Charities Legislation Amendment
Promoting Certainty, Trust and Independence Bill 2024
Explanatory Memorandum

What does the Bill do?

The Charities Legislation Amendment (Promoting Certainty, Trust, and Independence) Bill 2024 ('Bill'):

1. Amends the *Charities Act 2013* (Cth) ('*Charities Act*') to provide that advocacy in furtherance of all charitable purposes defined in the *Charities Act* is presumed to be for the public benefit.
2. Amends the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) ('*ACNC Act*') to establish a merit-based and transparent selection and appointment process for the Australian Charities and Not-for-profits Commission ('*ACNC*') Commissioner and to ensure that a person cannot be appointed as the Commissioner unless the Minister is satisfied that the person has appropriate qualifications.
3. Clarifies and strengthens the statutory intention of the *Not-for-Profit Sector Freedom to Advocate Act 2013* (Cth) ('*NFP Advocate Act*') by inserting an objects clause into the *NFP Advocate Act*, and also amends the *NFP Advocate Act* to clarify and broaden the prohibition on actions that might prevent charities from performing their advocacy role during the life of a government contract.

Proposed Amendments to the Charities Act 2013

This *Bill* amends the *Charities Act* to provide that political advocacy engaged in by charities, to promote or oppose a change to law, policy or practice that is in furtherance of or in opposition to their charitable purposes, is presumed to be a charitable purpose that is **for the public benefit**. This presumption of public benefit is a rebuttable presumption, i.e., it holds good only in the absence of contrary evidence. To understand why this proposed amendment is important, some background knowledge is required.

Background to the Charities Act and this proposed amendment

The *Charities Act* is primarily 'an Act to define charity and charitable purpose'.[1] The preamble to the *Charities Act*, which should be given the same weight for the purposes of statutory interpretation as any other part of an Act,[2] indicates that the definitions of charity and charitable purpose in the *Charities Act* are:

- based on 'familiar concepts from the common law' that applied 'until now.'
- modern definitions introduced to provide 'clarity and certainty as to the meaning of those concepts in contemporary Australia'.

The Meaning of 'Charity' and 'Charitable Purposes' under Commonwealth Law

The *Charities Act* expanded and replaced common law definitions of 'charity' and 'charitable purpose' at the Commonwealth level with statutory definitions. In the *Charities Act*, 'charity' means an entity:

- that is a not-for-profit ('*NFP*');[3]
- all the purposes of which are charitable purposes that are for the public benefit,[4] or purposes that are incidental or ancillary to, and in furtherance or in aid of, such purposes;[5] and
- none of the purposes of which are disqualifying purposes.[6]

What is a charitable purpose?

Charitable purposes are listed in the *Charities Act* under s 12(1).[7] These include traditional 'heads' of charity such as the advancement of religion,[8] education,[9] and social or public welfare (including relief of poverty),[10] but also include more contemporary purposes such as promoting or protecting human rights[11] and advancing the natural environment, and advocacy by charities to promote or oppose changes in the law, policy or practice in furtherance of or in opposition to charitable purposes.[12]

The presumption of public benefit

A charity's purposes must be for the public benefit (see meaning of charity above).[13] A charity's purpose is for the public benefit if achieving that purpose would be of benefit to the general public, or to a 'sufficient section of the general public'.[14]

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[1] As stated in its long title, which may be referred to as an aid to the construction of the Act.

[2] D Pearce, *Statutory Interpretation in Australia* (LexisNexis, 9th ed, 2019) [4.62].

[3] *Charities Act 2013* (Cth) s 5 (definition of 'charity' para (a)) ('Charities Act'). Section 3(1) provides that 'not-for-profit entity' has the same meaning as that found in the Income Tax Assessment Act 1997 (Cth).

[4] Ibid s 5 (definition of 'charity' para (b)(i)).

[5] Ibid s 5 (definition of 'charity' para (b)(ii)).

[6] Ibid s 5 (definition of 'charity' para (c)). See also at pt 2 div 3.

[7] The list is not exhaustive.

[8] *Charities Act* s 12(1)(d).

[9] Ibid s 12(1)(b).

[10] Ibid s 12(1)(c).

[11] Ibid s 12(1)(g).

[12] Ibid s 12(1)(j).

[13] Ibid s 5 (definition of 'charity' para (b)(i)).

[14] Ibid s 6(1)(b)(ii).

There is a special presumption of public benefit for certain **groups and activities**, such that the public benefit test set forth in section 6(1)(b) of the *Charities Act* does not apply. These include:

a) Relief of persons in necessitous circumstances (who may number only one or a few)[15]
b) Indigenous groups[16]
c) Open and non-discriminatory self-help groups[17]
d) Closed and contemplative religious orders who offer prayerful interventions at the request of members of the general public.[18]

In addition, certain **purposes** are presumed to be for the public benefit.[19] These are:

a) Preventing and relieving sickness, disease, or human suffering;
b) Advancing education;
c) Relieving the poverty, distress, or disadvantage of individuals or families;
d) Caring for and supporting the aged or individuals with disabilities; and
e) Advancing religion.

This *Bill* seeks to amend the *Charities Act* so that advocacy by charities to promote or oppose changes to law, policy or practice that are in furtherance of or in opposition to charitable purposes (pursuant to section 12(1)(l) of the *Charities Act*) are also presumed to be for the public benefit. This presumption of public benefit can be rebutted by contrary evidence.

