



Law Council
OF AUSTRALIA

Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017

Joint Standing Committee on Electoral Matters

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2018 Executive as at 1 January 2018 are:

- Mr Morry Bailes, President
- Mr Arthur Moses SC, President-Elect
- Mr Konrad de Kerloy, Treasurer
- Mr Tass Liveris, Executive Member
- Ms Pauline Wright, Executive Member
- Mr Geoff Bowyer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council is grateful to the Not-for-Profit Legal Practice and Charities Group of the Legal Practice Section, the Constitutional Law Committee of the Federal Litigation and Dispute Resolution Section, and the National Human Rights Committee in the preparation of this submission.

Introduction

1. The Law Council welcomes the opportunity to provide this submission to the Joint Standing Committee on Electoral Matters (**the Committee**) regarding its inquiry into on the Electoral Funding and Disclosure Reform Bill 2017 (**the Bill**).
2. The Bill proposes:
 - (a) public registers for ‘key non-party political actors’;
 - (b) registration requirements including complicated analysis of funding and application, additional accounting management and additional non-financial matters to be reported;
 - (c) prevention of the use of donations over \$250 from foreign entities to fund ‘political purposes’; and
 - (d) enforcement and compliance requirements relating to political finance regulation which significantly in the case of charities will be placed on their financial controllers.¹
3. In the timeframe available for response, and given the extensive number of Bills introduced for inquiry over the December-January period, the Law Council has not had the opportunity to comprehensively assess the Bill. This submission focuses on the Bill’s impact on charities.
4. Key recommendations contained in this submission include:
 - Charities should be exempt from registration and the consequent compliance obligations.
 - Activities within charitable purposes, as permitted by the *Charities Act 2013* (**Charities Act**) and regulated by the Australian Charities and Not-for-profits Commission (**ACNC**), should not be included in the proposed electoral funding, disclosure and transparency reforms.
 - The definition of ‘political purpose’ should reflect the purpose of the activity (rather than the activity per se) so as to exclude charities carrying out their charitable purposes.
 - If charities are not exempted from the requirements under the Bill, further review is required to reduce the potential and unnecessary burden of the compliance obligations, for example through a proportional or scaled set of obligations.

Unnecessary additional regulation of charities²

5. One of the objects of the ACNC is to promote the reduction of unnecessary regulatory obligations on the Australian charitable sector.³ There are numerous unnecessary regulations on charities and government policy has focussed on reducing the

¹ Explanatory Memorandum, Electoral Funding and Disclosure Reform Bill 2017, para 6(a).

² This material has been provided by the Law Council’s Not-for-Profit Legal Practice and Charities Group of the Legal Practice Section.

³ *Australian Charities and Not-for-profits Commission Act 2012* (Cth) s15–5(1)(c).

regulatory burden so as to maximise the time and the funds of charities being applied to pursue their purposes.

6. As a result, the Law Council is concerned with any new legislation which requires charities to be subjected to additional registration and reporting requirements or which includes obligations which overlap or are inconsistent with requirements existing under the principal legislation relating to charities.
7. The Law Council submits that as currently drafted, the Bill is too broad and onerous in its application to charities and it will, if passed, result in unnecessary regulation. This view is also replicated in the Law Council's submission to the Parliamentary Joint Committee on Intelligence and Security regarding the Foreign Influence Transparency Scheme Bill 2017.
8. While the Law Council supports the broad policy objectives in the suite of reforms, designed to address concerns regarding undisclosed foreign influence on public opinion and government policy, there may be unintended consequences for the charitable sector arising from unnecessary regulation and a diminution of the sector's important work in raising awareness of issues of public interest.

Diminishment of public debate and awareness of issues

9. The charitable sector plays an essential role in identifying and raising awareness of issues affecting society, often especially relating to the most disadvantaged. These activities are done in pursuit of, and in accordance with, charitable purposes for the public benefit, as required by law and already regulated by the ACNC. Moreover, as the High Court of Australia stated unambiguously in the case of *Aid/Watch v Federal Commissioner of Taxation*, by raising issues and engaging in debate in the public sphere, charities make a substantial contribution to the democratic processes on which our constitutional system of government depends.⁴
10. This position is appropriately recognised under existing legislation: there is a specific charitable purpose of advocacy in section 12 of the Charities Act, the 'political party disqualifying purpose' under section 11 of the Charities Act is appropriately narrow, and the *Not-for-Profit Sector Freedom to Advocate Act 2013* prohibits provisions in contracts with Commonwealth government entities which prohibits them from engaging in advocacy.
11. Many charities would not consider their actions in raising an issue in the public arena (for example, releasing a report or research, or stating observations from the work it undertakes) to be a political act which would result in them being labelled a 'political actor'. The Law Council submits that many will refrain from undertaking this activity if the result is incurring onerous compliance requirements as proposed under this Bill.
12. The likely consequence of the Bill is therefore that charities will not raise issues which could be discussed by parliamentary members or political candidates. This will be difficult for charities operating across many areas, in particular welfare and health, as these areas often generate (as they should) significant public interest and the subject matter is such that parliamentary members and political candidates often want to bring it into the public debate.

