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Mr Peter Cain
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(Legislative Scrutiny Role)
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30 October 2023

Dear Chair,

Information requested in Scrutiny report number 36

I write in response to the Scrutiny Committee's request for further information regarding my proposed amendments to the *Electoral and Road Safety Legislation Amendment Bill 2023* and the *Justice (Age of Criminal Responsibility Legislation Amendment Bill 2023)*. I would like to thank the Scrutiny Committee for its careful consideration of my amendments.

Electoral and Road Safety Legislation Amendment Bill 2023

"1.10. The Committee therefore requests further information on what purposes will be achieved by the proposed amendment to the definition of foreign entity and why, in light of that purpose, the proposed amendment should be considered, in the context of the Bill as amended, a reasonable limit on the right to freedom of expression using the framework set out in section 28 of the HRA."

The amendments draw upon the same justification of a legitimate objective as that utilised by the government in their explanatory statement to the bill. The primary difference is that my amendments will give effect to the intent in the explanatory statement, whereas the content of the bill and the federal/interstate provisions it seeks to replicate will not. This is because my amendments seek to make fewer exceptions that would be readily available to anyone looking to get around the laws, such as by the establishment of foreign-owned shell companies.

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“1.17. The Committee therefore requests further information on the basis on which limiting the making of political donations to Territory political entities by the prohibited entities will reduce the potential risks of corruption or undue influence or otherwise achieve a legitimate purpose. “

A few observations need to be made about the implied freedom.

- Firstly, as laid out in the draft explanatory statement to these amendments, political parties do not plan for federal and territory elections in isolation of each other. They campaign for, and organise around, both simultaneously. A corruption risk identified at the federal level must be considered relevant at the territory level, and vice-versa. Laws which attempt to resolve issues at only one level of government, and allow for loopholes through the other, such as is apparent in the Morrison government’s over-riding laws with respect to property developers, significantly imperil the effectiveness of those laws.
- Secondly, I refer the committee to the additional comments on *McCloy vs New South Wales [2015] HCA 34* made by Justice Gageler where are of particular interest. Gageler explores the questions of political donations having a corrupting influence on politics generally. Importantly, his judgement is not in conflict with the majority judgement, and he offers the following at paragraph 184:

“Gauged by reference to the system of representative and responsible government established by Chs I and II of the Constitution, as that system is extended by s 128 to permit alteration of the Constitution, the elimination of preferential access to government which results from the making of political donations is a legitimate legislative objective. More than that, the elimination of that form of influence on government is properly characterised as a compelling legislative objective.”

This reasoning is at the heart of efforts to restrict political donations as a legitimate objective to limit corruption in Australian democracies.

- Thirdly, the majority judgement in *Spence vs Queensland [2019] HCA 15* at paragraph 96 is worthy of being noted:

*“Apparent from the debate on the introduction and second reading of the Bill for the Queensland Amending Act¹²⁴ is that the choice to insert the new Subdiv 4 of Div 8 of Pt 11 into the Queensland Electoral Act was based on lessons learned from the experience in New South Wales. As Nettle J said in *McCloy* itself¹²⁵:*

“[I]t is not illogical or unprecedented for the Parliament to enact legislation in response to inferred legislative imperatives. More often than not, that is the only way in which the Parliament can deal prophylactically with matters of public concern.” *Australian States are not so much “little laboratories”¹²⁶ that each State is required to conduct its own experiments or rely on its own experiences before it can be justified in taking legislative action to address a risk of harm to its system of government highlighted by occurrences in another State.”*

¹²⁴: Queensland, Legislative Assembly, Parliamentary Debates (Hansard), 6 March 2018 at 190; Queensland, Legislative Assembly, Parliamentary Debates (Hansard), 15 May 2018 at 1105-1106, 1114.

¹²⁵: (2015) 257 CLR 178 at 262 [233].

¹²⁶: See *New Rare Ice Co v Liebmann* (1932) 285 US 262 at 311.

While these amendments are not seeking to replicate the legislative changes made in another jurisdiction, they are nonetheless making observations about harms to systems of government experienced in other jurisdictions across Australia and around the world.

To support the committee, the risks presented and observed on the three additional categories can be further described as follows:

Fossil Fuel entities

Fossil fuel companies (with energy-purpose interests) have made very significant donations to political parties over time. Despite compelling evidence that opening new fossil fuel projects is against Australia's long term social and economic interests, that there must be no new coal or gas in Australia if we are to meet our UNFCCC treaty commitments, and very clear information that Australians want their governments to act on climate change, politicians from political parties in receipt of these donations continue to approve fossil fuel projects and exacerbate the climate crisis. Australia's democracy is directly harmed by the disproportionate influence that fossil fuel companies wield through the apparent capture of politicians, so much so that commentators might describe governments as being ruled by fossil fuel companies for fossil fuel companies.

See for example this report: <https://australiainstitute.org.au/report/the-tip-of-the-iceberg-political-donations-from-the-mining-industry/>

Defence entities

The 'military-industrial complex' is the target of these amendments. Former US President Eisenhower, drawing upon his experience as commander-in-chief of the world's most powerful military force, warned us in the following words:

"A vital element in keeping the peace is our military establishment. Our arms must be mighty, ready for instant action, so that no potential aggressor may be tempted to risk his own destruction..."

This conjunction of an immense military establishment and a large arms industry is new in the American experience. The total influence—economic, political, even spiritual—is felt in every city, every statehouse, every office of the federal government. We recognize the imperative need for this development. Yet we must not fail to comprehend its grave implications. Our toil, resources and livelihood are all involved; so is the very structure of our society. In the councils of government, we must guard against the acquisition of unwarranted influence, whether sought or unsought, by the military-industrial complex. The potential for the disastrous rise of misplaced power exists, and will persist.

