



Australian Government



Australian
Charities and
Not-for-profits
Commission

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Joint Standing Committee on Electoral Matters
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Submission to the Inquiry into the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017

1. The Australian Charities and Not-for-profits Commission (**ACNC**) welcomes the opportunity to provide a submission to the Inquiry (**Inquiry**) into the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017 (**the Bill**). This submission focuses on the impact of the Bill on the ACNC and on charities registered with the ACNC that incur 'political expenditure'¹ including those charities that receive foreign donations. The submission also addresses the possible new requirements for registered charities to report to the ACNC on its AEC reporting.
2. The Bill aims to increase transparency in political expenditure and restrict the ability of foreign money to finance domestic election campaigns. It does this by establishing public registers for key non-party political actors, enhancing the current financial disclosure scheme, and prohibiting foreign donations for political expenditure.² This applies to any entity which undertakes political expenditure. This submission deals with the effect of the Bill on charities registered with the ACNC.

Summary of the ACNC's submission

3. The ACNC has four main areas of concern, which this submission details. These concerns are:
 - The Bill places an unnecessary regulatory burden on charities registered with and regulated by the ACNC.
 - The significant penalties for non-compliance as set out in the Bill are likely to increase the difficulty for charities attracting qualified staff and Directors, posing a risk to individual charities and the sector as a whole.
 - The Bill introduces legislative inconsistencies with the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) (**ACNC Act**) on allowable political activity. This legislative inconsistency is likely to reduce advocacy by charities,

¹ Under the Bill, 'political expenditure' would mean expenditure incurred for one or more 'political purposes'.

² Summarised from paragraph 6 of the Explanatory Material.



thereby reducing the avenues available for them to achieve their charitable purpose.

- There is currently no provision in the Bill for the proposed changes to the ACNC Act to enable the reporting of political expenditure to the AEC to be included on the ACNC Register, as was foreshadowed by the Minister for Revenue and Financial Services in December 2017.

The ACNC's role

4. The ACNC was established on 3 December 2012 by the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) (**ACNC Act**). The objects of the ACNC Act are to:
 - maintain, protect and enhance public trust and confidence in the Australian not-for-profit sector; and
 - support and sustain a robust, vibrant, independent and innovative Australian not-for-profit sector; and
 - promote the reduction of unnecessary regulatory obligations on the Australian not-for-profit sector.³
5. Just over 55,600 charities are regulated by the ACNC.⁴ Australia's charities deliver services, make grants and perform a wide range of other activities to advance health, education, welfare, religious and other charitable causes. Charities range in size from extra small (less than \$50,000 – 39.8% of all charities) to extra large with revenue over \$100 million (0.3% of all charities). Half of charities have no paid staff, and the sector is supported by 2.9 million volunteers.⁵

How charity law applies to political activities of registered charities

6. To become and remain a registered charity under the ACNC Act, among other requirements, a not-for-profit organisation must meet the definition of 'charity' in the *Charities Act 2013* (Cth) (**Charities Act**). Political parties are explicitly excluded from the definition of 'charity'.⁶
7. To be a registered charity, an organisation must have a charitable purpose. The Charities Act lists 12 charitable purposes⁷, which includes 'the purpose of promoting or opposing a change to any matter established by law, policy or practice in the Commonwealth, a State or a Territory or another country' provided that the advocacy is in furtherance or aiding in one or more of the 11 other charitable purposes.⁸

³ ACNC Act, section 15-5.

⁴ As of 5 January 2018. See www.acnc.gov.au for the most up to date figure for registered charities.

⁵ 2016 Australian Charities Report – available [here](#).

⁶ Sub-section (d) of the definition of charity in section 5 Charities Act

⁷ Section 12 Charities Act

⁸ In 2010, the High Court of Australia held in *Aid/Watch Inc v Federal Commissioner of Taxation* identified a public benefit to such advocacy in its contribution to public discussion, which informs voters as well as policy-makers.



