

Submission to the review of the Tasmanian Electoral Act

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The views expressed in this submission are those of the authors and not the University of Tasmania.

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Executive Summary

This submission to the Tasmanian Government's review of the *Tasmanian Electoral Act 2004* makes five recommendations in response to the Review's *Interim Report* which, once implemented, will ensure that Tasmania has among the most transparent campaign disclosure frameworks in Australia. This will help to ensure the legitimacy and integrity of the Tasmanian electoral process. Our recommendations are based on recent reforms in other Australian jurisdictions and international best practice.

Our key recommendations include:

1. Establishing a state-based disclosure regime to report donations to political parties above \$1000 and spending above \$1500 (including aggregates), with disclosures being reported to the Tasmanian Electoral Commission (TEC) within seven days in the 12 months prior to an election, and made available to the public via an on-line portal.
2. Third-party groups should also be required to disclose political donations above \$1000 and spending on campaigning and campaign-related issues above \$1500.
3. Individual candidates and parties should produce separate disclosure reports to account for intra-party competition between candidates in the same electorate under Hare-Clark.
4. Other Australian jurisdictions have introduced spending caps and public funding for political parties contesting elections. Although the main priority for Tasmania should be on enhancing transparency and improving campaign disclosure, if public funding and spending caps are introduced we suggest that public funding should be modest and designed to meet the administrative costs associated with complying with a disclosure regime. Expenditure caps could be applied to candidates seeking election in the House of Assembly to bring it into line with the Legislative Council, but an additional statewide cap would apply to parties based on the number of candidates they field.
5. Implementing a more robust and effective disclosure regime will require a modest investment, but this is necessary to ensure the integrity of the electoral process in Tasmania. Wherever possible, Tasmania should share resources and administrative systems with other Australian jurisdictions.

1. Introduction

We welcome this opportunity to contribute to the review of the Tasmanian Electoral Act.

This submission focuses specifically on the discussion questions identified in sections 2 and 3 of the *Interim Report* on the issues relating to campaign disclosure, electoral expenditure and funding, and third-party regulation. The analysis draws on and expands the Institute for the Study of Social Change's July 2018 submission to the *Review*. The views contained in this submission are those of the authors, and not the University of Tasmania.

On 5 April 2019 the Institute for the Study of Social Change convened an expert workshop of electoral researchers and professionals from around Australia, in partnership with the Electoral Regulation Research Network, on the reform of the *Tasmanian Electoral Act*. Many of the findings and discussion points raised in this workshop have been included in this submission.

The two most prominent themes which emerged from the workshop discussion were:

- The need to strike a careful balance between establishing a more rigorous disclosure regime, and creating an excessive administrative burden, especially for smaller actors.
- An effective disclosure regime should not only address and curtail undesirable behaviours, but should also encourage behaviours it hopes to encourage. We believe that an effective disclosure regime should:
 - facilitate transparent, regular disclosures;
 - be accessible and clear for all actors with disclosure obligations; and
 - encourage candidates and parties to avoid overreliance on a smaller number of large donors (and the associated risk such donors may exert undue influence over political decision making) and instead seek smaller contributions from a diverse range of donors.

2. State-based disclosure

There is a compelling case for the introduction of a state-based disclosure regime.

This case has grown even stronger since the first (July 2018) consultation: the legislation adopted in Victoria in November 2018 means that Tasmania is now the only state with no state-based disclosure laws for lower house elections.¹ The Grattan Institute's recent report assessing the quality of governance across the Australian states rates Tasmania (along with the Northern Territory) as the worst in the country in terms of electoral transparency.² The Federal disclosure laws – the only disclosure required in Tasmania – have also attracted criticism for being weak and ineffective.³

In the absence of reform, Tasmania will continue to lag national and international standards. Meaning less than 25% of income received by established political parties in House of Assembly elections will be disclosed because the majority of donations are below the Federal threshold.

Weak disclosure laws also leave Tasmania vulnerable to perceptions of undue influence in policy making. Both the Grattan report into political influence and a number of recent studies note that the *perception* of undue influence – regardless of whether such influence has occurred – can corrode public trust in the democratic system and undermine the legitimacy of government.⁴

Following broad-based criticisms of the belated and partial disclosures published by the Australian Electoral Commission (AEC) this February, and in light of strong support among Tasmanian voters for reform, there is a growing expectation that the current review of the *Electoral Act* will recommend the introduction of a credible and contemporary state-based disclosure regime.

