1 October 2021

By email: haveyoursay@justice.tas.gov.au

Dear Attorney-General

Submission *Electoral Act Review – Electoral Disclosure and Funding Bill 2021* and *Electoral Matters (Miscellaneous Amendments) Bill 2021*

Thank you for the opportunity to provide a submission to the *Electoral Act Review* (**Review**). This submission has been prepared jointly by the Human Rights Law Centre, the Australian Conservation Foundation and the Australia Institute Tasmania. We congratulate the Tasmanian Government for its commitment to improving the State's electoral laws, to make elections more fair, robust and democratic.

In particular, we note the improvements to disclosure for candidates, political parties and associated entities — the obligation for close to real-time disclosure during election campaign periods is a vast improvement, and the new donation disclosure threshold of $5,000 is a step in the right direction. We also commend the ambition of requiring third-party campaigners to disclose political donations and electoral expenditure, and the revised definitions of electoral matter and electoral expenditure.

That being said, there are a number of technical amendments necessary to achieve the stated aims of the Bills, detailed in this submission. We also see five opportunities for broader, more ambitious reforms that would put Tasmanian elections among the best-regulated in the country. These include amendments to:

1. better regulate third-party campaigners;
2. broaden the definition of gift;
3. lower the disclosure threshold to $1,000 for political parties, candidates and associated entities;
4. introduce election spending limits and donation caps; and
5. introduce truth in political advertising provisions.

The interest of each organisation in electoral law reform

a. Human Rights Law Centre

The Human Rights Law Centre uses strategic legal action, policy solutions and advocacy to support people and communities to eliminate inequality and injustice and build a fairer, more compassionate Australia.

We know that a healthy democracy is crucial to ensuring that the wellbeing of people, planet and future generations are at the heart of government decision-making. But right now democracy in Australia isn't working as it should, and this is distorting policy and impeding action on a range of important issues that directly impact people's human rights.

For this reason, strengthening democracy, including through electoral law reform, has been a key part of our work since our establishment.

b. Australian Conservation Foundation

ACF is Australia's national environmental organisation. We represent a community of more than 700,000 people who are committed to achieving a healthy environment for all Australians. For more than 50 years ACF has been a strong advocate for Australia's forests, rivers, people and wildlife. ACF is proudly independent, non-partisan and funded by donations from our community.

ACF believes that a healthy democracy is fundamental to our mission of protecting nature and stopping climate damage. We advocate nationally for strong electoral laws to improve political equality and reduce the influence of vested interests and powerful corporations on our democracy. ACF is pleased to contribute our first hand experience in complying with electoral laws at the state and federal level into the policy development process, in order to achieve robust, strong, and fair regulation of third-party campaigners at elections.

c. The Australia Institute Tasmania

The Australia Institute is an independent public policy think tank, with a branch based in Hobart, Tasmania. It is funded by donations from philanthropic trusts and individuals and commissioned research. We barrack for ideas, not political parties or candidates. Since its launch in 1994, the Institute has carried out research on a broad range of economic, social and environmental issues.

The Institute publishes research that contributes to a more just, sustainable and peaceful society. Our goal is to gather, interpret and communicate evidence in order to both diagnose the problems we face and propose new solutions to tackle them.

The Australia Institute's Democracy & Accountability Program was founded to research the solutions to our democratic deficit and develop the political strategies to put them into practice. It builds on decades of work by the Australia Institute to make the case for better, more representative political institutions and for the powerful to be held to account.

Recommendations

> **Recommendation 1:** Amend the Disclosure Bill to include a note in the definition of "electoral matter" to clarify that there can be only one dominant purpose, and that it doesn't include matter created or communicated for the dominant purpose of raising awareness, educating the public or encouraging debate on a policy issue.

Recommendation 2: Amend the Disclosure Bill to require third-party campaigners to disclose all political donations over the threshold used to incur electoral expenditure, regardless of when they were given for that purpose. Disclosure for third-party campaigners should be required by reference to when the electoral expenditure is incurred, not when the donation is made.

Recommendation 3: Amend the Disclosure Bill to set the disclosure threshold for political donations made to third-party campaigners to $2,500.

Recommendation 4: Amend the Disclosure Bill to broaden the definition of "gift" to explicitly include membership fees, levies, fundraising contributions and subscriptions.

Recommendation 5: Amend the Disclosure Bill to lower the donation disclosure threshold to $1,000 for political parties, candidates and associated entities.

Recommendation 6: Amend the Disclosure Bill to include best practice expenditure limits.

Recommendation 7: Amend the Disclosure Bill to include caps on donations for political parties, candidates and associated entities.

Recommendation 8: Amend the Disclosure Bill to introduce truth in political advertising provisions, modelled on South Australian and ACT legislation.

