



January 26, 2018

Submission by Human Rights Watch to the Joint Standing Committee on Electoral Matters on the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017

Summary

Human Rights Watch is concerned that provisions of the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017 (“The Bill”) infringe on basic rights, particularly the rights to freedom of speech, association and expression and the implied right to political communication. These rights are protected under the International Covenant on Civil and Political Rights and other treaties to which Australia is a party.¹

This submission raises specific concerns about the requirement for organizations that engage in advocacy to register as “political campaigners” and provisions to restrict foreign funding to organizations for advocacy. Such provisions risk stigmatizing organizations that are apolitical, imposing onerous reporting requirements on organizations and will have a chilling effect on the legitimate advocacy work of NGOs. NGOs should have the right to comment on political issues and proposed policies, which is not the same as promoting or opposing a political party or candidate.

Like an independent press, a vigorous and outspoken non-governmental organization (NGO) sector is essential to democracy. NGOs are a key way for people of all political views to influence public debate. Australia already has adequate measures in place that restrict political activity of organizations registered under the Australian Charities and Not-For-Profits Commission (ACNC) Act.

In the second reading of the Bill, Finance Minister Senator Mathias Cormann said that “Reform is necessary to support the integrity of Australia's electoral system, and Australia's sovereignty, by ensuring that only those with a meaningful connection to Australia are able to influence Australian politics and elections through political donations...There has been growing concern amongst the community about foreign interference with our domestic political landscape. Media reports of

¹ International Covenant on Civil and Political Rights (ICCPR), G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976, ratified by Australia on August 30, 1980, art. 19.

foreign donations to parties, candidates and third parties have affected the perceived integrity of elections, which is critical to our peaceful democratic government.”²

Restricting foreign donations to political parties or candidates, as well as organizations that are campaigning for political parties or candidates, is a valid legal change that Australia might choose to make.

Efforts by the Chinese Communist Party to influence politics in Australia have led the Australian government to take steps to counter foreign interference in Australia. Human Rights Watch has previously written to Attorney General Brandis on this issue.³

However, forcing NGOs engaged in advocacy to register as “political campaigners” and restricting foreign funding of their advocacy activities is an overblown and unnecessary response. Rather than protecting our peaceful democratic government, this Bill threatens to undermine it by curtailing freedom of speech, expression and association.

Senator Cormann also said during the Bill’s second reading that [the Bill] “will also ensure that the Commonwealth’s electoral funding and disclosure regime keeps pace with international and domestic developments and provides transparency for Australian voters.”⁴ If Australia adopts these amendments, it will be ‘keeping pace’ or following in the footsteps of repressive countries like Ethiopia, Russia, India, Hungary, and Egypt, all of which have taken steps to restrict foreign funding to NGOs with devastating consequences for civil society and freedom of expression. But neither the US, UK or Canada place any similar restrictions on foreign funding of NGOs who engage in advocacy.

Recommendations

We urge the Committee to:

- Abolish the requirement for organizations to register as “political campaigners” and limit application of this law to restrict foreign donations to political parties and candidates and curtail only the activities of organizations actively campaigning for a political party or candidate;
- Bring this Bill in line with the Charities Act that restricts political activity to expressing support for or opposition to a political candidate or party;

² Second Reading Speech, Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017, December 7, 2017, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansards%2F5d592247-329b-4d73-aa23-cc7010d35d45%2F0096%22> (accessed January 24, 2018).

³ Letter to Attorney General George Brandis, re China’s influence and foreign interference, December 4, 2017, <https://www.hrw.org/supporting-resources/315132/letter-brandis>.

⁴ Second Reading Speech, Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017, December 7, 2017.

- At minimum, remove from the definition of “political purpose”, the “public expression of views on an issue that is, or is likely to be, before electors in an election period (whether or not during an election period);”
- At minimum, make registered charities and not-for-profits exempt from the restriction on receiving gifts from non-allowable donors (ie foreign donors);

Background - Existing law

Under existing Australian law, non-governmental organizations that register as charities or not-for-profits are governed under the Australian Charities and Not-for-profits Commission (ACNC) Act 2012 and Charities Act 2013. ACNC-registered entities are entitled to receive gifts for the purposes of advocacy from domestic and foreign sources.

Medium⁵ and large⁶ entities registered under the ACNC Act are obliged to provide financial reports to the ACNC each year and such reports must be reviewed or audited; for large charities they must obtain and attach annual auditor’s reports.

