

# RIDING THE WAVE OF LAW REFORM: ADVOCACY AS A CHARITABLE PURPOSE UNDER AUSTRALIAN LAW

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## 1. Introduction

This article analyses the development in Australia of charities' ability to advocate or campaign for changes to the law and public policy. The article is made up of five sections. Section 1 is the introduction which sets the scene for legal reform in Australia concerning advocacy by charities. Section 2 contains an outline of political scientist John Kingdon's theories of legal reform and briefly explains how they apply to the law reform concerning Australian charities that took place between 2000 and the present. Section 3 tracks the rise of advocacy as a legitimate purpose of charities in Australia, and how a policy window allowed the three streams of problem, policy, and politics to coincide resulting in law reform. Section 4 uses Kingdon's theories to analyse the period from 2013 to the present and how political developments have impacted on charities' rights to advocate. Section 5 is the conclusion.

Not-for-profits (NFPs) and non-government organisations (NGOs) became strong voices for democracy in the 1970s and 1980s.<sup>1</sup> This advocacy role of NFPs and charities has continued into the 21<sup>st</sup> century. Traditionally, the common law has not allowed an NFP charitable status if it has a major purpose of advocacy.<sup>2</sup> However, as this article will discuss, Australian law has developed in a different direction. In 2010, the High Court of Australia held that a charity could retain its charitable status

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1 Samuel P Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (University of Oklahoma Press, Norman, USA 1991); James Goodman, 'Contesting Accusations of 'Foreign Interference': The New Agenda for Australian Civil Society' (2018) 10(1) *Cosmopolitan Civil Societies Journal* 63, 64.

2 Perri 6 and Anita Randon, *Liberty Charity and Politics: Non-Profit Law and Freedom of Speech* (Dartmouth Publishing Company 1995) 5–6.

even where its dominant purpose was advocacy.<sup>3</sup> In 2013, Australia enacted a statutory definition of charity that allows for a charitable purpose of advocating for, or opposing, a change in the law.<sup>4</sup> However, these developments have not been without political difficulties.

Greater advocacy by members of the NFP sector has been heavily criticised across the political spectrum, especially in the 2000s. It was argued that while NFPs exert political influence, they are relatively unaccountable and therefore their engagement in political advocacy should be limited.<sup>5</sup> In particular, some politicians and commentators saw them as elitist and self-interested organisations.<sup>6</sup> Others saw them as preventing genuine grassroots movements from flourishing and being too embroiled in inter-group conflict to do anything useful.<sup>7</sup>

Charities are essentially a subset of the NFP and NGO sector with a very specific legal status. In general terms, charities are NFPs that have charitable purposes such as the relief of poverty, advancement of education and advancement of religion, they must benefit the public or a section of the public and none of their purposes can be disqualifying purposes such as the furtherance of illegal activities.<sup>8</sup> Charities are also granted significant tax concessions by the Australian Federal Government.<sup>9</sup> This is because charities often deliver many government health and welfare services.<sup>10</sup> Atkinson argues that the exemption from income tax is an exclusion from the tax base that has been chosen for the benefit of all, and that even though it lowers taxation revenue, this is a cost that makes society better.<sup>11</sup> Other commentators argue

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3 *Aid/Watch Inc v Commissioner of Taxation* [2010] HCA 42.

4 Charities Act 2013 (Cth) s 12(1)(l).

5 Goodman (n 1) 64.

6 Joan Staples, 'Attacks on NGO 'accountability': Questions of governance or the logic of public choice theory' in Jo Barraket (ed), *Strategic Issues for the Not-for-profit Sector* (UNSW Press 2008) 263, 269 quoting Prime Minister John Howard's Menzies Lecture delivered in 1996 when he became Prime Minister of Australia.

7 Joachim Hirsch, 'The State's new clothes: NGOs and the internationalization of states' (2003) 15(2) *Rethinking Marxism* 237, 258–259.

8 The requirements for being a charity are discussed in detail later in this article; however, the common law is set out in *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531, and the Australian common law in *Federal Commissioner of Taxation v Word Investments Ltd* [2008] HCA 55.

9 Income Tax Assessment Act 1997 (Cth) (ITAA97) div 50 makes charities exempt from income tax; donations to certain types of NFPs, many of which are charities, are tax-deductible under ITAA97 div 30.

10 Linda McGuire and Deirdre O'Neill, 'The Report on Government Services: A New Piece in the Accountability Matrix?' in Barraket (ed) (n 6) 236.

11 Rob Atkinson, 'Theories of the Federal Tax Exemption for Charities: Thesis, Antithesis and Synthesis' (1997) 27(2) *Stetson Law Review* 395, 431–432.

that the tax concessions are to compensate NFPs for certain economically risky activities.<sup>12</sup>

Criticisms of charities began to dominate in Australia in the 2000s as the Federal Government engaged in various approaches to prevent exposure of possible flaws in their welfare policies and activities.<sup>13</sup> Cultural clash was possibly inevitable, as charities are driven by values and government bureaucrats by rules.<sup>14</sup> During the decade from 2000 to 2010, there was strong advocacy by some charities and NFPs about the government's approach to welfare, environmental, indigenous and other issues, and also three High Court decisions which clarified and strengthened the legal position of charities in Australia.<sup>15</sup> In 2007, the Conservative Government was replaced by a centre-left Federal Government which seemed to be more in tune with the needs and aspirations of the NFP sector. However, the Federal Government reverted to Conservative rule in late 2013, and, as discussed later in this article, the new regime is keen to limit the voice of the charity sector.

The analysis of legal reform in this article is placed in the context of political scientist John Kingdon's<sup>16</sup> public policy approach. This approach is used as the theoretical framework for the discussion presented in the article, as, in the author's opinion, it provides an effective way of explaining how law reform takes place.

It is argued that the convergence of Kingdon's three streams of problems, policies and politics in Australia resulted in a change in the law allowing Australian charities to engage in advocacy and break away from the English common law. However, section 4 of the article demonstrates that there has been subsequent backlash against this development and explains how Kingdon's theories apply to this new development. Australia is currently facing a time of political instability and this poses problems for a government which is forcing its own solution onto a problem that it perceives exists, in the face of strong opposition from charities, researchers and others interested in this issue. Although conceding that Kingdon's work has

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12 Nina J Crimm, 'An Explanation of the Federal Income Tax Exemption for Charitable Organizations: A Theory of Risk Compensation' (1998) 50 Florida Law Review 419.

13 Goodman (n 1) 64; Kerry O'Halloran, *The Politics of Charity* (Routledge 2011) 153.

14 John R Butcher, 'Not-for-profits must adapt as one arm of government's 'three-sector solutions'' *The Conversation* 24 March 2017 <<https://theconversation.com/not-for-profits-must-adapt-as-one-arm-of-governments-three-sector-solutions-72971>> accessed 10 October 2018.

15 For the period 2006 to 2010, the following major cases dealing with charity law were decided by the High Court: *Central Bayside General Practice Association Limited v Commissioner of State Revenue* [2006] HCA 43; *Federal Commissioner of Taxation v Word Investments Ltd* [2008] HCA 55; *Aid/Watch Inc v Commissioner of Taxation* [2010] HCA 42. There were also other influential cases, including the Federal Court's decision in *Victorian Women Lawyers' Association Inc v Commissioner of Taxation* [2008] FCA 983.

16 John W Kingdon, *Agendas, Alternatives, and Public Policies* (2nd edn, HarperCollins 1995).

been subject to criticism,<sup>17</sup> it is argued that it provides a good theoretical framework in which to illustrate the way in which reform in the Australian charity sector in relation to political advocacy has developed<sup>18</sup> and is still developing.

## 2. Kingdon's Theories

Kingdon argues that a convergence of problems, policies and political streams is needed to open a window of opportunity to initiate major changes to existing laws.<sup>19</sup>

Kingdon's first stream, the problem stream, consists of indicators, crises and/or existing conditions that may highlight perceived problems. As Greer states, '[t]hey are "focusing events" that bring public focus to bear on a problem'.<sup>20</sup> Australia has experienced unprecedented government and public attention on the charity sector over the last 20 years. This attention highlighted problems within the sector in relation to the restriction of advocacy by charities. Various government reports dating back to 1995 emphasised the need for reform,<sup>21</sup> which was further illustrated through the problems experienced by the large charities which received government grants and felt that in return they were prevented from vocalising any criticism of the government.<sup>22</sup> The limitation on charities' ability to engage in campaigning and advocacy has also been a particular focus in other developed nations.<sup>23</sup>

17 See Paul Sabatier (ed), *Theories of the Policy Process* (1st edn, Westview Press 1999); Jonathan Bendor, Terry M Moe and Kenneth W Shott, 'Recycling the Garbage Can: An Assessment of the Research Program' (2001) 95 *American Political Science Review* 169.