How the Bills regulate third-party campaigners

a. Definition of third-party campaigner

Proposed section 5 of the *Electoral Disclosure and Funding Bill 2021* (Tas) (**Disclosure Bill**) defines "third-party campaigner" as a person who is not a political party, candidate or associated entity who incurs more than $5,000 on electoral expenditure during the campaign period, or a person registered under proposed s. 117 of the Act.

"Electoral expenditure" is relevantly defined in proposed s. 6 of the Disclosure Bill as expenditure incurred for the dominant purpose of creating or communicating electoral matter.

"Electoral matter" is in turn defined in proposed section 4 of the *Electoral Matters (Miscellaneous Amendments) Bill 2021* (Tas) (**Electoral Matters Bill**) as "matter communicated, or intended to be communicated, for the dominant purpose of influencing the way electors vote in an election, including by promoting or opposing a political entity or a Member".

b. Third-party campaigners' disclosure obligations

Proposed s. 40 of the Disclosure Bill would relevantly require third-party campaigners to disclose:

- donations over $5,000 used to incur electoral expenditure ("reportable political donations" - see proposed s. 10);
- received during election campaign periods;
- if received for the purpose of incurring electoral expenditure.

Proposed s. 67 of the Disclosure Bill also requires third-party campaigners to disclose electoral expenditure incurred during the election campaign period, and the total amount of all political donations received, including those under $5,000.

Amendments to provide clarity for third-party campaigners

We note the definition of "electoral matter" closely follows that in s. 4AA of the *Commonwealth Electoral Act 1918* (Cth), which has proved to be a workable, sensible definition and we support its introduction in Tasmania. There is one technical but important omission in the Tasmanian definition that we recommend be added — the federal definition includes a note that is hugely helpful to third-party campaigners attempting to interpret the complex definition:

> "Communications whose dominant purpose is to educate their audience on a public policy issue, or to raise awareness of, or encourage debate on, a public policy issue, are not for the dominant purpose of influencing the way electors vote in an election (as there can be only one dominant purpose for any given communication)."

We support consistency between Tasmanian and Commonwealth laws where sensible, and the addition of this note would help third-party campaigners advocating on their issues across both jurisdictions.

> **Recommendation 1:** Amend the Disclosure Bill to include a note in the definition of "electoral matter" to clarify that there can be only one dominant purpose, and that it doesn't include matter created or communicated for the dominant purpose of raising awareness, educating the public or encouraging debate on a policy issue.

Amendments to better regulate third-party campaigners

Tasmania is the only jurisdiction that does not require third-party campaigners to disclose their election spending and relevant donations. This Bill is, therefore, a significant improvement on the status quo.

We commend the Tasmanian Government for the nuanced treatment of third-party campaigners under the Bills. Third-party campaigners at elections are fundamentally different to political parties, candidates and associated entities and should be regulated in a fair and proportionate way which reflects these differences.

That being said, there are some significant limitations in the disclosure provisions which make circumvention easy, and the lack of expenditure caps leave regulation of third-party campaigners weak. **If these laws are passed, Tasmania will still have the weakest**

regulation of third-party campaigners in the country, and they will do little to stop big industries, including the gambling industry, from far out-spending other voices in an election campaign.

First, requiring third-party campaigners to only disclose donations received during the election campaign period will merely incentivise donors to donate before that period starts — i.e. up to seven months before a Legislative Assembly election. Consistent with electoral laws elsewhere in the country, third-party campaigners should be required to disclose political donations over the threshold, regardless of when the donation was received.

Disclosure every seven days should be limited to the election campaign period, taking account of the administrative burden it places on third-party campaigners. In addition, the seven day period should start from *when the election expenditure is incurred*,[1] not when the donation is made, as third-party campaigners may not be certain ahead of time what donations will be allocated to electoral expenditure. Requiring disclosure from the time the donation is received is simply not practicable for the majority of third-party campaigners who largely receive untied gifts and only make decisions about electoral expenditure in the weeks and months leading up to an election.

Second, the drafting of proposed s. 40 states that reportable political donations only need to be disclosed "if… received… for the purposes of incurring" electoral expenditure. This implies that donations over the threshold and used to incur electoral expenditure are not disclosable unless it was received specifically for this purpose. The factsheet for third-party campaigners, which states donations "intended" to be used on electoral expenditure are disclosable, seems to confirm this.[2]

Donations over the threshold should be disclosed if used to incur electoral expenditure, regardless of the purpose of the donation at the time it was made. The intent or purpose of a donation is very hard to prove, and the disclosure obligations will therefore be easy for donors and recipients to circumvent, merely by being vague about its purpose when the donation is given. In other jurisdictions, including federally, all donations over the threshold used to incur electoral expenditure are disclosable.

