



Australian Government



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Committee Secretary  
Joint Standing Committee on Electoral Matters  
PO Box 6021  
Parliament House  
Canberra ACT 2600

**BY EMAIL: [em@aph.gov.au](mailto:em@aph.gov.au)**

**Supplementary 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 supplementary submission to the Inquiry (**Inquiry**) into the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017 (**the Bill**). This submission addresses the proposed amendments to the Bill submitted by the Minister for Finance and Special Minister of State to the Inquiry on Wednesday 19 September (**Proposed Amendments**). It also highlights where these changes will not address issues raised by the ACNC in our original submission (at **Attachment A** for ease of reference) regarding the original Bill (**original Bill**).
2. The ACNC notes that the period provided for lodging submissions is seven business days. While the ACNC has considered the Proposed Amendments, it may be that further reflection will highlight additional concerns that we have not been able to identify in the limited time available.
3. As with the ACNC's original submission, this submission focuses on the impact of the Bill on charities registered with the ACNC that undertake advocacy activities to achieve charitable purposes. Our original submission provides background information on how the ACNC regulates charities, and permissible advocacy activities for charities which would also be covered by this Bill. We will not repeat this here; suffice to say that the ACNC already regulates the 'political activities' of the charity sector.<sup>1</sup>

**Summary of the ACNC's submission**

4. The ACNC recognises that the Proposed Amendments considerably streamline and better focus the proposed reporting and compliance obligations under the Bill.

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<sup>1</sup> Paragraphs 6 to 13 of the original submission set out the parameters of allowable 'political activity' under the Charities Act, for the purposes of Commonwealth charity law, which is based on a different test to that used in the original Bill.



We welcome and support the majority of the amendments, which reduce the regulatory burden that would have been imposed on charities by the original Bill.

5. In particular, replacing the definitions of 'political purpose' and 'political expenditure' with the 'electoral matter' and 'electoral expenditure' definitions will reduce the regulatory burden and restrictions on activities for charities.
6. However, the ACNC still has ongoing concerns about some aspects of the Bill. The most significant concerns are that:
  - some charities may still be required to register as political campaigners under the Bill, which would impose significant regulatory burden on the charities, and potentially prohibit any use of foreign donations over \$1,000;
  - charities which meet the definition of 'third party' and use donations for electoral expenditure would need to identify the sources of all donations received to comply with the Bill; and
  - it is not clear in all circumstances what steps must be taken by third parties to ensure that any donations below the disclosure threshold used for electoral expenditure have not been received from foreign donors.
7. A table listing the outstanding issues identified, and the ACNC's recommendations to address these issues, follows the submission.

### **Electoral matters and electoral expenditure**

8. The ACNC generally welcomes the introduction of the 'electoral matter' and 'electoral expenditure' definitions, which largely replace the 'political purpose' and 'political expenditure' terms in the original Bill. Avoiding use of the 'political purpose' term resolves any confusion with the similar defined term 'disqualifying purpose' in the *Charities Act 2013* (Cth) (**Charities Act**).
9. The new definition of 'electoral matter' proposed at section 4AA sets clearer boundaries on what constitutes relevant activities and expenditure under the Bill. Defining the term with reference to a dominant purpose will enhance the capacity of charities to determine which communications will be covered by the Bill.
10. Specifying that communications are only 'electoral matter' where they are intended to influence voting in an election, will allow charities to continue to undertake issue based advocacy to achieve their charitable purposes separate to the operation of the Bill. This largely addresses our concerns raised at paragraph 24 of our original submission, regarding the impact of changes in the political landscape on the potential treatment of advocacy activities by charities.
11. That said, there will still be a range of advocacy and communication activities that charities may undertake to achieve their charitable purposes (without breaching section 11 of the Charities Act) that may fall within the definition of electoral matter.



