AUSTRALIAN LAWYERS FOR HUMAN RIGHTS

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Committee Secretary
Joint Standing Committee on Electoral Matters
PO Box 6021
Parliament House
Canberra ACT 2600

By email: em@aph.gov.au

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 revisions to the proposed *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill* 2017 (**'the Bill'**) which substantially amend the original version, following the Committee's Advisory Report of April 2018.

We note that the time frame for considering the revised Bill has been alarmingly short despite the extensive changes that have been made. The Bill as marked up from the 2017 version is 131 pages in length and makes numerous detailed changes which themselves total 44 pages, and yet stakeholders have effectively been given only 5 working days in which to make a submission in relation to the revisions, with the revised Explanatory Memorandum only being publicised 24 hours before the deadline for submissions on the Bill. Consequently, there may well be other issues in relation to the Bill which ALHR has failed to identify but which are also of importance.

We are greatly concerned by the apparent pattern of ever decreasing time frames within the Committee phase for the consideration of legislation with human rights impacts. There is a danger of rendering the Committee process ineffectual should this pattern continue.

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## 1. Summary

1.1 **ALHR welcomes the changes made to the Bill but is concerned that the changes do not go far enough and that the Bill continues to exceed its stated aims of supporting both real and perceived integrity and fairness of elections**. The definition of 'electoral matter' is not tied to public speech during an election period. Effectively, a person or entity may need to register and comply with the *Electoral Act* even if they make no public comment during any federal election period.

1.2 Changes that ALHR welcomes include:

- The reduction or removal of penalties, particularly in relation to financial controllers of third parties
- The removal of the requirement for third parties to nominate financial controllers (except in relation to sections 316 (2A) and (2B) – is this inconsistency intended?)[1]
- The increased thresholds for political campaigners
- The removal of statutory declaration requirements in respect of donations over $250 and increase of threshold to $1,000
- The removal of requirement for senior staff of third parties to declare any political party membership.

1.3 ALHR submits that significant continuing or additional problems with the Bill as amended include (not necessarily in order of importance):

- The Act applies not just during electoral periods but also outside electoral periods, thus still being likely to have a chilling effect on all political speech in Australia
- The distinction between issues based speech or campaigning and political campaigning is not sufficiently clear
- The threshold for third parties has not been increased despite an increase for political campaigners
- The definition of 'electoral matter' is excessively broad
- The exemptions for 'electoral matter' are excessively narrow
- The concept of an 'associated entity' is misconceived and far too broad. The possibility of an entity being regarded as an associate of several different parties is not addressed.
- The transition from existing reporting obligations needs to be clarified
- What spending amounts to expenditure on electoral matters needs to be clarified
- The requirement for senior staff of political campaigners to declare any political party membership has been retained
- The overruling of State legislation.

## 2. ALHR's Concerns

2.1 **ALHR's primary concern is that the Bill, despite some welcome amendments, will unreasonably and disproportionately violate the fundamental universal human rights to**

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[1] It may be that item (194) and part of item (197) (reference to 'third party') in the Exposure Draft of the revised Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017 are erroneous and should be deleted.

**freedom of speech and freedom of expression, and will diminish, not enhance, the right to free political communication in Australia.**

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 2014[2] 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. The new section 287AC acknowledges this implied right but is arguably inconsistent with other provisions in the Bill.

## 3. Human rights breached by the Bill

3.1 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, ALHR believes 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

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[2] Commonwealth of Australia, Parliamentary Joint Committee on Human Rights, *Guidance Note 1*: *Drafting Statements of Compatability*, December 2014, available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources>, 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> .

the cultural life of the community [and] to enjoy the arts…".

3.3 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.

3.4 ALHR submits 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 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.