Engaging in political advocacy is a defined charitable purpose in contemporary Australia

Section 12(1)(l) states:

> (1) In any Act:
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> *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:
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> (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
> (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.

Section 12(1)(l) of the *Charities Act* was introduced to clarify the common law position in contemporary Australia that promoting or opposing a change to any matter established by law, policy or practice in the Commonwealth, a State, a Territory or another country is a charitable purpose if that change is in furtherance or in opposition to a charitable purpose.

When the *Charities Act* was introduced in 2013, the 'political purposes doctrine' or the 'political objects doctrine', which exists in English common law,[20] and holds that political advocacy is not a charitable purpose,

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[15] Ibid s 8.
[16] Ibid s 9(1).
[17] Ibid s 10(1)(a).
[18] Ibid s 10(2).
[19] Ibid s 7.
[20] This doctrine is usually traced to the 1917 English case of *Bowman v Secular Society Ltd* [1917] AC 406. The doctrine was subsequently upheld in *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31 and *McGovern v Attorney-General* [1982] 1 Ch 321 ('McGovern'). In McGovern, Slade J held that 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. 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'. 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' (at 340). The English cases, upholding the doctrine, were initially applied by the High Court in *Royal North Shore Hospital of Sydney v Attorney-General* (NSW) (1938) 60 CLR 396.

had already been rejected by the High Court of Australia in 2010 in the case of *Aid/Watch Inc v Federal Commissioner of Taxation* ('*Aid/Watch*').[21] In that case, a majority of the High Court determined that political advocacy is of public benefit in Australia. Specifically, the majority recognised the constitutional value of the "agitation" for legislative and political changes undertaken in Australia as a public benefit.[22]

The *Aid/Watch* case

Responding to the reasoning in the English cases, 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'.[23] 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***'[24] by assisting the people, and the legislature, to fulfil their respective duties as the electors and the elected. The High Court therefore rejected the common law doctrine that excludes from charitable purposes the pursuit of 'political objects'.

Why is charitable purpose advocacy understood to be a constitutional process of public benefit?

In the Australian system of governance, voting is 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 the State', and s 24 requires that the members of the House of Representatives be 'directly chosen by the people of the Commonwealth'. In *Unions NSW v New South Wales [No 2]* ('*Unions NSW [No 2]*'),[25] 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 [Australian Capital Television Pty Ltd v Commonwealth*[26]], Deane and Toohey JJ observed that the implied freedom:
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> > 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.[27]

The majority decision in *Aid/Watch* confirms the view that the political advocacy or 'agitation' performed by charities plays an information dissemination role in the Australian system of representative and responsible government created by the *Constitution*. The fact that charities are entities rather than the elected, the electors, or other individuals is irrelevant if their 'agitation for legislative and political change' promotes political communication. Indeed, in another, subsequent High Court decision specifically concerning the implied freedom of political communication in Australia, Nettle J warns that our political sovereignty may be infringed 'by restrictions on political communications to and from persons *other than electors*'.[28] The same

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[21](2010) 241 CLR 539 ('*Aid/Watch*').

[22]Ibid 554–7 [39]–[49] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

[23]Ibid 556 [45].

[24]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*').

[25][2023] HCA 4 ('*Unions NSW [No 2]*').

[26](1992) 177 CLR 106.

[27]Ibid 13 [40] (Kiefel CJ, Bell and Keane JJ) (citations omitted), quoting *ACTV* at 174.

[28]*McCloy v NSW* (2015) 257 CLR 178, 257 [216] (Nettle J) (emphasis added).

sentiments are evident in the reasoning of Mason CJ in a much earlier case, *Australian Capital Television Pty Ltd v Commonwealth* ('*ACTV*'),[29] cited with approval in *Unions NSW [No 1]*:

> [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.[30]

These findings indicate that the agitation of political debates by groups other than electors, such as charities, encourage 'the people to exercise a free and informed choice as electors'.[31] Insofar as charities disseminate information bearing on electoral processes and choices concerning changes to any matter established by law, policy or practice, they have a role to play in creating a fertile environment for informed voting, ***and the public benefit of this, constitutionally speaking, is presumed***. 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'.[32]

Charitable purpose advocacy must be in promotion of or in opposition to changes that further or oppose charitable purposes.

Note, the majority in *Aid/Watch* decided political advocacy is of public benefit before turning to consider the purpose of Aid/Watch's advocacy. This second consideration undertaken by the majority was whether the purpose of the advocacy 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*.[33] In that case, decided in 1891, Lord Macnaghten held that 'the popular meaning of the words "charity" and "charitable" does not coincide with their legal meaning.' 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 education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding "heads"'. 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 (*43 Eliz I, c 4). The four 'heads' of charity are still relied on today in the Australian states and territories to define charitable purposes. As stated above, at the Commonwealth level, charitable purposes are listed in the *Charities Act* and this list extends beyond the four heads of charity traditionally recognised, by Lord Macnaghten in *Pemsel*, at common law.

In *Aid/Watch*, the majority held that the 'agitation for legislative or political changes'[34] being generated by *Aid/Watch* 'concern[ed] the efficiency of foreign aid directed to the relief of poverty'.[35] Presumably working by analogy, the majority held that the public debate in respect of 'activities of government'[36] was charitable because that debate concerned the first head of charity, poverty relief.[37] 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. However, their advocacy promoting or opposing 'a change to any matter established by law,

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[29] *ACTV* 139.

