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Committee Secretary
Parliamentary Joint Committee on Intelligence and Security
PO Box 6021
Parliament House Canberra ACT 2600
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15 February 2018

Dear Committee Secretary

Re: *Foreign Influence Transparency Scheme Bill 2017*

We provide the following to assist you with your inquiry into the *Foreign Influence Transparency Scheme Bill 2017* (the Bill).

About Not-for-profit Law

Not-for-profit Law is an Australia-wide program of the charity Justice Connect. Not-for-profit Law provides free and low cost legal assistance to not-for-profit (**NFP**) community organisations and social enterprises. Not-for-profit Law provides services directly (in the form of legal information, advice and training) and brokers referrals for pro bono assistance from its member law firms and barristers. By helping those involved in running NFPs to navigate the full range of legal issues that arise during the lifecycle of their organisation, Not-for-profit Law saves them time and resources. This allows them to focus on achieving their mission, whether that is helping vulnerable people, environmental conservation, or working towards social cohesion. Not-for-profit Law advocates for an improved legal and regulatory framework for the NFP and social enterprise sector, and to ensure law reform considers the impacts of regulation on small to medium-sized organisations. Effective and appropriate regulation supports efficient and well-run NFPs and social enterprises. A thriving sector benefits all Australians.

Our submission

We are an active member of the Law Council of Australia's Not-for-profit Legal Practice and Charities Committee, which provided input to a submission made to this inquiry by the Law Council of Australia (**LCA**). **We endorse the LCA submission, and the submission by the Community Council for Australia** (**CCA**)**.** We also endorse comments by the LCA[1], CCA[2] and Catholic Church Bishops Conference[3] at public hearings as to the adverse impact

[1] Commonwealth of Australia, Hansard, 30 January 2018, Joint Parliamentary Intelligence and Security Committee, page 40, Mr Bailes: the *Law Council is concerned with the potential for these measures to have a chilling effect on public policy dialogue*.
[2] Commonwealth of Australia, Hansard, 30 January 2018, Joint Parliamentary Intelligence and Security Committee, page 6, Mr Crosbie: *Advocacy on behalf of their cause or their community is exactly why they were established, why the community support them, why they get donations and why they exist. There seems to me within the bill to be a kind of implication that people speaking up for causes or issues is a problem. That is exactly what makes our democracy strong, and I think we should be encouraging more input from charities community groups and civil society into the way government shapes policies and makes laws, because then we will have better laws and we'll have stronger communities*.
[3] Commonwealth of Australia, Hansard, 30 January 2018, Joint Parliamentary Intelligence and Security Committee, page 7, Bishop McGuckin: *It will impact on our ability to advocate on behalf of the poor and the vulnerable. Also, we are concerned the bill will capture unnecessarily other charities with international contacts*.

this Bill would have on NFP and charitable organisations and those who they assist, and more broadly as a result, the Australian community.

Similar to those bodies, while we are supportive (in principle) of the broad policy aim of the Bill,[4] we do not support the scope of the Bill as drafted. Notably the very wide definitions of 'on behalf of', 'lobby', 'general political lobbying' and 'purpose of political or government influence', 'communications activity' coupled with the limited and narrow exemptions, means many NFPs that receive support from an entity or person outside of Australia (who are not Australian citizens or permanent residents) and who engage (directly or indirectly) with public officials or parliamentarians would be captured by the scheme. Other submissions to this Inquiry, notably by LCA and Australian Lawyers for Human Rights, have raised concerns about the wide scope and breadth of these terms. We endorse the comments made by these bodies.

We are very concerned about the significant administrative burden placed on organisations caught by the Bill, from registration (for a fee) to detailing all of their communications (its content, when and how it is communicated along with the form and manner). This burden is succinctly outlined by the CCA[5] in its evidence to the Committee, noting that administrative work takes a charity 'away from doing what the community expects [it] to be doing'.

Equally we are concerned about the severity of enforcement provisions, some of which are strict liability with imprisonment for up to seven years, while others impose significant monetary fines. We agree with Australian Lawyers for Human Rights' position that criminal offences '*should only be imposed where an activity both causes, or is likely to cause, harm to an essential public interest, and where there is relevant mens rea. Otherwise, the activity should be dealt with by administrative or civil penalties, which should be proportionate to the likely harm of the activity. Given the extremely broad reach of the Bill and the lack of exemptions for activities involving normal political discourse, the current approach is of great concern*'. The LCA submission suggests the wide terms of the Bill would make enforcement difficult, even in relation to activities the Bill is intended to capture. We endorse the LCA recommendation that consideration be given to the availability of civil penalties to enforce non-compliance.

