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Committee Secretary
Joint Standing Committee on Electoral Matters
PO Box 6021
Parliament House
Canberra ACT 2600

Submitted online

ACNC SUBMISSION: INQUIRY INTO AND REPORT ON ALL ASPECTS OF THE CONDUCT OF THE 2016 FEDERAL ELECTION

The Australian Charities and Not-for-profits Commission (**ACNC**) welcomes the opportunity to make a submission to this inquiry. This submission outlines the role of the ACNC, the charitable law concerning advocacy and elections, guidance issued by the ACNC, and the ACNC's experience in the lead-up to the 2016 Federal Election.

The ACNC's role

The ACNC was established on 3 December 2012 by the *Australian Charities and Not-for-Profits Commission Act 2012* (Cth) (**ACNC Act**). The objects of the ACNC Act are to:

- maintain protect and enhance public trust and confidence in the Australian not-for-profit (NFP) sector;
- support and sustain a robust, vibrant, independent and innovative Australian NFP sector; and
- promote the reduction of unnecessary regulatory obligations on the Australian NFP sector.

Currently the ACNC's regulatory responsibility extends only to registered charities, as distinct from the wider NFP sector.

The charities sector

There are 54,057 registered charities in Australia. Registered charities employ over 1.1 million Australians, or approximately 9.7% of the Australian workforce.¹ Charities make an invaluable contribution to our community, engaging volunteer effort, helping beneficiaries

¹ Based on data from 2014 Annual Information Statements available at: <http://data.gov.au/dataset/acnc2014ais>





and providing vital services all over Australia. Charities are also a significant economic force, with an income in 2014 in excess of \$122 billion.²

Charity law and political activities

The *Charities Act 2013* (Cth) commenced on 1 January 2014. The Act clarified concepts from the common law to introduce a statutory definition of ‘charity’ for Commonwealth purposes. Among other requirements, not-for-profit organisations must meet the definition of ‘charity’ in the Charities Act to become and remain a registered charity.

Section 5 of the Charities Act defines ‘charity’:

charity means an entity:

- (a) that is a not-for-profit entity; and
- (b) all of the purposes of which are:
 - (i) charitable purposes (see Part 3) that are for the public benefit (see Division 2 of this Part); or
 - (ii) purposes that are incidental or ancillary to, and in furtherance or in aid of, purposes of the entity covered by subparagraph (i); and

Note 1: In determining the purposes of the entity, have regard to the entity’s governing rules, its activities and any other relevant matter.

Note 2: The requirement in subparagraph (b)(i) that a purpose be for the public benefit does not apply to certain entities (see section 10).

- (c) none of the purposes of which are disqualifying purposes (see Division 3); and
- (d) that is not an individual, a political party or a government entity.

Political parties are explicitly excluded from the definition of ‘charity’. Organisations with a ‘disqualifying purpose’ are also excluded from the definition.

The meaning of ‘disqualifying purpose’ is defined by section 11 of the Charities Act:

disqualifying purpose means:

- (a) the purpose of engaging in, or promoting, activities that are unlawful or contrary to public policy; or

Example: Public policy includes the rule of law, the constitutional system of government of the Commonwealth, the safety of the general

² As above, 1



public and national security.

Note: Activities are not contrary to public policy merely because they are contrary to government policy.

(b) the purpose of promoting or opposing a political party or a candidate for political office.

Example: Paragraph (b) 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).

Note: 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 may be a charitable purpose (see paragraph (l) of the definition of **charitable purpose** in subsection 12(1)).

Relevantly to election and advocacy, a charity must not have a purpose of promoting or opposing a political party or a candidate for political office.

Importantly, a charity's *purpose* is distinct from its *activities*. In determining whether a charity has a disqualifying political purpose, the ACNC will consider all the relevant circumstances of the charity, including its governing rules and its activities. Assessment of these matters will be a question of fact and degree.

