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25 January 2018

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

Dear Secretary,

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

Please find attached Philanthropy Australia's submission in response to the Inquiry into the *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017*.

Philanthropy Australia thanks the Committee for the opportunity to make a submission to the Inquiry.

Philanthropy Australia would welcome the opportunity to discuss the matters raised in this submission further. In this regard, please do not hesitate to contact Krystian Seibert, Advocacy & Insight Manager, on (03) 9662 9299.

Yours Sincerely

A handwritten signature in black ink, appearing to read "Sarah Davies".

Sarah Davies
Chief Executive Officer

Submission – Inquiry into the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017

1. About Philanthropy Australia

As the peak body, Philanthropy Australia's purpose is to serve the philanthropic community to achieve more and better philanthropy.

The community we serve consists of funders, grant-makers, social investors and social change agents working to achieve positive social, cultural and environmental change by leveraging their financial assets and influence.

Informed, independent and with reach and credibility, Philanthropy Australia gives its Members a collective voice and ability to influence and shape the future of the sector and advance philanthropy.

We also serve the community to achieve more and better philanthropy through advocacy and leadership; networks and collaboration; professional learning and resources; and information and data-sharing.

Our membership consists of approximately 700 trusts, foundations, organisations, families, individual donors, professional advisers, intermediaries and not-for-profit organisations.

Our Members fund across a very diverse range of cause areas, and fund a variety of different approaches to achieve social, cultural and environmental change, including supporting advocacy activities by charities.

2. Overview

Philanthropy Australia values the positive and constructive relationship we have with the Australian Government. We are actively involved in initiatives such as the Prime Minister's Community Business Partnership and have participated in consultation process around matters such as deductible gift recipient reform and the regulation of ancillary funds. We have welcomed the positive engagement as part of these consultation processes, which has led to policy outcomes we have been able to welcome and support.

The Australian Government has a clear and stated desire to grow philanthropy in Australia.

It is in this context that Philanthropy Australia expresses major concerns with the *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017*. These concerns are both substantive and procedural.

We support a robust and transparent framework for political donations – this is a vital to instil public confidence in our democratic processes. There is community consensus about banning foreign donations to political parties and candidates, to address potential foreign influence over our elected representatives.

However, this Bill imposes new and burdensome reporting requirements on charities undertaking advocacy, and we are very concerned this will also extend to philanthropic organisations which support them. It will also

drastically restrict the ability of international philanthropy to fund advocacy by Australian charities.

These changes will have a negative chilling effect on charities undertaking advocacy in furtherance of their charitable purposes. As a result of the provisions in the Bill, charities will either be much more reluctant to undertake advocacy, and/or will find it much harder to access the necessary funds to undertake advocacy. This stifling and inhibiting of advocacy by charities will be harmful to the Australian community and to Australian democracy.

Our procedural concerns arise because the process for developing the Bill has been inadequate and has not engaged either the broader public or stakeholders who will be affected by its provisions. There was no public consultation on an exposure draft of the Bill and a detailed regulatory impact statement has not been completed. It appears that best practice regulation requirements, as set out in Australian Government policies and guidelines, have not been followed when developing this Bill.

Our substantive and procedural concerns are explained further in this submission.

Because of these concerns, Philanthropy Australia is unable to support the Bill in its current form. As currently drafted, the Bill is highly flawed and should not be progressed, as extensive revisions are necessary.

The current Bill should be withdrawn, and wide-ranging consultation should be undertaken with stakeholders, including charities and philanthropic organisations.

A detailed regulatory impact statement should be completed so the full impact and compliance costs of any changes can be properly assessed and considered.

Charities and philanthropic organisations should be excluded from any amendments which would stifle and inhibit advocacy activities in furtherance of a charitable purpose.

3. Context – Importance of Advocacy by Charities

Australian charities can undertake advocacy to further their charitable purposes, for example through supporting or opposing matters established by law, policy or practice. Many philanthropic organisations support these important activities, as it is an effective way to use private funds to support the common good.

