

# CHARITIES, ELECTION CAMPAIGNING AND THE AUSTRALIAN CONSTITUTION

JENNIFER LEIGH BEARD\*

*In this article I argue that the political advocacy of charities is crucial to Australia's political sovereignty. I analyse the role of charities as political actors in Australian political sovereignty and argue that the integrity and independence of the sector must include the freedom to speak out, or to speak up. I question whether contemporary political culture in Australia respects this proposition. Finally, I argue that although charities do have a role to play in our constitutional system of democracy, that role is, and ought to be, a regulated one. I consider how this is done in the context of both the Charities Act 2013 (Cth) and the Commonwealth Electoral Act 1918 (Cth), and I question whether current reforms to electoral law effectively ensure that the sector is not used to place undue influence on electors.*

## CONTENTS

I	Introduction.....	463
II	Charities as a Class of Non-Profit Organisation.....	464
	A Charities and Their Legal Form .....	465
III	The Meaning of 'Charity' and 'Charitable Purposes' under Commonwealth Law .....	467
	A The Purposes of Charity.....	468
	B The Purpose of Charitable Advocacy.....	468
	C The Purpose of s 12(1)(l) and the High Court's Rejection of the Doctrine against Political Purposes in Charity Law .....	469
	1 The Doctrine in Australia.....	471

\* Associate Professor, Melbourne Law School; Program Director (Law and Development), Institute for International Law and the Humanities. I wish to thank Professor Matthew Harding and Professor Andrew Geddis for providing insightful comments on earlier drafts of this article. I am extremely grateful to the anonymous reviewers for their detailed, constructive and engaging feedback; and to the 2019 Editors of the *Review*, Georgia Bourke, Sam Crock and Stuart Dixon, and the other editorial members who worked on this article, for their thorough and respectful editorial work. I thank the University of Otago Faculty of Law and staff for providing me with support and collegiality while I worked on this article in 2018.

D	The Political Aspects of Charity.....	474
IV	The Position of Charities within the Australian Constitutional Landscape ....	476
A	A Plural, Representative Democracy.....	479
B	Informed Voting.....	481
V	Maintaining the Integrity of the Charity Sector .....	483
A	Independence and Democracy.....	489
VI	Charities in the Electoral Law Landscape.....	494
A	The Distinct and Overlapping Roles of Charities and Political Parties.....	494
B	The <i>Electoral Act</i> .....	503
C	Charities and Commonwealth Electoral Reform .....	505
1	The <i>Electoral Act</i> as Amended .....	506
D	Third Parties.....	507
E	Political Campaigners.....	508
F	The Disclosure of Electoral Expenditure .....	508
VII	Conclusion .....	514

## I INTRODUCTION

This article focuses on the role played by charities as advocates of charitable causes in Australia's system of representative democracy. The first two parts of this article introduce the meaning of charity to the general reader. In Part II, charities are distinguished as a class of non-profit organisation. In Part III, the meaning of 'charity' and 'charitable purposes' under Commonwealth law is explained, and further distinguished.<sup>1</sup> I argue here that although very few charities have the exclusive object of promoting or opposing changes to law, policy or practice in pursuit of a charitable purpose, many charities engage in political activities as an incidence of their charitable mission. I conclude that this political engagement is crucial to Australia's political sovereignty. Part IV of this article positions charities within the Australian constitutional landscape. The aim here is to add further, specific Australian constitutional law jurisprudence to the existing literature on the political aspects of charity by explaining the role of charities as political actors in Australian political sovereignty. Political sovereignty is described by Nettle J in *McCloy v New South Wales* (*McCloy*)<sup>2</sup> as 'the freedom of electors, through communication

<sup>1</sup> Due to the different legal treatment of charities at the federal level compared to the state and territory levels, and the differences in electoral laws amongst Commonwealth, state and territory jurisdictions, the scope of this article does not extend beyond federal law.

<sup>2</sup> (2015) 257 CLR 178 (*McCloy*).

between themselves and with their political representatives, to implement legislative and political changes.<sup>3</sup> Part V explores the tensions that have arisen for the charitable sector as it seeks to maintain its integrity despite its politicisation.<sup>4</sup> In this part, I argue that the integrity and independence of the sector must include the freedom to speak out, or to speak up. I question whether contemporary political culture in Australia respects this proposition and suggest that governments and the sector must do more to ensure that the public understands what independence means in this context. Part VI of this article considers recent reforms to federal electoral laws. The Minister introducing these reforms intended to address government concerns about the influence charities and other not-for-profit entities have on voter intentions. This should only be the concern of electoral laws if that influence is undue or an abuse of power, not merely influential. Fortunately, the original amendments did not pass the Senate inquiry process, but the resulting amendments do little to assist charities to perform their role as political actors in a confident and transparent manner. By explaining how these reforms affect charities in Australia, I begin the process of questioning whether federal electoral law is working in the best interests of Australian democracy.

## II CHARITIES AS A CLASS OF NON-PROFIT ORGANISATION

Non-profit entities are constituted for a purpose other than the profit or personal gain of specific people.<sup>5</sup> Non-profit entities can, and do, make a profit, but whatever profit they do make cannot be distributed to members of

<sup>3</sup> Ibid 257 [216].

<sup>4</sup> Whilst not the direct topic of this article, factors that have led to the recent politicisation of charities are likely to include: common law and legislative changes to the meaning of charity; the decline in political party membership and the role of political parties as a linkage mechanism between the public and institutions of government; the rise of issues-based campaigning; and an increase in third-party advertising in terms of frequency and size. The latter factors tend to draw greater attention to the political aspects of charities, given the overlap between government policy and issues of concern to many charities, which in turn raises concerns — particularly amongst conservative politicians — that the sector is partisan in its advocacy. See generally Pro Bono Australia, Submission No 24 to Joint Standing Committee on Electoral Matters, Parliament of Australia, *Inquiry into the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017* (January 2018); Kerry Schott, Andrew Tink and John Watkins, *Political Donations* (Final Report, December 2014) vol 1, 108; Graeme Orr and Anika Gauja, 'Third-Party Campaigning and Issue-Advertising in Australia' (2014) 60(1) *Australian Journal of Politics and History* 73.

<sup>5</sup> See Mark Lyons, 'Australia's Non-Profit Sector' in Australian Bureau of Statistics, *Year Book Australia, 1999* (Catalogue No 1301.0, 24 February 1999) 536, 536–41; Productivity Commission, *Contribution of the Not-for-Profit Sector* (Research Report, January 2010) xxv.

the organisation. In that sense, their constitution may be considered purposefully altruistic.<sup>6</sup> The Productivity Commission estimates that there are more than 600,000 non-profit entities operating in Australia.<sup>7</sup>

The terms ‘charity’ and ‘non-profit’ or ‘not-for-profit’ are commonly used interchangeably. This misuse — or misunderstanding of, or nonchalance about, what a charity is, and how charities are distinguished from other types of non-profit entities — often leads to confusion in public policy debates about the not-for-profit sector generally and charities in particular.<sup>8</sup> Confusion also raises compliance concerns. In lay terms, charities have traditionally been understood as associations of individual members, who voluntarily give their time to alleviate poverty and engage in other altruistic purposes that we generally think of in moral or religious terms as ‘charitable’. However, over the centuries, legal definitions of charitable status and charitable purpose have been developed by parliaments and common law judges that differ from the lay understanding of the term. The aim of these legal definitions has been to capture, give recognition to, incentivise, and regulate a distinct sector of organised society that receives and raises private and public funds to pursue a defined set of ‘charitable purposes’ for the public benefit. The legal definition of charity is considered in Part III.

### A Charities and Their Legal Form

Charities are often referred to incorrectly as if ‘charity’ denotes a corporate entity or ‘legal person.’ The underlying structure of an entity is separate from its charitable status. At law, charity is a legal status — some might say a privilege — obtained by an entity because its institutional arrangements are non-profit, and its purposes are ‘charitable’ in a legal sense and for the public benefit.<sup>9</sup> An institutional arrangement that has been granted charitable status is subject to legal obligations and special privileges and protections that are

<sup>6</sup> Lyons (n 5) 536.

<sup>7</sup> Productivity Commission (n 5) 58. For an international, comparative analysis of civil society organisations, see Lester M Salamon and S Wojciech Sokolowski, *Global Civil Society: Dimensions of the Nonprofit Sector* (Kumarian Press, 2003) vol 2.

<sup>8</sup> See, eg, Josh Taylor, ‘Pssst, Abetz: GetUp Is Not a Charity, Does Not Care What You Think’, *Crikey* (Web Page, 6 July 2016) <<https://www.crikey.com.au/2016/07/06/eric-abetz-threatens-charity-status-of-getup/>>, archived at <<https://perma.cc/6F9K-2H75>>. Distinctions between charities and other non-profit organisations are often lost behind larger, ideological battles: see, eg, Emily Howie, ‘Safeguarding Advocacy on Behalf of the Environment’ (2016) 31(7) *Australian Environment Review* 263, 263.

<sup>9</sup> See below Part III.

specific to charities.<sup>10</sup> In terms of legal form, charities may operate within incorporated structures (for example, as incorporated associations, companies limited by guarantee, non-trading cooperatives or Indigenous corporations) but they may also have unincorporated structures (for example, trusts or unincorporated associations).<sup>11</sup> These differences in legal form generate governance and compliance issues for the sector and its regulation, particularly in a federation.<sup>12</sup>

In Australia, incorporated and non-incorporated entities that satisfy the definition of a charity at law are registered with, and regulated by, the Australian Charities and Not-for-Profits Commission ('ACNC').<sup>13</sup> The ACNC was established:

- (a) to maintain, protect and enhance public trust and confidence in the Australian not-for-profit sector; and
- (b) to support and sustain a robust, vibrant, independent and innovative ... sector; and
- (c) to promote the reduction of unnecessary regulatory obligations on the ... sector.<sup>14</sup>

It is possible that a non-profit may have all the attributes of a charity but not be registered with the ACNC,<sup>15</sup> although government reforms will make this

<sup>10</sup> See *Australian Charities and Not-for-Profits Commission Act 2012* (Cth) ch 3 ('ACNC Act'). For discussion of the privileges of charitable status, see generally Matthew Harding, *Charity Law and the Liberal State* (Cambridge University Press, 2014) 38–41.

<sup>11</sup> Productivity Commission (n 5) 7.

<sup>12</sup> These matters are beyond the scope of this article.

<sup>13</sup> *ACNC Act* (n 10) div 40 provides for the Australian Charities and Not-for-Profits Register. The common law still applies to charitable arrangements at the state and territory levels.

<sup>14</sup> *Ibid* s 15.5(1). For an analysis of the ACNC and its role in charity regulation and guidance, see John Vaughan-Williams, 'The Future of Charity Regulation in Australia: Complexities of Change' (2016) 37(1) *Adelaide Law Review* 219; Jenny Onyx, Liz Cham and Bronwen Dalton, 'Current Trends in Australian Nonprofit Policy' (2016) 7(2) *Nonprofit Policy Forum* 171, 179–80.

<sup>15</sup> Treasury reports that there are around 28,000 organisations endorsed as Deductible Gift Recipients ('DGRs'). Of these organisations, 18% are not registered charities, fewer than 10% are government entities, and over 8% could seek charity registration: Treasury (Cth), 'Tax Deductible Gift Recipient Reform Opportunities' (Discussion Paper, 15 June 2017) 1 [2] ('DGR Reform Opportunities'). Chia states that of the 596 environmental organisations on the Deductible Gift Recipient Register, 445 were also registered as charities with the ACNC: Joyce Chia, 'Taxing Environmental Advocacy: The Inquiry into the Register of Environmental Organisations' (2016) 31(8) *Australian Environment Review* 308, 310.

less likely in the future.<sup>16</sup> The ACNC on its website claims that there are approximately 56,000 registered charities, and that ‘charity registrations in Australia are growing by about 4 per cent per year.’<sup>17</sup>

### III THE MEANING OF ‘CHARITY’ AND ‘CHARITABLE PURPOSES’ UNDER COMMONWEALTH LAW

In Australia, at the Commonwealth level, Parliament has expanded and replaced common law definitions of ‘charity’ and ‘charitable purpose’ with statutory definitions in the *Charities Act 2013* (Cth) (*‘Charities Act’*).<sup>18</sup> In that Act, ‘charity’ means an entity: that is not-for-profit;<sup>19</sup> all of the purposes of which are charitable purposes that are for the public benefit,<sup>20</sup> or purposes that are incidental or ancillary to, and in furtherance or in aid of, such purposes;<sup>21</sup> and none of the purposes of which are disqualifying purposes.<sup>22</sup> This means that charities may have more than one charitable purpose, as well as other purposes that are not charitable but which assist the charity to further a charitable purpose, as long as they are not ‘disqualifying purposes’. Moreover, the law does not prevent charities from engaging in activities that are not in themselves charitable. As Chia and Stewart observe, ‘[t]he distinction between purposes and activities is well-established in charity law, but it is not a bright line distinction.’<sup>23</sup> According to Chia and Stewart, case law suggests that ‘at some undefined point’, an entity’s activity ‘may be construed as being of sufficient significance as to have become an independent non-charitable purpose’, which would ‘disqualif[y] it from charitable status and the tax concessions that flow from this status.’<sup>24</sup>

<sup>16</sup> See Treasury (Cth), ‘Deductible Gift Recipient (DGR) Reforms’ (Consultation Paper, August 2018) 4–9.

<sup>17</sup> ‘Are There Too Many Charities in Australia?’, *Australian Charities and Not-for-Profits Commission* (Web Page) <<https://www.acnc.gov.au/for-public/understanding-charities/are-there-too-many-charities-australia>>, archived at <<https://perma.cc/BK4F-52QC>>.

<sup>18</sup> The Act continues to utilise ‘familiar concepts from the common law’: *Charities Act 2013* (Cth) Preamble (*‘Charities Act’*).

<sup>19</sup> *Ibid* s 5 (definition of ‘charity’ para (a)).

<sup>20</sup> *Ibid* s 5 (definition of ‘charity’ para (b)(i)).

<sup>21</sup> *Ibid* s 5 (definition of ‘charity’ para (b)(ii)).

<sup>22</sup> *Ibid* s 5 (definition of ‘charity’ para (c)). See also at pt 2 div 3.

<sup>23</sup> Joyce Chia and Miranda Stewart, ‘Doing Business to Do Good: Should We Tax the Business Profits of Not-for-Profits?’ (2012) 33(2) *Adelaide Law Review* 335, 349.

<sup>24</sup> *Ibid*.

### A *The Purposes of Charity*

Charitable purposes are listed in the *Charities Act* under s 12(1).<sup>25</sup> These include traditional ‘heads’ of charity such as the advancement of religion,<sup>26</sup> education,<sup>27</sup> and social or public welfare,<sup>28</sup> but they also include more contemporary purposes such as promoting or protecting human rights<sup>29</sup> and advancing the natural environment.<sup>30</sup> A statistical portrayal of charities in Australia in 2016 indicates that the most common charitable purpose in Australia was religion (30.8%). A further 19.4% of charities pursued education and research, 7.8% pursued social services, and 9% advanced health.<sup>31</sup>

### B *The Purpose of Charitable Advocacy*

Section 12(1)(l) of the *Charities Act* is drafted in slightly different terms to the other listed charitable purposes in that it conceives advocacy for or against changes to law, policy or practice as a charitable purpose, as long as it is undertaken as a *means* to achieving one or more of the purposes listed under s 12(1). Section 12(1)(l) states:

(1) In any Act:

*charitable purpose* means any of the following:

...

- (l) 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, if:
  - (i) in the case of promoting a change — the change is in furtherance or in aid of one or more of the charitable purposes mentioned in paragraphs (a) to (k); or

<sup>25</sup> The list is not exhaustive.

<sup>26</sup> *Charities Act* (n 18) s 12(1)(d).

<sup>27</sup> *Ibid* s 12(1)(b).

<sup>28</sup> *Ibid* s 12(1)(c).

<sup>29</sup> *Ibid* s 12(1)(g).

<sup>30</sup> *Ibid* s 12(1)(j).