12. With regard to subsection 4AA(2), charities will need to make ongoing assessments about the nature of their advocacy communications, to determine what expenditure counts towards the charity's potential classification as a political campaigner or third party.
13. Having regard to the matters to be taken into account under subsection 4AA(4), determining whether some issue based advocacy by charities will constitute electoral matter may still be heavily influenced by reference to the stance of political parties or other external factors. Specifically, where obvious distinctions in political party policies exist on issues related to charitable purposes, charities may be considered to implicitly be commenting on political parties when advocating for particular issues, under section 4AA(4)(c).
14. For example, a registered charity could run an ongoing campaign advocating for an increase in social welfare benefits. The major political parties may have clear policy differences on this issue. Whether communication relating to this program is electoral matter could vary depending on timing, media focus or other factors. The charity could legitimately undertake issue based advocacy and publish information likely to directly influence voters.
15. The electoral matter definition is clearly preferable to the 'political purpose' definition in the original Bill. However, guidance from the Australian Electoral Commission (**AEC**) to assist organisations to determine whether communication is an 'electoral matter' would be welcomed by the ACNC, particularly in regard to what may constitute an implicit comment under section 4AA(4)(c).

### **Political campaigners**

16. The ACNC supports the changes to the thresholds in the definition of political campaigner. The changes will mean that far fewer charities will be required to register as political campaigners, particularly with the introduction of the electoral matter definition.
17. However, it is possible that some charities will still be required to register as political campaigners, and the potential regulatory burden for such charities would be significant. Specifically, we have concerns about the potential additional impact sections 302D and 306B could have on charities that are political campaigners.
18. The Proposed Amendments remove an exemption for registered charities previously contained in subsection 302D(1)(g) of the original Bill, which prevents political campaigners from accepting any donation of \$1,000 or more from a foreign donor. Subsection 302D(1A) specifies the requisite evidence required to demonstrate that a donor is not a foreign donor. Subsection 302D(1C) then provides a relevant alternative exception where gifts are provided on specific terms.
19. The Proposed Amendments would mean that political campaigner charities:
  - could not accept any donation of \$1,000 or more from a foreign donor, even if it had no intention of using the funds for communicating electoral



matters (unless the donor specified it was not to be used for communicating electoral matters, or electoral expenditure);

- would need to seek written confirmation that the donor of any amount from \$1,000 up to the disclosure threshold is not a foreign donor (unless the donor specifies the funds cannot be used on electoral matters); and
  - would need to obtain appropriate donor information in accordance with section 302P for any donation over the disclosure threshold.
20. The subsection 302D(1C) exception does provide a means for charities to seek foreign donations for non-electoral matter activities. However, charities which are, or in future may be, political campaigners, would still be restricted in how they could accept foreign donations. This additional regulatory burden may reduce the confidence of political campaigner charities in seeking foreign funding – particularly as the financial controller is held responsible if the donations are not properly managed.
21. Further, while only applying to donations over the disclosure threshold, the evidentiary requirements proposed in section 302P are onerous.
22. To satisfy evidentiary requirements for donations under item 1 in the table at section 302P,<sup>2</sup> charities would need to collect and retain information from individuals which goes well beyond that normally requested from donors. Many charities would not obtain the address, date of birth or other identifying details from donors.
23. Similarly, for donations from an Australian unincorporated association, the necessary evidence a charity must obtain under item 3 is particularly onerous,<sup>3</sup> and would require far more information be provided by the donor to the charity.<sup>4</sup>
24. This would still impose additional regulatory burdens on a charity, and would require the charity to seek significantly more information from Australian donors of large sums. The ACNC is concerned that a charity seeking to comply with these evidentiary requirements would have to make the process of donating more complex for donors, which may reduce the willingness of Australians to donate.
25. The ACNC recommends that the carve out for registered charities in section 302D be reinstated, particularly considering that section 302F covers a similar issue, but instead requires a positive intent to use the funds for electoral matter expenditure (be it on the part of either the donor or the charity).

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<sup>2</sup> Donations from an individual.

<sup>3</sup> This would apply to any entity which is not incorporated in Australia.