Under the Charities Act 2013, registered organizations are disqualified if they engage or promote activities that are unlawful or contrary to public policy;⁷ or that are for the purpose of promoting or opposing a political party or a candidate for political office.⁸

Section 45-10(6) of the ACNC Act, providing for the creation of governance standards, expressly notes that such governance standards must not impede the capacity of an entity to comment on or advocate support for the change in the law if such comment or advocacy is lawful and furthers a stated purpose of the entity. The Bill directly conflicts with this provision of the ACNC.

“Political campaigners” under the Bill

Under the Bill, entities or persons whose “political expenditure”⁹ during the previous four years amounts to \$100,000 or more, or whose “political expenditure” in a previous year was \$50,000 or

⁵ Australian Charities and Not-For-Profits Commission (ACNC) defines medium charities as having annual revenue \$A250,000 or more, but less than \$A1 million. See ACNC, “How Does ACNC Define Charity Size?” undated, <http://www.acnc.gov.au/ACNC/Manage/Reporting/SizeRevenue/ACNC/Report/SizeRevenue.aspx> (accessed January 24, 2018).

⁶ ACNC defines large charities as having annual revenue \$A1 million or more. See ACNC, “How Does ACNC Define Charity Size?”.

⁷ Public policy includes the rule of law, the constitutional system of government of the Commonwealth, the safety of the general public and national security.

⁸ Charities Act 2013 (Cth), part 2, division 3, section 11, <https://www.legislation.gov.au/Details/C2013A00100/Download> (accessed January 25, 2018).

⁹ Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017 (Cth), schedule 1, part 1, division 1A (proposed s 287F - Requirement to register as a political campaigner) http://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/s1117_first-senate/toc_pdf/1728620.pdf;fileType=application%2Fpdf (accessed January 25, 2018).

more where that political expenditure constituted 50 percent of the person or entity's annual budget, are required to register as "political campaigners," a status which then entails various additional obligations and restrictions.

"Political expenditure"¹⁰ is defined sweepingly as money spent in furtherance of "political purposes"¹¹ which includes any of the following:

- (a) public expression by any means of views on a political party, candidate in an election or a member of the House of Representatives or the Senate;
- (b) public expression of views on an issue that is, or is likely to be, before electors in an election period (whether or not during an election period);
- (c) the communicating of any electoral matter (not referred to in a) or b) for which particulars are required to be notified under section 321D (which requires certain electoral communications to be authorized)
- (d) The broadcast of political matter (not referred to in c) which is regulated under Schedule 2 to the Broadcasting Services Act 1992
- (e) Carrying out of an opinion poll, or other research, relating to an election or the voting intentions of electors

There are exceptions for media (and providing editorial content in news media) as well as genuine satirical, academic or artistic purposes.¹²

Political campaigners that are not registered as charities are unable to receive foreign funds of more than \$A250.¹³ Political campaigners that are registered as charities must disclose all foreign gifts of more than \$A250 and are prevented from using funding from any foreign person or entity for "political purposes."

This definition of "political purpose" is overly broad and vague, with (a) (b) and (e) especially problematic. Subsection (b), it would effectively extend to all aspects of advocacy and campaigning on social or environmental causes, regardless of whether such statements or views are apolitical. Many topics that NGOs work on such as poverty, education, health, the environment, women's rights and myriad other social causes could be the subject of debate at a federal election. Standard activities of NGOs such as publishing a report on a website, writing a

¹⁰ Electoral Funding and Disclosure Reform Bill 2017 (Cth), schedule 1, part 1, division 1, definition of "political expenditure" (proposed s 287(1)).

¹¹ Electoral Funding and Disclosure Reform Bill 2017 (Cth), schedule 1, part 1, division 1, definition of "political purpose" (proposed s 287(1)).

¹² Electoral Funding and Disclosure Reform Bill 2017 (Cth), schedule 1, part 1, division 1, (proposed s 287(1)).

¹³ Electoral Funding and Disclosure Reform Bill 2017 (Cth), schedule 1, part 2, division 3A, (proposed s 302E – Donations to third party campaigners and certain political campaigners).

submission for a parliamentary committee, holding a public forum at a thinktank and making comments on social media, could fall under this definition of “political purpose” under the law, and foreign funding for such activities is banned under the Bill.

The criminal penalties are extremely harsh for financial controllers of organizations deemed to be “political campaigners” who accept foreign funding for political purposes—they can face steep fines as well as imprisonment for up to 10 years.¹⁴

While it is appropriate to regulate and scrutinize the financial affairs of NGOs to address corruption and legitimate national security concerns, the Bill is too broad and unnecessarily and disproportionately infringes on the valuable efforts of NGOs to address and publicly debate issues of public importance in Australia. The “political campaigners” tag makes no distinction between organizations that are actively campaigning for individual political parties and those that are nonpartisan but publicly pressing for change to government policy.

