



Environmental
Defenders Office

**Submission to Economics and Governance
Committee in relation to the *Electoral and Other
Legislation (Accountability, Integrity and Other
Matters) Amendment Bill 2019***

8 January 2020

About EDO

EDO is a community legal centre specialising in public interest environmental law. We help people who want to protect the environment through law. Our reputation is built on:

Successful environmental outcomes using the law. With over 30 years' experience in environmental law, EDO has a proven track record in achieving positive environmental outcomes for the community.

Broad environmental expertise. EDO is the acknowledged expert when it comes to the law and how it applies to the environment. We help the community to solve environmental issues by providing legal and scientific advice, community legal education and proposals for better laws.

Independent and accessible services. As a non-government and not-for-profit legal centre, our services are provided without fear or favour. Anyone can contact us to get free initial legal advice about an environmental problem, with many of our services targeted at rural and regional communities.

Environmental Defenders Office is a legal centre dedicated to protecting the environment. EDO Ltd does not support, promote or oppose any particular political party or candidate.

www.edo.org.au

Submitted to:

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Executive Summary

We commend the introduction of a Bill designed to enhance the integrity of our elections and, subject to the amendments outlined below being made, support the passage of the *Electoral and Other Legislation (Accountability, Integrity and Other Matters) Amendment Bill 2019*.

Our primary concern with the Bill is that the proposed donations cap and restrictions on electoral expenditure by third parties may have unintended consequences which undermine the following stated policy intent of the Bill:

“level the playing field for electoral campaigning and ensure that an individual person or entity has a reasonable opportunity to communicate to influence voting in an election without being ‘drowned out’ by the communication of others”

In its current form the Bill may have the effect of actually reducing the capacity of third parties (such as non-government organisations (**NGOs**), grass-roots organisations and community legal centres) to participate in the debate surrounding an election (particularly as compared to organisations from the for-profit sector).

In that regard, we recommend that the Bill be amended in the following ways:

- **Recommendation 1:** That the definition of ‘electoral expenditure’ (in clause 9, proposed s199 of the Bill), be amended as it applies to third parties. That section should be amended to provide that expenditure incurred by third parties that are either registered charities or have an annual income of less than a threshold amount (eg. \$50,000) will only constitute ‘electoral expenditure’ if it is published material that refers both to a candidate or a political party and to how a person should vote in an election.
- **Recommendation 2:** That the Bill be amended to clarify the meaning of the terms ‘producing’ and ‘research’ in the definition of ‘electoral expenditure’ to provide certainty about the scope of expenditure captured by this concept, and avoid capturing activities such as background research and legal advice.
- **Recommendation 3:** That the Bill be amended to avoid placing onerous administrative burdens on small community groups by excluding, from the donations cap and associated administrative obligations, small third parties that are not associated with a political party or candidate and which have a turnover of below a threshold amount.
- **Recommendation 4:** That the compliance burden on small donors be alleviated by excluding small donations from the caps on donations to third parties in clause 22, proposed section 256(a) and (b) of the Bill.
- **Recommendation 5:** We recommend that the government reconsider its approach to the expenditure and donations caps to avoid creating the situation where for-profit organisations have a greater potential to participate in the election debate than not-for-profit organisations captured by the donations cap.

Third parties: captured ‘electoral expenditure’

Third parties, such as community groups, NGOs and industry organisations, will be subject to the more significant requirements of the Bill if they incur ‘electoral expenditure’¹ or accept political donations² (ie. generally donations for the purposes of incurring ‘electoral expenditure’³ or for the purpose of either donating to candidates or registered political parties).

‘Electoral expenditure’ includes costs of designing, producing, printing, broadcasting or publishing advertisements or other material, distributing advertisements and carrying out opinion polls or research⁴. Such costs will be ‘electoral expenditure’ for a third party if the cost is incurred for the dominant purpose of any of the following purposes—

- (a) to promote or oppose (directly or indirectly) a political party in relation to an election;
- (b) to promote or oppose (directly or indirectly) the election of a candidate;
- (c) to otherwise influence (directly or indirectly) voting in an election.**

The types of communications by third parties that might be considered to have the dominant purpose of indirectly influencing voting in an election is unclear. For example, while the EDO is not a campaigning organisation, during the course of an election we may well publish information to help the community to understand the meaning and consequences of election commitments or highlight what we consider to be desirable environmental law reforms. In a similar vein, issues-based campaigners may find that their ordinary awareness-raising activities take on the appearance of electoral expenditure in the lead up to an election, if parties or candidates have taken a position on the issue. This uncertainty may have a chilling effect on the voices of community-sector third parties during an election campaign.