<sup>31</sup> Australian Charities and Not-for-Profits Commission, Centre for Social Impact and Social Policy Research Centre, *Australian Charities Report 2016* (Report, December 2017) 27 (*Australian Charities Report*).

- (ii) in the case of opposing a change — the change is in opposition to, or in hindrance of, one or more of the purposes mentioned in those paragraphs.

I refer in this article to this type of advocacy as ‘charitable purpose advocacy’. The mischief s 12(1)(l) was designed to address is outlined in the next section.

*C The Purpose of s 12(1)(l) and the High Court’s Rejection of the Doctrine against Political Purposes in Charity Law*

The introduction of s 12(1)(l) significantly diminished the ‘political purposes doctrine’ or the ‘political objects doctrine’ in Australian common law. This doctrine is usually traced to the 1917 English case of *Bowman v Secular Society Ltd* (*Bowman*),<sup>32</sup> wherein it was held that a charitable trust for the ‘attainment of political objects [is] invalid.’<sup>33</sup> Despite the vague rationale provided for the doctrine in that case,<sup>34</sup> it was subsequently applied in *National Anti-Vivisection Society v Inland Revenue Commissioners* (*Anti-Vivisection*).<sup>35</sup> In that case, the House of Lords held that the ‘leading purpose’ of the National Anti-Vivisection Society was the repeal of the *Cruelty to Animals Act 1876*.<sup>36</sup> Referring to Lord Parker’s reasons in *Bowman*, Lord Wright observed that, in charity law, the word political ‘was not limited to party political measures but would cover activities directed to influence the legislature to change the law in order to promote or effect the views advocated by the society.’<sup>37</sup> Coming to the conclusion that ‘it is a main object, if not the main object, of the society, to obtain an alteration of the law’,<sup>38</sup> Lord Simonds, quoting a textbook of the day, reasoned:

However desirable the change may really be, the law could not stultify itself by holding that it was for the public benefit that the law itself should be changed.

<sup>32</sup> [1917] AC 406.

<sup>33</sup> *Ibid* 442 (Lord Parker).

<sup>34</sup> See generally Adam Parachin, ‘Distinguishing Charity and Politics: The Judicial Thinking behind the Doctrine of Political Purposes’ (2008) 45(4) *Alberta Law Review* 871, 876–97.

<sup>35</sup> [1948] AC 31 (*Anti-Vivisection*).

<sup>36</sup> *Cruelty to Animals Act 1876*, 39 & 40 Vict, c 77; *ibid* 76–8 (Lord Normand).

<sup>37</sup> *Anti-Vivisection* (n 35) 51–2 (Lord Wright).

<sup>38</sup> *Ibid* 62 (Lord Simonds, Viscount Simon agreeing at 40).



Each court in deciding on the validity of a gift must decide on the principle that the law is right as it stands.<sup>39</sup>

The inference here is that it is for the legislature, representing the people and exercising legitimate political power, to debate and decide the laws of a country. However, as Lord Porter pointed out in dissent, one of the difficulties with the doctrine is that it focuses on law reform as a purpose rather than a *means* to a recognised charitable purpose. His Lordship could not accept the view that

the anti-slavery campaign or the enactment of the Factory Acts or the abolition of the use of boy labour by chimney-sweeps, would be charitable so long as the supporters of these objects had not in mind or at any rate did not advocate a change in the laws, but became political and therefore non-charitable if they did so.<sup>40</sup>

Accordingly, Lord Porter construed the phrase ‘political objects’ in the narrower sense to refer to objects whose only means of attainment is a change in the law.<sup>41</sup> The majority did not agree, however, basing their reasons, as I have said, on principles underpinning the separation of powers. As Parachin explains it, the courts in these cases defer to a neutrality principle in order to maintain ‘a neutral stance in relation to political purposes [rather] than policing a substantive conception of what is charitable versus political.’<sup>42</sup>

The broad scope of the doctrine against political purposes was later confirmed in *McGovern v Attorney-General* (*‘McGovern’*),<sup>43</sup> which concerned a trust established by Amnesty International, the purposes of which Slade J held were political and not charitable because they sought a change in the laws of the United Kingdom or a foreign country, or sought to persuade governments to alter policies or administrative decisions.<sup>44</sup> In *McGovern*, Slade J held that

<sup>39</sup> Ibid, quoting Amherst D Tyssen, *The Law of Charitable Bequests* (William Clowes and Sons, 1888) 176–7. The language used here is remarkably similar to the language used in the American case of *Jackson v Phillips*, 96 Mass 539, 571 (Gray J) (1867). See also *Bowditch v A-G*, 241 Mass 168, 174 (Crosby J) (1922). These two cases are cited in Elias Clark, ‘The Limitation on Political Activities: A Discordant Note in the Law of Charities’ (1960) 46(3) *Virginia Law Review* 439, 447–8 nn 42–3.

<sup>40</sup> *Anti-Vivisection* (n 35) 55.

<sup>41</sup> Ibid.

<sup>42</sup> Adam Parachin, ‘Charity, Politics and Neutrality’ (2016) 18 *Charity Law and Practice Review* 23, 24.

<sup>43</sup> [1982] 1 Ch 321 (*‘McGovern’*).

<sup>44</sup> Ibid 354.

the political purposes doctrine included the principal purposes of: (i) furthering the interests of a particular political party; (ii) procuring changes in the laws of a country; or (iii) procuring a reversal of government policy or of particular decisions of government authorities in a country.<sup>45</sup> According to Slade J, none of these objects could be ‘regarded as being for the public benefit in the manner which the law regards as charitable.’<sup>46</sup>

As a consequence of these cases, entities with charitable status were required to ensure that any ‘political activity’ they undertook was ancillary or incidental to a principal or primary charitable purpose and in furtherance of it.<sup>47</sup> As Dunn points out, the factors used to determine whether a political activity is ‘subsidiary’ to a charitable purpose have ‘never been precisely defined within the law and are instead judged on a case-by-case basis taking into account the type, duration, and extent of the activity and its link to an organization’s charitable purpose.’<sup>48</sup>

### 1 *The Doctrine in Australia*

The English cases, upholding the doctrine, were initially applied by the High Court in *Royal North Shore Hospital of Sydney v Attorney-General (NSW)*.<sup>49</sup> However, the doctrine was ultimately rejected by the Court in 2010 in the case of *Aid/Watch Inc v Federal Commissioner of Taxation* (*‘Aid/Watch’*).<sup>50</sup> In that case, a majority of the High Court recognised the *constitutional* value of the

<sup>45</sup> Ibid 340.

<sup>46</sup> Ibid.

<sup>47</sup> See *Royal College of Surgeons of England v National Provincial Bank Ltd* [1952] AC 631, 655–60 (Lord Morton), 673–5 (Lord Cohen).

<sup>48</sup> 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, 54 (‘Charities and Restrictions on Political Activities’). See also LA Sheridan, ‘Charitable Causes, Political Causes and Involvement’ (1980) 2(4) *Philanthropist* 5, 16; LA Sheridan, ‘The Political Muddle: A Charitable View?’ (1977) 19(1) *Malaya Law Review* 42, 44–9.

<sup>49</sup> (1938) 60 CLR 396 (*‘Royal North Shore Hospital’*). The period 1903 to 1962 has been described as the ‘era of deference to England’: Sonali Walpola, ‘The Development of the High Court’s Willingness to Overrule Common Law Precedent’ (2017) 45(2) *Federal Law Review* 291, 294–8. For a discussion of judicial reluctance to accept the doctrine in Australia, see Joyce Chia, Matthew Harding and Ann O’Connell, ‘Navigating the Politics of Charity: Reflections on *Aid/Watch Inc v Federal Commissioner of Taxation*’ (2011) 35(2) *Melbourne University Law Review* 353, 357–9. See also *A-G (NSW) v NSW Henry George Foundation Ltd* [2002] NSWSC 1128, [53]–[58], [63]–[65] (Young CJ in Eq); *Public Trustee v A-G (NSW)* (1997) 42 NSWLR 600, 607–8, 617, 621 (Santow J); *Victorian Women Lawyers’ Association Inc v Federal Commissioner of Taxation* (2008) 170 FCR 318, 348 [128], 352–3 [149] (French J).

<sup>50</sup> (2010) 241 CLR 539 (*‘Aid/Watch’*).

“agitation” for legislative and political changes’ undertaken by charities in Australia as a public benefit, and therefore decided to reject the common law doctrine that excludes from charitable purposes the pursuit of ‘political objects.’<sup>51</sup> Responding to the reasoning of Lord Simonds in *Anti-Vivisection* and Lord Parker in *Bowman*, the majority did not adopt what Parachin has described as deference to a neutrality principle.<sup>52</sup> The majority in *Aid/Watch* observed that a court called upon to adjudicate the charitable status of an entity, whose purpose is the agitation for legislative and political change, is not being ‘called upon to adjudicate the merits of [the] particular course of legislative or executive action or inaction.’<sup>53</sup> This is because they took the view that the public benefit necessary to establish charitable status is found in an entity’s very engagement in constitutional processes of political communication, not in the outcome. According to the majority, ‘it is the operation of these constitutional processes which contributes to the public welfare.’<sup>54</sup> The inference here is that agitation for legislative and political change assists the people, and the legislature, to fulfil their respective duties as the electors and the elected.

Having established the public benefit of political communication, the second consideration undertaken by the majority seems to be whether the purpose of the communication fell within one of the four heads of charity identified by Lord Macnaghten in the seminal case of *Commissioners for Special Purposes of the Income Tax v Pemsel* (*‘Pemsel’*).<sup>55</sup> In that case, Lord Macnaghten held that ‘the popular meaning of the words “charity” and “charitable” does not coincide with their legal meaning.’<sup>56</sup> His Lordship proceeded to find that ‘charity’ in its legal sense comprises four principal ‘heads’: ‘trusts for the relief of poverty; trusts for the advancement of educa-

<sup>51</sup> Ibid 554–7 [39]–[49] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

<sup>52</sup> See above n 42 and accompanying text.

<sup>53</sup> Ibid 556 [45].

<sup>54</sup> Ibid. Although primarily a case about charity law, *Aid/Watch* also belongs to the long line of constitutional law cases about the implied freedom of political communication commencing in the early 1990s with *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 and *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 (*‘ACTV’*). This line of cases may be described as ‘a manifestation of Australia’s independent national identity’ following the abolition of appeals from Australian courts to the Privy Council in the 1970s and ’80s, and the emergence of the activist Mason Court: Walpole (n 49) 302–3. *Aid/Watch* provides a prime instance of the High Court’s willingness to reconsider ‘foundation rules’ and ‘adapt the common law to Australian circumstances’: see at 304–12.

<sup>55</sup> [1891] AC 531, 583 (*‘Pemsel’*).

<sup>56</sup> Ibid.

tion; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding “heads”.<sup>57</sup> No court has since provided a definition or set of principles sound enough to determine when a purpose under the fourth head is charitable, beyond the original principle that it must be within the spirit and intendment of the *Charitable Uses Act 1601*.<sup>58</sup> The 1601 statute was recognised by Lord Halsbury LC in *Pemsel* as the source of what the common law considered to be a ‘charitable purpose’ either by explicit mention or because a purpose falls within its ‘spirit and intendment’, and thus within the equity of the statute.<sup>59</sup> As a consequence, the case law has developed by way of analogy, leading one scholar to remark in 1945 that the fourth head ‘is a collection of disjointed decisions, for which no complete definition or connecting principle has ever been enunciated’.<sup>60</sup>

In *Aid/Watch*, the majority held that the ‘agitation for legislative or political changes’<sup>61</sup> being generated by Aid/Watch ‘concern[ed] the efficiency of foreign aid directed to the relief of poverty’.<sup>62</sup> Presumably working by analogy, the majority held that the public debate in respect of ‘activities of government’<sup>63</sup> was in furtherance of the fourth head of charity, because that debate concerned poverty relief.<sup>64</sup> Consequently, the Court was not required to determine if ‘the encouragement of public debate respecting government activities’ concerning *any matter* is a charitable purpose for the public

<sup>57</sup> Ibid. The four ‘heads’ of charity are still relied on today in the Australian states and territories to define charitable purposes. At the Commonwealth level, charitable purposes are defined in the *Charities Act* (n 18) s 12(1).

<sup>58</sup> *Charitable Uses Act 1601*, 43 Eliz I, c 4 (*‘Charitable Uses Act’*).

<sup>59</sup> *Pemsel* (n 55) 543–4. The Preamble to the *Charitable Uses Act* (which bears the long title of ‘An Acte to redresse the Misemployment of Landes Goodes and Stockes of Money heretofore given to Charitable Uses’) contained a list of charitable ‘uses’ that had been recognised in English society at least as far back as the 14<sup>th</sup> century: see Jennifer Beard, ‘The Significance of Christian Charity to International Law’ in John Haskell and Pamela Slotte (eds), *Christianity and International Law* (Cambridge University Press, 2020).

<sup>60</sup> John Brunyate, ‘The Legal Definition of Charity’ (1945) 61 (July) *Law Quarterly Review* 268, 279. See also Norman Bentwich, ‘The Wilderness of Legal Charity’ (1933) 49 (October) *Law Quarterly Review* 520, 523.

<sup>61</sup> *Aid/Watch* (n 50) 556 [42] (French CJ, Gummow, Hayne, Crennan and Bell JJ), quoting *Royal North Shore Hospital* (n 49) 426 (Dixon J).

<sup>62</sup> *Aid/Watch* (n 50) 557 [47] (French CJ, Gummow, Hayne, Crennan and Bell JJ). See Chia, Harding and O’Connell (n 49) 374–5, 383.

<sup>63</sup> *Aid/Watch* (n 50) 557 [48] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

<sup>64</sup> Ibid 557 [47].

benefit.<sup>65</sup> More notably, for the purposes of this article, the Court had no reason to consider or refer specifically to the public benefit of furthering the interests of a particular political party, even though the majority rejected the political objects doctrine, an indicator of which is the purpose of furthering the interests of a particular political party.<sup>66</sup> Consequently, the effect of the *Aid/Watch* decision, and, subsequently, s 12(1)(l) of the *Charities Act*, is that entities that wish to promote or oppose ‘a change to any matter established by law, policy or practice’ in furtherance of or opposition to a charitable purpose no longer need to concern themselves about losing charitable status because this is their main purpose.<sup>67</sup>

#### D *The Political Aspects of Charity*

Charities in Australia engage in politics; they are political actors. This role is an appropriate one within the Australian political landscape. What is remarkable is how the charitable sector continues to distance itself from these political aspects of itself. In the 2016 survey mentioned above, only 0.8% of the sector registered with the ACNC with the principal charitable purpose of ‘promoting or opposing a change to law, policy or practice’.<sup>68</sup> In addition to reporting their main purpose in 2016, charities were also asked to report on their main activity. Only 1.3% of charities reported their main activity as ‘civic, advocacy and political activities’.<sup>69</sup> Given the broad meaning of these terms, these statistics really tell us very little. And yet, charities are constantly communicating with the public about charitable purposes, and much of this communication is political. Indeed, the close relationship between ‘questions

<sup>65</sup> *Ibid* 557 [48]. One benefit of linking charitable advocacy to a principal charitable purpose is that it works against the bifurcation of service provision and advocacy within organisations that seems to be guiding reforms to DGR status and lines of reporting. See generally Jennifer L Beard, ‘Charity Law and Freedom of Political Communication: The Australian Experience’ in Matthew Harding (ed), *Research Handbook on Not-for-Profit Law* (Edward Elgar Publishing, 2018) 252, 278–9 (‘Charity Law and Freedom of Political Communication’).

<sup>66</sup> *Aid/Watch* (n 50) 557 [48]–[49] (French CJ, Gummow, Hayne, Crennan and Bell JJ). See below Part VI. Nor has the High Court provided a clear indication of what activities or forms of communication fall within the term ‘agitation for legislative and political change’, or whether this term encompasses election campaigning broadly conceived.

<sup>67</sup> For a more detailed analysis of s 12(1)(l), see generally Beard, ‘Charity Law and Freedom of Political Communication’ (n 65).

