AEC
Australian Electoral Commission

Electoral Commissioner

REF: IS21-000002

Mr Joel Bateman
Committee Secretary
Joint Committee of Public Accounts and Audit
Parliament House
Canberra ACT 2600

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Dear Mr Bateman

Thank you for your correspondence of 3 February 2021 inviting the Australian Electoral Commission (AEC) to make a submission to the Joint Committee of Public Accounts and Audit (the Committee) inquiry into Auditor-General's Reports 33, 47, 48 (2019-20) and 5 and 8 (2020-21).

This submission refers to Auditor-General Report No. 8 of 2020-21 *Administration of Financial Disclosure Requirements under the Commonwealth Electoral Act* (the report) tabled in Parliament on 17 September 2020.

Background

The Australian National Audit Office (ANAO) audit (the audit) examined the effectiveness of the AEC's management of financial disclosures required under the *Commonwealth Electoral Act* (Electoral Act), including the extent to which the AEC is achieving accurate and complete financial disclosures.

The audit concluded that the AEC's management of the financial disclosure scheme was partially effective. While the AEC welcomes all forms of scrutiny in this highly complex area, it does not agree with the conclusion and considers that the report demonstrates a misunderstanding by the ANAO of the Electoral Act which the AEC administers.

The audit made seven recommendations. The AEC agreed to two, agreed to four with qualification and disagreed with one of the recommendations. The AEC provided a fulsome response to the report which is contained within the report itself, however a summary of the AEC's response to the report findings is at **Attachment A**.

Progress on the implementation of recommendations

Recommendation no.1 (p29 of the report)

The Australian Electoral Commission improve the extent to which it is obtaining annual and election returns by taking:

(a) greater steps to identify entities with a reporting obligation, and drawing that obligation to the attention of those entities; and

(b) more effective action to obtain returns that have not been submitted by an entity with an identified disclosure obligation.

The AEC agreed with qualification to this recommendation as the AEC is already effective at discharging its responsibility to obtain required disclosure returns as demonstrated by the ANAO finding that during the period of review the AEC obtained 98.9 per cent of annual returns and 99.6 per cent of election returns. Recognising the importance of the AEC's ongoing role in stakeholder education, however, the AEC is working on enhancements to its suite of educational products relating to financial disclosure obligations.

The *Electoral Legislation Amendment (Election Funding and Disclosure Reform) Act 2018* (FAD Reform Act) introduced civil penalties (as opposed to criminal penalties) for the non-lodgement of disclosure returns on 1 January 2019. Accordingly, the AEC commenced legal action for non-lodgement of five candidate returns for the 2019 federal election and one 2018-19 annual disclosure return from a political party. The AEC will review its administration and use of the civil penalties once the current civil actions are complete.

Recommendation no.2 (p34 of the report)

The Australian Electoral Commission use data analytics and data matching techniques to provide greater assurance over whether data included in returns can be relied upon, and as an indicator of returns that may require investigation.

The AEC agreed with qualification to this recommendation and is considering opportunities for data analytics to be used to provide greater assurance that the data included in the returns can be relied upon. It should be noted that there are inherent difficulties and risks in using other public sources of financial information due to the different requirements of reporting to the AEC and bodies such as the Registered Organisations Commission and the Australian Charities and Not-for-profits Commission.

Recommendation no.3 (p36 of the report)

The Australian Electoral Commission identify and develop treatment plans for risks relating to the financial disclosure scheme and manage the scheme in line with its revised risk management framework.

The AEC agreed with this recommendation and has identified the risks of non-compliance by other persons or entities with disclosure obligations. Additional controls have also been recognised and treatment plans developed.

Recommendation no.4 (p40 of the report)

The Australian Electoral Commission apply the lessons learned that have been identified through:

(a) accessing specialist expertise to test the effectiveness of the processes and practices that are in place to identify undisclosed financial transactions; and

(b) establishing arrangements with other government agencies to share intelligence gathering, data interrogation and risk based sampling techniques.

The AEC agreed with qualification to this recommendation and is considering the use of specialist expertise to enhance the effectiveness of the processes and practices that are in place to identify

undisclosed financial transactions, and will consider the use of this expertise against cost and likelihood of the risk of such transactions occurring for persons or entities with disclosure obligations.

The AEC has commenced consultation with relevant agencies to discuss possible data sharing arrangements. However, it is important to note that the establishment of such an arrangement would be subject to any legal restrictions of the Electoral Act, privacy regulations or other governing legislation.

Recommendation no.5 (p47 of the report)

The Australian Electoral Commission adopt a risk based approach to its compliance review program that:

(a) assesses the aggregate level of risk to inform decisions about the size and coverage of the program;

(b) includes all disclosures required under the updated legislative framework; and

(c) improves the effectiveness of the risk matrix used to select the majority of reviews, and better address risks of nondisclosure and incomplete disclosure.

The AEC agreed with qualification to this recommendation as it already adopts a risk-based approach to its compliance review program, which is considered annually by the Electoral Integrity Committee (EIC) (formerly the Compliance Review Committee). The EIC has not formed a view that the results of the compliance review program justify the requirements of recommendation 5.

The 2020 compliance program, which applies to 2018-19 disclosures, is the first compliance program to operate under the FAD Reform Act. The AEC is in the process of determining an approach for including all disclosures as part of the risk matrix, including consideration of the current risk factors and weightings.

Recommendation no.6 (p57 of the report)

The Australian Electoral Commission establish performance measures for its compliance program that are relevant, reliable and complete.

