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Committee Secretary
Joint Standing Committee on Electoral Matters
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Parliament House
Canberra ACT 2600
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Dear Committee Secretary

Arnold Bloch Leibler's Submission: Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017

Please find enclosed Arnold Bloch Leibler's submission.

Could you kindly acknowledge receipt at your earliest convenience.

Yours sincerely

Peter Seidel
Partner

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1 Arnold Bloch Leibler Lawyers and Advisers (**ABL**) acts for a range of philanthropic families and foundations, not-for-profits and charities doing exceptionally important work in the community.

2 We are involved in establishing and administering not-for-profits (**NFPs**) and ACNC registered charities, advising on the legitimate scope of community education and advocacy activities, and helping our public interest clients to fulfil their governance responsibilities and regulatory obligations.[1]

3 We are therefore particularly well-placed to comment on the the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017 (**Bill**) and the very troubling and concerning implications for NFPs and charities.

Executive Summary

4 ABL does not in any way support the Bill insofar as it relates to NFPs and ACNC registered charities. Exempting only such registered charities from the Bill's operation will not adequately address our concerns.

5 Key implications of the Bill for NFPs and ACNC registered charities are as follows:

(a) NFPs and registered charities that spend in excess of a relatively modest threshold expressing views on certain matters of clear public interest for the improvement of civil society will be required to register as "political campaigners" and will be inexplicably treated, in many respects, as if they are political parties.

(b) "Political campaigners" will be required to submit a detailed annual return to the Australian Electoral Commission in precisely the same way as political parties. The return must include detailed financial information, political affiliations of senior staff, personal information about donors and an auditor's report. This reporting obligation is in addition to existing and already significant ACNC reporting obligations. Severe impacts on donor privacy are obvious.

(c) Australian donors to NFPs and registered charities that are classed as "political campaigners" will be required to submit annual returns in the precisely the same way as donors to political parties. The same severe impacts on donor privacy apply here.

(d) NFP "political campaigners" will be completely banned from accepting any gifts over $250 from foreign donors. This includes NFPs that pursue objects of public benefit that are not charitable at law.

(e) Registered charities that are classed as "political campaigners" will be significantly restricted in their ability to accept, and use, foreign gifts. For example, these charities must keep foreign gifts in a separate account that cannot be used for a

[1] All registered charities are not-for-profits. Registered charities are therefore a sub-set of NFPs.

range of advocacy activities or for making grants, as part of a grants program, to other "political campaigners".

(f) NFPs and registered charities engaged in advocacy will need to nominate a "financial controller" who, despite in many cases being a volunteer, may be subject to onerous penalties if the entity does not comply with the complex administrative requirements imposed by the Bill (including a potential prison term or hundreds of thousands of dollars in fines). These penalties may threaten ongoing eligibility for charity registration.

(g) Lack of clarity about the meaning of "political expenditure", together with real uncertainty about whether expenditure incurred well prior to the Bill is to be counted when determining whether or not an entity is a "political campaigner", will make it extremely difficult for NFPs and charities to ensure compliance with a very complex piece of legislation, which legislation has serious penalties for non-compliance.

6 The Committee Chair is correct to state that the Australian political landscape has changed. But so too has the concept of charity.

7 There are now very few areas of Australian society that are unregulated by government, making complete political disengagement by charities impossible. In light of this changed landscape, no less than the High Court of Australia has recognised that rather than merely operating soup kitchens or providing direct relief, agitating for policy or legal change may very well be the best and most effective means of achieving charitable objects in modern Australian society. This common law recognised and accepted advocacy objective is now enshrined in the *Charities Act 2013* (Cth) as a legitimate and valuable charitable purpose.

8 However, contrary to the Committee Chair's statements, this certainly does not make NFPs and charities "political actors" that are worthy of regulation *as if* they are political parties open to undue influence by foreign and domestic donors. It is regrettable, misguided and contrary to fundamental principles of Australian civil society that the Bill treats NFPs and charities in this way.

9 The Bill is simply wrong to conflate the community education and advocacy activities of NFPs and charities with the campaigning and electioneering of political parties. The voice of NFPs and registered charities cannot be equated with the legislative and executive power of members of parliament and government. It ought to be obvious the two assume different roles and perform different functions in society: the former is critical to the proper functioning and accountability of the latter.

10 The practical and substantive impact of the Bill is likely to be a severely compromised and weakened Australian civil society and a reduction in NFP and registered charity effectiveness, making this Bill more of a threat to the strength and integrity of Australia's democracy than the foreign donations that are the Bill's stated target.