Further, small community groups and charities will already be subject to limitations which may make such measures unnecessary. Small community groups with annual incomes that are low in comparison to the expenditure cap will already be significantly limited in their ability to participate in the debate. Similarly, in order to constitute a charity under the *Charities Act 2013 (Cth)* an entity must be not-for-profit, have only ‘charitable purposes’⁵ that are for the public benefit and must not have any disqualifying purposes⁶ (which include promoting or opposing a political party or candidate). As a consequence, charities that have achieved registration under the *Australian Charities and Not-for-Profits Commission Act 2012 (Cth)* are already subject to controls that prevent them from acting in way that is partisan or which undermines the policy intent of the Bill.

¹ Proposed s197A

² See proposed s250 for the definition of ‘political donation’ which includes donations for the purposes of incurring ‘electoral expenditure’

³ Proposed s250

⁴ Clause 9, proposed section 199

⁵ *Charities Act 2013 (Cth)*, s12

⁶ *Charities Act 2013 (Cth)*, s11

In that regard, we believe that a more limited definition of ‘electoral expenditure’ could be applied to such organisations in a way that removes the chilling effect of the current uncertain definition without undermining the intent of the Bill.

We recommend that the definition of ‘electoral expenditure’, as it applies to third parties that are either registered charities or have an annual income of below a threshold amount, be amended to be limited to material that is published or disseminated and refers to both a candidate or political party and how a person should vote in an election (**Recommendation 1**).

We further recommend (**recommendation 2**) that greater clarity be provided about the costs that are intended to be included in the concept of ‘electoral expenditure’ in clause 9 (proposed s199) of the Bill, in particular by clarifying the meaning of the terms ‘producing’ and ‘research’. The Bill should clarify that ‘producing’ includes only the direct costs of creating the actual advertisement or election material (and not the costs of, for example, any policy, legal or scientific analysis that sits behind the material). Similarly, it appears (from the context in which it is used) that the term ‘research’ is intended to be limited to research in relation to voter sentiment, however, this could be made clearer in the drafting.

Donations caps for third parties: administrative burden

Under the Bill in its current form, third parties that will incur electoral expenditure of more than \$1,000⁷ will be subject to the donations cap, the expenditure cap and to administrative obligations including:

- registration with the Electoral Commission of Queensland (proposed ss297 – 304);
- maintaining and managing state campaign accounts for political donations and electoral expenditure (proposed ss215 – 218);
- managing political donations throughout the 4 years leading to an election⁸ and managing electoral expenditure (typically in the year leading up to a polling day⁹) in accordance with proposed ss219 – 221B and issuing donor statements in accordance with proposed s251;
- record keeping in relation to political donations and electoral expenditure (proposed s272 and 305 – 305E);
- lodging returns with the Electoral Commission in relation to electoral expenditure following each election (proposed s283).

These are relatively onerous obligations, particularly for smaller organisations, and may actually discourage some organisations (particularly grass-roots community organisations) from participating in the debate surrounding an election.

We do not believe that this was intended, particularly given that such an outcome would be contrary to the stated policy intent of the Bill of ensuring that individuals and entities have a reasonable opportunity to communicate to influence voting in an election.

⁷ See clause 31, proposed section 281H in the Bill

⁸ See proposed s247 of the Bill and ss19B and 19C of the *Constitution of Queensland 2001 (Qld)*

⁹ See proposed s280

We believe that recommendation 1 (above) would assist in this respect by providing smaller organisations with a clearer understanding of the types of expenditure and donations that these obligations would apply to.

However, we also believe that greater consistency with the policy intent of the Bill could be achieved by excluding small third parties that are not associated with a political party or candidate and have an annual turnover of below a threshold amount (**recommendation 3**).

Donations cap on third parties: compliance burden for small donors

The donation cap contained in the Bill applies to political donations¹⁰ made at any time¹¹ to candidates, political parties and third parties. Under the Bill in its current form, it will be an offence for a person to exceed the donation cap of (at commencement) \$4,000 for a political party or third party and \$6,000 for a candidate¹² or to make political donations (of any amount) to more than of six third parties.

As a consequence, donors will be required to be careful to understand whether any donations they make are ‘political donations’ or donations for other purposes and to keep track (over a four-year period) of the amounts donated to each organisation and the number of organisations to which political donations have been made. This burden on donors may have a chilling effect on their willingness to donate to organisations in the community sector. Further, donors may find that the whole of their right to donate has been exhausted with small donations made well in advance of the election and find themselves unable to support organisations active on issues that emerge closer to the election.