<sup>4</sup> Many charitable organisations, such as churches, are unincorporated. If an unincorporated church donated an amount over the disclosure threshold to a political campaigner charity, section 302D would necessitate that the latter seek minutes or official documents from the church to satisfy the evidentiary requirements in section 302P, to accept the donation.



26. Of similar concern, section 305B requires any donor of an amount over the disclosure threshold to provide a return to the AEC. This would include donations made to a political campaigner charity, even if explicitly stated to be for activities completely unrelated to electoral matter. The ACNC recommends that donations to registered charities be excluded from the operation of this provision, to avoid a significant additional burden imposed upon donors.
27. Separate to foreign donations, a proposed exemption for registered charities has also been removed from the operation of section 306B. The section (relevantly) requires that if a corporate donor becomes insolvent or is wound up by the court within 12 months of providing a gift of value greater than the disclosure threshold to a political campaigner, the amount can be recovered as a debt due from the political campaigner.
28. The above could apply to any donation provided to a charity registered as a political campaigner, regardless of the intention of the donor, or the use by the recipient. The ACNC recommends reinstating the carve out for registered charities, or at least providing an exception where there is no evidence that the donor or recipient intended to, or did, use the gift for electoral expenditure.
29. While it may be that very few charities will be required to be registered as political campaigners, the regulatory burden could be felt by any large charity which is uncertain of its likely electoral expenditure in a financial year. Any charity which could potentially meet the political campaigner thresholds would need to take precautions with electoral expenditure, in the event it has to register.

### **Third parties**

30. It is more likely that charities will be classified as a 'third party' under the Bill, rather than a 'political campaigner'. The ACNC acknowledges the Proposed Amendments reduce some of the regulatory burden imposed on third parties.<sup>5</sup> We support the reduction in regulatory burden achieved by no longer requiring third parties to register with the AEC.
31. The ACNC also welcomes the removal of the requirement from section 314AEB for third parties to report on the political party memberships of any 'senior staff' employed by the third party. This addresses much of our concern on this issue as noted in our original submission.
32. In relation to foreign donors, the amended sections 302E and 302F appear to be more focused on the Bill's goals, by only imposing offences upon third parties where gifts from foreign donors:
  - are for amounts over the disclosure threshold and used to incur electoral expenditure (section 302E); or
  - of any amount, but specifically intended to be used for electoral expenditure by either the donor or recipient (section 302F).

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<sup>5</sup> Compared to the definition of 'third party campaigner' in the original Bill.



33. The ACNC is supportive of the reference to intent or the actual use of funds in these provisions, which reduces the broader regulatory burden on charities which are third parties.
34. Third parties are also only explicitly required to comply with the evidentiary requirements under section 302P in relation to individual donations which are over the disclosure threshold and actually used for electoral expenditure.
35. That said, it is not clear whether a third party must take the same steps to satisfy itself that a donation of any amount used for electoral expenditure is not from a foreign donor, under section 302F. Would this section only apply if the recipient is aware (or should reasonably be aware) that the donor is a foreign donor?
36. There also still appears to be practical challenges for charities to comply with reporting under section 314AEC. Pursuant to subsections 314AEC(1)(c)(ii), (2)(b) and (2)(c), a third party which receives gifts from the same person that collectively amount to more than the disclosure threshold, and part of which it uses for electoral expenditure, must provide a return detailing information about such gifts and the donor.
37. For a charity which spends any donations on electoral expenditure to properly determine whether this has occurred, it would need to be able to determine whether any of its donations have been received from the same donor.
38. Section 314AEC(1)(c)(ii) appears to impose a positive requirement on the third party recipient to be aware of the source of the donations. For charities which may be required to submit a return as third parties, compliance could essentially still require that it track the source of all donations.
39. As with section 302F, it is unclear how far charities need to go to identify donors, and ensure they are not foreign donors. While the evidentiary requirements in section 302P are not explicitly referred to in sections 302F or 314AEC, would this requirement still need to be satisfied?
40. This is a potentially significant additional regulatory burden. Some large charities have over 200,000 donors. The logistics of complying with this provision may require such charities to review and change the ways in which they receive donations, or how they handle and use their funds.
41. The ACNC accordingly still has concerns over how the obligations on third parties could impact charities which use donations to undertake issue based advocacy as well as other charitable activities. We recommended sections 302F and 314AEC be amended to ensure compliance does not effectively require charities that are third parties to identify the sources of all donations.