Unfair Politicisation of NFPs and registered charities as "campaigners"

11 Instead of treating NFPs and registered charities as entities that are independent of the political process, as they are currently treated under the *Commonwealth Electoral Act 1918*, the Bill effectively politicises NFPs and registered charities by requiring their registration as either "third party campaigners" or "political campaigners".

12 Under the Bill, both "campaigner" categories will capture NFPs and registered charities that are doing no more than simply pursuing the purpose or mission for which they are established.

13 Under the Bill also, activities such as community education, advocacy and speaking publicly on societal issues, in respect of which NFPs and registered charities are usually specifically established to undertake in furtherance of their charitable objectives, will be re-framed as political acts, pursued for a "political purpose".

14 The purported object of the Bill as it relates to foreign funding is "to secure and promote the actual and perceived integrity of the Australian electoral process by reducing the risk of foreign parties and entities exerting improper influence in the outcomes of elections".[2] Whether the Bill pursues this stated objective in a constitutionally valid manner is very much a live issue (see paragraphs to 62 to 66).

15 For the reasons outlined in the remainder of this submission, if the Bill is passed into law the disproportionate impact of it on the democratic public expression of views by NFPs and charities means that, well beyond promoting the integrity of Australian elections, it will effectively delegitimise, silence and significantly limit the influence of Australian civil society.

Charities and their supporters improperly equated with political parties and their donors

16 In many respects the Bill proposes to treat NFPs and ACNC registered charities that are classed as "political campaigners" as if they are political parties.

17 For example, major donors to NFPs and registered charities that are "political campaigners" will be required to submit annual returns as if they were donors to a political party.[3]

18 NFPs and registered charities captured by this category of campaigner will also be required to comply with annual return obligations that are substantially the same as those of a political party.

19 The reporting obligations to the AEC will be in addition to existing exhaustive reporting obligations to the ACNC and fundraising regulators across the country and will demand disclosure of, among other things; the total amount received during the financial year, personal/company details for all gifts over the disclosure threshold, details of "senior staff" and their personal political affiliations, discretionary benefits received from any government and an auditor's report.

20 The auditing requirement is concerning given that a small registered charity (with annual revenue of less than $250,000) that is not otherwise required to prepare audited reports for the ACNC, will, according to this Bill, be required to submit an audited report for the AEC.

[2] Bill, proposed s 302C.
[3] Bill, proposed s 305B.

21 In our view, this is a burdensome and entirely improper reporting scheme for NFPs and registered charities. NFPs and registered charities are already fully accountable to donors, members and supporters for their "political expenditure" (for example, political advertising, broadcasting and public expression of views) all of which by definition is already public.

22 There is no democratically defensible rationale for NFPs and ACNC registered charities to be required to disclose details of all gifts and donations over the disclosure threshold, without any regard to whether the amounts are intended to be used, or are in fact used, to incur "political expenditure".

23 This requirement would undermine fundraising efforts and lead to disclosure of entirely apolitical donors who in our experience generally place very high value on the protection of their privacy. Under the Bill their personal details will be severely compromised, despite adding very little if anything to the capacity of members of the public to determine whether there exists any undue or inappropriate influence in Australia's electoral system.

24 Maintaining and respecting donor privacy is fundamental to the ongoing viability and health of the charity sector. Donors invariably seek anonymity or privacy to avoid public attention, limit recognition of their personal wealth or out of a concern that their personal support for a charitable purpose does not align with separate business interests or public facing roles.

25 The apparent justification for compromising donor privacy is especially questionable when a donor makes an unconditional gift to a charity that pursues a wide range of activities for the public benefit, a small portion of which includes advocacy or public commentary. It is a nonsense to maintain that a gift, absent any intention on the part of the donor that it be used for "political expenditure", can undermine the integrity of Australian elections. It is akin to an argument that the voice of charities is itself detrimental and a threat to Australian democracy.

26 It is also of fundamental concern that the requirement to disclose political affiliations of senior staff may lead to political disengagement by individuals who are concerned not to damage the reputation of their employer/volunteer organisation.

Rule of law concerns

27 The current obligations of ACNC registered charities and NFPs under the Electoral Act are already complicated and difficult to comply with. These challenges are compounded by the Bill. Real interpretative difficulties relating to the meaning of "political expenditure", relevance of expenditure incurred prior to the commencement of the Bill and disclosure of gifts used to enable political expenditure will make it extremely difficult for NFPs and charities to understand and comply with the Act.

28 This undermines the rule of law and is particularly concerning given the severe penalties for non-compliance. Faced with an uncertain and highly technical legislative regime, NFPs and registered charities may adopt what in the circumstances may be the prudent strategy of overstating "political expenditure" (and in doing so unnecessarily attracting further regulation and further compromising donor privacy) by declaring all expenditure relating to public education and issues based communication, or of ceasing to engage in such activities altogether.