[30] *Unions NSW [No 1]* 551 [28] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), citing ibid.

[31] *Lange* (1997) 189 CLR 520 at 560 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ), quoted in *Unions NSW [No 1]* at 571 (Keane J), *McCloy* at 193–4 [2], 206 [42] (French CJ, Kiefel, Bell and Keane JJ), 228 [118] (Gageler J), 280 [303] (Gordon J).

[32] Ibid 382.

[33] [1891] AC 531, 583.

[34] *Aid/Watch* (n 20) 556 [42] (French CJ, Gummow, Hayne, Crennan, and Bell JJ), quoting *Royal North Shore Hospital of Sydney v Attorney-General* (NSW) (1938) 60 CLR 396 at 426 (Dixon J).

[35] Ibid 557 [47] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

[36] Ibid 557 [48] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

[37] Ibid 557 [47].

policy or practice in the Commonwealth, a State, a Territory or another country' must be in furtherance of or in opposition to one of the charitable purposes listed in s 12(1)(a)–(k).

Why does the Charities Act need to be amended?

As explained above, an entity is charitable if:

- it is an NFP,
- none of its purposes are disqualifying purposes, and
- its purposes are charitable purposes (or are incidental or ancillary to such charitable purposes) that are for the public benefit.

Thanks to the findings in the *Aid/Watch* case, charitable purpose advocacy is understood to be a charitable purpose under Australian common law. This law is now codified in section 12(1)(l) of the *Charities Act*. When the *Charities Act* was introduced, it also broadened the range of purposes that are *presumed* to be of public benefit. Charitable purpose advocacy should have been included in this list of charitable purposes presumed to be for the public benefit. This oversight needs correction.

Position at common law

At common law, the requirement of public benefit has two elements.

- The purpose(s) must benefit society generally.
- An entity must be of benefit to the public or a section of the public.[38]

In terms of the first element, at common law, purposes that fall within one of the first three heads of charity (see discussion above) have traditionally been *presumed* by the courts to be for the benefit of the community and therefore charitable, unless the contrary is shown. At common law, this presumption does not apply to the fourth head of charity. The courts have held that in the case of these purposes, their public benefit must be affirmatively established.[39] This is common sense since each such purpose falling under this head is worked out by analogy on a case-by-case basis (see above).

This common law approach to determining public benefit, based on the four heads of charity recognised at common law, was inserted into the *Charities Act* without sufficient consideration given to the expanded list of charitable purposes in s 12(1) that better reflect contemporary Australia and its *Constitution*.

What the Charities Act says now

The *Charities Act* currently provides that the following purposes are presumed to be for the public benefit, if there is no contrary evidence:

a) preventing and relieving sickness, disease, or human suffering;
b) advancing education;
c) relieving the poverty, distress or disadvantage of individuals or families;
d) caring for and supporting the aged or individuals with disabilities; and
e) advancing religion.

Not all these purposes are presumed to be of public benefit at common law. There is no common law presumption of public benefit in respect of charitable purposes: (a) preventing and relieving sickness, disease, or human suffering; and (d) caring for and supporting the aged or individuals with disabilities.

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[38] *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297; *Williams' Trustees v Inland Revenue Commissioners* [1947] AC 447.
[39] *National Anti-Vivisection Society v Inland Revenue Commissioners* [1955] AC 572 at 42 per Lord Wright.

One may argue that these two purposes are concerned with relieving poverty, which has always been presumed to be of public benefit. Nonetheless, these are instances of how the *Charities Act* clarifies the common law position; and sets an example of how the *Charities Act* is intended to operate.

A contemporary law for contemporary Australia

The common law presumption of public benefit is based on the traditional, common-law categorisation of charitable purposes under 'four heads'—a categorisation distilled in the 19th century based on a statute introduced in the 17th century. As stated above, the *Charities Act* is 'an Act to define charity and charitable purpose,' and its preamble indicates that whilst the definitions of charity and charitable purpose may be based on 'familiar concepts from the common law,' the *Charities Act* is intended to provide 'clarity and certainty' as to the meaning of these concepts in contemporary Australia.

In 2010, the Australian High Court held that political advocacy is of **public benefit** because of its constitutional value to our democracy, and it is a **charitable purpose** if the advocacy relates to a charitable purpose. The High Court of Australia is the apex court of the Australian judicial system. Such statement should be considered the correct position at law concerning the public benefit of political advocacy as a presumption if there is no evidence to the contrary. This *Bill* recognises it as such. This important proposed amendment to the *Charities Act* will clarify the common law on this point and reflect contemporary Australian law and values by ensuring that advocating in promotion of or in opposition to changes to law, policy or practice that further or oppose a charitable purpose listed in section 12 (1)(a) to (k) is presumed to be of public benefit.

Is this proposed amendment contentious?

The proposed amendment should not be considered contentious. Any presumption of public benefit can be rebutted. A purpose that is demonstrated to be harmful or detrimental to the public cannot be of public benefit. Moreover, by definition, a purpose that does not align with public policy cannot be beneficial so as to be charitable. Nor is benefit to the public, or a section of it is, determined by the level of public support for the object in question.

