

Committee Secretary
Parliamentary Joint Committee on Intelligence and Security
Parliament House
Canberra ACT 2600



AUSTRALIAN
COUNCIL
FOR
INTERNATIONAL
DEVELOPMENT

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Dear Committee Secretary

Submission to the Review of the Foreign Influence Transparency Scheme Bill 2017

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1. The Australian Council for International Development (ACFID) appreciates the Committee's extension to the public consultation period for this review and takes the opportunity to contribute a submission to this important discussion.
2. ACFID unites Australia's non-government organisations involved in international development and humanitarian action to strengthen their collective impact against poverty. ACFID's purpose is to lead and unite our members in action for a just, equitable and sustainable world. Further information about ACFID is at **Annexe A**. A full list of ACFID Member Organisations is at **Annexe B**.
3. As a principle, ACFID supports transparency so that the public can understand who is seeking to influence Government decision making. However, we are concerned that, if passed, this Bill is likely to have a chilling effect on legitimate and constructive advocacy and public debate, severely undermining Australia's open and democratic system of government - which we believe should encourage, not restrict, public engagement. Specifically, ACFID maintains the following concerns in relation to the proposed measures in their current form:

The breadth of activity captured by the Bill misconstrues charitable purpose

4. Part 2 Division 4 of the proposed legislation provides exemptions for certain activities including humanitarian aid and assistance, legal advice or representation, diplomatic activities, religious, news media and commercial or business pursuits. While we are pleased to see the exemption covering humanitarian aid and assistance, those terms are generally understood to be limited to emergency responses, and not to long-term development assistance. The absence of an exemption for NGOs and the critical work they undertake in long-term development assistance is highly anomalous.
5. Notwithstanding the exemption for humanitarian aid and assistance, the proposed legislation is drafted so broadly that any Australian charity that receives donations or has any kind of relationship with someone overseas (including donors and supporters) will be required to register and thus, will be encumbered with significant new administrative and compliance requirements. The breadth we're referring to means the following charities would unduly fall within the proposed scheme:

united against poverty

ACFID unites Australia's non-government aid and international development organisations to strengthen their collective impact against poverty

- Charities that receive financial support or membership fees from individuals who may not be Australian citizens or permanent residents (even if residing in Australia) and/or;
 - Charities that engage with overseas counterparts to share ideas or learning, support the capacity development of partners, or work in formal or informal collaborations, and;
 - Charities that have some form of engagement with public officials in Australia in pursuit of their charitable purpose.
6. For ACFID member organisations working to eradicate poverty and inequality globally, these activities are core business and are, in fact, considered to be good practice in the sector.
 7. In addition to capturing a significant number of ACFID member organisations, the likelihood is that the broad definitions within the proposed legislation will also capture a significant range of other charities and civil society actors who engage in healthy public policy debate and advocacy.
 8. However, unlike political parties, charities and civil society groups do not have the capacity to directly enact policy. **It is ACFID's position that the Bill should focus on bringing transparency reforms targeting genuine political activities tied to electoral processes and influences on candidates and parties who ultimately are elected to hold office.** This is because, as we emphasised in our recent submission to the Joint Standing Committee on Electoral Matters and their Inquiry into the Electoral Funding and Disclosure Reform Bill 2017¹—the purpose for which charities pursue issue-based advocacy is categorically different to the purpose of partisan political work.
 - a. ACFID considers that this categorical difference is due to the relative outcomes of the respective activities of party-political actors compared with those of charities, as regulated by charitable law.
 - b. Party-political electioneering is designed to win seats in Parliament and to put partisan individuals in positions of executive power where they ultimately contribute to federal decision-making. This is distinct from charitable advocacy which does not seek to hold a position of power in Parliament, but rather is focused on informing public debate on ideas and options that could be pursued to tackle the problems these organisations are established to address—such as reducing homelessness, improving mental health or addressing extreme poverty overseas.
 9. The activities of charities are strictly regulated and constrained by the Charities Act 2013 (Cth), and by the Australian Charities and Not-For-Profit Commission (ACNC) performing its regulatory function. The current legal regime is robust in outlining the purposes for which charities can legitimately be established, as well as in ensuring charities must demonstrate that they do not have a

¹ ACFID submitted to the Joint Standing Committee on Electoral Matters in relation to the inquiry into the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017 on 25 January 2017. Available at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Electoral_Matters/ELAEFDRBill2017/Submissions

'disqualifying purpose,'² the definition of which prohibits charities from having a "purpose of promoting or opposing a political party or candidate for political office."³