Political campaigning and advocacy by registered charities – ACNC guidance

Political campaigning and campaigning is a complex area for charities. In the lead up to the 2016 Federal Election, the ACNC issued public guidance to proactively assist charities in understanding and complying with their obligations.³ A copy of the ACNC's guidance is attached to this submission.

Advocacy and campaigning can be a legitimate and effective way of furthering the charitable purpose of a charity. However, charities need to be careful not to cross the line into having a disqualifying charitable purpose, and must be sure to maintain independence from party politics.

A charity's policy position on a matter of concern may be similar to, or align with that of a particular political party. In such a situation it is permissible for charities to continue to campaign on that issue, provided that it does not amount to the charity having a purpose of promoting or opposing a particular political party or candidate.

³ The ACNC's guidance was released in April 2016, and is available at acnc.gov.au/advocacy.



The 2016 Federal Election

Members of the public are able to raise concerns about charities with the ACNC by calling 13 ACNC (13 22 62) or by visiting acnc.gov.au/raiseaconcern. The ACNC also monitors media and other intelligence to identify concerns. The ACNC carefully considers all concerns.

During the 2016 Federal Election campaign and shortly after, the ACNC received a number of concerns about the campaigning and advocacy activities of registered charities. A number of these concerns have been reviewed and finalised, while some remain open.

Conclusion

The ACNC will continue to help charities understand and comply with their obligations in relation to political advocacy, and take appropriate and proportionate action where any concerns are identified.

Contact: Ross Gillott, Policy Manager

Attached:

‘Charities, elections and advocacy: Political campaigning and advocacy by registered charities – what you need to know’



Charities, elections and advocacy

Political campaigning and advocacy by registered charities – what you need to know

Released: April 2016

Who is this information for?

This guidance is for charity board or committee members. These are the people who sit on the governing body of a charity and are responsible for ensuring that it is working towards its charitable purpose and that its independence and reputation are protected.

The purpose of this guidance is to assist charities in deciding what advocacy and campaigning they can appropriately undertake and what they should avoid. It is designed to minimise risks for charities involved in advocacy.

In the lead up to an election, some charities may want to make their voices heard in the political arena. Charities can campaign on political issues to advance their charitable purposes, including during election periods, as long as they meet the requirements of charity law and other relevant legislation (e.g., the *Commonwealth Electoral Act 1918* (Cth)).

Before reading this guidance, it is important to know that political advocacy and campaigning is a complex area for charities. Reasonable advocacy and campaigning depends on the purposes of the charities involved and the specific details of their activities in pursuing their stated purposes. As such, it can be difficult to provide simple guidance that applies conveniently to all charities.

This guidance is not legal advice and if you have doubts about any particular situation involving your charity, you can seek specific advice from the ACNC or seek independent legal advice.

What this guidance covers

This guidance is about:

- the kinds of advocacy and campaigning that a charity can undertake; and
- the kinds of advocacy and campaigning that may call a charity's purposes into question, which may affect its registration with the ACNC.

This advice is intended to provide general guidance only to assist charities to avoid the risk of having a disqualifying political purpose, and therefore losing their registration as a charity.

For information about advocacy by registered charities generally, please read our guidance at acnc.gov.au/advocacy.

What does the ACNC mean by 'advocacy' and 'campaigning'?

'Advocacy' and 'campaigning' are both terms that in everyday use can have very broad meanings. For the purposes of this guidance these terms have particular meanings.

When the ACNC talks about advocacy and campaigning we mean activities which are aimed at securing or opposing any change to a law, policy or practice in the Commonwealth, a state or territory, or another country. Such activities can include:

- involvement in the development of public policy
- promotion of, or opposition to, particular laws, policies, practices or decisions of governments, and
- awareness-raising.

In the minds of the public, 'advocacy' can sometimes include political party activity. This is not included in the ACNC's use of this phrase, as registered charities cannot have a purpose of promoting or opposing a particular political party or candidate.

'Campaigning' in this guidance is used by the ACNC to mean activities undertaken to educate the public, raise public awareness, change public behaviour and/or mobilise public support. It can include ensuring that existing laws, policies or decisions are either maintained or changed.