Timeframes for reporting

Disclosure laws are only effective if they provide information in a timely fashion, allowing voters, regulators, and the media to scrutinise and analyse disclosures prior to polling day. It is also worth noting the subtle yet important distinction between disclosure and transparency. Transparency is only achieved if funding data is readily available and easily scrutinised.

- Federal laws, which currently apply in Tasmania, only mandate annual disclosure each financial year, which must be released by the February of the following year. Donations can therefore be concealed from the public for up to 19 months after the receipt of the donation.
- We recommend as timely a disclosure system as possible, in keeping with the Australian and international trend towards much shorter disclosure timeframes. A seven-day disclosure period would give Tasmania, along with Queensland, South Australia and the ACT the most timely, especially during election campaigns, disclosure system in Australia.

¹ There is a cap of \$17,000 per candidate (2019, indexed) on election spending for candidates in Legislative Council elections and associated disclosure provisions.

https://www.tec.tas.gov.au/Legislative_Council_Elections/assets/LC_Candidate_Information_Booklet.pdf

² Daley, J., Duckett, S., Goss, P., Terrill, M., Wood, D., Wood, T., and Coates, B., *State Orange Book 2018: Policy Priorities for States and Territories*, Grattan Institute, 2018, p.102.

³ Edwards, L., 'The Truth About Political Donations: There Is So Much We Don't Know', *The Conversation*, 2 Feb 2018, <https://theconversation.com/the-truth-about-political-donations-there-is-so-much-we-dont-know-91003> ; Sawyer, M., 'Australia Trails Way Behind Other Nations in Regulating Political Donations', *The Conversation*, 2 June 2016, <https://theconversation.com/australia-trails-way-behind-other-nations-in-regulating-political-donations-59597>

⁴ Wood, D., and Griffiths, K., *Who's In the Room? Access and Influence in Australian Politics*, Grattan Institute, 2018, p.13; Cameron, S., and Wynter, T., 'Campaign Finance and Perceptions of Interest Group Influence in Australia', *Political Science*, DOI: 10.1080/00323187.2018.1562307;

Thresholds for disclosure and aggregation of gifts and donations

The international trend has been to lower disclosure thresholds in the interest of promoting transparency. Given that the lowest disclosure threshold in Australia (\$1000) is used in New South Wales, Victoria, Queensland, and the ACT, we recommend that this threshold also apply in Tasmania. Given the cost of advertising and campaigning is lower in Tasmania compared to larger Australian jurisdictions, there is a clear case for Tasmania to adopt the lowest national threshold.

Aggregate donations from the same donor exceeding the threshold should also be disclosed, either on an annual basis or at the end of each parliamentary term. Given that the Tasmanian House of Assembly has a four-year (non-fixed) term, the disclosure period should align with last state election with the pre-election period deemed to start three years after the last poll.

Disclosure laws concerning political donations should be as broad as possible to ensure maximum transparency and to promote compliance. This should include non-monetary and indirect forms of funding, requiring the disclosure of (among others):

- In-kind donations
- Sources of funding gathered by external fundraising bodies
- Payments for political access, including dinners and meetings.

Several experts at our workshop expressed concerns that the definition of ‘gifts’ and ‘donations’ in the Federal disclosure regime is too narrow. Gifts, loans and other payments can be used as substitutes for donations, and should be covered by a broad definition to ensure that all forms of political donations are subject to appropriate disclosure regulations. Moreover, one participant suggested that as much as 50% of party income comes from fundraising events. Ideally parties and candidates should be required to report all sources of income.

- NSW and Victoria currently have some of the broadest definitions of gifts as political donations. These cover, among others, the giving of money, services (including paid labour), loans, guarantees and property (including loan of assets) to registered parties, candidates, groups of candidates, elected members, nominated entities or third party campaigners for the purpose of helping them make a political donation or to incur political expenditure.⁵
- Victoria also provides a clear outline of what does not constitute a gift, including gifts given in personal capacities for private use, annual subscriptions or membership fees to political parties, gifts between a registered party and its nominated entity, volunteer labour, and labour shared between branches.⁶
- Any definition adopted should be broad, to capture the range of contributions made to political parties and campaigners, but also clear and understandable, to ensure effective compliance.

Additionally, the Hare-Clark electoral system in Tasmania means any State-based disclosure system would require different elements to those seen in other Lower House jurisdictions around Australia. Specifically, given that candidates from the same party are in direct competition and that candidates attract direct donations independent of their party, candidates and parties should prepare separate disclosure reports.

⁵ See *Electoral Funding Act 2018 No 20*, New South Wales, Part 2(4), and *Electoral Act 2002*, Victoria, Part 12, section 206(1).