10. Politicising charitable organisations only serves to delegitimise their valuable work and carries an inherent reputational risk to these entities. It is important to emphasise here that the advocacy and public debate undertaken by charities is both legitimate and constructive.⁴
11. Advocating is an important approach which charities use to address the causes of social and environmental problems, rather than just the symptoms – an approach that often requires seeking policy change. This applies in almost every area of charitable endeavour. Most charities pursue their purpose and serve their communities partly through offering various services and partly through advocating to improve the community.
 - a. For example, if a factory is polluting a river because of poor regulation, environmental remediation work to treat affected wildlife downstream will have little impact if the factory can keep polluting the river. Addressing the underlying problem requires advocacy, to ensure the factory complies with regulations or adequate regulations are introduced.

Increased and duplicative regulatory burden

12. ACFID supports the transparency and accountability of charities and non-profit organisations and well-targeted, proportional approaches to maintain transparent and accountable charities.
 - a. Our commitment to transparency and accountability in the charitable sector is unrivalled in Australia. ACFID's Code of Conduct has been noted as 'best practice around the world.' by the former ACNC Commissioner.⁵ (See Annexe A for more information on ACFID's Code of Conduct).
13. However, it is our view that the additional cumbersome and costly administrative requirements which would be imposed under this Bill, along with serious penalties for non-compliance, are incommensurate to risk and would only unnecessarily burden charities – entities which are already appropriately regulated and transparent.
14. Further, the interaction between this Bill and the two others announced in the foreign security package in December 2017 – the Espionage and Foreign Interference Bill and the Electoral Funding and Disclosure Reform Bill – is

² See ACNC Fact Sheet http://www.acnc.gov.au/ACNC/Reg/Charities_elections_and_advocacy_.aspx

³ Charities Act 2013, s 11(b). This legislation specifies that the prohibition "does not apply to the purpose of distributing information, or advancing debate, about the policies of political parties or candidates for political office".

⁴ 2010. AID/WATCH INCORPORATED v COMMISSIONER OF TAXATION [2010] HCA 42. Accessed 16 January 2018. Available at: <http://www.hcourt.gov.au/assets/publications/judgment-summaries/2010/hca42-2010-12-01.pdf>. The High Court upheld the right of charities to advocate and campaign on issues of public concern in the Aid/Watch Incorporated v Commissioner of Taxation of 2010, finding advocacy activities to be essential to Australia's constitutional system of parliamentary democracy.

⁵ Susan Pascoe. *Are Australian Charities at Risk?* http://www.huffingtonpost.com.au/susan-pascoe/are-australian-charities-at-risk_a_21462478/ Huffington Post, August 2016.

problematic. For example, should a charity need to register under the scheme put forward by this Bill, and should the charity also be undertaking political expenditure over the disclosure threshold (according to the proposal in the Electoral Funding and Disclosure Reform Bill 2017), this charity now needs to register and submit annual returns on their advocacy undertakings to three different government entities; the ACNC, the Australian Electoral Commission, and the Attorney General's Department, and under three different sets of definitions in determining whether its advocacy is allowable or reportable⁶.

15. Imposing this new and unjustified regulatory burden will force many charities to divert resources away from frontline services and advocacy, that is, away from their important role in Australian society.
16. Given the limits already in place on charitable advocacy and the ACNC's regulatory authority to oversee charities' compliance with charitable law, it is difficult to see how capturing charities in this legislation would serve the realisation of the Bill's stated aim of providing *'transparency for the Australian Government and Australian public about the forms and sources of foreign influence in Australia'*⁷.

Punitive sanctions will inadvertently capture "benign conduct"

17. In addition to the breadth of activity covered by the Bill, the draft, as it stands, imposes severe criminal sanctions, effectively criminalising unregistered foreign influence.
18. Once again, because of the nature of the work that ACFID Members undertake, this exposes our membership to criminal liability, and personal risk of conviction of a serious indictable offence. It is our view that such a broad-brush approach may lead to an undue limitation on free speech and the communication of ideas from individuals and organisations; a scope well beyond the intended objects of the Bill.
 - a. In this regard, we refer to the Law Council's Rule of Law Principals, and the assertion that *'offence provisions should not be so broadly drafted that they inadvertently capture a wide range of benign conduct'*.⁸
19. The severity of penalties contained within the Bill, including the potential for a seven-year imprisonment term to be imposed on a person seeking a meeting without registering as an agent of foreign influence under the scheme, carries with it the risk that the valuable work of charitable organisations, as well as that of other civil society groups, religious groups, and think tanks in contributing to public discourse and informed political decision-making would be diluted. This is deeply concerning for Australia's democratic values.