It also does not matter if the benefits of political advocacy may sometimes seem intangible. For a long period, it was held by the courts that entities engaged in political advocacy were not charitable because, according to Lord Parker of Waddington, in *Bowman v Secular Society Limited*, 'the court has no means of judging whether a proposed change in the law will or will not be for the public benefit, and therefore cannot say that a gift to secure the change is a charitable gift'.[40] The benefits were understood as intangible and/or difficult to assess in a form that could be adduced in evidence. This finding was rejected by the majority of the Australian High Court in 2010 in the *Aid/Watch* case, where the Australian High Court held that courts are not being 'called upon to adjudicate the merits of [the] particular course of legislative or executive action or inaction',[41] and whilst the public benefit generated by constitutional processes such as charitable purpose advocacy may not always be easily measured, its agitative effect on public debate is of public benefit in a democratic society such as Australia.

As stated above, the *Charities Act* is primarily 'an Act to define charity and charitable purpose'. This includes clarifying the rules for determining whether a purpose is for the public benefit in a manner that reflects contemporary Australian law and values. Charities in Australia lawfully engage in political advocacy to pursue their charitable purpose or purposes. This advocacy serves our constitutional democracy; and it is a familiar aspect of the Australian political landscape. In Australia, the constitutional value and public benefit of political advocacy is presumed, pursuant to the *Aid/Watch* case; and the purpose of the proposed amendment to the *Charities Act* is to make this clear.

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[40] [1917] AC 406 at 442.
[41] *Aid/Watch* (n 20) at 556 [45].

Will the proposed amendment have a financial impact?

The *Bill* will not have a direct financial impact on the *NFP* sector or the government.

Is the proposed amendment compatible with human rights?

The proposed amendment does not limit any human rights, nor propose any offences or penalties. It is compatible with the human rights and freedoms recognised or declared in the international instruments listed in subsection 3(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) and would further guarantee protection and promotion of many of them.

Proposed Amendments to the Australian Charities and Not-for-profits Commission Act 2012 (ACNC Act)

Currently, section 115-5 of the *ACNC Act* only requires that:

(1) The Commissioner is to be appointed by the Governor-General by written instrument.

(2) The Commissioner is to be appointed on a full-time basis.

The *Bill* inserts a process that is consistent with other recent amendments to federal appointment processes, such as the appointment of Deputy Presidents to the proposed Australian Administrative Review Tribunal, the appointment of Commissioners to the Human Rights Commission and the appointment of non-executive Directors to the boards of the ABC and SBS.

This amendment should be supported because it creates greater coherence and consistency in federal appointment processes and promotes transparency and integrity in government. Appointing a properly qualified Commissioner to lead the ACNC also promotes efficiency and demonstrates prudent government spending.

The *Bill* inserts the following provisions:

A definition of merit-based:

> ***merit-based***: an assessment process for an appointment to office of the Commissioner is ***merit-based*** only if:
>
> (a) an assessment is made of the comparative suitability of the candidates for the performance of the functions and powers of the office of Commissioner, using a competitive selection process; and
>
> (b) the assessment is based on the relationship between the candidates' skills, expertise, experience and knowledge and the skills, expertise, experience, and knowledge required to perform the functions and powers of the office of Commissioner.

New provisions regarding the appointment process and assessment panels:

> **115-5 Appointment**
>
> (1) The Commissioner is to be appointed by the Governor-General by written instrument on the recommendation of the Minister.
>
> (2) Before the Minister makes a recommendation to the Governor-General, the Minister must be satisfied that the person to be recommended for appointment as Commissioner was assessed by a panel established under subsection (3) as suitable for the appointment through an assessment process that:
>
> (a) was merit-based; and
>
> (b) included public advertising of the position; and
>
> (c) complied with the requirements (if any) prescribed by the regulations.
>
> Note: Public advertising of the position of Commissioner should include, at a minimum, advertising in the national media, such as in national or other broad-reaching newspapers, as well as on government websites.

Assessment panels

(3) The Minister must establish a panel to assess the suitability of candidates applying for appointment as Commissioner.

(4) The assessment panel must include at least one representative of the charity and not-for-profit sector who is not an employee of an Australian government agency.

(5) The regulations may make provision for and in relation to assessment panels.

(6) Without limiting subsection (5), and subject to subsection (4), the regulations may make provision for and in relation to the following:

(a) the establishment of assessment panels;

(b) the composition of assessment panels;

(c) the operation and procedures of assessment panels;

(d) the methodology to be used by assessment panels in assessing candidates for appointment as a member;

(e) the provision of assistance by the ACNC to assessment panels, including secretariat services and clerical assistance.

Qualification for appointment

(7) A person must not be appointed as Commissioner unless the Minister is satisfied that the person has appropriate expertise in one or more areas relevant to the establishment, functions and powers of the Commissioner.

Period and basis of appointment

(8) Subject to subsection 115-10(1), the Commissioner holds office for a period of 5 years unless a shorter period is specified in the instrument of appointment.

(9) A person must not be appointed as the Commissioner under section 115-5(1) for a period if the sum of the following periods exceeds 10 years:

(a) that period; or

(b) any periods of previous appointment of the person as the Commissioner under that section and section 115-10(1).

(10) The Commissioner is to be appointed on a fulltime basis.