<sup>68</sup> *Australian Charities Report* (n 31) 86.

<sup>69</sup> *Ibid* 87.

of distribution of political power, law and policy<sup>70</sup> and the pursuit of several charitable purposes, such as those concerned with social or public welfare,<sup>71</sup> human rights,<sup>72</sup> or advancing the natural environment,<sup>73</sup> means that any impression of a sector that is independent of politics ought to be evaluated cautiously.<sup>74</sup> For example, a charity with the mission of offering poverty relief to those in need may not seem political on its face. However, mention the beneficiaries — say, migrants, refugees, Aboriginal and Torres Strait Islander peoples, the elderly and people with disabilities — and the political dimensions of the charitable mission start to come into view.<sup>75</sup> In this sense, even charities that do not pursue political change as a *purpose* may very well, and are indeed likely to, pursue political change as a *means* to achieving more traditional charitable purposes. Australian media, for example, is rich with political communication from charities about law and policy reform issues ranging from the funding of private schools,<sup>76</sup> to international arms sales,<sup>77</sup> to the development of fracking and coal mining.<sup>78</sup> In these cases, political advocacy is clearly a *means* of achieving their registered charitable purposes — namely, in these cases, the advancement of religion (the funding of private schools), promoting or protecting human rights (opposing international arms sales), and advancing the natural environment (opposing fracking

<sup>70</sup> Matthew Harding et al, 'Defining Charity: A Literature Review' (Not-for-Profit Project, Melbourne Law School, 23 February 2011) 34.

<sup>71</sup> *Charities Act* (n 18) s 12(1)(c).

<sup>72</sup> *Ibid* s 12(1)(g).

<sup>73</sup> *Ibid* s 12(1)(j).

<sup>74</sup> See, eg, Debra Morris, 'Charities and Political Activity in England and Wales: Mixed Messages' (2016) 18 *Charity Law and Practice Review* 109, 124–31; Ronald S Borod, 'Lobbying for the Public Interest: Federal Tax Policy and Administration' (1967) 42(6) *New York University Law Review* 1087, 1104–5; Alison Dunn, 'Charity Law as a Political Option for the Poor' (1999) 50(3) *Northern Ireland Legal Quarterly* 298.

<sup>75</sup> Take, for example, an arm of the Salvation Army based in Redfern, NSW: 'The Trustee for the Salvation Army (NSW) Social Work', *Australian Charities and Not-for-Profits Commission* (Web Page), archived at <<https://perma.cc/2G68-3BS3>>.

<sup>76</sup> See, eg, 'Media Releases', *Catholic Education Melbourne* (Web Page) <<https://www.cem.edu.au/News-Events/Media-Releases.aspx>>, archived at <<https://perma.cc/PVM7-DT23>>.

<sup>77</sup> See, eg, 'Save the Children Demands Immediate Ban on Weapons Exports to War Crime-Accused Saudi Arabia', *Save the Children* (Web Page, 20 February 2019) <<https://www.savethechildren.org.au/media/media-releases/ban-weapons-exports-to-saudi-arabia>>, archived at <<https://perma.cc/4DQG-P5BL>>.

<sup>78</sup> See, eg, 'Media Releases', *Lock the Gate Alliance* (Web Page) <[https://www.lockthegate.org.au/media\\_releases](https://www.lockthegate.org.au/media_releases)>, archived at <<https://perma.cc/Q8DK-VG3Z>>.

and coal mining). According to the ACNC register, however, changes to law, practice and policy is not a registered purpose of these charities.<sup>79</sup>

To conclude, charities form a social sector that pursues a distinct set of legally recognised purposes for the public benefit. The legal definition of charitable purpose in the *Charities Act* permits charities to promote or oppose changes to law and policy in furtherance of their charitable purposes, and to engage in political communication as a means to a charitable end, but prohibits political parties from obtaining charitable status.<sup>80</sup> Whether the political nature of charitable activities is formally acknowledged or not, this kind of political communication by charities contributes to Australia's political sovereignty by disseminating information bearing on the implementation of legislative and political changes and electoral choices not only in the lead up to elections, but at any time.<sup>81</sup> I analyse the role played by charities in Australia's political sovereignty in Part IV.

#### IV THE POSITION OF CHARITIES WITHIN THE AUSTRALIAN CONSTITUTIONAL LANDSCAPE

The doctrine against political purposes in charity law drew a line in the sand regarding constitutional assumptions about where lawmaking begins, and thus where political power rests in a liberal democracy.<sup>82</sup> In the English cases, lawmaking processes were conservatively situated within the legislative institution of representative government, leaving the judicial arm to find the law as it stands. In Australia, however, following the reasoning of the majority in *Aid/Watch*, the lawmaking process begins with the political sovereignty exercised by the Australian people. In any representative democracy, voting is key, but in the Australian system of governance, voting is also a duty crucial to the structural integrity of our political system. Section 7 of the *Constitution* requires that the Senators for each state be 'directly chosen by the people of

<sup>79</sup> 'Catholic Education Melbourne', *Australian Charities and Not-for-Profits Commission* (Web Page), archived at <<https://perma.cc/EN37-4MLA>>; 'Save the Children', *Australian Charities and Not-for-Profits Commission* (Web Page), archived at <<https://perma.cc/47UN-UT73>>; 'Lock the Gate Alliance Limited', *Australian Charities and Not-for-Profits Commission* (Web Page), archived at <<https://perma.cc/65BE-K6FJ>>.

<sup>80</sup> *Charities Act* (n 18) ss 5(d), 12(1)(l). See below Part VI.

<sup>81</sup> See *McCloy* (n 2) 257 [216] (Nettle J); *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 561 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ) ('*Lange*').

<sup>82</sup> See John Locke, *Two Treatises of Government* (Awnsham Churchill, 1690) bk 2, 219 for a definition of political power.

the State, and s 24 requires that the Members of the House of Representatives be ‘directly chosen by the people of the Commonwealth.’<sup>83</sup> In *Rowe v Electoral Commissioner*,<sup>84</sup> French CJ held:

[T]he term ‘the people’ in ss 7 and 24 of the *Constitution* is not limited to those who are qualified to vote. However, the adoption of universal adult-citizen franchise has caused the two concepts to converge. The people who choose are the electors. The non-inclusion of non-citizens, minors and incapable persons and persons convicted of treason or treachery, or serving sentences of imprisonment of three years or more for offences against Commonwealth, State or Territory law leaves little relevant room for distinguishing between ‘the people’ and those entitled to become electors.<sup>85</sup>

As Arcioni argues, ‘the most significant form of constitutive power of “the people” seen in the text of the *Constitution* is when the people act through the electors to choose members of federal Parliament and vote in referenda.’<sup>86</sup> Similarly, in the long line of cases concerned with the implied freedom of political communication,<sup>87</sup> the electors are understood to be at the heart of Australia’s political sovereignty and its system of representative democracy.<sup>88</sup> As mentioned earlier, political sovereignty is ‘the freedom of electors, through communication between themselves and with their political representatives, to implement legislative and political changes.’<sup>89</sup> Arcioni argues that the

<sup>83</sup> For an analysis of the case law in this area, see generally Elisa Arcioni, ‘The Core of the Australian Constitutional People: “The People” as “The Electors”’ (2016) 39(1) *University of New South Wales Law Journal* 421, 435–9.

<sup>84</sup> (2010) 243 CLR 1.

<sup>85</sup> *Ibid* 19 [21].

<sup>86</sup> Arcioni (n 83) 425. ‘The explicit references to “the people” can be understood as references to the people acting through the vehicle of the electors’: at 424. As Arcioni points out, ‘[o]ther sections of the *Constitution* make it clear that the choices in sections 7 and 24 are to be made by electors’: at 426.

<sup>87</sup> See above n 54.

<sup>88</sup> *Unions NSW v New South Wales [No 1]* (2013) 252 CLR 530, 578 [135] (Keane J) (‘*Unions NSW [No 1]*’); *Unions NSW v New South Wales [No 2]* (2019) 264 CLR 595, 614 [40] (Kiefel CJ, Bell and Keane JJ) (‘*Unions NSW [No 2]*’). In *Lange* (n 81), it was held that ‘each member of the Australian community has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters’: at 571 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ). See generally William G Buss, ‘Alexander Meiklejohn, American Constitutional Law, and Australia’s Implied Freedom of Political Communication’ (2006) 34(3) *Federal Law Review* 421.

<sup>89</sup> *McCloy* (n 2) 257 [216] (Nettle J).



representative link between those who are enfranchised and the broader community understood as ‘the people’ ... has led to the requirement that the franchise be sufficiently broad and general in order that ‘the electors’ can be considered to be speaking for ‘the people’ when exercising their political choices as to who represents them in Parliament.<sup>90</sup>

What relationship, then, do charities have to the electors in our constitutional system of democracy? In *Unions NSW v New South Wales [No 2]* (*‘Unions NSW [No 2]’*),<sup>91</sup> the plurality held:

[Sections] 7 and 24 of the *Constitution* guarantee the political sovereignty of the people of the Commonwealth by ensuring that their choice of elected representatives is a real choice, that is, a choice that is free and well-informed. Because the implied freedom ensures that the people of the Commonwealth enjoy equal participation in the exercise of political sovereignty, it is not surprising that there is nothing in the authorities which supports the submission that the *Constitution* impliedly privileges candidates and parties over the electors as sources of political speech. Indeed, in *ACTV, Deane and Toohey JJ* observed that the implied freedom:

extends not only to communications by representatives and potential representatives to the people whom they represent. It extends also to communications from the represented to the representatives and between the represented.<sup>92</sup>

We know that neither political parties nor individuals can be charities.<sup>93</sup> However, charities are constituted primarily by Australian electors, although not always. Similarly, charities may receive funding from electors, but also from other private persons, who are not eligible to vote. Charities also receive government funding. This means that charities carry within them various influences and constituencies. This has ramifications from an electoral law perspective, which is concerned with the regulation of undue influence and the maintenance of ‘free and well-informed’<sup>94</sup> political sovereignty. I address these concerns more closely in Part VI. In the remainder of this part, I consider the value of charities to Australian democracy, not as the elected or

<sup>90</sup> Arcioni (n 83) 437.

<sup>91</sup> *Unions NSW [No 2]* (n 88).

<sup>92</sup> *Ibid* 13 [40] (Kiefel CJ, Bell and Keane JJ) (citations omitted), quoting *ACTV* (n 54) 174.

<sup>93</sup> *Charities Act* (n 18) s 5(d). See below Part V.

<sup>94</sup> *Unions NSW [No 2]* (n 88) 614 [40] (Kiefel CJ, Bell and Keane JJ).

electors, which they are not, but as a diverse set of representative groups pursuing a diverse set of causes for the public benefit distinct from government, families and businesses. The sector's independence, which I discuss in Part V below, and inherent diversity, which I discuss in this part, are critical to Australia's democratic system.

### A A Plural, Representative Democracy

The importance of charities to democracy has long been acknowledged by economists and political and social scientists.<sup>95</sup> Advocates of pluralism and difference support the charitable sector as one home for interest groups to innovate and bring important perspectives to public debate.<sup>96</sup> As Dunn has argued, voluntary and community organisations such as charities

provide 'voice', ... utilize the trust placed in the sector and ... take advantage of their reach and beneficiary base in order to reinvigorate interest in civic affairs through engagement and civic renewal with a particular focus upon stimulating community cohesion.<sup>97</sup>

Salamon and Sokolowski note the sector's importance in community-building, 'in creating what scholars are increasingly coming to call "social capital"; those bonds of trust and reciprocity that seem to be crucial for a democratic polity and a market economy to function effectively.'<sup>98</sup> These authors argue that 'involvement in associational life teaches norms of cooper-

<sup>95</sup> See generally Mark Lyons, *Third Sector: The Contribution of Nonprofit and Cooperative Enterprise in Australia* (Allen & Unwin, 2001); James Douglas, *Why Charity? The Case for a Third Sector* (Sage Publications, 1983); Albert Hunter, 'National Federations: The Role of Voluntary Organisations in Linking Macro and Micro Orders in Civil Society' (1993) 22(2) *Nonprofit and Voluntary Sector Quarterly* 121; Joan Staples, 'Democracy Resides in Participation in Organisations', *Green Agenda* (Blog Post, 5 September 2015) <<http://greenagenda.org.au/2015/09/democracy-resides-in-participation-in-organisations>>, archived at <<https://perma.cc/MPG3-BGFZ>>; Chloe Gall and Emily Howie, Human Rights Law Centre, *Defending Democracy: Safeguarding Independent Community Voices* (Report, 2017).

<sup>96</sup> For a critical examination of the evolution of pluralism in theory and practice, see David Schlosberg, *Environmental Justice and the New Pluralism: The Challenge of Difference for Environmentalism* (Oxford University Press, 2002). For a tax law perspective, see David A Brennan, 'A Diversity Theory of Charitable Tax Exemption: Beyond Efficiency, through Critical Race Theory, toward Diversity' (2006) 4(1) *Pittsburgh Tax Review* 1.

<sup>97</sup> Dunn, 'Charities and Restrictions on Political Activities' (n 48) 52. See also Charities Aid Foundation, 'Do as I Say, Not as I Do: UK Policy and the Global Closing Space for Civil Society' (Giving Thought Discussion Paper No 5, January 2017).

<sup>98</sup> Salamon and Sokolowski (n 7) 23.

ation among individuals that carry over into political and economic life.<sup>99</sup> As a technique of representation, charities might also be described as a particularly important form of representation that allows, or encourages, people to attach themselves to a purpose beneficial to a section of the community or the entire community. Charities, like parliaments, provide a means of “making things public” among many other forms of producing voices and connections among people.<sup>100</sup> As Latour writes, ‘parliaments are only a few of the machineries of representations among many others and not necessarily the most relevant or the best equipped.’<sup>101</sup> Charities are ‘forums and agoras in which we speak, vote, decide, are decided upon, prove, be convinced.’<sup>102</sup> Accordingly, one role played by charities in Australian democracy is the representation of diverse views about causes with a public benefit element, as well as the invigoration of public policy debates and community engagement. As the Court acknowledged in *Unions NSW v New South Wales [No 1]* (*‘Unions NSW [No 1]’*):<sup>103</sup>

Political communication ... is not simply a two-way affair between electors and government or candidates. *There are many in the community who are not electors but who are governed and are affected by decisions of government.* Whilst not suggesting that the freedom of political communication is a personal right or freedom, which it is not, it may be acknowledged that *such persons and entities have a legitimate interest in governmental action and the direction of policy. The point to be made is that they, as well as electors, may seek to influence the ultimate choice of the people as to who should govern. They may do so directly or indirectly through the support of a party or a candidate who they consider best represents or expresses their viewpoint.* In turn, political parties and candidates may seek to influence such persons or entities because it is understood that they will in turn contribute to the discourse about matters of politics and government.<sup>104</sup>

<sup>99</sup> Ibid, citing James S Coleman, *Foundations of Social Theory* (Harvard University Press, 1990) 300–21, Robert D Putnam, *Making Democracy Work: Civic Traditions in Modern Italy* (Princeton University Press, 1993) 86–116, 163–85.

<sup>100</sup> Bruno Latour, ‘From Realpolitik to Dingpolitik or How to Make Things Public’ in Bruno Latour and Peter Weibel (eds), *Making Things Public: Atmospheres of Democracy* (MIT Press, 2005) 14, 34.

<sup>101</sup> Ibid 31.

<sup>102</sup> Ibid.

<sup>103</sup> *Unions NSW [No 1]* (n 88).

<sup>104</sup> Ibid 551–2 [30] (French CJ, Hayne, Crennan, Kiefel and Bell JJ) (emphasis added) (citations omitted). See also *Unions NSW [No 2]* (n 88) 646 [137] (Gordon J).