⁶ Noting that the Electoral Legislation Amendment (Political Funding and Disclosure Reform) Bill 2017 broadens the definition of political purpose, capturing more activities undertaken by charities and more charities will therefore need to register with the AEC.

⁷ Explanatory Memorandum, Foreign Influence and Transparency Scheme Bill 2017 (Cth), p.2. Accessed 12 February 2018. Available at:

https://www.aph.gov.au/Parliamentary_Business/Bills_LEGislation/Bills_Search_Results/Result?bld=r6018

⁸ Law Council of Australia, Policy Statement on Rule of Law Principals (2011). Accessed 13 February 2018. Available at: <http://www.lawcouncil.asn.au>

20. In addition, the level of the suggested penalties will, in ACFID's view, also have a negative influence on recruitment— under the conditions proposed by the Bill, it will be more difficult to recruit people with the necessary skills and experience to charities, with negative flow-on effects to the overall governance of the sector.

The breadth of the definition of acting 'on behalf of' a foreign principal

21. ACFID firmly opposes the implication arising from the clause 11(1)(e), namely that receipt of foreign funding, or collaboration with any foreign entity in any way means the recipient organisation acts '*on behalf of*' the donor.
22. Currently, proposed section 11 of the Bill provides that the mere receipt of funding or an existence of an arrangement (including an arrangement '*of any kind*') with a foreign principal will be enough to constitute acting '*on behalf of*' that principal. Further, that acting '*in collaboration with*' a foreign principal is tantamount to acting '*on behalf of*'.
23. ACFID Members, in particular those whose primary objective includes working overseas to alleviate poverty and inequality, cannot undertake their charitable purpose without entering into significant and ongoing partnership relationships with organisations and individuals based overseas. Not only are these partnerships intrinsic to our operations, but they enable cross-cultural learning, allowing the charity sector to put forward international best practice solutions.
- a. For example, the Australian Government went to Turkey in 2016 for the first World Humanitarian Summit and committed the Australian Government to the Grand Bargain, a series of changes in the working practices of donors and humanitarian organisations. This includes a commitment to increase the amount of money going directly to local and national organisations from donor governments.
 - b. Alongside this is a commitment for Australian NGOs to work with these local and national organisations to support them to act in their capacity as first responders in humanitarian crises, and to better build national resilience to such disasters. Building resilience also requires building legal and regulatory systems that enable that resilience in advance of humanitarian emergencies. This requires policy engagement in-country and in-Australia.
24. The proposed Bill would mean that for ACFID's members to work collaboratively with partner organisations or individuals based overseas, they would have to take on an additional regulatory burden, as well subject themselves to reputational scrutiny and potential diminishment as they would now be deemed to be working '*on behalf of*' a foreign principle. These partnerships necessarily, and legitimately, involve information sharing, coordination of agendas and jointly developed policy positions.

Undermining Australia's open, democratic system of government

25. Advocacy and public debate undertaken by charities is both legitimate and constructive as an essential contribution to Australia's robust, representative democratic system. It is our position that this Bill seriously risks undermining

this important method of public engagement and participation and erodes Australia's democratic values.

26. Silencing advocacy on the grounds of foreign involvement, despite this advocacy being a legitimate form of civic engagement, with no association to a political party or candidate seeking election to office, is unjustified. Individuals and civil society organisations that would otherwise make contributions to a range of democratic processes, including making policy submissions or engaging in dialogue with representatives of the legislature and executive, are likely to be reluctant to do so where there is a requirement to register under the scheme.
27. Combined with the significantly harsh penalties contained within, this Bill carries with it the very real likelihood of muting public debate and dialogue, with negative repercussions for Australia's national interest.
28. ACFID's vision of a world where all people are free from extreme poverty, injustice and inequality can only be realised through the collective efforts of civil society, governments, business and individuals concerned for our common humanity, and it is for this reason we are deeply concerned by the constraining effect this Bill constitutes for civil society and public voice.
 - a. A survey conducted recently by Pro Bono Australia⁹ in the wake of the current moves to restrict the advocacy activities of charities that receive foreign donations or international philanthropy found that the number one concern of leaders across the charities sector is their capacity to speak out and advocate for public policies that will improve the lives of the people they serve.