Enables the term of appointment to be extended by up to one year:

115-10 Extended appointment

(1) The appointment of a person as the Commissioner may be extended for a period of up to 1 year by written instrument made within 6 months before the end of the period specified in the person's instrument of appointment.

(2) Paragraph 115-5(2)(b) does not apply in relation to the extension of an appointment of a person under subsection 115-10(1).

Breakdown of the proposed amendment:

Proposed amendment 115-5(1)

Appointment by the Governor-General

This is a standard statutory provision commonly found in other statutes. It is proper for a Commissioner to be appointed by the Governor-General as these appointments are conventionally an exercise of prerogative power.

On the recommendation of the Minister

The office of Commissioner is part of the executive branch of government, and it is therefore conventional for these appointments to be made by the government of the day. Note this practice is not without its critics because it leaves the Minister with the final discretion to choose the Commissioner, and this is where bias or partisanship in the appointment process can occur. To safeguard the process, this *Bill* requires a merit-based appointment process (see below), and limits how the Minister may exercise their discretion (see below).

Proposed amendment 115-5(2)

This proposed clause ensures that appointments to the office of Commissioner are publicly advertised and based on merit. These processes are essential to the legitimacy and credibility of the Commission and its leadership. They increase the transparency of the appointment process and ensure the Minister does not appoint a person to the office of Commissioner on political or personal grounds. Requiring the Commissioner to be selected through a merit based and open process also maintains the *ACNC*'s essential institutional independence, which is essential to its integrity. Making this a statute-based process also means that it cannot be ignored or easily amended or repealed.

Merit-based

The *Bill* changes the law so that the Minister can only recommend a person for appointment if the Minister is satisfied that the person has been "assessed by a panel established under sub-section (3) as suitable for the appointment through an assessment process" that is **merit-based** (115-5(2)(a)). **The *Bill* inserts a definition of 'merit-based' in the *ACNC Act*.** The definition has two limbs, and each must be satisfied for a process to be merit-based.

> ***merit-based***: an assessment process for an appointment to office of Commissioner is ***merit-based*** only if:
>
> (a) an assessment is made of the comparative suitability of the candidates for the performance of the functions and powers of the office, using a competitive selection process; and
>
> (b) the assessment is based on the relationship between the candidates' skills, expertise, experience and knowledge and the skills, expertise, experience and knowledge required to perform the functions and powers of the office of Commissioner.

The references to 'assessed' and an 'assessment process' (and 'assessment panels' in cl 115-5(5) below) in the proposed amendment strengthen the use of the term 'merit-based'. These terms mean that the person's suitability for the appointment is based on an opinion or judgement formed by measuring or evaluating a person's suitability for appointment as Commissioner.

The proposed amendment in 115-5(2) addresses the broad contempt, by the Australian community, of political stacking within the Australian public sector and the growing expectation that senior public officers be appointed based on merit. The proposed amendment is also a recognition that other similar and comparable appointment processes in other Acts, for the appointment of senior public officers, require that the selection of an individual for appointment to positions similar to that of Commissioner be the result of a process that is merit-based and includes public advertising of such position. For example, Parts 3 and 3A of

the *Special Broadcasting Service Act 1991* (Cth) and Part IIIA of the *Australian Broadcasting Corporation Act 1983* (Cth) establish an independent nomination panel, at arms-length from the Government, and set out detailed requirements in relation to how non-executive directors of the relevant boards of such entities are selected. Sections 8A, 8B, 46B and 46MC of the *Australian Human Rights Commission Act 1986* (Cth) ('*HR Commission Act*') provide an example of a less stringent appointment process, that is nonetheless required to be open and merit-based. The process proposed under this *Bill* is most similar to the process set out in the *Administrative Review Tribunal Act 2024* (Cth) ('*ART Act*'), which was recently introduced as part of the current Government's integrity reforms. The process set out in the *ART Act* is the approach upon which the amendments in the proposed *Bill* have been modelled, given the *ART Act* includes an explicit definition of what 'merit-based' means and puts beyond doubt the legislative requirement to use an assessment panel as part of such merit-based process for appointments.

Currently, ACNC Commissioner appointments are made by the Governor-General, on the recommendation of the Government of the day. This broad exercise of ministerial discretion is outdated and does not sit well with contemporary Australian democratic values and community expectations regarding political stacking within the Australian public sector. The current process specifies very general criteria against which candidates are to be assessed and provides no process for appointments and has no requirements regarding transparency in relation to how candidates are selected. Outdated processes, such as the current ACNC Commissioner appointment process, lead to appointments being politically motivated and diminishes the level of expertise of ACNC Commissioners on important issues facing the charity sector.

The December 2017 appointment of Dr Gary Johns, as ACNC Commissioner, offers a prime example of how the current appointment process of ACNC Commissioners is not suitable. During his time as head of the conservative think tank, the Institute for Public Affairs, Dr Johns steered the 'NGO Watch' campaign, which specifically targeted civil society organisations engaged in policy advocacy. Dr Johns maintained the controversial and ideologically driven view that the relationship between charities and donors is that of a 'market' in which donors provide funding with the expectation that they be provided information and have the ability to observe how their funding is utilised.[42] He heavily focused his efforts as Commissioner upon compliance within the sector (as opposed to education and building a stronger charity sector),[43] was critical of and opposed public funding of the charity sector and the majority of advocacy undertaken across the charity sector – for example, his infamous critique of the charity Beyond Blue's queer mental health advocacy.[44] Despite these seemingly disqualifying characteristics, Dr Johns was appointed as ACNC Commissioner.