In 2010, the High Court (in *Aid/Watch Incorporated v Commissioner of Taxation*) recognised that advocacy undertaken by charities to enhance and improve public policy is essential to Australia's constitutional system of parliamentary democracy.

This finding was subsequently legislated in the *Charities Act 2013* (Cth) (the Charities Act). As a result, charities can undertake advocacy activities, including research, policy development, public communications and lobbying of decision makers, consistent with their charitable purpose. And they can, do

and should support or oppose matters in law, policy or practice in accordance with their charitable purpose.

Such advocacy is distinct from political activity that seeks to advantage a political party or candidate. The Charities Act specifically prohibits charities from having a purpose of promoting or opposing a political party or a candidate for political office. This is a necessary limitation which Philanthropy Australia strongly supports.

Advocacy is an important approach that charities often use to achieve change in a wide range of areas such as poverty, homelessness, mental health, disability, biodiversity and many others. The focus of such advocacy is to address the systemic causes of our social and environmental challenges, rather than just ameliorating their symptoms.

This is not a reason for concern. On the contrary, this approach benefits the Australian community and is vital to a vibrant, healthy and well-functioning democracy.

For example, if a factory is polluting a river because of poor regulation, environmental remediation work to treat affected wildlife downstream will largely be futile and have little impact if the factory can continue to pollute the river. In order to preserve the river's ecosystem and stop the pollution, advocacy may be necessary to ensure the factory complies with regulations or that government introduces adequate regulations.

Tangible outcomes of advocacy by charities funded in part by philanthropy include the introduction of the National Disability Insurance Scheme, same-sex marriage laws recently passed by the Australian Parliament, the introduction of Landcare and many other reforms that have focused on the common good. This advocacy has been pursued in the public interest, not to advance the interests of any political party.

Our Members support a range of charities including those with a mission to empower and amplify the voice of communities at the margins of power and public debate, enabling those voices to have prominence and presence in decision making arenas.

Charities in Australia are among the most trusted institutions in the country¹. They are well placed to undertake advocacy. And polling also shows that the public strongly values the advocacy role of charities².

The effectiveness and efficiency of advocacy as an approach to achieving social and environmental change is a key reason that many of our Members choose to fund advocacy activities by charities.

For these reasons, proposals which restrict, limit or inhibit advocacy by charities will be harmful to the Australian community, and to Australian democracy.

¹ See: <http://acnc.gov.au/trustandconfidence>

² See: <https://probonoaustralia.com.au/news/2017/11/government-called-stop-war-charities/>

4. Substantive Concerns

a) Evidence Base and Rationale

Robust and Transparent Reporting Requirements Already Apply

The current disclosure rules in the *Commonwealth Electoral Act 1918* (Cth) (the Electoral Act) provide that where ‘political expenditure’ reaches the disclosure threshold (currently \$13,500 and indexed), ‘third parties’ are required to lodge an annual ‘Third Party Return of Political Expenditure’³.

This requirement would cover charities undertaking advocacy activities which constitute political expenditure, including ‘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)’. This definition of political expenditure was broadened by the *Electoral and Other Legislation Amendment Act 2017*, passed in September 2017 and which takes effect in March 2018. It makes clear that the public expression of views on policy issues constitutes political expenditure at all times, and not merely after election writs have been issued.

Disclosure of the identity of donors of gifts above \$13,500, received to fund political expenditure, is also required.

Therefore, robust and transparent reporting requirements already apply to charities and other third parties undertaking advocacy activities constituting political expenditure.

Donation Disclosure and Reporting is Currently Subject to Review

The Joint Standing Committee on Electoral Matters is in the middle of a parallel Inquiry examining the issue of political donations, including disclosure and reporting requirements for donations.

With the tabling of this Bill, the Government is bypassing this process without receiving findings or recommendations from the Committee or public scrutiny of the evidence base for the Bill’s proposals.