Violation of international law

Restricting foreign funding in this way violates freedom of association, speech, expression, and particularly the right to share information and ideas on matters of political and public importance. Under the International Covenant on Civil and Political Rights, no restrictions may be placed on the right to freedom of association other than those “which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.” Moreover, no restriction should undermine the essence of the right to freedom of association itself. The Human Rights Committee – the body charged with interpreting the ICCPR – has consistently expressed concern over foreign funding restrictions of NGOs as impinging on the right to freedom of association.¹⁵

The UN Special Rapporteur on the right to peaceful assembly and association has said that undue restrictions on resources available to associations will violate their right to freedom of association. The Special Rapporteur has stated:

¹⁴ Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017, schedule 1, part 1 (proposed subdivision B – Part 287F of the Commonwealth Electoral Act 1918).

Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017, schedule 1, part 2, division 1 (proposed s 302E - Donations to third party campaigners and certain political campaigners).

¹⁵ See for instance, U.N. Human Rights Committee, Concluding Observations of the Human Rights Committee: Egypt, at para. 21, U.N. Doc. CCPR/CO/76/EGY (November 28, 2002), [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.CO.76.EGY.En?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CCPR.CO.76.EGY.En?Opendocument) (accessed January 24, 2018).

“[A]ny any restriction on access to foreign funding must meet the stringent test for allowable restrictions for the right to association developed by the international human rights bodies. Given this narrow test, restricting access to foreign funding for associations based on notions such as “political nature”, “economic interest of the State” or “public interest” violates the right because these terms or definitions are overly broad, do not conform to a prescribed aim, and are not a proportionate responses [sic] to the purported goal of the restriction.”¹⁶

These comments, made with reference to India’s Foreign Contributions Regulations Act, apply equally to Australia’s restriction on foreign funding given the focus on restricting funds for “political purpose.”

Australia following in footsteps of authoritarian governments

Devaluing and discrediting the legitimate work of NGOs is a move straight out of the authoritarian’s playbook. Under repressive governments from Russia to China, efforts to curtail NGO activity and restrict foreign funding of NGOs are a blatant attempt to silence NGO criticism and discourage NGOs from carrying out activities critical of the government. In the same way, the Bill’s use of the term “political campaigner” is an effort to taint those involved in advocating to politicians or government officials as politically biased, regardless of whether their organization is apolitical or not. Overly broad laws that restrict foreign funding and seek to hamper the advocacy efforts of NGOs have been used to intimidate and silence NGOs in Russia, Ethiopia, Hungary, India, China and other countries.

There are striking similarities between Australia’s bill and **Russia’s** much criticized 2012 law which requires independent groups to register as “foreign agents” if they receive foreign funding and engage in broadly defined “political activity.” To date, Russia’s Justice Minister has designated over 150 groups as “foreign agents”, courts have levied hefty fines on many groups for failing to comply with the law, and about 30 groups have shut down rather than wear the “foreign agent” label.¹⁷ Organizations targeted include groups that work on human rights, the environment, LGBT issues and health issues, groups that do polling about social issues.

Last June, **Hungary** passed a law forcing NGOs receiving that receive more than €23,000 (\$A35,390) in foreign funding to register with a court as “foreign funded organizations.”

¹⁶ United Nations Office of the High Commissioner for Human Rights, UN Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, Maina Kiai, “Analysis on International Law, Standards and Principles Applicable to the Foreign Contributions Regulation Act 2010 and Foreign Contribution Regulation Rules 2011,” April 20, 2016, <http://freemasssembly.net/wp-content/uploads/2016/04/UNSR-FOAA-info-note-India.pdf> (accessed January 24, 2018).

¹⁷ “Russia: Government vs. Rights Groups,” Human Rights Watch news release, September 8, 2017, <https://www.hrw.org/russia-government-against-rights-groups-battle-chronicle>.

Organizations are required to identify themselves in all published and online material as “foreign funded organizations;” as well as to provide a detailed account annually on the specific amount and donor, including private donors, for each foreign transaction.¹⁸ “We’re not dealing with civil society members but paid political activists who are trying to help foreign interests here,”¹⁹ said Viktor Orban, Hungary’s prime minister when he was describing the reasoning behind Hungary’s efforts to introduce a NGO law. The risks relating to the law are particularly severe in light of a virulent communications campaign by the government to discredit NGOs. This law has been criticized by the Council of Europe²⁰ and is the subject of European Commission enforcement action as a breach of EU law.²¹

China’s draconian Law on the Management of Foreign Non-Government Organizations Activities in China (the NGO Law) limits the ability of domestic NGOs to obtain foreign funding and work with foreign organizations.²² The law also steps up financial scrutiny of foreign NGOs, imposing strict regulations on the source of funding and account management of the groups, requiring that the organization’s financial accounts be audited and announced publicly.