Public advertising

The *Bill* amends the *ACNC Act* so that the appointment process commences by public advertising of the position (115-5(2)(b)). This proposed amendment will ensure that the process is open and transparent and signals that anyone who is qualified and meets the selection criteria may apply. Public advertising includes advertising in the national media, such as in national or other broad-reaching newspapers, as well as on government websites, as relevant. This should attract a wide cohort of applicants.

Regulations

Clause 115-5(2)(c) requires that the process comply with the requirements (if any) prescribed by the regulations. This provision makes clear that regulations may be made in relation to the assessment process generally. Clause 115-5(5) (see below) makes clear that specific regulations may be made for and in relation to assessment panels. Clause 115-5(6) is broader than this, and ensures that there is power to make regulations for and in relation to the entire process established under clause 115(2).

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[42] Johns, G 2019,' The ACNC's five-year strategy: A more visible charity market', Third Sector Review, vol. 25, no. 2, pp. 259–271

[43] Johns, G 2022, 'The ACNC – 10 years on: Reflections from the Commissioner, the Hon Dr Gary Johns. Australian Charities and Not-for-profits Commission. 9 June 2022, accessed on 30 December 2022. Retrieved from https://www.acnc.gov.au/media/news/acnc-10-years-reflections-commissioner-hon-dr-gary-johns

[44] Williams, W 2017, 'Who is Gary Johns?' Pro Bono Australia. 7 December 2017, Accessed 30 December 2022. Retrieved from https://probonoaustralia.com.au/news/2017/12/who-is-gary-johns/

Proposed amendment 115-5(3) and 115-5(4)

Assessment panels

The *Bill* requires the Minister to establish assessment panels for the purposes of assessing the suitability of candidates who have applied for appointment as Commissioner. Without this provision, the Minister could conduct the merit-based assessment themselves. Such is the case in the *HR Commission Act*. As stated, this *Bill* proposes a higher threshold in line with the more recently debated process now set out in the *ART Act*, which puts beyond doubt the legislative requirement to use an assessment panel as part of the merit-based process for appointments.

Involvement of a sector representative in the assessment

The *Bill* requires that **assessment panels must include at least one representative of the charity and *NFP* sector who is not an employee of an Australian government agency**. The Commissioner is responsible for registering entities as *NFP* entities, administering the national regulatory framework, and assisting registered entities in complying with and understanding the *ACNC Act*, by providing them with guidance and education. It is therefore important that a representative of the sector, who is not an employee of the *ACNC* or another government agency, is involved in the assessment of potential candidates for the office of Commissioner. Input from the charity sector into the suitability of each candidate is therefore vital. The 2017 appointment of Dr Gary Johns was made easier because there were few limits on the Minister's discretion to appoint him. Dr Johns was partisan – known for his antipathy towards the sector, particularly charities that engage in political advocacy. A process that is open to a wide pool of candidates, who must be assessed by a panel independent of the Minister, helps to prevent controversial political appointments such as Dr Johns.

Proposed amendment 115-5(5) and 115-5(6)

Regulations for and in relation to assessment panels

The *Bill* allows regulations to be made for and in relation to assessment panels (115-5(5)); and suggests these regulations make provision for and in relation to the following (115-5(6)):

(a) the establishment of assessment panels;
(b) the composition of assessment panels;
(c) the operation and procedures of assessment panels;
(d) the methodology to be used by assessment panels in assessing candidates for appointment as a member;
(e) the provision of assistance by the *ACNC* to assessment panels, including secretariat services and clerical assistance.

This proposed amendment ensures that certain aspects of the assessment process are front of mind when making regulations for and in relation to assessment panels. The suggested list of subject matter is not exhaustive. Proposed section 115-5(6) is made the dominant provision by inclusion of the words 'Without limiting paragraph 115-5(5)'.[45] Note also that the power to make regulations is subject to the requirement in 115-5(4) that an assessment panel include a representative of the charity and *NFP* sector who is not an employee of an Australian government agency.

Although the Minister is required to establish an assessment panel, the Minister still has discretion regarding what aspects of the assessment process should be set out in regulations, including the extent of the Minister's involvement (for example, will a short list of candidates be identified and submitted to the Minister for further assessment; or will one person be selected by the assessment panel as the best candidate for

[45] D Pearce, *Statutory Interpretation in Australia* (LexisNexis, 9th ed, 2019) [4.53].

appointment and this person be recommended to the Minister?). Accordingly, these regulations will be important to ensure that the assessment panel operates in a manner that ensures the assessment process is not influenced by political partisanship or bias.

Proposed amendment 115-5(7)

The appointment process should be designed to ensure the Commissioner is appropriately qualified and competent to fulfil their function and, as much as possible, to eliminate political appointments. This clause ensures that even if the Minister chooses a politically palatable candidate, the Minister must have chosen that candidate from a pool of candidates who have been assessed on merit and who the Minister is satisfied is qualified to be the Commissioner. Although the final recommendation is made by the Minister, section 115-5(7) ensures that a person must not be appointed as Commissioner unless 'the Minister is satisfied that the person has appropriate expertise (i.e. expert skill or knowledge) in one or more areas relevant to the establishment, functions and powers of the Commissioner'. This provides a second tier of accountability and means that the Minister must themself be satisfied that they are recommending a person who is appropriately qualified to fulfil the appointment.

