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**THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA**

**HOUSE OF REPRESENTATIVES**

**Electoral Legislation Amendment  
(Fair and Transparent Elections) Bill 2024**

**EXPLANATORY MEMORANDUM  
and  
STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS**

Circulated by authority of  
Kate Chaney MP

## Electoral Legislation Amendment (Fair and Transparent Elections) Bill 2024

### OUTLINE

1. Trust in our political system is declining, partly driven by a perception that the system is 'rigged' in favour of those with power.
2. Rebuilding trust is vital to ensure that voters do not further disengage from our democracy.
3. Voters should have the right to know who is supporting political candidates and be protected from outright lies in political advertising. Systems need to be in place so that voters can have confidence that decisions are being made in the interests of the country, not to benefit vested interests. Individuals or companies should not be able to have a disproportionate impact on the outcome of elections. Election rules should be fair, so that we can ensure ongoing political competition and allow new challengers to communicate alternative ideas to voters.
4. Reforms are needed to meet community expectations and to ensure that our political system can deliver on these important issues. These additional reforms are based on three pillars:
  - (a) improve transparency;
  - (b) reduce financial influence; and
  - (c) level the playing field.
5. This Bill amends the Commonwealth *Electoral Act 1918* (**Electoral Act**) and related legislation under the three pillars by introducing a number of measures including:

#### *Improve Transparency*

- lower the donation disclosure threshold from \$16,300 to a fixed \$1,000 (**lower the donation disclosure threshold to \$1,000**);
- require real-time disclosure of donations above the disclosure threshold of \$1,000 by a recipient within 7 days of the donation threshold being exceeded (**real-time disclosure**).
- prohibit misleading or deceptive electoral or referendum matter in terms of the *Commonwealth Electoral Amendment (Stop the Lies) Bill 2022* presented by Zali Steggall OAM MP (**truth in political advertising**);
- broaden the definition of a gift (donation) to cover all monetary and in-kind payments including fundraising dinners, cash for access 'business forums' and other events, as well as membership fees that benefit a political entity or candidate (**broaden gift/donation definition to capture dark money**);

- make funding disclosure meaningful and readily available on the Australian Electoral Commission (**AEC**) Transparency Register by requiring disclosure of receipts in separate categories including fundraising events, investment income, membership fees and public funding reimbursement as well as requiring the disclosure of the terms of loans (**require meaningful funding disclosure**);

#### *Reduce Financial Influence*

- Introduce a major-donor donation cap (**donation cap**);
- prohibit political donations from entities that inflict social harm for profit, such as tobacco, fossil fuels, gambling and liquor business entities (**social harm donations**);
- prohibit political donations from substantial Commonwealth government contractors and bidders for Commonwealth government contracts (**government contractor donations**);

#### *Level the Playing Field*

- prohibit government advertising from 2 years after an election until the next election except in limited and legitimate circumstances, as determined by the Independent Communications Committee (**limit pre-election government advertising**);
  - restore the independence of the postal vote process by preventing political parties and candidates from using it to seek advantage and harvest data (**ensure the independence of the postal vote process**);
  - establish an ‘independent campaign entity’ that upon registration will enable a registered independent candidate to be treated the same way as a ‘political party’ under the Electoral Act and related legislation, including access to the electoral roll and financial disclosure timelines (**an independent campaign entity to be treated as a political party**);
6. The Bill builds on the work of many crossbench members and senators, including Andrew Wilkie MP in the *Commonwealth Electoral Amendment (Cleaning up Political Donations) Bill 2022*, Rebekha Sharkie MP in the *Commonwealth Electoral Amendment (Lowering the Donation Disclosure Threshold) Bill 2019*, Zali Steggall OAM MP in the *Commonwealth Electoral Amendment (Stop the Lies) Bill 2022* and the Australian Greens *Commonwealth Electoral Amendment (Banning Dirty Donations) Bill 2020* and *Electoral Legislation Amendment (Fairer Contracts and Grants) Bill 2023*.
  7. These changes do not address every party and incumbency advantage (see Appendix A for a list) or cover the full list of issues on transparency or reducing financial influence. These changes are a ‘lowest common denominator’ approach, with broad support from a range of stakeholders.

8. The Bill does not address public funding. The public funding reimbursement model acts as a resource guarantee to maintain the status quo of the established parties. This taxpayer funding is also the opposite of community funding and engagement. Any significant increase in public funding in a cost-of-living crisis is poor reform.
9. Any public funding changes need to be moderate and designed to enable new entrants and not simply embed incumbents. See my Additional Comments to the JSCEM Interim Report of June 2023.”