We must never let the weight of this combination endanger our liberties or democratic processes. We should take nothing for granted. Only an alert and knowledgeable citizenry can compel the proper meshing of the huge industrial and military machinery of defense with our peaceful methods and goals so that security and liberty may prosper together."

These observations have been in place for over 60 years, and have been borne out as accurate. Defence-supplying industries have a vested interest in securing themselves as the monopoly suppliers of equipment and expertise. From this they profit, and they benefit further when times of war demand more of the equipment and services that only they are positioned to provide. Political donations are a small price to pay for securing the support

of the political class to perpetuate this operating environment. Meanwhile, a majority of voters who oppose war are unheard.

Nicotine entities

This should not be controversial to propose. The World Health Organisation has a substantial body of evidence on the harm perpetuated by tobacco companies, and established the WHO Framework Convention on Tobacco Control, which has the standing of a multilateral treaty. The convention includes among other commitments that countries make sure health policies are not influenced by the tobacco industry. Banning political donations from nicotine entities supports that treaty objective in recognition of the significant harm brought by their products.

Expanding the definition from tobacco to nicotine is necessary, because tobacco companies are now moving beyond tobacco products and into other technologies, including vaping products which contain no tobacco.

In all three cases, it is essential that the ACT play its part in avoiding corrupt influences.

“1.20 ...The Committee therefore requests further information on the justification for distinguishing between use of electronic voting by overseas voters and voters within the Territory.”

There is a distinction between an electronic voting system and such a system that is online. Online systems are much more complex to secure, and as such they present a tempting target for foreign interference.

The standard approach to handling a situation where an electronic voting system has been compromised is to suspend or withdraw that system from operation, which is what the bill would provide for. This would be done separately for local and overseas electors, as the online nature of electronic systems for overseas electors results in it needing to be an independently-operating system. If a malicious actor wanted to disrupt the casting of votes of specifically overseas electors, this would be a very simple exercise. If a voting system is withdrawn, the consequences for those presuming to have access to an online system for overseas voting is much more profound than for those local to Australia, because planning to vote in a different manner takes a significant amount of extra effort.

The submission to the Justice and Community Safety committee’s bill inquiry made by Vanessa Teague and colleagues, or by Thomas Haines, explains the significant risks associated with online voting systems.

The bill already makes significant distinctions between overseas and local electors. It is not the intent of these amendments to disrupt that distinction, or to solve the problems that the government is trying to solve. Rather, it is the intent of the amendments to preserve the status quo by omitting reforms, with the intent of protecting the integrity of the voting system. It should in fact incumbent upon the government to justify why its amendments do not imperil the

franchise of overseas electors in light of the advice of the aforementioned subject-matter experts.

Justice (Age of Criminal Responsibility) Legislation Amendment Bill 2023

The Committee's concerns related to Henry VIII clauses and stated:

1.27. The Committee therefore requests further information on why the Henry VIII clauses are considered necessary in the context of this Bill, including:

a) what limits, if any, are placed on the scope, subject matter and duration of the Henry VIII clause so as to restrict the potential impact of any regulations; and

b) what alternatives to the Henry VIII clause, either to the clause itself or the use of a Henry VIII clause in general, were considered and why those alternatives were not accepted.

Consideration should also be given to amending the explanatory statement to include this information.

As the Scrutiny Committee notes *“The new transitional Part 35 largely replicates the Part 34 to be introduced by clause 58 of the Bill.”* This is a deliberate drafting decision. These provisions are designed to fully replicate the government's methodology for the earlier expungement of offences that are not schedule offences. The same human rights considerations as are made for the bill in its choice of method, including with respect to the use of 'Henry VIII' clauses, should be taken to apply here. Therefore I will defer to the Government's justification for the use of Henry VIII clauses which was provided in the [Government response](#) (extract reproduced below).

Henry VIII clauses

The Committee also sought clarification on why it is necessary to include proposed new: sections 623 and 635 of the Crimes Act 1900; sections 212 and 222 of the Family Violence Act 2016; and sections 211 and 221 of the Personal Violence Act 2016, which allow for the creation of transitional regulations. While care has been taken to include adequate transitional measures in the Bill, due to the complexity of the reforms and the breadth of criminal justice and related services that are affected by the Bill, there remains a risk of unforeseen consequences during implementation that could negatively impact the provision of a range of essential justice services in the ACT.

The inclusion of the transitional regulation-making power reflects the ground-breaking nature of the reforms in this Bill. Some minor transitional issues may not emerge until implementation is under way and as such, greater flexibility in the legislation is preferred so that these issues can be quickly addressed to ensure uninterrupted criminal justice services in the ACT.

In light of this, I consider the inclusion of the abovementioned new sections to be a necessary and appropriate safeguard to ensure the Government can quickly and flexibly address any unforeseen issues that may arise. The key alternative approach to addressing an unexpected implementation issue would be a further amendment bill.

As you will appreciate, the development and passage of an amendment bill can be time consuming, resulting in a delay between the identification of an issue and action to remedy the issue. Noting that such an issue could impact on the ability of justice entities to provide services, this approach, with its risk of delay, was not preferred.

I have updated the Explanatory Statement to clarify this position.

Yours sincerely,

A handwritten signature in black ink, consisting of the letters 'A', 'B', and 'R' followed by a long horizontal line.

Andrew Braddock

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