



27 September 2018

Senator the Hon James McGrath
Chair, Joint Standing Committee on Electoral Matters
PO Box 6021
Parliament House
ACT 2600

By email: em@aph.gov.au

Dear Senator

Inquiry into the proposed amendments to the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017

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 the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017 (**the Bill**).
2. The Law Council notes the short timeframe in which to provide submissions to the Committee, and for this reason the Law Council's input is focussed primarily on the potential effects of the proposed measures on the charitable sector, as informed by the Law Council's Not-for-Profit Legal Practice and Charities Committee of the Legal Practice Section. This submission also benefits from input from the Constitutional Law Committee of the Federal Litigation and Dispute Resolution Section of the Law Council.
3. On 25 January 2018, the Law Council provided a submission to the Committee in response to the original Bill, highlighting a number of concerns with the proposed measures, particularly as they related to the Australian charitable sector.¹
4. On 9 April 2018, the Committee published its Advisory Report on the earlier version of Bill, in which it agreed in-principle to its passage, and broadly endorsed the creation of publicly available 'Transparency Register' for entities engaged in political expenditure. However, the Advisory Report contained 15 recommendations, many of which called for substantive drafting changes with a particular focus on the Bill's application to charitable institutions.
5. The Law Council acknowledges that the revised Bill is a significant improvement on the original version. It is clear that the Government has had regard to the Committee's

¹ Law Council of Australia, *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017* (25 January 2018), at <www.lawcouncil.asn.au/resources/submissions/electoral-legislation-amendment-electoral-funding-and-disclosure-reform-bill-2017>.

recommendations relating to 'political expenditure' and 'political purpose' which was a key area of concern for charities, as well as simplifying the registration categories.

6. While the Law Council continues to support the broad policy objectives of the Bill and other associated measures designed to address concerns regarding undisclosed foreign influence on public opinion and government policy, it is important to consider the potential for unintended consequences arising from such reforms. This is particularly the case for the charitable and not-for-profit sector, where many entities already 'face an unnecessarily complex, confused and costly regulatory environment'.²
7. Noting that the Australian Charities and Not-for-Profits Commission (**ACNC**) has regulatory oversight of registered charities, including monitoring existing restrictions on political purposes as set out in the *Charities Act 2013* (Cth) (**Charities Act**),³ the Law Council continues to hold the view set out in its previous submission that no further requirements should be imposed on registered charities under the proposed reforms.
8. To this end, the Law Council repeats its recommendation that charities should be exempt from the proposed scheme. If, however, charitable entities are not exempted from the requirements under the Bill, the following submissions are made with respect to the proposed measures.

Definition of 'electoral matter' and 'electoral expenditure'

9. Proposed section 287AB of the revised Bill introduces the definition of 'electoral expenditure', which is described as expenditure incurred for the dominant purpose of creating or communicating electoral matter, with some limited exceptions. The term 'electoral matter' is then defined at proposed section 4AA as matter communicated or intended to be communicated for the dominant purpose of influencing the way electors vote in an election, including by promoting or opposing:
 - (a) a political entity, to the extent that the matter relates to a federal election; or
 - (b) a member of the House of Representatives or a Senator.
10. The Law Council considers this to be an improvement on the previous approach, and the removal of the term 'political purpose' is helpful in avoiding confusion with the terminology under the Charities Act. This approach is also welcome in the sense that it proposes a narrower definition of electoral expenditure which is intended not to capture a broad range of general issues-based advocacy that is commonly undertaken by charitable institutions. However, the definition of 'electoral matter' should only cover matter communicated and not include 'intended to be communicated' as the legislation's purpose is aimed at transparency for funding *the influence of voters*. A voter cannot be influenced by something which is not actually communicated.
11. Similarly, 'electoral expenditure' should be further amended to refer only to communicating the electoral matter and not include the 'creation'.

² Productivity Commission Research Report, *Contribution of the Not-for-Profit Sector* (January 2010), 114.

³ *Charities Act 2013* (Cth), s 11.