Example: Small donors

Donor A makes regular monthly donations to two charities. One of those charities provides mental health services to vulnerable sectors of the community and, in order to advance the interests of its clients, is also active in law reform and policy advocacy. The other charity is active in promoting the human rights and occasionally publishes material to raise awareness in the community of human rights issues including during the debate surrounding state elections. Donor A donates \$25 per month to each organisation total, however, only one donation to each organisation is a ‘political donation’ (with the balance of the donations being directed to the other work of each charity).

Donor A then makes a political donation of \$400 to a Christmas charity drive by a Christian charity associated with her church. Donor A has also made spontaneous one-off political donations to three other charities through Facebook campaigns, totalling \$300.

As a consequence, Donor A has exhausted her right to donate with donations totalling \$750.

Donor A has become increasingly concerned about the fate of our wildlife, in particular her local koala population, due to the effects of the bushfires over the summer of 2019/20. She would like to make a donation to help to highlight this issue during the 2020 state election but finds herself

¹⁰ See proposed section 250

¹¹ See definition of ‘donation cap period’ in proposed s247

¹² See proposed sections 252 and 254 - 256

unable to do so without breaching proposed section 256 because she has already made political donations to six third parties.

Under the *Electoral Act 2002 (Vic)*, small contributions are excluded from the cap on political donations.¹³ A similar approach in Queensland could simplify compliance obligations for donors. We recommend that section 256(b) of the Bill be amended to exclude small donation amounts, to avoid donors inadvertently exhausting their donation rights with small donations (**recommendation 4**).

Third parties: expenditure and donations caps

The **donations cap** (which applies to donations for the purposes of incurring ‘electoral expenditure’) applies to political donations¹⁴ made at any time¹⁵ throughout the four-year parliamentary term. Donors to third parties will be limited to donations totalling \$4,000 to a third party and will be limited to making political donations to no more than six third parties.¹⁶ The related **expenditure cap**¹⁷ for third parties limits electoral expenditure both generally and in any electoral district.

Third parties that are not-for-profit organisations (such as grass-roots organisations, community legal centres and other charities) generally rely primarily on donations for their funding and will, as a consequence, be limited in their ability to participate in elections by both the donations cap and the expenditure cap. By contrast, organisations (such as industry associations) which rely on sources of funding such as membership fees, as well as for-profit organisations, will be limited only by the expenditure cap. This would potentially provide for-profit organisations and organisations such as industry associations with a greater resource pool with which to participate in the debate surrounding an election, as compared to organisations advocating on behalf of the community. We do not believe that this outcome is consistent with the policy intent of this Bill, which is to ‘level the playing field’ and ensure that everyone has a reasonable opportunity to participate in the debate surrounding elections.

Example: donations cap

Charity A is medium sized environmental charity that runs a koala hospital and undertakes activities to raise community-awareness of the threats to the species, including by participating in the debate surrounding the state election about preserving local koala habitat. The charity does not receive government funding and relies on donations for both its koala hospital and its advocacy work.

The donation cap in the Bill and the current very broad definition of electoral expenditure means that Charity A will need to find donors willing to use part of their limited right to donate to support campaigning for local koala protections. Each donor can only donate a maximum of \$4,000. Charity A has a broad local support base but many of its donors can only afford small donations or have already made political donations to other third parties. Charity A is unable to

¹³ See s217D(9)

¹⁴ See proposed section 250

¹⁵ See definition of ‘donation cap period’ in proposed s247

¹⁶ See proposed ss252 and 256

¹⁷ Proposed s281E

raise sufficient funds over four years for the expenditure cap of \$87,000 per electoral district to become a limitation on its activities. **Industry Association A** is a membership-based organisation which promotes the mining industry in the same local area, and has an interest in preventing land from becoming 'locked up' for koala conservation. Its members are mining businesses that operate in the local area, each of whom pay a membership fee of \$10,000 per year. Membership fees are not counted as political donations, so the members do not need to report or keep records on those fees. Even with only 10 members, Industry Association A can raise in excess of the expenditure cap for the electoral district with a single year's membership fees.

Not-for-profit organisations are a diverse group that will have expertise, experience and perspectives that could be expected to enhance the quality of the debate around elections. While we acknowledge the need for controls on donations (particularly as an anti-avoidance measure), steps should be taken to ensure that such controls don't have the perverse effect of providing further advantage to already well-resourced organisations advocating on behalf of the for-profit sector. It is likely that a more nuanced approach to this issue (for example, through differential expenditure caps) may be required to ensure that the intent of the Bill is delivered (**recommendation 5**).