18 Ann O'Connell, Fiona Martin and Joyce Chia, 'Law, Policy and Politics in Australia's Recent Not-for-Profit Sector Reforms' (2013) 28 *Australian Tax Forum* 289, 296–297. See also Oonagh Breen, 'Long Day's Journey: The Charities Act 2009 and Recent Developments in Irish Charity Law' (2014–15) 17 *The Charity Law & Practice Review* 91.

19 Kingdon (n 16) 88, 165–168.

20 Scott Greer, 'John W Kingdon *Agendas, Alternatives, and Public Policies*' in Martin Lodge, Edward C Page and Steven J Balla (eds), *The Oxford Handbook of Classics in Public Policy and Administration Online* (OUP 2016) <<http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199646135.001.0001/oxfordhb-9780199646135-e-18>> accessed 9 October 2018.

21 O'Connell, Martin and Chia (n 18); Sarah Maddison, Richard Denniss and Clive Hamilton, *Silencing Dissent: Non-Government Organisations and Australian Democracy* (The Australia Institute Discussion Paper Number 65 June 2004).

22 Maddison, Denniss and Hamilton (n 21); Marian Sawer, 'Governing for the Mainstream: Implications for Community Representation' (2002) 61(1) *Australian Journal of Public Administration* 39.

23 E.g. in the United Kingdom, the Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014, which addresses the ability of charities to participate in pre-election public dialogue, has reignited the debate on the challenging nature of political campaigning for charities – see Debra Morris, 'Legal limits on political campaigning by charities: drawing the line' (2016) 7(1) *Voluntary Sector Review* 109; in New Zealand, the decision of *Re Greenpeace of New Zealand Incorporated* [2014] NZSC 105 also cast

The second Kingdon policy stream is characterised as a ‘policy primeval soup’.<sup>24</sup> It is the community of specialists, including academics, social policy commentators, and lawyers, who put forward different ideas and solutions to the problem. This is the ongoing discussion of policy options among experts – the often invisible academics, government employees and others who take an area of policy and make it their own. This community is engaged in the heavy lifting of discussing policy alternatives. Its members are also engaged in entrepreneurship and advocacy. Their solutions and alternative views are generated, debated, redrafted and accepted for consideration as genuine alternatives to the existing system. Having viable alternatives available for adoption by government increases the chances of the issue being placed on the government’s agenda. As a result of the government inquiries that have taken place over the last few decades in Australia, policy communities have been formed and have generated a number of ideas and solutions relating to advocacy and charities.<sup>25</sup>

The third Kingdon stream, the political stream, is composed of a range of factors such as national mood, election promises, a change in government and pressure group campaigns.<sup>26</sup> The stifling of the broader NFP sector in Australia, combined with the harsh attitude<sup>27</sup> and often inconsistent approach of the Australian Taxation Office (ATO) – as perceived by members of the sector during the 1990s and 2000s and recognised by the Auditor-General<sup>28</sup> – were a galvanising influence. The return to power of the Labor Party in 2007, after eleven years under Conservative rule, was the defining moment in reviving the reform process.<sup>29</sup> The charity sector had resisted

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significant doubt on the *Bowman v Secular Society* and *McGovern* rationales. See also J Casey, B Dalton, R Melville and J Onyx, ‘Advocacy in the Age of Compacts: Regulating Government–Community Sector Relations–International Experiences’ (Centre for Australian Community Organisations and Management Working Paper No 78 2007).

24 Kingdon (n 16) 116.

25 These public consultations with the charity and NFP sector include: Industry Commission, *Charitable Organisations in Australia* (Report No 45 16 June 1995); Ian Fitzhardinge Sheppard, Robert Fitzgerald and David Gonski, *Report of the Inquiry into the Definition of Charities and Related Organisations* (Commonwealth of Australia 2001); Commonwealth of Australia, *Consultation Paper: Scoping Study for a National Not-For-Profit Regulator* (2011); Australian Council of Social Service, *Contribution of the Not-for-Profit Sector Productivity Commission Research Report, January 2010 ACOSS Analysis and Priorities for Future Advocacy, February 2010* (February 2010) <[http://acoss.org.au/images/uploads/ACOSS\\_analysis\\_and\\_advocacy\\_priorities.pdf](http://acoss.org.au/images/uploads/ACOSS_analysis_and_advocacy_priorities.pdf)> accessed 8 October 2018; Treasury and Australia’s Future Tax System Review Panel, *Australia’s Future Tax System—Final Report* (2 May 2010) <[http://taxreview.treasury.gov.au/content/Content.aspx?doc=html/pubs\\_reports.htm](http://taxreview.treasury.gov.au/content/Content.aspx?doc=html/pubs_reports.htm)> accessed 8 October 2018.

26 Kingdon (n 16) 87, 145–164.

27 Maddison, Denniss and Hamilton (n 21) vii.

28 Australian National Audit Office (ANAO), ‘Administration of Deductible Gift Recipients (Non-Profit Sector)’ (Australian Government Audit Report No 52 2011) 20.

29 O’Connell, Martin and Chia (n 18).

the Federal Government's attempt to statutorily define charity due, in large part, to perceptions that the government was attempting to shut down the sector's capacity to advocate.<sup>30</sup> The sector therefore welcomed the return of the Labor Government and saw it as providing an opportunity to fight for reform. Australia experienced what Kingdon describes as an 'open window'. In other words, the situation presented an opportunity for proposals for reform of the charity sector to be moved into a position where they were ripe for legislative enactment.<sup>31</sup>

The Labor Government was then led by Kevin Rudd and it began by removing the 'gag' clauses common in government contracts that restricted the capacity of NFPs to engage in advocacy. The Labor Government also developed 'standardised' government contract conditions.<sup>32</sup> During this period, the judiciary was also moving towards the idea that charities played an important part in the democratic process and should be able to advocate for their charitable objects.<sup>33</sup>

In late 2013, the Conservatives gained federal power, but without a majority in the Senate (the Australian upper house).<sup>34</sup> From then to the present is characterised by political instability and increasing pressure on the charities sector to refrain from criticising the government.

The fact that there was an alignment between problem, policy and politics in 2010 to 2013 put NFP sector reform at the top of the government agenda and resulted in a suite of legislative reform. This is discussed in section 4 of this article. In 2014 to the present, the issue of charities and their ability to criticise public policy has again come to the top of the government agenda, but there is political instability and no policy consensus. A time of political volatility implies that the final Kingdon stream may not successfully operate to wind back the reforms to advocacy by charities, resulting in maintenance of the status quo.

Another important point of Kingdon's theories is that the three streams are not a linear process and may loop and cycle backwards and forwards.<sup>35</sup> In fact, prior to Kingdon, Brewer had introduced a metaphor to assist in thinking through the stages of policy-making: that is, the image of this process as an ongoing cycle. This metaphor recognised that most policies did not go through a linear development

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30 Maddison, Denniss and Hamilton (n 21).

31 Kingdon (n 16) 166.

32 Community Council of Australia, 'Remove gag clauses legislation welcomed!' (Media release 13 March 2013); O'Connell, Martin and Chia (n 18) 296–297.

33 E.g. *Victorian Women Lawyers' Association Inc v Commissioner of Taxation* [2008] FCA 983 para 149.

34 Parliament of Australia, Senate Composition <[https://www.aph.gov.au/Senators\\_and\\_Members/Senators/Senate\\_composition](https://www.aph.gov.au/Senators_and_Members/Senators/Senate_composition)> accessed 8 October 2018.

35 Kingdon (n 16) 222–230.

from birth to death but, instead, tended to reappear in slightly different manifestations, as one policy succeeded another through incremental modification.<sup>36</sup> In Australia, this is demonstrated through the political upheaval which has occurred from 2014 to the present and which appears to be a catalyst for placing advocacy by charities back on the government agenda – although the lack of cohesion within the majority party may mean that reforms are not passed. Breen confirms Kingdon's reflection that policy windows open rarely and do not stay open for long.<sup>37</sup>

### 3. Charities and Political Advocacy in Australia

Until January 2014, when the Charities Act 2013 (Cth) (Charities Act) came into effect, there was no statutory definition of charity in Australia. Therefore, Australia followed the common law to determine whether a particular organisation was a charity.<sup>38</sup> The common law states that a charity must be NFP.<sup>39</sup> In other words, it must be an organisation that does not distribute its surpluses to members. Furthermore, it must have charitable purposes and be of benefit to the public or a sufficient section of the public.<sup>40</sup>

The limitation of advocacy by NFPs seems to have originated together with the common law concept of charity. In 1995, 6 and Randon surveyed 24 countries to determine the freedom of voluntary organisations to engage in campaigning and political activity.<sup>41</sup> The report found that there was a clear distinction between countries with a common law legacy and others. The authors found that:

At some stage in their history, all the charity law countries have followed the general approach which descends from the 1601 English Statute of Charitable Uses ... of the countries to constrain the campaigning activities of non-profit organisations specifically because of their organisational form or status, all were charity law, and ... originally common law, countries.<sup>42</sup>

The English common law states that a charity cannot have advocacy as a main purpose because the courts are not in a position to judge whether or not a particular

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36 GD Brewer, 'The Policy Sciences Emerge: To Nurture and Structure a Discipline' (1974) 5 Policy Sciences 239.

