



## Hands Off Our Charities alliance

# Submission to the JSCEM Inquiry into the proposed amendments to the *Electoral Legislation Amendment (Electoral Funding the Disclosure Reform) Bill 2017*

27 September 2018

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## Co-submitters

The submitters thank the Joint Standing Committee on Electoral Matters for the opportunity to engage in its **Inquiry into the proposed amendments to the *Electoral Legislation Amendment (Electoral Funding the Disclosure Reform) Bill 2017***.

This is the joint submission of 31 members of the Hands Off Our Charities (**HOOC**) alliance, listed below.



Amnesty International Australia



Anglicare Australia



Asylum Seeker Resource Centre



Australian Conservation Foundation



Australian Council for International Development



Australian Marine Conservation Society



Australian Progress



Australian Youth Climate Coalition



Community Council for Australia



CARE Australia



Caritas Australia



Consumer Action Law Centre



Digital Rights Watch



Environmental Justice Australia



The Fred Hollows Foundation



Friends of the Earth Australia



Good Shepherd Australia New Zealand



Greenpeace Australia Pacific



Humane Society International Australia



Jesuit Social Services



Oxfam Australia



The Pew Charitable Trusts



Public Health Association of Australia



Public Interest Advocacy Centre



Queensland Conservation Council



Queensland Community Alliance



RESULTS International (Australia)



Sunshine Coast Environment Council



TEAR Australia



Union Aid Abroad APHEDA



WWF Australia

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HOOC is an alliance of charity and not-for-profit organisations formed to protect communities' right to advocate for community interests.

The members of HOOC together represent millions of Australians concerned with a wide range of subjects related to social welfare, human rights, the environment, health, climate change, disabilities, philanthropy and other fields of public interest.

Since Federation in 1901, Australia's democracy has benefited greatly from the active role played by charities and not-for-profit organisations. HOOC strongly believes this role should not be curbed or undermined through legislative measures to address any 'foreign' influence.

As an alliance we support laws that protect the integrity of representative government and promote fairness and participation in our public life. We also recognise the concerns about foreign influence in Australian politics and the need to address them in a targeted and effective way. However, measures to address this issue should not undermine the proper functioning of Australia's democracy or unduly constrain public interest advocacy by charities and not-for-profits.

HOOC is made up of a broad range of charities and civil society organisations and it is an indication of how great our concern is that over 40 Australian charity and not-for-profit organisations from across the Australian community have come together and cooperated to assist policy makers achieve an appropriate legislative outcome.

HOOC continues to grow as an alliance with new organisations constantly joining, and we are resolved to protect the rights of charities and civil society into the future and will continue to engage on these issues.

Due to the very tight timeline for drafting this submission not all HOOC members were able to indicate official endorsement of this submission by 27 September 2018. Failure to endorse this document in the available time does not necessarily imply any specific position on the part of such organisations. Individual organisations participating in the HOOC alliance may also exercise their right to make separate submissions.

Should the Committee wish to seek further information from HOOC or invite representatives to appear at hearings, the contact point is Lauren Frost, HOOC Coordinator, [lauren@hooc.org.au](mailto:lauren@hooc.org.au), 0402 495 005.

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Note: For convenience this submission will refer to "***the amendments***", meaning the exposure draft government amendments published online by the Committee on 19 September 2018, and "***the Bill***", meaning the original *Electoral Legislation Amendment (Electoral Funding the Disclosure Reform) Bill 2017*.

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## Introduction

While we were deeply concerned by many of the proposed changes in the original Bill put to the Senate in 2017, we are pleased to see that this amended version addresses many of the concerns raised by HOOC members in previous submissions in relation to this Bill. We welcome that the Committee has heard many of the sector's concerns and recommended amendments to the Government.

We particularly welcome the proposed definition of 'electoral expenditure' which will be a significant improvement on current arrangements. While much improved, it is our view that the Bill could benefit from some further changes which we discuss below.

HOOC members accept and abide by the Charities Act which states that charities cannot "have a dominant purpose to promote or oppose a political party or a candidate for political office" and that this is a disqualifying purpose for a registered charity.

However, we also emphasise that section 12(1)(l) of the Charities Act 2013 (Cth) sets out the valid charitable purpose of 'advancing public debate' and confirms the ability of charities to undertake public advocacy to work towards achieving their charitable purposes.