⁶ Victorian Electoral Commission, Disclosure of political donations, 4 January 2019. Available at: <https://www.vec.vic.gov.au/CandidatesAndParties/FundingDisclosure.html>

- To ensure minor parties and individual candidates can comply with disclosure requirements, consideration should be given to providing limited financial or administrative support to candidates' returns.

Disclosure of electoral expenditure

All State and Territory jurisdictions bar Tasmania (with the exception of the Legislative Council) have expenditure reporting incorporated into their disclosure systems. This ensures political parties remain accountable to the public and that electoral practices/spending can be effectively scrutinised. The lack of transparency in relation to campaign spending in the 2018 Tasmanian Election became a significant issue for many voters.

In addition to enhancing transparency, expenditure disclosure requirements allow for closer scrutiny of spending on advertising (a major issue in most democracies), and would ensure more consistent standards between the House of Assembly and Legislative Council.

In line with legislation in other states, political parties and candidates in Tasmania should disclose individual expenses totaling over \$1500 per annum (and any aggregate expenses on the same product/service totaling over \$1500). A comprehensive approach in which parties and candidates are required to report all key types of expenditure (advertising, communications, research, data analysis) would also ensure that the information disclosed provides meaningful insight into the nature of Tasmanian political expenditure and enhances transparency.

As with donation disclosure, both parties and individual candidates should prepare separate expenditure reports, to account for multiple members of the same party running in the same electorate under the Hare-Clark system.

Implementation approaches

Effective implementation, education and enforcement mechanisms are crucial for ensuring an effective and transparent disclosure regime. Tasmania can learn from other Australian states here. In particular, Queensland has developed an efficient and effective online portal for lodging and publishing political donations and campaign spending.⁷

There was a wide-ranging discussion of the financial and administrative costs associated with establishing and administering an effective funding and disclosure regime. The consensus was that a disclosure regime could be implemented in a cost-effective manner with appropriate planning and reasonable implementation timelines. Systems savings could also be achieved by sharing database and development costs with other jurisdictions.

Of key importance to the implementation of an effective disclosure regime, is the need to keep requirements clear, consistent and achievable for donors and recipients. An accessible regime will make it easier for donors and recipients to understand and meet their disclosure obligations. As well as encouraging donors and recipients to take responsibility for their own disclosures, this will reduce the administrative burden on the Tasmanian Electoral Commission. The emphasis, especially during implementation, should be on education and compliance, rather than enforcement and punishment, to encourage a positive and cooperative disclosure culture. We also recommend providing limited public funding for administrative support to help parties, candidates and donors fulfil their obligations.

⁷ Electoral Commission of Queensland <https://disclosures.ecq.qld.gov.au/Map>

Enforcement and compliance considerations

Effective enforcement mechanisms are also essential to ensure compliance. There needs to be scope to audit disclosures to ensure the integrity of reporting. Other Australian jurisdictions can provide guidance. For example, in Victoria, the Electoral Commission has the capacity to vest authority in a registered company auditor, and request additional material and information following the initial audit.⁸

Withholding or reducing public funding is the most common way to ensure compliance; in Victoria, individuals found to have breached disclosure regulations can also be convicted of an offence and subject to up to 300 penalty units, depending on the offence.⁹

Public funding and disclosure

The question of introducing public funding for electoral expenditure in conjunction with a state-based disclosure regime raises several issues that need to be considered. A public funding system would align Tasmania with most other Australian jurisdictions and may provide an effective mechanism for ensuring compliance with new disclosure requirement, by enabling the Tasmanian Electoral Commission (TEC) to withhold or reduce funding in the event of a violation of the disclosure regime. Advocates of public funding also suggest that publicly financing election campaigns can reduce parties' reliance on large donations (and thus minimise risk of undue influence of undue influence) in addition to allowing a greater focus on policy development and communicating with the electorate rather than fundraising.¹⁰

However, the evidence that public funding reduces reliance on large private donations is limited. Rather, research in Australia indicates that, without appropriate caps on electoral expenditure and/or donations, public funding can actually lead to increases in campaign spending and would do little to reduce party reliance on private donors as they strive to increase campaign budgets.¹¹ Public funding can also favour established parties and incumbent MPs relative to emerging parties, independents and new candidates, and also reduce the need for parties to engage with civil society.¹²

In light of this evidence, we do not support general public funding for candidates or parties for political campaigning. However, we do support the provision of limited public funding for facilitating disclosure administration.

We also recommend that, if public funding is to be introduced, it should be in conjunction with caps on electoral expenditure. This would limit (though not entirely alleviate) the gap between established, larger parties and smaller, emerging parties or independents by placing an upper limit on spending, and limit the cost of public funding to taxpayers.