3.5 **We maintain that the Bill (even as revised) is too far-reaching in its scope and therefore will still have a severely chilling effect upon free speech, and particularly constitutionally-protected free political speech. It diminishes our democracy.**

## 4. Continuing Problems - applies to public speech throughout each financial year whether or not writs have been issued for a federal election

4.1 The new section 4AA essentially still captures any matter which is intended or likely to affect voting in an election, whether directly or indirectly. While the previous definitions of ***political expenditure*** and ***political purposes*** have been removed, it is arguable that the breadth of the new section 4AA definition of 'electoral matter' is still wide enough to encompass the first paragraphs of the former definition of 'political purpose', being:

*(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);*

4.2 That is, section 4AA 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 section is drafted so broadly that it effectively regulates any expression of opinion on any matter of public interest, at any time. The definition 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. Given 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.

4.3 Section 4AA(1) reads as follows:

> **4AA Meaning of *electoral matter***
>
> (1) ***Electoral matter*** means matter communicated or intended to be communicated for the dominant purpose of influencing the way electors vote in an election (a ***federal election***) of a member of the House of Representatives or of Senators for a State or Territory, including by promoting or opposing:
>
> (a) a political entity, to the extent that the matter relates to a federal election; or
>
> (b) a member of the House of Representatives or a Senator.

Effectively, by virtue of this definition a person or entity may need to register and comply with the Act even if they make no public comment during any federal election period.

ALHR submits that this definition has the same undesirable effect as the existing section 314AEB (as amended in 2017), which requires annual returns to be made by persons who "publicly express 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) by any means." That is, the definition still reflects a confusion between electoral campaigning and political speech in that the definition applies outside election periods. While we note that section 287AC has been included to highlight the implied constitutional protection of political speech, in our view section 4AA is inconsistent with section 287AC because section 4AA applies whether or not a writ has been issued for a federal election.

4.4 At the very least, the qualification 'to the extent that the matter relates to a federal election' should apply to both paragraphs (a) and (b). The effect is otherwise that opposition to a specific party is not regarded as political campaigning when the matter does not relate to a federal election, but opposition to a specific member of parliament will always be regarded as political campaigning and is therefore always likely to be regarded as an electoral matter. This inconsistency is not appropriate and is not justified, particularly in the light of section 287AC.

4.5 We recommend that section 4AA(1) be amended to read as follows:

> **4AA Meaning of *electoral matter***
>
> (1) ***Electoral matter*** means matter communicated or intended to be communicated for the dominant purpose of influencing the way electors vote in an election <u>for which a writ has been issued</u> (a ***federal election***) of a member of the House of Representatives or of Senators for a State or Territory, including by promoting or opposing:
>
> (a) a political entity, ~~to the extent that the matter relates to a federal election~~; or
>
> (b) a member of the House of Representatives or a Senator.
>
> <u>to the extent that the matter relates to that federal election.</u>

and we recommend that consequential changes be made to other subsections in section 4AA with similar wording, such as subsection (3).

While it might be argued that section 4AA would not apply if no writ had been issued for a specific election, in our view subsection (4)(e) confirms that the definition could apply even if no writ had been issued. That subsection provides that in determining the dominant purpose of the communication or intended communication, one factor to be taken into account is: "(e) how soon a federal election is to be held after the creation or communication of the matter." That is, a communication may be less likely to be regarded as electoral matter if the next federal election is far off (which would usually mean that a specific date has not been set) but it is still possible that a communication may be regarded as an electoral matter even when the next federal election is some unspecified time in the future. ALHR submits that that this result confuses political speech with political campaigning and is not acceptable in a democracy that seeks to protect political speech.

4.6 The references in section 4AA (1) to electoral matter meaning matter communicated 'or *intended to be* communicated' are also problematic. This appears to mean that something can be an 'electoral matter' even if it is never actually communicated – that is, never made public.

Further, section 4AA (2) says that not just each communication or recommunication is relevant to whether something is electoral matter, but also each 'creation or recreation' - again implying that creation of certain material, even if it is never communicated, is caught by the legislation. The subsection reads:

> (2) For the purposes of subsection (1), each creation, recreation, communication or recommunication of matter is to be treated separately for the purposes of determining whether matter is electoral matter.