⁴ *Aid/Watch Inc v Federal Commissioner of Taxation* (2010) 241 CLR 539, [44]-[45].

13. In most instances, it is beyond the charity's control when they release information, as to whether a political party, parliamentary member or political candidate will choose to take the issue forward in a such a manner that it becomes an issue 'before electors'.

14. It is submitted that the likely consequence of this Bill is:

- (a) charities may avoid bringing matters of public importance to the public's attention; and
- (b) parliamentary members or political candidates may avoid taking up issues brought to their attention by charities as they will be aware of the onerous consequences to the charity if they make the issue something that is 'before electors'.

Recommendation:

Charities should be exempt from registration and the consequent compliance obligations.

Inconsistency with Charities Act

15. Including activities which are permitted in pursuing charitable purposes for the public benefit, as 'political' and potentially requiring significant compliance obligations, will cause confusion with charities, the public, supporters and corporate and philanthropic funders of charities.

16. The Bill gives rise to unnecessary inconsistency and overlap with the Charities Act and regulatory requirements of the ACNC.

17. The Charities Act:

- (a) permits as a charitable purpose, the purpose of promoting or opposing a change to any matter established by law, policy or practice in the Commonwealth, a State, a Territory or another country, if it is in furtherance of and consistent with one or more of the charitable purposes under the Act;⁵ and
- (b) prohibits charities from having a 'purpose of promoting or opposing a political party or candidate for political office'.⁶ The note to this subsection of the Charities Act specifies that the prohibition 'does not apply to the purpose of distributing information, or advancing debate, about the policies of political parties or candidates for political office'.

18. Given there is already this prohibition and regulation by the ACNC, no further requirements should be imposed on charities. If additional requirements are considered necessary for charities (which the Law Council does not accept), at the very least the concepts and wording should be consistent between the pieces of legislation.

⁵ *Charities Act 2013* (Cth) s 12(1)(l).

⁶ *Charities Act 2013* (Cth) s 11(b).

Recommendation:

Activities within charitable purposes, as permitted by the *Charities Act 2013* and regulated by the ACNC, should not be included in the proposed electoral funding, disclosure and transparency reforms.

‘Political purpose’

19. The Explanatory Memorandum refers to ‘political actors’ who neither endorse candidates nor seek to form Government, *yet actively seek to influence the outcomes of elections*⁷ and who lack the public accountabilities of more traditional actors such as registered political parties or parliamentarians.⁸
20. While the Law Council accepts and supports public accountability, the Bill as currently drafted captures more than these ‘political actors’ by capturing charities carrying on their activities in pursuit of their charitable purposes.
21. A political actor is someone required to register under the Bill. The key to determining the requirement to register and consequent compliance obligations is the amount applied for ‘political expenditure’. Political expenditure means expenditure incurred for one or more ‘political purposes’.⁹
22. The definition of ‘political purpose’ has a fundamental drafting issue as paragraphs (a) to (e) are not purposes but are activities. For example, the activity of cooking can be either charitable or not, depending on the purpose for which the activity is undertaken. If the cooking activity is undertaken for a private or commercial purpose it would not be charitable but if the cooking activity was undertaken for a charitable purpose (such as feeding the homeless), it would be charitable. The definition does not address the purpose of conducting the activities listed.
23. For charities, these activities are done in pursuit of their charitable purposes and generally not done with the purpose of ‘actively seeking to influence the outcome of elections’ as referred as the intention of the reforms in paragraph 2 of the Explanatory Memorandum.

Recommendation:

The definition of ‘political purpose’ should reflect the purpose of the activity (rather than the activity per se) so as to exclude charities carrying out their charitable purposes.

24. Of particular concern for the charitable sector is the activity listed in paragraph (b) of the definition of political purpose, which states that a political purpose is ‘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)’.¹⁰
25. The public expression of views on an issue is a legitimate activity of charities if consistent with a charitable purpose. If an election has not been called (and arguably

⁷ Emphasis added.

⁸ Explanatory Memorandum, Electoral Funding and Disclosure Reform Bill 2017, para 2.

⁹ Proposed definition in s 287(1).

¹⁰ Proposed definition in s 287(1).

even if it has), for most cases it will be impossible for a charity to know whether it will become a matter before electors at the time it expresses its views.

26. For example, a charity working with homeless people may, on becoming aware of the increasing numbers of older women who are homeless, conduct a review and issue a report, on its website, to its members, to its stakeholders and, possibly, to the media, drawing attention to the increasing number of older women who are homeless. To do so is entirely consistent with its charitable purpose to raise awareness and enable other welfare bodies and philanthropic funders as well as the public to work together to prevent this occurring. A government, political party or candidate may well pick up this issue and decide to take it forward such that it becomes an issue before electors in an election.
27. It was not the purpose of the charity to influence the outcome of an election, but inconsistent with the stated intention of the Explanatory Memorandum and the use of the word 'purpose' in the defined term, this charity will be caught by the definition of 'political purpose' and if the expenditure relating this report and any other activities which similarly come within this broad definition exceeds the threshold tests, this charity will have to register.