37 Breen (n 18) 104.

38 *Federal Commissioner of Taxation v Word Investments Ltd* [2008] HCA 55.

39 *Re Smith's Wills Trusts; Barclays' Bank Ltd v Mercantile Bank Ltd* [1962] 2 All ER 563; Ann O'Connell, 'The Tax Position of Charities in Australia – Why Does It Have To Be So Complicated?' (2008) 37 Australian Tax Review 17, 24.

40 *Commissioners for Special Purposes of Income Tax v Pemsell* [1891] AC 531; *Federal Commissioner of Taxation v Word Investments Ltd* [2008] HCA 55.

41 6 and Randon (n 2).

42 *ibid* 5–6.

law reform would be for the public benefit. Lord Parker, in the leading case of *Bowman v Secular Society Ltd*,<sup>43</sup> encapsulated the principle when he said:

A trust for the attainment of a political object has always been held invalid, not because it is illegal, for everyone is at liberty to advocate or promote by any lawful means a change in the law, but because the Court has no means of judging whether a proposed change in the law will or will not be for the public benefit, and therefore cannot say that a gift to secure the change is charitable.<sup>44</sup>

In the subsequent case of *National Anti-Vivisection Society v Inland Revenue Commissioners*,<sup>45</sup> it was held that the purpose of changing the law, which in this case was abolishing the practice of vivisection, was a political purpose that disqualified the organisation from charitable status. In 1982, Slade J in *McGovern v Attorney-General*<sup>46</sup> made additions to the list of exclusions, including furthering the interests of a particular political party, procuring changes in the laws of a country, and procuring a reversal of government policy or governmental decisions in a country.<sup>47</sup>

### 3.1. *Kingdon's first stream: the problem is seen as significant in Australia*

As noted in section 2 of this article, there have been an inordinate number of inquiries and government reports into the charity sector in Australia.<sup>48</sup> While one of the earliest inquiries was in 1995,<sup>49</sup> the most influential was in 2000, when the Federal Government called for submissions relating to the definition of charity and resulted in a report in 2001.<sup>50</sup> This inquiry resulted in 373 public submissions,<sup>51</sup> with a significant number arguing that advocacy by charities is important and should not

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43 [1917] AC 406.

44 *Bowman v Secular Society Ltd* [1917] AC 406, 442.

45 [1948] AC 31.

46 [1982] 1 Ch 321.

47 *McGovern v Attorney-General* [1982] 1 Ch 321, 340.

48 Seibert points out that between January 2011 and April 2013 there were 11 formal consultations undertaken: Krystian Seibert, 'Navigating Reform in Contested Spaces: Reflections on Not-for-Profit Sector Regulatory Reform in Australia, 2010-2013' in John R Butcher and David J Gilchrist (eds), *The Three Sector Solution: Delivering public policy in collaboration with not-for-profits and business* (ANU Press 2016) 131, 143.

49 Industry Commission, *Charitable Organisations in Australia* (Report No 45, 16 June 1995).

50 Sheppard, Fitzgerald and Gonski (n 25).

51 Fiona Martin, 'Is it Time for an Independent Regulator of the Non Profit Sector in Australia?' (2009) 12(3) *The Tax Specialist* 149, 154.



be made invalid.<sup>52</sup> At the same time, commentators were arguing that the traditional limitations on advocacy by charities were stifling the sector and public debate.<sup>53</sup> An online survey of NFPs in 2003, to which 290 organisations responded, found that nine out of ten of those surveyed did not believe that individuals and organisations that dissented from government views were valued by the government as part of a robust democracy, and that dissenting organisations risked having their funding cut.<sup>54</sup>

During this period, a number of influential NFPs that had been critical of the Federal Government were defunded. This particularly impacted on organisations representing the poorest Australians, such as the Australian Federation of Pensioners and Superannuants, National Shelter and the Association of Civilian Widows.<sup>55</sup> National Shelter was a peak body whose membership represented approximately 700 community and housing consumer organisations that assisted people on low incomes to find housing. Its chair is quoted by Sawyer as saying that ‘National Shelter has been resourced by successive governments for 23 years. The axing of a national consumer voice in the midst of housing policy upheaval can only be read as the Minister’s inability to accept criticism or hear alternate views’.<sup>56</sup> On the other side of the political spectrum, right-wing think tanks complained that strident advocacy groups were unrepresentative and were being granted too much government influence.<sup>57</sup>

Because of the 2000 Charities Definition Inquiry (the CDI), legislation was drafted in 2003 to enact a statutory definition of charity which, amongst other things, limited the ability of charities to engage in advocacy. Although this legislation was not enacted, these clauses caused alarm to many charitable bodies.<sup>58</sup>

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52 E.g. Philanthropy Australia Inc Submission to the *Inquiry into the Definition of Charities and Related Organisations* (19 January 2001); Central Land Council Submission to the *Inquiry into the Definition of Charities and Related Organisations* (25 January 2001); Australian Council for Social Service Submission to the *Inquiry into the Definition of Charities and Related Organisations* (January 2001) pt 3(3).

53 Marian Sawyer and Gianni Zappalà (eds), *Speaking for the People: Representation in Australian Politics* (Melbourne University Publishing 2001); Maddison, Denniss and Hamilton (n 21).

54 Maddison, Denniss and Hamilton (n 21) 27, 43.

55 Sawyer (n 22) 44.

56 Quoted in Sawyer (n 22) 44.

57 Gary Johns and John Roskam, Report to the Prime Minister’s Community Business Partnership, *The Protocol: Managing Relations with NGOs* (The Institute of Public Affairs 2004) 22–24.

58 E.g. Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) Submission to the *Inquiry into the Definition of Charities and Related Organisations* (undated, on behalf of Aboriginal land councils and native title representative bodies).

The defunding of committed and highly regarded charities such as National Shelter, the draft legislation that threatened to further limit charities' already limited advocacy rights, and the breadth and depth of submissions by sector representatives to public consultations are all indicators that there was a problem with the rules around advocacy by charities at this time. All these discussions and consultations are examples of Kingdon's first stream in action.

### 3.2. *The second stream: policy and legal consensus – the policy primeval soup*

Commencing in the late 1990s, there was some doubt cast on the *Secular Society* view by Australian and New Zealand courts.<sup>59</sup> In 2008, French J of the Federal Court of Australia observed that the Victorian Women Lawyers' Association did not engage in disqualifying political activity merely because it made representations and took public positions on matters affecting the position of women generally.<sup>60</sup> However, none of these judicial pronouncements overruled the common law.

At the same time as the CDI, academics and policy makers were arguing that policy is not developed exclusively by the legislature with the support of the public bureaucracy, nor would this be desirable.<sup>61</sup> It was reasoned that governments recognise the important role of advocacy in the health, education and social welfare fields in many ways. They directly fund such bodies, appoint their representatives to advisory bodies, and convene regular meetings between those organisations and relevant ministers. Many commentators therefore argued this recognition should be included as a charitable purpose, as these activities are clearly for a public benefit.<sup>62</sup> Furthermore, it was argued that rather than passing judgment on public policy, the courts were being asked to facilitate policy development and public discussion around issues that bear on charitable purposes (such as the relief of poverty) by enabling advocacy organisations to attract financial support from the public due to their charitable status.<sup>63</sup> Policy research and development by charities is for the benefit of modern democracies.<sup>64</sup>

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59 *Public Trustee v Attorney-General* (1997) 42 NSWLR 600, 621; *Re Collier (deceased)* [1998] 1 NZLR 81, 89–90.

60 *Victorian Women Lawyers' Association Inc v Commissioner of Taxation* [2008] FCA 983 para 149.

61 GFK Santow, 'Charity in its Political Voice – a Tinkling Cymbal or a Sounding Brass?' (1999) 18 Australian Bar Review 225; Adam Parachin, 'Distinguishing Charity and Politics: The Judicial Thinking behind the Doctrine of Political Purposes' (2008) 45 Alberta Law Review 871; Fiona Martin, 'The Legal Concept of Charity and its Expansion after the Aid/Watch Decision' (2011) 3(3s) *Cosmopolitan Civil Societies Journal* 20.

