



Hands Off Our Charities alliance

Submission to the Review of the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Act 2018

29 January 2021

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Co-submitters

This is the joint submission of 44 members of the Hands Off Our Charities alliance, listed below.



Act for Peace



Action Aid



Alliance for Gambling Reform



Amnesty International Australia



Anglicare Australia



Asylum Seeker Resource Centre



Australasian Centre for Corporate
Responsibility



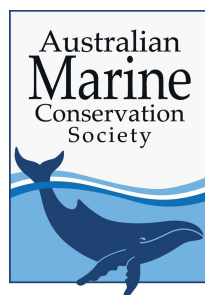
Australian Conservation Foundation



Australian Council for International
Development



Australian Council of Social Service



Australian Marine Conservation Society



Australian Religious Response to Climate Change



Australian Youth Climate Coalition



Bob Brown Foundation



Caritas Australia



Climate Action Network Australia



Climate Council



Community Council for Australia



Community Legal Centres Australia



Consumer Action Law Centre



Environment Victoria



The Foundation for Young Australians



Friends of the Earth Australia



GRATA FUND

Grata Fund



**HUMANE SOCIETY
INTERNATIONAL**
AUSTRALIA

Humane Society International Australia

Human
Rights
Law
Centre

Human Rights Law Centre



International Justice Mission Australia

IWDA INTERNATIONAL
WOMEN'S
DEVELOPMENT
AGENCY

International Women's Development Agency



Oxfam Australia



People with Disability Australia



The Pew Charitable Trusts



Plan International Australia



Public Health Association
AUSTRALIA

Public Health Association Australia



public interest
ADVOCACY CENTRE

Public Interest Advocacy Centre



UnitingCare Australia



Queensland
Conservation
Council

Queensland Conservation Council



RESULTS Australia



Save the Children



Sunshine Coast Environment Council



Tasmanian Council of Social Service



Tearfund Australia



Uniting Church Synod of Victoria and Tasmania



Uniting World



World Wide Fund for Nature (Australia)

Summary of recommendations

Recommendation 1: The Committee not propose amendments to the *Commonwealth Electoral Act 1918* (Cth) that will create a barrier to charities and not-for-profits advocating on their issues in the lead up to elections.

Recommendation 2: If any non-minor amendments to the *Commonwealth Electoral Act 1918 and Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Act 2018* are proposed which impact on entities that exist for purposes other than political campaigning, such as third parties, the Committee recommends that in taking forward any amendments the Government undertake a considered, full public consultation consistent with best practice (as specified in guidance [issued by the Department of Prime Minister and Cabinet](#)) and that a comprehensive regulatory impact statement is undertaken.

Recommendation 3: Members of the Committee consider in its deliberations the increased pressures on services provided by charities and not-for-profits during the COVID-19 pandemic and charities' and not-for-profits' unique insights into the impact of the pandemic on people and families across Australia. The Committee should consider how charitable service delivery and advocacy can be enhanced and supported in light of the COVID-19 pandemic.

Recommendation 4: The Committee does not propose substantive changes to the compliance regime constituted in the *Commonwealth Electoral Act 1918*. Many charities and not-for-profits have invested significant time and resources into ensuring compliance with the Act and substantive changes to this regime without reasoned evidence for doing so would introduce new and unnecessary administrative costs.

Recommendation 5: The Committee recommend retaining the current definition of electoral matter. This definition strikes the right balance between being suitably broad to capture the appropriate range of activities for regulation, without being indeterminate and thus impossible to implement.

Recommendation 6: The Committee recommend that the category of “political campaigner” be renamed “large third party” to maintain consistency in terminology and more accurately reflect the types of participants in elections.

Recommendation 7: The HOOC alliance strongly opposes the lowering of the threshold for becoming a political campaigner from \$500,000 to \$100,000 in electoral expenditure. The Committee should recommend that the threshold for becoming a political campaigner remain at \$500,000 in electoral expenditure.

Who is Hands Off Our Charities?

The alliance would like to thank the Committee for the opportunity to provide a submission to the Joint Standing Committee on Electoral Matters' Review of the *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Act 2018 (the EFDR Act)*.