Charity ‘activities’ and charitable ‘purposes’

Throughout this guidance, we refer to a charity’s *purpose* as distinct from its *activities*. Although it may seem like these terms refer to the same thing, they are different in a subtle but important way, and it is worth making the distinction clear.

A [charitable purpose](#) is what a charity has been set up to achieve. It is the overarching object or goal of the charity – some people may refer to it as a ‘mission’. There are 12 charitable purposes listed in the *Charities Act 2013* (Cth), and charities may have more than one charitable purpose. Charities cannot have a non-charitable purpose unless the purpose is incidental or ancillary to (in aid of) a charitable purpose.

Charity activities are the activities that a charity undertakes in support of its overarching purpose. This may include direct work with beneficiaries (e.g. providing temporary accommodation to homeless people or providing education services) or more indirect work (e.g. selling goods to raise funds for a homeless shelter or holding a conference to educate people about research into a disease).

For example:

- A charity holds a cake sale to raise funds for its homeless accommodation. The activity – baking cakes and selling them to the public – is not the same as its overarching purpose – advancing social and public welfare. The cake sale would simply be an activity the charity undertakes to further its charitable purpose of advancing social and public welfare.

It is important to remember that a charity may only conduct activities that further its charitable purposes.

In determining whether a charity has a disqualifying political purpose, the ACNC will consider all the relevant circumstances of the charity, including its governing rules and its activities.

Assessment of these matters will be a question of fact and degree.



Advocacy and campaigning in summary

For an organisation to be a charity it must be established for charitable purposes which are for the public benefit. An organisation will not be charitable if it has disqualifying political purposes.

Advocacy and campaigning can be a legitimate and effective way of furthering the charitable purposes of a charity. However, it is important that charities do not cross the line into having a disqualifying political purpose and that they maintain independence from party politics.

A charity's policy position on a matter of concern may be similar to, or align with that of, a particular political party. In such a situation it is okay for the charity to continue to campaign on that issue, provided that this does not amount to the charity having a purpose of promoting or opposing a particular political party or candidate.

It would also be prudent for members of a charity's governing body to consider the independence of their charity and any potential reputational impact of particular campaigning activities on the charity, including online activities through social media. Public perception is important and members of a charity's governing body should be aware of the perception of any advocacy or campaigning.

In the lead up to an election there are increased risks that, in the minds of the public, charity advocacy or campaigning can be associated with a particular political party.

It's okay for a charity to:

- have a purpose of advancing public debate – including promoting or opposing a change in law – where this furthers or aids another charitable purpose.
- have a purpose to promote or oppose a change to a law, policy or practice in the Commonwealth, a state or territory or another country where this furthers or aids another charitable purpose.

It's not okay for a charity to:

- have a purpose to promote or oppose a political party or a candidate for political office.
- have a purpose to engage in or promote activities that are unlawful.
- have a purpose to engage in or promote activities that are contrary to public policy (which, in this context, means the rule of law, our constitutional system, the safety of the public or national security).



Each of the above are ‘disqualifying political purposes’.

What does this mean in practice?

This means that a charity can campaign if it is satisfied that:

- what it is doing is advancing its charitable purpose
- its governing document (e.g. its constitution or rules) does not prevent the activity
- it does not have a purpose of advancing a particular political party or candidate or campaigning against a particular party or candidate
- it does not have a purpose of engaging in or promoting activities that are unlawful, and
- it does not have a purpose of engaging in or promoting activities that are contrary to public policy (i.e., the rule of law, our constitutional system, the safety of the public or national security).

How does the ACNC respond to public concerns about a charity’s activities?

The ACNC has an established process for receiving concerns about charities from the public. Before you raise a concern with the ACNC about a registered charity, make sure you have read this guidance including the FAQs below – these may resolve your concern. You can also try to resolve it by speaking with the charity directly. If you are unable to resolve the issue, you can talk to the ACNC. More information about raising a concern about a charity is available on our website at acnc.gov.au/raiseaconcern.