62 Parachin (n 61) 884–97; Charles Rickett, 'Charity and Politics' (1982) 10 *New Zealand Universities Law Review* 169; Santow (n 61).

63 Rickett (n 62) 174. Parachin (n 61) 884–97.

64 Martin (n 61).

Some academics pointed out that many disadvantaged groups who are the recipients of charitable services are politically controversial and these are the groups that are involved in advocacy activities.<sup>65</sup> Allowing them to engage in these activities would undermine the community support for charities. A stronger counter-argument was that if controversial subject matters are not charitable, groups that are pro-choice, pro-life, for the environment or that aid refugees would not be charities. It has been argued that this would be a great loss to the development of our community and would deny us the opportunity to broaden our perceptions and concepts of welfare and what is charitable.<sup>66</sup>

It was also argued that the imprecise boundary between acceptable and unacceptable political activities may create a chilling effect which deters charities from engaging in any political activity or from applying for charitable status.<sup>67</sup> Smaller charities without political experience or resources to challenge the law may self-censor their campaigning activities lest they lose their charitable status. Restrictions may impede critical public policy debates by preventing full participation of charities, which often possess great expertise in their fields of endeavour. The situation also distorts the preferences of donors and the structures of organisations.<sup>68</sup>

In the UK, although the common law cases presented a strict rule against advocacy, the Charity Commission for England and Wales (the regulator of the charity sector in these two jurisdictions) takes a much softer approach.<sup>69</sup> It has stated that a charity can engage in political and campaigning activity. However, these activities ‘must be undertaken by a charity only in the context of supporting the delivery of its charitable purposes. Unlike other forms of campaigning, it must not be the continuing and sole activity of the charity’.<sup>70</sup>

<sup>65</sup> Michael Chesterman, *Charities, Trusts and Social Welfare* (Weidenfeld and Nicolson 1979) 367; Gino Dal Pont, *Law of Charity* (LexisNexis Australia 2010) para 1236.

<sup>66</sup> Martin (n 61) 28.

<sup>67</sup> Myron Walker and Tim Rothermel, ‘Political Activity and Tax Exempt Organizations before and after the *Tax Reform Act of 1969*’ (1970) 38 *George Washington Law Review* 1114, 1126.

<sup>68</sup> Alison Dunn, ‘Charity Law as a Political Option for the Poor’ (1999) 50 *Northern Ireland Legal Quarterly* 298, 300.

<sup>69</sup> In England and Wales, determination of charitable status and supervision of charities generally is undertaken by the Charity Commission. The Charity Commission has its origins in the Charitable Trusts Acts of 1853 and 1860 (UK), but its modern existence stems from the Charities Acts of 1993, 2006 and 2011 (UK).

<sup>70</sup> Charity Commission for England and Wales, *Guidance: Campaigning and Political Activity Guidance for Charities* (1 March 2008) <<https://www.gov.uk/government/publications/speaking-out-guidance-on-campaigning-and-political-activity-by-charities-cc9/speaking-out-guidance-on-campaigning-and-political-activity-by-charities>> accessed 9 October 2018; See also Alison Dunn, ‘Charities and Restrictions on Political Activities: Developments by the Charity Commission for England and Wales in Determining the Regulatory Barriers’ (2008) 11(1) *International Journal of Not-for-Profit Law* 51.

The effect of the rule against political purposes in England and Wales was also somewhat lessened when ‘promotion of human rights’ was included in the statutory list of charitable purposes enacted in the Charities Act 2011.<sup>71</sup> Lee argues that this provision effectively legitimises some political engagement of English and Welsh human rights organisations in human rights causes.<sup>72</sup> Furthermore, the Charity Commission has attempted to offer guidelines on the circumstances in which political activities will be deemed permissible. In 2008<sup>73</sup> and then in 2014,<sup>74</sup> the Commission published guidance on the limitations of campaigning and political activity by charities. The 2014 guideline states that a charity’s policy position on an issue may coincide with, or be similar to, that of one of the political parties but that this does not prevent the charity from campaigning on that issue and advocating its policy as long as it makes clear its independence from any political party advocating the same policy. In addition, the charity must not do anything to encourage support for any political party. Charities are also free to invite candidates and political party representatives to public meetings about issues on which the charity is campaigning. Examples of this are inviting candidates to debate those issues, or to speak at a reception to launch the charity’s campaign. But they must not favour one party’s candidates over another’s.<sup>75</sup>

In Australia, it appeared that the status quo was maintained until 2010 when the High Court of Australia’s decision of *Aid/Watch Inc v Commissioner of Taxation*<sup>76</sup> changed the course of the common law in Australia in relation to advocacy by charities. This case concerned an NFP, Aid/Watch Inc, which was formed to monitor, evaluate and advocate regarding the delivery of foreign aid by Australian and multinational agencies. Aid/Watch did not provide direct relief of poverty but argued that its activities of researching and publishing details of foreign aid to developing nations and undertaking political lobbying in order to change government policy to increase and better target such aid was for the purposes of relieving poverty and advancement of education.

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71 Charities Act 2011 s 3(1)(h).

72 Rebecca Lee, ‘Charity without Politics? Exploring the Limits of ‘Politics’ in Charity Law’ (2015) 11(3) *Journal of Civil Society* 271, 275.

73 Charity Commission for England and Wales, *Guidance: Campaigning and Political Activity Guidance for Charities* (1 March 2008) <<https://www.gov.uk/government/publications/speaking-out-guidance-on-campaigning-and-political-activity-by-charities-cc9/speaking-out-guidance-on-campaigning-and-political-activity-by-charities>> accessed 8 October 2018.

74 Charity Commission for England and Wales, *Guidance, Charities, Elections and Referendums* (July 2014) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/591355/Charities\\_Elections\\_and\\_Referendums\\_new.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/591355/Charities_Elections_and_Referendums_new.pdf)> accessed 8 October 2018.

75 *ibid.*

76 [2010] HCA 42.

The majority of the High Court held that a purpose of generating public debate about the efficacy of foreign aid directed to the relief of poverty is a charitable purpose. They clearly rejected the McGovern line of reasoning when stating ‘... in Australia there is no general doctrine which excludes from charitable purposes political objects and has the scope indicated in England by *McGovern v Attorney-General*’.<sup>77</sup>

The Court was of the view that the origin of the political activities disqualification notion was decided in a context which did not consider the Australian Constitution, and the inherent right of constituents for agitation and communication about matters affecting government, politics and policies. The majority emphasised the context of the decision in the Australian legal system and its basis in the Australian Constitution, all of which rely upon ‘... communication between electors and legislators and the officers of the executive, and between electors themselves, on matters of government and politics’.<sup>78</sup>

The result of this decision is that Australian charities are entitled to carry out campaigning and advocacy activities, rather than just participate in government-led reforms or provide educational information as had previously been the case. The proviso to all this, however, is that these activities must be directed towards purposes that benefit the public. Examples of this include campaigning for the improvement of government policies relating to education, relief of poverty and advancement of religion.<sup>79</sup> It is argued by some that there is now an implied public benefit in holding government to account.<sup>80</sup>

The Court therefore held that in certain circumstances a charity could engage in advocacy and not lose its charitable status.

The High Court of Australia is clearly not part of government or the political process. But its decision in the *Aid/Watch* case was influential. How the decisions of courts relate to Kingdon’s theories is discussed by Nowak,<sup>81</sup> who suggests that the decisions of a court are originated in the problem stream. The court decision itself, which involves solving a dispute, then puts a solution in the policy stream or strengthens one that is already there.<sup>82</sup> In the Australian context, there was already a

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77        *ibid* para 48.

78        *ibid* para 44.

79        Matthew Turnour and Elizabeth Turnour, ‘Archimedes, Aid/Watch, constitutional levers and where we now stand’ in Matthew Harding, Ann O’Connell and Miranda Stewart (eds), *Not-for-Profit Law: Theoretical and Comparative Perspectives* (Cambridge University Press 2014) 37.

80        *ibid* 52.

81        Tobias Nowak, ‘Of Garbage Cans and Rulings: Judgments of the European Court of Justice in the EU Legislative Process’ (2010) 33 *West European Politics* 753.

82        *ibid* 759–760.

large group of policy makers and other actors arguing for a broadening of the power of charities to advocate. The *Aid/Watch* decision strengthened what was already there and provided a powerful solution.