Since charities have a legitimate interest in government action and the direction of policy, it is expected that they may seek to influence the ultimate choice of the people as to who should govern. That is, it is expected that they engage in politics. It must also be noted that charities are not only an important means of delegitimising or invigorating discussion about existing unjust social, political and economic arrangements of importance to electors. Charities also advocate on behalf of those who remain *unaffected* by our electoral system and its outcomes.<sup>105</sup> To return to Arcioni's work above, charities do not just represent electors — they represent the people. In this sense, charities assist in remediating the limitations of our democratic system.

### B *Informed Voting*

The majority decision in *Aid/Watch* confirms the view that charities have, in some circumstances, an information dissemination role to play in the Australian system of representative and responsible government created by the *Constitution*. The fact that charities are not the elected, the electors, or individuals should be irrelevant as long as their influence is transparent and does not dominate. In a subsequent High Court decision concerning the implied freedom of political communication in Australia, Nettle J warns that political sovereignty may be infringed 'by restrictions on political communications to and from persons *other than electors*.'<sup>106</sup> The same sentiments are evident in the reasoning of Mason CJ in a much earlier case, *Australian Capital Television Pty Ltd v Commonwealth*,<sup>107</sup> cited with approval in *Unions NSW [No 1]*:

<sup>105</sup> Not all Australians enjoy the right to vote as a practical matter. The Human Rights Commission reports that '[i]f you are young, live in a rural or remote area, have a disability, are Indigenous, homeless or a prisoner serving a sentence of more than 3 years, your right to vote in a federal election may be restricted as a legal or practical matter': 'The Right to Vote Is Not Enjoyed Equally by All Australians', *Australian Human Rights Commission* (Web Page, February 2010) <<https://www.humanrights.gov.au/our-work/rights-and-freedoms/publications/right-vote-not-enjoyed-equally-all-australians>>, archived at <<https://perma.cc/F97S-BQNK>>. See also Human Rights and Equal Opportunity Commission, Submission No 50 to Senate Finance and Public Administration Committee, Parliament of Australia, *Inquiry into the Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Bill 2005* (9 March 2006) 2 [7]–[10]. See 'Indigenous Electoral Participation Program', *Australian Electoral Commission* (Web Page, 7 February 2019) <<https://www.aec.gov.au/Indigenous/iepp.htm>>, archived at <<https://perma.cc/BY8A-MVN7>>.

<sup>106</sup> *McCloy* (n 2) 257 [216] (emphasis added).

<sup>107</sup> *ACTV* (n 54) 139.

[F]reedom of communication could not be understood as confined to communications between electors and elected representatives, candidates or parties. It cannot be so confined because the efficacy of representative government depends upon free communication between all persons and groups in the community. An elector's judgement on many issues will turn upon free public discussion, often in the media, of the views of all those interested.<sup>108</sup>

These passages indicate that the political communication of entities other than electors, such as charities, enable 'the people to exercise a free and informed choice as electors'.<sup>109</sup> Insofar as charities disseminate information bearing on electoral processes and choices, they have a role to play in creating a fertile environment for informed voting. Kildea and Smith argue that in ordinary elections for political representatives, informed voting could refer to at least three areas of knowledge:

First, it could refer to the possession of practical and technical information about the who, when, where and how of voting, as well as the ways in which votes are tallied to determine winners and losers. Second, it might refer to the basis for choosing between different candidates. Informed voting based on a certain level of knowledge and reflection could be contrasted with a voting decision based on uncritical partisan loyalty, 'gut instinct', the 'honest' face of a candidate, cynicism about politicians, and so on. Third, it might be understood to encompass knowledge about the place of voting and elections within the broader democratic system.<sup>110</sup>

At the very least, charities can help to ensure a certain level of knowledge and reflection and thereby preserve 'an environment in which informed voting can take place'.<sup>111</sup> Charities can assist voters to inform themselves about the way in which different candidates represent different policy issues and, within the

<sup>108</sup> *Unions NSW [No 1]* (n 88) 551 [28] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), citing *ibid.*

<sup>109</sup> *Lange* (n 81) 560 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ), quoted in *Unions NSW [No 1]* (n 88) 571 (Keane J), *McCloy* (n 2) 193–4 [2], 206 [42] (French CJ, Kiefel, Bell and Keane JJ), 228 [118] (Gageler J), 280 [303] (Gordon J). See also John Stuart Mill, *Utilitarianism, Liberty, Representative Government*, ed HB Acton (JM Dent & Sons, 1972) 175–217. Echoing Mill, McAllister writes that '[o]ne of the most important requirements for the functioning of representative democracy is the existence of informed and knowledgeable citizens': Ian McAllister, *The Australian Voter: 50 Years of Change* (UNSW Press, 2011) 56.

<sup>110</sup> Paul Kildea and Rodney Smith, 'The Challenge of Informed Voting at Constitutional Referendums' (2016) 39(1) *University of New South Wales Law Journal* 368, 371.

<sup>111</sup> *Ibid* 382.

electoral process more broadly, assist in ‘generating a collective social experience that can help bind the political community together.’<sup>112</sup> A charity may also be able to engage in political communication that directly supports a candidate or political party, but only if the policies of that candidate or party further that entity’s charitable purposes.<sup>113</sup> However, as stated, no voice should be able to dominate.<sup>114</sup> As Nettle J observes in *McCloy*, political sovereignty necessitates that money ought not influence government considerations.<sup>115</sup> These concerns relate to a more general concern about political legitimacy and the requirement that political power be exercised through a process that is open and democratic, and consistent with constitutional and legal norms. Accordingly, whilst charities that engage in political activity or pursue political purposes do have a role to play in our constitutional system of democracy, that role is, and ought to be, a regulated one. I consider how this is done in the context of both the *Charities Act* and Commonwealth electoral laws in Part VI below. Before doing so, in Part V, I argue that the charitable sector should not be expected to disclaim its political aspects in order to maintain, protect and enhance public trust and confidence in the sector, or to support and sustain its vibrancy, independence and innovation.

## V MAINTAINING THE INTEGRITY OF THE CHARITY SECTOR

An important value that underpins the charitable sector is its independence.<sup>116</sup> The Explanatory Memorandum to the *Charities Act* recognises: ‘The independent nature of the charitable sector is greatly valued by the public.’<sup>117</sup> The need for an independent charitable sector is fundamentally linked to the important role that charities play as advocates in Australia’s political sovereignty.<sup>118</sup>

As Chan persuasively argues, ‘it is appropriate to regard the common law charities tradition, in a general or categorical sense, as a true hybrid of public

<sup>112</sup> Andrew Geddis, ‘Foreword’ (2016) 39(1) *University of New South Wales Law Journal* 312, 313.

<sup>113</sup> See below Part VI.

<sup>114</sup> *Unions NSW [No 2]* (n 88) 628 [83] (Gageler J).

<sup>115</sup> *McCloy* (n 2) 257 [217].

<sup>116</sup> See generally Jeffrey C Alexander, ‘The Social Requisites for Altruism and Voluntarism: Some Notes on What Makes a Sector Independent’ (1987) 5(2) *Sociological Theory* 165.

<sup>117</sup> Explanatory Memorandum, Charities (Consequential Amendments and Transitional Provisions) Bill 2013 (Cth) 22 [1.106] (‘Charities Bill Explanatory Memorandum’).

<sup>118</sup> See above Part IV.

law and private law'.<sup>119</sup> According to Chan, 'charity law's twin goals — the goal of enabling property owners to improve the world in accordance with their own individual vision, and the goal of setting limits on that ability to ensure conformity with a more collective ideal of the good'<sup>120</sup> — create a tension between competing priorities: 'protecting the autonomy of donors and charities and protecting the public interest in their activities'.<sup>121</sup> The autonomy of donors inherent in the concept of charity is considered to be the engine of the sector's success because it drives 'new and innovative educational, social and cultural projects'.<sup>122</sup> Chan writes that, if 'voluntariness and a capacity to innovate are among the greatest strengths of the charitable sector, we should be wary of phenomena that work against those strengths'.<sup>123</sup>

To a certain degree, the independence of charities has been treated as a socio-legal question rather than a doctrinal one. Although independence, autonomy or voluntarism have never explicitly formed part of the legal meaning of charity, independence is a consequence of charitable status. For example, in Australia, 'Responsible Persons' of most registered charities are required to adhere to rigorous governance standards, which include the duty to act in good faith in the best interests of the charity and for its charitable purposes.<sup>124</sup> The doctrine of political objects has had the further effect of framing the independence of charities as a distinction between charity and politics. However, as I argue below, separating the activities and purposes of party politics from charity by means of the political objects doctrine is complex, if not impossible.<sup>125</sup> After all, there is an element of the political in most social institutions that exist within democratic societies, including government, families, businesses and, as argued here, charities. Moreover, as Parachin argues, the aim of the doctrine was in fact to protect the neutrality of the courts.<sup>126</sup> We would be better off acknowledging the complexity of the

<sup>119</sup> Kathryn Chan, *The Public-Private Nature of Charity Law* (Hart Publishing, 2016) 181 (emphasis omitted).

<sup>120</sup> *Ibid.* 20.

<sup>121</sup> *Ibid.*

<sup>122</sup> Kathryn Chan, 'The Co-Optation of Charities by Threatened Welfare States' (2015) 40(2) *Queen's Law Journal* 561, 568 ('Co-Optation of Charities').

<sup>123</sup> *Ibid.*

<sup>124</sup> ACNC Act (n 10) div 45; *Australian Charities and Not-for-Profits Commission Regulation 2013* (Cth) sub-div 45-B ('ACNC Regulation'). See especially at s 45.25(2)(b). My thanks to one of the anonymous reviewers for this insight.

<sup>125</sup> See below Part VI. See also Chia, Harding and O'Connell (n 49) 366–8; LA Sheridan, 'Charity versus Politics' (1973) 2(1) *Anglo-American Law Review* 47.

<sup>126</sup> Parachin, 'Charity, Politics and Neutrality' (n 42).

distinction at law and concentrate on finding the best means of preventing undue political influence on and by charities. The independence of the charitable sector can then be used to explain the distinction between charity and government (or the state),<sup>127</sup> not politics.<sup>128</sup> Harding persuasively maintains that government is characterised by administration — ‘the distribution and application of the revenue by entities created by statute or which derive their authority from the Crown’<sup>129</sup> — whereas charity is characterised by voluntarism — that is, ‘pursuing the common good [in an] individually and autonomously chosen way’.<sup>130</sup> This also appears to be the sense in which the independence of the sector has been framed in social policy debates.

William Beveridge, known best as the founder of the welfare state in the United Kingdom,<sup>131</sup> but also as a libertarian with a keen interest in voluntarism, ‘argued passionately that there was a continued role for voluntary action and that the principle of independence was central to organisations performing this role adequately’.<sup>132</sup> Beveridge was writing at the end of the World

<sup>127</sup> Murray Baird, the Assistant Commissioner and General Counsel for the ACNC, has stated:

I take independence to mean that charities are not an arm of government. Sometimes their purposes will be coincidental with the purposes of government, sometimes they'll be funded by government, and in fact 47% of charity revenue come from government, but it is the directors, the governors, the committees of charities, who have to decide on their direction and control their own operations. The charity has a mind of its own and shouldn't be excluded from expressing its opinion on any matters that concern it. So charities are not excluded from the marketplace of ideas and from advocating in that marketplace.

Pro Bono Australia, *Civil Voices* (Webinar Book, 13 December 2017) 15 <[https://civilvoices.com.au/wp-content/themes/probono\\_theme/download/Webinar\\_book.pdf](https://civilvoices.com.au/wp-content/themes/probono_theme/download/Webinar_book.pdf)>, archived at <<https://perma.cc/K8G7-JFS3>>.

<sup>128</sup> The distinction between charity and business is beyond the scope of this article but it too deserves attention. For an interesting way to start thinking about this distinction, see the weekly podcast *Seeds* (Steven Moe, 10 September 2017) <<https://theseeds.nz/seeds-podcast/>>, archived at <<https://perma.cc/YQ49-LF26>>.

<sup>129</sup> See Matthew Harding, ‘Distinguishing Government from Charity in Australian Law’ (2009) 31(4) *Sydney Law Review* 559, 572 (‘Distinguishing Government from Charity’).

<sup>130</sup> *Ibid.*

<sup>131</sup> Jose Harris, *William Beveridge: A Biography* (Clarendon Press, rev ed, 1997) 452. Beveridge's subsequent report on *Voluntary Action*, published in April 1948 — the same month that the Elizabethan Poor Law was repealed — was largely ignored by government, except for his recommendation that the government establish a Royal Commission into charitable trusts: at 459–60.

<sup>132</sup> Matthew Smerdon, ‘Allies Not Servants: Voluntary Sector Relations with Government’ (Working Paper No 1, Baring Foundation, 2006) 5.



Wars during the ‘general landslide towards peacetime state intervention.’<sup>133</sup> A subsequent report prepared by Lord Nathan in 1952 on the law and practice relating to charitable trusts in England acknowledged, admittedly in paternalistic Victorian terms, that

[s]ome of the most valuable activities of voluntary societies consist, however, in the fact that they are able to stand aside from and criticise state action, or inaction, in the interests of the inarticulate man-in-the-street. This may take the form of helping individuals to know and obtain their rights. It also consists in a more general activity of collecting data about some point where the shoe seems to pinch or a need remains unmet. The general machinery of democratic agitation, deputations, letters to the Press, questions in the House, conferences and the rest of it, may then be put into operation in order to convince a wider public that action is necessary.<sup>134</sup>

The political role of charities, assumed by both Beveridge and Nathan, appears to be based on similar reasoning to that of the majority in *Aid/Watch*. Agitation for political change promotes representative democracy and is of public benefit.<sup>135</sup> Indeed, Beveridge believed that ‘a flourishing voluntary sector was not merely a social good in itself but a vital cradle of democratic citizenship.’<sup>136</sup>

Public interest in the independence and role of charities has both intensified and shifted in social policy debates since the introduction, and subsequent waning, of the welfare state.<sup>137</sup> Following neoliberal programmatic reforms and the dominance of public choice theory in policy making, there has been a consequential demand for charities to fill the gap left by the state’s retreat.<sup>138</sup> However, the emphasis on voluntarism (and independence) is absent, having been replaced with a stronger commercial narrative of running

<sup>133</sup> Harris (n 131) 453. ‘[V]oluntary action was to be interpreted as meaning, not just charity and philanthropy, but all non-governmental forms of action that were relevant to “the promotion of the good life” in modern industrial society’: at 455.

<sup>134</sup> Charitable Trusts Committee, *Report of the Committee on the Law and Practice Relating to Charitable Trusts* (Cmnd 8710, 1952) 13 [55] (‘Nathan Report’).

<sup>135</sup> *Aid/Watch* (n 50) 556 [45] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

<sup>136</sup> Harris (n 131) 455.

<sup>137</sup> For a history of these developments in the American context, see Lester M Salamon, ‘The Nonprofit Sector at a Crossroads: The Case of America’ (1999) 10(1) *Voluntas* 5, 6–7.

<sup>138</sup> Onyx, Cham and Dalton (n 14) 173; Harding, ‘Distinguishing Government from Charity’ (n 129) 560–1.

charities like service providers.<sup>139</sup> This in turn has raised corresponding concerns that charities are being ‘coopted’ by governments to perform public functions in a competitive environment, and that this poses a threat to their independence of action.<sup>140</sup> For Chan, cooptation occurs when a charity’s benefits are aligned with, and directly supportive of, the government’s policy agenda.<sup>141</sup> Cooptation therefore benefits charities with the same policy agenda as the government, and it may lead to ‘mission drift’ towards causes that are government-funded. The additional sense of charities being run as businesses has meant that they are also perceived as self-serving, competitive and commercial.<sup>142</sup>

According to social and political scientists, these developments have been evident in Australia since the 1990s, when government policies changed to enable government departments to provide project funding to charities tied to outcomes supporting government objectives, rather than to support operational funding for representational roles.<sup>143</sup> These moves brought a

preference for a ‘purchaser/provider’ model whereby peak bodies with recognisably corporate structures would deliver tangible outcomes, often short-term in nature and related to government objectives rather than community identified priorities.<sup>144</sup>

The mantra ‘big is better’ placed pressure on the charitable sector to engage in mergers and amalgamations intended to ensure a ‘reduction in volume of

<sup>139</sup> Onyx, Cham and Dalton (n 14) 173–5. See also Dunn, ‘Charities and Restrictions on Political Activities’ (n 48) 52.