### **Constitutionality**

10. Any electoral law reform must not violate the implied freedom of political communication guaranteed under the Australian Constitution.
11. The High Court has ruled that restrictions on political donations are valid only if they are compatible with representative democracy and they are reasonably appropriate and adapted to their stated purpose (*McCloy v New South Wales (2015)*).
12. Equal participation in, and access to, the electoral sphere is relevant to the High Court. The principle of a “level playing field” has been addressed together with “political equality”, which principles serve the purpose of equalising the electoral field.
13. The Bill addresses a number of aspects of electoral law reform to improve transparency, reduce financial influence and level the playing field. The reforms sought do not violate the implied freedom of political communication.

### **FINANCIAL IMPACT**

The Bill will have no financial impact.

## **NOTES ON SCHEDULES**

### **SCHEDULE 1 – IMPROVE TRANSPARENCY**

#### **Part 1 - Lower the donation disclosure threshold to \$1,000**

The current disclosure threshold of \$16,300 (as indexed) facilitates a system of 'dark money' that is out of step with thresholds for disclosure set by states and territories. It is time for transparency and community expectations to be met.

Part 1 of Schedule 1 lowers the donation disclosure threshold to a fixed \$1,000.

#### **Part 2 - Real-time disclosure for donations**

Requiring real-time disclosure is a fundamental reform enabling voters to understand who is donating to which party or candidate before they vote (and not after). It will bring the federal system in line with nearly all state jurisdictions.

Part 2 of Schedule 1 requires disclosure in 'real-time' - within 7 days by the recipient.

Additionally, this Part requires the AEC to publish any gift disclosure return lodged as soon as reasonably practicable after the AEC receives the return.

#### **Part 3 - Truth in political advertising**

Truth in political advertising is an important integrity and transparency measure and necessary component of electoral reform. Voters need to be able to trust information presented as being factual in political advertising.

Part 3 of Schedule 1 prohibits misleading or deceptive electoral or referendum matter by implementing amendments to the Electoral Act in terms of the *Commonwealth Electoral Amendment (Stop the Lies) Bill 2022* presented by Zali Steggall OAM MP.

#### **Part 4 - Broaden definition of gift (donation)**

In line with community expectations, dark money donations should be disclosed by broadening the definition of "gift" in the Electoral Act.

By Part 4 of Schedule 1, all monetary and in-kind payments (beyond reasonable consideration for a benefit) are to be treated as a gift/donation including fundraising dinners, cash for access "business forums" and other events, as well as membership fees that benefit a political entity or candidate. Any such payments greater than \$1,000 will be disclosable under the new disclosure threshold regime.

#### **Part 5 - Require meaningful funding disclosure**

The current reporting regime by political entities under the Electoral Act requires the disclosure of donations (or gifts) above the disclosure threshold. Other sources of income above the threshold all simply fall within an "other receipts" category. Donations below the threshold are "undisclosed". With the lowering of the donation disclosure threshold, more donations will be disclosed.

The “*other receipts*” category is a ‘*catch-all*’ and opaque category often covering varied sources of income including from events, investments, membership fees and public funding. There is no transparency in relation to these often significant income sources.

Grattan Institute analysis of AEC data for the 2020/21 financial year revealed that almost 90% of private funding of the Coalition and Labor is made up of the “*undisclosed*” or “*other receipts*” categories. Of the \$63 million of Coalition private income, 29% was “*other receipts*”. Of the \$47 million of Labor Party private income, 39% was “*other receipts*” (see page 3 Grattan Institute submission to JSCEM – submission 367).

Reporting needs to be reformed to be meaningful, with such disclosures to be readily available to the public on the AEC Transparency Register. Reporting of funding or receipts should include categories capturing moneys received from:

- (a) fundraising events;
- (b) investments;
- (c) membership or affiliation fees not otherwise reported as donations;
- (d) public/government funding such as AEC public funding reimbursement;
- (e) loans; and
- (f) transfers between branches of political parties.

For each receipt within a category, sufficient detail upon the receipt needs to be provided including date, amount and description for the receipt.

Political entities should disclose the terms and conditions of any loans made to such an entity.

AEC should be funded to ensure the accessibility of all such data including an effective search function.

## **SCHEDULE 2 – REDUCE FINANCIAL INFLUENCE**

### ***Major-donor donation cap and prohibited donations***

#### *Major-donor donation cap*

The massive election spending funded by individuals in the 2013 federal election and since shows the vulnerability of the Australian political system to motivated, very wealthy individuals and groups. This spending distorts the political debate to favour the rich and powerful at the expense of other Australians.

