

Senate Finance and Public Administration Committees  
PO Box 6100  
Parliament House  
Canberra ACT 2600

7 July 2020

Dear Officer,

**RE: Commonwealth Electoral Amendment (Donation Reform and Other Measures) Bill 2020**

The Australian National University Law Reform and Social Justice Research Hub ('ANU LRSJ Research Hub') welcomes the opportunity to provide this submission to the Senate Finance and Public Administration Committees.

The ANU LRSJ Research Hub falls within the ANU College of Law's Law Reform and Social Justice program, which supports the integration of law reform and principles of social justice into teaching, research and study across the College. Members of the group are students of the ANU College of Law, who are engaged with a range of projects with the aim of exploring the law's complex role in society, and the part that lawyers play in using and improving law to promote both social justice and social stability.

**Summary of Recommendations:**

1. The Bill requires a clearer and more comprehensive explanation of why it does not impermissibly burden the implied freedom of political communication.
2. (i) The Bill requires a clearer and more comprehensive explanation of the function and potential consequences of section 302AD 'Electoral expenditure purpose of the Australian Electoral Commission Disclosure Portal'. In particular, the Bill requires the inclusion of detail regarding the scope and operation of the Disclosure Portal.  
(ii) The Bill requires greater consideration of the financial impact created by expanding the role of the AEC.

If further information is required, please contact us

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## 1. Introduction

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The Commonwealth Electoral Amendment (Donation Reform and Other Measures) Bill 2020 ('the Bill') aims to create a more transparent electoral donation system in Australia. We support this intention. Some provisions of the Bill, if passed, would better regulate political donations and introduce safeguards against anonymous 'purchasing' of influence and political power. In particular, we support the reduction of the current six-month disclosure threshold, from \$13,800 to \$2,500, introduced in subsection 287(1) and the creation of 'trigger gifts' and 'post-trigger gifts' in sections 305A, 305B and 305C.

However, we have two primary concerns with the Bill in its current form. Firstly, the Bill inadequately addresses the issue of the implied freedom of political communication. Secondly, section 302AD, if passed, would create an entirely new function of the Australian Electoral Commission ('AEC') without the necessary introduction of both safeguards to ensure AEC independence and a concurrent increase in AEC funding.

## 2. Background to the Reform

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The Bill does not propose radical reforms. All States and Territories have lower disclosure thresholds and greater transparency than what is currently applicable at the Commonwealth level. Section 216(5) of the *Electoral Act 2002* (Vic)<sup>1</sup> requires donations of \$1,000 or more to be disclosed to the Victorian Electoral Commission within 21 days of the donation being received. A donor must make a disclosure that includes their name and address, a record of who the donation was made to and the date of the donation. Entities receiving donations are required to disclose donations the same way. Similar schemes with similar disclosure thresholds exist in the *Electoral Funding Act 2018* (NSW)<sup>2</sup> and the *Electoral Act 1992* (Qld).<sup>3</sup> The highest disclosure threshold for donations in a state or territory is in South Australia, where political donations of \$5,000 or more must be disclosed under the *Electoral Act 1985* (SA).<sup>4</sup> As well as reducing the threshold level, the Bill introduces a \$2,500 aggregated donation model or 'trigger-gift' in section 305A. A similar model operates in Western Australia pursuant to the *Electoral Act 1907* (WA).<sup>5</sup>

Reforms to the federal political donation system to meet threshold levels already established in state and territory legislation would not be out of step with comparable international standards. In Canada, federal election finance laws prohibit organisations from making political donations.<sup>6</sup> Donations can only be made by individuals, with contributions capped at C\$1,500 (approximately A\$1,600) per year to any political party.<sup>7</sup> Political entities are required to disclose the names of any donor making a donation larger than

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<sup>1</sup> *Electoral Act 2002* (Vic) s216(5).

<sup>2</sup> *Electoral Funding Act 2018* (NSW) s12(3).

<sup>3</sup> *Electoral Act 1992* (Qld) s290(1)(a). For the gift threshold see s201A.

<sup>4</sup> *Electoral Act 1985* (SA) s130ZF(4)(a).

<sup>5</sup> *Electoral Act 1907* (WA) s175N(3).

<sup>6</sup> *Canada Elections Act* s363(1).

<sup>7</sup> *Ibid.* s367(a).

C\$200 (A\$215).<sup>8</sup> Likewise, in Ireland, the maximum annual donation cap is €2500 (A\$4,050).<sup>9</sup> Donations over €200 (A\$325) from corporations are prohibited.<sup>10</sup>

The introduction of reduced disclosure thresholds in the Bill is in keeping with most Australian states and territories, as well as comparable international common law jurisdictions.