<sup>140</sup> See Matthew Smerdon and Nicholas Deakin, ‘Independence in Principle and Practice: Relationships between the State and Voluntary Action’ (2010) 1(3) *Voluntary Sector Review* 361, 361; Chan, ‘Co-Optation of Charities’ (n 122).

<sup>141</sup> Chan, ‘Co-Optation of Charities’ (n 122) 574.

<sup>142</sup> For the American context, see Salamon (n 137) 6–8, 12.

<sup>143</sup> David Matthews, ‘Future Directions for the Non-Government Youth Sector’ (March 1999) *Up2date: Monthly Newsletter of the Australian Youth Policy and Action Coalition* 2; Marian Sawyer and James Jupp, ‘The Two-Way Street: Government Shaping of Community-Based Advocacy’ (1996) 55(4) *Australian Journal of Public Administration* 82, 87; Jenny Onyx et al, ‘Implications of Government Funding of Advocacy for Third-Sector Independence and Exploration of Alternative Advocacy Funding Models’ (2008) 43(4) *Australian Journal of Social Issues* 631; Jenny Onyx et al, ‘Advocacy with Gloves On: The “Manners” of Strategy Used by Some Third Sector Organizations Undertaking Advocacy in NSW and Queensland’ (2010) 21(1) *Voluntas* 41; Cassandra Star, ‘Silencing Australian Civil Society: The Howard Legacy and the Abbott Government’s Remaking of Australian Democracy’ (2016) 35(1) *Social Alternatives* 33.

<sup>144</sup> Marian Sawyer, ‘Governing for the Mainstream: Implications for Community Representation’ (2002) 61(1) *Australian Journal of Public Administration* 39, 42.

separate and contradictory representations, attributes that were once considered a great strength of the charitable sector.<sup>145</sup> The forced amalgamation of peak bodies under the Howard government, for example, ‘affected representation of feminist perspectives as women’s peak bodies were forced to merge with non-gender-specific peaks as a condition of funding’.<sup>146</sup> What was also lost in these policy shifts towards ‘purchaser/provider’ culture was a sense of partnership or consensus between government and an independent charity sector.<sup>147</sup>

The ideological underpinning of these policy shifts, and the corresponding ‘culture wars’ over ideological positions, has taken its toll on the viability of the sector,<sup>148</sup> and its perceived independence. Sawer argues that, under Howard’s leadership of the Liberal Party (1995–2007), equality-seeking groups were repositioned as ‘special interests outside the mainstream’ to create a political environment where ‘[s]uspensions, fears and resentments of difference are endorsed rather than allayed, and are turned against the pursuit of social justice or of more inclusive forms of democracy’.<sup>149</sup> Sawer observes that ‘[t]he Howard attack on special interest groups was by implication an attack on the extra-parliamentary forms of representation that had enabled more sections of the community to have a voice in policy development’.<sup>150</sup> Arguably, these ‘extra-parliamentary forms of representation’ are the very benefits that were recognised by the likes of Beveridge and Nathan,<sup>151</sup> and subsequently recognised by the majority in the *Aid/Watch* case.<sup>152</sup> However, any diminishing effect that the *Aid/Watch* decision and the subsequent introduction of s 12(1)(l) may have had on the limits placed on charities to engage in politics is stifled by these neoliberal government policies that are, of course, beyond the justiciability of the courts, including the High Court. Finding ways to challenge the validity of an individual entity’s charitable status, if its ‘public’

<sup>145</sup> Ibid, quoting Department of Family and Community Services (Cth), ‘Funding Peak Bodies’ (Discussion Paper, July 2000) 3.

<sup>146</sup> Sawer (n 144) 45.

<sup>147</sup> For an analysis of past consensus frameworks, see Joan Staples, ‘Non-Government Organisations and the Australian Government: A Dual Strategy of Public Advocacy for NGOs’ (PhD Thesis, University of New South Wales, 2012).

<sup>148</sup> For an overview of the ‘culture wars’, see Carol Johnson, *Governing Change: From Keating to Howard* (University of Queensland Press, 2000) 61–6.

<sup>149</sup> Sawer (n 144) 43.

<sup>150</sup> Ibid 44.

<sup>151</sup> Harris (n 131) 453–61; *Nathan Report* (n 134) 13 [55].

<sup>152</sup> *Aid/Watch* (n 50) 556 [45] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

functions (and decision-making) indicate that its purposes are no longer exclusively charitable (but administrative or governmental), is also challenging. For example, questions would arise as to who would have standing to challenge the validity of the entity's charitable status, in addition to more substantive questions about the definition of charity (and its distinction from government), even despite explicit provisions such as s 5 of the *Charities Act*. Moreover, given the dependency of the charitable sector on government funding, there is little incentive for the charitable sector to challenge government interference in this way.

### A *Independence and Democracy*

If we do take seriously the findings in *Aid/Watch* concerning the public benefits of political agitation for charitable purposes, then we should be seriously concerned about any government policy that places an undue burden on the ability of charities to advocate for or against political changes to charitable causes, in the same way that government is concerned about the undue influence of foreign funding of charities and the dominance of some charitable voices over others.

A 2017 report prepared by Maddison and Carson, for example, examines how public debate and advocacy have evolved in Australia since 2004 and how not-for-profit perceptions of their capacity to participate in public debate have changed.<sup>153</sup> This report indicates that the state of public debate in Australian democracy is poor, and that government policies have produced a culture in Australia in which charities are self-silencing for fear of risking their financial security or otherwise attracting political retribution.<sup>154</sup> Likewise, the Human Rights Law Centre has noted the funding pressures being placed on non-profits dependent on government funding.<sup>155</sup> In December

<sup>153</sup> Sarah Maddison and Andrea Carson, *Civil Voices: Researching Not-for-Profit Advocacy* (Report, 2017). A total of 1,462 people from the not-for-profit sector responded to the survey: at 1.

<sup>154</sup> Ibid 53. There is research to suggest that this is part of a global phenomenon as states seek 'to exert control over these spaces, to silence critical and challenging voices': Article 19 et al, 'On the Promotion and Protection of Civic Space' (Joint Statement, 11 March 2014) <<https://www.article19.org/resources/joint-statement-promotion-protection-civic-space/>>, archived at <<https://perma.cc/P4U3-L4VV>>. See also Antoine Buyse, 'Squeezing Civic Space: Restrictions on Civil Society Organizations and the Linkages with Human Rights' (2018) 22(8) *International Journal of Human Rights* 966; Freedom House, *Anxious Dictators, Wavering Democracies: Global Freedom under Pressure* (Freedom in the World Report, 2016).

<sup>155</sup> Maddison and Carson (n 153) iv.

2013, the Commonwealth government cut funding to the Environmental Defenders Office at its locations across Australia; and, in 2014, the government decided that it would no longer fund the Refugee Council of Australia, explicitly stating that it should not be funding advocacy.<sup>156</sup>

At the Commonwealth level, these concerns have been addressed to some extent by ‘anti-gagging’ legislation, which ‘prohibit[s] Commonwealth agreements from restricting or preventing non-profit entities from commenting on, advocating support for or opposing changes to Commonwealth law, policy or practice, and for related purposes.’<sup>157</sup> However, anecdotal evidence suggests that although gagging clauses are no longer found in government funding agreements at the federal level, organisations that receive government funding, and which engage in advocacy, still get calls from departmental officials advising the organisation to desist from that advocacy.<sup>158</sup> Moreover, anti-gagging legislation does not prevent governments from providing targeted funding aimed at service provision and not advocacy. In some cases, the practices of government departments have not intentionally sought to silence the charitable sector; they are simply based on the misconception, both in government and amongst philanthropists, that service delivery is more effective than advocacy. As Howe has noted:

The strong message that we see the government is sending is that advocacy by the not-for-profit sector is unwanted, and that if you speak out, you will risk your financial security, but we know that democracy requires a range of voices and our concern really is while government may find criticism of it inconvenient and uncomfortable, and we understand that, but actually that’s just part and parcel of a good democracy.<sup>159</sup>

These pressures are more likely to be felt by smaller, grassroots charities than by larger charities, particularly now that peak organisations have been given greater voice.<sup>160</sup>

Empirical studies such as those mentioned above indicate that the High Court’s finding that charitable advocacy is a charitable purpose with public benefits has done little to change the government’s policy agenda, and even

<sup>156</sup> Howie (n 8) 263.

<sup>157</sup> *Not-for-Profit Sector Freedom to Advocate Act 2013* (Cth) (*‘Anti-Gagging Act’*).

<sup>158</sup> *Civil Voices* (n 127) 23.

<sup>159</sup> *Ibid* 6. See generally Sarah Maddison, Richard Denniss and Clive Hamilton, ‘Silencing Dissent: Non-Government Organisations and Australian Democracy’ (Discussion Paper No 65, The Australia Institute, June 2004).

<sup>160</sup> See Sawyer (n 144).

less to change the neoliberal reframing of the charitable sector as a service provider. The effects of this neoliberal reframing of the charitable sector are also seen within the academy, where increasing attention is being given to the accountability of charities because of the public functions they are performing.<sup>161</sup> As Chan argues, a consequence of becoming a de facto government agency may be that charities ‘are more likely to be subject to human rights liability, judicial review and other public law standards.’<sup>162</sup> Charities are losing their status as a sector of society that is independent of government and driven by a diverse set of autonomous missions and purposes. Of course, these shifts have not all gone in the direction wanted by conservative politics. The increasingly public functions of charities have meant that charities are increasingly coming under pressure to comply with ‘public’ anti-discrimination and equality norms — thereby benefitting the very ‘special interests’ that Howard had sought to ostracise from ‘mainstream’ agendas.<sup>163</sup>

It is certainly true to say that in terms of government contracting and funding, many charities in Australia, but particularly those working in welfare services, cannot be conceived purely in terms of autonomous, private entities channelling private funds towards public benefits. They are to varying degrees publicly funded bodies, often forced to ‘follow the money’ to pursue purposes in line with the government’s (public) priorities, albeit within the terms of their mission. The level of ‘cooptation’ in Australia is therefore difficult to measure. Moreover, the influence is not always one way. Large charities in Australia, particularly religious charities, have power to influence government policy.<sup>164</sup> The independence of charities should be aimed at protecting charities from cooptation — in the sense of being unduly influenced by, rather than merely ‘aligned with, and directly supportive of, the government’s policy

<sup>161</sup> See, eg, Kathleen McEvoy and Chris Finn, ‘Private Rights and Public Responsibilities: The Regulation of Community Housing Providers’ (2010) 17(3) *Australian Journal of Administrative Law* 159; Kathleen McEvoy and Chris Finn, ‘The Public/Private Confluence: Administrative Law and Community Housing’ (2010) 62 *AIAL Forum* 30; Emily Rumble, “Remedying” the Problems Presented by Privately Provided Human Services: Reconsidering the Public/Private Law Divide’ (2013) 20(4) *Australian Journal of Administrative Law* 208.

<sup>162</sup> Chan, ‘Co-Optation of Charities’ (n 122) 573.

<sup>163</sup> Sawyer (n 144) 43. See, eg, Harding, *Charity Law and the Liberal State* (n 10) ch 7; Debra Morris, Anne Morris and Jennifer Sigafos, ‘Adopting (In)Equality in the UK: The Equality Act 2010 and Its Impact on Charities’ (2016) 38(1) *Journal of Social Welfare and Family Law* 14.

<sup>164</sup> This kind of influence is beyond the scope of this article, although it is deeply related to its themes. Further research on the complex relationship between charity law, electoral law and lobbying laws in Australia is required to ensure influence in all its forms and degrees, by and on the charitable sector, is appropriately regulated and understood.

agenda.<sup>165</sup> This is because it is the independence of the charitable sector that keeps the sector 'charitable'. According to Smerdon, independence means the freedom to:

- agree values based on their own experience and vision and not external pressures
- carry out work that delivers the stated purpose of the organisation
- negotiate robustly with funders and partners
- challenge others and engage in public debate

In turn, these freedoms are necessary for organisations to perform their important functions. To:

- identify needs
- pioneer new approaches to tackling these needs
- provide services that meet these needs
- provide the means of empowerment for groups that are marginalised
- articulate dissent
- promote equality
- inspire others ...<sup>166</sup>

This freedom can never be absolute.<sup>167</sup> Apart from the funding conditions already mentioned, charities must comply with ACNC governance standards and the terms of their own constitutive documents. Accordingly, these documents should strengthen, rather than diminish, the independence of Responsible Persons and the operations of charities.<sup>168</sup>

In conclusion, still more work is required from all sectors of society to change perceptions that are critical of, or misconceive, the importance of the freedom of political communication for the independence of charities. The introduction of s 12(1)(l) of the *Charities Act* was a good start to stimulate greater charitable advocacy in Australian political sovereignty. The real danger to the sector's integrity appears to be coming from government funding conditions and tax policies that direct the sector towards governmental agendas and service provision, and away from a richer and more diverse set of

<sup>165</sup> Chan, *The Public-Private Nature of Charity Law* (n 119) 131.

<sup>166</sup> Smerdon (n 132) 5.

<sup>167</sup> *Ibid.*

<sup>168</sup> See above n 124 and accompanying text.

purposes and interests, including advocacy.<sup>169</sup> Seibert recommends that anti-gagging legislation, mentioned above,<sup>170</sup> 'be strengthened to provide for, not necessarily protections, but principles or statements around the importance and value of advocacy and how the Federal Government approaches advocacy by charities.'<sup>171</sup> This may go some way to prevent the public aspects of charitable work, including public funding, diminishing the underlying rationale for the sector's independence. Since the explicit, overarching purpose of the *Charities Act* is to introduce a statutory definition of charity that applies to all federal legislation, it may be preferable to integrate this kind of statement into this Act.<sup>172</sup> References to charity in other legislation would then include a construction of charity that makes clear its independence from government, *and* the defined nature and purpose of its advocacy and its constitutional value. A further concern would then be to address charitable lobbying to the extent that it is undue and distorts or undermines the value of elections or drowns out other voices. In the American context, Salamon has argued for renewal of the sector's role and operations, 'and for achieving a new consensus, a new settlement, regarding the functions of nonprofit organizations, the relationships they have with citizens, with government, and with business, and the way they will operate in the years ahead'.<sup>173</sup> In Australia, this would require a fundamental shift in governmental policy towards the sector. More also needs to be done to educate the Australian public about what independence means in the context of charitable work. It does not mean desisting from charitable advocacy or other forms of political communication ancillary to charitable purposes, as conservative politics would have us believe. On the contrary, independence means having the freedom to speak out, or to speak up, and to engage in political debate on diverse issues, even when charities are performing what is perceived to be a public function.

<sup>169</sup> In Australia, the field of tax law and policy is just as relevant to debates concerning the ability of charities and other not-for-profits to engage in advocacy: see, eg, House of Representatives Standing Committee on the Environment, Parliament of Australia, *Inquiry into the Register of Environmental Organisations* (Report, April 2016) ('*Environmental Organisations Inquiry*'); 'DGR Reform Opportunities' (n 15). See also Not-for-Profit Sector Tax Concession Working Group, *Fairer, Simpler and More Effective Tax Concessions for the Not-for-Profit Sector* (Final Report, May 2013).

<sup>170</sup> *Anti-Gagging Act* (n 157). See above nn 157–60 and accompanying text.

<sup>171</sup> *Civil Voices* (n 127) 24.

<sup>172</sup> See *ibid.*

<sup>173</sup> Salamon (n 137) 19.