Frequently asked questions about advocacy and political campaigning

The following questions and answers give examples to assist a charity in making decisions about advocacy and political campaigning.

Does a charity need to be registered with a subtype of advancing public debate to carry out advocacy activities?

No. A charity may undertake advocacy activities without having a specific subtype of advancing public debate, as long as the advocacy is in line with its charitable purposes.

For example:

- A charity with the purpose of advancing education can advocate and campaign on education issues. However, if it engages in partisan advocacy, it runs the risk of being found to have a purpose of promoting or opposing a political party or candidate (see the example below).

Can a charity advocate for a change to government policy directly to elected representatives and public officials?

Yes, provided the advocacy is to promote the charitable purpose of the charity, or the interests of its beneficiaries.

For example:

- A charity that also has the charitable purpose of advancing social or public welfare and delivers services to victims of violence can promote a change to the law which would increase criminal penalties for perpetrators of family violence.

It can do this in a variety of ways – such as meeting with elected representatives or officials or making written submissions. In doing so, the charity should remain neutral on any party views. If board members are open and transparent about such engagement, this can help ensure public perceptions of neutrality.



Can a charity carry out activities which advocate for a change in government policy or law?

Yes, as long as the activities are carried out to promote the charitable purpose of the charity. However, if the activities explicitly support or endorse a particular political party or candidate, the charity runs the risk of being found to have a disqualifying political purpose.

For example:

- A charity with the purpose of advancing education should take care when producing and distributing flyers. A flyer that states 'Vote (named party) first to support local schools' may be perceived as explicitly supporting a particular party which may indicate a disqualifying political purpose.
- A charity with the purpose of advancing education can produce and distribute a flyer that states a party's policies in relation to education and allows readers to draw their own conclusions.

Can a charity make a submission to a public consultation or enquiry where legislative changes are being considered?

Yes. A charity can make a submission to a public enquiry into an issue that aligns with its charitable purpose or affects its beneficiaries.

For example:

- A charity with the purpose of advancing social or public welfare that provides services for homeless people can make submissions in relation to existing or proposed laws, government policies or practices dealing with housing and homelessness.



Can a charity have a purpose to carry out activities which are illegal in order to advocate for a change in government policy or law?

No. A charity cannot have a purpose to engage in or promote activity that is illegal.

For example:

- A charity with a purpose of advancing the natural environment cannot have a purpose of encouraging its members to engage in illegal methods such as intimidation, trespassing or assault to promote a change to the law regarding logging.

Should a charity support (or oppose) a particular political party or candidate?

No, because the charity will run the risk of being found to have a disqualifying political purpose, and therefore not being a registered charity. However, a charity is able to have a purpose of supporting (or opposing) a specific policy or law that is relevant to another charitable purpose.

For example:

- A charity that has the charitable purpose of advancing religion can't have a purpose of promoting a particular candidate because that candidate's views are consistent with the religious faith the charity promotes. If it promotes a particular candidate, it runs the risk of being found to have a disqualifying political purpose. But the charity can publish material advising of the candidate's views on issues that have implications for people of that faith.

Should a charity distribute how-to-vote cards on election day for a particular candidate or party?

No, because the charity will run the risk of being found to have a purpose of promoting or opposing a political party or candidate for political office, which is a disqualifying purpose, as explained above.



Should a charity produce material asking its members or supporters to vote for a particular candidate or party?

No, because the charity runs the risk of being found to have a disqualifying purpose of promoting a political party or a candidate for political office.

Can a charity produce material which compares and ranks the policies of political parties?

Yes. Assessing, comparing or ranking the policies of political parties or candidates as part of carrying out a charitable purpose is acceptable, as long as the material is related to the charity's purpose. However, the charity cannot have a purpose of explicitly promoting or opposing a political party. If the material produced explicitly tells members or supporters which party to vote for based on this ranking, the charity runs the risk of being found to have a disqualifying political purpose.

Charities should also ensure that they comply with requirements in electoral legislation (e.g. sections 328, 328B, 329, 351 of the *Commonwealth Electoral Act 1918* (Cth)).