Wrong to Expect the Same Requirements of Political Parties/Candidates and Other Charities

The Minister’s second reading speech for the Bill, sets out the Government’s key rationale for the Bill:

The Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017 will improve the consistency of the regulatory treatment of all political actors. This includes political actors that have emerged in the Australian political landscape, who neither endorse candidates nor seek to form government, yet actively seek to influence the outcome of elections through their campaigning activities. While this is a positive indicator of the strength of Australian civil society and civic engagement, it is important that these actors are subject to the public accountability of

³ See: http://www.aec.gov.au/Parties_and_Representatives/financial_disclosure/guides/third-parties/index.htm

more traditional actors, such as registered political parties or candidates.

[Emphasis added]

Expecting that charities undertaking advocacy activities constituting political expenditure should be regulated in a manner more closely resembling political parties and candidates is a flawed rationale.

There is a fundamental difference between advocacy activities undertaken by charities, which are supported by our Members, and political parties and candidates.

Political parties and candidates seek election to office and/or government and upon election are given decision making power through either or both the executive and the legislature.

Charities, on the other hand, can only undertake issues-based advocacy, and must not have a purpose of promoting or opposing a political party or a candidate for political office.

There is a rationale for some form regulation of charities undertaking advocacy activities which constitute political expenditure, but as pointed out above, that regulation already exists.

Importantly, the accountability of charities and philanthropic organisations is even further enhanced because they are regulated by the Australian Charities and Not-for-profits Commission and are subject to the provisions of the Charities Act.

b) Introduction of New Reporting and Compliance Requirements

New Red Tape for Charities and Philanthropic Organisations

The Bill introduces new and burdensome reporting and compliance requirements for charities and philanthropic organisations which undertake or support advocacy activities.

This red tape will severely impact upon charities undertaking advocacy activities as well as philanthropic organisations which fund these activities.

Clearly, most of the advocacy activities undertaken by charities will constitute a 'political purpose' under s287(1) Electoral Act, given the very broad and ambiguous definition of political expenditure because of the previous amendments to the Electoral Act made in September 2017.

Philanthropic organisations fund such advocacy activities in furtherance of their charitable purposes, which could also constitute political expenditure – this will bring them within the scope of the new reporting and compliance requirements proposed in the Bill.

The new red tape introduced by the Bill includes:

- The creation of 'third party campaigner' and 'political campaigner' categories for charities (as well as other organisations) deemed to have a 'political purpose'
 - Under s287F of the Bill, if during the current or any of the previous three years a charity incurred political expenditure of \$100,000 or more (or if it incurs \$50,000 or more in political expenditure, where that represents 50% or more of their annual

- budget) then the charity is required to register as a 'political campaigner'
 - Under s 287G, a charity that does not meet the requirements for registration as a political campaigner, but incurs more political expenditure than the 'disclosure threshold' (currently \$13,500 and indexed), will be required to register as a 'third party campaigner'
- A requirement that third party campaigners, political campaigners and 'associated entities' register with the Australian Electoral Commission (AEC), maintain detailed records and report annually – 'political campaigners' would be required to submit the same type of return as political parties
- A requirement that third party campaigners, political campaigners and associated entities nominate a 'financial controller' who will be personally liable for any contravention of the Electoral Act, for example in relation to the acceptance of prohibited donations or for not meeting reporting requirements

Severe Impacts on Advocacy Undertaken for Charitable Purposes

The red tape which the Bill seeks to introduce, as detailed above, will provide a strong disincentive for charities to undertake advocacy.

The Bill imposes extremely harsh penalties for non-compliance personally on financial controllers (as opposed to the charity or philanthropic organisation itself).

For example, under s314AB of the Bill, if the financial controller of a charity or philanthropic organisation registered as a political campaigner does not submit an annual return to the AEC in an approved form, they are personally liable for a civil penalty of 360 penalty units. With the value of a penalty unit currently \$210, this amounts to a potential personal liability of \$75,600.

There is no justification for financial controllers being personally liable for offences, nor for the imposition of such extremely harsh penalties for non-compliance with the relevant provisions of the Electoral Act.

