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Committee Secretary
Joint Standing Committee on Electoral Matters
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Dear Committee Secretary

Inquiry into the provisions of the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017

Australian Lawyers for Human Rights (**ALHR**) is grateful for the opportunity to provide this submission in relation to the Committee's current Inquiry into the proposed *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017* ('**the Bill**') which builds on the recent *Electoral and Other Legislation Amendment Act 2017* (referred to in the Explanatory Memorandum for the Bill as the "Authorisation Amendment Act").

A number of issues raised by this Bill are also relevant to the *Foreign Influence Transparency Scheme Bill*, as to which we have recently made a submission to the Parliamentary Joint Committee on Intelligence and Security.

We note that the time frame for considering this and other related Bills has been particularly short and at a difficult time of year. There may well be other issues in relation to the Bill which we have failed to identify but which are also of importance.

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1. Summary

- 1.1 **ALHR is concerned that the Bill far exceeds its stated aims of supporting both real and perceived integrity and fairness of elections.** The Explanatory Memorandum states that the Bill is intended to increase accountability of all ‘political actors’ and limit ‘foreign attempts to influence elections’ in Australia. Registration will, it is said (paragraph 6):
- a) *allow voters to distinguish between political opinions popular because of their merits, and those that are common in public debate because their promoters incurred significant political expenditure;*
 - b) *allow voters to form a view on the effect that political expenditure is having on the promotion of a particular political opinion, as opposed to opinions that are being debated without financial backing ...*
- 1.2 **However the Bill unreasonably restricts and chills political speech of charities and not-for-profit NGOs, even speech that is not related to election campaigns, while restricting business comparatively lightly and providing exemptions for some types of media activity. This approach is illogical as business and media operations are likely to have a much greater ability to affect public perceptions and hence voting patterns than charities and NGOs.**
- 1.3 The Bill requires many Australian individuals and bodies who are active public communicators about ‘political’ matters to register as ‘political campaigner’ (in general terms responsible for per annum political expenditure of \$100,000 or more), ‘third party campaigner’ (in general terms responsible for per annum political expenditure of \$13,500 or more) or ‘associated entity’ (see paragraph 5.9 and following below). Registration requires compliance with additional often complex requirements in relation to:
- (a) the receipt of donations, particularly restrictions on foreign donations (Division 3A);
 - (b) disclosure of donations, electoral expenses, and reporting of annual returns (Divisions 4, 5 and 5A); and
 - (c) authorisation of electoral matters (Part XXA).
- 1.4 **The extensive restrictions will impose substantial compliance burdens upon charities, advocates and not-for-profits which are least able to bear such burdens. Such organisations will be comparatively restricted in their ability to continue to be involved in political communication in comparison to businesses and business groups, which will have the resources to lobby political parties and espouse particular policies as they wish.** In particular, businesses will not have to register as associated entities¹ unless they state that they support (or oppose) a specific political party (see paragraph 5.12 and following below).
- 1.5 **The concept of an associated entity is misconceived and far too broad.** It does not take into account the complexities of political discourse, nor the nature of the diverse and non-linear ways in which public speech operates. The expression of a particular viewpoint in common with a candidate or registered political party is taken as indicating political alignment in all respects, which may well not be the case.

2. ALHR’s Concerns

- 2.1 **ALHR’s primary concern is that the Bill will unreasonably and disproportionately violate the fundamental universal human rights to freedom of speech and freedom of expression, and will diminish, not enhance, the right to free political communication in Australia.**

¹ Businesses may still, however, be registerable as political campaigners or third party campaigners.

