

No good deed goes unpunished

The effect of Coalition–Labor “political campaigners” amendments on charities

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INTRODUCTION

In the last parliamentary sitting weeks of 2021, the Morrison Government and Labor Opposition negotiated a deal to pass “political campaigner” legislation, although the legislation now refers to “significant third parties” instead.

Charities, including the Australia Institute, have expressed serious concerns that the legislation is ill-considered, rushed and designed to quell legitimate charity advocacy ahead of the 2022 election.¹

This briefing note explains what the laws are, how have they changed, and what the consequences might be for the charities sector.

¹ Michael (2021) *‘It’s really come out of nowhere’: Charities dismayed by changes to political campaigners bill*, <https://probonoaustralia.com.au/news/2021/11/its-really-come-out-of-nowhere-charities-dismayed-by-changes-to-political-campaigners-bill/>; Oquist (2021) *The new law threatening the future of Australia’s charities*, <https://www.canberratimes.com.au/story/7527428/the-new-law-threatening-the-future-of-australias-charities/>

POLITICAL CAMPAIGNER LAWS

In 2018, the Parliament amended the *Commonwealth Electoral Act* to require people or organisations to register as “political campaigners”, if they:

- incur electoral expenditure of \$500,000 or more in any of the last three financial years, or
- incur electoral expenditure of \$100,000 or more in the current financial year and spent two-thirds or more of revenue on electoral expenditure in the financial year before that.²

“Electoral expenditure” meant “expenditure incurred for the dominant purpose of creating or communicating electoral matter”, and “electoral matter” meant “matter communicated or intended to be communicated for the dominant purpose of influencing the way electors vote in an election”.³

Once registered, political campaigners have disclosure requirements including

- total receipts
- value of gifts-in-kind
- details of receipts and debts greater than the disclosure threshold (~\$14,500). Charities did not need to disclose receipts where none of the amount was used on electoral expenditure
- total payments and total debts
- total electoral expenditure.⁴

Political campaigners are also limited in the international philanthropy they can receive. Political campaigners are restricted from receiving gifts worth \$1,000 or more from foreign donors, except if using the gift for a “federal purpose” (electoral expenditure or electoral matter) would “be inconsistent with the terms of the gift”.⁵

Political campaigners are also prevented from receiving gifts worth \$100 or more from foreign donors, if the gift is intended for electoral expenditure or electoral matter.⁶

² *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Act 2018* (Cth), <https://www.legislation.gov.au/Details/C2018A00147/Html/Text>; *Commonwealth Electoral Act 1918* (Cth), www.legislation.gov.au/Details/C2016C01022, s. 287F

³ AEC (2021) *Financial Disclosure Guide for Political Campaigners*, p. 6, https://www.aec.gov.au/Parties_and_Representatives/financial_disclosure/guides/political-campaigners.htm

⁴ AEC (2021) *Financial Disclosure Guide for Political Campaigners*, p. 12

⁵ *Commonwealth Electoral Act 1918* (Cth), s. 302D

⁶ *Commonwealth Electoral Act 1918* (Cth), s. 302F

For financial year 2019–20, 23 organisations filed returns as political campaigners. Political campaigners had total receipts of \$1.6 billion, although over half of this was made up of receipts for the Minderoo Foundation. Political campaigners had collective electoral expenditure of \$4 million, or 0.3% of total receipts.⁷

Over the two years of disclosures that currently exist, the median political campaigner spent 0.6% of its total receipts on electoral expenditure,⁸ though it is worth emphasising that there was no federal election in these years.

GOVERNMENT AMENDMENTS

First tranche

In August 2021, the Morrison Government introduced amendments to the *Commonwealth Electoral Act*, the Electoral Legislation Amendment (Political Campaigners) Bill 2021.⁹

In short, the amendments were to retrospectively lower the threshold to qualify as a political campaigner:

- from **\$500,000** in electoral expenditure to **\$100,000** in electoral expenditure, or
- from **\$100,000** or more in the current financial year and spent **two-thirds** or more of revenue on electoral expenditure in the financial year before that to around **\$14,500** or more in the current financial year and spent **one-third** on electoral expenditure.¹⁰

These changes were already of serious concern because of their retrospectivity, meaning that they would capture organisations that in good faith spent less than \$500,000 – acting in accordance with the law as it was at the time.