HOOC members have always insisted there is a fundamental distinction between *advocacy* on public issues – which is the legitimate activity of civil society organisations – and *electioneering* – which is conduct specific to the individuals and parties who seek election to parliaments. The latter acquire the official power of office, and their conduct should appropriately be governed by a set of rules designed to ensure that they behave with integrity. Those who engage in advocacy, on the other hand, deserve a far broader scope of freedom to pursue their legitimate public interest goals.

In attempting to coherently engage with these issues, earlier in 2018 HOOC members developed a brief statement of 'red line principles' (Appendix 1) which articulated our position. We were pleased to see that on 25 June 2018 the Senate passed a motion specifically recognising the HOOC red line principles. In the discussion below we remind the Committee of those Senate-endorsed principles, and use them as a framework to assess the amendments which are the object of the Committee's current inquiry. We also take the opportunity to comment on certain other issues which arise from the Bill and the amendments.

HOOC would also like to highlight the short time frame for making submissions into this inquiry and the delayed release of relevant documentation such as the Explanatory Memorandum (EM) which was published less than 24 hours before the submission deadline. Due to this short time frame many of our members are still seeking legal advice as to how these amendments will affect our respective work and we reserve the right to update our comments as more information about the Bill and the amendments comes to light. Due to the delayed release of the EM it has not been possible for this submission to consider the content of the EM, and this will likely be the case for many other interested parties

## HOOC's 'red line principles'

### 1. The ability of charities and NFPs to use funding (including international funding) for issues-based advocacy is not restricted

The Bill seeks to prevent flows of money from foreign governments (presumably not in their own name, but through undisclosed representatives) and other foreign entities into Australian political parties and their campaigning. This is a legitimate public interest goal. However, the Bill should not include provisions which would interfere with the legitimate international activities of charities and NFPs.

It has been a HOOC principle throughout this debate that there exists a fully legitimate domain for charities which have a presence in multiple nations to be able to go about their legitimate public-interest activities, including in some cases through the use of funds which move between national branches of multinational entities. Many exercises in advocacy operate across multiple nations. In addition, some charities are funded by grants from the United Nations or related treaty entities, which are in themselves a form of public funding.

At a top level the amendments have improved the Bill, however HOOC maintains that the definition of 'electoral expenditure' needs to be clearer, particularly because the use of funding from foreign donors is still prohibited for activities that are classified as 'electoral expenditure'. If the definition of electoral expenditure remains ambiguous enough to capture some issues-based advocacy it may cause problems for charities and NFPs who use international funding for this issues-based advocacy.

HOOC acknowledges that the replacement of the definition of 'political expenditure' in the original Bill with the definition of 'electoral expenditure' in the amendments is an improvement. The current broad and imprecise definition of 'political expenditure' has been problematic as it relates to third party activities, in particular charities. Further, the amended definition on the face of it appears that it should exclude the majority of non-partisan issues-based public interest campaigning.

However some grey area remains. For example, it is clear from the new section 287AB that that express promotion or opposition of a political entity or sitting MP or Senator is not required for a communication to be deemed electoral matter. What about activities that may not directly promote or oppose a candidate or party but might indirectly influence voting behaviour? Without further guidance, whether an activity or communication may qualify as an electoral matter will be a question of fact in each case. This will require organisations to get independent legal advice on these matters regularly at significant cost burden to these groups.

**HOOC recommends that in order for the amendments to pass and meet the red line principles, guidance for charities should be provided via Section 4AA(4) by including an additional point that clarifies that a matter is not an electoral matter if it: "Is by an organisation in pursuit of a purpose that is charitable (as defined by the Charities Act 2013)". This would provide certainty to charitable organisations and will ensure that issues-based advocacy is not misconstrued as electoral expenditure.**

2. There is a clear distinction between issues-based advocacy and politically partisan electioneering. This should be consistent with the distinction drawn in the Charities Act 2013 (where having a dominant purpose of "promoting or opposing a candidate or a party for political office" is a disqualifying purpose for a Charity – section 11)

As mentioned above, HOOC maintains that advocacy for public interest concerns must not be legally conflated with electioneering. The pursuit of charitable and civil society goals exists outside of the question of who is elected to Parliament and forms government, and advocacy work continues regardless of who holds elected offices.