- 2.2 Pursuant to the principle of legality, Australian legislation and judicial decisions should adhere to international human rights law and standards, unless legislation contains clear and unambiguous language otherwise. Furthermore, the Australian parliament should properly abide by its binding obligations to the international community in accordance with the seven core international human rights treaties and conventions that it has signed and ratified, according to the principle of good faith.
- 2.3 ALHR endorses the views of the Parliamentary Joint Committee on Human Rights (PJCHR) expressed in Guidance Note 1 of December 2014² as to the nature of Australia's human, civil and political rights obligations, and agree that the inclusion of human rights 'safeguards' in Commonwealth legislation is directly relevant to Australia's compliance with those obligations.
- 2.4 Generally, behaviour should not be protected by Australian law where that behaviour itself infringes other human rights. There is no hierarchy of human rights – they are all interrelated, interdependent and indivisible. Where protection is desired for particular behaviour it will be relevant to what extent that behaviour reflects respect for the rights of others.
- 2.5 It is only through holding all behaviours up to the standard of international human rights that one can help improve and reform harmful and discriminatory practices.
- 2.6 Legislation should represent an **appropriate and proportionate response** to the problems and harms being dealt with by the legislation, and adherence to international human rights law and standards is an important indicator of proportionality.³
- 2.7 ALHR expresses **strong doubts as to the adequacy of the Constitutional basis** for those parts of the Bill which place unreasonable burdens on persons or organisations merely because they are involved in discussions about matters of importance to the Australian public, and thus burden the implied Constitutional right of political communication.

3. What does the Bill do?

- 3.1 Under the amendments to the Commonwealth Electoral Act adopted in the *Electoral and Other Legislation Amendment Act 2017* passed in September of 2017, "key non-party actors" in political communications, whether during elections or otherwise, are "required to identify themselves in political communications with the public." The Bill requires those actors which are subject to the authorization regime established by the earlier amending Act to register under particular categories and to follow numerous complex donation and reporting requirements.
- 3.2 In very general terms, if an entity is responsible for political expenditure of:
- \$100, 000 or more during the current financial year or any one of the previous 3 financial years (section 287F (1)(a)), it must register as a political campaigner, or
 - \$13,500 or more (being the current disclosure threshold), it must register as a third party campaigner (section 287G).

² Commonwealth of Australia, Parliamentary Joint Committee on Human Rights, *Guidance Note 1: Drafting Statements of Compatibility*, December 2014, available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources> accessed 16 January 2015, see also previous *Practice Note 1* which was replaced by the Guidance Note, available at <<https://www.humanrights.gov.au/parliamentary-joint-committee-human-rights>>.

³ See generally Law Council of Australia, "Anti-Terrorism Reform Project" October 2013, <<http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/Oct%202013%20Update%20-%20Anti-Terrorism%20Reform%20Project.pdf>> .

- 3.3 If an entity has a close association with a registered political party, then it must register as an associated entity of that party (section 287H). This would include being controlled by the party, being a financial member of the party either directly or indirectly, and having voting rights in the party either directly or indirectly. **However the section seeks also to require entities to be registered as associated with a party if they act for its benefit, including if they oppose its own opponents (section 287H (5)). Given that in this way an entity could be deemed to be associated with multiple parties, it is not clear how such relationships could be regulated nor how such regulation would enhance transparency of the Australian political system.** These issues are addressed further in paragraphs 5.13 to 5.15 below.

4. Human rights breached by the Bill

- 4.1 The Statement of Compatibility within the Explanatory Memorandum identifies the following rights under the *International Covenant on Civil and Political Rights (ICCPR)* as potentially impacted, arguing however that the impact is proportionate, necessary and reasonable in the circumstances. These are:
- a) the right of citizens to take part in public affairs and elections, as contained in article 25;
 - b) the right to freedom of opinion and expression, as contained in article 19;
 - c) the prohibition on interference with privacy and attacks on reputation, as contained in article 17; and
 - d) the right to freedom of association with others, as contained in article 22.
- 3.2 Given that a purported exemption for artistic and academic work is too narrowly drafted (see paragraphs 4.6 – 5.8 below) we believe that a further right which could be affected by the Bill is Article 27 of the Universal Declaration of Human Rights which provides that “everyone has the right freely to participate in the cultural life of the community [and] to enjoy the arts...”.
- 4.3 Australia is a contracting party to the ICCPR which was signed by the Australian government on 18 December 1972 and ratified on 13 August 1980. Pursuant to Article 26 of the 1969 Vienna Convention on the Law of Treaties, Australia is obliged to the international community to implement, uphold, protect and respect all of the rights contained in the ICCPR including the right to freedom of expression.
- 4.4 We submit that the legislation as drafted provides neither a proportionate, necessary or reasonable response to the perceived harms. We remind the Committee that Australia had a section 287H significant role in drafting the Universal Declaration of Human Rights and in its adoption by the United Nations General Assembly on 10 December 1948. This is a proud history that Australia has in upholding basic human rights and we should be vigilant to guard against their infringement by the government of the day.
- 4.5 **We fear that the Bill as presently drafted is so excessive in its scope and in the penalties imposed as to have a severely chilling effect upon free speech, and particularly constitutionally-protected free political speech. It diminishes our democracy.**