They are also unnecessarily broad, capturing organisations that spend a small amount on political advocacy and burdening them with extensive reporting requirements.

⁷ AEC (2021) *Transparency Register - Political Campaigner Returns*, <https://transparency.aec.gov.au/AnnualPoliticalCampaigner>

⁸ AEC (2021) *Transparency Register - Political Campaigner Returns*

⁹ *Electoral Legislation Amendment (Political Campaigners) Bill 2021* (Cth), https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r6752

¹⁰ *Electoral Legislation Amendment (Political Campaigners) Bill 2021* (Cth), First reading, Schedule 1

Second tranche - last minute changes

In November 2021, the Morrison Government – without warning or consultation with the sector – announced amendments to its own amending legislation. The amendments were introduced at the start of the last parliamentary sitting period of the year, and two weeks later they would become law.¹¹

Electoral expenditure

The most dramatic change expanded the definition of “electoral expenditure” for political campaigners to any spending “in relation to an election”.¹² The previous definition of electoral expenditure was already broad, and required considerable nuance from the Australian Electoral Commission to explain.¹³

The new definition is broad, vague and untested, and further conflates advocacy by charities with political activity.

The expanded definition also “locks” organisations into the political campaigner category: once you become a political campaigner, expenditure that was not previously “electoral expenditure” suddenly becomes electoral expenditure.

International philanthropy

Because existing laws strictly limit what donations “political campaigners” can receive from foreign donors, dramatically increasing the number of charities that fall into this category limits the extent to which Australians charities can receive international philanthropy. This is exacerbated by the broadened definition of “electoral expenditure”, which further limits the circumstances under which charities could accept foreign donations. Both aspects are discussed further in “Problems”, below.

Fundraising for incurring electoral expenditure in the future

The amendments also expanded the definition of political campaigners to include organisations that operate for the dominant purpose of fundraising for the purposes of incurring electoral expenditure in the future,¹⁴ changes apparently targeted at the “Voices for” groups and other organisations fundraising for independent candidates.

¹¹ *Electoral Legislation Amendment (Political Campaigners) Bill 2021* (Cth), Government amendments sheet ZD132, Schedule 2

¹² *Electoral Legislation Amendment (Political Campaigners) Bill 2021* (Cth), Government amendments sheet ZD132, Schedule 2

¹³ AEC (2021) *Financial Disclosure Guide for Political Campaigners*, pp. 20–21

¹⁴ *Electoral Legislation Amendment (Political Campaigners) Bill 2021* (Cth), Government amendments sheet ZD132, Schedule 2

Retrospective disclosures

The laws also introduced another retrospective reporting requirement: once an organisation becomes a political campaigner, it must disclose information for the previous financial year – even though it was not a political campaigner in that year.¹⁵

Limitations on associated entities

The amendments also extended limitations on associated entities (entities with connections to registered political parties), including foreign donor limitations and gift disclosures.¹⁶

Third tranche - negotiated with Labor

In December 2021, the Senate was set to vote down the Government's political campaigner amendments in their entirety, as it did punitive charities regulations one week earlier.¹⁷ Senators Stirling Griff, Rex Patrick and Jacqui Lambie have confirmed that they were going to vote against the bill which – with the Labor Party – would have been sufficient.¹⁸

The Labor Opposition instead chose to negotiate with the Government to pass an amended version of the laws.¹⁹

Change of name

The amended laws rename “political campaigners” to “significant third parties”, which is a welcome change of nomenclature that better reflects that most so-called political campaigners have so far spent less than 1% of their receipts on electoral expenditure.

¹⁵ *Electoral Legislation Amendment (Political Campaigners) Bill 2021* (Cth), Government amendments sheet ZD132, Schedule 2

¹⁶ *Electoral Legislation Amendment (Political Campaigners) Bill 2021* (Cth), Government amendments sheet ZD132, Schedule 2

¹⁷ Karp & Knaus (2021) *Senate scuttles Coalition crackdown on charity advocacy work*, <https://www.theguardian.com/australia-news/2021/nov/25/senate-scuttles-coalition-crackdown-on-charity-advocacy-work>

¹⁸ Knaus & Karp (2021) *Charities blast 'unfair' law changes they say will silence dissent during elections*, <https://www.theguardian.com/australia-news/2021/dec/02/charities-blast-unfair-law-changes-they-say-will-silence-dissent-during-elections>

¹⁹ *Electoral Legislation Amendment (Political Campaigners) Bill 2021* (Cth), Government amendments sheet ZD154, Schedule 2

Lowered threshold

The amended laws also lower the threshold to \$250,000 from \$500,000, rather than the \$100,000 threshold countenanced in the original amendments.