We note in the amendments the title of restricted activity has changed from 'political expenditure' to 'electoral expenditure' which recognises the difference between political communication and electoral communication. However, the amendments still leave a grey area of what is classified as electoral expenditure when it comes to direct versus indirect communication.

For example s4AA(3) outlines that if the dominant purpose of a communication or intended communication is to expressly promote or oppose a political entity (to the extent that the matter relates to a federal election) or a sitting MP or Senator, the communication is presumed to be electoral matter.

It is unclear if s4AA only applies where communication influences voting by promoting or opposing a candidate or a party directly or whether this also applies to indirect communication, specifically on issues which candidates and parties hold positions on.

Charities are already prohibited from having the dominant purpose of "promoting or opposing a candidate or a party for political office", however they may do things such as inform the public on each party's position on the issue the charity advocates on. This sort of communication is generally considered indirect communication and therefore should not be captured by the definition in s4AA. Under the Charities Act, a charity can promote or oppose a change to any matter of law, policy or practice, as long as this advocacy furthers or aids another charitable purpose.

Activities like encouraging electors to consider a particular issue whilst exercising their vote or publishing comparisons of various parties' positions to particular issues for distribution at polling booths do not directly promote or oppose a single party or candidate. Recipients of the communication are left to form their own conclusions. Therefore these activities should not be captured in the definition of 'electoral expenditure'.

**As outlined in the recommendation above, HOOC recommends that in order for the amendments to pass and meet the red line principles, guidance for charities should be provided via Section 4AA(4) by including an additional point that clarifies that a matter is not an electoral matter if it: "Is by an organisation in pursuit of a purpose that is charitable (as defined by the Charities Act 2013)". This would provide certainty to charitable organisations and will ensure that issues-based advocacy is not misconstrued as electoral expenditure.**

### 3. Charities and NFPs don't face a greater compliance burden than they do presently, and charities and NFPs are not subject to more extensive regulatory controls and administrative requirements or criminal offences than other third parties (e.g. businesses and industry associations)

Organisations that carry out both issues-based advocacy and activities that contribute to 'electoral expenditure' will have to implement a system of keeping foreign donations quarantined from electoral expenditure such as setting up separate bank accounts which adds an extra financial and administrative burden, particularly for smaller organisations.

Added to this, organisations that fall into the 'third party' category will have to go through an extensive process to ensure that any donation they receive over the disclosure threshold of \$13,800 is not from a foreign donor before they can use it for electoral expenditure, as not complying with this process is considered an offence.

For organisations that fall into the 'political campaigner' category this process requirement has an even broader application as they will have to go through this process of ensuring that a donor is not foreign for any gift, even \$1, irrespective of whether or not the charity has other funds from non-foreign donors sufficient to cover its actual and intended electoral expenditure.

**While HOOC finds that the amendments will result in charities and NFPs facing a greater compliance burden than they do presently, we acknowledge that this is a necessary part of implementing these new restrictions around the use of foreign donations. HOOC recommends that in order for the amendments to pass and meet the red line principles, The Electoral Commission and the Australian Charities and Not-for-profits Commission should be appropriately resourced to implement the new laws, including by providing information and services to assist charities with any compliance obligations.**

### 4. Donors of gifts that are not intended or used for promoting or opposing a candidate or a party for political office should not be subject to new public reporting or registration requirements

Many HOOC members receive donations from members of the community entirely unrelated to political matters. Needless to say, many of the social welfare, environmental, human rights and other goals of HOOC members are the natural concern of the philanthropic instinct in the community. Many donations come in the form of bequests in wills. The current law provides privacy for such gifts, a position which is long-established and appropriate. There would be a legitimate concern that removal of such privacy would reduce the extent of philanthropy in Australia.

Under the amendments an organisation must take 'reasonable steps' to verify that donors are not foreign donors which may require either obtaining a statement from the donor within 6 weeks of the donation being made, or obtaining appropriate donor information in accordance with section 302P to establish that the donor was not a foreign donor.