5. Breadth of definitions excessive

Electoral matter

- 5.1 This is defined as matter which is intended or likely to affect voting in an election. As practically every matter of public discussion could be said to be likely to affect voting in an election, this definition would appear to catch all public discourse not specifically exempted.

Political expenditure for political purposes

- 5.2 Under the Bill, **political expenditure** means expenditure incurred for one or more political purposes. “Political purposes” is drafted widely to mean:

- (a) *the public expression by any means of views on a political party, a candidate in an election or a member of the House of Representatives or the Senate;*
- (b) *the public expression by any means of views on an issue that is, or is likely to be, before electors in an election (whether or not a writ has been issued for the election);*
- (c) *the communicating of any electoral matter (not being matter referred to in paragraph (a) or (b)) for which particulars are required to be notified under section 321D;*
- (d) *the broadcast of political matter (not being matter referred to in paragraph (c)) in relation to which particulars are required to be announced under subclause 4(2) of Schedule 2 to the Broadcasting Services Act 1992; or*
- (e) *the carrying out of an opinion poll, or other research, relating to an election or the voting intentions of electors.*

5.3 Paragraph (b) is wide enough to cover any issue which is likely to be of public interest, ranging from those which would traditionally be recognised as political campaign issues to those which may arise tangentially in public discourse. The definition is wide enough to include a huge range of topics, including immigration, treatment of refugees, any discussion of any recent government legislation, government transparency, unemployment, homelessness, inequality, taxation, education, health issues such as contraception, abortion, immunisation and assisted dying, regulation and funding of arts and sport and so on. The extension of paragraph (b) to cover situations *whether or not a writ has been issued for the election* means that all expression to do with any of these issues is captured, regardless of whether the person who is expressing the view has any interest in the electoral process or any intention of influencing it. The paragraph effectively regulates any expression of opinion on any matter of public interest, at any time. The paragraph cannot be justified in the context of legislation, the aim of which is expressed to be the prevention of undue influence in the democratic electoral process, because its reach goes far beyond expression that has any nexus to that electoral process.

5.4 These provisions are subject to exceptions that apply if:

- (f) *the sole or predominant purpose of the expression of the views, or the communication, broadcast or research, is the reporting of news, the presenting of current affairs or any editorial content in news media⁴; or*
- (g) *the expression of the views, or the communication, broadcast or research, is solely for genuine satirical, academic or artistic purposes.⁵*

Media Exemption

5.5 The exemption (introduced in the *Electoral and Other Legislation Amendment Act 2017* and continued in the Bill) for news media for activities which have the ‘sole or predominant purpose’ of reporting news, presenting current affairs or expressing editorial content in news media clearly does not cover opinion pieces. Given that opinion pieces are a major part of most mainstream news (on which, indeed, the Huffington Post is based) it is not appropriate to exclude opinion pieces. The consequences would appear to be either that the relevant media outlet would become subject to the Commonwealth Electoral Act, or that the journalist (or non-journalist) writing an opinion piece might need to register under the provisions of the Bill.

Artistic and Academic Exemption

5.6 The exemption introduced in the *Electoral and Other Legislation Amendment Act 2017* and continued in the Bill for expression which involves “genuine” satirical, academic or artistic purposes and is solely for those purposes, is far too narrow. This wording reflects the *Criminal Code Amendment (Impersonating a Commonwealth Body) Bill 2017* and contains the same inherent problems.

