Australian Government

Australian Government response to the Joint Standing Committee on Electoral Matters reports:

Second interim report on the inquiry into the conduct of the 2016 Federal Election: Foreign donations

Advisory report on the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017

Second advisory report into the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017

November 2018

Introduction

The Australian Government is committed to protecting the Australian political process from foreign interference.

On 10 March 2017, the Joint Standing Committee on Electoral Matters (JSCEM) tabled a report entitled *Second Interim Report on the inquiry into the conduct of the 2016 Federal Election: Foreign donations* (the second interim report).

JSCEM found that the current regulatory arrangements are insufficient to assure Australians that their electoral processes are free from undue influence from those without a meaningful connection to Australia. Restricting foreign donations will reduce the extent to which foreign money finances public debate, and will contribute to restoring public trust in Australia's system of representative democracy.

On 7 December 2017, the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017 (the Bill) was introduced into the Senate. The Bill:

(a) formed part of a package of reforms to address foreign interference and covert political influence in Australia; and

(b) addresses the JSCEM's recommendations in its second interim report.

The JSCEM has tabled two advisory reports on the Bill. On 9 April 2018, the Advisory report on the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017 (first advisory report) made 15 recommendations in relation to the Bill.

The Government considered the first interim report in developing Government amendments addressing its recommendations, and on 12 September referred the draft Government amendments to the JSCEM.

On 15 October 2018, the JSCEM issued a second advisory report on the referred amendments, making further recommendations.

On 30 October 2018, the Government circulated revised Government amendments to the Senate. The circulated amendments address the recommendations of the second advisory report.

Additionally, the Government intends to ask the Committee to review the Bill following the next federal election to assess any impact on charitable issue-based advocacy. Given the Committee's extensive and cross-party work on the Bill over the course of this Parliament, it is the Government's view that the Committee is best placed to review the Bill's operation and impact once implementation is complete.

The recommendations of the three reports are addressed in detail below.

Report	Recommendation	Government response
Second interim report on the inquiry into the conduct of the 2016 Federal Election: Foreign donations		
Majority report	1. The Joint Standing Committee on Electoral Matters recommends that any donation reform of the *Commonwealth Electoral Act 1918* (the Electoral Act) be in accordance with Australia's sovereign interests.	**The Government supports the recommendation.** The Government considers that it is important to address ongoing community concern around the potential for domestic policy decision making and political outcomes to be subject to foreign influence, while ensuring that reform is in accordance with Australia's sovereign interests. Australia's sovereign interests were a key consideration in developing the Bill.
	2. The Joint Standing Committee on Electoral Matters recommends that any donations reform of the C*ommonwealth Electoral Act 1918* will be consistent with the four principles of transparency, clarity, consistency and compliance as identified by this Committee in this interim report: Transparency via visible, timely disclosure of donations and donors; Clarity about what is required and by whom; Consistency of regulations so that they capture all participants and support an equitable and level playing field; and Compliance through enforceable regulations with minimal, practicable compliance burdens.	**The Government supports the recommendation.** These considerations were key considerations in developing the Bill.
	3. The Joint Standing Committee on Electoral Matters recommends a prohibition on donations from foreign citizens and foreign entities to Australian registered political parties, associated entities and third parties. This ban would not apply to dual Australian citizens either in Australia or overseas, or to non-Australian permanent residents in Australia.	**The Government supports the recommendation.** The Bill bans gifts from foreign donors to key Australian political actors, including Australian registered political parties and third parties. Dual Australian citizens, and Australian permanent residents, as individuals who are have a legitimate interest in Australia, are not precluded from donating.
	4. The Committee recommends that the Joint Standing Committee on Electoral Matters, in its wider inquiry into donations and disclosure, further examine the requirement to extend a	**The Government supports the recommendation in principle.** The Government notes broader donations and disclosure reforms are included in the Bill, and that the JSCEM