### 3.3. *The third stream: a change of government and legislation is enacted*

The government reports and consultancy documents discussed in section 3.1 of this article included several hundred pages of useful and considered recommendations and had consumed thousands of hours of the sector's time in the form of submissions and consultations.<sup>83</sup> But most of those recommendations came to nothing.<sup>84</sup>

However, as mentioned earlier, in 2007 the Howard-led Conservative Federal Government was defeated and replaced by a Labor Government. The new government removed conditions in government contracts that restricted the capacity of NFPs to engage in advocacy, much to the relief of the sector. It also developed 'standardised' government contract conditions which lessened the compliance burden on grant-receiving charities.<sup>85</sup>

Then, in May 2011, the Labor Government announced a suite of reforms relating to the NFP sector. There were to be four major developments: first, the establishment of an independent charities and NFP regulatory body – this became the Australian Charities and Not-for-profits Commission (ACNC);<sup>86</sup> second, a statutory definition of charity and charitable purpose; third, a proposal to tax unrelated business income retained by charities and NFPs; and fourth, the restriction of tax concessions for NFPs to those operating mainly within Australia.<sup>87</sup> A change in government provided the opportunity for reforms of the charity sector to rise to the top of the government's agenda and be legislated.

### 3.4. *Advocacy under the Charities Act*

In 2011, policy makers saw the Labor Government developing its reformist agenda of the NFP sector.<sup>88</sup> It appears that it was motivated by being in government for the first time in 11 years, the many government reviews of the NFP sector that had taken place, the lobbying by major NFP organisations and academics writing in this area,

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83 O'Connell, Martin and Chia (n 18) 293; O'Halloran (n 13) 153.

84 E.g. the recommendations in the CDI for a statutory definition of charity and a regulator of the NFP sector were not followed.

85 O'Connell, Martin and Chia (n 18) 296–297.

86 Australian Charities and Not-for-Profits Commission Act 2012 (Cth) s105–5.

87 O'Connell, Martin and Chia (n 18).

88 *ibid* 291.

and several recent court cases on charity law (*Aid/Watch* being only one of them).<sup>89</sup> We see here an example of Kingdon's third stream in action, as there is a significant upheaval of the NFP sector and an election resulting in a change in government. This works on the second stream, the policy primeval soup and the underlying problem of advocacy of charities. Breen notes a similar occurrence in Ireland, which resulted in the establishment of an Irish Charities Regulator – although the policy catalyst was a series of charity scandals and the resultant public outcry.<sup>90</sup>

A major reform of the charity sector by the Labor Government was that the Charities Act was enacted in 2013 and came into force on 1 January 2014. This legislation includes a definition of charity and charitable purpose. Under the Charities Act, an entity is 'charitable' for federal law purposes if it is a 'charity' within this term as defined in the legislation.<sup>91</sup> The Act requires that the organisation satisfies four requirements. First, it must be NFP; second, all the entity's purposes must be *charitable* and for the *public benefit* (or ancillary or incidental to *and* in furtherance or in aid of such purposes); third, none of the entity's purposes can be disqualifying purposes; and finally, the entity cannot be an individual, political party or government entity.<sup>92</sup>

Charitable purposes are defined in s 12(1)(a)–(l), and expanded upon in ss 14, 15, 16 and 17 of the Charities Act. Section 12(1)(l) of the Charities Act states that a charitable purpose includes the purpose of promoting or opposing a change to any matter established by law, policy or practice in the Commonwealth, a State, a Territory or another country, but the promotion or opposition to change must be in furtherance or in aid of one or more of the purposes set out in s 12(1)(a)–(k). These purposes include the traditional categories of relief of poverty, advancement of education and religion<sup>93</sup> together with others such as promoting reconciliation and protection of the natural environment.<sup>94</sup>

Section 11 of the Charities Act limits the impact of s 12(1)(l) by stating that the purpose of promoting or opposing a political party or a candidate for political office is a disqualifying purpose. This section sets clear boundaries about what a charity can and cannot do with respect to political advocacy and political parties.

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89 For the period 2006 to 2010, there were three High Court decisions dealing with charity law – see n 15.

90 Breen (n 18).

91 Charities Act, s 5.

92 *ibid* ss 5–6, 11 and 12.

93 As established by the common law – see *Commissioners for Special Purposes of Income Tax v Pemsell* [1891] AC 531.

94 Charities Act, s 12 (1)(a)–(k).

#### 4. Kingdon's Streams Again Collide – or Do They?

As discussed earlier, there was a change to a Conservative-led government in September 2013.<sup>95</sup> Then, in 2016, there was another federal election and the Conservative Government was re-elected.<sup>96</sup> However, the result was extremely close with the Conservatives just winning the majority in the House of Representatives (the lower house) by one seat.<sup>97</sup> It was prior to this that the leadership changed to Malcolm Turnbull amidst much political controversy.<sup>98</sup> He was Australia's fourth Prime Minister in two years.<sup>99</sup> To add to the political instability, there was again no clear majority of any major party in the upper house.<sup>100</sup>

Although commentators agree that the overtly hostile approach towards advocacy by the Federal Government during the 1990s is no longer evident, a recently published survey of approximately 1,400 charities conducted in 2017 indicated that NFPs are feeling pressured to take a more cautious approach to advocacy to sustain and protect their other functions and services.<sup>101</sup> This research was published at the same time as the ACNC was tasked with its statutory five-year annual review.<sup>102</sup> It also coincided with the appointment of a new ACNC Commissioner, Gary Johns, by the current government. This new appointment was seen by many charitable

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- 95 Mungo MacCallum, 'Abbott's in charge – what happens next?' *ABC news online* (9 September 2013) <<http://www.abc.net.au/news/2013-09-09/maccallum-abbotts-government-surprises/4945552>> accessed 1 August 2018.
- 96 David Wroe, 'Labor takes seat of Herbert, leaving Malcolm Turnbull with majority of just one seat' *The Sydney Morning Herald online* (31 July 2016)<<https://www.smh.com.au/politics/federal/labor-takes-seat-of-herbert-leaving-malcolm-turnbull-with-majority-of-just-one-seat-20160731-gqhjy4.html>> accessed 1 August 2018.
- 97 *ibid*; Dan Conifer and Stephen Dziedzic, 'Election 2016: LNP retains Capricornia, gives Coalition 76-seat majority government' *ABC News online* (12 July 2016) <<http://mobile.abc.net.au/news/2016-07-11/coalition-secures-majority-government-as-lnp-retains-capricornia/7587578>> accessed 1 August 2018.
- 98 'A prime-ministerial coup in Australia: Stabbed in the front' *The Economist* (19 September 2015) <<https://www.economist.com/news/leaders/21665022-malcolm-turnbull-ousts-tony-abbott-critical-juncture-economy-why-so-many-political>> accessed 1 August 2018.
- 99 *ibid*.
- 100 Nicole Hasham, 'Election 2016 results: Senate count throws up a wild mix as One Nation, Fred Nile, Liberal Democrats vie for seats' *The Sydney Morning Herald* (3 July 2016).
- 101 Sarah Maddison and Andrea Carson, *Civil Voices, Researching Not-for-profit Advocacy* (Pro Bono Australia and Human Rights Law Centre 2018) 52.
- 102 The Treasury, 'Review of the Australian Charities and Not-for-profits Commission (ACNC) legislation' 2018 <<https://treasury.gov.au/review/acnc-legislation-review/>> accessed 9 October 2018.



organisations as a serious concern<sup>103</sup> due to the Commissioner's many public statements that charities need to be more financially accountable and not engage in government lobbying.<sup>104</sup> Furthermore, legislation was introduced into Federal Parliament in late 2017 that was clearly targeted at charities and NFPs and their ability to engage in election campaigning.<sup>105</sup>

The 2013 and 2016 elections, review of the ACNC, and targeting of election campaigning through legislative amendment have all come together at a similar time to potentially open another political window. In Kingdon's work, the agenda, which helps to define the problem and is part of the first stream, is described as the list of subjects or problems that are getting attention.<sup>106</sup> Clearly, advocacy by charities is back on the agenda. The third stream has come about because of two federal elections, but it is hampered by political instability.

#### **4.1. *The role of the Australian Charities and Not-for-profits Commission in relation to advocacy by charities***

In the period leading up to, during and following the 2016 federal election, the ACNC received an increased number of concerns regarding political advocacy.<sup>107</sup> As a result, the ACNC issued information guidelines that clarified its position regarding advocacy by charities.<sup>108</sup> This publication states that a charity can have a purpose of advancing public debate, which includes promoting or opposing a change in law, where this furthers or aids another charitable purpose. It can also have a purpose of promoting or opposing a change to a law, policy or practice in the Commonwealth, a state or territory or another country where this furthers or aids another charitable purpose.