⁴ See also the similar exemption in paragraph 321D(4)(a)

⁵ See also the similar exemption in paragraph 321D(4)(b)

- 5.7 Firstly, it is not clear what counts as "genuine" satire, or even as "satire." This is not a matter that is established in common law in Australia, and the Bill provides no guidance. What is non-genuine satire? How does one establish that one's satire is 'genuine'? These provisions raise more questions than they solve.
- 5.8 Furthermore, the qualification that the conduct be "solely" for the exempt purpose is also problematic: what if the work is satirical (or academic or artistic) but the creator also has other, or additional, motivations? Given that any conduct can convey multiple messages to different audiences, it is likely to be virtually impossible for anyone to prove that their conduct had a sole purpose or a sole message. At the very least a reference to 'predominant' purpose should be included, as for the media exemption.

For the benefit of

- 5.9 A person or body must register as an associated entity under section 287H (1) if:

- (a) the entity is controlled by one or more registered political parties;*
- (b) the entity operates wholly, or to a significant extent, for the benefit of one or more registered political parties*
- (c) the entity is a financial member of a registered political party;*
- (d) another person is a financial member of a registered political party on behalf of the entity;*
- (e) the entity has voting rights in a registered political party;*
- (f) another person has voting rights in a registered political party on behalf of the entity.*

- 5.10 However section 287H (5) gives such a wide definition to 'for the benefit of' as to render the section a virtual catch-all. It provides that:

(5) Without limiting paragraph (1)(b), an entity is, for the purposes of this Part, taken to be an entity that operates wholly, or to a significant extent, for the benefit of one or more registered political parties if:

- (a) the entity, or an officer of the entity acting in his or her actual or apparent authority, has stated (in any form and whether publicly or privately) that the entity is to operate:*
 - (i) for the benefit of one or more registered political parties; or*
 - (ii) to the detriment of one or more registered political parties in a way that benefits one or more other registered political parties; or*
 - (iii) for the benefit of a candidate in an election who is endorsed by a registered political party; or*
 - (iv) to the detriment of a candidate in an election in a way that benefits one or more registered political parties; or*
- (b) the expenditure incurred by or with the authority of the entity during the relevant financial year is wholly or predominantly political expenditure, and that political expenditure is used wholly or predominantly:*
 - (i) to promote one or more registered political parties, or the policies of one or more registered political parties; or*
 - (ii) to oppose one or more registered political parties, or the policies of one or more registered political parties, in a way that benefits one or more other registered political parties; or*
 - (iii) to promote a candidate in an election who is endorsed by a registered political party; or*

(iv) to oppose a candidate in an election in a way that benefits one or more registered political parties.

- 5.11 While it is unlikely that any officer of an entity would state that the entity is supporting or opposing a particular party if the entity did not wish to register as an associated entity, paragraph (b) is much more problematic. Paragraph (b) effectively allows all businesses to avoid registration as an associated entity, because any sums spent on political expenditure will be a small part of the overall business. This is not likely to be the case, however, for NGOs and charities which have an advocacy role.

Associated entity

- 5.12 According to the Explanatory Memorandum (paragraph 37),

“Examples of associated entities include ‘500 clubs’, ‘think tanks’, registered clubs, service companies, trade unions and corporate party members, provided that they fall within the relevant definition in subsection 287(1).”

- 5.13 As has been demonstrated in the above paragraphs, the definition of an ‘associated entity’ is so broad (by virtue of the breadth of section 287H(5)(b)) that the associated entity registration provisions would appear to be virtually unworkable, if an associated entity is required to register as an associate of a specific political party (section 287K(2)(b)(ii)). This is not a problem where the entity intends to support a particular political party, but it is hard to see how registration would work where an entity is deemed to be registerable just because of its general political speech or just because it opposes a registered political party, candidate or policy.
- 5.14 The fact that an entity disagrees with a policy adopted or endorsed by a registered political party (like offshore processing of refugees) does not mean it supports the the policies of an opposing party. It is not always the case that “my enemy’s enemies are my friends” which is what the legislation seems to contemplate. Because an entity supports a Xenophon Party policy (like banning poker machines) does not mean that entity opposes all other political parties (the ALP, the LNP, One Nation etc) who do not agree with that policy. Because an entity publicly agrees with a policy of the Pirate Party (such as government transparency) does not mean that it should be registered as an associate of the Pirate Party. Opposition to the policies of one party may have an indirect benefit to its opponents – in the sense that any public criticism of one’s opponents is likely to have some benefit. But the proposed provision draws no distinction between direct, tangible and intended benefits on the one hand and incidental, notional or theoretical benefits on the other.
- 5.15 The concept of an associated entity in section 287H(5)(b) is misconceived and far too broad. The concept does not take into account the complexities of political discourse, the fact that many political parties share common philosophies and policies, nor the nature of the diverse and indirect ways in which public speech operates and political views and alignments are formed and discarded. Under the present wording, entities might effectively be required to register as ‘associates’ of multiple registered political parties, because they would be caught by different aspects of section 287H(5)(b) in relation to the different political parties. Such a result would make nonsense of the whole concept of transparency of affiliations.