12. As currently drafted an entity would need to disclose expenditure for creating matter which it intended to communicate, but in fact never communicated. It would also need to include the expenditure on creation of matter, such as a research report, which was intended to be general educative and informative materials, but subsequent to the report or findings from the report was communicated for the purpose of influencing voters. The Law Council submits the creation of the research report should not be included in the expenditure.
13. Alternatively, if 'creation' is to be included it must be subject to the dominant purpose test i.e. restricted to creation of material where the dominant purpose *of the creation* is for communication to influence voters.
14. The Law Council submits there will be a need to clear and accessible guidance, including practical examples, as to what will be included in the definition of 'electoral expenditure'. This is particularly the case for registered charities given the possibility for confusion when reconciling the proposed approach with that of the Charities Act framework. As noted in the Law Council's earlier submissions, the Charities Act:
 - 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;⁴ and
 - prohibits charities from having a 'purpose of promoting or opposing a political party or candidate for political office'.⁵ 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.'
15. Charities do dedicate resources towards to pursuing permissible purposes which may fall within the proposed definition of electoral expenditure. This is most likely the case where a charity creates a research report (as in the example above) without the intention of communicating this for the purpose of influencing voters, but then subsequently uses the report or findings from the report to promote a change in the law or policies being proposed in the context of an election.
16. It will also apply where a charity advances debate about the policies of political parties or candidates for political office in furtherance of, and consistent with, its charitable purposes, noting that these communications are intended to be educative and influence voters only to the extent of supporting policies which align to the charitable purposes rather than to vote for a specific candidate or party. In most, if not all such instances, these charities would prefer all candidates and parties to adopt the policies which align to their charitable purposes.
17. The Law Council submits the legislation and the guidance must make it clear that such activities of charities are not caught.
18. Importantly however, the proposed measures appear to have been amended to only require registration as a political campaigner where the electoral expenditure is more than \$500,000 over three years, or in one year is \$100,000 and when during the previous financial year was at least two-thirds of its revenue. In light of these

⁴ Ibid, s 12(1)(l).

⁵ Ibid, s 11(b).

thresholds, it appears more likely that a charity that may incur electoral expenditure would fall within the definition of 'third party', as an entity that in a financial year incurs electoral expenditure of more than the disclosure threshold of \$13,800.

Donations to third parties from foreign donors

19. The proposed measures seek to prohibit gifts of over \$13,800 received by third parties from a foreign donor from being used for the purpose of incurring electoral expenditure.⁶ Under this proposal, a third party must check the status of the donor for amounts greater than the monetary threshold. To satisfy this requirement, a third party must get a written affirmation by the donor that it is not a foreign donor and must also obtain 'appropriate donor information' under proposed section 302P or take reasonable steps to verify that the donor was not a foreign donor, together with a requirement that they must not know or have reasonable grounds to believe that the person is a foreign donor.
20. It is unclear from the Bill what steps would be regarded as 'reasonable' to verify the donor's status, or what will be 'reasonable grounds' for believing that the person is a foreign donor. It is submitted that this uncertainty is likely to have the effect of donations over the threshold not being used towards political expenditure unless the donor is easily identifiable as an Australian citizen. While this may be the intended consequence of the proposed provision, it is submitted that greater clarity is required, perhaps through guidance material, as to what level of inquiry will satisfy the requirement that reasonable steps be taken to verify the donor's status.

Gifts for the purpose of incurring electoral expenditure

21. Related to the above point, yet perhaps more problematic, is the proposal that gifts from foreign donors to third parties be prohibited where the donor intends for the gift to be used for the purposes of incurring electoral expense, or where the third party recipient accepted the gift with the intention of directing it towards electoral expenditure.⁷ There does not appear to be a monetary threshold amount under this proposal, meaning that even minor gifts from foreign donors must not be accepted with the intention that it be used for electoral expenditure.
22. This raises a practical challenge for third parties, particularly charities, who may wish to engage in electoral expenditure, as they will need to be satisfied that this activity is sourced from very specific funding, and not drawn from general donations without the charity first capturing relevant information on citizenship and residency of each donor. This has obvious implications for public fundraising campaigns where it may be impractical, if not impossible, to confirm the citizenship of each donor.
23. It is submitted that the application of this proposed provision should be more aligned with that of proposed sections 302D and 302E, where inquiries as to a donor's nationality will only be required where the gift is over a certain financial threshold.

Federalism issues

24. In our earlier submission to the Committee, the Law Council highlighted constitutional concerns with the Bill, in particular regarding a potential federalism issue when

⁶ Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017 (Cth), s 302E.

⁷ Ibid, s 302F.

considering the interaction between the proposed measures with State and Territory laws regarding political donations.

25. The Law Council notes the further submissions of Professor Anne Twomey in this respect, and draws on her continued concerns with the manner in which the Bill purports to override State law. The Law Council endorses Professor Twomey's analysis and submits that the Committee should have regard to her submission accordingly.

Contact

26. Thank you for the opportunity to provide these comments. The Law Council would be pleased to elaborate on the above issues, if required.
27. Please contact Mr Nathan MacDonald, Senior Policy Lawyer, on 02 6246 3721 or at nathan.macdonald@lawcouncil.asn.au, in the first instance should you require further information or clarification.

Yours sincerely

Morry Bailes
President