8. A registered charity must not have a 'disqualifying purpose'. The meaning of disqualifying purpose is set out in section 11 of the Charities Act, and includes 'the purpose of promoting or opposing a political party or a candidate for political office'.
9. However, it is not a disqualifying purpose to distribute information, or advance debate, about the policies of political parties or candidates for political office (such as by assessing, critiquing, comparing or ranking those policies) (see the example given in section 11 of the Charities Act). Therefore a registered charity may carry out activities permitted under the Charities Act that will come within the proposed definition of 'political purpose' in the Bill.
10. If a charity expends sufficient funds for a 'political purpose', it may mean the charity meets the definition of 'third party campaigner' or 'political campaigner', and would be subject to the requirements proposed by the Bill.

Political purpose and charitable purpose

11. The Bill defines political purpose as

political purpose means any of the following purposes:

- (a) the public expression by any means of views on a political party, a candidate in an election or a member of the House of Representatives or the Senate;
 - (b) the public expression by any means of views on an issue that is, or is likely to be, before electors in an election (whether or not a writ has been issued for the election);
 - (c) the communicating of any electoral matter (not being matter referred to in paragraph (a) or (b)) for which particulars are required to be notified under section 321D;
 - (d) the broadcast of political matter (not being matter referred to in paragraph (c)) in relation to which particulars are required to be announced under subclause 4(2) of Schedule 2 to the *Broadcasting Services Act 1992*;
 - (e) the carrying out of an opinion poll, or other research, relating to an election or the voting intentions of electors;
except if:
 - (f) the sole or predominant purpose of the expression of the views, or the communication, broadcast or research, is the reporting of news, the presenting of current affairs or any editorial content in news media; or
 - (g) the expression of the views, or the communication, broadcast or research, is solely for genuine satirical, academic or artistic purposes.
12. Under this broad definition of political purpose, it is likely that some charities would have a political purpose. Under the Charities Act, a charity can undertake advocacy and campaigning on relevant issues as a legitimate way of furthering its charitable purpose. In the lead-up to the 2016 Federal Election, the ACNC issued public guidance to assist charities in understanding their obligations under the



Charities Act in relation to political campaigning and advocacy. This guidance was previously provided to the Joint Standing Committee⁹.

13. These differences between the Charities Act and the amended CEA may affect a charity's ability to undertake some forms of advocacy and may decrease the amount of advocacy work undertaken by charities that are unable to meet the proposed regulatory burden and the risk of non-compliance as set out in the new regime.

Regulatory burden – increased reporting

14. The ACNC notes that there are existing requirements in the CEA for third parties to report political expenditure over the disclosure threshold and gifts they received which were used for political expenditure where the gift was over \$10,000. Nine registered charities reported to the AEC under these requirements in 2015-16. On 14 September 2017 the *Act to amend legislation relating to electoral and broadcasting matters, and for related purposes 2017* amended the definition of political purpose, which will come into effect in March 2018. Under the new definition it is likely more charities will be required to report to the AEC and the Bill also increases the regulatory requirements for each individual charity engaged in political expenditure over the threshold amount.
15. The Bill introduces a new category of 'political campaigner'. It also introduces new reporting requirements for third parties. The complexity of the definition of political campaigner could lead to difficulties for charities in interpreting how it applies to their situation. The ACNC notes that of the nine charities submitting returns to the AEC in 2015-16, seven would be required to register as political campaigners under the proposed section 287F, rather than the less onerous third party campaigner category.
16. The information required under the proposed section 314AB includes total receipts and total expenses, not just receipts and expenses relating to political expenditure. Requesting information on the total receipts and expenses of a charity such as Oaktree Foundation Australia (which submitted a return to the AEC in 2015-16) and total outstanding debts, including details of each debt could be perceived as an unnecessary regulatory burden without assisting the AEC to meet the objects of the Bill. As noted above, one of the objects of the ACNC Act is promote the reduction of unnecessary regulatory obligations on the Australian not-for-profit sector, including charities.
17. Advocating on issues is one activity charities can lawfully perform in the furtherance of their charitable purpose. The requirements of the Bill do not recognise the additional burden the reporting requirements places on charities.
18. The ACNC already requires registered charities to complete an annual information statement (AIS) which includes similar, but not exactly replicable information to some of the information referred to above. The ACNC AIS is due six months after the end of the charity's reporting period, noting that not all charities report on a

⁹ The guidance is available at www.acnc.gov.au/advocacy



financial year basis¹⁰. Returns to the AEC are required within 16 weeks after the end of the financial year¹¹. This duplicative reporting increases the regulatory burden on registered charities, particularly, but not limited to, those charities that do not report on a financial year basis.