The AEC agreed with this recommendation and updated its performance measures for 2020-21 in accordance with the recent changes to the *Public Governance, Performance and Accountability Act 2013* (PGPA Act). The measures are currently being reviewed for 2021-22 to ensure that they continue to meet PGPA Act requirements and are relevant, reliable and complete.

Recommendation not agreed to

Recommendation no.7 (p62 of the report)

The Australian Electoral Commission implement a graduated approach to addressing non-compliance, including by making better use of its investigatory powers and seeking to have prosecutions undertaken by the Commonwealth Director of Public Prosecutions or civil penalties applied by the courts where serious or repeat noncompliance has been identified.

The AEC did not agree to this recommendation as it has a graduated approach to addressing non-compliance, makes appropriate use of its investigatory powers and undertakes enforcement action where necessary. The AEC is of the view that a more heavy-handed approach to enforcement is not warranted.

Since 1983, the AEC's enforcement and prosecution regime has reflected the legislative intent of Part XX of the Electoral Act: disclosure through transparency. The AEC has consistently maintained this approach since that time, and the AEC's application of the intent has not been corrected by Parliament and has been largely uncontested by stakeholders. The AEC upholds that the purpose of the penalties in Part XX is to encourage transparency by deterring non-compliance and, where necessary, penalising intentional non-compliance.

The FAD Reform Act enacted on 1 January 2019 changed some of the penalties in the disclosure scheme from criminal to civil penalties. The report did not indicate that the AEC was in the process of applying the new regime for enforcement against eleven candidates that did not lodge 2019 federal election returns. The timing of the audit resulted in this action not being reflected in the report for the period examined.

Up until 2019, the AEC did not have powers to prosecute criminal proceedings in this area, and the AEC was reliant on other agencies and the priorities and resources of those agencies aligning with the AEC's desire to proceed. Notwithstanding the change to civil penalties noted above, it remains costly and time-consuming to pursue civil penalties in court. Whilst not aligned to the original intent of the legislation, it is also not clear what would be gained by pursuing a civil penalty for minor non-compliance, for example against a person or entity who lodged a return late, or who made an amendment to correct their return on realising (or being informed by the AEC) that there was an error in the original return.

The report notes that the AEC does not have the legislative power to apply administrative penalties to address minor non-compliance. This reinforces the view that Parliament has not considered it necessary or appropriate to prescribe a graduated enforcement model in the legislation that would punish participants for minor errors, or amendments or for late returns. Therefore, the AEC has achieved accurate and transparent disclosure appropriately through consultation, education and compliance.

As referred to earlier, the AEC commenced legal action under the civil penalties regime for non-lodgement of five candidate returns for the 2019 federal election and one 2018-19 annual disclosure return from a political party, and will assess the effectiveness of the civil penalties process once these civil actions are complete.

I trust that this submission relating to Auditor-General Report No. 8 of 2020-21 is of assistance to the Committee's inquiry and I have attached the AEC Audit reply snapshot to my response.

Yours sincerely

[redacted]

Tom Rogers

19 February 2021

[redacted]

Attachment A

Audit reply: AEC snapshot

Administration of the financial disclosure requirements under the Commonwealth Electoral Act 1918

An otherwise uninformed reader of the ANAO's audit report may think the AEC's administration of the disclosure scheme is insufficiently focused and, therefore does not aid transparency and electoral integrity. The AEC rejects this implication, and believes the ANAO has misinterpreted components of the legislation.

PURPOSE OF THE AUDIT

The AEC welcomes all forms of examination of this already transparent, and highly complex, area.

However, a comprehensive audit undertaken in 2020-21 – as recommended by the AEC – would have been more appropriate.

AUDIT RECOMMENDATIONS

- The AEC has accepted six of the seven recommendations, four of these with qualification
- The AEC disagrees with recommendation seven
  - The AEC already has a graduated approach to non-compliance, making appropriate use of investigatory powers with enforcement action undertaken when necessary
  - The legislation's intent does not lead to a view that a more heavy-handed enforcement approach is warranted

KEY AUDIT INACCURACIES

75 returns not obtained

This is incorrect. Of these, 32 returns were for political parties deregistered during the year (legislation at the time did not require lodgement).

The vast majority of the remaining outstanding returns are for the most recent federal election or financial year and are currently being pursued (as is normal practice).

Amendments = AEC mismanagement

This suggestion is incorrect. Amendments are part of the broad process provided for in the legislation. It recognises the large number of entities involved and the fact that many disclosure entities have volunteer staff completing very complex requirements.

This is why the AEC adopts an educative rather than strict enforcement approach to disclosure.

FINDINGS

- The AEC rejects the ANAO conclusion the management of the disclosure scheme is partially effective
- This conclusion runs counter to the extent of disclosure achieved by the AEC - 98.9 per cent of annual returns and 99.6 per cent of election returns were obtained in the four-year period examined
- The audit's implication that incomplete/inaccurate returns and a high number of amended returns represent AEC mismanagement suggests a misunderstanding of the *intent of the legislation* and the AEC's role
- Returns are analysed for completeness and undergo data matching with amendments provided for in the legislation (most often correcting a lodger's inadvertent administrative error)
- The decline in compliance reviews noted by the ANAO reflects the AEC's approach of balancing the preservation of transparency of financial dealings with natural justice and the prudent use of Commonwealth resources
- The AEC has not detected systemic issues of intentional or large scale non-compliance with the legislation

SUMMARY

While the current system is highly transparent and successfully operated within legislative boundaries, the AEC agrees that there is always room for improvement.

The AEC's detailed reply is contained within the audit report.

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Authorised by the Electoral Commissioner, Canberra