This provision does not identify specific qualifications or training and allows flexibility in determining whether a candidate has the expertise to be Commissioner. Importantly, it sets out the minimum requirements to be appointed. Whilst the Minister may be able to choose from a wide range of persons who have been 'assessed as suitable for the appointment through an assessment process;' at the very least, the Minister must always be satisfied that the chosen candidate has appropriate expertise in one or more areas relevant to the establishment, functions and powers of the Commissioner. (The merit-based assessment of a candidate will include a wider range of considerations and selection criteria.)

A broad discretionary power is difficult to challenge. Inserting explicit criteria limiting the Minister's discretion increases accountability by clarifying the grounds on which a person should be appointed to the office of Commissioner.

Proposed amendment 115-5(8)-(10)

Period of appointment

The *Bill* maintains the current appointment period of five years. A shorter period may be agreed to, but this shorter period must be specified in the instrument of appointment.

The *Bill* also changes the law to limit the period any one person may serve as Commissioner in their lifetime. A person cannot serve as Commissioner for more than ten years in total, either consecutively or non-consecutively. This prevents the possibility of unlimited tenure and reflects existing practice in appointments, whereby commissioners are typically appointed for a five-year initial term and may be reappointed for a subsequent term. If a person completes an initial period of appointment as Commissioner, and then seeks to be appointed to the position again, either consecutively after their initial term, or in future years, the recruitment of that person must be through a merit-based and publicly advertised selection process in accordance with new paragraph 115-5 (2)(b).

Basis of appointment

The *Bill* does not change the basis of appointment. The Commissioner may only be appointed on a salaried/fulltime basis. Given the workload associated with the role, it could not be adequately performed by a person who works on a sessional basis.

115-10 Extended appointment

This clause inserts a new provision in the *ACNC Act* to enable the Commissioner's period of appointment (five years) to be extended once only for a period of up to one year. This clause allows flexibility for commissioners

to be reappointed on a short-term basis, when necessary, without undergoing a merit-based appointment process. For example, to complete existing projects being undertaken.

The extension must be confirmed within six months before the end of the period specified in the person's instrument of appointment. In this instance, the further appointment does not need to be assessed on merit in the public, competitive process provided for in this *Bill*.

Is the proposed amendment contentious?

The proposed amendment should not be considered contentious. The proposed process was chosen because it builds on other recent amendments to federal appointment processes. This proposed amendment should be supported because it creates greater coherence and consistency in federal appointment processes and promotes transparency and integrity in government. Appointing a properly qualified Commissioner to lead the *ACNC* also promotes efficiency and demonstrates prudent government spending.

Will the proposed amendment have a financial impact?

The *Bill* will not have a direct financial impact on the *NFP* sector.

The *Bill* will have a minor financial impact on Commonwealth Government departments and the *ACNC* to implement merit-based selection and appointment processes.

Is the proposed amendment compatible with human rights?

The proposed amendment does not limit any human rights, nor propose any offences or penalties. It is compatible with the human rights and freedoms recognised or declared in the international instruments listed in subsection 3(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Proposed Amendments to the Not-for-profit Sector Freedom to Advocate Act 2013.

The *NFP Advocate Act* was intended to achieve two outcomes:

1. Provide a clear and tangible response to the advocacy concerns raised by the *NFP* sector by prohibiting the use of and invalidating 'gag clauses' in Commonwealth agreements. 'Gag clauses' were used in Commonwealth agreements to restrict or prevent the *NFP* sector from engaging in debate or lobbying on Commonwealth policy.[46]
2. Enable ongoing positive engagement, together with open communication and debate, between the Federal Government and the *NFP* sector.

Unfortunately, the *NFP Advocate Act* appears not to be working. Independent, and anecdotal research indicates that *NFP*s are concerned that government officials were still trying to prevent *NFP* entities that are party to Commonwealth agreements from engaging in charitable purpose advocacy during the management of such agreements.[47]

To address these concerns, this *Bill* will:

1. insert an objects clause into the *NFP Advocate Act* to explicitly recognise the essential independent nature of the *NFP* sector, and the importance of the sector's participation in lawful public policy debate and development.
2. broaden the application of the prohibition in the *NFP Advocate Act* to include conduct occurring during the negotiation, tender, management, extension or renewal of Commonwealth agreements.

The proposed amendments are as follows:

The introduction of an objects clause:

2A Objects of this Act

The objects of this Act are to ensure:

(1) the Commonwealth respects the not-for-profit sector's independent participation in lawful public policy debate and development; and

(2) that Commonwealth agreements are not used by the Commonwealth to supress participation in lawful public policy debate and development by not-for-profits.

Amendment of main provisions

Section 4

Insert:

(3) A Commonwealth agency or officer must not engage in or use prohibited conduct during the negotiation, tender, management, extension or renewal of a Commonwealth agreement.

Note 1: Agreement management refers to all the activities undertaken by an agency, after a Commonwealth agreement has been signed or commenced, to manage the performance of the contract (including any corrective action) and to achieve the agreed outcomes.

