

The importance of advocacy in philanthropy and current

Government directions

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Philanthropy Australia, the national peak body, defines philanthropy as:

“The planned and structured giving of money, time, information, goods and services, voice and influence to improve the wellbeing, of humanity and the community.”

“Advocacy” is another term for the “giving of voice” which is part of this definition.

It seems self evident to me that all philanthropic and charitable organisations need to give voice and to advocate in various ways for the causes they seek to serve, but this is not universally accepted. The Rev. Tim Costello in a 2003 article quoted the words of the Brazilian Bishop Dom Helder Camara to make this point: “when I feed the poor they call me a saint. When I ask why the poor are poor they call me a communist”, noting that this “insight goes to the very heart of the current controversy in the charity versus advocacy debate.”¹

In recent years charitable organisations in Australia have been uncertain about the extent to which they can engage in advocacy. Lessening that uncertainty is the purpose behind the paper published by Changemakers Australia and Leslie Falkiner-Rose in 2007, “Funding Advocacy for Social Change: Clarifying the Rules for Grantmakers”, and of today’s workshop.

¹ Costello, Tim (2003) “Charity and advocacy” The Australia Institute No 36 September 2003

The Rudd Government accepts the role of advocacy as an essential part of charitable and philanthropic work. For that reason the Government has moved quickly to ensure that no contract between charitable organisations and the Commonwealth will contain “anti-advocacy “clauses of the kind promoted by the former Government.

My purpose today is to canvass current issues and directions for advocacy, and invite questions about further possible changes to regulation affecting advocacy.

The environment for advocacy by charitable organisations has shifted substantially, and for the better, since Trudy Wyse wrote at the start of a paper in 2000 : “With the election in the 1990s of conservative governments at state and federal levels, there has been an increasingly aggressive stance towards groups and organisations undertaking advocacy and social action activity

- funding has been reduced or withdrawn from almost all consumer rights and advocacy groups ...
- organisations seen to be critical of government policy are in danger of losing any government funding they may receive ...
- agencies in the community services area ... are explicitly prevented from speaking out about the policies and structures that discriminate and perpetuate the disadvantage of their service users...”²

There are several possible constraints on engaging in advocacy. These include what in free speech cases is referred to as the “chilling effect”, referring to defamation or sedition law. The “chilling effect” here is caused by dependency on government funding, and fear of loss of that funding as a consequence of advocacy. Other constraints include unfamiliarity with or distaste for

² Wyse, Trudy (2000) Campaign Fundraising : Finding Philanthropic Partners for Social Action and Advocacy Projects. Just Policy/Advocacy and Social Action September 2000

engagement in political debate, actual government prohibition of advocacy, and the possibility of the loss of charitable status arising from advocacy activity.

The “chilling effect” can be removed or at least reduced by the adoption of policies which clearly recognise the role of advocacy. Government needs to make clear that criticism by charitable organisations of government policy and legislation will not lead to a loss of funding.

I hope that the Rudd Government has already demonstrated a preparedness to welcome criticism, to welcome new ideas. Openness to ideas was shown with the 2020 Summit and with the Government’s engagement with the charitable and philanthropic sectors through the Social Inclusion Agenda and the establishment of the Social Inclusion Board.

The second constraint I mentioned - unfamiliarity with or distaste for political debate - is very much a matter for education, rather than regulation or government policy setting. Here the Government can assist by welcoming engagement and debate.

The third constraint, actual government prohibition of advocacy by charitable organisations, can take several forms, but the Rudd Government will not engage in any of them. Government contracts will not contain “anti-advocacy” clauses, and the Government will not seek to impose any funding conditions which seek to restrict criticism of Government policy.

