

Submission to Joint Standing Committee on Electoral
Matters

Electoral Legislation Amendment
(Electoral Funding and Disclosure
Reform) Bill 2017

February 2018

National Association of Community Legal Centres

ABN 67 757 001 303 ACN 163 101 737

Tel: 61 2 9264 9595

Fax: 61 2 9264 9594

Email: naclc@clc.net.au

Web: www.naclc.org.au

Mail: PO Box A2245 Sydney South NSW 1235 Australia

 @naclccomms

Contents

Executive Summary	1
Impact of the Bill on Advocacy	2
The importance of advocacy	2
The advocacy work of community legal centres	2
Operation and impact of the Bill	3
Compliance Burden	5
International Philanthropy	5
Conclusion	6

Executive Summary

This submission is made to inform the inquiry being conducted by the Parliamentary Joint Standing Committee on Electoral Matters into the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017 (Cth).

The submission is made on behalf of the National Association of Community Legal Centres (NACLC). NACLC is the peak body for all community legal centres (CLCs) in Australia. NACLC is a registered charity and undertakes a wide range of activities in support of the community legal sector, including policy and advocacy work in relation to access to justice-related issues.

Community legal centres are independent, not for profit community based organisations. They provide free legal help – including information, referral, legal education, advice, casework and representation services – to hundreds of thousands of people across Australia every year, at times when they most need it.

In summary, while supportive of measures to ensure the integrity of the electoral system, NACLC considers that this Bill goes beyond its stated intention and will have serious and negative consequences for vital advocacy undertaken by charities and not-for-profit organisations in Australia and public debate. Specifically, the Bill if enacted is likely to:

1. stifle legitimate and important advocacy by civil society
2. impose increased, excessive and cumbersome administrative and reporting requirements
3. further restrict the already limited funding and resources available to civil society in Australia, in particular international philanthropy

In particular, given that all CLCs are not-for-profit organisations (and many are also registered charities) and undertake early intervention and prevention work, including strategic litigation and advocacy, it may be the case the some CLCs are captured by the definition of ‘political campaigner’ included in the Bill.

In light of the concerns outlined by NACLC in this submission as well as others, and the way in which the Bill is drafted, NACLC recommends that the Bill be withdrawn and completely redrafted, rather than amended.

NACLC notes that a number of individual CLCs have made submission to the Inquiry and NACLC draws the Committee’s attention to submissions made by CLCs including:

- Consumer Action Law Centre
- Human Rights Law Centre
- Public Interest Advocacy Centre

In addition, NACLC acknowledges the important work done by bodies such as the Australian Council of Social Service (ACOSS), Australian Council for International Development, St Vincent de Paul Society, which has informed this submission.

NACLC would welcome the opportunity to discuss these issues in more detail. The most appropriate contact person for this submission is:

Amanda Alford
Director Policy & Advocacy
Ph: (02) 9264 9595
Email: amanda.alford@clc.net.au

Impact of the Bill on Advocacy

Australian charities and non-government organisations (NGOs), including community legal centres (CLCs), undertake advocacy on a range of matters in the public interest each year. These organisations, including many CLCs, undertake important advocacy work and have a long and successful history of bringing about positive and systemic reform of laws and legal frameworks at all levels of government.

NACLC is concerned that this Bill will contribute to an increasing trend of restricting or seeking to excessively regulate advocacy work by charities and NGOs, including CLCs. NACLC, along with others, has outlined these concerns in numerous contexts, including most recently in its submission to the *Treasury Tax DGR Reform Opportunities Paper*.

In this section of the submission, NACLC briefly outlines the importance of the advocacy work undertaken by charities and NGOs; some of the early intervention and prevention work undertaken by CLCs, including law reform and advocacy; and then examines the possible ways in which this Bill might limit this vital work.

The importance of advocacy

Australian charities and NGOs, including many CLCs, undertake important advocacy work. In this way, CLCs are able to support and defend the people and communities we work with, who would otherwise have no or limited access to justice. The advocacy of CLCs includes identifying and making recommendations about systemic issues in the areas we work, and championing positive law reform for the benefit of the community as a whole.

The importance of advocacy was recognised by the High Court in *Aid/Watch Incorporated v Commissioner of Taxation* [2010] HCA 42, in which the Court emphasised that charities undertaking advocacy was an ‘indispensable incident’ of Australia’s constitutional system. This decision is now reflected in the *Charities Act 2013* (Cth).