While the threshold for becoming a third-party campaigner as stated in proposed s. 5 should remain at $5,000, third-party campaigners should be required to disclose political donations of over $2,500. This threshold is more in line with what the majority of States and Territories require, whilst not being so low as to impose a disproportionate burden on third-party campaigners. It's important to note that it is harder for third-party campaigners to comply with electoral laws than political parties and candidates, because they have to apply the complex definitions of "electoral matter" and "electoral expenditure". A threshold of $2500 relieves some of the most severe impacts of the administrative burden of tracking and accruing very small donations, while also providing a higher degree of transparency over who is funding their electoral expenditure.

[1] As is done in Queensland, see r. 8B *Electoral Regulation 2013* (Qld).
[2] Third-Party Campaigners, Fact Sheet no. 6, 2.

Recommendation 2: Amend the Disclosure Bill to require third-party campaigners to disclose all political donations over the threshold used to incur electoral expenditure, regardless of when they were given for that purpose. Disclosure for third-party campaigners should be required by reference to when the electoral expenditure is incurred, not when the donation is made.

Recommendation 3: Amend the Disclosure Bill to set the disclosure threshold for political donations made to third-party campaigners to $2,500.

Other opportunities for stronger reform of politicians and third-party campaigners

1. Broadening the definition of "gift"

Currently, the definition of "gift" in proposed s. 8 of the Disclosure Bill does not explicitly include very common contributions to political parties, associated entities and third-party campaigners, such as membership fees, levies and ticket prices/other contributions raised through fundraising events. On top of this, subscriptions are explicitly excluded. These types of contributions pose the same corruption risk as donations, and should be captured by the disclosure obligations.

Recommendation 4: Amend the Disclosure Bill to broaden the definition of "gift" to explicitly include membership fees, levies, fundraising contributions and subscriptions.

2. Lowering the disclosure threshold to $1,000 for political parties, candidates and associated entities

Under the Disclosure Bill, the donations disclosure threshold would be lowered to $5,000 and donations from the same donor would be aggregated. We believe the threshold should be lowered to $1,000 for political parties, candidates and associated entities, which is consistent with most jurisdictions in Australia. This lower threshold is important to achieve greater transparency for pay-for-access events, which can erode public trust in Tasmanian politicians.[3]

Recommendation 5: Amend the Disclosure Bill to set the political donation disclosure threshold to $1,000 for political parties, candidates, and associated entities.

3. Introduce spending limits in elections

Spending limits are a crucial reform which we urge the Tasmanian Government to consider as part of the proposed Bills. HRLC, ACF and the Australia Institute Tasmania support

[3] B Burton, "Comment: The $22,000 'Aird loophole' lives on as Tasmania baulks at donations transparency" *Tasmanian Inquirer*, 28 June 2021, available at https://tasmanianinquirer.com.au/news/comment-the-22000-aird-loophole-lives-on-as-tasmania-baulks-at-donations-transparency/.

spending limits which apply to parties, candidates, associated entities and third-party campaigners.

Spending limits are essential to ensure that elections remain about the best ideas, not who can spend the most money buying the biggest platform. Additionally, limiting how much political parties and candidates can spend getting re-elected leads to the following benefits:

i. They reduce the requirement for public funding;

ii. They take the fundraising pressure off candidates and political parties, allowing them to focus on their work representing their constituents;

iii. They are the only way to effectively regulate big industry. Unlike laws focused entirely on donation income, spending caps apply to all third-party campaigners in the same way, regardless of whether they rely on donations, membership fees or corporate revenue to fund their spending.

University of Tasmania's *Campaign finance reform in Tasmania* report released after the 2018 Tasmanian election recommended that for House of Assembly elections there be:

• An expenditure limit of $30,000 per individual candidate.
• A limit of $30,000 per candidate for parties.
• A total cap of $750,000 per party (five candidates per electorate, for $30,000 for each of 25 candidates in total across the State) in House of Assembly elections.

For the Legislative Council the Insight report recommended that:

> In the interests of consistency, we propose that the expenditure cap for Legislative Council elections be increased to $30,000 per candidate. Reflecting the culture and practice of the Legislative Council, the current ban on political party spending in the Upper House election should remain.[4]

Principles for designing expenditure limits

This submission does not recommend a precise figure at which spending caps ought to be set, but instead sets out principles that should inform the introduction of best practice spending caps. We support expenditure limits based upon the following principles:

- **Spending limits should apply to all actors in elections** such as candidates, parties, associated entities and third-party campaigners.