## VI CHARITIES IN THE ELECTORAL LAW LANDSCAPE

A *The Distinct and Overlapping Roles of Charities and Political Parties*

To maintain an open and democratic system, charities, like all political actors, are subject to regulation. For example, political parties have long been regulated — first through their initial legal recognition and the requirements for party registration and internal organisation, but also in terms of candidate selection, their conduct in elections, and the public and private funding of both election campaigns and the political parties themselves.<sup>174</sup> This body of regulation has served to strengthen the construct of the political party. It has also served to distinguish political parties from other not-for-profit entities, including charities, in form and substance.<sup>175</sup>

The clear distinction between charities and political parties as legal entities is recognised in s 5 of the *Charities Act*, which states that a charity is ‘not an individual, a political party or a government entity’. However, the meaning of ‘political party’ in s 5 could be clearer. The term should be defined by reference to the definition in the *Commonwealth Electoral Act 1918* (Cth) (*‘Electoral Act’*).<sup>176</sup> The *Electoral Act* defines ‘political party’ as ‘an organization the object or activity, or one of the objects or activities, of which is the promotion of the election to the Senate or to the House of Representatives of a candidate or candidates *endorsed by it*’.<sup>177</sup> If this definition is applied, then even though one of the entity’s activities ‘is the promotion of the election to the Senate or

<sup>174</sup> See generally Anika Gauja, *Political Parties and Elections: Legislating for Representative Democracy* (Ashgate, 2010).

<sup>175</sup> The Minister’s second reading speech states that ‘[p]olitical parties are not charitable, and a purpose of promoting or opposing a political party or candidate for political office is a disqualifying purpose’: Commonwealth, *Parliamentary Debates*, House of Representatives, 29 May 2013, 4242 (David Bradbury). A discussion of why political parties should not be registered charities is beyond the scope of this article, but the distinction is not only historically based: see Clark (n 39) 453; but is also constitutionally justified: see generally Anika Gauja and Graeme Orr, ‘Regulating “Third Parties” as Electoral Actors: Comparative Insights and Questions for Democracy’ (2015) 4(3) *Interest Groups and Advocacy* 249. It has and will continue to evolve over time: see generally *Unions NSW [No 2]* (n 88) 651 [154] (Gordon J). For a legal philosophical perspective, see Harding, *Charity Law and the Liberal State* (n 10) 199–200.

<sup>176</sup> There is an explicit reference to the *Commonwealth Electoral Act 1918* (Cth) (*‘Electoral Act’*) in the Charities Bill Explanatory Memorandum (n 117) 22 [1.111].

<sup>177</sup> *Electoral Act* (n 176) s 4 (definition of ‘political party’) (emphasis added). A person shall be taken to have been endorsed as a candidate in an election by a registered political party according to criteria set out in s 169B. A political party applies for registration under the Act: at pt XI, s 124. A Register of Political Parties contains a list of the political parties registered under pt XI of the Act: at s 125.

House of Representatives of a candidate, that candidate must still be endorsed by the entity for the entity to be a political party. Endorsement is defined in s 169B of the *Electoral Act*, which sets out a list of criteria including that the candidate is nominated by the registered officer of a political party<sup>178</sup> to the satisfaction of the Electoral Commissioner.<sup>179</sup> Section 169B(2) states that only one political party may endorse a candidate. In the longer term, further reform may also be required with respect to the concept of endorsement. This is a matter of electoral law, not charity law. An explicit cross-reference between these two Acts would at least provide greater coherence than currently exists.

Related to s 5 is s 11(b) of the *Charities Act*, which disqualifies the *purpose* (but not the activities) of promoting or opposing a political party or a candidate for political office from being a charitable purpose (that purpose, save for the element of endorsement, being the defining purpose of a 'political party' under the *Electoral Act*). By leaving open the possibility for charities to engage in the same type of *activities* as political parties, both charities and political parties may be considered to have overlapping political functions within the Australian democratic system.

A legislative note to s 11(b) states that the disqualification of promoting or opposing a political party or a candidate from the meaning of charitable purpose 'does not apply to the purpose of distributing information, or advancing debate, about the *policies* of political parties or candidates for political office (such as by assessing, critiquing, comparing or ranking those policies)'.<sup>180</sup> The issues-based advocacy being described in the legislative note to s 11(b) includes the kind of 'charitable purpose advocacy' listed as a 'charitable purpose' under s 12(1)(l) of the Act. It would also include issues-based political communication that is engaged in as a *means*, or an activity undertaken, to achieve a charitable purpose or purposes.<sup>181</sup> But what about the activity of directly or explicitly promoting or opposing a political party or candidate?

Distinguishing between the promotion of or opposition to a political party or a candidate and the promotion of or opposition to policy issues is not always easy or sensible, as it requires a distinction to be drawn between the promotion of candidates, as representatives of a body politic, and the causes

<sup>178</sup> Ibid s 169B(1)(a).

<sup>179</sup> Ibid s 169B(1)(c).

<sup>180</sup> *Charities Act* (n 18) s 11(b) (emphasis added). See also Charities Bill Explanatory Memorandum (n 117) 22 [1.108]–[1.110].

<sup>181</sup> See Chia, Harding and O'Connell (n 49) 383–5.

or policies that those candidates undertake to promote as political representatives.<sup>182</sup> As noted in the *Advisory Report on the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017*: ‘Today, campaigning is continuous and largely issues-based.’<sup>183</sup> As the CEO of a large charity advocating for increased amounts of Australian foreign aid stated to the Joint Standing Committee on Electoral Matters (‘JSCEM’) (which was reporting on the 2016 election results):

We were trying to influence voters through [our] campaign all the time during an election period. ... We will put some indication of whether the parties are going to raise aid or not and, if they are, whether they support a target or not. ... [Without wanting to rank parties, what] we wanted to show was whether parties were going to meet our policy calls or not ...<sup>184</sup>

Arguably, an absolute distinction between issues-based advocacy and ‘promoting or opposing a political party or a candidate’ is also difficult to draw because they are both forms of political communication that assist electors, and their political representatives, to implement legislative and political changes. To offer a concrete example: a charity established to combat homelessness for women escaping domestic violence may spend its money on posters that say, ‘when you vote, vote for a party that says “no” to violence against women’ (with a scorecard on how it views each party’s policies on this issue). This kind of ‘issues-based campaigning’ may fall within the scope of ‘charitable purpose advocacy’ permitted under s 12(1)(l) if the charity pursues law reform as the principal means of achieving its purpose. However, it is more likely to be seen as an activity undertaken as a means of achieving the

<sup>182</sup> The task given to the regulator is the same task that was unsuccessfully attempted by courts in the United States, which is to distinguish between ‘express advocacy’ and ‘issues advocacy’: Nina J Crimm and Laurence H Winer, ‘Dilemmas in Regulating Electoral Speech of Non-Profit Organisations’ in Matthew Harding, Ann O’Connell and Miranda Stewart (eds), *Not-for-Profit Law: Theoretical and Comparative Perspectives* (Cambridge University Press, 2014) 61, 77–8.

<sup>183</sup> Joint Standing Committee on Electoral Matters, Parliament of Australia, *Advisory Report on the Electoral Legislation (Electoral Funding and Disclosure Reform) Bill 2017* (Report, April 2018) iii (‘*First Advisory Report*’). Recognition of the continuing nature of election campaigning can also be seen in recent amendments to the *Electoral Act* (n 176): see, eg, at s 287 (definition of ‘disclosure period’), as repealed by *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Act 2018* (Cth) sch 1 item 16 (‘*Electoral Legislation Amendment Act*’).

<sup>184</sup> *First Advisory Report* (n 183) 12 [1.50], quoting Evidence to Joint Standing Committee on Electoral Matters, Parliament of Australia, Canberra, 31 January 2018, 16–17 (Marc Purcell, CEO, Australian Council for International Development).

charitable purpose of advancing social welfare or promoting or protecting human rights (as examples). But what about a poster that combines the issue with a singular conclusion that says ‘Stop Violence against Women: Vote for Shirley Brown and the Women’s Solidarity Party’? This may not necessarily fall foul of s 11(b) of the *Charities Act* either.

It has been reasoned that a charity cannot give support to a political party or candidate, even to support the delivery of a charitable purpose, because each political party has a range of policies.<sup>185</sup> Therefore, if a charity endorses a party or a candidate because of their policy against domestic violence, it is effectively said to be supporting that party or candidate generally, and endorsing that party or candidate’s policies in general, even though many or all of those policies may have nothing to do with furthering or opposing the charity’s purposes. Presumably, the nexus between support for the political party or candidate and achieving the charity’s purpose is therefore too remote for the support to be considered a means of achieving the charity’s purpose. Hence, the Explanatory Memorandum to the *Charities Act* states:

In determining whether an entity has a purpose to promote or oppose a candidate or political party, considerations could include whether the focus of the entity is on promoting or opposing a particular candidate or a political party in general, rather than on their policies that are relevant to the charitable purpose, the direct nature and extent of engagement and association with a candidate’s or a party’s campaigns or publications, or lack of balance in promoting or opposing the policies of another political party or candidate with similar policies relevant to the charitable purpose.<sup>186</sup>

In short, s 11(b) only captures charities that have ‘the *purpose* of promoting or opposing a political party or a candidate for political office’.<sup>187</sup> The promotion of, or opposition to, a political party or a candidate for political office would need to be quite substantial for it to amount to the principal purpose of an entity, or even an ancillary or incidental one, such that the entity would be disqualified from charitable status under s 11(b).

<sup>185</sup> See Charity Commission for England and Wales, *Campaigning and Political Activity Guidance for Charities (CC9)* (Guidance, February 2017) 15 [4.1]. Even single-issue parties would need to adopt a general set of policies if elected.

<sup>186</sup> Charities Bill Explanatory Memorandum (n 117) 22 [1.110].

<sup>187</sup> *Charities Act* (n 18) s 11(b) (emphasis added). See also *ibid* 22 [1.107]: ‘The disqualifying purpose is concerned with direct partisan political engagement that supports or opposes a candidate or party for office or other partisan political engagement to the extent and in a way that this can be construed as a purpose.’

In an analysis of charities that engage in commercial activities to further their charitable purposes, Murray argues that courts have ‘typically adopted a close factual analysis, rather than a specific test.’<sup>188</sup> Although case law does not provide us with a specific nexus test, in *Federal Commissioner of Taxation v Word Investments Ltd* (‘*Word Investments*’),<sup>189</sup> a majority of the High Court has set ‘the outer limits of the requisite nexus by reference to the “natural and probable consequences” of purposes and activities.’<sup>190</sup> In *Word Investments*, the High Court considered the charitable status of a company that carried out investment activities and operated a funeral business but applied its profits to another charitable entity. The Court found that the trading activities did not disqualify the company from charitable status.<sup>191</sup> As Murray notes, the test adopted by the majority ‘looks to the effect of, rather than the motivation for, the activities.’<sup>192</sup> Intention was also considered by the majority in *Word Investments* when it considered the fact that the revenues of the company were applied solely to charitable purposes, and that it ‘carried on commercial businesses only in order to effectuate those purposes.’<sup>193</sup>

Murray argues that ‘the more remote the activities that realise a charitable purpose, the harder it will be to satisfy the test.’<sup>194</sup> He argues for a ‘but for’ test, which looks to the motivation for the entity’s activities.<sup>195</sup> This test would require ‘examining an entity’s constitution, activities and the circumstances of its formation,’ and asking — would it have engaged in the communication ‘but for’ the purpose of furthering its charitable objects?<sup>196</sup> This would provide an explicit basis for considering motivating factors. Murray suggests that this ‘but for’ test be ‘applied in conjunction with a test based on the effect of the activities, such as one looking to the “natural and probable consequences” of the objects or activities.’<sup>197</sup> This is comparable to the requirement in s 12(1)(l)

<sup>188</sup> Ian Murray, ‘Charity Means Business: *Commissioner of Taxation v Word Investments Ltd*’ (2009) 31(2) *Sydney Law Review*, 309, 317–18 nn 48–55 (‘Charity Means Business’).

<sup>189</sup> (2008) 236 CLR 204 (‘*Word Investments*’).

<sup>190</sup> Murray, ‘Charity Means Business’ (n 188) 318, quoting *ibid* 226 [38] (Gummow, Hayne, Heydon and Crennan JJ).

<sup>191</sup> *Word Investments* (n 189) 224–6 [35]–[39] (Gummow, Hayne, Heydon and Crennan JJ).

<sup>192</sup> Murray, ‘Charity Means Business’ (n 188) 318.

<sup>193</sup> *Word Investments* (n 189) 227 [27] (Gummow, Hayne, Heydon and Crennan JJ).

<sup>194</sup> Murray, ‘Charity Means Business’ (n 188) 318.

<sup>195</sup> *Ibid* 319; Ian Murray, ‘Charitable Fundraising through Commercial Activities: The Final Word or a Pyrrhic Victory?’ (2008) 11(2) *Journal of Australian Taxation* 138, 148–91.

<sup>196</sup> Murray, ‘Charity Means Business’ (n 188) 319.

<sup>197</sup> *Ibid* 320.

of the *Charities Act*, which requires that if an entity is promoting or opposing a change to any matter established by law, policy or practice, the change must be in furtherance or in aid of, or in opposition to or in hindrance of, one or more of the charitable purposes listed under s 12(1). Importantly, there is no requirement that the desired outcome be inevitable. This is because the High Court takes the view that the public benefit necessary to establish charitable status is found in an entity's very engagement in constitutional processes of political communication, not in the outcome. It is worth remembering here that the High Court has held that such agitation is a constitutional process that 'contributes to the public welfare'.<sup>198</sup> More work needs to be done, both theoretically and empirically, to determine the public benefits of campaigning by charities with respect to candidates and political parties, particularly given several observations made by the High Court not only concerning the place of candidates and political parties, but also electors and third-party entities such as charities, within our constitutional system.<sup>199</sup>

Returning to our example, it would be open to the charity to argue that its campaigning for Shirley Brown is neither its principal purpose, nor an incidental or ancillary purpose, but a means of furthering the social welfare or human rights protection purposes through the democratic system of elections, which enables changes to who exercises political (legislative) power. Although not a constitutional right, such 'entities have a legitimate interest in governmental action and the direction of policy'.<sup>200</sup> In determining the purposes of the entity, regard would be had to the entity's governing rules, its activities, and any other relevant matter.<sup>201</sup> The charity might show that it is constituted for the exclusive purpose of advancing the human rights and social welfare of women; that it has no continuing interest in Shirley Brown's election beyond her policy; that it will continue to lobby any government on the issue; that it has produced evidence-based research on the policies of all candidates before choosing to recommend Shirley Brown; and that the preponderance of its activities focus on the provision of shelter, counselling and information referral services, legal literacy and education, and advocating for coherence in domestic violence laws and legislation relating to violence against women across Australia.

<sup>198</sup> *Aid/Watch* (n 50) 566 [45] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

<sup>199</sup> *Unions NSW [No 1]* (n 88) 551–2 [30] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); *Unions NSW [No 2]* (n 88) 646 [137] (Gordon J). See generally Gauja (n 174).

<sup>200</sup> *Unions NSW [No 1]* (n 88) 551 [30] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

<sup>201</sup> *Charities Act* (n 18) s 5(b) note 1.

It is not a foregone conclusion, therefore, that charities are not permitted to engage in political communication that directly supports a particular political party or candidate in certain circumstances. Arguably, the only kind of political communication that is clearly caught by the disqualification in s 11(b) of the *Charities Act* is the communication of political parties. Political parties are not regulated under the *Charities Act*, and they do not enjoy the benefits of charitable status. They are appropriately regulated under, and privileged by, the *Electoral Act*.

What work then does s 11(b) really do? One possible argument is that the disqualification in s 11(b) is justified because partisan support of specific political parties or candidates strengthens the perception of a sector that has been coopted by political self-interests. By distinguishing ‘charitable purpose advocacy’ (or issues-based campaigning) from ‘political party campaigning’, the charitable sector is ostensibly removed from partisanship, and its coherence as a distinctive social force within our democracy is preserved. This, in a *general* sense, could be said to be a legitimate purpose underpinning s 11(b).<sup>202</sup>

As I have argued above, the difficulty for the sector in Australia is that charities have already been cast as political; the engagement by the sector in charitable purpose advocacy and political activities means that they are already perceived, and in some cases expected, to be engaging in politics.<sup>203</sup> The question is whether there is a difference in popular perceptions between an involvement in political issues generally and electoral politics in particular. The development of a ‘continual campaign’ makes it even more difficult to assess what sort of communications are ‘political party campaigning’ and which are generally aimed at specific public policy matters. In short, the disqualification has had little effect in maintaining a perception of independence. Moreover, given that issues-based advocacy is permitted, it is arguable that there is no justification for preventing charities from influencing the ultimate choice of the people as to who should govern by directly promoting (or opposing) a party or candidate who they consider best (or least) represents their principal charitable purposes, provided they comply with electoral laws

<sup>202</sup> See Beard, ‘Charity Law and Freedom of Political Communication’ (n 65) 268–72.

