

Committee Secretary
Joint Standing Committee on Electoral Matters
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Dear Committee Secretary

Re: *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017*

We provide the following to assist you with your inquiry into the *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017 (Bill)*.

About Not-for-profit Law

Not-for-profit Law is an Australia-wide program of the charity Justice Connect. Not-for-profit Law provides free and low cost legal assistance to not-for-profit (NFP) community organisations and social enterprises. Not-for-profit Law provides services directly (in the form of legal information, advice and training) and brokers referrals for pro bono assistance from its member law firms and barristers.

By helping those involved in running NFPs to navigate the full range of legal issues that arise during the lifecycle of their organisation, Not-for-profit Law saves their time and resources. This allows them to focus on achieving their mission, whether that is helping vulnerable people, environmental conservation, or working towards social cohesion. Not-for-profit Law advocates for an improved legal and regulatory framework for the NFP and social enterprise sector, and to ensure law reform considers the impacts of regulation on small to medium sized organisations. Effective and appropriate regulation supports efficient and well run NFPs and social enterprises; a thriving sector benefits all Australians.

Our submission

We are an active member of the Law Council of Australia's Not-for-profit Legal Practice and Charities Committee (**LCA NFP**) and endorse its submission to this Inquiry.

Our submission builds upon the points made in the LCA NFP submission in an effort to help the Committee have a complete understanding of exactly how the Bill will affect the 600 000 NFP organisations and charities in Australia and the communities they support. Our particular focus is on small and medium sized NFPs (which make up the majority and those that we are established to support). We have done this by setting out a 'likely scenario' that

demonstrates the impact on two fictional organisations. One is a charity registered with the Australian Charities and Not-for-profits Commission (**ACNC**) (**Elder Empathy**). The other is a NFP community organisation that is not registered with the ACNC (**Spark Out**). The Spark Out case study is instructive, as it shows the likely effect of the Bill on those NFP organisations that do not meet the requirements of the *Charities Act 2013* (Cth) (**Charities Act**) but that are established for the dominant purpose of benefiting the broader community, rather than for private member benefit.

Implications of the Bill on small and medium sized NFP organisations and charities

Uncertainty and confusion

Not-for-profit Law has had a considerable increase in inquiries for legal assistance in relation to this Bill, far in excess of inquiries we would normally receive in response to legislative change. In particular, organisations have expressed concern on the question of how or whether the Bill will apply to their organisation. Our clients are mostly small and medium sized community organisations that, unlike larger community organisations, can neither afford legal assistance nor have established pro bono legal relationships. They rely on Not-for-profit Law (a program of Justice Connect, a charity registered with the ACNC) to assist them. In this instance, however, we have had to advise organisations that we cannot assist at this point in time (other than through the provision of information: www.nfplaw.org.au/electoral-amendment).

While this is in part because of our limited resources, and those within the pro bono legal community, it is also because the Bill creates uncertainty, particularly in relation to the broad definition of 'political purpose' (for the purposes of *political expenditure* in relation to being a 'political actor' as a *political campaigner* or *third party campaigner*). Just like Elder Empathy in (our scenario on page 5), many small to medium sized NFPs are rightly concerned by the broadened definition of 'political purpose': '*the public expression by any means of views on an issue that is, or is likely to be before electors in an election*'.

The Bill is also likely to cause confusion. As the LCA NFP has explained, under the Charities Act charities are permitted to conduct activities within their charitable purposes. One of the charitable purposes in the Charities Act includes "*promoting or opposing 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*". Most charities would not consider public expression of matters related to their charitable purpose as being political or a political act (that is, not political actors as described in the Bill), but expressions in relation to the furtherance of their charitable purposes. If restricted from making such statements their ability to achieve their charitable purposes may be limited. This imposes a considerable detriment on those people the charity is seeking to help (refer to Elder Empathy in our scenario on page 5). **We urge the Committee to implement the LCA NFP recommendation that activities within charitable purposes permitted by the Charities Act be excluded from the proposed electoral funding, disclosure and transparency reforms.**

We note it is quite clear in the Charities Act that where a charity has a purpose of promoting or opposing a political party or a candidate for a public office, it would not be, or no longer be, eligible to register as a charity. However, this does not apply to the purpose of distributing information or advancing debate about the policies of political parties, or candidates for political office (such as by assessing, critiquing, comparing or ranking those policies): see explanatory note under s 11(b) of the Charities Act.

We urge the Committee to implement the recommendation of the LCA NFP that the 'the definition of "political purpose" be amended to reflect the purpose of the activity (rather than the activity per se) so as to exclude charities carrying out their charitable purposes'.