India’s Foreign Contribution Regulation Act, like Australia’s Bill, bans “organizations of a political nature” from receiving foreign contributions. Government approval is required before civil society organizations can receive foreign funds. Indian officials have used the law to harass and silence organizations critical of the government by delaying or denying efforts to renew their foreign funding licenses in an effort to discourage their work.²³

Egypt’s 2017 NGO law also will tightly regulate foreign funding of NGOs.²⁴ The law establishes a government entity to control all foreign funding of NGOs, and prohibits any work of “political nature.” Failure to adhere to the law could result in imprisonment for up to five years. The law provides for day-to-day monitoring by officials, including security agencies, and prohibits activities that “harm national security, public order, public morality, or public health,” terms that

¹⁸ “Hungary: Bill seeks to Stifle Independent Groups,” Human Rights Watch news release, June 12, 2017, <https://www.hrw.org/news/2017/06/12/hungary-bill-seeks-stifle-independent-groups>.

¹⁹ Hungarian Government, “Prime Minister Viktor Orbán’s Speech at the 25th Bálványos Summer Free University and Student Camp,” July 30, 2014, <http://www.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/prime-minister-viktor-orban-s-speech-at-the-25th-balvanvos-summer-free-university-and-student-camp> (accessed January 24, 2018).

²⁰ Parliamentary Assembly of the Council of Europe, “PACE calls on Hungary to stop work on NGO funding and university laws,” April 27, 2017, <http://assembly.coe.int/nw/xml/News/News-View-EN.asp?newsid=6618&lang=2> (accessed January 24, 2018).

²¹ “Infringements – European Commission refers Hungary to the Court of Justice for its NGO Law,” European Commission press release, December 7, 2017, http://europa.eu/rapid/press-release_IP-17-5003_en.htm (accessed January 24, 2018).

²² “China: New Law Escalates Repression of Groups,” Human Rights Watch news release, April 28, 2016, <https://www.hrw.org/news/2016/04/28/china-new-law-escalates-repression-groups>.

²³ “India: Foreign Funding Law Used to Harass 25 Groups,” Human Rights Watch news release, November 8, 2016, <https://www.hrw.org/news/2016/11/08/india-foreign-funding-law-used-harass-25-groups>.

²⁴ “Egypt: New Law Will Crush Civil Society,” Human Rights Watch news release, June 2, 2017, <https://www.hrw.org/news/2017/06/02/egypt-new-law-will-crush-civil-society>.

authorities abuse to outlaw activities that are plainly protected under international law, including most human rights activities.

Ethiopia enacted a law in 2009 that prohibits human rights groups from receiving more than 10 percent of their funding from abroad. This law has decimated the country's human rights movement.²⁵

By contrast, the United States, the United Kingdom and Canada do not have laws on the books that restrict foreign funding to NGOs for advocacy. Australia itself through its aid program provides important funding NGOs in other countries working on human rights, rule of law and good governance, and that funding is vital especially in countries where there are no local alternatives.

Whether organizations receive foreign or local funding to carry out their objectives is irrelevant. A vigorous NGO sector is an indispensable part of democracy. While the government claims this will not impact on NGOs ability to advocate, the reality is the onerous reporting restrictions and requirements and criminal penalties are likely to have a chilling effect of organizations willingness to speak out, especially for smaller NGOs. Financial controllers are likely to err on the side of caution and advise against public advocacy activities where it brings organizations into the ambit of the Bill. NGOs may think twice before expressing public comments about controversial policies suggested by politicians. This chilling effect on freedom of speech and expression is not in Australia's interests. Australian people and NGOs need the freedom to speak out on issues whenever they arise, not only through voting on election day. So long as an organization is engaged in peaceful advocacy, even if it is critical of the government, or concerning issues before voters in an election, it should be entitled to do so as a matter of right, regardless of who funds it.

²⁵ Letter from Human Rights Watch to the United Nations Human Rights Council, "Addressing the Pervasive Human Rights Crisis in Ethiopia," June 2, 2017, <https://www.hrw.org/news/2017/06/02/addressing-pervasive-human-rights-crisis-ethiopia>.