29 In relation to the definition of "political expenditure", whether an issue is likely to be before electors in a future election will very often be unclear, particularly well prior to the calling of an election. Historically, the disclosure period followed an election. This allowed third parties to look back at the issues that were contested to determine whether disclosure

was required. The disclosure period is now each financial year. Under the definition of "political expenditure" third parties will be required to determine prospectively whether an issue will be relevant in an election that is potentially two or three years away. Arguably, that is a nearly impossible task given the very nature of politics in this country.

30 While this is also a problem with the existing legislation, the Bill's proposal to tie "political expenditure" to registration requirements greatly compounds the problem. If an entity cannot accurately determine its level of "political expenditure", it will not know what its obligations are under the Electoral Act, including in relation to annual reporting and capacity to accept foreign donations.

31 The re-branding of "political expenditure" as expenditure for a "political purpose" also raises serious interpretive difficulties. Previous AEC guidance supported a narrow reading of political expenditure, limited to where the third party's 'primary or dominant' purpose is to express views on an issue before electors. Of course, the primary or dominant purpose of charities is ordinarily to advance their charitable objects, and charities are prohibited from having a disqualifying political purpose. The phrase "political purpose" is highly likely to mislead, as it directly cuts across the charitable sector's understanding of, and ACNC guidance on, the appropriate role of charities in elections and public advocacy.

32 It is also unclear whether political expenditure incurred in previous financial years, as it was then defined, is to be counted when determining whether an entity is required to register as a "political campaigner". As a matter of principle, the application of the Bill should be entirely prospective.

33 Finally, the drafting changes to the requirement for "third party campaigners" to disclose gifts used to enable political expenditure under section 314AEC are unclear. On one view, all gifts over the disclosure threshold must be disclosed regardless of whether the gift is used to enable political expenditure. On another view, this section demands an accounting system that can identify or earmark the use of specific donations. This is an extremely difficult, costly and ultimately meaningless task given that the intention of donors is irrelevant and money is fungible and ordinarily pooled in a public fund or donations account.

Treatment of foreign donations - a ban in substance

34 To acquit the Government's commitment (in form, though clearly not in substance) that this Bill will not prevent *registered charities* from receiving foreign donations, the Bill 'splits hairs' by proposing to differentiate between ACNC registered charities on the one hand, and NFPs that are not ACNC registered and other "third party campaigners" on the other.

35 In our view this distinction is unprincipled, and ineffective. The Bill's suffocating restrictions on the use of foreign donations and complex administrative regime for holding such donations will practically mean that many registered charities will have no choice but to refuse foreign funding. And so, as outlined in paragraphs 37 to 44, the Bill will, in substance, prevent many registered charities from receiving foreign donations.

36 The ban on foreign donations over $250 will apply to NFPs and other third parties who are required to register as "political campaigners", including NFPs engaged in advocacy activities or NFPs established for worthy causes which are not recognised as charitable at law (such as the promotion of sport).[4] Critically, these entities may have no affiliation or association with any political party.

[4] Bill, proposed s 302D.

37 The ban on foreign donations will not apply to ACNC registered charities or NFPs that are "third party campaigners".[5] Instead of being banned from accepting *all* foreign gifts, these entities will be banned from accepting *some* foreign gifts and will be severely restricted in their use and administration of such gifts.

38 For example such gifts cannot be accepted if:

(a) gifts from the non-allowable (i.e. foreign) donor are over $250 and expressly made (whether wholly or partly) for one or more political purposes;[6] or

(b) the recipient has exceeded its "allowable amount" for the financial year (that is, its political expenditure for the financial year exceeds its domestic sources for that expenditure).[7]

39 Under proposed s 302F, ACNC registered charities that are classed as "political campaigners" will also be subject to a requirement to keep foreign gifts in a separate account. Critically this separate account, and therefore foreign donations, cannot be used to fund political expenditure. [8]

40 "Political expenditure" is not restricted to expenditure on partisan politics. Rather, under the Electoral Act it includes legitimate activities of charities that comply with the requirement that they not have a *disqualifying political purpose* under the Charities Act.

41 Therefore, as a matter of accuracy, when the Minister states that the Bill "does not restrict the ability of charities to receive foreign gifts for non-political purposes", the Minister is not referring to partisan "political purposes" as understood by charity law. The restriction is so much broader than that. The Bill does restrict the ability of charities to receive foreign gifts for such purposes as public education, analysis of government policy and non-partisan advocacy.

