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BY EMAIL: [REDACTED]

Submission to the Review of the Foreign Influence Transparency Scheme Bill 2017

1. The Australian Charities and Not-for-profits Commission (**ACNC**) welcomes the opportunity to provide a submission to the Review (**Review**) into the Foreign Influence Transparency Scheme Bill 2017 (**the Bill**). This submission focuses on the impact of the Bill on charities registered with the ACNC that undertake 'activities for the purpose of political or governmental influence'.¹

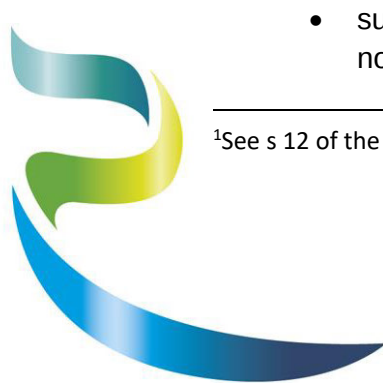
Summary of the ACNC's submission

2. The ACNC has three main areas of concern, which this submission details. These concerns are:
 - The Bill places an unnecessary regulatory burden on charities. Charities are already well-regulated and transparent.
 - The significant penalties for non-compliance as set out in the Bill are likely to increase the difficulty for charities attracting qualified staff and Directors, posing a risk to individual charities and the sector as a whole.
 - The definition of 'undertaking an activity on behalf of a foreign principal' is imprecise and extremely broad. This creates difficulties for charities in understanding their potential obligations. The difficulties inherent in charities meeting the requirements of the Bill and the risks attached to non-compliance mean it is likely charities will be less inclined to engage in public discourse which is an important element of charitable activity and purpose.

The ACNC's role

3. The ACNC was established on 3 December 2012 by the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) (**ACNC Act**). The objects of the ACNC Act are to:
 - maintain, protect and enhance public trust and confidence in the Australian not-for-profit sector; and
 - support and sustain a robust, vibrant, independent and innovative Australian not-for-profit sector; and

¹See s 12 of the Bill for a definition of such activities.





- promote the reduction of unnecessary regulatory obligations on the Australian not-for-profit sector.²
- 4. Just over 55,600 charities are regulated by the ACNC.³ Australia's charities deliver services, make grants and perform a wide range of other activities to advance health, education, welfare, religious and other charitable causes. Charities range in size from extra small (less than \$50,000 – 39.8% of all charities) to extra large with revenue over \$100 million (0.3% of all charities). Half of charities have no paid staff, and the sector is supported by 2.9 million volunteers⁴.

How charity law applies to activities of registered charities for the purpose of political or governmental influence

5. To become and remain a registered charity under the ACNC Act, among other requirements, a not-for-profit organisation must meet the definition of 'charity' in the *Charities Act 2013* (Cth) (**Charities Act**). Political parties are explicitly excluded from the definition of 'charity'⁵.
6. To be a registered charity, an organisation must have a charitable purpose. The Charities Act lists 12 charitable purposes⁶, which includes 'the purpose of promoting or opposing a change to any matter established by law, policy or practice in the Commonwealth, a State or a Territory or another country' as long as the advocacy is in furtherance or aiding in one or more of the 11 other charitable purposes.⁷
7. A registered charity must not have a 'disqualifying purpose'. The meaning of disqualifying purpose is set out in section 11 of the Charities Act, and includes 'the purpose of promoting or opposing a political party or a candidate for political office'.
8. However, it is not a disqualifying purpose to distribute information, or advance debate, about the policies of political parties or candidates for political office (such as by assessing, critiquing, comparing or ranking those policies - see the example given in section 11 of the Charities Act).
9. There is no current requirement in the ACNC Act or the ACNC Regulation for charities to disclose relationships with foreign entities. The *Commonwealth Electoral Act 1918* (Cth) (**CEA**) requires entities to inform the AEC via an annual return where a donation over the disclosure amount has been received for the purposes of political expenditure. These donations may be from foreign entities but are not specifically targeting such information.

² ACNC Act, section 15-5.

³ As of 5 January 2018. See www.acnc.gov.au for the most up to date figure for registered charities.

⁴ 2016 Australian Charities Report – available [here](#).

⁵ Sub-section (d) of the definition of charity in section 5 Charities Act

⁶ Section 12 Charities Act

⁷ In 2010, the High Court of Australia held in *Aid/Watch Inc v Federal Commissioner of Taxation* identified a public benefit to such advocacy in its contribution to public discussion, which informs voters as well as policy-makers.