The importance of this work, and indeed its legislative protection, were further guaranteed by the *Not-for-Profit Sector Freedom to Advocate Act 2013* (Cth) which emphasises its purpose in protecting and promoting ‘the NFP sector’s freedom to advocate or oppose changes on Commonwealth law, policy and actions’.¹

The advocacy work of community legal centres

Community legal centres have a long and successful history of bringing about systemic change through policy, advocacy and law reform. This work is crucial in identifying and encouraging reform of laws, policies and practices that are not operating effectively or equitably.

By way of example, the law reform and advocacy work of CLCs includes:

- providing evidence-based information to government and law reform reviews and inquiries, including inquiries such as this current inquiry
- working with other legal and non-legal service providers, organisations and institutions to improve processes and increase awareness of the particular needs and perspectives of CLC client groups, and where possible avoid legal problems occurring
- strategic litigation

¹ Explanatory Memorandum, *Not-for-Profit Sector Freedom to Advocate Bill 2013*.

- supporting clients and representatives of client groups to participate in government and community forums and other policy and law reform processes
- reporting illegal conduct, for example of debt collectors or door to door salespeople, to relevant authorities and regulators
- writing to and meeting with Members of Parliament about issues affecting CLC client groups, and
- broader advocacy work, including for and with victims/survivors, consumers and others, human rights advocacy, and awareness raising.

The value of the advocacy work of CLCs has been recognised in a number of contexts, including the 2014 Productivity Commission Inquiry into Access to Justice Arrangements.

In its report, the Productivity Commission stated that CLCs play a key role in law reform, policy and advocacy, that it should be a 'core activity' of CLCs and that 'in many cases, strategic advocacy and law reform can reduce demand for legal assistance services and so be an efficient use of limited resources'.² The Commission also expressed the view that 'strategic advocacy can benefit those people affected by a particular systemic issue, but, by clarifying the law, it can also benefit the community more broadly and improve access to justice (known as positive spill-overs or externalities)'. It ultimately recommended that "Australian, State and Territory Governments should provide funding for strategic advocacy and law reform activities that seek to identify and remedy systemic issues and so reduce demand for frontline services."³

Unfortunately however, CLCs that receive Commonwealth funding under the National Partnership Agreement on Legal Assistance Services 2015-2020 (NPA) have been restricted from undertaking advocacy work with Commonwealth funding. As a result, CLCs undertake this type of work with funding from other sources.

NACLC is concerned that the vital advocacy work of the sector would be captured by the definition of "political purpose" (discussed in more detail below) proposed and that in addition to existing limitations under the NPA, that this Bill would further limit advocacy by CLCs. This would limit the expert contribution charities across Australia make to public policy and debate and have a detrimental impact on the fair and effective operation of law in Australia.

Operation and impact of the Bill

This Bill creates new classes of "political campaigner" and "third party campaigner". An organisation would be a "political campaigner" if it:

- incurs more than \$100,000 of "political expenditure" in any of the previous four years; or
- incurs \$50,000 or more in "political expenditure", where that represents 50% of more of its annual budget.

A "third party campaigner" is an organisation that does not meet the definition above, but incurs "political expenditure" above the "disclosure threshold" which is defined in s 287(1) as \$13,500 (indexed).

² Productivity Commission of Australia, *Access to Justice Arrangements Inquiry* (2014) Final Report, Vol 2, 709.

³ *Ibid*, Vol 1, rec 21.1

Categorisation as either of these relates to “political expenditure” by the relevant organisation. Importantly, the definition of “political expenditure” proposed under section 287(1) of the Bill is “expenditure incurred for one or more political purposes.” Political purpose is defined broadly as:

- (a) the public expression by any means of views on a political party, a candidate in an election or a member of the House of Representatives or the Senate;
 - (b) 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);
 - (c) the communicating or any electoral matter (not being matter referred to in paragraph (a) or (b)) for which particulars are required to be notified under section 321D;
 - (d) the broadcast of political matter (not being matter referred to in paragraph (c)) in relation to which particulars are required to be announced under subclause 4(2) of Schedule 2 to the *Broadcasting Services Act 1992*;
 - (e) the carrying out of an opinion poll, or other research, relating to an election or the voting intention of electors;
- except if:
- (f) the sole or predominant purpose of the expression of the views, or the communication, broadcast or research, is the reporting of news, the presenting of current affairs or any editorial in news media; or
 - (g) the expression of the views, or the communication, broadcast or research, is solely for genuine satirical, academic or artistic purposes.