Similarly s 4AA (4)(e) says that it is relevant how soon a federal election is called after the 'creation' of potentially 'electoral' matter - as opposed to its communication.

How the Act can apply when something is created but not communicated is not clear. ALHR submits that references to 'intended' communication and to 'creation' and 'recreation' should be removed.

## 5. Continuing problems - exemptions too limited

5.1 Section 4AA(1) is subject to exceptions (similar to those in the previous Bill) that apply under subsection (5) if the communication or intended communication:

(a) forms or would form part of the reporting of news, the presenting of current affairs or any genuine editorial content in news media; or

(b) is or would be by a person for a dominant purpose that is a satirical, academic, educative or artistic purpose, taking into account any relevant consideration including the dominant purpose of any other communication of matter by the person.

While the removal of the previous problematic 'sole or predominant' tests is welcomed, the exemptions are still too narrow.

### Media Exemption

5.2 In relation to subsection 4AA(5)(a) ALHR submits that the exemption should be expanded. It should be made clear that 'editorial content' covers all political comment, including by the issue and self- publication of media releases by persons and entities wishing to engage in public discussions of issues important to Australia. 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.

As 'editorial content' is not defined, it is possible that it already does cover all political comment (as opposed to 'advertising content') but we submit that this should be made clear and that the exception for editorial content should not be limited to its appearance in 'news media.'

We suggest that the subsection be amended to read as follows:

(5) Despite subsections (1) and (3), matter is not ***electoral matter*** if the communication or intended communication of the matter:

(a) forms or would form part of the reporting of news, the presenting of current affairs or any genuine editorial content in news media <u>or the publication of issues-based political comment in any media</u>; or

Whether further amendments to this subsection are appropriate would depend upon whether or not our previous suggested amendments are adopted.

### Artistic and Academic Exemption

5.3 The removal of references to "genuine" satire and conduct "solely" for the exempt purpose are welcomed. However the additional reference to the need for *"taking into account any relevant consideration including the dominant purpose of any other communication of matter by the person"* raises significant questions. The implication would seem to be that if a person is involved in political campaigning, any other communications by them that might otherwise be regarded as educative or academic or artistic are likely to perceived as 'tainted' by and also having a political purpose, even if that is not the case. This comes perilously close to 'regulating the speaker, not the speech' and ALHR submits this is in direct conflict with section 287AC and the implied constitutional right of free political speech.

## 6. Continuing problems – disclosure of party membership

While ALHR welcomes the removal of the requirement that senior staff of third parties are required to disclose their political party membership, we remain concerned that this requirement applies to

political campaigners under sections 309 (4)(a), 314 AB (2)(b) and 314AEA(1)(d). Political party membership is 'sensitive' personal information for the purposes of the *Australian Privacy Principles*. It is a clear breach of the privacy of senior staff to require their political party membership to be disclosed under the Act and we strongly submit that the relevant sections must be removed.

## 7. Continuing problems - Electoral expenditure unclear

Given the breadth of the definition of 'electoral matter', which can cover both direct and indirect communications, clarification is needed as to what amounts to 'electoral expenditure' for the purposes of section 287AB. What if a media adviser works on both political campaigns and other communications? Should their salary be apportioned between the different types of work? These types of difficulties and compliance burdens will chill the advocacy efforts of all civil society organisations, especially the smaller organisations which do not have the resources to apply to these questions.

## 8. Continuing problems -Third party threshold too low

While the registration thresholds for political campaigners have been increased from $100, 000 to $500,000 (section 287F (1)(a)) or two thirds of their total expenditure if over $100,000 (as opposed to the previous threshold of over 50% of their total expenditure if over $50,000), the threshold for third parties (no longer called 'third party campaigners') remains at the general disclosure threshold which is currently $13,800 (although apparently this provision in section 287G is likely to be opposed). This is too low in comparison to political campaigners.