19. The Bill also requires submission of an auditor's report at the same time the annual return is provided to the AEC. Under the proposed section 314ABA, the auditor's report must state whether the return satisfies the requirements of the CEA. Currently, only large registered charities (those with annual revenue of \$1 million or greater) must submit an auditor's report to the ACNC.
20. A medium sized charity (that with an annual revenue that is \$250,000 or greater but less than \$1 million) can have its financial report reviewed rather than audited.¹² A medium sized charity under the ACNC Act could be a 'political campaigner' according to the definition in the Bill and therefore be subject to far greater reporting requirements than those that currently exist, and be required to submit an auditor's report. Not only is this an increased reporting burden, but it also brings an increased cost to charities. This would apply to both medium and large charities that would fall within the definition of 'political campaigner' under the Bill.

Regulatory burden – receipt of gifts used for political expenditure

21. Under the Bill, gifts of a certain amount to third party campaigners and to certain political campaigners from non-allowable donors must not be made or used for political purposes. The Bill proposes some exceptions such as where the campaigner seeks information about the donor's status. That is, the campaigner obtains a statutory declaration from the donor declaring they are an 'allowable donor'. This requirement places an additional burden on charities that by their nature collect donations from a variety of sources.
22. While the Explanatory Memorandum does state that gifts under \$250 can be anonymous, this is not feasible under the regime proposed by the Bill. Donations less than \$250 can be from anyone, but cumulatively over the course of a financial year, donations over \$250 from a single person or entity must be from an allowable donor. This means that a charity must know who has given every single donation to ensure that all summed donations over \$250 came from allowable donors. This also means that charities must get a statutory declaration from every donor donating more than \$250 cumulatively in a financial year for political purposes.

¹⁰ ACNC Act, sections 60-5 and 60-85

¹¹ Financial year does not seem to be defined in either the bill nor the CEA, therefore the standard financial year of 1 July to 30 June is assumed.

¹² A review provides a lower level of assurance than an audit. In rare cases, the ACNC Commissioner may give a written notice to a medium charity indicating that the option of having its financial report reviewed does not apply and the charity is therefore required to provide an auditor's report (ACNC Act, s.60-20).



23. Charities may not be aware at the point of donation receipt that the application of such funds may be defined in the future as a political purpose. As stated above, for the purposes of the Charities Act, advocating for a particular policy position may be a legitimate activity for a charity to undertake to further its charitable purpose. The expression of these views may not appear to be on issues which are likely to be before electors in an election at the time the charity is advocating for change. Or conversely, the charity may think that the issue *will* appear before the electors at election time and then it does not. The charity has then committed time and resources to being compliant with the requirements proposed under the Bill (e.g. obtaining statutory declarations from donors) which do not apply. The difficulty in deciding whether an issue is likely to be before electors in an election may cause charities to cease advocating, which limits their ability to further their charitable purposes. Such limits may be inhibiting to individual charities and the charity sector and stifle their ability to advocate.
24. The Bill makes no reference to a time limit on advocacy. If a charity were advocating in, for example, January 2018¹³ on the issue of waste and recycling, and an election were called in June 2019 where one of the issues raised was waste and recycling, would the charity be in breach of its obligation to register as a third party or political campaigner? If the charity did not request statutory declarations from its donors, would it not be entitled to claim the exception from contravening the relevant donation restrictions? When would the penalties be backdated to?
25. A final cause of concern relates to banking requirements. Gifts from non-allowable donors to political campaigners must be kept in a separate account. One element of the recently announced reform to the Deductible Gift Recipient schemes is the abolition of the requirement for DGR funds to be kept in a dedicated account. The DGR reform was premised on the ability of accounting practices to adequately account for how ear-marked funds are actually used. Requiring separate bank accounts increases the costs of doing business for charities, and increases their administrative workload.
26. We note that third party campaigners do not have this requirement for a separate bank account. However, proposed section 302E will require a high degree of administration. The charity will be required to calculate their allowable amount and ensure they do not spend more on political expenditure than this. This will require statutory declarations from a large subset of donors within six weeks of receiving the gift, to be able to ensure the gift can be used for political expenditure without contravening provisions of the Bill. In addition, the charity will have to be able to assess its allowable amount at any time in the financial year to ensure political expenditure does not exceed this.