A simple way to limit the influence of vested interests and very wealthy people is to cap the total amount that a person and associated entities can contribute over an election cycle, to all parties and candidates. The cap counts all contributions made by a person that result in political donations by others. The cap takes account of a candidate making their own money available during an electoral cycle.

A cap set at 2% of the total amount of public funding at the previous election equates to approximately \$1.5 million for the next federal election (on current public funding levels) and would have been \$1.4 million for the 2022 election.

#### *Social harm prohibited donations*

The tobacco, fossil fuel, gambling and liquor industries inflict social harm for profit. The justification for these industries giving away shareholder funds appears to be to buy influence and obtain a more favourable policy position from government.

These industries should not be able to influence policy by political donations where the outcome sought is more social harm.

The Bill provides that social harm industries are prohibited from donating.

#### *Government contractor prohibited donations*

Probity dictates that donations should be prohibited from substantial government contractors and government contract bidders. These parties should not be able to influence policy or contracting decisions through political donations. This includes the big four consulting firms (PWC, KPMG, EY and Deloitte) to which the federal government has outsourced significant public service functions, with donations made back to the government, creating a 'co-dependency' culture.

“*Substantial government contractors*” is defined to be a party that has received payments from the Commonwealth government of more than \$200,000 in the last 24 months.

A majority of OECD countries ban political donations from corporations. Of those who do not, a number ban donations from corporations with government contracts and those bidding for government contracts.

The Bill provides that substantial government contractors and government contract bidders are prohibited from donating.

## **SCHEDULE 3 – LEVEL THE PLAYING FIELD**

### **Part 1 - Pre-election government advertising**

Expenditure of public moneys on government advertising is currently regulated by the *Public Governance Performance and Accountability Act 2013* (Cth).

The regulation is not working, as governments have consistently used taxpayer-funded advertising for political advantage. Government advertising has a pronounced spike before elections, often promoting the government's policies or performance. The Grattan Institute Report "*Depoliticising taxpayer-funded advertising*" (October 2022, at page 17) illustrates that government advertising has spiked before the last four federal elections, with daily spending at about twice the average for each term in the three months before each election.

Part 1 of Schedule 3 introduces a new part into the Electoral Act to prohibit government advertising in a pre-election period starting 2 years after the polling day for a general election except where the Independent Communications Committee determines that the advertising is exempt because of a national emergency, a public health campaign with a dominant purpose of a call-to-action, defence force recruiting or other compelling reason.

### **Part 2 - Restore the independence of the postal vote process**

Part XV of the *Electoral Act* sets out the regime for postal voting.

Postal voting is an increasing feature of federal election, rising to 14.3% of votes cast in 2022 compared to 8.3% in 2019.

The postal vote process involves a written application in approved form to the Electoral Commissioner. If the application for a postal vote that is received by the AEC is compliant, the AEC send postal vote papers to the applicant. A ballot paper and postal vote certificate need to be validly completed and be posted or delivered to the AEC.

The postal vote process has become both unfair and confusing to a number of voters as political parties and candidates with sufficient resources have implemented application form programs aimed to gain an advantage by seeking to influence a voter and harvest that voter's data. The programs usually involve sending voters a postal vote application form and a how to vote card at the same time. The application form invites voters to return their postal vote application to the party or candidate for processing. The application is then sent by the party or candidate to the AEC, which will then send the postal vote papers to the applicant.

The application form sent by the party or candidate is often not the AEC form but a reproduced version. The personal information on the application form received by the party or candidate can be harvested to be used by that party or candidate for timely communications when the applicant receives the voting forms, or at any time in the future.

The independence and integrity of the postal vote process needs to be protected. The AEC bluntly states "*The distribution and collection of PVA's (postal vote applications) by candidates and parties creates eligibility confusion and privacy concerns amongst voters*" (see JSCEM submission 330 by AEC at page 8). Community concerns are reflected by numerous complaints received by the AEC.



On 16 April 2022, the AEC Commissioner, Tom Rogers, took the step of writing to all registered political parties warning against distributing “*potentially misleading*” postal vote applications to residents. He referred to reports of incorrect forms being distributed to voters, the AEC’s purple colour being used on some forms and voters being directed to generically named websites en masse with the potential to mislead. In part, the AEC Commissioner said “... *the use of colour and wording means someone who doesn’t examine the material in detail could mistake it for a piece of AEC communication*” and “*Our message couldn’t be clearer – vote in person if you can, apply for a postal vote through us if you need one*”.