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103 Luke Michael, 'Charities Express Shock At 'Bizarre' Appointment of Gary Johns to Head ACNC' *Pro Bono Australia* (7 December 2017) <<https://probonoaustralia.com.au/news/2017/12/charities-express-shock-bizarre-appointment-gary-johns-head-acnc/>> accessed 1 August 2018; Fergus Hunter, 'Charities express alarm as long-time 'foe' Gary Johns is appointed as their regulator' *Sydney Morning Herald* (7 December 2017) <<https://www.smh.com.au/politics/federal/charities-express-alarm-as-longtime-foe-gary-johns-is-appointed-as-their-regulator-20171207-h00cr5.html>>; David Crosbie, 'Anti-charity campaigner new head of charity regulator!' *Medianet* (7 December 2017) <<https://www.medianet.com.au/releases/150228/>> accessed 1 August 2018.

104 Gary Johns, *The Charity Ball: How to Dance to the Donors' tune* (Connor Court Publishing 2014).

105 Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017, Explanatory Memorandum, 3. This Bill is discussed later in the article.

106 Kingdon (n 16) 3.

107 ACNC, 'Charity Compliance Report 2015 and 2016, Protecting Public Trust and Confidence in Australia's Charity Sector' (March 2017).

108 ACNC, 'Charities, Elections and Advocacy' (April 2016) <<http://www.acnc.gov.au/tools/guides/charities-elections-and-advocacy>> accessed 6 December 2018.

The ACNC guidelines go on to state that general areas that are precluded from acceptable advocacy by a charity are: having a purpose of promoting or opposing a political party or a candidate for political office, having a purpose of engaging in or promoting activities that are unlawful, or having a purpose engaging in or promoting activities that are contrary to public policy. The latter point means that these purposes must not be contrary to the rule of law, the Australian constitutional system, and the safety of the public or national security. Although these information guidelines are not legally binding,<sup>109</sup> they are certainly influential with the charity sector.<sup>110</sup>

Furthermore, the ACNC has responsibility for regulating organisations that fail to comply with the ACNC Act, including if a charity engages in a disqualifying purpose under the Charities Act.<sup>111</sup> In 2015–2016, seven charities were investigated by the ACNC due to complaints about their advocacy activities, and one of these was deregistered.<sup>112</sup> In 2017, the ACNC announced that one of the five areas it would concentrate on for its compliance work was the political activity of charities.<sup>113</sup> The ACNC subsequently reported that there were 39 concerns raised by the public about 28 charities regarding political and unlawful activities in 2017. Of these 28 charities, five charities were investigated where information suggested that they may have a disqualifying purpose of promoting or opposing a political party or person for office.<sup>114</sup> This represented less than three per cent of concerns that were investigated by the Commission.<sup>115</sup> As there are approximately 54,000 charities registered with the ACNC,<sup>116</sup> the number of complaints about political activity is minute compared to the number of charities in the sector.

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109      *ibid.*

110      Certainly legal firms engaged in NFP law publish notes about them on their websites e.g. Neumann & Turnour, Lawyers ‘New Guidelines, Legislation and Guidance for NFPs’ (2018) <<http://www.ntlawyers.com.au/new-guidelines-guidance-and-legislation-for-nfps/>> accessed 7 October 2018; Mills Oakley, ‘Lawyers New Interpretation Statement – Could Your Organisation Be a PBI?’ (February 2017) <<http://www.millsOakley.com.au/new-interpretation-statement-could-your-organisation-be-a-pbi/>> accessed 7 October 2018.

111      A disqualifying purpose includes ‘the purpose of promoting or opposing a political party or a candidate for political office’ – Charities Act, s 11(1)(b).

112      ACNC, ‘Charity Compliance Report 2015 and 2016, Protecting Public Trust and Confidence in Australia’s Charity Sector’ (March 2017) 7.

113      *ibid* 21.

114      ACNC, ‘Charity Compliance Report 2017, Protecting Public Trust and Confidence in Australia’s Charity Sector’ February 2018, 5.

115      *ibid* 27.

116      ACNC, ‘Charity Compliance Report 2015 and 2016, Protecting Public Trust and Confidence in Australia’s Charity Sector’ (March 2017) 4.

Of more concern is that there has been a steady decline in trust and confidence in Australian charities since 2013 when it was first measured.<sup>117</sup> It might be thought that relevant to this is the amount of advocacy charities undertake. However, the most significant factors that influenced these results were the worthiness of the cause and the portion of funds that go to those in need.<sup>118</sup>

#### **4.2. *Research suggests that the NFP sector feels silenced again***

Research carried out in 2017–2018 argues that ‘public debate in Australia is not as healthy as it ought to be in a developed liberal democracy’.<sup>119</sup> It goes on to say that, ‘[d]espite some disquiet across the sector, many organisations report that they engage in some form of “self-silencing” – treading very carefully in their advocacy work to avoid the risk of financial (sic) [in]security and political retribution’.<sup>120</sup> The report concludes that:

Australian civil society needs to be reinvigorated, supported, and encouraged to engage in frank and fearless advocacy. There is need for reforms to ensure that the current definition of charities, which recognises advocacy as a part of an organisation’s charitable purpose, be protected and advanced.<sup>121</sup>

That the sector’s ability to advocate is seen as a problem by government and is at the top of their agenda is borne out by several actions of the current Federal Government. These developments include inquiries into the conduct of the 2016 election,<sup>122</sup> the appointment of a new and very conservative ACNC Commissioner,<sup>123</sup> and several proposed legislative reforms targeted at foreign

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117 Kantar Public Consultants, ‘ACNC Public Trust and Confidence in Australian Charities 2017: Market Research Report’ (October 2017) 2. Levels of trust and confidence in charities have decreased 13 percentage points from 2013 to 2017. The level of trust in charities was 37 per cent in 2013, 30 per cent in 2015 and, 24 per cent in 2017. Fourteen percent of those surveyed expressed outright distrust of charities which is a significant increase from 10 per cent in 2015.

118 *ibid* 45.

119 Maddison and Carson (n 101) 2.

120 *ibid* 1.

121 *ibid* 53.

122 Joint Standing Committee on Electoral Matters, ‘The 2016 Federal Election Interim Report on the authorisation of voter communication’ (December 2016); Joint Standing Committee on Electoral Matters, ‘Second Interim Report on the Inquiry into the Conduct of the 2016 Federal Election: Foreign Donations’ (March 2017); Joint Standing Committee on Electoral Matters, ‘Third Interim Report on the Inquiry into the Conduct of the 2016 Federal Election: AEC Modernisation’ (June 2017).

123 David Crosbie, ‘Anti-charity campaigner new head of charity regulator!’ *Medianet* (7 December 2017) <<https://www.medianet.com.au/releases/150228/>> accessed 1 August 2018.

donations to charities and NFPs and political advocacy by charities and NFPs.<sup>124</sup> The latter is encapsulated in amendments to the Commonwealth Electoral Act 1918 (Cth) (CE Act). These amendments focus on limiting advocacy surrounding Federal Government elections.

#### **4.3. *Electoral materials, issues and controversies: 2016 to 2018***

Between 2016 (the last federal election) and 2018, there were three interim Federal Government inquiries into authorisation of electoral materials. The report of the first inquiry states as its rationale that:

The 2016 Federal election saw concerns raised regarding authorisation of election material and subsequently questions have been asked about whether the current legislation is able to effectively address the modern techniques used in political campaign strategies of the 21st century.<sup>125</sup>

The second interim inquiry specifically targeted foreign donations to NFPs and NGOs,<sup>126</sup> and the third inquiry specifically investigated electoral activities of NFPs and NGOs.<sup>127</sup> The third inquiry report was handed down in June 2017.

In December 2017, the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017 (ELA Bill) was introduced in the Federal Senate (the Australian upper house).<sup>128</sup> As the name of the ELA Bill suggests, this legislation was drafted to increase disclosure regarding funding of electoral activities.

The ELA Bill proposes to amend the CE Act in several areas. These areas are far-reaching and include: establishing public registers for non-party political actors; prohibiting donations from foreign governments; requiring political actors to verify that donations over \$250 come from Australian organisations or citizens; modernising the enforcement and compliance regime for political finance regulation;

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124 Joint Standing Committee on Electoral Matters, 'The 2016 Federal Election Interim Report on the Authorisation of Voter Communication' (December 2016); Joint Standing Committee on Electoral Matters, 'Second Interim Report on the Inquiry into the Conduct of the 2016 Federal Election: Foreign Donations' (March 2017); Joint Standing Committee on Electoral Matters, 'Third Interim Report on the Inquiry into the Conduct of the 2016 Federal Election: AEC Modernisation' (June 2017).

125 Joint Standing Committee on Electoral Matters, 'The 2016 Federal Election Interim Report on the Authorisation of Voter Communication' (December 2016) vi.

126 Joint Standing Committee on Electoral Matters, 'Second Interim Report on the Inquiry into the Conduct of the 2016 Federal Election: Foreign Donations' (March 2017).