⁸ *Electoral Act 2002*, Part 12, Division 2 – Election Expenditure, s209.

⁹ *Electoral Act 2002*, Part 12, Division 4 – Miscellaneous, s218.

¹⁰ For a summary of the main arguments relating to public funding of elections, see Orr, G., 'Full Public Funding: Cleaning Up Parties or Parties Cleaning Up?', in Mendilow, J., and Phélippeau (eds), *Handbook of Political Party Funding*, (Northampton, MA: Edward Elgar, 2018), pp.84-102.

¹¹ Tham, J., and Grove, D., 'Public Funding and Expenditure Regulation of Australian Political Parties: Some Reflections', *Federal Law Review*, 32, 2004, p.411-12

¹² Tham and Grove, 'Public Funding and Expenditure Regulation of Australian Political Parties', p.413; Francia, P.L., Herrnson, P.S., 'The Impact of Public Finance Laws on Fundraising in State Legislative Elections', *American Politics Research*, 31(5), 2003, pp.520-539.

Caps on electoral expenditure

Reflecting trends in other Australian jurisdictions, we believe that the focus of reform should, in the first instance at least, be on the disclosure of donations and spending rather than on imposing spending caps on political parties and candidates contesting House of Assembly elections.

As noted in our July 2018 submission, analysis of per capita expenditure disclosed in the AEC database demonstrates that Tasmania's spending is, while high compared to the national average, not outside the norm for smaller states.¹³

Nonetheless, expenditure caps can reduce the demand for private donations and limit the influence of large private donors relative to smaller donations,¹⁴ which may reduce the risk of undue influence on political decision making. Moreover, expenditure caps apply to Legislative Council elections and applying them to House of Assembly elections would enhance the consistency of Tasmanian electoral law. Paired with public funding, caps can also ensure that public funding achieves its intended purposes, and that the cost to taxpayers is not too high.

- Expenditure caps, if applied, should be effective for the final year of a parliamentary term given that paid advertising can commence prior to the formal campaign period.
- The level of and design of expenditure caps would also require careful consideration. For example, caps for individual candidates contesting House of Assembly elections could be aligned with those which apply in the Legislative Council Election with larger 'global' cap applying to parties fielding candidates state-wide.

In response to consultation issue 20, concerning what level of expenditure could be justified, we suggest a joint system for candidates and parties:

- \$30,000 per individual candidate, plus for parties \$30,000 per candidate with a total cap of \$750,000 (25 candidates in total across the State).

At our 5 April workshop, we discussed whether an expenditure cap on parties or candidates is likely to be unconstitutional in light of the recent UNSW Unions case. The view from experts in Australian electoral law is that it is very likely the High Court would uphold a wider state-level expenditure cap such as outlined above especially given the long-tradition of such caps in the Legislative Council.

Caps on donations

Some jurisdictions (NSW and Victoria) impose caps or bans on certain types of donors. While there have been calls for such measures in Tasmania we believe that reforms should, in the first instance, focus on strengthening disclosure provisions and imposing caps on campaign expenditure. There was also a widely held view among workshop attendees that caps and bans on donations with sectoral groups should only be imposed after proven cases of corruption and that bans on foreign donations are largely symbolic and extremely difficult for sub-national jurisdictions to enforce.

¹³ Eccleston, R., and Gribble, N., Submission to the review of the *Tasmanian Electoral Act 2004*, Institute for the Study of Social Change, University of Tasmania, 20 July 2018, p.9.

¹⁴ Anderson, M., Tham, J., et al, 'Less Money, Fewer Donations: The Impact of New South Wales Political Finance Laws on Private Funding of Political Parties', *Australian Journal of Public Administration*, 77(4), 2017, p.798.

3. Regulation of third parties

As with the growing case for more robust disclosure laws for political parties, there is a clear case to enhance disclosure and potentially regulate political expenditure of third-party entities who seek to influence political decision making and election campaigns. Indeed evidence from Australia and beyond suggests that third-party campaigning at arms-length from political parties has become more prominent in recent years, and is perhaps the most common strategy for influencing election outcomes and political decision making.¹⁵ Indeed, evidence from US-based studies in particular demonstrates that restricting private donations to registered party and candidate campaigns (through donation caps or bans, or through expenditure caps) can result in individual donors redirecting their resources directly towards other political organisations and lobby groups willing to promote their cause.¹⁶ This 'hydraulic theory' of campaign finance highlights the fact that the demand to contribute to, or influence, elections does not diminish even if the ability to do so through traditional party-based donations is restricted. In turn, this highlights the need to ensure rigorous and transparent disclosure laws not only for political parties, but for all political organisations engaging in campaign activities.