For example:

- A charity with the purpose of advancing social or public welfare can produce and distribute flyers that compare the key features of the paid parental leave policies of various political parties.
- The website of a charity with the purpose of advancing the natural environment can state its policy on the development of renewable energy and compare it to the current policies of several political parties.

Can a responsible person of a charity such as a director or committee member support a particular outcome in an election?



Yes – providing it is solely in a personal capacity and not on behalf of the charity. It would not be prudent for officers and employees of a charity to use their position in a way that would imply that the charity itself endorses a particular candidate. Extra care should be taken with social media to ensure that the individual does not give the impression that they are speaking on behalf of the charity. Otherwise the charity runs the risk of being found to have a disqualifying political purpose of supporting a political party.

Can a charity spend money to publicly express its views on issues and policies of different political parties during an election?

Yes, as long as the spending is clearly tied to the charity's purpose and would not be perceived as an independent purpose of explicitly promoting or opposing a particular party or candidate. The charity should also check that the spending is permitted by its governing rules.

Members of the charity's governing body should also take care to comply with Australian electoral laws and refer to the [Australian Electoral Commission](#)'s guidance.

For example:

- A charity with the purpose of advancing culture can conduct an advertising campaign promoting the need for government to promote and support the work of artists in the community.

Can a member of a political party or a candidate standing for election appear at an event a charity is running?

Yes, provided that this would not amount to the charity having a purpose of promoting that candidate or party. It would be prudent for a charity to invite members of a range of political parties to attend the event to mitigate any risk of appearing to have a purpose of promoting a particular candidate or party. If members from a number of parties are invited or attending then the charity is unlikely to be found to have a purpose of promoting a particular party.

Can a charity hold an event to debate a matter of law or policy during the election campaign?



Yes, if the event is an open forum which promotes public debate on law or policy issues related to a particular charitable purpose.

For example:

- A charity with the purpose of advancing health by conducting research can host a public debate about government policies on major health initiatives. Inviting members and candidates representing a range of political parties and persuasions to the debate would mitigate any risk of the charity being found to have a purpose of promoting a particular political party or candidate.

Can a charity publish research on current or proposed laws, government policies or practices related to its charitable purpose?

Yes. However, if the charity explicitly tells its members or supporters which party to vote for based on the findings of the research, it runs the risk of being found to have a disqualifying political purpose.

For example:

- A charity with the purpose of advancing the safety and security of the Australian public that provides advice and support to victims of crime can produce research on the impact of current or proposed government policy on law enforcement and publish this research.

Should a charity donate money to a particular candidate or political party during an election campaign?

No, because the charity will run the risk of being found to have a purpose of supporting a particular candidate or party.

Can a charity accept donations or money from a particular candidate or political party during the election campaign?

Yes, but it should not accept a donation which requires the charity to promote the political candidate or party.



Can a charity provide accommodation space or other non-financial support to a particular candidate or political party?

It depends. If the support is outside of the charity's ordinary provision of services, the charity runs the risk of being found to have a purpose of supporting a political candidate or party.

For example:

- If a charity provided its office space and equipment to assist a particular candidate's campaign, it runs the risk of being found to have a disqualifying political purpose.
- A charity that owns a hall which it regularly allows organisations or individuals to hire for events may provide the same service on the same conditions to a particular candidate as long as the arrangement does not amount to having a purpose of explicitly supporting the candidate's party or campaign.

Do things change when an election has been called?

Once an election has been called, charities should take extra care to ensure that their activities do not indicate disqualifying political purposes.

Related ACNC resources

[Legal meaning of charity](#)

[Charitable purpose](#)

[Charity subtypes and charitable purpose](#)

[Examples of charitable purpose clauses](#)

External resources

[NFP Sector Freedom to Advocate Act 2013 \(Cth\)](#)

[Charities Act 2013 \(Cth\)](#)

[Commonwealth Electoral Act 1918 \(Cth\)](#)

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