What's wrong with the Turnbull Government's electoral reforms?

Human Rights Law Centre March 2018

Human Rights Law Centre

EXPLAINER: WHAT'S WRONG WITH THE TURNBULL GOVERNMENT'S ELECTORAL REFORMS?

We have been working with many of Australia's leading charities and others who are extremely concerned about the Turnbull Government's proposed electoral laws.

The proposed changes to the Electoral Act (in the Electoral Legislation Amendment (Electoral Funding Disclosure Reform) Bill) ban certain donations to political parties, but also impose new controls on all types of civil society organisations.

The Government's stated reason for the proposed laws is to prevent foreign influence in Australian elections. This is a worthy purpose, but they won't be particularly effective at achieving this aim. Worse, if passed, the laws will seriously harm our democracy by significantly restricting the ability of organisations including charities, universities, churches, medical research bodies, academics and others to engage in public debate.

Why is the Bill so dangerous?

The Bill imposes financial controls and compliance measures on organisations and individuals in Australia that incur expenditure to contribute to public debate on policy or government issues.

These compliance measures apply regardless of whether or not the organisation receives a single dollar of overseas funding. There are severe penalties including up to ten years in prison for non-compliance.

The Bill's compliance regime is so broad, vague, onerous and complex, and the penalties for non-compliance are so severe, that the cumulative effect will suffocate vital public communication.

Public debates about laws and policies, where a range of voices, interests and perspectives are represented, are crucial to the health of Australia's democracy. This is particularly so in relation to charities and other non-profit organisations that act for the public interest, for vulnerable groups and for the voiceless.

Charities and non-profits run homeless shelters, women's refuges, childcare facilities, disability support services and much more. They develop expertise and insight into how laws and policies affect many groups in society. Laws and policies are improved when these organisations share their insights with the public, governments and parliaments.

Many of the rights, laws, policies and services that we now enjoy in areas as diverse as discrimination, family violence, consumer protection, homelessness, disability and workplace safety have been secured after years and sometimes decades of civil society informing the public about problems and how the government can work to solve them. The Bill will shut this expertise out of public debate.

So what does the Bill do?

The Bill bans direct foreign donations to political parties. But it will also impose a range of suffocating financial controls and compliance measures on any organisation that spends money for a "political purpose". Spending on a "political purpose" is defined to include spending on things like advertising, billboards or pamphlets about political issues but it also includes spending on "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)".

This definition is incredibly broad and could cover any public comment on anything to do with government policy at any time.

So a homeless charity speaking up for more investment in public housing or a sexual assault service publicly explaining the case for a compensation scheme for victims of abuse are both likely to be covered. Similarly an environmental charity explaining the benefits of renewable energy targets is likely to be covered.

There are limited exemptions for media and artistic, satirical or academic purposes.

How much does an organisation have to spend to be captured?

The compliance regime applies to any organisation that spends over $13,500 (indexed) in a year for a "political purpose" (such as public comment on policy issues). These organisations have to register as "third party campaigners".

Extra measures apply to organisations that spend over $100,000 in a year (or in some circumstances $50,000). These organisations have to register as "political campaigners".

Any organisation that spends anything on public communication will have to monitor what they say and their spending to work out whether or not they have to comply.

Once the spending threshold is reached, organisations have 28 days to register with the Australian Electoral Commission (AEC) with penalties of up to $50,400 for each day that the organisation spends money on a "political purpose" (such as public comment on policy issues) after it fails to register.

There is no guidance in the Bill about how to calculate expenditure and whether organisations are expected to try and calculate internal costs such as whatever fraction of a staff member's salary, or rent, IT or mobile phone costs relates to the public expression of views.

What will the Bill require organisations to do?

If an organisation meets the spending threshold it will be required to:

- register with the AEC;
- appoint someone to be its "financial controller" who is responsible for certifying that the organisation has complied with scheme, and who will personally face potentially severe penalties including up to ten years jail for non-compliance;

• submit an annual return to the AEC within 16 weeks of the end of the financial year with financial information including the names and addresses of all donors over $13,500 (indexed) whose support was used for a "political purpose" (such as public policy comment). The AEC is required to make all annual returns public; and
• disclose any political party membership of its senior staff (e.g. the board of directors) in the annual return.

All "political campaigners" must also engage an external auditor for the AEC return and, if they are a registered charity, must maintain separate bank accounts. They must also include the names and addresses of all donors over $13,500 in a financial year whether or not the donation was used for a "political purpose".

There is an obligation on "political campaigners" (excepting registered charities and unions) to obtain "appropriate donor information" to make sure that anyone who donates more than $250 in a year is an "allowable donor".

"Allowable donors" include Australian citizens or permanent visa holders but Australian residents who do not hold a permanent visa are not "allowable donors" under the Bill. As such, a person living, working and participating in civic life in Australia on a long-term visa is not an "allowable donor", and their donations to charities or other non-profits are treated as "foreign" donations. For example, many of the estimated 600,000 New Zealanders living in Australia do not have permanent visas.

