THE UNIVERSITY OF SYDNEY

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Senator the Hon James McGrath
Chair
Joint Standing Committee on Electoral Matters
Parliament House
Canberra, ACT, 2600

Dear Senator,

Review of the *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Act 2018*

Thank you for the opportunity to comment on a review of the above Act. As you will be aware, I made a detailed submission in relation to that Bill when it was scrutinised during its passage through Parliament. The final version of the Bill was a vast improvement upon the initial version. Improvements could still, however, be made to achieve the underlying aim of the Act.

This submission will consider paragraphs (c) and (d) of the Committee's terms of reference, being how the Act's objectives can continue to be achieved in the most effective way while minimising red tape and the impact of the Act upon issue-based advocacy.

In my submission from 2018 I noted that the Act needed to balance the following factors, all of which continue to be relevant:

1. The Act needs to be constitutionally valid. There is no point in making the reforms if they are likely to breach the Constitution. Efforts therefore need to be made to accommodate existing precedents and constitutional principles.

2. The Act needs to be effective. Efforts therefore need to be made to prevent avoidance of the provisions, facilitate the prosecution of breaches and provide strong disincentives for those who would try to exploit or avoid the application of prohibitions.

3. The Act needs to be practical. Efforts therefore need to be made to ensure that the Act does not impose excessive burdens on parties, donors and campaigners. In particular, it should not adversely affect the capacity of charities to fulfil their charitable functions and to advocate for charitable causes.

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Achieving the objects of the Act

The claimed object of the Act was to prevent foreign influence upon elections and the risk or perception of corruption resulting from the making of political donations. This has singularly failed. It is very easy for large foreign donations to be made to political parties in an attempt to influence both elections and the behaviour of parties when in Government. This can be done by uncapped large donations being made by permanent residents of Australia or via Australian formed corporations that are owned by foreign individuals or corporations.

The High Court accepted in *Unions NSW v New South Wales (No 1)* (2013) 252 CLR 530 at [30] that non-voters that are individuals or entities based in Australia and affected by the decisions of government have a legitimate interest in governmental action and the direction of policy and may seek to influence the choice of who should govern by supporting candidates and political parties or contributing to political discourse. This includes public advocacy and the making of political donations – both of which are protected by the constitutionally implied freedom of political communication. To accommodate this constitutional constraint, the 2018 Act permitted political donations from permanent residents and bodies formed within Australia, even though the source of the money or the power behind the body is foreign. This was considered necessary to ensure the constitutional validity of the Act.

The consequence, however, is that any foreign actor that seeks to influence elections and political parties in Australia at the federal level can easily avoid any constraints by making large influential donations through permanent residents or companies established in Australia.

The obvious solution to this problem is to impose caps on donations. Influence is not obtained by making a $50 donation to a candidate or political party. Influence is obtained by making a very large donation to a candidate or political party. The way to prevent malign influence is to impose a cap on donations so that the maximum donation made by one person is worth the same as everyone else's maximum donation. If there are thousands of them, then influence cannot be bought by foreigners or anyone else. We know from High Court judgments, such as that in *McCloy v New South Wales* (2015) 257 CLR 178, that caps on donations can be constitutionally valid. Accordingly, if the Committee genuinely wishes to reduce or eliminate foreign influence upon elections and potential corruption arising from political donations, it should recommend imposing a cap on political donations.

Impact of the Act upon issues-based advocacy

Charities and non-government advocacy bodies have an important role to play in advocating for the interests of the least powerful in society. This is an essential aspect of the political communication protected by the Constitution. It is vulnerable both to express prohibition and to strangulation through the imposition of excessive administrative burdens that eat away at the body's financial resources.

When this Act was first introduced as a Bill, it imposed excessive burdens on third party campaigners, such as charities, which would have caused them to cease engaging in advocacy work. Fortunately, through the Committee's scrutiny process, the Government accepted that changes were needed and made them. This ensured that charities and non-government bodies could engage in low-level advocacy without facing costly administrative burdens.

The Committee should be wary of changes that are directed at increasing the level of burden upon third party campaigners. The High Court, in *Unions NSW v NSW (No 2)* (2019) 264 CLR 595, held invalid a law that reduced the cap on the amount that could be spent on political advertising by third party campaigners in the absence of adequate justification of such a change. The High Court tends to seek to protect the diversity of voices in political discourse in Australia and will apply particularly close scrutiny to any attempts to limit that participation, whether it be done directly or indirectly through the imposition of administrative burdens.

Recommendation 18 in the Committee's report on the 2019 election proposes reducing the threshold for political campaigners to $100,000 or expenditure of a third of the entity's annual income on electoral matters, whichever is lower. If implemented, this would be vulnerable to constitutional challenge to the extent that the law effectively burdens political communication and is not reasonably appropriate and adapted to advance a legitimate purpose in a manner that is compatible with the system of representative and responsible government prescribed by the Constitution.

Recommendation 19 is even more likely to fail constitutional scrutiny. It seeks to privilege political parties by permitting persons representing parties and candidates to hand out vote-influencing material within the area 6m to 100m from a polling booth entrance, and exclude those handing out equivalent material but who do not represent a candidate from the area within 100m of the polling booth entrance.

In *Unions NSW (No 2),* the NSW Government tried to run an argument that that the constitutional system of representative and responsible government gave a special status to political parties and candidates as participants in the electoral system that entitled them to receive 'distinctive treatment relative to others who are not directly engaged in the electoral contest.' This argument was rejected by the Court. Chief Justice Kiefel and Justices Bell and Keane responded at [40] that the constitutional requirement that candidates be 'directly chosen by the people' 'in no way implies that a candidate in the political process occupies some privileged position in the competition to sway the people's vote simply by reason of the fact that he or she seeks to be elected'. Instead, they saw the Constitution as guaranteeing the political sovereignty of the people by ensuring that they have a real choice that is free and informed. The implied freedom supports this by protecting the equal participation of the people in the exercise of political sovereignty. Justice Edelman, at [159]-[160] also found such a purpose to be incompatible with the maintenance of the constitutionally prescribed system of government. Hence, drawing a distinction between representatives of candidates/parties and those involved in issues advocacy in terms of where they can stand outside polling booths is likely to fail constitutional scrutiny.

It is likely that the location of persons handing out 'how to vote' cards does not fall under the scope of this particular inquiry, but it is still an important point about which the committee should be aware. Further, the principle adopted by the High Court should be taken into account with respect to any changes proposed to the law concerning political donations and political campaigners. As the NSW Government found in *Unions NSW (No 2)*, the High Court is quite strict in this area, and any action taken to restrict communications by third-party campaigners will be closely scrutinised both for a legitimate purpose and in relation to proportionality.

I hope these comments are of assistance to the Committee.

Yours sincerely,

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