The fourth constraint, the possible loss of charitable status, has been the subject of a great deal of debate in recent years, particularly the debate sparked by the draft Charities Bill proposed by the former Federal Treasurer Peter Costello in 2003. The draft legislation followed the 2001 report of the [Inquiry into the Definition of](#)

Charities and Related Organisations. The draft Charities Bill included a clause 8(2) in these terms:

“(2) Any of these purposes is a disqualifying purpose:

- (a) the purpose of advocacy a political party or cause
- (b) the purpose of supporting a candidate for political office
- (c) the purpose of attempting to change the law or government policy,

if it is, either on its own or when taken together with one or both of the other of these purposes, more than ancillary or incidental to the other purposes of the entity concerned.”

This proposed limitation on the scope of advocacy by charities caused understandable alarm in the philanthropic sector. Many organisations made lengthy submissions to the Treasurer opposing this and other aspects of the draft legislation. These submissions, notably that of ACOSS,³ are reasoned and principled defences of the role of advocacy. ACOSS recommended a quite different provision for the proposed legislation:

“A charity may have public advocacy purposes (which could be described in the explanatory material as including “attempts to change the law or government policy”) provided those purposes:

- (1) further, or aid, or are ancillary to, its dominant charitable purpose or purposes; and
- (2) do not promote a political party or a candidate for public office, unless such purposes are ancillary or incidental for its dominant charitable purpose or purposes.”

³ Australian Council of Social Service (2003) “A charity by any other name” Submission to the Board of Taxation or the draft Charities Bill 2003, September 2003

The Victorian Women's Trust provided an illuminating example, and eloquent defence of advocacy, in their submission on the draft legislation: ⁴

“As a philanthropic body, we face an ethical choice – we can simply distribute our limited funds and hope they provide some soothing effect for women – OR, we can make grants that impact on a number of levels other than the women themselves can, to try and change conditions for the better.

To illustrate this point, a substantial number of our grants have supported women and community organisations in their work to alleviate domestic, family, sexual and emotional violence. Part of this effort has addressed the “battered woman syndrome” – where women have endured prolonged and systematic violence from their spousal partner.

If, in this context, we observe that existing legislation and judicial processes are not adequately responding to survivors' needs, in our mind, we are obliged to alert, lobby, educate and work for changes and improvements in these areas. In relation to our earlier reference to the “battered woman syndrome”, existing law in some states is currently deficient in that it is difficult for women who are responding to prolonged violence to argue provocation successfully.

To simply make grants available, and ignore laws and the obvious need for law reform is ethically unacceptable. Rather, the challenge is to engage in responsible grant making that

⁴ Victorian Women's Trust (2003) Submission to Board of Taxation 7 October 2003. Accessed 15 July 2008 at www.philanthropy.org.au/pdf/advocacy/vwt-cb-1005.pdf

works towards progressive systemic changes that help alleviate conditions for women.

That is what advocacy is about. It is a critical task in a civil, democratic society: For if bodies like us, and the organisations we fund, do not try and inspire positive change in such a way, how, in the grand schema, does it happen?"

Although the Liberal Government abandoned the draft legislation there is still some pressure from conservatives to restrict the advocacy role of charitable organisations. Ironically for me, an example of this approach is a paper by the Liberal candidate for my seat of Isaacs at the 2007 election published by the Institute of Public Affairs in May 2006.⁵

In the paper the author argues for "a new definition of charitable purposes enshrined in a Charity Act." His definition is restrictive. As he explains:

"Reference to civil and human rights has been excluded because they refer to purposes which are contested in the political sphere and may not constitute rights. The advancement of rights about which there is significant argument regarding their existence should not constitute charitable purposes because they are by their nature, essentially political rather than charitable purposes."

Elsewhere the IPA paper appears to accept that advocacy should be permitted in some circumstances:

⁵ Fox, Ross (2006) "Promoting Freedom and Community : Civil Society Organisations in Australia" Institute of Public Affairs IPA Backgrounder May 2006 Vol 18/2

“Charities should be prohibited from providing funding or resources to political parties, and from arguing for or against political parties and their candidates. This would not prohibit charities from publicly advocating, or lobbying for, particular policies in a way that is informative on the substance of a policy area, rather than explicitly endorsing one political party over another.”