The Electoral Act should be amended to ensure the independence of the postal vote process by requiring that:

- (a) only the AEC produced postal vote application form can be used;
- (b) the AEC application form can only be sent to a voter by the AEC or a party or candidate where the voter makes such a request in writing; and
- (c) the AEC application form must not be sent to the AEC on behalf of a voter by a party or candidate.

### **Part 3 - Independent Campaign Entity**

A registered political party (see section 4 of the Electoral Act) has a number of advantages under the Electoral Act and related legislation that are not available to an independent candidate.

The Bill proposes to establish an Independent Campaign Entity that will be treated the same way as a registered political party.

The registration process for an Independent Campaign Entity will require:

- (a) the independent candidate to complete an application for registration and a statutory declaration attesting to the candidate’s intention to stand as a candidate at the next election, nominating the electoral district or senate (where applicable); and
- (b) written nomination by at least 100 electors in the relevant electoral district or state (for senators) of a new candidate.

Registration of the Independent Campaign Entity can commence from 2 years after an election until the next election.

The Independent Campaign Entity that is created upon registration will be treated the same way as a registered political party for the matters below.

#### *Electoral Roll*

Upon request, an Independent Campaign Entity will be provided with both a hard and electronic copy of the electoral roll (“*habitation index*”) for the “*Division*” in which associated independent candidate is contesting.

### *Financial Disclosure timelines*

The time of financial disclosures and deadlines under the *Electoral Act* be the same for an Independent Campaign Entity as a registered political party.

### *Treatment under Do Not Call Register Act*

The time from when an independent candidate is treated as being a “*candidate*” for the purposes of an exemption from the *Do Not Call Register Act (2006) (Cth)* is to be from registration of the Independent Campaign Entity, so as to be treated the same as for a registered political party. This means an independent candidate can conduct fundraising for electoral purposes from an earlier time, more aligned with registered political parties and current independent members of parliament.

## STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

### Electoral Legislation Amendment (Fair and Transparent Elections) Bill

This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

#### Overview of the Bill

1. This Bill amends the Commonwealth *Electoral Act 1918* (**Electoral Act**) and related legislation to improve transparency, reduce financial influence and level the playing field by introducing a number of measures including:

##### *Improve Transparency*

- lower the donation disclosure threshold from \$16,300 to a fixed \$1,000 (**lower the donation disclosure threshold to \$1,000**);
- require real-time disclosure of donations above the disclosure threshold of \$1,000 by a recipient within 7 days of the donation threshold being exceeded (**real-time disclosure**);
- prohibit misleading or deceptive electoral or referendum matter in terms of the *Commonwealth Electoral Amendment (Stop the Lies) Bill 2022* presented by Zali Steggall OAM MP (**truth in political advertising**);
- broaden the definition of a gift (donation) to cover all monetary and in-kind payments including fundraising dinners, cash for access 'business forums' and other events, as well as membership fees that benefit a political entity or candidate (**broaden gift/donation definition to capture dark money**);
- make funding disclosure meaningful and readily available on the Australian Electoral Commission (**AEC**) Transparency Register by requiring disclosure of receipts in separate categories including fundraising events, investment income, membership fees and public funding reimbursement as well as requiring the disclosure of the terms of loans (**require meaningful funding disclosure**);

##### *Reduce Financial Influence*

- introduce a major-donor donation cap (**donation cap**);
- prohibit political donations from entities that inflict social harm for profit, such as tobacco, fossil fuels, gambling and liquor business entities (**social harm donations**);

- prohibit political donations from substantial Commonwealth government contractors and bidders for Commonwealth government contracts (**government contractor donations**);

#### *Level the Playing Field*

- prohibit government advertising from 2 years after an election until the next election except in limited and legitimate circumstances, as determined by the Independent Communications Committee (**limit pre-election government advertising**);
- restore the independence of the postal vote process by preventing political parties and candidates from using it to seek advantage and harvest data (**ensure the independence of the postal vote process**); and
- establish an ‘independent campaign entity’ that upon registration will enable a registered independent candidate to be treated the same way as a ‘political party’ under the Electoral Act and related legislation, including access to the electoral roll and financial disclosure timelines (**an independent campaign entity to be treated as a political party**).

#### **Human rights implications**

2. The amendments proposed in this Bill may engage the following rights under the *International Covenant on Civil and Political Rights (ICCPR)*:

- the right to freedom of expression (Part III, Article 19, Section 2); and
- the right to take part in public affairs (Part III, Article 25).

#### *The right to freedom of expression*

3. The right to freedom of expression is contained in Article 19 of the ICCPR. It includes the ‘freedom to seek, receive and impart information and ideas of all kinds,’ regardless of medium (Article 19(1), ICCPR).