In conclusion

29. Due to the concerns outlined above, **ACFID is unable to support the Bill in its current form.**
30. Pursuant to the Charities Act, and regulation by ACNC, as well as the Australian Taxation Office, and from a risk mitigation perspective, we see no justification for including charities under this proposed legislation, and believe it is critical that the Government excludes charities from any new impositions around advocacy, particularly those relating to foreign donations and political parties.
31. ACFID supports the intention of the Bill in providing transparency for the Australian Government and the Australian public about the forms and sources of foreign influence in Australia. However, we query the effectiveness of the Bill in achieving its stated aims, given that the onus of proof appears to be on charitable actors.
32. As stated by the Law Council of Australia, ACFID agrees that transparency in policy development will be more effectively achieved if the onus of disclosure of approaches or representations from foreign powers is placed on members of parliament, senators, parliamentary secretaries and public officials.

⁹ 2018. Pro Bono Australia. 'Only One in Five Australian Favour Proposed Limits on Charitable Advocacy'. Accessed 7 February 2018. Available at <https://probonoaustralia.com.au/news/2018/02/one-five-australians-favour-proposed-limits-charitable-advocacy/>

33. ACFID strongly recommends:

- a. that the Government reconsider the framing of this legislation to ensure that reform opportunities related to foreign interference target genuine influential behaviour that is of identifiable concern, not public communications that are already fully disclosed, or which do not raise foreign influence concerns.
- b. further consultation with the charities and not-for-profit sector. The full effect and compliance costs of any changes and the effect on the sector can then be properly assessed and considered. We would also welcome more time to properly assess the interplay (and contradictions) between this Bill, and the two others announced in the foreign security package in December 2017 – the Espionage and Foreign Interference Bill and the Electoral Funding and Disclosure Reform Bill.
- c. that in any re-draft, charitable entities registered with the ACNC be exempt from the registration scheme proposed in this Bill.

Further information

34. ACFID would be happy to provide additional clarity on any of the statements contained within this submission. Requests to meet can be directed to Marc Purcell, CEO, ACFID on (02) 8123 2216.

Annexe A

About ACFID

The Australian Council for International Development (ACFID) unites Australia's non-government organisations involved in international development and humanitarian action to strengthen their collective impact against poverty. ACFID's purpose is to lead and unite our members in action for a just, equitable and sustainable world.

Our vision is of a world where all people are free from extreme poverty, injustice and inequality; where the earth's finite resources are managed sustainably; and Australia is compassionate and acting for a just and sustainable world. We believe that this vision can only be realised through the collective efforts of civil society, governments, business and individuals concerned for our common humanity.

Founded in 1965, ACFID currently has 126 Members and 18 Affiliates operating in more than 100 developing countries. The total revenue raised by ACFID's membership from all sources amounts to \$1.658 billion (2014–15), \$921 million of which is raised from 1.64 million Australians (2014–15). 80 per cent of funding for ACFID Members is from non-government sources. ACFID's members range between large Australian multi-sectoral organisations that are linked to international federations of NGOs, to agencies with specialised thematic expertise, and smaller community-based groups, with a mix of secular and faith-based organisations. A list of ACFID Member Organisations is at **Annex B**.

ACFID's Members adhere to a **Code of Conduct** which is a voluntary, self-regulatory sector code of good practice that aims to improve international development outcomes and increase stakeholder trust by enhancing the transparency and accountability of signatory organisations.

The Code sets standards for practice rather than standards for results. It goes beyond the minimum standards required by government regulation and focuses on good practice. The Code is underpinned by a set of values and quality principles and speaks to the results we seek to achieve, the processes that support organisations to achieve those results, and the organisational systems that enable our Members' work.

The Code addresses areas such as fundraising, governance and financial reporting. Compliance includes triennial self-assessment, annual reporting and spot checks. All Members are subject to the independent complaints handling process governed by the Code of Conduct Committee (CCC) which is independent from the Governing Board of ACFID.

