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Submission to the Senate Select Committee into the *Political Influence of Donations*

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Introduction

The St Vincent de Paul Society National Council (the Society) is pleased to respond to questions raised by the Senate Select Committee on the regulation of third party organisations with respect to political funding and disclosure.

Indeed, we believe it is timely, as when the Senate Select Committee first began its deliberations, the Society was not a third party under the *Commonwealth Electoral Act 1918*, but due to an amendment of that Act in September 2017, the Society now appears to be one.

Strangely, this amendment, which redefined political expenditure and effectively made the St Vincent de Paul Society a 'third party', was justified in the explanatory memorandum on the basis that it clarified "that to give rise to a need for a return, the public expression of views must relate to an upcoming election rather than a past election."[1]

In fact, the amendment did something else. It expanded the definition of political expenditure to include "the public expression of views on an issue that is, or likely to be, before electors in an election by any means, whether or not a writ has been issued for the election."[2] As a result, expenditure on the public expression of views on almost any public policy issue at any time is now defined as political expenditure.

The consequences of this have not been well thought through. It will result in difficulties in differentiating real third parties in an election from organisations who are making comments on public policy as part of their mission or purpose. It will also result in needless red tape and extra costs to charities. It will be at odds with aspects of charity law and the objects of the ACNC Act. And critically, it will have a chilling effect on the public expression of social, economic and environmental concerns by charities, thereby undermining rather than strengthening the integrity of our democratic political system.

It will be argued in this submission that the best course for the Government to take is to delete entirely the subparagraph in the *Commonwealth Electoral Act 1918* which is causing the difficulties. This would be in line with recommendations made by the Australian Electoral Commission, which pointed out the difficulties and dangers of this clause some years ago.[3]

Who we are

The St Vincent de Paul Society (the Society) is a respected lay Catholic charitable organisation operating in 149 countries around the world. Our work in Australia covers every state and territory, and is carried out by more than 64,000 members, volunteers, and employees. Our people are deeply committed to social assistance and social justice, and our mission is to provide help for those who are marginalised by structures of exclusion and injustice. Our programs assist millions of people each year, including people living with mental illness, people who are homeless and insecurely housed, migrants and refugees, women and children fleeing violence from men, and people experiencing poverty.

The adequacy of current laws governing third parties and their political expenditure

In September 2017 a phrase was altered in the *Commonwealth Electoral Act 1918* pertaining to annual returns relating to political expenditure.

On the face of it the change seemed simple and innocuous.

The phrase:

> "the public expression of views on an issue in an election by any means"

was replaced by the following phrase from 14 March 2018

> "the public expression of views on an issue that is, or is likely to be, before electors in an election (whether or not a writ has been issued for the election) by any means."

In the explanatory memorandum attached to the legislation, the proposed change was justified because:

> "This clarifies that to give rise to a need for a return, the public expression of views must relate to an upcoming election rather than a past election."[4]

Except it did not provide clarification. The wording remains ambiguous and could conceivably still relate to a previous election. If the intent was to specify an upcoming election, the adjective "upcoming" could simply have been added before the word election.

Instead, a convoluted phrase was added that broadens substantially the number and range of publicly expressed views whose financial costs will be deemed reportable in an annual return relating to political expenditure. It is unfortunate that the explanatory memorandum did not explain this fact to Senators at the time.[1]

The Australian Electoral Commission (AEC) has confirmed to the St Vincent de Paul Society that the change in wording results in a change in meaning and they are currently obtaining legal opinion on its new meaning and preparing advice for the community. At the time of writing this advice has not been made public.