We also urge the Committee to consider how such an amendment can also be extended to those NFPs that operate predominantly for a public benefit but are not eligible to be registered under the Charities Act (for example, those organisations that Parliament already considers contribute in such a way that they are exempted from income tax).

Regulation and compliance

This Bill imposes significant costs on the sector. Where a NFP or registered charity is, or may potentially be, caught by this Bill, they will need to put in place strict arrangements. Just like Spark Out in our scenario on page 7, organisations will need new policies and practices in place, as well as systems to monitor all communicative activities of the organisation to determine whether the cost of their labour contributes to *'political expenditure'*. These communicative activities will include the drafting of submissions to Government, media statements or expert commentary on a political party's policy platform. In practice, they will need to understand how each of these activities is costed in order to determine whether they are approaching the monetary thresholds under the Bill. To faithfully comply with these laws, the organisations will be required to implement onerous time management practices (typically found in top-tier law and accounting firms), to account for the time expended on communicative activities.

They will need to put in place arrangements to ensure their ongoing compliance with the Bill. For example, they will need to register with the Electoral Commission, appoint a 'financial controller' (subject to personal liability with severe and extreme consequences including imprisonment and or civil penalties), and monitor the eligibility and location of donors. They may also need to open a separate bank account and have their accounts audited. For many charities like Elder Empathy in our scenario on page 5, the reporting requirements duplicate existing reporting requirements to the ACNC, and are also inconsistent with one of the overall objects of the *Australian Charities and Not-for-profits Commission Act 2012* (Cth), that is to ensure Parliament does not impose unnecessary regulatory burdens on the charity sector. Parliament was clear that the ACNC's purpose is to work 'to put in place administrative practices to ensure appropriate levels of regulatory supervision without the imposition of unnecessary procedural requirements including administrative procedures and practices' and to 'work with other agencies to consolidate and standardise information that is sought from NFPs to minimise the burden which repeatedly seeking the same information would impose on NFPs' (refer to page 19 of the Explanatory Memorandum to the ACNC Bill 2012).

These burdensome requirements may lead to organisations questioning whether it is even worth undertaking any activities that could be construed as failing within the meaning of 'political purpose' and or accepting donations from international sources, as demonstrated by the Elder Empathy shows (see page 5). Both of these will result in serious consequences for all Australians that benefit from their work.

Implications of the Bill: international philanthropy

We endorse the points made in the position paper "Charities and International Philanthropy" (dated August 2017) developed by a consortium of charities and led by Community Council for Australia, Philanthropy Australia and the Australian Council for International Development. This position paper provides considerable analysis on the contribution of international philanthropy to Australian communities, and how restrictions on this will negatively impact the work of Australian charities in Australia and surrounding regions.

Of note is the paper's analysis of the category difference between political parties and charities. Charities assume entirely different roles in Australian society. Charities exist for the public benefit and must work to further their charitable purposes. They contribute to a flourishing society and undertake valuable work in diverse areas including poverty alleviation, health and the environment. They also operate in different legal circumstances to political

parties, have their own statutory regulator in the ACNC and are subject to a robust legislative framework in the Charities Act and the *Commonwealth Electoral Act 1918* (Cth). For these reasons we consider that placing restrictions on international philanthropy in Australia is unnecessary and undesirable.

Extending the ban on foreign donations to encompass international philanthropy will have a deleterious effect on Australia's third sector far beyond the stated intention of preventing foreign influence on Australian elections. Under the current legislative framework, Australian charities cannot have a disqualifying political purpose (as outlined above) and must abstain from party politics. The Bill takes this much further, however. As demonstrated in our scenarios on pages 5 to 7 of this submission, the definitions in the Bill of 'political expenditure', 'political campaigner' and 'associated entity' are vague and indeterminate. The likely result is that charities will either refrain entirely from making public statements on law reform (statements that are permitted under the current law as interpreted by the ACNC) for fear of being captured by the Bill, or will be excluded from international philanthropy, a key source of vital funding required to fulfil their charitable purpose. Neither outcome is desirable.

Conclusion

As outlined in this submission, we are very concerned about the implications of this Bill for NFP organisations and charities and consequently, for all those they benefit. The Committee must give full and proper consideration to these matters and make appropriate amendments to the legislation as we and the LCA NFP have recommended.

We would welcome any opportunity to discuss our submission further.