Consequences of registration

Imposition of obligations on charities

28. In spite of not having a political purpose, as a consequence of activities done in pursuit of the charitable purposes, charities may find they have to register as either a political campaigner or third-party campaigner. For many charities the risk of being considered a political 'actor' or 'player' will be enough to shut down an expression of views as most charities consider themselves to be non-political.
29. It is submitted that involvement in assisting governments (of any politics) to develop and administer policies in accordance with an entity's charitable purpose is not intended to be caught by these reforms. This is because such involvement is not included in the policy intention in the Explanatory Memorandum. Charities which are involved in this way in furtherance of their charitable purposes should not come within the terms of the Bill or be subject to any further regulation. The ACNC already adequately regulates this area.¹¹
30. If a charity is registered, the requirements to track and disclose expenditure on activities which fall within the definition of 'political purpose' are complicated and confusing and will require significant time and costs of the charities to try and remain compliant – particularly due to not knowing until there is an election as to whether any of their previous expressions of views become matters before the electors.
31. It will require the creation of a separate bank account for foreign donations over \$250 which must not be used for activities which may fall within the definition of political purpose. As with the breadth of the proposed Foreign Influence Transparency Scheme Bill 2017, this will restrict foreign funding of valuable research and reports done by charities in pursuit of their charitable purposes. Charities will easily find themselves in breach if as a result of a report funded in whole or part by a foreign philanthropic

¹¹ See Australian Charities and Not-for-profits Commission, *Charities, elections and advocacy* <https://www.acnc.gov.au/ACNC/Reg/Charities_elections_and_advocacy_.aspx>.

organisation, a political candidate or parliamentary member takes any issue raised in the report before electors.

32. Charities will be required to assess donors and contributors to fundraising events as to their Australian citizenship, residency or head office, in the case of corporates, and their intention when making contributions to the charity.
33. Under the proposals, a political campaigner or a third-party campaigner will be required to obtain statutory declarations from all donors to establish whether or not they are 'allowable donors'. This may well deter persons from giving to a charity if they have to get a statutory declaration witnessed by someone before they can do so. While it formally only applies to donations over \$250, it also extends to donations under \$250 if the one donor has given cumulative donations up to the level of \$250. This effectively means that any type of low-level fund-raising would require the collection of details from every donor, to ensure that the \$250 barrier is not breached.
34. These requirements will significantly increase the costs of fundraising and place unreasonable compliance burdens on charities. It is submitted that the over-regulation of charities limits the ability of citizens to exercise their rights of association through charitable organisations. Such over-regulation has a tendency to impinge upon the rights protected by Articles 18 and 19 of the *International Covenant on Civil and Political Rights (ICCPR)*.

Imposition of obligations on individuals and penalties

35. The Bill proposes that every registered 'political actor' must nominate a 'financial controller' and that where the entity is a company, this is to be the secretary. For many charities the role of secretary is a voluntary role. It is inappropriate for obligations and significant penalties (including imprisonment in some cases) to be imposed on anyone who is not in fact responsible for controlling finance nor has visibility over donations and gifts and how they are applied.
36. The introduction of these requirements may require many charities to incur greater costs as personnel will need to be trained, new systems put in place and potentially new personnel recruited. If charities are not exempted from the requirements under the Bill, further review is required to reduce the potential and unnecessary burden of the compliance obligations, for example through a proportional or scaled set of obligations, as applied in the *Australian Charities and Not-for-Profits Commission Act 2012*.

Recommendation:

If charities are not exempted from the requirements under the Bill, further review is required to reduce the potential and unnecessary burden of the compliance obligations, for example through a proportional or scaled set of obligations.

Constitutional issues

37. Finally, the Law Council is aware of two possible constitutional issues that arise in relation to the Bill. The first is the threat to the implied freedom of political communication that will arise through bodies and persons restricting their engagement in public debate so as to avoid the serious burdens involved in being classified as a political campaigner or a third-party campaigner.

38. The second is a potential federalism issue. Unlike the New South Wales legislation¹² which restricts political donations only in relation to state elections, this Bill affects donations to all political parties in all circumstances, including when the money would go to funding state or territory elections. Doubts were raised in *Australian Capital Television v Commonwealth*,¹³ as to whether this was permissible, but as the legislation was struck down, it was not finally decided.
39. Therefore, it is uncertain whether the Commonwealth has the power to interfere with State elections in this way, and whether the Commonwealth has a head of power that extends to matters concerning State elections.¹⁴

¹² *Election Funding, Expenditure and Disclosures Act 1981* (NSW).

¹³ (1992) 177 CLR 106.

¹⁴ See *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 and *McGinty v Western Australia* (1996) 186 CLR 140.