In the meantime, one of the consequences appears to be that the number of community organisations, including charities, who will have to submit an annual Third Party Return of Political Expenditure will be greatly expanded. This is because the new wording includes not only issues that are before electors in an election, but also issues that are likely to be before electors. It also weakens

[1] In the JSCEM Advisory report on the *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017*. p. 16, it is noted that the intention of sub clause b of the definition of "political purpose" in that Bill "is to recognise that modern political campaigning takes place beyond the period in which the writs have been issued and is now continuous."
Sub clause b reads, "the public expression by any means of views on an issue that is, or is likely to be, before electors in an election (whether or not a writ has been issued for the election);" and is clearly based on the changed wording in the *Commonwealth Electoral Act 1918* from September 2017. This real reason for changing the wording should have been made clear to Senators and the public in the explanatory memorandum.

the link between the public expression of views and an actual election. The combination of these two changes means that virtually any public comment on a public issue could be deemed political for the purposes of the *Commonwealth Electoral Act 1918*. The *Commonwealth Electoral Act 1918* does not stop community organisations from making such political comment, but it states that if such comment is made and the politically expenditure associated with the public expression exceeds $13,500 in a year, then the community organisation must submit a Third Party Return of Political Expenditure.

In Parliament on 8 February 2018, Sarah Henderson reported that there were only seven charities that currently report. This was a claim later repeated by the Prime Minister. This was appropriate for the law as it stood in the financial year 2016/2017. For the 2016/2017 financial year some 34 organisations submitted returns.[5] These were mainly unions with a sprinkling of other community organisations, for example GetUp and Greenpeace. After 14 March 2018, following the amendment that changed the definition of political expenditure, it is likely that more than 1,000 charities and community organisations will be required to submit such returns.

For example, organisations that regularly make submissions to Federal Government inquiries will probably need to submit a return, because in order to make high quality submissions, organisations generally employ policy officers to research and coordinate responses. It does not take long to exceed the $13,500 threshold. More broadly, any organisation that campaigns on an issue for a length of time will find that it needs to submit a return.

While the Third Party Return of Political Expenditure is not a particularly onerous document, it is a waste of time for the more than 1,000 charitable and not for profit organisations to be filling it out. It serves no real purpose and no meaningful or useful information will be gained.

Applying this additional administrative requirement to charities is also unnecessary given existing law already imposes appropriate limits on advocacy activities by charities, such as prohibitions on donating to political parties, endorsing or supporting candidates or political parties for political office, or promoting unlawful activity. Existing regulations and law already impose reporting and accountability requirements on charities, and the additional requirements created under the Third Party Return of Political Expenditure will merely add to red tape without any justified benefits.

Critically, charities differ from other entities that may seek to influence political processes in that they can only be registered if they demonstrate they have been established to pursue a purpose that provides a *public benefit*. Charities cannot operate for personal profit or gain, and any surplus must be directed towards the public benefit purpose. Charities cannot pursue individual wealth or be privately owned. In this regard, they differ from third parties pursuing vested economic interests, such as the alcohol or tobacco producers or resources companies. Advocating for public policy that serves self-interest is not the same as advocating for public benefit.

Requiring so many extra charities to submit a Third Party Return of Political Expenditure will also add an unnecessary administrative burden to the AEC in terms of compliance. Additionally, it will make it difficult to distinguish in the publicly available returns between organisations who are attempting to influence elections during an election period and those who are simply engaging in public advocacy on issues as they arise during the year.

In 2011, the AEC advised the Joint Standing Committee on Electoral Matters on problems associated with the expression "the public expression of views on an issue in an election." They stated in part:

> "The difficulties with this provision place the AEC in the position of needing to determine the subjective intent of the expenditure in each case and undertaking a detailed analysis on a case-by-case basis which could conceivably involve extensive resources including the need to obtain legal advice on almost every new third party expenditure to assess whether there is a disclosure obligation unless voluntary compliance is achieved."[6]

Consequently, the Joint Standing Committee on Electoral Matters (JSCEM) recommended:

> "removing the reference to 'issues in an election' from the definition of political expenditure, by deleting section 314AEB(1)(a)(ii) of the *Commonwealth Electoral Act 1918*."[7]

However, in September 2017, the section was not deleted but greatly expanded. The administrative ambiguity remains and now the number of community organisations who need to report is expanded enormously.