For individual donors, organisations would have to obtain one of the following to confirm that they are an appropriate donor:

- the person's particulars set out on the electoral roll; or

- a copy of a document evidencing the person's Australian citizenship (passport, naturalisation document etc.); or
- a copy of the person's permanent residency visa

HOOC has concerns around the difficulty of ensuring that the donor's particulars match up with the electoral roll in cases where the donor might not keep their electoral details up to date. The work required to verify this or to obtain copies of a document evidencing Australian citizenship or a permanent residency visa is overly onerous for charities.

HOOC is also concerned that this requirement may create issues for workplace giving programs by contradicting other laws that apply in these programs such as privacy laws which dictate that the ATO does not give the beneficiary details of the donor.

**HOOC recommends that in order for the amendments to pass and meet the red line principles, the process of checking if a donation comes from a foreign donor should only apply if the donation is intended to be used for electoral expenditure. Additionally, to allow for donor privacy to be maintained and reduce the compliance burden on charities and NFPs, the process of checking if a donor is foreign should sit with the AEC rather than with the recipient organisation.**

## 5. A clear and precise regime that is unambiguous. Charities and NFPs should not be left wondering what parts of a regime apply to them and when they apply

No person or organisation should be subject to laws which cannot reasonably be understood.

The current state of the *Commonwealth Electoral Act* was complex when it was adopted in 1984 and has grown more so with every passing suite of amendments which make the legislation larger, more unwieldy and less easy for any observer to read and understand. Regrettably, whatever improvement these amendments represent on the original Bill, they do little to reduce the overall problem that the electoral law is hard to understand.

The amendments still leave uncertainty particularly about what expenses should be included in electoral expenditure. For example, if a charity incurs some electoral expenditure, does it also have to add in an apportionment for CEO time and an apportionment for the rent for their offices that may be used for the electoral expenditure or does this definition only apply to direct expenditure?

Under the current definition it is very difficult for organisations to calculate exactly what to report and whether they meet the threshold of a third party or political campaigner.

**HOOC recommends that in order for the amendments to pass and meet the red line principles, the Bill should explicitly exclude staff time, administration costs and assets (such as rent and premises) from the category of electoral expenditure.**

## Other issues

### Political affiliations of senior staff

Under the amendments third parties would not be required to report the political affiliations of senior staff. However the requirement remains for political campaigners. Although fewer entities will be captured because the threshold for political campaigners has been increased, HOOC regards it as highly inappropriate to require employees to disclose their political affiliations to a Government agency merely because they are involved with an entity engaging in our democratic process. Political party membership is acknowledged to be sensitive personal information under the Australian Privacy Principles and requiring senior staff to publicly declare their political affiliation may even be at odds with industrial relations laws. The Australian Public Service recognises senior staff can be members of political parties without it affecting their work in senior roles or as government spokespeople. A requirement for senior staff in political campaigner organisations to be forced to disclose their political affiliation is inappropriate and regulatory overreach.

### Foreign Interference Transparency Scheme Act amendments

Under Schedule 5 of the *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018 (EFI Act)* there are changes proposed to the *Foreign Interference Transparency Scheme Act 2018 (FITS Act)* which will commence when the Bill becomes Law. These changes provide that attempts to influence a 'process' of a political campaigner on behalf of a foreign person may be caught by the FITS Act. It is not clear whether these amendments are appropriate in the light of the amendments to this Bill.

### Communication outside election periods

While there has been an apparent move away from the concept that political speech is the same as political campaigning (and must therefore all be regulated), there is still the related concept that the closer to an election the speech is published, the more likely that it will be objectively regarded as speech about an electoral matter (s4AA(4)(e)). Thus, it still seems possible that even under s314AEB as amended, reporting obligations could arise in relation to speech that occurs before the issuing of writs. **HOOC strongly recommends that communication for issues-based advocacy should not be classified as electoral expenditure regardless of timing and that the proximity to an election should not change this classification.**

## Recommended conditions for passing the Bill

Taking into account all of the issues, HOOC members believe the Bill should only be enacted if the following alterations to the proposed amendments, the Bill, or the existing law are adopted.