Individuals within charities and philanthropic organisations which must be registered as political campaigners will be very reluctant to take on this responsibility, and it is highly likely that some charities will therefore stop undertaking advocacy.

c) Broadened Definition of Associated Entity

Under s287 of the Electoral Act, an associated entity includes an entity that operates wholly or to a significant extent for the benefit of one or more registered political parties.

In s287H (5), the Bill proposes to amend the definition of associated entity to provide that an entity operates for the benefit of a registered party (and is therefore an 'associated entity') if the entity's expenditure is wholly or predominantly political expenditure, and that political expenditure is used wholly or predominantly to promote a party, a party's policies, or a candidate endorsed by a party; or to oppose a party, its policies, or candidate in a way that benefits another party. Where an organisation incurs expenditure opposing a party or candidate, the Explanatory Memorandum states that

association can be inferred: 'For an entity to be associated with a registered political party because of negative campaign techniques that is, the entity opposes a party, or operates to its detriment, intent to benefit is not required in order for an association to exist.'

These provisions cast a wide net and make many presumptions about intent, purpose, benefit and impact that will be extremely difficult for charities and philanthropic organisations to interpret and navigate.

Charities may have policy positions which align with some of the policy positions of one or more political parties, or with none. Under the proposed expansion of the definition of associated entity, charities and potentially philanthropic organisations which support their advocacy activities may be deemed to be associated entities.

The idea that 'intent to benefit is not required in order for an association to exist' is simply extraordinary.

The Charities Act provides that charities are able 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)⁴. Many charities, across a diverse range of cause areas, undertake such activity, for example using comparison tables examining policy positions of different political parties, which they place on their website and distribute to the public.

Given that political parties have varying policy positions, and some will inevitably be assessed as having inferior policy positions and some with superior policy positions in particular cause areas, the effect of the broadened definition of associated entity is likely to be that many charities and philanthropic organisations will be deemed to be associated entities.

This will falsely label such charities and philanthropic organisations as being 'associated' with particular parties, despite the only 'association' being that they assessed different parties' policies in terms of their alignment with the charity's charitable purposes (such as reducing homelessness or improving mental health) and communicated the results of these assessments to the public.

Because of this, if it becomes law, the Bill will undermine the role of charities, and the philanthropic organisations which support them, and lead to adverse inferences being made about them by the Australian public.

It will impugn their independence as non-partisan actors focused on the common good by classifying some of them as associated entities, despite them pursuing legitimate charitable activities and not having any structural, financial or other association with political parties.

⁴ See example in s11 b) of the *Charities Act 2013* (Cth)

d) Restrictions on International Philanthropy Funding Advocacy

International philanthropy makes an important contribution to funding the activities of Australian charities in diverse fields such as health and medical research, Indigenous advancement, marine conservation, poverty alleviation, and education.

Many social and environmental challenges are global in nature, and therefore foundations need to adopt approaches which cross international boundaries in order to respond to these challenges. This may include funding advocacy activities by charities.

Philanthropy Australia recognises that the question of foreign influence in Australian politics is a significant public policy issue. We also acknowledge that there is community consensus about banning foreign donations to political parties and candidates, in order to address potential foreign influence over our elected representatives.

However, it is important to differentiate Australian charities receiving funding from international philanthropy in order to undertake legitimate and lawful issues-based advocacy, from foreign donations to politicians or political parties for their campaigning for elected office.

As pointed out in section 4 a) of this submission, political parties and candidates seek election to office and/or government and upon election are given decision making power through either or both the executive and the legislature.

Charities, on the other hand, can only undertake issues-based advocacy, and their advocacy activities are considerably constrained by the Charities Act. They cannot have a purpose of promoting or opposing a political party or a candidate for political office.

Given the very different circumstances within which charities operate, any restrictions on foreign donations to political parties and associated entities should not apply to charities.