Report	Recommendation	Government response
	foreign donations ban to all other political actors. The key issue to be considered is how to prevent foreign funds being channelled through organisations engaging in political activities and who are not subject to regulation under the Electoral Act. This new inquiry would also examine related issues that have arisen in this inquiry which are outside the current terms of reference, including tax deductibility for gifts.	considered these reforms in their advisory reports on the Bill. The Government considers the Bill adequately addressing the issue of foreign fund 'channelling'. For example, sections 302D and 302E apply equally to gifts made directly and on behalf of foreign donors. This prevents foreign donations being channelled through an Australian intermediary. The integrity of the Bill's foreign donations ban is further supported by anti-avoidance provisions. The anti-avoidance provisions focus on the substance of what has been done, and are intended to be applied in a practical way.
	5. The JSCEM recommends that the penalties in relation to offences in the Electoral Act are significantly strengthened to include stricter penalties for non-compliance.	**The Government supports the recommendation in principle.** The Bill contains appropriate penalties. The Government notes the JSCEM's later recommendations on penalty amounts have also been considered.
Dissenting report 1 (Senator David Leyonhjelm)	1. That the Government regulate foreign donations the same as domestic donations.	**The Government does not support the recommendation.** The Government is seeking passage of the Bill to ensure that Australia's electoral processes are free from undue influence from those without a meaningful connection to Australia.
	2. That the AEC [Australian Electoral Commission] have the power to require the location of the donor to be provided in disclosure returns.	**The Government notes the recommendation.** The Government notes the recommendation is irrelevant in the context of the foreign donations ban, and that furthermore, address is required in annual returns.
	3. That it be a requirement for all donations (above an agreed threshold) be disclosed to voters prior to a relevant ballot. 4. That donations made so close to a ballot that voters cannot be made aware of them before voting be prohibited.	**The Government notes the recommendation.** The Government committed to investigate options for enhancing the timeliness and the accessibility of data disclosed under the electoral funding and disclosure scheme in its second Open Government Partnership National Action Plan.
Dissenting report 2 (Labor Members and Senators)		**The Government notes the dissenting report did not make any recommendations.**

Report	Recommendation	Government response
Advisory report on the Electoral Legislation (Electoral Funding and Disclosure Reform) Bill 2017		
Majority report	1. The Government reconsider introducing the term 'political purpose' into the Electoral Act 1918, having regard to potential confusions with the *Charities Act 2013* in which the term has a divergent meaning. 2. The Government consider amending the definition of 'political expenditure' to define the type of expenditure which constitutes expenditure undertaken to influence voters to take specific action as voters, so as not to capture non-political issue advocacy.	**The Government supports the recommendations.** 1 & 2. Amendments replace the definition of political expenditure with a new definition – electoral expenditure. The definition of electoral matter feeds into this new definition, and is based on intent to influence the way electors vote in a federal election, including by promoting or opposing parties, candidates, groups, or parliamentarians. The definitional change streamlines and simplifies the concepts in Part XX of the *Commonwealth Electoral Act 1918* (Electoral Act), while also ensuring non-political, issues based advocacy is not captured. The definition does not capture general issue-based advocacy. There are also clear carve-outs for communications with parliamentary committees, parliamentarians, other Commonwealth officials, political parties or candidates for federal elected office. Carve-outs also apply to private communications, news and editorial content, and for satirical, academic, educative, and artistic purposes.
	3. Instead of the categories of 'third party campaigner' and 'political campaigner' being established as registration thresholds, the Government consider establishing a publically available 'Transparency Register' be established that provides: - voluntary registration for all entities engaged in 'political expenditure'; - mandatory registration for all entities engaged in activities that require disclosure of 'political expenditure' that reach a minimum 'expenditure threshold'; and - disclosure obligations that are commensurate with levels of expenditure. The registration process for the Transparency Register should be simple and provide access	**The Government supports the recommendations.** 3. Registration processes are streamlined and simplified by the introduction of a single Transparency Register. The number of people and entities required to register is reduced through higher thresholds for political campaigners, and removal of registration requirements for third parties. However, any person or entity not required to register may choose to register voluntarily. Disclosure obligations are made more commensurate with levels of expenditure. Disclosure obligations are reduced for third parties, who will no longer be required to report