127 Joint Standing Committee on Electoral Matters, 'Third Interim Report on the Inquiry into the Conduct of the 2016 Federal Election: AEC Modernisation' (June 2017).

128 Parliament of Australia, Parliamentary Business, Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017.

and enabling the Electoral Commissioner to prescribe certain matters by legislative instrument.<sup>129</sup>

One area targeted is the part played by charities and NFPs in influencing elections and the perception that they lack public accountability. The Explanatory Memorandum states:

Election campaigning has radically changed through the professionalisation of politics and the proliferation of media advertising. New political actors neither endorse candidates nor seek to form government, yet actively seek to influence the outcome of elections. While a positive indicator of the strength of Australian civil society and civic engagement, these new actors lack the public accountabilities of more traditional actors, such as registered political parties or parliamentarians.<sup>130</sup>

The ELA Bill introduces and expands a range of definitions in the CE Act. For the purposes of this article, several definitions are important. First, the definition of ‘political purpose’, secondly a new group of entities defined as ‘political campaigners’ and ‘third-party campaigners’ and their associates and thirdly, ‘political expenditure’.

Section 287(1)(b) of the Bill proposes a new definition of political purpose which includes: ‘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’.<sup>131</sup> This definition extends the reach of the electoral laws well beyond party political participation and support into policy development and public advocacy, which is a core charitable purpose. It can be contrasted with the definition of charitable purpose in the Charities Act (which is discussed in section 3 of this article) which states that charitable purpose includes the purpose of promoting or opposing a change to any matter established by law, policy or practice in the Commonwealth, a State, a Territory or another country, but the promotion or opposition to change must be in furtherance or in aid of one or more of the purposes set out in s 12(1)(a)–(k). Furthermore, s 11(b) prohibits advocacy in favour of or against a particular political party or candidate.

The Bill creates new classes of actors, referred to as political campaigners and third-party campaigners or their associates, that are required to register with the Electoral Commission and comply with stringent requirements such as setting up additional bank accounts and appointing a financial controller. These entities can include

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129 Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017, Explanatory Memorandum, 3–4.

130 *ibid* 3.

131 Author’s emphasis.

charities and NFPs.<sup>132</sup> Generally, third-party campaigners are those that incur political expenditure above the disclosure threshold (\$13,500, indexed) and less than \$100,000 in a year, and political campaigners are those that spend \$100,000 or more.<sup>133</sup>

Charities that fall into one of the categories of third-party campaigners, political campaigners or associated entities will be required to lodge annual returns with the Australian Electoral Commission that outline their total income, expenditure and any outstanding debts. They will also have to list donors who have donated an amount above \$250. Memberships of political parties by their senior officers and any money received from the Commonwealth or any state or territory will also have to be declared. These returns must be accompanied by an auditor's report. The Bill imposes several civil, and some criminal penalties for breaches of the provisions and the penalties imposed are generally much more severe than those currently in the Act.<sup>134</sup>

If a charity falls within the definition of 'political campaigner', one of the consequences of the many onerous provisions will be that it will be required to keep records to show whether donations of more than \$250 were from what are referred to in the Bill as allowable donors or non-allowable donors. The definition of allowable is complex and for an individual means that they are, an elector, an Australian citizen, or an Australian permanent resident (unless the Minister decides that the resident is not an allowable donor).<sup>135</sup> Clearly, most donations will be from allowable donors. However, a very small number of donations are likely to come from non-citizens or residents of other countries who are appreciative of the work done for them or their families by the relevant charity. The Bill requires that specific accounts are set up for this small number of donors and kept separate from other general revenue accounts. No funds from these separate accounts can be used for political expenditure. Even if no such donations are received, charities registered as political campaigners will need to demonstrate that all donations of \$250 or more were from allowable donors. There is also the possibility of fines of over \$50,000 for charities who breach the legislation.

The Bill contains provisions that strongly resemble those of the Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014 (the Lobbying Act) which came into effect in the United Kingdom in January 2014. This Act requires charities, campaign groups and other organisations to register with the Electoral Commission as non-party campaigners if their spending on particular

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132 Joint Standing Committee on Electoral Matters, 'Advisory Report on the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017' (April 2018) 9.

133 *ibid* 3.

134 *ibid* 50.

135 ELA Bill, s 287AA.

‘controlled expenditure’ on regulated campaign activities during the run-up to an election exceeds specified amounts. ‘Controlled expenditure’ is money spent on an activity that can reasonably be regarded as being intended to influence voters to vote for or against political parties or categories of candidates, including those who do or do not support specific policies.<sup>136</sup> This is very similar to the new definition of ‘political purpose’ in the Australian legislation. Activities that fall within controlled expenditure also include lobbying even if the intention is to achieve something else, such as raising awareness of an issue.<sup>137</sup> There are registration thresholds, again like the Australian provisions, and the UK legislation is complex and cumbersome,<sup>138</sup> which again mirrors the Australian legislation. Many argue that it has ensured that charities have restricted their advocacy or lobbying activities, even where permissible, for fear of somehow inadvertently breaching the Act.<sup>139</sup>

It is strongly argued that the ultimate effect for charities in Australia will be a set of complex, cumbersome and costly administrative requirements. This will force many charities to divert resources away from frontline services and advocacy. Although it is impossible to determine which charities will be impacted the most by these proposals, it is likely that the effect will be widespread. This is evidenced by the range of charities that have been vocal in their opposition, ranging from charities that assist the impoverished such as the St Vincent de Paul Society to environmental charities such as the Australian Conservation Foundation and Greenpeace.

It is likely that the Bill will impact on a wide variety of charities. The St Vincent de Paul Society states that:

... while the St Vincent de Paul Society has a relatively high profile on social justice issues, the cost of the Society’s advocacy is relatively modest. However, the cost is more than \$100,000. This means that if the Bill is passed into law, the Society will be required to register as a political campaigner.<sup>140</sup>

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136 Political Purposes Act, s 85.

137 Political Purposes Act, s 85(A); See generally Commission on Civil Society and Democratic Engagement, *The Lobbying Act: Analysis of the law, and regulatory guidance recommendations* (February 2014).

138 Lord Harries, The Commission on Civil Society and Democratic Engagement, *Non-Party Campaigning Ahead of Elections* (2013) 4.

139 Debra Morris, ‘Legal Limits On Political Campaigning By Charities: Drawing the Line’ (2016) 7(1) *Voluntary Sector Review* 109; Lord Hodgson, *Third Party Election Campaigning – Getting the Balance Right: Review of the operation of the third party campaigning rules at the 2015 General Election* (2016) paras 6.57; Debra Morris, ‘Charities and Political Activity in England and Wales: Mixed Messages’ (2015) 16 *The Charity Law & Practice Review* 110, 122–123.

140 St Vincent de Paul, ‘Electoral Funding and Disclosure Reform Bill’ <[https://www.vinnies.org.au/page/Publications/National/Factsheets\\_and\\_policy\\_briefings/Electoral\\_Funding\\_and\\_Disclosure\\_Reform\\_Bill/](https://www.vinnies.org.au/page/Publications/National/Factsheets_and_policy_briefings/Electoral_Funding_and_Disclosure_Reform_Bill/)> accessed 1 August 2018.

A parliamentary inquiry into the Bill was established and received 102 submissions from the charity sector together with submissions from individuals.<sup>141</sup> The author has reviewed 20 of these submissions, chosen on the basis that they are from peak bodies such as Philanthropy Australia and NSW Council for Civil Liberties. All express concern that the regulatory burden in the proposed legislation will have an adverse effect on their advocacy and ability to operate.<sup>142</sup>

Kingdon's second stream is now active. There is a community of NFP specialists who are criticising the government's policy agenda and trying to work through solutions to this new problem. In late 2017, the Australian Council for International Development, the Australian Council for Social Service, the Human Rights Law Centre and the Community Council, together with many other major charitable organisations, established a 'Hands off our Charities' campaign.<sup>143</sup> These charities protested vehemently against the proposed new laws arguing that they would increase red tape which in turn would waste crucial donations and that 'Restricting advocacy by charities sends a deeply troubling message—that our government is seeking to avoid accountability. Their actions would have a chilling effect on our democracy'.<sup>144</sup>

The Chief Executive Officer of St Vincent de Paul, Dr John Falzon stated, 'this Bill is aimed at muting the voice of charities and others who have been critical of the government. It is dangerous legislation that is not only a threat to charities, but to democracy itself'.<sup>145</sup>

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141 Joint Standing Committee on Electoral Matters, 'Advisory Report on the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017' (April 2018) 11.

