



Law Council
OF AUSTRALIA

Office of the President

9 October 2018

Senator the Hon James McGrath
Chair, Joint Standing Committee on Electoral Matters
PO Box 6021
Parliament House
CANBERRA ACT 2600

By email: em@aph.gov.au

Dear Senator

Response to question on notice: Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017

1. The Law Council was grateful for the opportunity to appear before the Joint Standing Committee on Electoral Matters in relation to its inquiry into the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017 (**the Bill**) on 5 October 2018.
2. In the course of providing evidence, the Law Council was asked to consider the Supplementary Explanatory Memorandum (**Supplementary EM**), and in particular its attempts to clarify the Bill and its approach to defining the scope of terms such as 'electoral matter' and 'electoral expenditure'.
3. On multiple occasions, the Supplementary EM states that general issue-based advocacy is not intended to be captured by the proposed measures.¹ However, following a review of the Supplementary EM, the Law Council considers that several of the examples set out in in the Supplementary EM may involve general issue-based advocacy with the potential for that advocacy to be in furtherance of a charitable purpose. Several of the examples, therefore, may operate in a manner inconsistent with the stated intent of the legislation.

Definition of 'electoral matter'

4. The uncertainty with the Bill identified by some members of the Joint Standing Committee is partially a result of the current drafting of the definition of 'electoral matter' at proposed section 4AA of the Bill.
5. The Law Council suggests that the proposed definition of electoral matter could be clarified by drawing on established definitions of 'charitable purpose' and 'disqualifying purpose' in the *Charities Act 2013* (Cth) (**Charities Act**). This may be achieved by shifting the definition in proposed subsection 4AA(1) away from an

¹ Supplementary EM to the Bill, paragraphs 3 and 4.

inclusive definition by deleting the word 'including'. Such an amendment may provide added certainty to those seeking to apply this provision in practice and who are familiar with the terminology in the Charities Act.

6. If this is not accepted by the Committee and the definition of 'electoral matter' were to remain inclusive, proposed subsection 4AA(1) should explicitly state that it will not include promoting or opposing a change to any matter established by law, policy or practice in the Commonwealth, provided it is in furtherance of a charitable purpose by a charity registered with the Australian Charities and Not-for-profits Commission. This reflects the wording at paragraph 12(1)(l) of the Charities Act, and would provide charities with some assurance that the two regimes, and their application, are consistent.
7. Either of these amendments will assist in making it clearer that issue-based advocacy by charities as permitted under the Charities Act is not caught by the proposed measures. Without these amendments, or some means of distinguishing between a dominant purpose of influencing voters to vote for a party and/or a candidate, from a dominant purpose of raising awareness, education or promoting debate on an issue, the Bill is likely to catch issue-based advocacy by charities, and due to the uncertainty in application, may deter many charities from engaging in issue-based advocacy in furtherance of their charitable purposes.
8. While the matters listed at proposed subsection 4AA(4) largely focus on matters which will show the dominant purpose of influencing voters, these issues may also apply to education, awareness raising, and encouraging debate. There are no matters included in this proposed subsection which assist in distinguishing a purpose of influencing from a purpose of educating, awareness raising or encouraging debate on a particular issue from the communication of electoral matter. Further clarity in this area is required.

Examples used in the Supplementary EM

9. The Law Council was asked by members of the Joint Select Committee to give consideration to the examples appearing in the Supplementary EM, and to provide a view on whether these examples had the effect of clarifying the scope of the proposed measures. The following comments are provided.

- *Example 4 on page 8*

If issue-based advocacy is not intended to be caught by the proposed measures, the activity described in this example would not be electoral expenditure as the group is unlikely to be creating or communicating electoral matter. As it is currently drafted, it appears the dominant purpose is to have Defence land transferred for construction of a business park. The voting guide indicating preferred candidates is presumably based only on who supports this particular issue. It is submitted that if this activity is caught then so would a campaign to increase subsidised dental care or preservation of an arts precinct or other charitable purpose.

- *Example 1b on page 10*

This example appears to suggest that *pro bono* services of any service provider to create electoral matter may be a gift and could require disclosure if the entity is a third party or campaigner and the foreign donation requirements could apply. This requires further consideration. Most, if not all, service

providers who provide services on a *pro bono* basis, do this on a commercial basis as a part of a corporate social responsibility platform, staff retention strategy, public relations and marketing. Such in-kind support would not typically be viewed as a gift. Where it is a gift, this example should make it clear that while not part of the electoral expenditure (as it is not incurred by the recipient), additional amounts may need to be disclosed by the recipient and there may be consequences for the service provider. The unintended consequences of this example may be that charities engaging in electoral matters may find it difficult to access *pro bono* services.

- *Example under paragraph 13 on page 10*

As it is currently drafted, this example describes issue-based advocacy where the entity takes steps to highlight candidates who support the specific issue of school language programs rather than undertaking a holistic campaign for one or more candidates. While it is agreed that specifically supporting a candidate or party should be caught as electoral matter, this should be distinguished from campaigning on an issue and advising the public of those candidates who support that issue, as the dominant purpose is to raise awareness, educate and promote the acceptance and adoption of the issue. The Law Council suggests that it is incidental to this purpose that voters may be influenced to vote for candidates who also support the issue.

- *Examples at pages 13 and 14*

As currently drafted, the examples on pages 13 and 14 do not adequately distinguish between influencing the voters and educating the public on an issue, and as such they do not assist in clarifying how the dominant purpose can be identified and differentiated as both party-specific campaigning and issue-based campaigning typically rely on wide dissemination to the public.

In particular, the examples for proposed paragraph 4AA(4)(c) seem to suggest that issue-based advocacy is in fact caught despite the earlier statements to the contrary in the Supplementary EM. Example 1 in this context does not appear to recognise that the definition of electoral matter requires the identification of the dominant purpose of communication. It is therefore not relevant what actually occurs or the outcome of communication, rather what was intended. Whether the public sees an imputed party recommendation, or whether there was an implied support for a candidate, is not relevant in these circumstances of issue-based advocacy where a group is clearly campaigning on one issue only.

Similarly, in example 2, adding a smiley face to a pamphlet assessing policies of different parties assists voters understand who is supportive of a particular policy area. In the context, the dominant purpose may be educative rather than to influence the way electors vote in an election or a combination. The same comments can be made for the other examples.

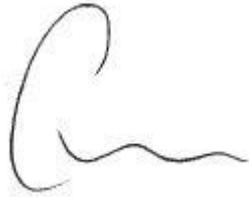
10. Upon review of the Supplementary EM, particularly those relating to implicit comment on a political entity, the Law Council does have a concern that there may be confusion as to how the proposed measures as drafted and described in the Supplementary EM will distinguish between communication of electoral matter and issue-based advocacy intended to educate and inform.

11. This remains a critical distinction, particularly for the charitable sector, and the Law Council submits that improved clarity on these matters is required.

Thank you for the opportunity to provide this supplementary submission.

Please contact Mr Nathan MacDonald, Senior Policy Lawyer, on 02 6246 3721 or at nathan.macdonald@lawcouncil.asn.au, in the first instance should you require further information or clarification.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Morry Bailes', with a large initial 'M' and a wavy line extending to the right.

Morry Bailes
President