Report	Recommendation	Government response
	to additional support for registrants to fulfil their reporting obligations. 4. The Government consider setting expenditure thresholds for triggering increased reporting obligations under the proposed Transparency Register be set at a level that could reasonably be expected to have a significant impact on voter behaviour and that these obligations be proportionate to levels of expenditure.	non-financial particulars. Independent audit requirements are removed. 4. The threshold for Political Campaigners is increased to cover those who incur electoral expenditure of $500,000 or more in the current or past three financial years (or where they spend more than $100,000 on electoral expenditure and electoral expenditure was at least two-thirds of revenue in the previous year).
	6. The Government reconsider the definition of 'associated entity' proposed in the Bill, and instead consider retaining the definition of 'associated entity' currently in the Electoral Act.	**The Government supports the recommendation.** 6. New elements of the definition of associated entity are removed, and transitional arrangements introduced for automatic associated entity registration to reduce the regulatory burden experienced by associated entities during implementation.
	8. The Government give consideration to replacing the definition of 'allowable donor' with a definition of 'non-allowable' donors. 9. The Government consider: - removing the potential requirement for statutory declarations for all gifts: - simplifying the process for entities to verify whether a donor is a non-allowable donor.	**The Government supports the recommendations.** 8. A definition of foreign donor is added to the bill. Whereas the Bill bans political campaigners from receiving gifts from foreigners and foreign bank accounts, the draft amendments only ban gifts from foreigners. While third parties are prohibited from financing electoral campaigning with foreign money, they no longer need to keep foreign funds for their other activities in separate bank accounts. 9. The amendments removed the need for statutory declarations and simplify obligations with respect to foreign donations to: a) prohibit the giving and knowing receipt of all gifts from foreign donors, where the donor intends the gift to be used for electoral expenditure and apply penalties to donors who make prohibited gifts or false or misleading statements to recipients; b) require donors to affirm to Political Campaigners, political parties and candidates that they are not foreign for gifts between $1,000 and the disclosure

Report	Recommendation	Government response
		threshold ($13,800 in 2018-19), for instance a check box on a donation form; and c) require all covered recipients to verify that donors are not foreign for gifts above the disclosure threshold ($13,800) (a menu of alternative forms of proof is listed, to help recipients check a donor's status).
	10. The Government consider removing the aggregation of donations received under the allowable amount, provided that appropriate anti-avoidance measures are implemented. 11. The Government consider providing a legislative mechanism to give greater transparency of foreign funds that are moved through multiple organisations, whether they be charities, not for profits, industry associations or businesses, and to prohibit the use of such funds by way of political expenditure; noting the need to reach agreement on defining 'political expenditure' and noting the Australian Greens' concerns that non-partisan issue based advocacy not be included in the definition of 'political expenditure'.	**The Government supports the recommendations.** 10. Aggregation of donations is removed and anti-avoidance rules are included in the amendments. 11. Anti-avoidance rules address the movement of foreign funds between organisations. As part of the anti-avoidance rules the Electoral Commissioner can require an organisation that is part of a scheme to report as a political campaigner or associated entity, or can order that people stop a scheme or not participate in it. The rules also ensure that Commonwealth laws apply exclusively to amounts that are used or available for use in federal elections, so that foreign donations cannot be inappropriately shielded by ambiguity about the jurisdiction in which those funds were intended to be used. This integrity rule still ensures that donations given for state and territory elections are, appropriately, fully under the laws of those jurisdictions. As noted above, in response to recommendations 1 and 2, non-partisan issue advocacy is no longer captured.
	12. The Government consider establishing a minimum expenditure threshold before requiring substantiation for public funding claims. Subject to the above amendment, the Committee recommends that the proposals relating to public funding be agreed.	**The Government supports the recommendation.** 12. Amendments provide for the automatic payment of the first $10,000 of public election funding to eligible claimants.
	13. The Government consider reducing the proposed penalties in the Bill, and that penalties be proportionate to the type of breach displayed.	**The Government supports the recommendation.** 13. Penalties are reduced, and, where it is possible to determine the amount involved in a breach, linked to this amount. Per day penalties and

Report	Recommendation	Government response
		imprisonment are removed. Apart from penalties that are made proportionate to the amount involved in a breach, the amendments reduce the maximum penalty for the most serious types of other breaches from 1,000 penalty units to 200 penalty units (reducing the highest penalty from $210,000 to $42,000). For third parties, obligations are transferred from the financial controller to the entity.
	5. The Government consider establishing a process that requires, prior to each election, all political parties to reaffirm their registration or be subject to automatic deregistration. 7. The Government consider introducing administrative action to support consistent compliance with the provisions of the Electoral Act, as amended, by third party entities. 14. The Government consider: - an appropriate legislative mechanism whereby organisations which hold Deductible Gift Recipient (DGR) status which donate funds to another organisation in breach of their DGR obligations forfeit the right to DGR status; and - that any legislation include a mechanism to allow for a warning before removal of DGR status. 15. The Committee recommends that the Government appropriately resource both the Australian Electoral Commission (AEC) and the Australian Charities and Not-for-profits Commission to undertake a comprehensive education campaign for business, for industry associations, and for the charity sector on their obligations under the Electoral Act 1918.	**The Government notes the recommendations.** Several JSCEM recommendations are being addressed outside of these amendments. Recommendation 5, which relates to the review of political party registration, will be considered after the JSCEM hands down its final report on its inquiry into the 2016 federal election. Consistent with recommendations 7 and 15, the AEC was provided with funding of $56.5 million through the 2017-18 MYEFO measure 'Electoral Integrity Reforms' to implement the Bill, allowing it to inform the public about the changes. To avoid any concern that the AEC might focus on previous non-compliance by third parties with disclosure obligations, the amendments forgive past failure to comply. This allows the AEC to focus on dealing with future compliance risks, including risks of foreign interference in federal elections. Recommendation 14 is being considered by the Government as part of wider reforms to deductible gift rules.