¹³ Through an advertising campaign lasting one month which incurred expenditure exceeding the disclosure threshold



Branches

27. We note that the proposed section 287(8) states that a political campaigner or third party campaigner that has branches, is for the purposes of this Part, to be treated as a single political campaigner or third party campaigner. Neither the CEA nor the Bill define 'branches'. The ACNC has a large number of charities which could be perceived as branches of a larger organisation, depending on how branch is defined. Requiring these branches to report as a single campaigner may also impose a considerable burden on the charities involved, as decision making and budgeting is often devolved¹⁴. The ACNC would suggest that where a branch is registered as a separate charity with the ACNC, it be considered a separate campaigner.

Possible reduction in funds

28. With the new requirement for donations to come only from allowable donors, and for donors to complete a statutory declaration stating they are allowable, it is likely that there will be less funds available for charities to undertake advocacy work. This is because of the administrative overhead in maintaining separate accounts or calculating allowable amounts, ensuring statutory declarations are kept, and ensuring that all activity relating to a 'political purpose' is contained in projects separate to other work to minimise the risk of cross-contamination of funds.

29. Charities perform an important role in Australian society, and their experience provides depth to public discussion. The charity sector plays a distinctive role in Australia, a role recognised in legislation (see section 15-10(h) of the ACNC Act). The charity sector is already regulated, including in preventing a registered charity from having the purpose of promoting or opposing a political party or candidate for political office¹⁵.

Interaction with the withholding provisions of the ACNC Act

30. Both the AEC and the ACNC have Registers where information is published. The ACNC Register contains information on all charities registered by the ACNC, including Annual Information Statements. The ACNC Act legislates the information displayed on the ACNC Register.

31. The CEA legislates the information published by the AEC. Broadly, the AEC provides information on political expenditure by political actors, and information on donations over \$10,000 given and received. This information is in the form of annual returns. The Bill establishes a Register for Political Campaigners and a Register for Third Party Campaigners. These registers will contain annual returns from the campaigners. The Bill also amends the reportable amount from \$10,000 to 'the disclosure threshold'.

¹⁴ Without a definition of 'branch' it is difficult for the ACNC to be more prescriptive about the potential difficulties.

¹⁵ Part (b) of definition of disqualifying purpose in s 11 Charities Act 2013



32. The Bill provides that if someone gives a donation to fund political expenditure, the amount of which is over the disclosure threshold, the donor must submit an annual return to the AEC¹⁶ and the gift recipient must include information regarding the donation and the donor in their annual return to the AEC. (See proposed section 314AEC for third party campaigner requirements, proposed section 314AB for political campaigners (which refers to existing section 314AC of the CEA, 'Amounts received', and proposed section 305B for the donor (this must be read in conjunction with existing 305B¹⁷).)
33. Where the donor is a trust or foundation, the information reported by the gift recipient includes the names and addresses of the trustees, and the title, name or other description of the trust fund or foundation. These annual returns are to be published by the AEC under proposed section 320. Some trusts and foundations are registered charities with the ACNC. The ACNC Act (see section 40-10) provides for the ability of the Commissioner to withhold information from the ACNC Register under certain circumstances. This can include the names and address of trustees of trusts which are registered charities if the publication of a person's name is likely to result in the identification of an individual donor (section 40-10(1)(g) of the ACNC Act, and item 4 of the table in section 40.10(2) of the *Australian Charities and Not-for-profits Commission Regulation 2013*). There may be circumstances where the Commissioner would consider withholding trustee information from the ACNC Register, but that similar information is required to be displayed on an AEC Register. This leads to inconsistencies between requirements of different Commonwealth Acts.
34. The ACNC Register contains the name of responsible persons¹⁸ of registered charities. Responsible persons are analogous to the concept of 'senior staff' as defined by the Bill. The Bill requires that annual returns contain the details of senior staff of the campaigners (proposed sections 314AB, 314AEA(1), and 314AEB(2)). While the ACNC Register does display names of responsible persons such as directors, it does not display any other personal information. Further, names of responsible persons can be withheld from the ACNC Register if the information could endanger public safety (see section 40-10(2)(d)). There are no similar clauses in the Bill in regards to senior staff of third party or political campaigners. The ACNC suggests that the Bill should cater for certain circumstances in which the publication of personal information on the AEC Register would not be appropriate.