6. Extent of obligations excessive

- 6.1 Whether an entity is required to register as a third party campaigner, political campaigner or associated entity, its subsequent obligations are extensive and onerous, particularly in relation to the documentation of foreign donations.
- 6.2 Donations from Australian electors, citizens and perhaps residents, as well as Australian-incorporated companies and trustees who are any of the foregoing, are permitted. It is not clear how in practice the legislation could prevent any of such persons from being a conduit for foreign donations, unless the bank accounts of all political donors are to be inspected.

- 6.3 ALHR does not agree that it is appropriate to restrict foreign donations to entities which engage in political communications for advocacy and non-profit-making purposes, particularly in circumstances where the scope of political communication has been defined so widely that it is not confined to communications connected in some way with elections or to issues that would traditionally be recognised as overtly political. The purpose of restricting foreign donations is to avoid potential corrupt conflicts of interest. Where an organisation is not advocating for its own interests but to share its expertise in a way that improves Australian society and/or to advocate for the needy and dispossessed, such restrictions are not necessary and not appropriate. Should donations from the Bill and Melinda Gates Foundation to domestic violence support organisations, or from the World Wildlife Foundation to organisations opposing fracking for conservation reasons, or supporting protection of the platypus, be disallowed just because the Foundations are not Australian? This type of restriction is entirely out of place in the charitable and NGO sector.

7. Conclusion

- 7.1 Political comment aimed at making a better nation is a fundamental underpinning of any democracy. Public participation in our political system is a fundamental and indispensable part of Australian democracy. The discourse of NGOs and charities and the media's ability to report and comment on the same are a potent expression of the free spirit of Australia and our democracy. They should not be traded away so carelessly by overreaching legislation such as the proposed Bill.
- 7.2 Any legislation which impinges upon human rights must be narrowly framed, proportionate to the relevant harm, and provide an appropriate contextual response which minimises the overall impact upon all human rights. The drafting of the Bill far exceeds its stated aims and has the potential to severely restrict normal political behaviour and to chill the exercise of free speech including political comment.
- 7.3 Given that Australians do not have an express legally protected right to freedom of speech and/or expression, the aspects of the proposed Bill referred to above are all the more troubling.
- 7.4 ALHR is concerned that the Bill will severely impact on the ability of non-government associations, from major charities to small volunteer groups, to participate in political discourse, while leaving major businesses relatively untouched. This outcome ensures that the voices of the 'haves' dominate our democracy, while those who attempt to speak on behalf of the 'have nots' will be so limited and restricted that their voices will not be heard. Growing inequality in the world is indeed "a direct consequence of the voice of working people being crushed" as a former Australian Treasurer has said, and this Bill could have that very effect because of its overreach.
- 7.5 ALHR submits to the Committee that given the potential for the Bill's excessive reach to seriously infringe on fundamental democratic freedoms, all of the questions and ambiguities raised must be clarified before the Bill is put to a vote in the parliament.
- 7.6 ALHR is happy to provide any further information or clarification in relation to the above if the Committee so requires.

If you would like to discuss any aspect of this submission, please email me at: president@alhr.org.au

Yours faithfully

A handwritten signature in black ink, appearing to be 'BC' followed by a stylized flourish.

Benedict Coyne
President
Australian Lawyers for Human Rights

ALHR

ALHR was established in 1993 and is a national association of Australian solicitors, barristers, academics, judicial officers and law students who practise and promote international human rights law in Australia. ALHR has active and engaged National, State and Territory committees and specialist thematic committees. Through advocacy, media engagement, education, networking, research and training, ALHR promotes, practices and protects universally accepted standards of human rights throughout Australia and overseas.