Under the Bill, the "appropriate donor information" required is a statutory declaration from the donor confirming their eligibility as an "allowable donor". The Minister will also have the power to make regulations about other information that will satisfy this requirement, but the Government has not provided any indication of what regulations, if any, it might make.

However, in practice, all "third party campaigners" and registered charities and unions that are "political campaigners" will still have to check whether donors are "allowable". This is because the Bill prohibits these organisations from accepting donations from a non "allowable" donor:

• of over $250 in a financial year which are expressly made, wholly or partly, for a "political purpose" (i.e. public comment on policy issues); or
• of any amount if, in that financial year, the organisation's "political expenditure" exceeds its "allowable amount" (defined in the Bill as its total income, including donations from "allowable donors", but excluding donations from non "allowable" donors and any loans).

Like much of this Bill, this is a convoluted scheme, but the practical upshot is that, in order to work out what its "allowable amount" is, and to be protected from committing an offence under the Bill in the event that a donor turns out not to be an "allowable donor", any organisation captured by these laws will need to collect "appropriate donor information" (i.e. a statutory declaration, according to the Bill).

There is no other mechanism within the Bill that protects an organisation (more specifically, its financial controller) if the organisation innocently receives donations from someone which it wrongly thought was an "allowable donor". Bear in mind, that even someone living in Australia may not be an "allowable donor" under this Bill if they do not have a permanent visa.

So a registered charity that is a "political campaigner" or "third party campaigner" which runs a fundraising appeal for activities that include public comment on tackling homelessness and poverty needs to guess whether these issues are likely to be before electors in a future election (whether or not called), and if so, it would then have to get evidence from donors confirming that they are Australian or a permanent visa holder:

- if the donor gives over $250 (including donors of smaller amounts in case they add up to more than $250 in a year); and
- to confirm that, in that financial year, the organisation does not spend more on "political purposes" than its "allowable amount".

Obviously this is completely unworkable in a modern society and will be a major disincentive for charities, most of which rely on donations, to inform the public about their causes or engage in public debate.

There are severe criminal penalties for the person who is the financial controller, and their organisation, if they do not comply with this regime, including up to ten years jail and fines of up to $210,000.

The Bill is particularly bad for charities

There are many problems with the Bill and the way it stifles public communication by the estimated 600,000 not-for-profit organisations in Australia such as think tanks, industry groups, sporting clubs, professional bodies and cultural associations.

But the Bill's problems are particularly acute for Australia's 55,000 registered charities which often rely on donations as a principal source of income for their work. This Bill is likely to mean that many charities will stop informing the public and participating in public debate to avoid being captured by the Bill's regime.

Charities already have any public advocacy regulated by special rules. Charities are not-for-profit organisations established for charitable purposes such as advancing health, education or the environment. By law, they must be established for the public benefit and cannot have a political purpose of promoting or opposing a political party or candidate.

The High Court, charity legislation and guidance from the charity regulator all clearly recognise that advocacy by charities is lawful and legitimate activity provided it is in line with the charity's purpose (for example a disability service charity campaigning for a stronger National Disability Insurance Scheme).

Some charity donors themselves will have to submit returns to the AEC

Further, donors who donate over $13,500 to a "political campaigner" will themselves be required to submit their own return to the AEC, even though the organisation has to also disclose the donor's details, and whether or not the donation is for public expression of views.

So an Australian philanthropist who gives $20,000 for Aboriginal education services to an Australian charity that spends over $100,000 a year on public advocacy around Aboriginal and Torres Strait Islander welfare, will themselves have to submit a return to the AEC.

This will be a major disincentive to donors and will mischaracterise charity donations as political donations.

The Bill will stop international philanthropy to Australian charities

The Bill prohibits Australian charities from receiving international philanthropy for what the Bill calls "political purposes" which, as set out above, is defined very broadly and could include the public expression of views on almost any policy or government issue at any time.

International philanthropy often supports Australian charities, particularly to work on global issues like stopping the spread of disease, addressing poverty and climate change. The Bill will deprive Australian charities of vital funding for important, legitimate work informing the public, raising awareness and speaking up for better laws and policies to address the causes they work on.

How does the Bill differ from existing electoral law?

Currently, the existing law requires charities and others to disclose a limited amount of information if they spend over $13,500 on the public expression of views on an "issue in an election" and other matters. There are existing problems with the overbreadth of this law and the Government has ignored recommendations from a 2011 inquiry to amend it.

Instead of fixing problems with the existing law, the Bill introduces an even wider definition of "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)" and then uses that definition as the basis not just for disclosure, but for financial controls, and a far more onerous compliance regime with severe penalties. It will be very difficult for organisations to know when they are caught by this regime.

Will the Bill stop foreign influence in Australian elections?

The Bill will stop political parties from accepting donations directly from foreign individuals, foreign companies or foreign governments.

But electoral law experts think the Bill will not be particularly effective at keeping foreign money out of Australian political parties or prevent lobbying by wealthy individuals and companies.

The Bill will not stop foreign companies and individuals from donating to political parties via Australian incorporated companies that they control. The Bill does not limit how much money political parties can receive or spend from companies.