[46] A Commonwealth agreement is defined in the Act as 'a legally binding agreement between an agency (on behalf of the Commonwealth) and a not-for-profit entity' *Not-for-profit Sector Freedom to Advocate Act (2013)* (Cth) s 3. Agency is also defined in section 3 of the Act to mean an entity mentioned in paragraph (a), (b), (c), (d), (e), (f) or (h) of the definition of ***agency*** in subsection 6(1) of the *Privacy Act 1988*.

[47] See *Voices for Change* survey, https://www.strongercharities.org.au/our-work/voices-for-change-survey/, accessed on 8 May 2024.

Section 5

Insert:

(1A) ***Prohibited conduct*** is any conduct by a Commonwealth agency or officer which directly or indirectly, either by words (whether written or spoken), by conduct or a combination of both, restricts, prevents, discourages, persuades or influences a not-for profit entity (including staff of the not-for-profit entity) from commenting on, advocating support for or opposing a change to any matter established by law, policy or practice of the Commonwealth.

Breakdown of the proposed amendment.

Proposed amendment – the objects clause

The proposed objects clause seeks to make it clear that the Commonwealth respects the *NFP* sector's independent participation in lawful public policy debate and development. This enhances protection for *NFP* entities to continue to comment on, advocate support for or oppose changes to Commonwealth law, policy or practice without fear that a Commonwealth agency will use its power by engaging in prohibited conduct as defined in the *NFP Advocate Act*.

An objects clause is part of the legislation in which it appears.[48] It enables the *NFP Advocate Act* to be interpreted in a purposive manner.[49] Like any other provision in legislation, a purpose or objects clause must be interpreted in its context.[50] An objects clause cannot control clear statutory language or command a particular outcome or exercise of discretionary power.[51]

This *Bill* should be viewed as part of this government's wider commitment to reforming the Australian public service and to integrity, honesty and accountability in government. The proposed amendments seek to ensure that Commonwealth agreements between agencies and *NFP* entities are negotiated and managed transparently and in good faith. This is essential in order to reduce unnecessary regulatory obligations on the Australian *NFP* sector and wasting of time and resources of *NFP* entities, which reduces their ability to perform their core missions of public benefit.

Proposed amendment to sections 4 and 5

NFP entities rely on Commonwealth agreements to further their charitable missions for the public benefit. Notwithstanding the *NFP* sector's reliance on Commonwealth agreements, the sector must be able to negotiate robustly with Commonwealth agencies, agree values based on their own experience and mission and not those of the government of the day, and carry out work that delivers the stated purpose of the organisation.[52] To perform their essential functions, *NFP* entities must also be able to continue to challenge others and engage in public debate as necessary during the life of an agreement. These freedoms are necessary for organisations to perform their essential functions.[53]

Currently, the prohibitions in sections 4 and 5 of the *NFP Advocate Act* are limited to the prevention of certain terms being used in a Commonwealth Agreement and do not capture conduct by Commonwealth agencies or officers which may restrict, prevent, discourage, persuade or influence *NFP* entities to cease lawful advocacy activities.

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[48] *Acts Interpretation Act 1901* (Cth) s 13(1).
[49] Ibid s 15AA.
[50] D Pearce, *Statutory Interpretation in Australia* (LexisNexis, 9th ed, 2019 [2.21].
[51] See Jeffrey Barnes, 'Statutory Objects Provisions: How Cogent is the Research and Commentary?' (2013) 34(1) *Statute Law Review* 12.
[52] Matthew Smerdon, 'Allies Not Servants: Voluntary Sector Relations with Government' (Working Paper No 1, Baring Foundation, 2006) 5.
[53] Ibid.

The purpose of these amendments is to enhance the protection of *NFP* entities (including the staff of *NFP* entities) when commenting on, advocating support for or opposing a change to any matter established by law, policy or practice of the Commonwealth.

The *Bill* does so by broadening the application of the main operative section in the *NFP Advocate Act* to include conduct that occurs during the tender, negotiation, management, extension or renewal of a Commonwealth agreement. The *Bill* achieves this by defining 'prohibited conduct' separately from 'prohibited content' to ensure clarity regarding Commonwealth agencies and officers' obligations during the tender, negotiation, management, extension or renewal phases of a Commonwealth agreement.

These amendments are necessary to ensure that Commonwealth agencies or officers cannot use their powers to grant, extend or renew Commonwealth agreements to prevent or influence *NFP* entities from engaging in political advocacy.

While this *Bill* protects the independence of *NFP* entities, it also strengthens public trust in government institutions by clarifying what a lawful exercise of power is in the context of negotiating, drafting, and managing Commonwealth agreements.

The *Bill* does not expand the scope of the *NFP Advocate Act* to include conduct beyond the negotiation, tender, drafting, management, extension or renewal of Commonwealth agreements.

Will the proposed amendment have a financial impact?

The *Bill* will not have a direct financial impact on the *NFP* sector or the government.

Is the proposed amendment compatible with human rights?

The *Bill* engages and promotes the right of freedom of expression as set out in Article 19 of the *International Covenant on Civil and Political Right* (*ICCPR*). The *Bill* will prevent the Commonwealth from including clauses in Commonwealth agreements that prevent or restrict *NFP* entities from advocating on Commonwealth policy issues.

The *Bill* does not relate to any of the other applicable rights or freedoms outlined in the *Human Rights (Parliamentary Scrutiny) Act 2011*, such as encompassed in the *ICCPR*.