This morning I am going to speak about the *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017* also known as the “Foreign Donations Bill”.

You may be relieved to hear that I don’t intend to provide a detailed analysis of what a more workable definition of *“political expenditure”* in the Electoral Act might look like. Who knew that, depending upon the legislative framework in which this definition is placed, that it could be pivotal to the state of health of our democracy??

Instead I would like to use the time to provide some reflections on the sector response to the Bill and the depth of feeling and fervour that the Bill has evoked. It has been an enlivening journey so far.

For some context, it is worth noting that this Bill did something quite special – it managed to unite Get Up and the Institute for Public Affairs in common cause! For the benefit of our NZ colleagues, something akin to the US gun control activists joining forces with the NRA.

At a personal level, engaging in a collective response to the Bill has had the effect of emphasising for me the value of the open platform that we have to engage in public discourse in Australia and the various mechanisms, often unseen, that we have in place to preserve and foster the health of our democracy. It has caused me to actively consider the settings that underpin the vibrance of our democracy and the need for these settings be treated with care and respect – any changes to the underpinning settings must be fully considered and consulted upon. Fast law tends not to make good law – as we have seen with the first iteration of the Foreign Donations Bill.

Responding to the Bill has also helped to crystalise for me at a foundational principle level what an important role charities and other civil society voices play in our democracy.

A well-functioning society needs a balance between the power of government, economic interests and the community.

The ability for charities to be able to engage is vital to good policy-making by both government and business.[[1]](#footnote-1) The relationship need not be a confrontational one.

A well-functioning society needs a balance between the power of government, economic interests and the community. There is inevitably a healthy tension between the three sectors, but keeping the balance of power between the sectors is the challenge faced by a democracy – we need to embrace this challenge, including the way in which we maintain this balance in a changing world – the Foreign Donations Bill is one of the attempts to respond to the changed landscape, but it has missed the mark thus far.

The richer the variety of voices in a society the healthier is that society. An active community, engaged and debating creative proposals about public life is to be desired. It is imperative that we understand this at a foundational level so that in our attempts to respond to a fast-changing world we don’t inadvertently lose something that is of fundamental importance. The importance of that something – an open platform to engage in public discourse - may not be realised until after it has disappeared or been diluted.

As a representative from an international organisation that is dealing with the erosion of civil society space in many countries around the world, it has also been a sobering jolt to be facing off issues of a similar character on our own doorstep.

**The Foreign Donations Bill**

The Foreign Donations Bill had its genesis when the Senate Joint Standing Committee on Electoral Matter (JSCEM) released its third interim report on the outcomes of the 2016 Federal election.

There are two key recommendations which, in addition to banning foreign donations to political parties, gave life to the possibility that the Bill would affect foreign donations to third parties such charities in addition to political parties:

* + ***Recommendation 3:*** *The Joint Standing Committee on Electoral Matters recommends a prohibition on donations from foreign citizens and foreign entities to Australian registered political parties, associated entities and* ***third parties****.*
  + ***Recommendation 4:*** *The committee recommends that the Joint Standing Committee on Electoral Matters, in its wider inquiry into donations and disclosure, further examines the requirement to extend a foreign donations ban to* ***all other political actors. The key issue to be considered is how to prevent foreign funds being channelled through organisations engaging in political activities and who are not subject to regulation under the Commonwealth Electoral Act 1918.*** *This new inquiry would also examine related issues that have arisen in this inquiry which are outside the current terms of reference, including tax deductibility for gifts.*

When it became apparent that legislation may be introduced linking charities and civil society actors to a ban on overseas funding this led to the formation of one of the broadest coalitions of civil society groupings for many years.

25 charities launched their ‘Hands Off Our Charities’ campaign.  They included Anglicare, Oxfam, the Fred Hollows Foundation, Pew Charitable Trusts, World Vision, the Human Rights Law Centre and numerous environmental agencies such as the Australian Conservation Foundation.  Peak bodies aligned with the coalition include ACCOSS, Community Council of Australia and Australian Council for International Development.

The HOOC has been a collaborative and effective coalition. It has also been a forum for honest and robust debate amongst participants.

The Foreign Donations Bill was introduced in December 2017, hot on the heels of fallout from Sam Dastyari controversy relating to influence and donations from Chinese business. A theme that also resonates in the political discourse and public debate in NZ.