There may be growing evidence that a wide range of interest groups seek to influence elections independently of candidates and parties, yet it is also important to note that there are three distinct challenges when applying disclosure laws to third parties. These include:

3.1 Defining third party political activity

Debate over what constitutes political spending tends to focus on two types of definition. A narrow definition of third-party political activity tends to focus on election material or any spending or activity designed to encourage electors to vote in a particular way (e.g. to vote for a candidate or party, or to vote for/against particular policies/issues). A broader approach attempts to focus on any activity design to influence or promote 'political issues'. While defining political issues broadly can be difficult and involves establishing a number of objective tests, this approach may be necessary to limit undue influence given the clear potential for carefully designed issue-based campaigns to influence voting behavior without explicitly referring to political parties, candidates, policies or elections.

Existing definitions of third-party political activity in other Australian jurisdictions tend to focus on political advertising, communication and activity that focuses directly on a candidate, party or influences voting. However, if we look to international models such the Canada Elections Act there are definitions of third-party activity which are broader than those which currently apply in other Australian states. For example, the Canadian Act (s319) defines political activity as the promotion of "an issue with which a registered party or candidate is associated". The aim here is achieve disclosure of spending on issues of relevance to a campaign without requiring disclosure of all spending in relation to a wide range of issues, given the potential for almost all advocacy groups to drawn into a political disclosure regime.

Recent research suggests that most third-party activity takes the form of print and broadcast advertising.¹⁷ However, there was a detailed discussion the 5 April workshop of the changing nature

¹⁵ Wood and Griffiths, *Who's In the Room? Access and Influence in Australian Politics*.

¹⁶ La Raja, R.J., and Schaffner, B.F., *Campaign Finance and Political Polarisation: Purists Prevail*, (Michigan University Press, 2015); Sullivan, K.M, 'Against Campaign Finance Reform', *Utah Law Review*, 1998, p.311.

¹⁷ Wood and Griffiths, *Who's In the Room? Access and Influence in Australian Politics*, p.63.

of campaigning with many attendees highlighting the fact that cutting-edge campaign organisations are spending less on advertising (traditional and on-line) and more on ‘back room’ data mining and analysis to identify key households in marginal electorates to be targeted directly by campaign workers. Any definition of third-party activity should incorporate these emerging campaign strategies while acknowledging that they will be difficult to detect and that enforcement will be challenging.

3.2 Determining what constitutes a third party

Having defined what constitutes third-party political activity it is also necessary to determine what organisations and entities should be subject to the regime. We argue that the principle the legislation is trying to promote is to limit the undue influence of well-resourced actors and interest groups without limiting broader civil society engagement in election campaigns and the political process more generally.

Any third-party regulation needs to take care not to place an undue administrative burden on small third-party groups, especially given that many of these organisations work directly with grass roots community groups and minorities who may struggle to make their voices heard during political campaigns. In addition to ensuring that the definition of third-party political activity excludes general issue advocacy, it is also important to set disclosure thresholds high enough so that small organisations and grassroots campaigns aren’t drawn into the third-party disclosure system.

3.3 Thresholds, caps and jurisdictional considerations

Applying equivalent disclosure requirements for both political parties and third parties (spending over \$1500 and donations over \$1000) would ensure transparency and uphold the key democratic principle of fairness. It would also identify the flow of donations from (regulated) parties to (unregulated) third parties by requiring all actors engaging in political activity to adhere to the same regime. Concerns about the distinction between third parties and affiliate groups can also be addressed by granting the Tasmanian Electoral Commission the investigatory powers to make an accurate determination.

NSW and ACT have imposed expenditure caps on third-party political expenditure. Given the recent NSW Unions case we suggest that the immediate focus of third-party regulation should be on promoting disclosure of third-party spending on political activity rather than on imposing expenditure caps.

A final challenge for third party regulation at a sub-national level are the jurisdictional limits of state law. Whereas political parties or candidates must be registered at a state level, third party organisations may not have any presence in Tasmania (or even Australia). Given the growth of digital platforms and streaming, third-party organisations may not use local media outlets to disseminate their message adding to the challenges of enforcing third-party regulations. Despite these challenges, it’s important to introduce third-party disclosure provisions to create a clear expectation that any organisation seeking to influence elections in Tasmania should disclose expenditure in a timely manner.

Given the challenges associated with regulating third-party political activity combined with the rapidly changing nature of political campaigning, any framework for regulating third parties needs to be subject to regular review and respond to the rapidly changing political environment.