It is our view that this Bill may have a negative impact on the ability of charities and other public-serving NFP organisations to undertake and fund their work, including advocacy activities (for registered charities this is work that is both allowed by law and acknowledged to be of public benefit). This would in turn negatively impact their ability to provide important, and necessary contributions to public debate and public policy development.

In summary, **we recommend**:

1. **That clause 11 ('on behalf of a foreign principal') be amended as per the Law Council of Australia proposal, to cover only activities that are:**

   a) undertaken as an agent, representative, or employee of a foreign principal, or in any other capacity at the order, request, or under the direction or control of a foreign principal; or

   b) ***directly or indirectly supervised, directed, controlled, financed or subsidised in whole or in major part by a foreign principal.***

[4] That is, to enhance government and public knowledge of the level and extent to which foreign sources may have impact on Australia's elections, government and parliamentary decision-making and the creation and implementation of laws and policies
[5] See David Crosbie, Chief Executive Officer, Community Council for Australia in his evidence to the Committee. Refer Commonwealth of Australia, Hansard, 30 January 2018, Joint Parliamentary Intelligence and Security Committee, page 2

2. **Exemption from the proposed scheme for charities registered with the Australian Charities and Not-for-profits Commission**.

3. **That registered charities be exempt from any fees charged under this scheme (if they are not otherwise excluded by extending the exemptions in the Bill, per recommendation 2 above).**

We also **urge the Committee** to:

4. **Carefully consider how this Bill may affect public debate and Government policy development.**

5. **Consider how our recommended exemption from the proposed scheme for charities registered with the ACNC (above), could also extended to all NFPs with purposes that are of public benefit.**

Particular comments on the scope of the Bill

Clause 11 – 'undertaking activity on behalf of a foreign principal'

The LCA has raised concern about the breadth of clause 11 'undertaking activity *on behalf of* a foreign principal'. We share that concern. Particular difficulties arise for the NFP sector with the inclusion of 'funding or supervision by' and 'in collaboration with' a foreign principal in the definition. For example, the provision as drafted would capture the following (hypothetical but realistic) scenarios:

1. A legal centre, like Justice Connect, being provided with funding from an independent non-profit organisation, such as PILnet (a multi-national NGO established to promote the use of law as a tool to serve public interests), of which the legal centre is a member. Funding (from PILnet, Switzerland) is provided to the legal centre for the purpose of an internal program review to help other PILnet member organisations develop similar programs in other parts of the world. This review is in keeping with both the centre's and PILnet's commitment to make systems of justice more effective and accessible. The legal centre then decides to use the report (although that was not the initial intent) to lobby the Australian Government for funding to expand this program across Australia or alternatively in discussions with the Government about the effectiveness of the program.

   This activity may be caught by the legislation as it involves funding from a foreign organisation and an attempt to influence government policy. It also involves international organisations 'working together' (collaborating) to undertake the activity. (The Explanatory Memorandum states that 'in collaboration with' is meant 'to take its ordinary meaning such as the person and the foreign principals working together to undertake the activity'. We consider this vague and unhelpful – see further discussion below.)

2. A health organisation in Australia, working to promote awareness of infectious diseases caused by bacteria spread by parasites, being provided with a small amount of funding by the New Zealand Government to help it develop information for distribution in New Zealand. The material was then circulated in Australia in an attempt to bring awareness to the issue locally and this leads to a decision by Parliament to hold an inquiry.

> This activity may be caught by the legislation as it involves funding from a foreign government and the (initially unplanned) communications activity indirectly influences Parliament. It would be caught if the information communicated specifically called on Government(s) to take a particular action in relation to the diseases.

We consider it undesirable for such scenarios to be subject to the proposed scheme. In our global world, NFPs and charities should be encouraged to work together to pursue innovative solutions to social problems – including drawing on (and being supported by) international experts and partners. They should not be burdened by (yet more) red tape for doing so. We are deeply concerned that the scheme may result in organisations deciding not to explore beneficial (and cost effective for Australians) collaborations with overseas partners, in order to avoid the requirements proposed under this Bill (see our comments below on regulation and compliance). We note this result would contradict the Government's national innovation and science policy[6], as many health and educational organisations (research institutes and universities) would be captured by the concept of 'collaboration' by the very nature of their work. Other Government policy objectives may be thwarted by this proposed scheme – for example social impact investing, where Government is encouraging increased private sector-led investing to fund new approaches which generate savings and avoid future costs, and deliver better outcomes for Australians.

We recommend amending clause 11, as per the LCA proposal, to cover only activities that are:

a) undertaken as an agent, representative, or employee of a foreign principal, or in any other capacity at the order, request, or under the direction or control of a foreign principal; or

b) ***directly or indirectly supervised, directed, controlled, financed or subsidised in whole or in major part by a foreign principal*.**

This amendment would **considerably limit the scope of the proposed scheme** and provide adequate and necessary relief to NFP and charitable organisations that would otherwise be captured.

