for the public benefit and in accordance with their charitable purpose. Charities are not permitted to promote or oppose political parties or candidates for office. Profit-motivated industry groups and corporations face no such restrictions.

Clearly, the intention of this Bill is not to stifle advocacy, but to increase transparency in our murky political system. The amendments canvassed below would ensure that the latter aim is achieved without sacrificing the former.

A. Operation of the Bill

The Bill would insert a new section, section 305B, to the *Commonwealth Electoral Act 1918* (Cth) (**Act**), requiring political parties and political campaigners to give notice of gifts to the AEC within 5 business days of receipt. The notice would set out the identity of the donor, description, amount and date of the gift, and the name and address of the political party or political campaigner to whom the gift was made.

Noncompliance with the proposed law would attract a penalty of 60 penalty units (currently \$12,600), or three times the value of the gift, whichever is higher (see proposed subsection 305C(1)).

B. Why transparency over donations to politicians matters

Big political donations are intended to have political influence. There is a sliding scale of influence enabled by political donations: at the lower end, a sizeable donation can ensure the donor gets access to a politician that ordinary Australians wouldn't get.¹ In the middle, is what the High Court has described as "clientelism", or a "more subtle kind of corruption... [where] officeholders will decide issues not on the merits or the desires of their constituencies, but according to the wishes of those who have made large financial contributions valued by the officeholder".² At the far end, is "quid pro quo" corruption – illegal bribes – where politicians explicitly make promises in exchange for political donations. This last kind may be rare (although in the absence of a Commonwealth integrity commission, we do not know how rare), but the other forms of influence are an inevitability in our political system.

The ever-increasing cost of election campaigns puts pressure on politicians to keep big donors happy. Our political system is designed to ensure the needs of the very rich are given priority. Put another way: our laws bake political inequality into our democracy.

Donations to politicians should not only be transparent, but be capped, so that wealth cannot translate into political influence. Expenditure caps should also be imposed, to relieve the pressure on politicians to appeal to big donors, and to ensure the rich cannot drown out the voices of everyone else by making big election spends (see our joint submission to the Committee in response to the inquiry into the 2019 Federal election). Laws to increase transparency around lobbying, and to restrict politicians from becoming lobbyists themselves after leaving Parliament, are all vital reforms for the health of Australia's democracy.

Such laws will require lengthy consultation with stakeholders. In the meantime, it is clear that Australians should at least know who is giving how much to our politicians in as close to real time as possible.

C. The case for real time disclosure of donations to politicians

Currently, candidates and political parties are required to disclose their donations only once a year at Federal level. Disclosure of incoming amounts for the financial year is made to the Australian Electoral

¹ D Wood, K Griffiths, "Who's in the Room: Access and Influence in Australian Politics" *The Grattan Institute*, 23 September 2018.

² *McCloy v NSW* [2015] HCA 34 at [36] per French CJ, Kiefel, Bell, Keane JJ.

Commission (**AEC**) in October of each year, and published on the AEC's website in February of the following year. This timeline means that 20 months can elapse between receipt of the donation and its being made public. For instance, Malcolm Turnbull's \$1.75m donation to the Liberal Party was not disclosed for 12 months after it was made.

Knowledge of who has made substantial contributions to politicians is of heightened importance in the lead up to an election, as it may influence who a person votes for. It has been five months since the last Federal election, and yet we will not know who funded candidates' campaigns for another four months.

Knowing the timing of donations at other times of the government term can also be informative: for instance, a political donation made by a corporation during a tender process would have immense significance.

D. Different principles apply regarding the disclosure of donations to other actors

Real time donation disclosure obligations should not be extended to political campaigners as they have been in this Bill.

Political campaigners operate very differently to political parties. Regulating them in the same way will not lead to any greater transparency for corporate and industry groups, which are among the biggest spenders in elections. The administrative burden will, however, unduly burden civil society groups and, for the reasons set out below, stifle their freedom to speak out on public interest matters.

- i. The amendments do not capture industry groups, the biggest election spenders

Industry groups like the Business Council of Australia and the Minerals Council of Australia and corporations such as COAL21 and the Minderoo Foundation are among the biggest spenders in Australian elections. However, as they rely on membership fees and other forms of income not captured by the definition of "gift" in the Act,³ they would not be impacted by this Bill.

Only charities and not-for-profits rely on donations. Charities, which are bound by law to advocate for the public benefit and in accordance with their charitable purpose, should not have more restrictions imposed on them than profit-motivated industry groups and corporations.

Recommendation: Unless the definition of "gift" in the Act is expanded to meaningfully capture industry groups, political campaigners should be removed from the scope of the Bill.

- ii. The administrative burden of real time disclosure for donations would be crippling for charitable political campaigners

The risk of unforeseen consequences in this policy area is high. To understand the administrative burden real time disclosure would put on charitable political campaigners, it is important to consult with impacted organisations.