Finally, the Bill only applies to public communications. It doesn't address private lobbying or influence such as money spent on private events.

Is the Bill constitutional?

Probably not. Our analysis and that of other constitutional experts is that there are serious risks that if the Bill passes, the High Court will find it is invalid.

Australia's Constitution protects freedom of political communication. Broadly, laws that restrict communication on government or politics must be for a proper purpose and must be reasonably adapted to that purpose. Given the damaging impact of this Bill and the lack of evidence put forward to justify that impact, we think it is likely that the High Court would find that the Bill violates the freedom of political communication.

Debunking the Government's claims about the Bill

Claim: The Bill will only affect charities that engage in "political campaigning" (Finance Minister Matthias Cormann)

Reality: The incredibly broad drafting in the Bill is likely to cover almost any public comment by charities and other organisations at any time on any issue relating to government policy.

Claim: Only a tiny number of charities will be affected as only seven reported "political expenditure" last year (Prime Minister Malcolm Turnbull)

Reality: The Bill uses a greatly expanded definition of political expenditure that is likely to capture almost any public policy comment by charities. Thousands of charities and other organisations will be affected.

Claim: Excluding charities from the Bill would make the foreign donations ban "entirely ineffective" and create a "massive loophole" (Matthias Cormann).

Reality: By law, charities must be established for public benefit. Charities cannot have a purpose of supporting or promoting political parties or candidates. The charity regulator makes sure that charities only speak out about the cause they were established to address, whether it's helping the homeless or defending human rights. There has been no evidence put forward by the Government of any risk of improper foreign influence through charities. Worse, the Bill's stifling compliance regime applies to charities regardless of whether they receive any overseas funding. If the Government is genuinely worried about loopholes, there are some significant loopholes for donations through Australian subsidiary companies, and the funding of private lobbying.

Claim: The Bill "doesn't curtail [charities'] ability to engage in political advocacy at all, it just cannot be funded by foreign interest" (Matthias Cormann)

Reality: The Bill significantly restricts the ability of charities and others to publicly comment on government policy. Charities can still publicly comment on government policy using Australian funding IF they are happy to try to constantly monitor how much they spend each year on public expression of their views on policy issues and, if they spend more than $13,500 be characterised publicly as a "third party campaigner" or if the spending exceeds $100,000, be characterised publicly as a "political campaigner", in which case they will also be required to:

- publicly disclose the political party membership of their senior staff (e.g. board of directors); supply a range of unnecessary financial information to the AEC including the addresses of donors over $13,500 which will be made public;
- if they are a "third party campaigner" or registered charity or union that is a "political campaigner", obtain from anyone who donates towards any work including commenting publicly on policy, evidence that they are Australian or a permanent visa holder;

• if they are a "political campaigner" (excepting registered charities and unions), obtain from anyone who donates over $250 in a financial year a statutory declaration confirming they are Australian or a permanent visa holder;
• maintain separate bank accounts or ledgers to ensure compliance;
• alert significant donors, as a matter of good practice, that they may have to lodge their own returns to the AEC, characterising them as political donors;
• require one of their staff or board members to be a financial controller who will then run the risk of criminal penalties of up to ten years jail and $210,000 in fines if they do not comply with these broad, vague and complex requirements.

Changes to "associated entities"

The concept of an "associated entity" in electoral law is used to regulate those organisations that are not political parties but are very closely associated with them. "Associated entities" currently include organisations such as foundations that fundraise for political parties and unions. "Associated entities" are required to annually disclose detailed financial information to the AEC.

The Bill will expand the definition of "associated entities" to include organisations whose expenditure is either wholly or predominantly "political expenditure" which is then used, wholly or predominantly to promote the policies of one or more political parties or to oppose the policies of one or more political parties in a way that benefits other political parties.

This would mean that an organisation could be an "associated entity" of a political party even if it has no connection in terms of control, membership, finances or voting rights to the party it is supposedly associated with. The organisation may never have communicated with the party or even be aware of its existence.

This would lead to nonsensical consequences, particularly given the sheer number of political parties that exist in Australia. For example a not-for-profit foundation set up to campaign to better road safety protection for cyclists might be deemed to be an "associated entity" of the Australian Cyclists Party even if the two organisations have nothing to do with each other.

What should happen now?

The Turnbull Government should withdraw the Bill and engage in proper public consultation so it can be reworked to address the legitimate issue of money corrupting politics, without harming the ability of charities and others to engage in public debate.

More information

• The Human Rights Law Centre submissions to the Parliamentary inquiry examining the Bill: https://www.hrlc.org.au/news/2018/1/29/proposed-laws-will-stifle-charity-voices
• Constitutional law expert, Professor Anne Twomey's article in The Conversation on why the Bill is flawed and needs redrafting: https://theconversation.com/federal-governments-foreign-donations-bill-is-flawed-and-needs-to-be-redrafted-92586
• The text of the Bill and submissions to the Parliamentary inquiry into the Bill: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Electoral_Matters/ELAEFDRBill2017