Hands Off Our Charities (**HOOC**) is an alliance of charity and not-for-profit organisations formed in 2017 in response to a number of bills which would have severely restricted the voices of charities and not-for-profits and added significant barriers to advocacy. This included implications of the originally drafted *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017 (the EFDR Bill)*. The alliance has previously made submissions to the Committee on the EFDR Bill and has submitted 'Red Line Principles' for amendments to the Bill, which form part of this submission.

The HOOC alliance formed to protect the important role of public interest advocacy and the ability of community voices to be heard in national political debates. The members of HOOC together represent millions of Australians concerned with a wide range of issues including education, social welfare, human rights, animal welfare, the environment, health, climate change, disability rights and philanthropy. Our organisations, the issues we work on, and the communities we serve and represent, are diverse, but we all share a fundamental commitment: to act in the public interest.

Charities' advocacy is a critical element of a vibrant Australian democracy

Charities provide a vital vehicle for ordinary Australians to be heard in national debates of importance. Every year, millions of Australians choose to make their voices heard on issues they care about by joining, donating to, or otherwise supporting charities and other not-for-profit organisations. In addition, charities that work on the frontlines, for example, of climate change, domestic violence and homelessness, offer a wealth of expertise in public debate on important issues. Finally, charities give voice to the voiceless, including disenfranchised communities and the planet.

For many charities, the ability to further their charitable purpose requires them to advocate both to educate the public and influence decision making. Charities' contributions enrich public debate in Australia and contribute to good policy making by governments. As much was recognised by the High Court of Australia in *Aid/Watch Incorporated v Commissioner of Taxation*,¹ when it held that advocacy in pursuit of legislative or policy change in furtherance of a charity's purpose is beneficial to the community, and that "in Australia there is no general

¹ *Aid/Watch Incorporated v Commissioner of Taxation* [2010] HCA 42.

doctrine which excludes from charitable purposes ‘political objects’”.² Further, the High Court held that our constitution, which established Australia as a representative government, postulates precisely the kind of advocacy charities engage in.

The months leading up to elections are typically the most crucial for responding to and influencing the policy platforms of candidates and political parties. The Australian public is more engaged in public debate, and politicians’ responsiveness to advocacy is heightened. The proximity of an election often means that usual, run-of-the-mill public advocacy may take on the quality of “influencing the way electors vote in an election” and therefore qualify as “electoral matter”. Charities may also choose to advocate in a different way in the lead up to elections, including by providing “score cards” to inform voters on where each political party stands on an issue.

Importantly, regardless of when it happens in the electoral cycle, the purpose of charities’ advocacy remains the same: to further our charitable purposes by influencing decision-makers to support better policies. In this way, advocacy by charities is fundamentally different to campaigns for election by political parties, and our electoral laws must respect this difference with tailored, proportionate regulation.

Unclear definitions, disproportionate, burdensome financial and disclosure obligations, and significant penalties, will — through self-silencing or regulatory overload — prevent charities and wider civil society from playing a part in Australian democracy. The HOOC alliance will act together to resist any restriction of rights to advocate, participate in national political debates, and represent the communities we serve.

In a region, and a world, in which democracy is backsliding, it is critically important for the Australian Government to support and be seen to support a rich, vibrant democracy at home.

Why amendments to the original EFDR Bill were critical to maintaining a vibrant Australian democracy

The HOOC alliance supports laws that protect the integrity of representative government and promote fairness and participation in public debate.

The stated purpose of the original EFDR Bill was to increase the transparency of Australia’s political finance regime and reduce the risk of foreign influence in Australian political processes — objectives supported by the HOOC alliance.

However, the original Bill went far beyond its stated purpose and introduced amendments to the *Commonwealth Electoral Act 1918* (Cth) (**Electoral Act**) which would have silenced

² *Aid/Watch Incorporated v Commissioner of Taxation* [2010] HCA 42 at [48], per French CJ, Gummow, Hayne, Crennan and Bell JJ.

independent community voices in public debates in the lead up to elections. It also threatened to curtail charities' access to international philanthropy, which plays a critical role in augmenting domestic giving.