Yours sincerely



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Likely scenario: "Elder Empathy" (a registered charity): Part 1

Elder Empathy (EE) is a not-for-profit organisation that is a registered charity with the ACNC. It has been operating in Australia for more than 15 years. Its primary purpose is to support ageing Australians with mental health issues. From time to time it makes public statements. As example, it recently issued a media release in support of comments made on 22 January 2018 by the Royal Flying Doctor Service about mental health services in rural and remote Australia being in a state of "crisis". Assuming the Bill in its current form becomes law on 1 July 2018 ("the new law"), EE sets out straight away to understand if it applies to the organisation (like the vast majority of charities, it seeks to comply with the law). It cannot afford legal advice, so it relies on its understanding of the new law and asks itself the following questions:

1. *Do we incur 'political expenditure'?* The organisation is not sure. It makes public statements on its views on issues related to its charitable purpose. But it is not sure if 'mental health' is 'an issue that is, or is likely to be, before electors in an election' (this is one of five political purposes that go to the meaning of political expenditure). The election is not due until later this year or next. How would one know if an issue is going to be before an election?

2. *If so, how much do we spend on 'political expenditure'?* In 2017, it employed a communications person. A combination of that salary and a portion of the salaries of the two managers to whom the communications person reports, is over \$100 000. In addition, EE spent some money on an awareness campaign. It is not really sure of its status under the new law, but to be safe (and compliant) assumes it is a political campaigner.

3. *Are we an 'associated entity'?* EE does not think it meets the definition of 'associated entity' in the new law, but is confused by the breadth and vagueness of the definition, and wonders if it might be considered an entity 'that operates wholly or to a significant extent for the benefit of one or more registered parties'. It is also concerned about the ability of people within the organisation to make statements in public or private, and their exercise of the right to freedom of political communication. It needs legal advice: what does this mean, and what lawful directions can it give to staff about private statements?

Registration: EE proceeds to register as a political campaigner (while seeking pro bono legal advice as it cannot afford paid advice). It is required to appoint an eligible person to be the 'Financial Controller', and explain to this person their obligations and the consequences of a breach (imprisonment or civil penalties). In addition, the person (whose street address must be provided to the Electoral Commissioner) will be on a public register. While the charity is accustomed to listing its directors on the public register managed by the ACNC, EE has never previously had a staff member's name on a public register. It must remember to advise the Electoral Commissioner within 28 days if there is a change to the Financial Controller or it may face a hefty fine. It hurriedly makes the application to register – if not done within 28 days of being required to register it may be fined (or will need to cease any political expenditure).

Annual Return: At the end of the financial year (within 16 weeks) the Financial Controller must lodge a return or could be subject to a large penalty. The organisation has to provide all its financial details and an auditor's report. It already provides reviewed financial information to the ACNC (but not an auditor's report as it is a medium sized charity). The organisation hopes that it can afford an auditor but the additional expense is placing an undue burden on their constrained budget. Senior staff have to be named and disclose if they are a member of a registered political party in the annual return. They also have to detail 'discretionary benefits' provided by the Federal or a State Government (they will need to include a Victorian Government grant they received to focus on Victorian senior citizens struggling after the death of a long term partner). They will need to make a compliance statement in relation to donations, which means they need to work out how the new law applies in relation to donations. They rely on donations to help them achieve their primary purpose of supporting older Australians as they struggle mentally with the ageing process. They do not regard anything they do as being political – after all, if their purpose was to promote or oppose a political party then they could not be a charity under the extant Charities Act. They know that their advocacy work in relation to their purposes is allowed, because the ACNC has said so, along with the High Court. But they are really worried about how all of this will affect the people they help and how as an organisation they will be able to make all the changes to comply. EE envisages that considerable cost and time will be required to fully comply with this new regime.

Likely scenario: "Elder Empathy": Part 2

Donations to "Elder Empathy". EE needs to understand what an 'allowable donor' is, and that people or organisations that donate from within Australia probably meet that criteria but may not. Sometimes they have had donations from people outside Australia. For example, once they had a substantial donation from a New Zealand actor that lived in Australia for a long time (but was not a permanent resident), and was overseas when money transferred into their bank account. They cannot remember if it was from the actor's Australian or overseas bank account (there are provisions in the new law about this too). To be sure and to comply with the new law about acceptable donors they will need a statutory declaration from the donor. This is a lot of work. They will need to put new systems in place, and train their few staff and many volunteers.

Can they accept a gift given to them?