Finally we question how this Bill may impact upon the ability of a government-funded organisation to provide input to Government policy development, where it is also collaborating with an international organisation (this scenario is likely in a globalised world where new approaches to solving social problems are shared and where funding is less able to meet increasing needs). Take, for example, a world-renowned welfare organisation which is engaged in international collaboration to tackle poverty – would Australian Government policy-makers be discouraged from engaging with that organisation in the context of forming or reviewing policy? **We urge the Committee to carefully consider how this Bill may affect public debate and Government policy development**. A potential consequence of this Bill is that Government may hamper the development of well-informed and evidence-based public policy, because those with specialised knowledge are prevented or otherwise disincentivised from contributing their expertise and advocacy. This prospect is deeply concerning.

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[6] The agenda focuses on the need to encourage innovation because it is "critical to improving Australia's competitiveness, standard of living, high wages and generous social welfare net". A central point of the agenda is a need for collaboration: "We need to encourage Australia's world-class researchers and businesses to collaborate to shape our future industries and generate wealth". It also highlights the importance of overseas industries: "We will also link Australia to other innovative economies and change the visa system to attract more entrepreneurial and research talent from overseas". See https://www.innovation.gov.au/page/national-innovation-and-science-agenda-report accessed on 14 February 2018.

Exemptions

We consider the proposed exemptions in Division 4 of Part 2 of the Bill are inadequate, both in terms of their application (which has significant consequences in terms of the enforcement provisions, as outlined above) and their scope.

Humanitarian aid or assistance

The exemption for 'humanitarian aid or assistance'[7] is vaguely defined. The Explanatory Memorandum suggests (without being conclusive) that this means in response to actual crises or conflict or civil unrest. This is limiting. It is widely accepted that humanitarian assistance is often provided as a way of preventing conflict or civil unrest or in response to other situations (eg. health outbreaks). We also note the difficulty of the words 'relates solely to' (as highlighted in the submission of the Australian Lawyers for Human Rights: 'conduct can convey multiple messages to different purposes, it is likely to be virtually impossible for anyone to prove that their conduct had a sole purpose or a sole message'). The problems with this clause would be largely cured if all charities registered with the ACNC were exempted from the scheme (per our recommendation) as it is overwhelmingly charitable organisations that undertake this kind of work and advocacy. If this exemption were to remain, however, the definition should be extended to cover a broader range of humanitarian action than those covered by the term 'is, or relates solely to'.

Religion

We are troubled by the proposed exemption for religion. We submit there is no necessary connection between an organisation's status as a religious organisation and its relationship with a foreign government (and implying such a connection is contrary to the principle of separation of church and state). Under the *Charities Act 2013 (Cth)*, the advancement of religion is but one of twelve purposes defined as charitable. We see no valid reason why activities which advance religious doctrines – as opposed to activities which further other charitable purposes – should be exempt from the proposed scheme. We acknowledge that under the ACNC Act, certain charities (basic religious charities) are exempt from certain obligations including financial reporting, however, we are similarly troubled by this exemption and intend to submit to the current review of the ACNC legislation[8] that basic religious charities should be subject to the same requirements as other charities under the ACNC Act.

Our final point in relation to this exemption (if it is to remain) is that Commonwealth legislation should, as much as possible, use consistent language and concepts. Consideration should be given to making the term 'religion' in cl 27(2) of the Bill consistent with the language of the Charities Act which refers to 'advancement of religion'.

Commercial or business pursuits (exempt) vs charitable pursuits (not exempt)

We cannot see why a business or commercial entity established by an individual for their own private benefit should be entitled to an exemption (in certain circumstances) compared to an organisation that is established, for example, to help people inflicted by an illness, for which the organisation does not receive a benefit but instead is for the public benefit.

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[7] Ibid, clause 24.
[8] Review of Australian Charities and Not-for-profits Commission (ACNC) legislation, https://consult.treasury.gov.au/people-and-communications-division/acnc-legislation-review/

The point here is that while charitable organisations may be involved in the activity of influencing government (as currently defined under the Bill), it is done in order to further their charitable purposes. We note the High Court has said 'it could scarcely be denied, these days, that it may be necessary for organisations, whose purposes are directed to the relief of poverty or the advancement of education to agitate for change in the policies of government or in legislation in order to best advance their charitable purposes'[9]. The High Court has also made clear that lawful public debate is a purpose beneficial to the community.[10] Charitable organisations are already subject to robust regulation (e.g. revocation of charity status if they are no longer for the public benefit, or have a disqualifying purpose such as promoting a political party)[11] under the ACNC legislation that brings with it an appropriate level of transparency, including financial reporting.