4. This right may be engaged because the Bill seeks to limit freedom of expression by:

- (a) making unlawful the printing, publication or distribution of certain content, where that content is electoral matter or referendum matter within the meaning of the Electoral Act (truth in political advertising); and
- (b) preventing donations from particular industries and parties from a social harm or probity or governance perspective (social harm and probity restrictions); and
- (c) otherwise, by the measures to improve transparency, reduce financial influence or level the playing field.

5. As part of reform to improve transparency, the Bill is seeking to prohibit misleading or deceptive electoral or referendum matter. Additionally, the Bill is seeking to prohibit donations from tobacco, fossil fuel, gambling and liquor business entities as well as substantial Commonwealth government contractors and bidders for Commonwealth government contracts.
6. The right to freedom of expression is not absolute and may be limited by law, to the extent those limitations are necessary for the respect of the rights or reputations of others (Article 19(3) ICCPR).
7. The truth in political advertising measures in the Bill only constrains the ability of a person to disseminate electoral or referenda matter that contains a statement in relation to a matter of fact that is misleading or deceptive to a material extent. It does not otherwise impose restrictions on individuals expressing political views or contributing to public disclosure on elections.
8. Prohibiting donations from tobacco, fossil fuel, gambling and liquor business entities is a limitation that is not incompatible with the right to freedom of expression. Each of tobacco, fossil fuel, gambling and liquor industries inflict social harm for profit.
9. The justification for tobacco, fossil fuel, gambling and liquor industries giving away shareholder funds appears to be to buy influence and obtain a more favourable policy position from government.
10. Prohibiting donations from substantial Commonwealth government contractors and bidders for Commonwealth government contracts is also not incompatible with the right to freedom of expression. Probity dictates that donations be prohibited from these contractors and bidders.
11. The Bill only constrains the ability of certain parties to donate where it could cause an increase in social harm to Australians or potential financial harm to taxpayers. It does not otherwise impose restrictions on individuals expressing political views or contributing to public discourse on elections.
12. The limitations are reasonable, necessary and proportionate for the reasons set out above.

*The right to take part in public affairs*

13. The right to take part in public affairs is contained in Article 25 of the ICCPR. This right provides that 'every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions, to take part in the conduct of public affairs.' None of the distinctions mentioned in Article 2 of the IPCC are relevant to the provisions of the Bill.
14. This right is closely related to the right to freedom of expression. The Bill only seeks to limit the right to take part in public affairs, to the extent of making unlawful various misleading or deceptive conduct relating to elections and referendums and prohibiting certain parties from donating in circumstances where it could cause an increase in social harm to Australians or potential financial harm to taxpayers. It

does not otherwise impose restrictions on individuals expressing political views or contributing to public discourse on elections.

15. The limitations are necessary, reasonable and proportionate for the reasons set out above.

### **Conclusion**

This Bill is compatible with human rights because to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.

**Kate Chaney MP**

## APPENDIX A

### List of party and incumbency advantages creating barriers to entry for new participants

#### Party advantages include:

1. Public awareness/brand reinforced by national advertising.
2. Public funding reimbursement model acts as a resource guarantee and enables the rollover of funding from election to election.
3. Existing infrastructure such as office space and equipment.
4. In any spending cap, the ability to shift costs from unwinnable/unlosable seats to battleground seats.
5. Donor access to ministers/shadow ministers.
6. Tax deductibility of donations at any time.
7. Exemptions from data protection and spamming laws.
8. Party endorsed Senators using their communications/office budget in non-election cycles to support the re-election of their House of Representative party colleagues.
9. Assets built over time in associated entities formed specifically to support the party.
10. When in government, the use of pre-election government advertising.
11. When in government, control over the election date with the opportunity to book advertising space and use funding more strategically.
12. When in government, the opportunity to 'pork barrel' strategic seats by funding projects in those electorates.
13. Public funding reimbursement to parties is not liable to tax, whereas this reimbursement to independents may be taxable.

#### Incumbent politician advantages include:

1. Access to the electoral roll.
2. The use of resources for a parliamentarian to perform their role, including the parliamentarian's salary, office, use of communications/office budget, printing and travel allowances, and electorate and personal staff. Subject to certain limitations, these resources may be used during an election campaign whilst also providing financial security and mobility.
3. Public funding reimbursement model potentially enables the rollover of funding from election to election.

4. Tax deductibility of donations at any time.
5. Intervening in the postal vote process and data harvesting associated with requiring postal voting applications to be sent to the incumbent.