### **Associated entities**

42. The ACNC supports removing subsections (4) and (5) of the proposed section 287H in the Bill, relating to the definition of 'associated entity'. However, while acknowledging that the definition now reflects the definition in the current Act, it





could still be open in some cases to classify a charity as an associated entity under section 287H(1)(b). For example, this may be the case if a coincidence of common policies between a registered charity and a political party, on a matter related to a charitable purpose, resulted in the charity's activities largely benefiting the political party.

43. The ACNC recommends charities be exempted from the requirement to register as an associated entity under section 287H. Alternatively, a note could be inserted to the effect that a registered charity will not be required to register as an associated entity merely because of a coincidence of common policies between the charity and a political party.

### **Timelines for compliance and penalties**

44. The ACNC supports extending the timeframes (often from 28 days to 90 days) within which political campaigners or third parties must comply with many of their obligations under the Bill.<sup>6</sup>
45. The ACNC also supports the changes in the penalty regime. In particular, we note and support the general reduction in the scale of penalties relating to non-compliance, as well as no longer treating breaches, such as failure to register as a political campaigner, as cumulative. These changes will help reduce the additional impact of the Bill on charities run by volunteers with less time or expertise than other organisations.
46. The ACNC also welcomes the move away from placing legal responsibility on the financial controller of third parties, and onto the entity itself.<sup>7</sup> However, there are still some instances where the Bill imposes personal responsibility for non-compliance upon financial controllers of political campaigners.<sup>8</sup> While it may be that only larger charities are likely to be political campaigners, this is still a significant burden personally imposed upon financial controllers, as opposed to the campaigner entity. The ACNC recommends political campaigners that are legal persons be held responsible for breaches of offences under the Bill, rather than their financial controllers.

### **Issues maintained from original submission**

47. Two issues raised in our original submission are generally unchanged by the Proposed Amendments.
48. In paragraphs 30-35 of the original submission, we noted concerns about how the Bill may interact with the withholding provisions in the *Australian Charities and Not-for-profits Commission Act 2012 (Cth)* (**ACNC Act**). With the exception of the amended section 314AEB no longer requiring third parties to provide details about their senior staff in returns, the other issues previously raised in this regard still remain.

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<sup>6</sup> For example, the requirement for political campaigners to register under section 287F(2).

<sup>7</sup> For example, in relation to dealing with foreign donations under section 302E.

<sup>8</sup> For example, in relation to dealing with foreign donations under section 302D.



49. The Proposed Amendments also do not introduce any amendments to the ACNC Act to allow the ACNC to publish declarations of political expenditure on the ACNC Register. This was noted at paragraph 42 of our original submission.

#### **Further Information**

50. Overall, the ACNC is appreciative that many of the concerns raised in relation to the original Bill have been addressed. However, despite these changes, the Bill as amended will impose an additional regulatory burden on charities wishing to comment on policy issues related to their charitable purpose.
51. 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.