We recommend an exemption from the proposed scheme for charities registered with the ACNC.

We acknowledge that such an exemption would not be applicable to not-for-profit organisations that are not registered charities (some of which do operate for the public benefit, which is recognised in certain cases by Commonwealth income tax relief), such as pensioner or senior citizens associations.[12] It is our view that **consideration should be given to exempting all NFPs with purposes that are of public benefit** from the proposed scheme, although we recognise that currently the regulatory regime for non-charitable NFPs is not as transparent (overall) as for charities registered with the ACNC. At the very least, non-charitable NFPs would benefit from the more limited definition of clause 11 we have recommended above.

Regulation and compliance burden

Further to our recommendation above, we submit that registered charities are already subject to a robust framework (the Charities Act, ACNC Act and related legislation) that provides high-level transparency to both the Government, as regulator, and the public (certainly more so than a private company and arguably more accessible than public companies).

Imposing new regulation is therefore unnecessary and unwelcome. We also note that additional regulation is inconsistent with one of the three objectives of the ACNC Act (to promote the reduction of unnecessary regulatory obligations). Parliament was clear the ACNC is to work 'to put in place administrative practices to ensure appropriate levels of regulatory supervision without the imposition of unnecessary procedural requirements including administrative procedures and practices' and to 'work with other agencies to consolidate and standardise information that is sought from NFPs to minimise the burden which repeatedly seeking the same information would impose on NFPs'.[13]

Increased regulatory burden of charities will impose significant costs to the sector. Where a registered charity is, or may potentially be, caught by the proposed scheme, they would need to put in place strict administrative arrangements to ensure they register (where required – noting they may need to seek legal advice about whether they are caught, which further increases money and time spent), and meet onerous reporting requirements, for example in relation to communications activity (if prescribed), when and how disclosures are made, their content

[9] AID/WATCH Incorporated v Commissioner of Taxation [2010] HCA 42 [68].
[10] Ibid [47].
[11] *Australian Charities and Not-for-profits Commission Act 2012* (Cth), Division 35
[12] Income tax exemptions are extended to a range of organisations and institutions working in the public benefit including registered charities. See *Income Tax Assessment Act 1997* (Cth) Div 50, particularly ss 50.1 and 50.5.
[13] Australian Charities and Not-for-profits Commission Bill 2012 (Cth), Explanatory Memorandum page 19.

and form and manner of disclosures. New administrative processes will bring financial implications, in addition to the fees charged to register (and renew) under this scheme.

Increasingly, charities are being called upon to show value to the donor, and to operate efficiently in order to direct as much of the value of donations as possible to 'the cause' (e.g. providing a home for the homeless, planting to rejuvenate a forest, providing free health checks to people who cannot afford to pay). Increased regulation devalues the ability, however misconceived, of a donor's value for money (the ACNC appropriately suggests administration costs are the wrong measure of efficiency and donors should look at the work charities do and the impact they have)[14]. Whilst this unhelpful discourse is not directly linked to this Bill or the scheme it proposes, it and its broader impact on philanthropy needs to be highlighted.

In summary, increased regulation and compliance costs mean less time and money spent on achieving purpose – which brings with it reduced benefit to the public. This is undesirable. **We recommend that registered charities be exempt from any fees charged under this scheme (if they are not otherwise excluded by extending the exemptions in the Bill, as recommended above).**

Impact on International Philanthropy

We draw the Committee's attention to points made in the position paper "Charities and International Philanthropy" (dated August 2017) developed by a consortium of charities and led by CCA, Philanthropy Australia and the Australian Council for International Development. This position paper provides considerable analysis on the genuine contribution of legitimate international philanthropy to Australian communities, and how restrictions on this will negatively impact the work of charities in Australia and surrounding regions.

If charities refrain from situations that would bring them within the Bill or are otherwise excluded by international organisations and philanthropists this will have a deleterious effect on Australia far beyond the stated intention of transparency of foreign influence on Australian Government, Parliament and political processes and decision making.

Conclusion

As outlined in this submission, we do not object to the broad policy aim of the Bill, however the Bill needs to better balance the objective of transparency with the potential regulatory burden imposed upon the charitable and NFP sector, along with potential impact upon its vital contributions to public debate and policy development.

We note it is proposed the Act (if and when made) be reviewed within five years, and suggest this would be an appropriate amount of time to assess whether the objectives had been achieved, or if changes were necessary including reconsideration of its scope and breadth of the provisions.

We welcome the opportunity to discuss our submission further.

[14] Australian Charities and Not-for-profit Commission, "Charities and administration costs" at http://acnc.gov.au/AdminCosts

Yours sincerely

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