Up to that point the Bill was released I had been harbouring a private reservation that some of the voices in HOOC (and other extremists and activist cells!) were being a bit alarmist about the impact of any potential legislation. I anticipated that when the text of the Bill landed that it would be in a sensible form that would deliver the political party donation ban, some additional transparency requirements for charities and other civil society (both of which have universal support by the way) - but that in large part things wouldn’t change day to day for charities like Save the Children engaging in public discourse, advocating and receiving funds from foreign sources like our sister Save the Children entities, UN, EU or the Gates Foundation.

This hope proved to be misplaced and I was grateful for the foresight of colleagues in the HOOC who had anticipated a potentially damaging Bill which meant that we had an effective voice from the get go to respond quickly. Something that was necessary with short opportunity for submissions to be made to JSCEM over the Christmas period to a complex and important Bill.

Changes to our electoral legislation – something central to function of our democracy should be consulted upon with a more realistic timeframe – they are too important to do otherwise – with a rush job likely to create unforeseen consequences. This unfortunately is what happened.

To be blunt, the design and architecture of the Bill was poorly conceived and clumsy.

The Bill ***created a false equivalence between political parties and third parties such as charities***. It extended/transposed requirements appropriate for regulation of foreign donations to political parties (i.e. those with actual decision-making power in our democracy) to third parties without decision-making power. A significant overreach.

Some examples:

* the Bill created compliance obligations relating to receipt of donations that ***cut across all donor management and acceptance processes - not just those relating to acceptance of foreign donations which may or may not be used for advocacy***. Practically this would affect our approach to receiving funds from all donors, not just foreign donors e.g. the prescriptive regime for determining whether a donor is an “allowable donor” through mass requirement for statutory declarations verifying citizenship - unworkable.
* the obligations and penalties to be placed on volunteer directors of charities and a nominated “financial controller” are onerous and inappropriate and punitive – personal criminal liability with up to 10 years imprisonment.
* additionally, and importantly, in sweeping up charities into an onerous and punitive administrative regime, the Bill did not appear to take into account existing regulation of the charitable advocacy under the Charities Act, setting up inconsistencies with issues based advocacy which is allowable under the Charities Act.

Very encouragingly, the response to the Bill was forceful, not only from HOOC but a spectrum of stakeholders.

In particular, I want to highlight for this audience the strength of the submissions to JSCEM and participation in Senate Hearings from the legal community – from private practice and academia.

I have outlined some issues already, but rather than a full exegisis of the problems with the Bill - these are covered ad nauseum in written and oral submissions to JSCEM.

However, I would share an extract from the cover letter from Save the Children’s written submission to JSCEM – made jointly with another international humanitarian agency, in an attempt provide more of a flavour of the concerns we have:

*While our organisations are strongly supportive of the policy goal of transparency and accountability in elections, and also, transparency in the activities of charities, taken in its entirety the practical and substantive impact of the Bill is likely to be a severely compromised and weakened civil society, making the 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.*

*Numerous submissions to the Committee have identified material intertwined deficiencies in the Bill as well as the adverse impacts on charities and civil society more broadly. We share these concerns and believe this Bill is deeply flawed and should be withdrawn.*

*The breadth of organisations that the Bill covers, the types of activity that it covers, the thresholds of expenditure it adopts and the broad range of donors who are not “allowable donors”, combine to produce a regime that is unnecessarily expansive and onerous. If passed into law the Bill will set up a new scheme of regulation which will sit across participation in public debate on political matters at large and create a significant disincentive for philanthropic donations to Australia’s major charities. The effect will be a considerable ‘chilling effect’ on the legitimate advocacy activities of registered charities. The reforms proposed in the Bill do not represent a proportionate response in respect of the treatment of those who are not political parties or candidates, or closely connected to political parties or candidates.*

*Rather than incur the costs or run the compliance risks built into the proposed regime, charities and other civil society organisations are likely to choose to refrain from the public expression of their views to avoid the requirement to register and all that flows from it. The pressure to refrain from engaging in activities that create compliance risks will be especially strong on charities and smaller organisations. This would harm public debate in Australia by discouraging voices that pose no risk of undue or improper influence on Australia’s system of elections.*