The effect of the Bill, specifically s287AA and 302F, would be that where a charity is a 'political campaigner' (or 'associated entity', an issue which may arise given the broadened definition of this as discussed in section 4 c) of this submission), it would not be permitted to use foreign donations to fund political expenditure. As pointed out in section 4 b) of this submission, most if not all advocacy activities by charities will now constitute political expenditure.

Australian charities need the ability to seek funding from overseas in order to further their charitable purposes in Australia. Although the Australian philanthropic sector is growing, it is still relatively small compared to the sector worldwide and particularly when compared with the United States.

Under the proposed ban, charities which rely on international philanthropy to fund their advocacy activities will be less likely to undertake advocacy and Australia will also be a less attractive as a destination for international philanthropy.

As an organisation whose mission is to encourage more and better philanthropy in Australia, Philanthropy Australia strongly opposes the proposed ban. It is inconsistent with the Australian Government's stated desire to grow philanthropy and contradicts other positive initiatives the Government has progressed in this area.

More broadly, around the world we are witnessing a 'closing space for civil society'. This term refers to the closing down of opportunities for civil participation. Civil society organisations worldwide are under significant pressure as restrictions on foreign funding, barriers to registration, intervention in internal affairs, and other similar measures have proliferated.

One of the main tools being used to restrict the voice of civil society is the introduction of restrictions in foreign funding of those groups that speak up on important issues. We've seen this happen in countries as diverse as Russia, India and Ethiopia.

The proposed ban will reinforce this global trend towards closing the space for civil society.

5. Procedural Concerns

Our procedural concerns arise because the process for developing the Bill has been inadequate, especially given the far-reaching consequences of the Bill.

The Australian Government's own best practice regulation requirements, as set out in the 'The Australian Government Guide to Regulation'⁵ (the Guide) and associated documents, do not appear to have been followed.

a) Inadequate Consultation

Principle 5, on page of 2 of the Guide, provides that 'Policy makers should consult in a genuine and timely way with affected businesses, community organisations and individuals.'

The Bill proposes wide ranging and comprehensive reforms to electoral regulation in Australia. The changes proposed impose new reporting and compliance requirements and introduce extremely harsh penalties for contravention of these new requirements.

Despite proposing such major changes, there was no public consultation on a exposure draft bill, let alone consultation earlier in the process.

The Joint Standing Committee on Electoral Matters is in the middle of a parallel Inquiry examining the issue of political donations, including disclosure and reporting requirements for donations. Yet the Government has bypassed this useful and constructive process of engagement and examination of the issues and possible solutions. Despite not having received findings or recommendations from the Committee, the Government seems to have decided that reform is necessary in the absence of a properly developed evidence base.

⁵ Available here: <https://www.pmc.gov.au/resource-centre/regulation/australian-government-guide-regulation>

b) No Detailed Regulatory Impact Statement

No detailed regulatory impact statement has been completed for the proposals in this Bill. It is our understanding that only a 'short form' regulatory impact statement has been prepared.

The Australian Government's 'Short form and Interim Regulation Impact Statements Guidance Note'⁶ provides that:

In general, short form [regulatory impact statements] should only be prepared when a proposal is non-regulatory or administrative/machinery in nature, or is expected to have only a minor regulatory impact on individuals, businesses and community organisations.

Short form regulatory impact statements only require a very superficial assessment of the regulatory impact of a proposal, and unlike other regulatory impact statements, do not need to be publicly released. It is our understanding that there is no intention of releasing the short form regulatory impact statement which has been completed.

Short form regulatory impact statements do not subject a proposal to detailed analysis to assess its impact on stakeholders and the size of compliance costs. They also do not provide any assessment of whether a proposal provides an overall net benefit, nor undertake an examination of alternative regulatory options.

The proposals in the Bill are clearly not 'non-regulatory or administrative/machinery in nature' and they cannot reasonably be 'expected to have only a minor regulatory impact on individuals, businesses and community organisations'.

On this basis, the Government does not seem to have followed its own requirements regarding the need for a regulatory impact statement.

⁶ Available here: <https://www.pmc.gov.au/resource-centre/regulation/short-form-regulation-impact-statements-guidance-note>