<sup>203</sup> Research undertaken in Australia indicates that the public values political alignment, at least in some types of charities. National polling undertaken by the left-leaning Australia Institute found that most people support tax-deductible donations to a wide range of advocacy activities — for example, activities undertaken by environmental charities, including advocacy to change policy (68%), campaigning (68%), and legal cases to uphold existing law (55%): Tom Swann, The Australia Institute, *Who Says? Public Support for Environmental Advocacy* (Policy Brief, 2015) 3.

like any other non-party actor. Rather than struggle with the distinction between issues-based politics and party politics, or indeed the broader distinction between charity and politics, which exists in form rather than substance, perhaps the time has come to challenge these distinctions once and for all. This is not to say that any one charity should be given undue influence over electors.

It is worth emphasising here that political communication is a freedom, not an obligation, and that charities can and do distinguish themselves as nonpartisan in the same way that many charities refuse to accept government funding. For example, in her evidence before the *Inquiry into the Register of Environmental Organisations*,<sup>204</sup> Kelly O'Shanassy, CEO of the Australian Conservation Foundation, an organisation that is a registered charity and listed as a Deductible Gift Recipient ('DGR') for tax purposes, stated: 'While we may seek to influence the views of politicians, business leaders and communities, we remain strictly nonpartisan. We base our views on the policy and not the party behind it.'<sup>205</sup> According to the Committee's report, 'Ms O'Shanassy went on to argue that the credibility of the organisation, and the trust of its supporters and the wider community, would be jeopardised if it were to act in a partisan manner.'<sup>206</sup>

O'Shanassy's evidence indicates that not-for-profit entities already think carefully about their mission and the outcome they wish to achieve by their advocacy, and whether it is aligned with their purpose. A decision to inform voters that a particular political party or a candidate ranks higher than another in terms of achieving a particular charitable purpose requires a careful approach in terms of communication. Whether communication of this sort harms the perception of how independent an organisation is will depend on how the communication is framed, and why the communication is best put in a manner that many would still perceive as partisan, as well as more pragmatic but real concerns about funding.

The real advantage in enabling charities to engage in political party campaigning is the power it would give them to further develop theories or practices of change. The real concern about giving greater freedom, and power, to the charitable sector is that it is likely to attract greater government scrutiny, intervention and retribution against the sector, particularly if the

<sup>204</sup> *Environmental Organisations Inquiry* (n 169).

<sup>205</sup> Evidence to House of Representatives Standing Committee on the Environment, Parliament of Australia, Melbourne, 21 September 2015, 29 (Kelly O'Shanassy, CEO, Australian Conservation Foundation), cited in *ibid* 58 [5.53].

<sup>206</sup> *Environmental Organisations Inquiry* (n 169) 58 [5.54].



current culture of fear cannot be changed in Australia. As an Assistant Commissioner to the ACNC has observed:

[T]he legal framework for regulation of charity advocacy is permissive, but I see that there is still a climate of fear amongst charities about advocacy, and the climate is said to have a high chill factor. The factors contributing to this fear appear to be outside the current charity regulatory arrangements ...<sup>207</sup>

Although charities have a right to feel confident in their role as advocates within Australian political sovereignty, granting them greater freedom, albeit freedom that is regulated by electoral laws,<sup>208</sup> may do more harm than good in the current climate. This reminds us why the independence of the sector is important.<sup>209</sup>

Despite these fears, given the amount of campaigning by charities that already occurs, it is arguable that political campaigning is an accepted outcome of charitable work, and that the public already understands that the sector's independence does not require impartiality or neutrality. In this respect, it must be noted that beyond the confines of charity, campaigning communities such as GetUp! are emerging as 'high impact' advocates free from the constraints of traditional structures and regulatory control of charity law, but inviting electoral law regulation.<sup>210</sup> More research is needed to tease out the differences in these and other politically active, not-for-profit entities from a regulatory perspective and in terms of public benefit.<sup>211</sup>

In conclusion, if maintaining the integrity and independence of the charitable sector is the objective of s 11(b), then the disqualification provision is probably too little too late, and arguably misses the point. It does not address government influence over the charity sector, nor does it effectively address the political influence of charities. Its effects also lack transparency.<sup>212</sup> A much

<sup>207</sup> *Civil Voices* (n 127) 17.

<sup>208</sup> See below Part VI(B).

<sup>209</sup> See above Part V.

<sup>210</sup> See Krystian Seibert, 'Yes, GetUp Fights for Progressive Causes, but It Is Not a Political Party — and Is Not Beholden to One', *Pro Bono Australia* (Web Page, 22 August 2019) <<https://probonoaustralia.com.au/news/2019/08/yes-getup-fights-for-progressive-causes-but-it-is-not-a-political-party-and-is-not-beholden-to-one/>>, archived at <<https://perma.cc/CSQ4-LQ54>>.

<sup>211</sup> See, eg, the 'lines of response' identified by Salamon (n 137) in the US policy debates on the sector: at 16–21.

<sup>212</sup> For example, when the conservative Christian organisation, Catch the Fire Ministries, had its charitable status revoked in 2017, the reasons for the decision (and any connections it had to the nationalist party Rise Up Australia) remained confidential: Natasha Robinson, 'Catch the

more explicit and carefully crafted set of provisions in the *Charities Act*, setting out the meaning of charitable independence, or autonomy, like that cited above by Smerdon in terms of freedom, is needed. This requires much deeper and jurisprudential reforms to charity law to ensure that the autonomy and voluntarism, or freedom and independence, of charity are promoted and protected. This is separate to, but equally important as, the need to ensure that the sector's autonomy is balanced against applicable public law values that seek to protect against undue influences in our electoral system, to which I now turn. These influences not only include wealth, but also foreign influences of other sovereign and corporate bodies, and the influence of extremist and terror groups.<sup>213</sup>

### B *The Electoral Act*

The democratic system in Australia, and the electoral system that underpins it, requires giving electors the freedom and opportunity to form their opinions, and decide who to vote for, without undue pressure or other false or misleading influence, particularly in the lead up to elections. It is in this context that the exercise of political power and influence warrants the imposition of public law values, such as transparency, on individuals and private entities, including charities.<sup>214</sup> This is one of the objects of the *Electoral Act*, which regulates political parties and other 'third party' political actors.<sup>215</sup> Under this Act, it is the autonomy of the voter, rather than the autonomy of the charitable sector, that is in focus; maintaining the integrity and independence of the charitable sector becomes incidental to the principal objective of ensuring free and fair elections.

The *Electoral Act* regulates the financing of interests in electoral outcomes by providing for public funding of election campaigns and the disclosure of

Fire Ministries Stripped of Charitable Status after Raising Funds for Rise Up Australia Party', *ABC News* (Web Page, 17 January 2017) <<https://www.abc.net.au/news/2017-01-17/catch-the-fire-ministries-stripped-of-charitable-status/8189070>>, archived at <<https://perma.cc/VC3M-QM4G>>.

<sup>213</sup> See, eg, Mark Sidel, *Regulation of the Voluntary Sector: Freedom and Security in an Era of Uncertainty* (Routledge, 2010).

<sup>214</sup> The motivation behind these regulatory reforms may not always be to secure free and open democratic systems. Indeed, the opposite may be true: see Buyse (n 154). For a broader analysis of the application of transparency principles to private persons in the context of taxation, see Miranda Stewart, 'Transparency, Tax, and Human Rights' (Melbourne Legal Studies Research Paper No 774, Melbourne Law School, 15 May 2018).

<sup>215</sup> See *Electoral Act* (n 176) s 287N.

political donations and electoral expenditure.<sup>216</sup> The public funding scheme is aimed at assisting political parties to meet increasing political party campaigning costs and relieving them of the need to continually engage in fundraising activities.<sup>217</sup> The disclosure schemes require political parties, associated entities and third parties to disclose specific details of receipts and debts that exceed a disclosure threshold.<sup>218</sup> Disclosure helps the public to see who funded any distortion and ideally prevents donors channelling money in disguised ways.<sup>219</sup>

The term 'third party' is defined in the *Electoral Act*.<sup>220</sup> The term is also used in the literature concerning electoral regulation to refer generally to a 'residual category, encompassing any participant in an election campaign other than political parties or candidates.'<sup>221</sup> Gauja and Orr outline the rationales for the increased regulation of 'third party' political actors in election campaigns.<sup>222</sup> The first is to do with levelling the field, particularly by regulating financial flows into the electoral process as a whole, to ensure that politics is not 'owned' by the wealthy or special interests to the exclusion of individual electors.<sup>223</sup> A second justification for the regulation of third parties is a concern for 'representativeness, accountability and democratic legitimacy' to avoid a situation where corporate groups, who do not have a right to vote, are prevented from exercising an undue voice within electoral processes.<sup>224</sup> A further rationale cited by Gauja and Orr is the 'waterbed effect', which describes the need to regulate third parties as a by-product of political party

<sup>216</sup> Ibid pt XX divs 3–5.

<sup>217</sup> Joint Select Committee on Electoral Reform, Parliament of Australia, *First Report* (Report, September 1983) 153–5 [9.24]–[9.30].

<sup>218</sup> *Electoral Act* (n 176) pt XX div 4. See Department of the Prime Minister and Cabinet, *Electoral Reform Green Paper: Donations, Funding and Expenditure* (Green Paper, December 2008) 43–5 [5.12]–[5.35] ('*Electoral Reform Green Paper*').

<sup>219</sup> See *McCloy* (n 2) 204–5 [36], 206–8 [43]–[47] (French CJ, Kiefel, Bell and Keane JJ), 248 [181]–[184] (Gageler J), 257–8 [218], 260 [227] (Nettle J); *Unions NSW [No 2]* (n 88) 613 [38] (Kiefel CJ and Bell J), 623 [71] (Gageler J), 638 [110] (Nettle J); *ACTV* (n 54) 144–5 (Mason CJ), 154–6 (Brennan J), 175 (Deane and Toohey JJ), 188–9 (Dawson J), 239 (McHugh J); *Unions NSW [No 1]* (n 88) 557 [49] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), 579 [138] (Keane J).

<sup>220</sup> *Electoral Act* (n 176) s 287. See below Part VI(D).

<sup>221</sup> Gauja and Orr (n 175) 252–3.

<sup>222</sup> Ibid 253–5. See also Graeme Orr, 'Special Edition on Electoral Regulation and Representation' (1998) 7(2) *Griffith Law Review* 166, 169–70; Schott, Tink and Watkins (n 4) 8–9.

<sup>223</sup> Gauja and Orr (n 175) 253–4.

<sup>224</sup> Ibid 254.

regulation because there is little point in regulating political parties if there are no other limits on third party actors.<sup>225</sup>

If it is accepted both from a charity law perspective and from a constitutional law perspective that a charity may engage in political communication that supports its charitable purpose, then it is important, from an electoral law perspective, to recognise that this political communication confers upon that charity the status of a third party political actor. Any third party political actor that achieves a certain level of influence within the electoral system ought to be subject to electoral regulation for the reasons set out above by Gauja and Orr. To date, this kind of transparency has been somewhat lacking in the sector.<sup>226</sup>

### C Charities and Commonwealth Electoral Reform

Significant reforms to the *Electoral Act* were introduced late in 2018.<sup>227</sup> Charities expressed concern in their submissions to JSCEM that the regulatory burden in the proposed legislation would have a chilling effect on their advocacy.<sup>228</sup> Charities also aired concerns about being subjected to two regulators, the ACNC and the Australian Electoral Commission ('AEC'),

<sup>225</sup> Ibid.

<sup>226</sup> During evidence to the Joint Standing Committee on Electoral Matters ('JSCEM') into the Bill proposing these reforms, it became clear that there had been widespread inadvertent non-compliance with the *Electoral Act* (n 176) by the charity sector, including the provisions relating to political expenditure above the disclosure threshold that previously applied, and those provisions requiring charities to authorise any broadcast of electoral material: *First Advisory Report* (n 183) 12 [1.48]. In response, the *Electoral Legislation Amendment Act* (n 183) sch 1 item 143(14) created an amnesty for historical non-compliance with third party disclosure obligations.

<sup>227</sup> These reforms were initiated by the government in December 2017, with the introduction of the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017 (Cth) to ban foreign political donations. The Bill was referred to JSCEM, which handed down the *First Advisory Report* (n 183) in April 2018. JSCEM received 102 submissions from the charity sector, together with many submissions from individuals involved in the sector: at 11 [1.44]. Based on the recommendations of the Advisory Committee, an amended Bill was referred to JSCEM on 19 September 2018. JSCEM held a further inquiry inviting submissions on whether the proposed amendments to the Bill addressed the recommendations made in its *First Advisory Report*. A second Advisory Report was tabled on 15 October 2018: Joint Standing Committee on Electoral Matters, Parliament of Australia, *Second Advisory Report on the Electoral Legislation (Electoral Funding and Disclosure Reform) Bill 2017* (Report, October 2018). The *Electoral Legislation Amendment Act* (n 183) was assented to on 30 November 2018, with some but not all the amendments to the *Electoral Act* (n 176) to take effect on the following day.

<sup>228</sup> *First Advisory Report* (n 183) 11 [1.44].

despite the fact that charities engaging in charitable advocacy have always been subject to the *Electoral Act*.<sup>229</sup>

The sector is right to be concerned about unnecessary regulation and the silencing effect this can have on entities that are already overly burdened by administration. The sector is also justifiably suspicious of ideologically driven law reforms being undertaken by the government here and in other areas of public policy, particularly around DGR arrangements.<sup>230</sup> However, too much resistance to public law obligations may not necessarily be the best way to present or protect both the integrity and the diversity of the sector. It should be accepted that some obligations, in addition to the ACNC's governance standards, will be imposed on them.<sup>231</sup> The real challenge for the sector is about how to advocate against increased red tape, heightened surveillance, and additional reporting requirements, when these reforms are able to be framed by the government in terms of transparency, accountability and guardianship of the public purse. By resisting electoral law accountability mechanisms, the charitable sector risks being represented by the government, and being perceived by the public, as lacking in transparency and accountability. The real concern for the sector in this context is how to reframe debates about its independence<sup>232</sup> and recent law reform in a way that produces an appropriate balance between autonomy and transparency. If one of the most important aspects of the charitable sector is its capacity to represent diverse and under-represented views, then electoral law is integral to charity law. Well-drafted electoral laws, together with appropriate regulation of lobbying, can be used to protect the diversity of views within the sector. Currently, some charities in Australia have a far greater influence over government than others. My focus in the remainder of this part is merely to point out the challenges for charities in the interpretation of the new provisions of the *Electoral Act*.

### 1 *The Electoral Act as Amended*

As stated above, the *Electoral Act* requires certain types of entities to disclose specific details of receipts and debts that exceed a disclosure threshold. The *Electoral Act* now includes a range of new definitions introduced to encompass the various entities that might incur 'electoral expenditure'.

<sup>229</sup> See, eg, *ibid* 12 [1.48].

<sup>230</sup> *Civil Voices* (n 127) 5. See *Environmental Organisations Inquiry* (n 169); 'DGR Reform Opportunities' (n 15).

<sup>231</sup> See *ACNC Act* (n 10) ch 3; *ACNC Regulation* (n 124) div 45.

<sup>232</sup> See above Part V.