Contact:       Natashia Allitt, Policy Manager, Legal and Policy

                  Thomas Abourizk, Legal and Policy Officer, Legal and Policy

The Hon Dr Gary Johns  
ACNC Commissioner





### Summary of recommendations

No	Relevant paras in submission	Recommendation
1.	12-15	If the Bill comes into effect, ensure the AEC provides clear guidance on what may constitute an implicit comment on a political party, under the definition of 'electoral matter' in section 4AA.
2.	17-20; 25	Consider retaining section 302D(1)(g)(i) from the original Bill to exempt entities registered under the ACNC Act from section 302D.  Alternatively, consider restricting the operation of section 302D to gifts actually spent on electoral matter (similar to section 302E(1)(f)).
3.	26	Consider amending section 305B to exclude donations to entities registered under the ACNC Act.
4.	27-28	Consider amending section 306B to exclude entities registered under the ACNC Act.
5.	19; 21-24; 34-35; 39	Consider revising the evidentiary requirements under items 1 and 3 of section 302P.
6.	32; 35; 39-40	Consider amending subsection 302F(1) to limit its application to where the relevant person knows, or ought to reasonably know, that the gift is made by a foreign donor.
7.	36-40	Consider amending section 314AEC to exclude entities registered under the ACNC Act from the application of subsection 314AEC(1)(c)(ii).  Alternatively, limit subsection 314AEC(1)(c)(ii) to only apply to gifts where the third party knows, or ought to reasonably know, the identity of donors.
8.	42	Consider exempting entities registered under the ACNC Act from being required to register as an 'associated entity' under section 287H.
9.	45	Consider amending subsections 302D(1)(a)(ii), 302F(1)(a)(ii) and 314AB(1) to refer to political campaigners, rather their financial controller.
10.	47	Consider introducing exceptions for the publication of personal or donor information on the Transparency Register where it would not be appropriate, and particularly where such information is withheld from the ACNC Register.
11.	48	Consider whether the Bill should amend the ACNC Act to allow the publication of returns submitted to the AEC on the ACNC Register.



## Attachment A- Original ACNC Submission

24 January 2018

Joint Standing Committee on Electoral Matters  
PO Box 6021  
Parliament House  
Canberra ACT 2600

**BY EMAIL: [em@aph.gov.au](mailto:em@aph.gov.au)**

### **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'<sup>1</sup> 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.<sup>2</sup> 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, thereby reducing the avenues available for them to achieve their charitable purpose.

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

<sup>2</sup> Summarised from paragraph 6 of the Explanatory Material.



- 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.<sup>3</sup>
5. Just over 55,600 charities are regulated by the ACNC.<sup>4</sup> 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.<sup>5</sup>

### 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'.<sup>6</sup>
7. To be a registered charity, an organisation must have a charitable purpose. The Charities Act lists 12 charitable purposes<sup>7</sup>, 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.<sup>8</sup>
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

<sup>3</sup> ACNC Act, section 15-5.

<sup>4</sup> As of 5 January 2018. See [www.acnc.gov.au](http://www.acnc.gov.au) for the most up to date figure for registered charities.

<sup>5</sup> 2016 Australian Charities Report – available [here](#).

<sup>6</sup> Sub-section (d) of the definition of charity in section 5 Charities Act

<sup>7</sup> Section 12 Charities Act

<sup>8</sup> 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.



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 Committee<sup>9</sup>.

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<sup>9</sup> The guidance is available at [www.acnc.gov.au/advocacy](http://www.acnc.gov.au/advocacy)



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 financial year basis<sup>10</sup>. Returns to the AEC are required within 16 weeks after the

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<sup>10</sup> ACNC Act, sections 60-5 and 60-85



end of the financial year<sup>11</sup>. 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.<sup>12</sup> 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.

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<sup>11</sup> 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.

<sup>12</sup> 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 2018<sup>13</sup> 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.

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<sup>13</sup> 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 devolved<sup>14</sup>. 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 office<sup>15</sup>.

## 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'.

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

<sup>15</sup> 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 AEC<sup>16</sup> 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 305B<sup>17</sup>).)
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 persons<sup>18</sup> 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.

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<sup>16</sup> 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.

<sup>17</sup> 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.

<sup>18</sup> 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 parties<sup>19</sup>.
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.

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<sup>19</sup> 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"<sup>20</sup>. 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.

Contact:       Natashia Allitt, Policy Manager, Legal and Policy

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