42 Charities registered under the charitable sub-type of promoting or opposing a change to any matter established by law, policy or practice are likely to be severely restrained in their ability to accept *any* foreign donations.[9] This is because almost all of the expenditure of such charities may be deemed to be for a "political purpose". A gift from a foreign donor expressly made for the purpose of supporting such a charity's efforts to change "law or policy x" could very well fall foul of the restriction in paragraph 38(a) above, despite this gift being made to advance the charity's sole charitable purpose.

43 A further concern with this provision is the Minister's power to determine that Australian residents are not allowable donors.[10] If the Minister exercises this power, some tax deductible gifts and donations received under state fundraising licences may be obtained from non-allowable donors. Currently, many Deductible Gift Recipients are required to maintain a separate account for all deductible gifts. Similar requirements can be found in fundraising legislation. It would be incongruous and a nonsense if our tax and fundraising laws required the pooling of gifts at the same time as the Electoral Act required their separation. The definition and application of "allowable donor" must ensure that registered charities are capable of complying with taxation, fundraising and electoral laws.

44 Finally, if the Bill becomes law, while NFPs and ACNC registered charities that are registered as "third party campaigners" could use foreign donations to incur political

[5] Bill, proposed s 302D(1)(g), s 302E.
[6] Bill, proposed s 302E(2)(b).
[7] Bill, proposed s 302E(2)(a). Under the Bill registered charities cannot in any event make donations to political parties.
[8] Bill, proposed s 302F(1)(e).
[9] Charities Act 2013 (Cth), s 12(1)(l) (legislative expression of the High Court's decision in Aid/Watch).
[10] Bill, proposed s 287AA (Meaning of allowable donor).

expenditure and avoid the statutory requirement to establish separate accounts, in practice, all NFPs and registered charities would be well advised to maintain a separate account for foreign donations. This is both to avoid a breach of record keeping obligations,[11] and to comply with the complex regulatory systems proposed by the Bill - without such demarcation of funds NFPs and charities are unlikely to be able to determine whether registration is required in the first instance.

Excessive administrative burden

45 The excessive administrative burden to be imposed by the Bill will inevitably have a further silencing impact on NFPs and ACNC registered charities.

46 The registration requirements proposed under the Bill will require NFPs and registered charities to spend significant time and resources on closely monitoring all advocacy activities and communications that may potentially be construed as "political expenditure".

47 Currently a NFP or registered charity can determine at the end of financial year whether it is required to submit an annual return. Under the Bill entities will only have 28 days after meeting the relevant expenditure threshold to register as a third party campaigner or political campaigner.[12] Failure to register may result in a fine of 240 penalty units ($50,400) and the entity may commit a separate contravention for every day it remains unregistered.[13]

48 Accordingly, unless an entity, acting cautiously, seeks registration at the beginning of a financial year (regardless of whether it is certain it will meet the relevant expenditure threshold), it will have to very diligently and exhaustively monitor expenditure to ensure it meets the 28 day registration requirement. In addition there may be an enforced window of silence while the entity waits for the Commissioner to determine its application (within a reasonable time).[14] This is because an entity that is required to be registered must not incur any further political expenditure until registration is completed.[15]

49 Further, applications for registration will require NFPs and ACNC registered charities to nominate a “financial controller”.[16] For companies, the financial controller is the secretary. In the case of trusts, it is the trustee. In all other cases, the financial controller is the person responsible for maintaining financial records.[17] In nominating a “financial controller”, a company may presumably select its treasurer rather than secretary though this discretion is unclear under the Electoral Act. While the requirement to nominate a financial controller is not of itself overly burdensome, the ongoing notification obligation is concerning, as are the penalties that may flow to the individual appointed (see paragraphs 52 to 55 below).

50 For example, any changes to financial controller details must be updated within 60 days. Failure to update details with the AEC, including financial controller information, attracts a civil penalty of 60 penalty units ($12,600). This duplicates charities’ existing obligations to update responsible person details with the ACNC and attracts a significant fine that would trigger breach of ACNC regulations and thus threaten ongoing charity registration.

51 NFP “political campaigners” that are not registered charities will also be required to seek “appropriate donor information” for all gifts over $250 (whether given as a lump sum or

[11] Bill, proposed s 317.
[12] Bill, proposed ss 287F(2), 287G(2), 292FE.
[13] Bill, proposed s 287F(3). The fine for third party campaigners is 120 penalty units (s 287G(3)).
[14] Bill, proposed s 287L.
[15] Bill, proposed s 287F(3), 287G(3).
[16] Bill, proposed s 287K(2)(b).
[17] Electoral Act, s 287 (definition of “financial controller” as amended by the Bill.

over a financial year).[18] The relevant civil penalty is 1000 penalty units ($210,000). This is a major administrative undertaking, requiring information such as statutory declarations from relatively minor donors that will at a minimum significantly disrupt fundraising activities, and quite probably significantly curtail charitable giving.