¹⁶ Only if the gift was to a political campaigner. It does not seem that gifts over the disclosure threshold to third party campaigners need to be reported by the donor.

¹⁷ The amount of information regarding the donor is not prescribed in the proposed Bill or in the CEA. Rather, the CEA (section 305B(4)) requires the information to be in a return which must be the approved form. The current approved form requires the name/title and address of the organisation making the donation, and the name, capacity or position, and postal address of the person completing the form. If this form does not change, the ACNC considers this does not conflict with withholding provisions in the ACNC Act in relation to trustees.

¹⁸ The term 'responsible entity' refers to those who have one of the positions described in s.205-30 of the ACNC Act. The ACNC refers to 'responsible entities' of charities as 'responsible persons'.



35. The ACNC would therefore suggest that charities be excluded from the requirement to report on senior staff where the ACNC has decided to withhold this information from the ACNC Register. Further, campaigners should be excluded from the duty to provide the names and addresses of donor trustees of trusts where the trust is a charity and the information is withheld from the ACNC Register.

Associated Entity

36. A charity's policy position on a matter may be similar to, or align with that of a particular political party. Under the Charities Act, it is permissible for charities to continue to campaign on that issue, providing that it does not amount to the charity having a purpose of promoting or opposing a particular political party or candidate. The ACNC guidance on elections and advocacy states that a charity must maintain independence from party politics.
37. There may be occasions where a charity is required to register as an 'associated entity' under the definition provided in the Bill. While it appears that very few charities would meet the definition of 'associated entity' set out in proposed section 287H of the Bill, there may be occasions when the AEC decides a charity is an associated entity, based on proposed paragraph 287H(5)(b) where:
- the expenditure incurred in the relevant financial year is predominantly political expenditure;
 - that expenditure is used predominantly to oppose the policies of a registered political party; and
 - this may lead to an unintended benefit to another registered political party or parties¹⁹.
38. Such a characterisation may be inconsistent with the Charities Act.

Increased penalties

39. The ACNC notes the higher penalties set out in the Bill, and the fact that often penalties for breaches are cumulative e.g. every day that a third party or political campaigner fails to register past the date when they are required to do so is a separate contravention. Charities are often reliant on donations for their funding, and are frequently run by volunteers who are seeking the betterment of society. The level of the suggested penalties will have a greater impact on charities than other organisations. Publication of political expenditure data and compliance information on the AEC Registers may achieve the purpose of the Bill in itself, without further penalties.

¹⁹ The Explanatory Memorandum makes clear that intent to benefit is not necessary to demonstrate association (paragraph 61).



40. Of particular concern to the ACNC is the burden on the financial controller. It is the financial controller who is responsible for some contraventions of the Bill (such as receiving donations over \$250 for political purposes from non-allowable donors and not taking acceptable action within six weeks of the gift having been made), and in the instance of some contraventions can be liable for up to 10 years in jail or 600 penalty units.
41. The charities sector already faces a challenge of finding appropriately skilled personnel as staff and for governance positions. The introduction of substantive penalties for financial controllers will, in our view, make it more difficult to recruit to charities and will adversely impact on the governance of the sector.

Legislative changes to the ACNC

42. On 5 December 2017, the Hon Kelly O'Dwyer, MP, Minister for Revenue and Financial Services, released information to the media on "Reforming administration of tax deductible gift recipients"²⁰. In this media release, the Minister stated that "the ACNC will publish charities' declarations of political expenditure to the AEC . . . in the Annual Information Statement". The ACNC Act will require amendment to enable this to occur. This Bill does not provide for these legislative changes.

Further information

43. The ACNC is able to provide further information on any of the concerns raised above, should this be useful to the Joint Standing Committee on Electoral Matters. Contact information is provided below.

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²⁰ <http://kmo.ministers.treasury.gov.au/media-release/114-2017/>