According to EE's understanding, the new law means that if they receive a gift during the financial year (when they are registered as a political campaigner), they need to first establish if the donor is an 'allowable donor' (by way of a statutory declaration). If so, they can keep the gift. However, if the gift is from a person, or on behalf of a person who is not an allowable donor then they have to work out:

- if the amount of their organisation's political expenditure is more than their allowable amount (which they think basically means the total of all their savings and revenue but not gifts from non-allowable donors or loans), or if they have made a gift to another political campaigner or political entity which is more than their allowable amount in that financial year, and
- if the gift is expressly made (in whole or in part) for at least one political purpose and is more than \$250 at the time made (or if the donor has made gifts totalling \$250 in the financial year)

If any of these situations apply then they cannot accept the gift. Rather, EE has to undertake 'acceptable action', which means transferring the amount of the value of the gift to the Commonwealth, or returning the gift (or transferring the value of the gift) to the donor or person that made the gift. They have six weeks to do all of this, or face very serious penalties – 10 years imprisonment or 600 penalty units (\$126 000) or both, and a potential civil penalty of 1000 units (\$210 000). They also work out that they have to set up a separate bank account for any gifts they receive from overseas (in those circumstances where they are allowed to keep them) and ensure that they only use those gifts on things other than 'political expenditure'.

Options: Elder Empathy worries if it is really worth it.

Should they accept gifts at all from people or organisations outside Australia? The previous gift they had from the New Zealander meant that they could implement a new counselling program for people in remote Western Australia. Many people benefited.

The EE board decides to meet to discuss the option of not accepting funds from non-allowable donors. Perhaps they can instead reduce spending on 'political expenditure' so they would not be a 'political campaigner' but a 'third party' campaigner. That is not really a viable option, however, as similar rules apply in relation to working out allowable donors and whether they can then accept the gift (as above). There would also be similar annual reporting obligations, but some differences in relation to identifying the donor in certain circumstances in that annual report. The time and effort is mostly the same, but they would have limited their opportunities to raise important issues. The only other option is maybe they could cease any activity that might be a 'political purpose' in respect of the new law. But then they wonder how they could really achieve their purpose of supporting ageing Australians with mental health issues without making public statements from time to time. A complicating factor is that it seems that Australia's ageing population and health issues are topics that are always discussed within the community, including at election times. In short, EE faces great uncertainty.

Likely scenario: "Spark Out": A not for profit (but not charitable)

Does the Bill apply and can it accept donations? Spark Out is a not-for-profit organisation that has been operating in Australia for more than 15 years. It was formed by a group of workers who were made redundant when the old state electricity commission closed down. Their main purpose over the years has been to provide information about electricity, from how it is generated to how to save it. They provide annual reports to their regulator, including in relation to their fundraising activities. While their work is beneficial to the public it does not meet the legal definition in the Charities Act. Spark Out has a considerable budget but not for legal fees (it considers that more people benefit from spending on its purpose rather than on legal fees). Spark Out is relying on its own understanding of the new law and asks itself the following questions:

1. *Do we incur 'political expenditure'?* The organisation is not sure. It makes public statements on issues about electricity. Generally people have not shown much interest in electricity over the years, but with rising household electricity prices it is becoming a more common topic. Spark Out decides some of its work may meet the definition of a political purpose in the new law.
2. *How much do we spend on 'political expenditure'?* Three years ago it employed consultants to produce a number of reports which are available to the public. Again, they think this comes within the definition of political purpose in the new law. The consultant's work cost more than \$100 000. Spark Out decides it is likely to be a political campaigner within the new law.
3. *Are we an 'associated entity'?* It does not think it meets the definition. However, it may need legal advice. Spark Out notes that under the new law it could be both a political campaigner and associated entity (and that it may need to be registered as both).

Registration and Annual Return

The organisation proceeds to register and report annually (see the Likely Scenario: Elder Empathy in relation to these requirements).

Donations to Spark-Out?

Under the new law, Spark Out cannot accept gifts from non-allowable donors if that donor makes a gift or gifts totalling \$250 or more in the one financial year. They must take 'acceptable action' (meaning to return it to the donor or transfer to the Commonwealth, see the Likely Scenario: Elder Empathy) if a gift meets these requirements within 6 weeks. If not, an offence is committed (imprisonment) and civil penalties can apply.

Options: There are no options: under the new law Spark Out cannot accept gifts from non-allowable donors of more than \$250 in a financial year. They consider this a real shame. One of their founding members (who never became an Australian citizen despite living here for 55 of his 60 years) moved to Canada a few years ago and is incredibly wealthy and would like to continue to help the organisation in its work. He cannot donate to Spark Out without it being an offence. They consider this a real loss because a lot of what they do is educative, helping Australians to reduce their electricity spending. Spark Out's intention is to be informative and helpful, and not to be political nor seek influence over a particular registered political party.

If Spark Out had not met the definition of political campaigner but had met the definition of a third party campaigner then it may have been able to accept gifts from non-allowable donors of more than \$250 in a financial year in certain circumstances (see the Likely Scenario: Part 2). However, this is not applicable as at the current time Spark Out cannot be a third party campaigner - it is a political campaigner and it cannot be both at the same time.