Ultimately, the St Vincent de Paul Society National Council agrees with the earlier JSCEM report that section 314AEB(1)(a)(ii) should be deleted from the *Commonwealth Electoral Act 1918*, hence removing the reference to 'issues in an election' from the definition of political expenditure.

It is inappropriate that the St Vincent de Paul Society and other charities and community groups should suddenly be defined as third parties in an election due to an ambiguously and poorly-worded amendment to the *Commonwealth Electoral Act 1918* that slipped through the Parliament without sufficient scrutiny or a proper understanding of the full implications.

Comments on the advisory report on the *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017*

On the 9th April 2018, the JSCEM released the above report. In it, the Committee recommended "the Government consider amending the definition of 'political expenditure' to define the type of expenditure which constitutes expenditure undertaken to influence voters to take specific action as voters, so as not to capture non-political issue advocacy."[8]

In so doing the Committee recognised that the current definition of political expenditure is too broad. While this is an important step in the right direction, it is difficult to see how the proposed solution will remove ambiguity and is likely to be untenable and impractical to administer.

It is also unfortunate that the report implies that charities were not compliant and were not aware of their obligations under the *Commonwealth Electoral Act 1918* regarding reporting as third parties. The St Vincent de Paul Society National Council was very aware of these obligations as per the legislation prior to September 2017 and was compliant with it.

We believe the evidence of Mr Pirani from the AEC was confusing when he stated quite strongly:

> "If they're out there making public expressions of view on matters that are going to be before electors, they have disclosure obligations on their electoral advertising. Those laws apply 365 days—every day of the year—and not just during an election campaign."[9]

At the time, the relevant wording on the AEC website stated merely:

> "public expression of views on an issue in an election by any means,"[10]

The St Vincent de Paul Society National Council has interpreted this in the common sense meaning of the words to mean public expression of views on an issue during an election period. Had the Society interpreted it in the way Mr Pirani suggests then it would have been protesting about it long ago.

However, Mr Pirani may have been referring to the changes in the wording to the *Commonwealth Electoral Act 1918* which occurred after September 2017 and came into effect on 14 March 2018, and which have a much broader scope.

The upshot of this confusion, is that Mr Pirani's reaction gave credence to the mistaken belief that many third parties to an election are not complying with the provisions of the *Commonwealth Electoral Act 1918*.

The most appropriate means, if any, of further regulating third party actors to improve the integrity of political decision-making, including the possibility of caps on political expenditure.

Whether third party actors would accept further regulation if it were part of a comprehensive reform of the political funding and disclosure regime.

Whether all types of third parties should be treated equally in relation to regulation of their political expenditure.

The St Vincent de Paul Society National Council rejects outright that the Society should ever have been defined as a third party in an election. It further rejects, as per the previous section, the absurd all-encompassing definition of political expenditure on which it is based.

In this context, it should be noted that the *Charities Act 2013*, while recognising public policy advocacy in furtherance of a charity's purpose is legitimate, prohibits charities from having a "purpose of promoting or opposing a political party or candidate for political office."[11] Given there is already this prohibition and regulation by the ACNC, no further requirements are necessary for charities and there is therefore little justification for the imposition of additional requirements under the *Commonwealth Electoral Act 1918*.

The Society is on record in opposing the *Electoral Legislation Amendment* (*Electoral Funding and Disclosure Reform) Bill 2017*, which would not only place further unnecessary and onerous restrictions on third parties (called third party campaigners in the Bill), but also see the Society forced to register as a political campaigner.[12,13]

While certainly there appear to be problems created by wealthy individuals and some big businesses attempting to unduly affect the political process, this problem will not be solved by shackling the charity and community sectors with meaningless and burdensome red tape.

Prior to September 2017 there was a system administered by the AEC that seemed to work well in alerting people as to who were the main third parties in an election. The current and proposed changes to what constitutes a third party will only complicate reporting and make the system far less transparent.