Activities on behalf of a Foreign Principal

10. The Bill provides that where a person⁸ intends to conduct an activity or activities on behalf of a foreign principal, if these activities are registerable, the person needs to register with the Secretary.
11. The ACNC has assessed the definition of undertaking an activity on behalf of a foreign principal (s 11 of the Bill) and is concerned that the definition is not sufficiently precise. The relevant section could mean that simply discussing activities for the purpose of political or governmental influence with a foreign principal could then be interpreted as undertaking that activity on behalf of the foreign principal.
12. The ACNC considered the example of an Australian academic working in a research institute which is registered with the ACNC⁹ who presents a paper at an international conference convened by a foreign research institute. During this presentation if the researcher mentions that the Australian research institute is planning to commend this research to the Australian government, this could, according to s 11(3) then mean that such commendation (which is for the purpose of political or governmental influence according to the definitions provided in the Bill in s 12(1)) be on behalf of a foreign principal¹⁰¹¹.
13. It is also possible that where a charity is part of a wider family of charities, such as an international aid organisation which has links to an international grouping of entities, the charity may be required to register under s 11(1)(e) or (f) should the group all decide to draw attention to the same transboundary issue, for example wealth and income inequality, or global environmental issues. Such collaboration would not normally be seen as undertaking activities on behalf of a foreign principal but could come within the definition under the Bill.
14. Such a broad definition of undertaking activities on behalf of a foreign principal will result in a lack of clarity as to what activities a charity can and cannot do without being seen (rightly or wrongly) to be undertaking an activity on behalf of a foreign principal. The Bill provides the Secretary with the power to investigate whether a person should have been registered, and provides strict liability and jail sentences for various offences under the Bill. Given such penalties, a charity may decide not to comment on issues which are directly related to its charitable purpose because it cannot be confident that it may not be subject to a charge that an activity was on

⁸ Person is defined under s 10 of the bill, as is foreign principal.

⁹ A large number of research institutes and universities are registered charities, with charitable purposes as defined by the Charities Act 2013.

¹⁰ Should this researcher have private discussions on the same topic, each person in the discussion could be seen to be a separate foreign principal, noting a foreign principal can be an individual under s 10.

¹¹ The ACNC notes paragraph 146 of the Explanatory Memorandum to the Bill, which states that "This definition is not intended to cover circumstances where a person undertakes an activity with no knowledge, awareness or direction from the foreign principal or where the relationship between the person's activities and the foreign principal's interests is merely coincidental." however the ACNC is of the view that this is carve out is not captured in the Bill and suggests this section requires re-wording.



behalf of a foreign principal. The ACNC suggests that the definition of undertaking activities on behalf of a foreign principal be clarified, or that charities registered with the ACNC be exempt from the Bill as they are already regulated by the ACNC.

15. Under the Charities Act, a charity can undertake advocacy and campaigning on relevant issues as a legitimate and effective way of furthering its charitable purpose.
16. As there has been concern at times about the extent of those activities for a registered charity, the ACNC has published guidance to assist. For example, in the lead-up to the 2016 Federal Election, the ACNC issued public guidance to proactively assist charities in understanding their obligations under the Charities Act in relation to political campaigning and advocacy¹².
17. The ACNC is concerned that the broad definitions set out in the Bill may decrease the amount of advocacy work undertaken by charities that are unable to meet the proposed regulatory burden and the risk of non-compliance as set out in the new regime.

Regulatory burden – increased reporting

18. This scheme provides for registration with, presumably, the Secretary of the Department of Home Affairs or the Attorney General's Department (it is not clear from the Bill where responsibility sits). Should a charity need to register, and should the charity also be undertaking political expenditure over the disclosure threshold, this charity now needs to register and submit annual returns (all with different due dates) to three different government entities; the ACNC, the Australian Electoral Commission, and the Commonwealth Department implementing this scheme. The charity also needs to determine whether its advocacy is allowable or reportable under three different sets of definitions¹³.
19. The ACNC is concerned that the registration and reporting requirements are overly burdensome. While many reporting requirements are not fully articulated in the Bill¹⁴, the ACNC understands the Bill to require:
 - (a) Registration, if the person¹⁵ undertakes registerable activities on behalf of a foreign principal, even if this is only a single activity (s 18)
 - (b) Registration if the person enters into a registerable arrangement with a foreign principal, even if they never act on the arrangement (s 18)
 - (c) Sending the Secretary a notice of cessation of being liable to register (s 19 and s 31). This may include sending a notice when registration is due for renewal – there seems to be some confusion as to whether there is

¹² The guidance is available at www.acnc.gov.au/advocacy

¹³ Noting that the Electoral Legislation Amendment (Political Funding and Disclosure Reform) Bill 2017 broadens the definition of political purpose, capturing more activities undertaken by charities and more charities will therefore need to register with the AEC.