Report	Recommendation	Government response
Second advisory report on the Electoral Legislation (Electoral Funding and Disclosure Reform) Bill 2017		
Majority report	1. The Committee recommends that the Government amend the explanatory memorandum to improve the clarity of the sections on Electoral Matter (4AA) and Electoral Expenditure (287AB)	**The Government supports the recommendation.** Chapter 1 of the Supplementary Explanatory Memorandum has been revised to improve the clarity of the sections on Electoral Matter (4AA) and Electoral Expenditure (287AB).
	2. The Committee recommends that the proposed Transparency Register be published in a form that is easily searchable and analysed by the public	**The Government supports the recommendation.** As this recommendation is non-legislative in nature, the Government undertakes to implement the recommendation outside of these amendments when implementing the Transparency Register.
	3. The Committee recommends that the Electoral Commissioner not be given the authority to determine additional information for inclusion in the Transparency Register at this time and that JSCEM be consulted on future proposals to augment the register, after scoping has occurred on future proposals for improvements.	**The Government supports the recommendation.** The Government has amended this provision in line with the recommendation.
	4. The Committee recommends that s. 314AC be amended to not require disclosure of donations to a political campaigner that is also a registered charity, when none of that donation is used on electoral expenditure.	**The Government supports the recommendation.** The Government has amended this provision in line with the recommendation and made a consequential amendment to s. 305B.
	5. The Committee recommends that s. 302F be redrafted to: • redefine the fault element so that the offence requires a recipient to have actual knowledge that the donor is foreign; and • introduce a minimum threshold of $100 before there is an offence under this provision.	**The Government supports the recommendation.** The Government has amended this provision in line with the recommendation.
	6. The Committee recommends that s. 302P be amended so that a recipient is able to use other means to determine the status of a trust or foundation; including evidentiary documents such as the trust deed, or by checking registration of the trust as a charity in Australia.	**The Government supports the recommendation.** The Government has amended this provision in line with the recommendation.

Report	Recommendation	Government response
	7. The Committee recommends that s. 287AA be amended so that New Zealand citizens that are Australian residents on a Special Category visa (subclass 444) are excluded from the definition of a foreign donor.	**The Government supports the recommendation.** The Government has amended this provision in line with the recommendation. Note that the Bill identifies that if this subclass reference ceases to exist, an equivalent replacement visa is also considered to be relevant.
	8. The Committee recommends that the requirement to disclose the political affiliation of senior staff on the proposed Transparency Register be removed.	**The Government supports the recommendation.** The Government has amended this provision in line with the recommendation.
	9. Following the passage of the legislation, the Committee recommends that the Australian Electoral Commission ensure that the candidate handbook makes clear the need to keep receipts for substantiating possible public funding claims for electoral expenditure incurred.	**The Government supports the recommendation.** As this recommendation is non-legislative in nature, the Government undertakes to implement the recommendation outside of these amendments when updating the candidate handbook, reflecting these changes.
	10. The Committee recommends that proposed sections 302CA and 314B are amended to ensure that Commonwealth laws would not apply to money that is directed towards non-federal campaigns (including state, territory and local government campaigns).	**The Government supports the recommendation.** Sections 302CA and 314B have been amended to address JSCEM's concerns, by ensuring that amounts used, kept or identified for a State or Territory electoral purpose are appropriately subject to State or Territory law.
	11. The Committee recommends definitional conflict regarding the term 'political entity' be rectified.	**The Government supports the recommendation.** The Government has amended this provision in line with the recommendation.
	12. Subject to adjustment of the amendments to reflect the recommendations in this report, the Committee recommends that the Parliament pass the Electoral Legislation (Electoral Finance and Disclosure Reform) Bill 2017, as amended.	**The Government supports the recommendation.** The Government will move to pass the Bill as soon as practical in the Spring sittings.
Dissenting report (Australian Labor Party)		**The Government notes the dissenting report did not make any recommendations.**
Dissenting report (Australian Greens)	That the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017 not be passed.	**The Government notes the recommendation.**