Significant penalties for non-compliance and impact on voluntary officers of NFPs and registered charities

52 Unlike the existing Electoral Act civil penalty provisions, many of the new offence and civil penalty provisions in the Bill impose liability directly on the individual "financial controller" rather than the third party entity. The potential for personal fines and a prison term is likely to act as a major deterrent to accountants and other skilled persons taking on the position of secretary or treasurer of a NFP or registered charity, particularly in light of the rule of law concerns outlined above.

53 Unlike the position of agent of a political party, such positions are often assumed on a voluntary basis. It is critical that the sector can continue to attract skilled persons to take on these important positions on the Boards of NFPs and charities.

54 Further, the quantum of penalties is significantly higher than those currently imposed under the Electoral Act. These penalty provisions do not distinguish between entities that accept foreign donations and those that do not, which again calls into question the objectives sought to be achieved by this Bill.

55 Many of these penalties may be imposed for technical breaches that have little if any impact on the integrity of Australian elections, such as failure to tell the AEC that the charity secretary has been replaced. Further, these penalties are over the threshold for possible revocation of a charity's registration under ACNC regulations. We fail to see any justification at all for such draconian penalties.

Impact on grants programs

56 The Bill contains a number of anti-avoidance provisions which will probably have unintended consequences for the legitimate grants programs of NFPs and charities.

57 As stated at paragraph 39 above, registered charities that are classed as "political campaigners" will be required to maintain a separate account for foreign donations. This account cannot be used to pay another "political campaigner". This would be so even if the payment is for a grants program that is entirely unrelated to political purposes, such as grants to other charities to undertake medical research or environmental conservation projects. To re-iterate, if two charities are subject to the requirement to register as "political campaigners", one charity cannot make a grant from its account containing foreign donations to the other, even for initiatives that have nothing to do with any "political purpose". There is simply no benefit to having such a law.

58 The Bill contains related anti-avoidance provisions and exceptions that do not satisfactorily remedy this problem.[19]

[18] Bill, proposed ss 302L, 302P.
[19] See proposed sections 302G, 302H.

Associated entities - inappropriate focus on policy alignment

59 A further threat to the proper functioning of Australian democratic society is the proposed amendments to the definition of "associated entity", which introduce a focus on the support or opposition of *policies* of registered political parties.[20]

60 Supporting or opposing the policies of registered political parties will almost always be well within the scope of legitimate charitable activities, in accordance with current Australian law, and will not engage the prohibition on having a disqualifying political purpose under the Charities Act.

61 Further, it is entirely unclear whether an entity's expenditure that promotes or opposes the policies of one or more political parties must explicitly relate to the stated policies of such parties or whether the entity might just be incurring expenditure on an issue that happens to also be a policy of a political party. Either of these two possible interpretations would be a completely unacceptable restriction on the legitimate activities of the NFP sector.

Potential constitutional invalidity

62 There is a real prospect of a constitutional law challenge on the basis of the implied freedom of political communication if the Bill were to pass in its current form.

63 Rather than undertaking a detailed analysis of the constitutional validity of the Bill, in this submission we have identified some of the more concerning impacts of the Bill on ACNC registered charities and NFPs. Those impacts will likely manifest as compelling legal arguments that the Bill is not an appropriately adapted means of achieving its stated ends.

64 Issues of relevance include the real interpretive difficulties and lack of clarity in determining whether a charity's activities constitute political expenditure (and the related risk of over-disclosing and over-enforcement), the mandated window of silence pending registration, as well as the particular funding constraints imposed on charities with a purpose of promoting or opposing a change to any matter established by law, policy or practice.[21]

65 If this Bill becomes law it will very likely diminish Australian democracy by limiting crucial funding for charitable activities and discouraging NFPs and registered charities from adding their trusted voices to robust public debates about important issues upon which they are uniquely placed and expected by the public to speak.

66 Regrettably, the Bill's anticipated effectiveness in silencing charities leads to the inevitable conclusion that the real end sought to be achieved by this Bill is not the removal of foreign influence in Australian elections, but the domestic influence of Australian charities and NFPs.

[20] Bill, proposed s 287H(5)(b).
[21] *Charities Act 2013* (Cth), s 12(1)(l) (legislative expression of High Court's decision in Aid/Watch).