¹⁴ Many of the registration and reporting requirements are at the discretion of the Minister through rules established by legislative instrument.

¹⁵ Using the Bill's definition of the word person



automatic lapsing of registration (s 32(b) implies there may be, while s 39(1)(b) seems to imply that for registration to cease a notice must be provided

- (d) Reporting material changes in circumstances (s 34), including if another type of registrable activity is to begin, or to be included in an arrangement (ie, it is not enough to merely register, you must state what you will be doing, which could be very difficult for charities to comply with, given the nebulous nature of the definition of undertaking an activity on behalf of a foreign principal, as discussed above, and given the occasional reactive nature of advocacy)
- (e) Reporting donor activity where the amount spent is over the disclosure threshold¹⁶, (described as disbursing money or things of value in s 10). This could include campaign t-shirts, bumper stickers or other advocacy gifts and could therefore apply to charities (s 35 and s 37).
- (f) At the beginning of a voting period at the federal level providing a notice to the Secretary in regards to registration (s 36)
- (g) Giving the Secretary a notice of a registrable activity undertaken during the voting period. It is not clear if each registrable activity in a voting period requires a separate notice (s 37)
- (h) Reporting any communications activity undertaken on behalf of the foreign principal (s 38)¹⁷.
- (i) Annual renewal of registration (s 39)
- (j) Keeping records including actual documents or material used in undertaking registrable activities and other material not connected to registrable activities but which are on behalf of the foreign principal (s 40).

As noted above, one of the objects of the ACNC Act is promote the reduction of unnecessary regulatory obligations on the Australian not-for-profit sector, including charities. The ACNC is therefore concerned with the increased burden this would place on charities. The ACNC recommends the government undertake a regulatory impact assessment of this Bill as it relates to entities which are already regulated, such as charities.

- 20. Charities needing to report donor activity may also have to report political expenditure to the AEC. This requires a complex set of reporting and financial recording systems to ensure that similar costs are accurately captured for a variety of reporting obligations. This increases the regulatory burden on charities.
- 21. The ACNC already requires registered charities to complete an annual information statement (AIS). The ACNC AIS is due six months after the end of the charity's reporting period, noting that not all charities report on a financial year basis¹⁸. Returns to the AEC are required within 16 weeks after the end of the financial

¹⁶ The ACNC notes that the disclosure threshold is set at \$13,500 which matches that set in the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017. However, the ACNC notes an inconsistency in that this amount is indexed yearly in the latter Bill, but not this Bill. This again introduces complexity, with charities needing to monitor different threshold amounts for potentially the same activity.

¹⁷ Noting that details of this are to be set by the rules, and therefore the true burden attached to this requirement cannot be assessed.

¹⁸ ACNC Act, sections 60-5 and 60-85



year¹⁹ and the above requirements seem to relate to a variety of timeframes. The complexity of multiple reporting duties to multiple bodies at multiple points in the year increases the regulatory burden on registered charities.

22. Charities perform an important role in Australian society, and their experience provides depth to public discussion. Often this experience is shared with international charities, or foreign charities engaged in similar issues. Cross-learning allows the charity sector to put forward international best practice solutions. The charity sector plays a distinctive role in Australia, a role recognised in legislation (see s 15-10(h) of the ACNC Act). The ACNC is concerned that the Bill may negatively impact on this role noting that the sector is already well regulated and transparent.

Increased penalties

23. The ACNC notes the penalties set out in the Bill, and the fact that penalties are for the 'person', including terms of imprisonment. The ACNC questions whether this means that, for example, in the instance of a breach, the entire Board of an incorporated association would be liable for an offence and the entire Board would face a jail sentence?
24. The ACNC reminds the Committee that charities are often reliant on donations for their funding, and are frequently run by volunteers who are seeking the betterment of society. The level of the suggested penalties will have a greater impact on charities than other organisations. The ACNC notes also in this regard the imposition of charges for registration and would suggest that registered charities be exempt from such charges.
25. The charities sector already faces a challenge of finding appropriately skilled personnel as staff and for governance positions. The introduction of substantive penalties will, in our view, make it more difficult to recruit to charities and will adversely impact on the governance of the sector.

Further information

26. The ACNC is able to provide further information on any of the concerns raised above, should this be useful to the Joint Parliamentary Committee on Intelligence and Security. Contact information is provided below.

¹⁹ Financial year does not seem to be defined in either the bill nor the CEA, therefore the standard financial year of 1 July to 30 June is assumed.