### 3. Implied Freedom of Political Communication

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The current protection of donor anonymity creates confusion for the Australian public about who political parties are funded by and, ultimately, who they represent. This threatens Australia's system of representative democracy.

The constitutional implied freedom of political communication allows individuals and organisations to express their political opinion. This implied freedom is fundamental to Australia's system of representative democracy. In *Unions NSW v NSW* [2013] HCA 58, sections of the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) that were alleged to limit the ability of corporations and unions to make political donations were held to be invalid, as they impermissibly burdened the implied freedom of political communication. In light of this decision, it is arguable that the reforms proposed by the Bill may burden the implied freedom of political communication, by discouraging entities from making political donations.<sup>11</sup> This may lead to a drastic reduction in political funding, resulting in reduced capacity to conduct campaigns and other electoral activities. However, the Bill is not directed to the situation addressed in *Unions NSW v NSW*. It does not limit the ability of the organisations to donate. Instead, it seeks to lower the threshold for identification of a donor. As such, the Bill does not seek to limit the implied freedom of political communication as it does not propose to constrain political donations.

We recommend the introduction of an additional section that more clearly addresses the issue of the implied freedom of political communication.

#### **Recommendation 1:**

**The Bill requires a clearer and more comprehensive explanation of why it does not impermissibly burden the implied freedom of political communication.**

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<sup>8</sup> Ibid. s349.91(4)(b).

<sup>9</sup> *Electoral (Amendment)(Political Funding) Act 2012* s31(1)(b)(II).

<sup>10</sup> Ibid. s32.

<sup>11</sup> Domenico Cucinotta, 'The fight for the right to make donations to political parties: *Unions NSW v NSW* (2013) HCA 58' (2013) 25(2) *Bond Law Review* 209.

#### **4. The ‘Electoral Expenditure Purpose’ of the AEC Disclosure Portal**

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Section 302AD of the Bill introduces the AEC Disclosure Portal (‘the Portal’). The Disclosure Portal would create a new function of the AEC. The introduction of this function would mean the Portal would become the exclusive means by which donations may be made to reporting entities (as defined at Schedule 1(4)) for electoral expenditure purposes and the exclusive means by which reporting entities may receive donations. However, it is unclear whether the Bill intends for the AEC to hold electoral expenditure funds or to simply act as a node between privately held accounts. As raised in the Senate Scrutiny of Bills Committee Report<sup>12</sup>, the Portal is part of a set of broad legislative principles laid out in the Bill. These principles rely upon delegated legislation to determine their scope and operation. This delegated legislation is not currently available, and is not included in the text of the Bill or its accompanying Explanatory Memorandum. Without the inclusion of detail in the text of the primary legislation, the function of the Portal is unclear and open to misinterpretation.

We have additional concerns over how the Portal would affect public perceptions of AEC independence. In its current form, the Portal would grant the AEC significant powers to distribute funding for electoral expenditure. Any extension of the AEC into the everyday operation of party politics would likely create opportunities for the AEC’s independence to be questioned.

Finally, the financial impact statement included in the Explanatory Memorandum of the Bill provides that no additional AEC expenditure would be required to meet the objectives of the legislation. As noted already by the Commonwealth Electoral Commissioner in a submission to this inquiry<sup>13</sup>, it is hard to see how this could be the case. Regardless of the detail of the Portal’s operation, if passed, section 302, and in particular section 302AD, would dramatically expand the role of the AEC. As such, the creation of an adequately constructed and maintained Disclosure Portal would have a significant financial impact and would very likely require additional AEC resources.

##### **Recommendation 2:**

- i) The Bill requires a clearer and more comprehensive explanation of the function and potential consequences of section 302AD ‘Electoral expenditure purpose of the Australian Electoral Commission Disclosure Portal’. In particular, the Bill requires the inclusion of detail regarding the scope and operation of the Disclosure Portal.**
- ii) The Bill requires greater consideration of the financial impact created by expanding the role of the AEC.**

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<sup>12</sup> Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Scrutiny Digest* (Digest No 2 of 2020, 12 February 2020).

<sup>13</sup> Australian Electoral Commission, *Submission – Inquiry into Commonwealth Electoral Amendment (Donation Reform and Other Measures) Bill 2020*.

## **5. Conclusion**

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We support the broad purpose of the Bill. Reforms to the Commonwealth political donation system of this kind are required, however, the Bill does not adequately address the issue of implied freedom of political communication and lacks sufficient clarity and detail as to the scope and operation of the AEC Disclosure Portal.