Recommendations	
Item 1 & 2 – clearer definition of electoral expenditure	Guidance for charities should be provided via Section 4AA(4) by including an additional point that clarifies that a matter is not an electoral matter if it: “Is by an organisation in pursuit of a purpose that is charitable (as defined by the Charities Act 2013)”. This would provide certainty to charitable organisations and will ensure that issues-based advocacy is not misconstrued as electoral expenditure.
Item 3 – compliance burden is not excessive	The level of increased compliance burden should not be so great that it discourages charities and NFPs from participating in advocacy and electoral expenditure. As outlined below, the AEC and ACNC should be appropriately resourced to help charities through this transition.
Item 4 – donor privacy is protected	The process for checking if a donor is foreign should only apply if the donation is intended to be used for electoral expenditure. The process of checking if a donor is foreign should sit with the AEC rather than with the recipient organisation. This will allow for donor privacy to be maintained and reduce the compliance burden on charities and NFPs.
Item 5 – exclusion of staff time and assets from the category of electoral expenditure	The Bill should explicitly exclude staff time and assets (such as rent and premises) from the category of electoral expenditure.
Item 6 - remove requirement to register political affiliations of senior staff	No staff members of civil society organisation should have to report their political affiliations. HOOC specifically recommends the removal of the requirement for senior staff from organisations classified as political campaigners to register their own political affiliations.
Item 7 - classification of electoral expenditure is not linked to proximity to an election	Communication for issues-based advocacy should not be classified as electoral expenditure regardless of timing. The proximity to an election should not change this classification.
Implementation	
Communications	Responsible agencies should communicate the requirements of the law to all charities and not-for-profits.
Agency resourcing	The Electoral Commission and the Australian Charities and Not-for-profits Commission should be appropriately resourced to implement the new laws, including by providing information and services to assist charities with any compliance obligations.

## Appendix 1

### **Hands Off Our Charities Red Line Principles for the Foreign Influence Transparency Scheme Bill 2017, and the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017**

We the 'Hands Off Our Charities' alliance supports laws that protects the integrity of representative government and promotes fairness and participation in public debate. We recognise concerns regarding foreign influence on Australian politics, including multi-party support for banning foreign donations to political parties. However, we emphasise that measures to address foreign influence should not undermine our democracy or unduly constrain public interest advocacy by charities and not-for-profits.

We will only accept new or amended laws that ensure:

1. The ability of charities and NFPs to use funding (including international funding) for issues-based advocacy is not restricted
2. There is a clear distinction between issues-based advocacy and politically partisan electioneering. This should be consistent with the distinction drawn in the Charities Act 2013 (where "promoting or opposing a candidate or a party for political office" is a disqualifying purpose for a Charity – section 11)
3. Charities and NFPs don't face a greater compliance burden than they do presently, and charities and NFPs are not subject to more extensive regulatory controls and administrative requirements or criminal offences than other third parties (e.g. businesses and industry associations)
4. Donors of gifts that are not intended or used for promoting or opposing a candidate or a party for political office should not be subject to new public reporting or registration requirements
5. A clear and precise regime that is unambiguous. Charities and NFPs should not be left wondering what parts of a regime apply to them and when they apply
6. Charities and NFPs are free to cooperate on issues-based advocacy to advance issues of public interest, including by working with non- Australian citizens and non-permanent Australian residents

These red line principles were endorsed by the following members of Hands Off Our Charities on 22 June 2018:

Australian Council of Social Services  
Actionaid  
Amnesty International Australia  
Anglicare Australia

Australian Conservation Foundation  
Australian Council for International Development  
Australian Marine Conservation Society  
Australian Youth Climate Coalition  
Beyond Zero Emissions  
Campaign for Australian Aid  
CARE Australia  
Caritas Australia  
Child Fund Australia  
Community Council for Australia  
Consumer Action Law Centre  
Digital Rights Watch  
Environmental Justice Australia  
Environment Victoria  
Greenpeace Australia Pacific  
Human Rights Law Centre  
Human Rights Watch  
Jesuit Social Services  
National Association of Community Legal Centres  
Nature Conservation Council  
Oaktree  
Oxfam Australia  
People With Disabilities Australia  
Pew Charitable Trusts  
Public Health Association Australia  
Queensland Community Alliance  
Queensland Conservation Council  
RESULTS International (Australia)  
Save the Children  
Sunshine Coast Environment Council  
Union Aid Abroad APHEDA  
UnitingCare Australia  
Uniting Church in Australia (Synod of Victoria and Tasmania)  
World Wildlife Fund  
350 Australia