Acknowledged problems

The negotiated amendments do not address the other problems with the Government amendments – problems that Shadow Assistant Minister for Treasury and Charities Andrew Leigh acknowledged.

Dr Leigh said that the new laws increase the “paperwork burden” on charities and Labor has “significant concerns” with the bill. Labor plans to “revisit this framework” if it wins the election.²⁰

PROBLEMS WITH THE LEGISLATION

Retrospectivity

Charities that, in good faith, kept under the \$500,000 electoral expenditure threshold in previous years will now be captured if they spent over \$250,000. This is unfair. Any change to thresholds should apply going forward, not retrospectively.

Inconsistent treatment of “electoral expenditure”

The new definition of “electoral expenditure” for significant third parties is broad and vague. It is also perverse that once an organisation becomes classified as a significant third party, the definition of “electoral expenditure” expands making it harder for them to lose the classification.

²⁰ Leigh (2021) *Labor will always defend charities - Transcript, ABC News Radio*, https://www.andrewleigh.com/labor_will_always_defend_charities_transcript_abc_news_radio; (2021) *The Liberals have abandoned their voter ID bill. But Labor has significant concerns with the govt's political campaigners bill. While the Senate amendments we've secured are the best achievable outcome for charities, a Labor government would revisit this framework. #auspol*, <https://twitter.com/ALeighMP/status/1465923639547600896>

Loss of international philanthropy

Political campaigners are limited in the foreign donations they can receive, especially if the donation could be used for electoral expenditure.

The amendments both dramatically expand the definition of “electoral expenditure” and increase the number of charities that will be captured under the definition of “political campaigners”. Both changes will substantially limit which charities can receive international philanthropy and the uses that philanthropy can be put to.

Red tape

The laws impose extensive new reporting and monitoring requirements on charities. Existing data from so-called political campaigners shows that they, on average, spend less than 1% of receipts on electoral expenditure – but they are required to track and publish significant accounting data.

The right to privacy

Charities often do difficult and controversial work, whether it is advocacy for LGBTIQ+ rights, challenging militarism and defence spending, exposing government corruption, supporting people suffering from diseases like HIV/AIDS or calling for major economic changes. Donors to these organisations may be understandably concerned about the public and political blowback that they may face if their contributions are made public.

Poor legislative practice

The Government’s amendments never went to a parliamentary committee for a thorough inquiry. While the first tranche of amendments were available since August, the subsequent amendments were seen only days or hours before they were passed into law. This is an inappropriate way to legislate because it does not allow for scrutiny or consultation, or for problems in proposed laws to be identified and rectified.

Vital sector

As well as the important social and community work that it does, the charity sector is a key part of the economy. A 2017 Deloitte Economics report estimated the size of the Australian charity sector at \$129 billion per year (\$72 billion direct and \$57 flow-on contribution), employing 840,500 full-time equivalent (FTE) paid workers with a further 471,700 FTE workers indirectly employed.²¹

In other words, the charity sector is about as large as Australia's retail sector or its education and training sector²² – but it is impossible to imagine major changes to those sectors being rushed through by both major parties without consultation.

CONCLUSION

The Coalition Government and Labor Opposition have passed flawed laws that impose unnecessary and onerous obligations on the charities sector, a key part of the Australian economy. The changes are retrospective, use a vague and overly broad definition of “electoral expenditure”, and were rushed into law without consultation or scrutiny. The organisations that are currently captured by the laws spend less than 1% of their receipts on electoral expenditure – and yet many more organisations are going to be hit by the same extensive reporting requirements and limits on international philanthropy.

²¹ ACNC (2017) *Economic contribution of the Australian charity sector*, <https://www.acnc.gov.au/tools/reports/economic-contribution-australian-charity-sector>

²² ACNC (2017) *Economic contribution of the Australian charity sector*