*We endorse and reiterate the concerns raised by the Human Rights Law Centre regarding material defects in the Bill which are attributable to interrelated factors.*

*The case has been well made in numerous submissions to the Committee that the Bill introduces disproportionate, unnecessary and inconsistent regulation in the case of ACNC registered charities.*

*Our strong preference is that the Bill be withdrawn.**In the event that the Bill is not withdrawn, it should, at an absolute minimum, be amended to ameliorate the adverse impacts on charities registered with the ACNC.*

One technical design floor that I will labour over a little – because it draws out something critical – is the way that the Bill clumsily transposed the existing “political expenditure” definition into the proposed new administrative scheme.

Under the current Electoral Act third parties (including charities) must already provide public disclosures of their political expenditure via annual returns which must be lodged with the AEC.

In September 2017 the ***definition of “political expenditure” was broadened*** in such a manner as to potentially include expenditure at any time on public comment on issues of any public significance - amendment came into effect this week.

There is significant uncertainty around how entities should comply with the new transparency requirements – this uncertainty persists as reporting as the time for disclosure to the AEC for the first time approaches this year.

Setting aside the uncertainties, while the new definition of political expenditure captures a very wide range of activities by third parties (especially the public expression of views), the burden imposed on those caught by this broad definition is limited to a requirement to annually disclose the extent of spending and major gifts to enable that spending – ***light touch regulation***. This is something that we can work with.

However, the impact of the administrative scheme and the onerous obligations and penalties of the foreign donations scheme set out in the Bill – ***heavy regulation*** – makes it inappropriate to just drag across the broad gateway definition of political expenditure.

The impact of this on the Bill is significant. It compounds the uncertainty which already exists around the definition and its application and the poor regulatory design of the administrative regime for charities.

**JSCEM Advisory Report and Recommendations**

In April JSCEM released its Advisory Report and Recommendations relating to the Foreign Donations Bill. And this is where the story starts to get better, with JSCEM signally the need for a significant revision of the Bill.

Save the Children cautiously welcomed the recommendations. While we are broadly supportive of the JSCEM recommendations, the recommendations do not provide sufficient detail on the extent to which the administrative regime would be modified in any revised Bill to alleviate our concerns around the way in which charities will be impacted.

The HOOC Red Line Principles[[2]](#footnote-2) provide a strong framework to test the Foreign Donations Bill when the next iteration of the Bill emerges – which we expect to be in the coming months.

**Reflections**

Developing a public campaign on an issue that impacts something so broad and ephemeral as the health of our democracy - but that hinges on highly technical, focussed and prosaic formulations of legislation - is about as difficult as it sounds! It is hard enough for policy makers and those with a close interest to grasp, let alone conveying a message to a retail audience.

On the face of it the Foreign Donations Bill proposes to do something that will strengthen and protect our democracy – that is the political messaging. We are reacting by saying that some parts of the Bill do protect our democracy and we are strongly supportive of them, but there are a whole bunch of things buried in it that will diminish our democracy.

*Good for democracy on the one hand – devasting for democracy on the other.* A tough brief.

This requires sophistication and it has been amazing to observe and be part of the various ways in which the sector has risen to the challenge – we have so much good will, capacity and talent in our community.

I have also been very encouraged by the receptiveness of representatives from the government and all sides of politics to better understand the problems that the Bill would create if passed in its original form and willingness to try to find constructive solutions.

**What next**

While I am encouraged that we will find our way to a workable legislative reform we are not there yet.

We need to make sure that we follow this through when the Bill returns.

I strongly encourage members of the legal community to engage and react when the Bill returns. The biggest impacts will come from technical flaws and we need as many technical and credible voices as can be garnered.

Strong voices from the legal community will be complimentary and perhaps even more compelling than noises made by the usual suspects such as HOOC.

1. Discussion of benefit of charities to healthy society drawn from Joan Staples, 2015: <https://greenagenda.org.au/2015/09/democracy-resides-in-participation-in-organisations/> [↑](#footnote-ref-1)
2. <https://d3n8a8pro7vhmx.cloudfront.net/handsoffcharities/pages/4/attachments/original/1529883158/180622_HOOC_Red-Line_Principles.pdf?1529883158> [↑](#footnote-ref-2)