By way of example: established charities advocate on their issues – be it eradicating homelessness or promoting human rights in Australia – in the long term and irrespective of elections. Nonetheless, much of that advocacy may be caught by the Act as "electoral matter" in the lead up to an election.

³ Section 287 *Commonwealth Electoral Act 1913* (Cth).

The assessment as to when that advocacy becomes electoral matter is complex and largely referable to the politics of the day.⁴

If real time disclosure obligations were imposed on charitable political campaigners (assuming it only captured donations used to incur electoral expenditure, see section E.iii below), they would have to determine, in real time, what advocacy counted as electoral matter, and what specific donations were used to incur that expenditure. If the disclosure obligations applied to gifts of any amount, as per this Bill, the laws would be virtually impossible to comply with. Even if the Bill were to be amended to retain a disclosure threshold, looking into the future, it is entirely possible that the disclosure threshold will be reduced to \$1,000 (as has been proposed by the Australian Labor Party and the Greens). This would mean that charitable political campaigners would have to live track all small donors so that they may disclose their identities to the AEC if and when they reach the \$1,000 threshold, or as little as \$20 per week.

The practical effect of extending real time disclosure obligations to political campaigners would be to discourage civil society groups from becoming political campaigners. This means they would opt to do less advocacy to come under the political campaigner threshold. This Bill would effectively stifle public interest advocacy, but leave organisations that champion corporate interests to operate unimpeded.

iii. There is little benefit to real time disclosure by political campaigners

Requiring political campaigners to disclose gifts in real time does not meaningfully increase the transparency of our political system. Unlike politicians, political campaigners cannot introduce or vote on proposed legislation. Unlike MPs, they cannot give approval for development proposals, or pass regulations. All political campaigners can do is participate in public debate.

It follows that, while there is some public interest in knowing who is behind the biggest election spends, knowing the timing of the donations (or membership fees) is less important. The small gains in transparency are far outweighed by the administrative strain real time disclosure would put on advocacy groups.

The best way to regulate political campaigners, is to impose expenditure caps that would apply to charities and industry groups equally. We refer the Committee to our submission in response to the concurrent inquiry into the 2019 Federal election with regards to expenditure caps.

E. Specific drafting concerns with the Bill

i. The Bill captures all gifts, not just those over the disclosure threshold

The Explanatory Memorandum to the Bill indicates that it is only intended to require real time disclosure for donations over the disclosure threshold (\$14,000).⁵ However, this limitation is not reflected in the language of the Bill: proposed section 305C requires the financial controller of a political party or political campaigner to give notice if a person makes “a gift”, without specifying that the gift be over the disclosure threshold.

Requiring real time disclosure of gifts of any amount would impose an enormous administrative burden on all those to whom it applies. It would significantly worsen the issues of compliance canvassed above.

⁴ Section 4AA of the *Commonwealth Electoral Act 1913* (Cth) is lengthy and complex, involving a series of competing considerations and presumptions.

⁵ Explanatory Memorandum to the *Commonwealth Electoral Amendment (Real Time Disclosure of Political Donations) Bill 2019* (Cth), page 2.

Recommendation: The Bill be amended to apply to gifts over the disclosure threshold only.

- ii. The Bill does not capture candidates, groups of candidates or associated entities

Currently, candidates and members of groups in an election must disclose gifts to the AEC annually under section 304 of the Act. Annual returns must also be made by associated entities under section 314AEA of the Act.

It seems an anomaly, and concerning, that the Bill would not capture candidates, members of groups and associated entities, given that the risk of undue influence through political donations remains. In particular, not including associated entities would merely incentivise donors to give to political parties via associated entities, more effectively obscuring the donation.

Recommendation: The Bill be amended to capture candidates, groups of candidates and associated entities.

- iii. The Bill captures gifts to political campaigners with charity status regardless of whether those gifts are used to incur electoral expenditure

Currently, political campaigners with charity status need to disclose gifts only if they were used to incur political expenditure – see section 305B(6) of the Act. Donations used on, for instance, service delivery, do not have to be disclosed.

This is a sensible and important exclusion. The purpose of the Act is to have a transparent election process – donations completely unconnected with elections should not be captured. Further, the public disclosure of a donor's name and address may discourage some people from giving to important causes.

Recommendation: The Bill be amended to exclude from real time disclosure, gifts made to political campaigners with charitable status where those gifts were not used to incur electoral expenditure.

- iv. The penalty is too high

Given the ease of non-compliance with the real time donation disclosure obligations, the current penalty of 60 penalty units is disproportionately high.

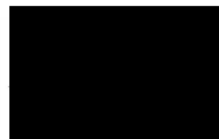
Recommendation: The Bill be amended to include a reduced penalty.

We would be pleased to provide further information should it assist the Committee.

Yours sincerely



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