How additional third party regulation might impact charities in their ability to fulfil their purpose under the ACNC Act

The St Vincent de Paul Society National Council of Australia Incorporated is registered with the Australian Charities and Not-for-profits Commission (ACNC).

Some of the purposes for which the Society is registered include:

- Advancing social or public welfare
- Promoting reconciliation, mutual respect and tolerance between groups of individuals that are in Australia
- Promoting or protecting human rights
- Promote or oppose a change to law, government policy or practice.

Changes to the *Commonwealth Electoral Act 1918* made in September 2017, means that expenditure on these purposes will now largely be defined as political expenditure.

There are several ways that current and proposed changes to third party regulation might impact both the St Vincent de Paul Society National Council and other charities in their ability to fulfil their purpose under the ACNC Act.

In the first instance, the defining criteria for charitable status pertains to an organisation's *purpose.* Public policy advocacy may be an essential, and is often the most effective, means of achieving charitable purposes. Recent charity case law in Australia has indicated that charities may legitimately adopt a wide range of means to achieve an end, so long as that end is consistent with their charitable mission and the means are not fundamentally harmful to society.[14,] This focus on *purposes* is central to charity law and regulation, and it helps preserve the independence of charities:

> Their (charities) independence from government or any particular political grouping is an important feature of their ability to serve their beneficiaries and to contribute more broadly to the public good. Independence allows charities to identify groups needing support and to make decisions about the best way to provide assistance to them 'without fear or favour'[15]

The changes to the *Commonwealth Electoral Act 1918*, however, introduce additional administrative burdens and legal ambiguities that ultimately serve to undermine the independence of charities, and muddle important regulatory distinctions between activities and purpose, as spelt out in charity law and case law.

Importantly, because of the changes to the *Commonwealth Electoral Act 1918* made in September 2017, expenditure on these purposes will now largely be defined as political expenditure, and this will have the immediate effect of increasing administrative burden. The ACNC has summed up the situation succinctly, "Under the new definition (of political purpose which came into effect in March 2018) it is likely that more charities will be required to report to the AEC and the Bill (the *Electoral Funding and Disclosure Reform Bill 2017*) also increases the regulatory requirements for each individual charity engaged in political expenditure over the threshold amount."[16]

Legislative changes that increase the administrative burden on charities and the NFP sector are at odds with an underlying aim of charity regulation in Australia, as articulated in the third object of the ACNC Act, which is to "promote the reduction of unnecessary regulatory obligations on the Australian not-for-profit sector". Rather than reducing red tape, the changes increase administrative burden and divert a charity's resources away from activities that fulfil their purposes and mission.

The more money that goes on senseless administration, the less there is to fulfil the purposes of the organisation. For a large organisation like the St Vincent de Paul Society this is a nuisance, but losses of this nature can be sustained. It will not stop the Society from continuing to give a hand up to those in need or speaking up for them as we seek to change unjust laws and policies.

However, for smaller and medium sized charities, changes taking place to third party regulation are a real threat. The combination of administrative burden and the threat of legal action will almost certainly mean that some charities will feel constrained from pursuing legitimate purposes of policy advocacy that are recognised under the ACNC Act. This will result in people who currently have least say in public policy, having even less say in the future. This in turn will lead to a less robust democracy.

Conclusion

The changes in regulation of third parties begun in September 2017 and envisaged in the *Electoral Legislation Amendment* (*Electoral Funding and Disclosure Reform) Bill 2017* are ill-conceived and will not lead to improved integrity of political decision making. In fact, they will lead to greater administrative burdens and costs being placed on the charities and community groups who currently speak up for those who are vulnerable or excluded in our society. Changes need to be targeted to address issues of actual political campaigning for parties during an election campaign if they are not to stifle normal policy advocacy and debate. A first step in this process would be to delete the ambiguous and problematic section 314AEB(1)(a)(ii) from the *Commonwealth Electoral Act 1918*.

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