#### D *Third Parties*

As outlined in Part II, at law, charity is a legal status obtained by an entity because its institutional arrangements are non-profit, and its purposes are 'charitable' and for the public benefit. The underlying structure of an entity is therefore separate from its charitable status. The reforms to the *Electoral Act* have the potential to confer an additional statutory status on some charities. Under the *Electoral Act*, a charity might also be considered a 'third party' or a 'political campaigner' if that charity incurs expenditure of a particular kind. The term 'third party' is defined in s 287 of the *Electoral Act* as follows:

[A] person or entity (except a political entity or a member of the House of Representatives or the Senate) is a *third party* during a financial year if:

- (a) the amount of electoral expenditure incurred by or with the authority of the person or entity during the financial year is more than the disclosure threshold [set at \$13,800]; and
- (b) the person or entity is not required to be, and is not, registered as a political campaigner under section 287F for the year.

The first thing to note about s 287 is that a third party may be an individual or an entity. Charitable entities are therefore subject to the same regulations as individual electors, who possess even more fundamental rights to privacy than a private entity.<sup>233</sup> The second point to note is that charities will need to incur \$13,800 in electoral expenditure before they are subject to any of the provisions under the Act.<sup>234</sup> Charities that are classified as third parties will not be permitted to receive donations equal to the disclosure threshold (\$13,800) from certain defined 'foreign donors', if these funds are then used for the purpose of incurring electoral expenditure or for creating or communicating electoral matter.<sup>235</sup> This provision is concerned with the regulation of foreign influence in Australian political sovereignty. Finally, if a charity is defined as a third party, it must lodge annual returns to the AEC disclosing electoral expenditure.<sup>236</sup> Third parties that lodge these returns will be added to a Transparency Register introduced with the reforms.<sup>237</sup> The Transparency

<sup>233</sup> See *Electoral Reform Green Paper* (n 218) 51 [6.41].

<sup>234</sup> *Electoral Act* (n 176) s 287 (definition of 'disclosure threshold').

<sup>235</sup> *Ibid* ss 287AA, 302E.

<sup>236</sup> *Ibid* ss 314AEB, 314AEC.

<sup>237</sup> *Ibid* s 287N.

Register enables the public to view information relating to disclosures of expenditure made under pt XX of the *Electoral Act*.<sup>238</sup>

### E *Political Campaigners*

The term ‘political campaigner’ is also introduced.<sup>239</sup> Pursuant to s 287F(1) of the *Electoral Act*, a ‘political campaigner’ is required to register as such when:

- (a) the amount of electoral expenditure incurred by or with the authority of the person or entity during that or any one of the previous 3 financial years is \$500,000 or more; or
- (b) the amount of electoral expenditure incurred by or with the authority of the person or entity:
  - (i) during that financial year is \$100,000 or more; and
  - (ii) during the previous financial year was at least two-thirds of the revenue of the person or entity for that year.

These amounts are significant, and the obligations imposed on ‘political campaigners’ are much more onerous than those imposed on third parties. It is not yet clear how many charities are likely to incur expenditure over the thresholds necessary to attract ‘third party’ status, let alone ‘political campaigner’ status. The more significant issue is whether charities are captured by the provisions at all, and if so, how.

### F *The Disclosure of Electoral Expenditure*

‘Electoral expenditure’ is defined in s 287AB of the *Electoral Act*. Subject to some exceptions, the definition includes ‘expenditure incurred for the dominant purpose of creating or communicating electoral matter’.<sup>240</sup> ‘Electoral matter’ is defined under s 4AA(1) to mean

matter communicated or intended to be communicated for the dominant purpose of influencing the way electors vote in an election (a *federal election*) of a

<sup>238</sup> Ibid s 287N(2).

<sup>239</sup> Section 305B(6) exempts donors to registered charities that are also political campaigners from disclosing donations above the disclosure threshold where none of the donations above the disclosure threshold was used: to incur electoral expenditure; to create or communicate electoral matter; or to reimburse the registered charity for one of these activities.

<sup>240</sup> Ibid s 287AB(1).

member of the House of Representatives or of Senators for a State or Territory, including by promoting or opposing:

- (a) a political entity, to the extent that the matter relates to a federal election; or
- (b) a member of the House of Representatives or a Senator.

Neither ‘charitable purposes’ nor ‘charitable purpose advocacy’ are listed in the exceptions, although some charitable purposes may fall within other exceptions — such as matter produced for educative purposes,<sup>241</sup> lobbying,<sup>242</sup> or submissions to parliamentary committees.<sup>243</sup> A further indication that the dominant purpose test is meant to exclude issues-based advocacy, such as charitable purpose advocacy, from the disclosure requirements of the Act is the legislative note to s 4AA(1):

Communications whose dominant purpose is to educate their audience on a public policy issue, or to raise awareness of, or encourage debate on, a public policy issue, are not for the dominant purpose of influencing the way electors vote in an election (as there can be only one dominant purpose for any given communication).

However, the absence of an explicit exemption for charities indicates that some charitable advocacy is expected to fall within the meaning of ‘electoral matter’, that is, matter communicated or intended to be communicated for the dominant purpose of influencing the way electors vote in an election. Expenditure on issues-based matters would most likely be on conducting research and publishing reports or information sheets, or otherwise generally educating the community about the relevant issue or issues. Comparatively little money is likely to be spent on activities more directly related to influencing electors — for example, the costs of producing a how-to-vote card and having it circulated by volunteers would be low.<sup>244</sup> This is the kind of commu-

<sup>241</sup> Section 4AA(5)(b) excludes matter that is for a ‘satirical, academic, educative or artistic purpose, taking into account any relevant consideration including the dominant purpose of any other communication of matter by the person.’

<sup>242</sup> Section 4AA(5)(d) excludes matter that ‘is or would be by or to a person who is a Commonwealth public official (within the meaning of the *Criminal Code*) in that person’s capacity as such an official’. Section 4AA(5)(e) excludes matter that ‘is or would be a private communication to a political entity (who is not a Commonwealth public official) in relation to public policy or public administration.’

<sup>243</sup> Section 4AA(5)(f) excludes matter that ‘occurs or would occur in the House of Representatives or the Senate, or is or would be to a parliamentary committee.’

<sup>244</sup> My thanks to one of the anonymous reviewers for this insight.



nication that is most likely to fall within the disclosure requirements. According to the Supplementary Explanatory Memorandum to the Bill:

The dominant purpose of ‘influencing the way electors vote in an election’ is intended to capture content that seeks to influence voters’ formation of political judgement in relation to the act of voting, and includes matter seeking to influence:

- (a) the order in which a voter indicates their preferences on their ballot paper; and
- (b) a voter’s choice of whether to cast a formal ballot paper.<sup>245</sup>

Section 4AA(4) sets out the matters that must be taken into account in determining the dominant purpose of the communication or intended communication of matter:

- (a) whether the communication or intended communication is or would be to the public or a section of the public;
- (b) whether the communication or intended communication is or would be by a political entity or political campaigner (within the meaning of Part XX);
- (c) whether the matter contains an express or implicit comment on a political entity, a member of the House of Representatives or a Senator;
- (d) whether the communication or intended communication is or would be received by electors near a polling place;
- (e) how soon a federal election is to be held after the creation or communication of the matter;
- (f) whether the communication or intended communication is or would be unsolicited.

This kind of ‘I’ll know it when I see it’ definition indicates the difficulties inherent in regulating political communication in Australia. In a fact sheet on *Electoral Matter and Electoral Expenditure* prepared by the AEC, it is stated that the ‘dominant purpose of [an association] does not determine the dominant purpose of the expenditure.’<sup>246</sup> On that basis, the AEC reasons that although an election campaign run by an association may be ‘a short-term

<sup>245</sup> Supplementary Explanatory Memorandum, Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017 (Cth) 12–13 [18].

<sup>246</sup> Australian Electoral Commission, *Electoral Matter and Electoral Expenditure: Understanding These Terms* (Fact Sheet, 1 January 2019) 7.

activity and the association has wider purposes, the dominant purpose of these campaign-related expenses to create and communicate electoral matter makes the expenses electoral expenditure.<sup>247</sup> However, the definition appears to me to be more complicated.

When s 287AB of the *Electoral Act* is read together with s 4AA, the definition of electoral expenditure is ‘expenditure incurred for the dominant purpose of creating or communicating’ ‘matter communicated or intended to be communicated for the dominant purpose of influencing the way electors vote in an election’. Before determining what the dominant purpose of the expenditure is, it is therefore necessary to determine what is being paid for, and whether that expenditure is predominantly on ‘electoral matter’ or something else.

As stated above, ‘electoral matter’ is matter communicated or intended to be communicated ‘for the dominant purpose of influencing the way electors vote in an election’. In the case of charities, it is arguable that the dominant purpose of communicating matter is a charitable one, and that influencing voters is an incidental consequence of achieving that charitable purpose. In the same way that charitable purpose advocacy is defined in terms of a means to pursue a charitable end, communicating matter to influence the way voters vote in an election may be considered a means to a charitable purpose. The question is: why does the entity exist, and is charity the intended and desired result?<sup>248</sup> The phrase ‘dominant purpose’ has been interpreted in other contexts<sup>249</sup> not as the ‘primary’ or ‘substantial’ purpose,<sup>250</sup> but rather the ‘ruling, prevailing, or most influential purpose.’<sup>251</sup> Distinguishing between purposes in the charity law field, the Privy Council made the distinction between ends, means and consequences when considering whether a trust was established exclusively for charitable purposes in *Latimer v Commissioner*

<sup>247</sup> Ibid.

<sup>248</sup> The definition of ‘electoral matter’ includes an element of intention: *Electoral Act* (n 176) s 4AA(1). The requirement of intention is also found within the *Political Parties, Elections and Referendums Act 2000* (UK) s 143A, as inserted by *Transparency in Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014* (UK) s 26(12). See 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* (Cm 9205, 2016) 28 [4.35].

<sup>249</sup> Such as in the context of interpreting the *Evidence Act 1995* (Cth): *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49, 72–3 [58]–[61] (Gleeson CJ, Gaudron and Gummow JJ).

<sup>250</sup> *Grant v Downs* (1976) 135 CLR 674, 678 (Barwick CJ).

<sup>251</sup> *Federal Commission of Taxation v Spotless Services Ltd* (1996) 186 CLR 404, 416 (Brennan CJ, Dawson, Toohey, Gaudron, Gummow and Kirby JJ) (‘*Spotless Services*’).

of *Inland Revenue*.<sup>252</sup> In that case, the Privy Council found that a trust may ‘authorize the trustees to apply the trust income for a number of different purposes’<sup>253</sup> and that ‘[t]he distinction is between ends, means and consequences.’<sup>254</sup> Lord Millett held: ‘The ends must be exclusively charitable. But if the non-charitable benefits are merely the means or the incidental consequences of carrying out the charitable purposes and are not ends in themselves, charitable status is not lost.’<sup>255</sup>

Ends here are equated with purposes. The means by which these purposes are achieved — or the incidental consequences of pursuing purposes — may sometimes result in non-charitable outcomes such as ‘influencing the way voters vote in an election’ (s 4AA(1)) or indeed expenditure incurred for ‘creating or communicating electoral matter’ (s 287AB).<sup>256</sup> Similar reasoning is found in the High Court decision in *Word Investments*,<sup>257</sup> and discussed above using the hypothetical case of the entity explicitly supporting the policies of Shirley Brown. If influencing voter intentions does not appear to arise incidentally or consequentially to charitable purposes such that they appear to have been pursued as an additional result or end in their own right (Murray’s ‘but for’ test), this may indicate that the expenditure is on electoral matter. Otherwise, it is arguable that influencing the way electors vote in an election is not necessarily the dominant purpose for which matter is communicated or intended to be communicated by charities. Arguably, the aim is to reach an overall determination of what purposes are being served. On one view, funds are being immediately applied to political communication intended to influence voters; however, the less immediate, but ‘ruling, prevailing, or most influential’<sup>258</sup> — and therefore dominant — purpose to which they are being applied is the charitable purpose being furthered by means of political communication. Depending on the emphasis given to various factors by a court, this may mean that the test provides an unfair

<sup>252</sup> [2004] 1 WLR 1466.

<sup>253</sup> *Ibid* 1476 [32] (Lord Millett).

<sup>254</sup> *Ibid* 1476 [36].

<sup>255</sup> *Ibid*.

<sup>256</sup> A similar distinction was made in a charitable context by the UK Court of Appeal: *Incorporated Council of Law Reporting for England and Wales v A-G* [1972] 1 Ch 73, 93 (Sachs LJ). For a summary of the case law in this area, see New Zealand Inland Revenue, *Income Tax: Donee Organisations — Meaning of Wholly or Mainly Applying Funds to Specified Purposes within New Zealand* (IS No 18/05, 20 September 2018) 42–4 [235]–[244].

<sup>257</sup> *Word Investments* (n 189) 277 [27] (Gummow, Hayne, Heydon and Crennan JJ).

<sup>258</sup> *Spotless Services* (n 251) 416 (Brennan CJ, Dawson, Toohey, Gaudron, Gummow and Kirby JJ).

advantage to the large, established charities that predominantly engage in service provision and register as charities advancing religion or social welfare, but which also engage in charitable advocacy, compared to single-issue charities registered with the sole purpose of advocating for a change in law or policy in furtherance of a charitable purpose. Time will tell.

Whether the law simply stifles political communication as boards of directors and individuals on management committees refrain from engaging in political communication to remain within the law, or it is held that the *Electoral Act* provisions do not apply to charities at all, the reforms do not serve the charitable sector, or electors, very well. The disclosures tell the public very little about the political influence of charities, how to measure that influence, or determine when that influence is undue. Communications with the dominant purpose of educating their audience on a public policy issue, or of raising awareness of, or encouraging debate on, a public policy issue, influence the way electors vote in an election, but they need not be disclosed. All political communication is, by its nature, communication that influences, or intends to influence, the way electors vote in an election. To define electoral matter as communication with the dominant purpose of influencing the way electors vote is a highly nuanced, and quite misleading, means of distinguishing different kinds of political influence. What does it really tell us? The definition sits uncomfortably with the way in which a free, open and informed political sovereignty works, and how a voter's formation of political judgement in relation to the act of voting is influenced. The very reason why the majority in *Aid/Watch* upheld charitable purpose advocacy (issues-based advocacy) as a charitable purpose is because of the role it plays in assisting electors to form political judgements.<sup>259</sup> What are charities doing when they educate the public, if not to ultimately influence their vote, as well as the policy intentions of governments? The nuance between informing voters on policy issues and informing voters of candidates and parties that promote those issues (by definition a charity can do no more than this) provides a thin basis for sound regulation. Many charities, but particularly large, wealthy and established charities, will continue to influence voter intentions in Australia and will not be required to disclose expenditure under the *Electoral Act*. At most, these reforms may assist electors to see what is being spent by charities on communication at the very pointy end of our electoral system — on how-to-vote cards or other direct campaigning. These limited disclosures do help to protect the integrity of the charitable sector vis-à-vis the electors to some

<sup>259</sup> *Aid/Watch* (n 50) 555–6 [44]–[45] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

extent but they do not really tell us very much about the influence charities have over democratic outcomes in Australia, and they do nothing to address, nor are they designed to address, the continuing and significant, if not undue, influence of government over the sector, or the significant, if not undue, influence of some charities over government. Still more work is needed to assess the actual effect these provisions will have on charities, if any, and to critique these effects in the light of the theoretical points made in the earlier parts of this article.

## VII CONCLUSION

This article has focused on charities in the context of Australia's democratic system, and the importance of charities to our political sovereignty. The Australian public understands why charity matters to the vulnerable, the disadvantaged and the voiceless in our society. It is perhaps less clear to the public why charity matters to our political sovereignty. I have argued that it is important to ensure that the sector is sufficiently autonomous to achieve its objectives, promote its experience, challenge others and engage in public debate. This autonomy enriches our political sovereignty. At present, however, there remains insufficient normative certainty around the distinction between charity and politics, or charity and government, to enable the sector to respond consistently to the legal obligations that adhere to all political actors in representative democracies. Added to this is the uncertainty of how electoral laws will operate to effectively ensure that the influences of the charitable sector are not undue, or apt to adversely affect the overriding aim of ensuring open, free and fair elections in Australia.