## 9. Continuing problems - Associated entities

In ALHR's view the concept of an associated entity is misconceived and still 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. Subsection 287(5) formerly provided that the expression of a particular viewpoint in common with a candidate or registered political party would be taken as indicating political alignment in all respects, which may well not be the case.

Although subsection 287H (5) has now been removed, which ALHR welcomes, section 287H(1) is still couched very broadly. To be absolutely sure that no shadow of implication from the previous subsection (5) remains, it would assist if the concepts in the old subsection (5) were specifically negated, for example by the narrowing of (1) or description of circumstances in which (1) will not apply.

ALHR notes that the problem of an entity being potentially regarded as associated with several political parties at the same time has not been addressed by the amendments. We submit that it makes a nonsense of the whole idea of transparency if an entity can be regarded as associated with numerous political parties.

## 10. Relationship with Foreign Interference Transparency Scheme Act (FITS) amendments

Under Schedule 5 of the **Amendment (Espionage and Foreign Interference) Act 2018** there are changes proposed to the **FITS Act** which will commence when the Bill commences. Basically, attempts to influence a 'process' of a political campaigner on behalf of a foreign person may be caught by the FITS Act. Whether these amendments, particularly the proposed s 12(1)(g) and 12 (7), are appropriate in the light of the recent amendments to this Bill is questionable. ALHR is concerned that they have not been fully considered as part of the process of amendment of the Bill.

## 11. Donations

Appropriate donor information required under section 302P to evidence that the donor is not foreign effectively requires an individual's name and address 'set out in [an Electoral] Roll'. While the removal of the requirement for statutory declarations is welcomed, this new provision only assists in relation to

adults who are registered to vote. For donors under 18 or those not so registered, different methods of checking that they are not foreign would be needed.

## 12. Existing reporting obligations – transition period(s)

It is not clear how the reporting for the period from March 2018 up to the date of commencement of this legislation or the date of the next reporting period (whichever is applicable) will work in practise, given the change in focus in the revised Bill and the deletion of much of section 314AEB which contains the annual return requirements. Section 314AEB was previously changed in March 2018 to apply the *Electoral Act* more generally to non-election periods, thus potentially capturing a number of entities which would not otherwise have been subject to the *Electoral Act*. With the revisions to the Bill, most of those entities will not be captured under the *Electoral Act either* and so there is the possibility of entities being required to give a return only for the last quarter of the 2017 -2018 financial year and the first quarter of the 2018 – 2019 financial year.

We note that specific legislative wording may be required to make the situation clear.

## 13. State legislation

We have not had sufficient time to consider the impact of proposed sections 302CA and 314B, which would appear to override State law. We note that this is an important issue which needs to be considered in an appropriate time frame.

## 14. Conclusion

13.1 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.

13.2 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 this 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. If passed these measures will diminish Australia's democracy.

13.3 Given that Australians are alone amongst Western democracies in not having a federal Human Rights Act to expressly legally protect their rights to freedom of speech and/or expression, the aspects of the proposed Bill referred to above are all the more troubling.

13.4 ALHR is deeply concerned that the Bill will 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.

13.5 ALHR respectfully 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.

13.6 ALHR is happy appear before the Committee or to provide any further information or clarification in relation to the above if the Committee so requires.

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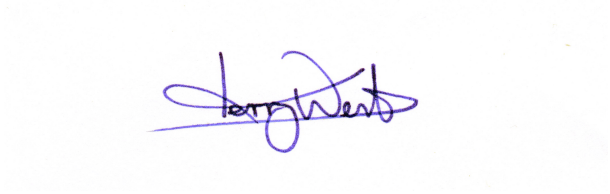
If you would like to discuss any aspect of this submission, please email me at: president@alhr.org.au

Yours faithfully



Kerry Weste
President
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## 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.