Annexe B

List of ACFID Members

* Denotes Interim Full Members

Full Members

- ACC International Relief
- Act for Peace - NCCA
- ActionAid Australia
- Action on Poverty
- Adara Development Australia
- ADRA Australia
- Afghan Australian Development Organisation
- Anglican Aid
- Anglican Board of Mission - Australia Limited
- Anglican Overseas Aid
- Anglican Relief and Development Fund Australia
- Asia Pacific Journalism Centre
- Asian Aid Organisation
- Assisi Aid Projects
- Australasian Society for HIV, Viral Hepatitis and Sexual Health Medicine
- Australia for UNHCR
- Australia Hope International Inc.
- Australian Business Volunteers
- Australian Doctors for Africa
- Australian Doctors International
- Australian Himalayan Foundation
- Australian Lutheran World Service
- Australian Marist Solidarity Ltd
- Australian Medical Aid Foundation
- Australian Mercy
- Australian Red Cross
- Australian Respiratory Council
- AVI
- Beyond the Orphanage
- Birthing Kit Foundation (Australia)
- Brien Holden Vision Institute Foundation
- Bright Futures Child Aid and Development Fund (Australia)
- Burnet Institute
- Business for Millennium Development
- CARE Australia
- Caritas Australia
- CBM Australia
- ChildFund Australia
- CLAN (Caring and Living as Neighbours)
- Credit Union Foundation Australia
- Daughters of Our Lady of the Sacred Heart Overseas Aid Fund
- Diaspora Action Australia
- Diplomacy Training Program
- Door of Hope Australia Inc.
- Edmund Rice Foundation (Australia)
- EDO NSW
- Engineers without Borders
- Every Home Global Concern
- Family Planning New South Wales
- Fairtrade Australia New Zealand
- Food Water Shelter
- Foresight (Overseas Aid and Prevention of Blindness)
- Fred Hollows Foundation, The
- Global Development Group
- Global Mission Partners
- Good Shepherd Services
- Grameen Foundation Australia
- Habitat for Humanity Australia
- Hagar Australia
- HealthServe Australia
- Heilala*
- Hope Global
- Hunger Project Australia, The
- International Children's Care (Australia)
- International Christian Aid and Relief Enterprises
- International Needs Australia
- International Nepal Fellowship (Aust) Ltd
- International RiverFoundation
- International Women's Development Agency
- Interplast Australia & New Zealand
- Islamic Relief Australia
- KTF (Kokoda Track Foundation)

- Kyeema Foundation
- Lasallian Foundation
- Leprosy Mission Australia, The
- Live & Learn Environmental Education
- Love Mercy Foundation
- Mahboba's Promise Australia
- Marie Stopes International Australia
- Marist Mission Centre
- Mary MacKillop International
- Mary Ward International Australia
- Mercy Works Ltd.
- Mission World Aid Inc.
- MIT Group Foundation
- Motivation Australia
- MSC Mission Office
- Murdoch Children's Research Institute
- MAA (Muslim Aid Australia)
- Nusa Tenggara Association Inc.
- Oaktree Foundation
- Opportunity International Australia
- Oro Community Development Project Inc.
- Oxfam Australia
- Palmera Projects
- Partner Housing Australasia*
- Partners in Aid
- Partners Relief and Development Australia
- People with Disability Australia
- PLAN International Australia
- Quaker Service Australia
- RedR Australia
- Reledev Australia
- RESULTS International (Australia)
- Royal Australian and New Zealand College of Ophthalmologists
- Royal Australasian College of Surgeons
- Salesian Missions
- Salvation Army (NSW Property Trust)
- Save the Children Australia
- Service Fellowship International Inc.
- School for Life Foundation
- SeeBeyondBorders
- Sight For All
- So They Can
- Sport Matters
- Surf Aid International
- Tamils Rehabilitation Organisation Australia

- TEAR Australia
- Transform Aid International (incorporating Baptist World Aid)
- UNICEF Australia
- Union Aid Abroad-APHEDA
- Uniting World
- Volunteers in Community Engagement (VOICE)
- WaterAid Australia
- World Education Australia
- World Vision Australia
- WWF-Australia
- YWAM Medical Ships

Affiliate Members

- Australian Federation of AIDS Organisations
- Australian National University – School of Archaeology and Anthropology, College of Arts and Social Sciences
- Deakin University – Alfred Deakin Research Institute
- La Trobe University – Institute of Human Security and Social Change
- Murdoch University – School of Management and Governance
- Refugee Council of Australia
- RMIT – Global Cities Research Institute
- Swinburne University of Technology Centre for Design Innovation
- Transparency International Australia
- University of Melbourne – School of Social and Political Sciences
- University of New South Wales- International
- University of Queensland – Institute for Social Science Research
- University of Sydney – Office of Global Engagement
- University of the Sunshine Coast – International Projects Group
- University of Technology, Sydney – Institute for Sustainable Futures
- University of Western Australia – School of Social Sciences
- Vision 2020
- Western Sydney University- School of Social Sciences and Psychology