This definition and scope is extremely broad. It would essentially capture advocacy on any issue of significant public interest at any time (given the failure to limit the scope to election periods). In particular, in considering subsection (b):

- ‘*public expression by any means*’ is likely to encompass activities including media comment, social media engagement, writing submissions, giving evidence or otherwise engaging with Parliamentary and similar inquiries and reviews (a core part of effective and legitimate CLC work); and publishing reports or research
- ‘*on an issue that is, or is likely to be, before electors in an election*’ the scope of which potentially intersects with almost all issues of public interest and areas in which CLCs and other charities and NGOs undertake advocacy; and

Accordingly and given the breadth of the definition, much of the public policy, law reform and advocacy work undertaken by many charities and NGOs, including CLCs, is likely to fall within this definition.

NACLC is concerned that this Bill conflates the overtly party political activities of political organisations seeking to influence the outcome of elections with the non-partisan advocacy work undertaken by charities and NGOs designed to contribute to the development of better public policy and law.

Given the administrative and reporting requirements proposed, the penalties attached to breach of the Bill’s provisions, as well as the breadth of the definitions and likely uncertainty about its application, NACLC is concerned that the Bill would have a chilling effect on advocacy by charities and NGOs, including CLCs, across Australia.

In addition, given existing limitations under the *Charities Act and Australian Charities and Not-for-Profits Commission Act (Cth)* on charities having a “disqualifying purpose”, there is a risk that this broader and arguably inconsistent terminology and definition may promote confusion about the advocacy work of charities and contribute to this chilling effect, or even unfairly put at risk the charitable status of organisations.

Compliance Burden

The community legal sector supports a clear regulatory framework for the not-for-profit sector that ensures good governance and transparency, and the work of the Australian Charities and Not-for-profits Commission (ACNC). It also supports transparency and steps to ensure the integrity of the Australian electoral system.

NACLC is concerned however that this Bill would impose increased, excessive and cumbersome administrative and reporting requirements.

Third party entities are already subject to a range of disclosure and reporting requirements under the Electoral Act.⁴ Charities are also subject to a broad range of regulatory requirements under the *Charities Act* and ACNC Act. Indeed, one of the objects of the ACNC is to promote the reduction of unnecessary regulatory obligations on the Australian charitable sector.

However, one of the consequences of being deemed a “political campaigner” under the Bill is the imposition of a range of registration and reporting requirements, including registration,⁵ appointment of a financial controller,⁶ and submitting a detailed annual return.⁷

NACLC considers that these requirements and obligations would impose a substantial administrative and compliance burden on charities that already comply with rigorous reporting regime. The funds spent on complying with such a regime would further divert limited resources from essential services and work by charities and NGOs for the benefit of people across Australia. Alternatively, given the costs and penalties, organisations may choose not to undertake vital advocacy work moving forward.

International Philanthropy

Finally, NACLC is concerned that this Bill would further restrict the already limited funding and resources available to civil society in Australia, in particular international philanthropy.

One consequences of falling within the definition of “political campaigner” under the Bill is restrictions on receiving foreign donations, with significant penalties associated with breaching the restrictions.

NACLC is concerned that these bans and/or limitations, would result in the loss of already limited funding to charities and NGOs in Australia that receive funding from foreign sources such as overseas charities or philanthropic foundations.

This ban or limitation has the capacity to stop projects or collaborations based on grants from foreign or global philanthropic bodies to address domestic issues. In addition, given many public policy issues are of global importance, or benefit from global perspective, research or comparison it also has the ability to further limit the expert contribution charities and NGOs can make to the development of public policy based on international collaboration or research.

⁴ *Commonwealth Electoral Act 1918* ss 314AEB, 314AEC,

⁵ Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017 (Cth) s 287F.

⁶ *Ibid*, s 292E.

⁷ *Ibid*, ss 314AB and 314AC.

Conclusion

As outlined above, NACLC considers that this Bill goes beyond its stated intention and will have serious and negative consequences for vital advocacy undertaken by charities and not-for-profit organisations in Australia and public debate. In particular it likely to:

1. stifle legitimate and important advocacy by civil society
2. impose increased, excessive and cumbersome administrative and reporting requirements
3. further restrict the already limited funding and resources available to civil society in Australia, in particular international philanthropy

There is also a significant risk that the Bill will have the effect of discouraging informed public debate of key issues and therefore risk undermining vital democratic discussion and debate in Australia.

In our view, it is not possible for the Bill to be redrafted in a way that addresses the concerns outlined above, and as a result, NACLC recommends that the Bill be withdrawn and completely redrafted, rather than amended.