- **Spending limits should aim to improve current levels of political equity.** Limits should not be set so high that they will only restrain the largest spenders, but rather should be at a level that will achieve a significant improvement in political equity.

- **Limits should not unfairly disadvantage independent candidates.** Spending limits should take into consideration the ability of political parties and

[4] Eccleston and Jay (n.d.) *Campaign finance reform in Tasmania: Issues and options,* p. 4

party-endorsed candidates to pool resources, and should be set accordingly so as to not disadvantage independent candidates.

- **Spending limits should be appropriately aggregated.** Spending by political parties and party-endorsed candidates should be aggregated towards a total cap and spending by associated entities should be aggregated with the political parties they're associated with.

  Recommendation 6: Amend the Disclosure Bill to include best practice expenditure limits.

4. Introduce donation caps for political parties, candidates and associated entities

Capping political donations is an important part of strong, holistic reforms to strengthen the integrity of Tasmania's electoral system and achieve greater political equality.

Large political donations are designed to have political influence. There is a sliding scale of influence enabled by political donations: at the lower end, a sizeable donation can ensure the donor gets access to a politician that ordinary Tasmanians wouldn't get.[5] In the middle, is what the High Court has described as "clientelism", or a "more subtle kind of corruption… [where] officeholders will decide issues not on the merits or the desires of their constituencies, but according to the wishes of those who have made large financial contributions valued by the officeholder".[6] At the far end, is "quid pro quo" corruption – illegal bribes – where politicians explicitly make promises in exchange for political donations. This last kind may be rare, but the other forms of influence are inevitable in our current political system. The ever-increasing cost of election campaigns adds to the pressure on politicians to keep big donors happy.

Donation caps should apply to political parties, candidates, and associated entities so that wealth does not translate into political influence. Without prescribing the exact cap that would be suitable for Tasmania we note that in other Australian jurisdictions where donation caps exist, they range between $4,000-$6,000.

Very importantly, donation caps should not be extended to third-party campaigners. Because the caps cannot apply to corporate revenue, such caps discriminate between third-party campaigners that rely on donations — i.e. charities and not-for-profits — as against corporations and some industry peaks.[7] As noted above, the best way to equitably regulate third-party campaigners at elections is through strong expenditure caps.

> **Recommendation 7:** Amend the Disclosure Bill to include caps on donations for political parties, candidates and associated entities.

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[5] D Wood and K Griffiths, "Who's in the Room: Access and Influence in Australian Politics" The Grattan Institute, 23 September 2018.

[6] McCloy v NSW [2015] HCA 34 at [45] per French CJ, Kiefel, Bell, Keane JJ.

[7] Queensland's electoral laws extend donation caps to associated entities, which are properly defined as entities that work to a significant extent to benefit a candidate or political party, prevents would-be big political donors circumventing caps by giving to those who campaign on their behalf.

5. Introduce truth in political advertising provisions

In Tasmania it is currently perfectly legal for political parties and candidates to lie during an election campaign. Australia has laws against misleading and deceptive conduct in trade and commerce, but not in politics. It is reasonable for Tasmanians to expect this level of protection, if not higher, when it comes to political discourse.

Truth in political advertising laws are extremely popular. Polling undertaken by the Australia Institute in April 2021 found almost nine in ten Tasmanians (87%) want Truth in Political Advertising laws.[8] National polling over the last four years supports this.[9]

Proposed s. 197 of the Disclosure Bill is too narrowly focused. It is limited to preventing misleading voters about casting a valid vote.

In August 2020, the ACT Legislative Assembly passed truth in political advertising laws based on the existing South Australian laws, with the unanimous support of the Assembly's Labor, Liberal and Greens MLAs. The laws came into effect in July 2021. South Australia, truth in political advertising laws have existed since the 1980s.

The laws establish an offence for misleading political advertising and empower the ACT Electoral Commissioner to request that the person who placed the advertisement not disseminate it, or retract it in stated terms. The laws are limited to electoral material that requires authorisation, and do not burden publishers any more than existing rules about defamation or offensive material do. Under the new laws an individual could be fined up to $8,000 and a corporation up to $40,500, if they have been found to have issued untrue political advertising.

> **Recommendation 8**: Amend the Disclosure Bill to introduce truth in political advertising provisions, modelled on South Australian and ACT legislation.

We would be happy to provide further comment should the Department have questions.

Yours sincerely

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[8] The Australia Institute (2021) Polling: Good Government in Tasmania https://australiainstitute.org.au/report/polling-good-government-in-tasmania/
[9] The Australia Institute (2020) Polling: Truth in political advertising, https://www.tai.org.au/sites/default/files/Polling%20-%20June%202020%20-%20Truth%20in%20political%20advertising%20%5BWeb%5D.pdf

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