The significant issues with the original Bill included:

- Introducing onerous administrative and reporting obligations, breach of which attracted significant penalties (including prison time), for charities and not-for-profit organisations that engaged in even modest levels of advocacy in election years. The regulatory burden was excessive and would have created a complete barrier to advocacy in election years for many charities and not-for-profits;
- Creating a new category of “political campaigner”, which conflated charitable issue-based advocacy with partisan campaigning. The Bill exacerbated this issue by setting the threshold of expenditure which saw charities become “political campaigners” far too low, at \$100,000; and
- Banning charities that fell within the broad political campaigner category from receiving international philanthropy for publicly expressing a view on almost any government policy or issue.

The HOOC alliance and many other civil society voices opposed these amendments on the basis that they were disproportionate, unnecessary and undemocratic. They illustrated how poor electoral law reforms that do not take account of the important differences between candidates and political parties, and not-for-profit advocacy groups, lead to oppressive and potentially unconstitutional outcomes.

Following extensive consultation with HOOC and other civil society organisations, important amendments were made to the EFDR Bill so that it achieved its stated purposes, without unduly restricting the ability of not-for-profit organisations to advocate on their issues.

HOOC's overarching concern with this review, and all future amendments to the Electoral Act, is that in seeking to achieve electoral integrity, legislation does not stifle the civil society voices that are vital to the health of our democracy, especially in the absence of any compelling evidence.

Recommendation 1: The Committee not propose amendments to the *Commonwealth Electoral Act 1918* (Cth) that will create a barrier to charities and not-for-profits advocating on their issues in the lead up to elections.

Recommendation 2: If any non-minor amendments to the *Commonwealth Electoral Act 1918 and Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Act 2018* are proposed which impact on entities that exist for purposes other than political campaigning, such as third parties, the Committee recommends that in taking forward any amendments the Government undertake a considered, full public consultation consistent with best practice (as specified in guidance [issued by the Department of Prime Minister and Cabinet](#)) and that a comprehensive regulatory impact statement is undertaken.

Recommendation 3: Members of the Committee consider in its deliberations the increased pressures on services provided by charities and not-for-profits during the COVID-19 pandemic and charities' and not-for-profits' unique insights into the impact of the pandemic on people and families across Australia. The Committee should consider how charitable service delivery and advocacy can be enhanced and supported in light of the COVID-19 pandemic.

How the Act is operating

The EFDR Act brought in a number of significant changes to the Electoral Act which required careful consideration by the senior staff and Board members of charitable organisations. Many members of the HOOC alliance have dedicated substantial effort and resources towards understanding the new obligations, including seeking independent legal advice on the amendments and the associated guidance. Additionally, many organisations have needed to implement entirely new processes and procedures in order to ensure compliance with the Electoral Act, such as new methods for record keeping and for approving expenditure.

As outlined above, members of the HOOC alliance have taken significant steps to ensure their compliance with the new requirements and embed the processes required into their organisations' operations. Understanding and ensuring compliance with the Act has not been without difficulty and additional administrative costs, however we believe that the Act is functioning appropriately regarding regulation of issues-based advocacy undertaken by charities.

Recommendation 4: The Committee does not propose substantive changes to the compliance regime constituted in the *Commonwealth Electoral Act 1918*. Many charities and not-for-profits have invested significant time and resources into ensuring compliance with the Act and substantive changes to this regime without reasoned evidence for doing so would introduce new and unnecessary administrative costs.

a. New definition of “electoral matter”

One of the most significant amendments made by the EFDR Act was to introduce a new definition of “electoral matter”. This definition strikes the right balance between being suitably broad to capture the appropriate range of activities for regulation without being indeterminate and thus impossible to implement. By distinguishing between advocacy for the purpose of raising public awareness about an issue, and advocacy for the dominant purpose of influencing votes in an election, third parties are less likely to be caught unaware and accidentally fail to meet the substantial reporting requirements outlined in the Electoral Act.

The current definition of electoral matter was arrived at after very thorough and extensive consultation with MPs, impacted organisations, and electoral law experts. We urge the committee not to reopen consideration of the definition as we are of the view that there is no compelling evidence to do so.