142 See e.g. St Vincent de Paul Society, Submission to the *Electoral Funding and Disclosure Reform Bill 2017* (31 January 2017) <[https://www.vinnies.org.au/page/Publications/National/Submissions/Charity\\_sector\\_reform/Submission\\_on\\_the\\_Electoral\\_Funding\\_and\\_Disclosure\\_Reform\\_Bill\\_2017/](https://www.vinnies.org.au/page/Publications/National/Submissions/Charity_sector_reform/Submission_on_the_Electoral_Funding_and_Disclosure_Reform_Bill_2017/)> accessed 1 August 2018; Seak-King Huang, Prolegis lawyers 'Electoral disclosure & funding reform: Why charities and NFPs should be concerned' (January 2018) <[http://www.prolegis.com.au/insights\\_detail.php?Electoral-disclosure-funding-reform-why-charities-and-NFPs-should-be-concerned-17](http://www.prolegis.com.au/insights_detail.php?Electoral-disclosure-funding-reform-why-charities-and-NFPs-should-be-concerned-17)> accessed 1 August 2018; Lesley Lynch, NSW Council for Civil Liberties, 'Electoral funding bill – reform or suppression of civil society voices' (1 March 2018) <[http://www.nswccl.org.au/electoral\\_reform\\_or\\_suppression\\_of\\_civil\\_society](http://www.nswccl.org.au/electoral_reform_or_suppression_of_civil_society)> accessed 1 August 2018.

143 Hands off our charities, 'Tell them 'Hands-off! No silencing of Australians' 2017' <<https://www.handsoffourcharities.org.au/>> accessed 1 August 2018.

144 *ibid.*

145 St Vincent de Paul Society, 'Electoral Bill will silence charities and undermine democratic debate' (National Council Media Release 10 January 2018).



The ACNC also expressed its concerns with the Bill and argued that it would cause confusion and administrative overburdening in the charity sector.<sup>146</sup> In its submission to the Inquiry into the Bill it stated in respect of the different definitions of political purpose in the Charities Act and the proposed amendments to the CE Act that:

These differences between the Charities Act and the amended CEA may affect a charity's ability to undertake some forms of advocacy and may decrease the amount of advocacy work undertaken by charities that are unable to meet the proposed regulatory burden and the risk of non-compliance as set out in the new regime.<sup>147</sup>

In April 2018, the Joint Standing Committee on Electoral Matters handed down its report on the ELA Bill.<sup>148</sup> In coming to its recommendations, the Committee noted that charities are already subject to provisions in the CE Act. These provisions require charities to authorise any broadcast of electoral material, and to make annual returns relating to political expenditure above the disclosure threshold (\$13,500). It also noted that the ACNC provides advice on what is considered advocacy, what is considered political campaigning, and what is allowed under the Charities Act (as discussed above).<sup>149</sup>

Of major importance to this discussion, the Committee recommended the government reconsider introducing the term 'political purpose' into the CE Act. This was because it had the potential to cause confusion with the Charities Act, which also uses this term but which attaches to it a different meaning.<sup>150</sup> This recommendation is of immense comfort to the charities sector, which was justifiably concerned that it could be engaging in legitimate advocacy under the Charities Act but be required to undertake significant compliance activities in order to comply with the CE Act.

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<sup>146</sup> ACNC, Submission to the *Inquiry into the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017* (24 January 2018) paras 13, 14–17.

<sup>147</sup> *ibid* para 13.

<sup>148</sup> Joint Standing Committee on Electoral Matters, 'Advisory Report on the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017' (April 2018).

<sup>149</sup> ACNC, 'Charities, Elections and Advocacy' (April 2016) <<http://www.acnc.gov.au/tools/guides/charities-elections-and-advocacy>> accessed 6 December 2018; Joint Standing Committee on Electoral Matters, 'Advisory Report on the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017' (April 2018) 11.

<sup>150</sup> Joint Standing Committee on Electoral Matters, 'Advisory Report on the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017' (April 2018) recommendation 1, V.

The Committee also recommended amending the definition of ‘political expenditure’ to define this expenditure as expenditure undertaken to influence voters to take specific action as voters. In this way, advocacy that was non-political would not be captured,<sup>151</sup> and therefore many charities would not unwittingly fall within the proposed laws.

The final recommendation was that the Federal Government appropriately resource both the Australian Electoral Commission and the ACNC to undertake a comprehensive education campaign aimed at businesses, industry associations, and the charity sector regarding their obligations under the CE Act.<sup>152</sup> The Bill was still before the House of Representatives, the lower house, and had not been passed at the time of writing this article in August 2018.<sup>153</sup>

This report is a clear example of Kingdon’s second stream. Although coming from government and comprised of politicians from all sides of politics,<sup>154</sup> the Committee is acting in an independent capacity and has listened to the arguments submitted by the charity sector, legal representatives and academics. Many of these submissions, as stated earlier, propose maintaining the current ability of charities to engage in advocacy to promote or oppose a change in the law relating to a charitable purpose. This will ensure charities can lobby on behalf of their beneficiaries for or against law reform where appropriate and can protect themselves from unnecessary compliance costs that will detract from their charitable purposes. This solution encapsulates the ideals expressed in *Aid/Watch* that ‘the generation by lawful means of public debate ... concerning the efficiency of foreign aid directed to the relief of poverty, itself is a purpose beneficial to the community within the fourth head in Pemsel’.<sup>155</sup> Kingdon notes this debate is essential to a true democracy.<sup>156</sup>

Furthermore, it doesn’t appear that the Federal Government has correctly judged the ‘national mood’. Kingdon refers to the correct analysis of this mood by policy makers and politicians as providing fertile grounds for an issue to rise to the top of the government agenda. But the strong voices of the charity sector, discussed in

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151        *ibid* recommendation 2, V.

152        *ibid* recommendation 15, VIII.

153        The Bill, in an amended form was passed by both houses on 27 November 2018. It was amended to take into account the concern raised in the advisory report discussed in this article to make clear that non-political issues based advocacy is not caught by its provisions. The amendments are still complex and will increase compliance costs for many charities.

154        *ibid* xiii. The Committee was chaired by Senator Linda Reynolds, Liberal Party and also comprised members of the Labor Party, Greens and independent members of parliament.

155        [2010] HCA 42 para 47.

156        Kingdon (n 16) 146–147.

section 3, as well as newspaper reports<sup>157</sup> and the minimal complaints to the ACNC about advocacy by charities, do not support a view that there is a national mood of concern over advocacy by charities.<sup>158</sup>

## 5. Conclusion

When you lobby for something, what you have to do is put together your coalition, you have to gear up, you have to get your political forces in line, and then you sit there and wait for the fortuitous event ... As I see it people who are trying to advocate are like surfers waiting for the big wave ...<sup>159</sup>

Prior to 2014, it seemed like legislative reform to broaden the scope of advocacy by charities had been successful. However, the preceding analysis demonstrates that since the federal election in late 2013, successive Conservative Governments have put advocacy by charities on their agenda. This is an example of Kingdon's first (and also third) streams in action as the problem is redefined, gains momentum and government (the political stream) is focusing on it. The above discussion also highlights that there are policy makers and researchers grappling with the redefined problem.

The question is whether the government will be successful with its own solution to a problem that it perceives exists, at a time of political instability and strong opposition from charities, researchers and others interested in this issue. It is arguable that Kingdon's political stream is not really meshing with the policy stream to allow a window to open and reform to take place. The government is pushing ahead with its own solution through the ELA Bill, but this does not suit the charities sector, academics and other policy makers. It is yet to be seen whether the separate streams will come together. Another federal election is due in 2019 and, as a result, may or may not open a 'policy window' that will allow the reforms to be pushed through.<sup>160</sup>

A better way of viewing the issue is that the appropriate approach when considering advocacy by charities is to make a distinction between advocacy for charitable purposes and advocacy with a political end in mind. The test should be whether the activities are merely political. In other words, is the aim to increase the political

157 E.g. Glen Morrison, 'Laws leave room for charity' *Rural Weekly* (27 June 2018) <<https://www.weeklytimesnow.com.au/news/rural-weekly/opinion/glenn-morrison-laws-leave-room-for-charity/news-story/65764fa969b5161eb3d3555fd04c06bf>> accessed 1 August 2018.

158 ACNC, 'Charity Compliance Report 2017, Protecting public trust and confidence in Australia's charity sector' (February 2018) 5.

159 Comment of an analyst for an interest group, quoted in Kingdon (n 16) 165.

160 Kingdon (n 16) 88.

power or influence of the organisation or its members, or is the aim charitable, in that it is intended to improve public health, education or social welfare.<sup>161</sup> If it is the latter, it should be encouraged. This is what is already encapsulated in the Charities Act.

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<sup>161</sup> Australian Council for Social Service Submission to the *Inquiry into the Definition of Charities and Related Organisations* (January 2001) pt 3(3)).