While the HOOC alliance supports the current definition, we note that interpreting and applying the complex and lengthy definition has required significant time and resources of many members. This administrative burden will presumably lessen as we have more elections and charities become accustomed to the laws, but nonetheless this is an important example of how seemingly neutral laws can, in application, impose discriminatory burdens on some participants in public debate. These additional costs were also unseen prior to implementation, as there was no comprehensive regulatory impact statement conducted for the Bill.

Political parties exist to get their candidates elected into public office, and all of their expenditure is presumed to be for an electoral purpose and is disclosed. By contrast charities and other third parties exist to do many things besides advocating on their issues in the lead up to an election. Only they, therefore, have to interpret and apply the complex and burdensome definitions of “electoral expenditure” and “electoral matter”.

It is fundamental that lawmakers understand and recognise this important difference when making electoral laws which apply to organisations beyond political parties. It is also important that regulators, like the AEC and ACNC, take an educative approach to compliance by charities and not-for-profit organisations.

Recommendation 5: The Committee recommends retaining the current definition of electoral matter. This definition strikes the right balance between being suitably broad to capture the appropriate range of activities for regulation without being indeterminate and thus impossible to implement.

b. The category of “political campaigner” is misleading and should be renamed “large third party”

Another of the more significant amendments made by the EFDR Act was the introduction of the political campaigner category. The alliance still holds the view that the term “political campaigner” wrongly conflates public interest advocacy by independent, non-partisan groups with “political campaigning” (see Red Line Principle #2).

By calling large third parties (those that incur more than \$500,000 in electoral expenditure) “political campaigners”, the Act gives the false impression that large third parties are inherently political organisations. Some charities have reported fearing becoming a political campaigner due to the public perception of a charity having this status and the perceived risk to their charitable status. This is an unfortunate consequence of the Act as the impact is to silence important community voices around election debates.

As noted above, public interest advocacy around elections is a legitimate and valuable part of the democratic process, and is separate to electioneering. The alliance recognises the benefit of having a distinct category with more extensive regulatory obligations for larger third party spenders, however the category would be better served by removing the misleading name of “political campaigner” and replacing it with “large third party”. This would be consistent with other terminology used in the Electoral Act and would better reflect the role of such organisations in election debates.

Recommendation 6: The Committee recommend that the category of “political campaigner” be renamed “large third party” to maintain consistency in terminology and more accurately reflect the types of participants in elections.

HOOC opposes the Committee’s recommendation to lower the threshold for becoming a political campaigner to \$100,000

In the recent *Report on the conduct of the 2019 federal election and matters related thereto*, the Committee made a recommendation to lower the threshold for becoming a political campaigner from \$500,000 to \$100,000 in electoral expenditure. HOOC strongly opposes this recommendation.

In its report, the Committee did not draw on any evidence to support its recommendation to lower the threshold for becoming a political campaigner. It is unclear on what basis lowering the threshold for becoming a political campaigner would be justified.

HOOC members are extremely concerned by this recommendation as many of the aspects of the EFDR Act, including the threshold for becoming a political campaigner, were very thoroughly consulted and considered prior to its enactment.

Lowering the threshold for becoming a political campaigner would introduce a very significant compliance burden for many third parties and, as discussed above, the amendment would have a chilling effect on public interest advocacy in the lead up to elections.

Overwhelmingly, evidence in this area of law has been for more transparency of political parties, including reforms to introduce real time disclosure of political donations and to lower the donations disclosure threshold. Nevertheless, the Government has resisted these reforms on the grounds that it is a too high and unnecessary administrative burden for political parties. It is disappointing that the Committee is willing to ask third parties to take a substantial administrative burden for little extra transparency, while not offering support to key transparency reforms overwhelmingly supported by the Australian public.

Recommendation 7: The HOOC alliance strongly opposes the lowering of the threshold for becoming a political campaigner from \$500,000 to \$100,000 in electoral expenditure. The Committee should recommend that the threshold for becoming a political campaigner remain at \$500,000 in electoral expenditure.

Thank you for the opportunity to provide this submission. Should the Committee wish to seek further information from the HOOC alliance, or invite representatives to appear at hearings, the contact point is Saffron Zomer, hoocoordinator@gmail.com, 0417 152 908.