But at several points the paper clearly favours restrictions on advocacy, and indeed a fairly punitive approach:

“In contrast to democratic political purposes which entail conflicting ideas and policies, charitable purposes should reflect a community consensus and hence should not be political. Charities should therefore be prohibited from undertaking political activity such as political campaigning that is more than merely incidental to their charitable purpose.”

and

“Any political activities in which charities engage should be merely incidental to a charity’s purpose. Activities such as the distribution of literature only to marginal seats in an election period or the provision of paid staff to political campaigns should prompt more detailed consideration of the extent to which a charity’s purposes and activities are charitable rather than political. In these cases, it would seem reasonable to classify the purposes pursued as political rather than charitable. Such instances should prompt a revocation of charitable status. Under

such circumstances, charities and other CSOs receiving public benefits would be encouraged to conduct themselves with care.”

There are a number of problems with the claims and threats in this argument. First, the idea that “charitable purposes should reflect a community consensus” seems unsustainable. Notions of consensus within our political system are illusory – there are strongly contested positions that arise from different value systems, from conflicting economic interests, from different life experiences and social positions. Change is always opposed by those who fear that their position or values are under threat. To claim that the activities of charities must be “non-political” is a deliberate attempt to deny to charities the option of pursuing policy and political change when the need arises.

My own view differs substantially from this sort of restrictive, conservative perspective. I believe that it is beneficial to the community and to governments when charities, in line with their dominant purposes, give voice to the need for change within the political system to achieve those purposes.

The first reason for this is that advocacy by the charitable sector is important to the democratic process. It allows for the representation and empowerment of those who might otherwise be excluded.

It ensures a diversity of voices will be heard and listened to by government. Charities can use their first-hand knowledge to bring to the attention of decision makers, and the media, public policy problems that might otherwise be ignored.

It is also my belief that the input of the charitable sector improves the outcomes of the policy process, as well as democratic decision making processes. The hubris of a government that seeks not just to ignore other voices, but actively

works to silence these voices, results in policy mistakes and ultimately in political failure.

The Social Inclusion Agenda of the Rudd Government illustrates my point.

One of the first acts undertaken by Kevin Rudd when he was elected Opposition Leader in December 2006 was the creation of the Social Inclusion portfolio and the appointment of Julia Gillard to that portfolio. Since the election, Julia Gillard has continued in that role, supported by Senator Ursula Stephens as Parliamentary Secretary.

This focus on social exclusion, following a period of sustained economic growth, was a renewal of Labor's long standing commitment to the amelioration, reduction and elimination of social inequality and disadvantage.

The Rudd Government's Social Inclusion Agenda recognises the importance of ensuring all Australians have the opportunity to: secure a job; access services; connect with family, friends, work and local community; deal with crises; and have their voices heard.

Within this framework, the Government has already taken action in the areas of early childhood education, school retention, homelessness, literacy and numeracy, dental health and indigenous health, education and employment. The Government is also working on a new Employment Services system, a National Mental Health and Disability Employment Strategy and a White Paper on Homelessness.

Rightly, the Government is developing a "whole of government" approach to address the many issues relating to social exclusion. These policies will only be delivered by embracing 'joined up' solutions, to address the complexity of needs and this is not easy. It demands that we recognise that the types of services that

work in one place may not work in another and that we have to tailor service to meet local needs if we are to achieve good policy outcomes.

The Social Inclusion Agenda also requires the involvement of charities and other non-government organisations. The Government has demonstrated its commitment to the involvement through the establishment of the Social Inclusion Board, composed of individuals from diverse backgrounds, including the charitable sector and also from business and union backgrounds.

Policy outcomes will be improved through the involvement of the charitable and non-government sector. To pose one simple example: how can a government develop and implement housing policy without the input of social, community and emergency housing providers?

And advocacy needs to be a continuous process – not confined to the meetings of government bodies but heard regularly and consistently.

The Changemakers Australia 2007 paper notes that “many grant makers shy away from funding advocacy for fear of losing their charitable status.” The purpose of the paper is “to give grant makers a clearer idea of where the legal lines are drawn”, and it does so in part by examining material published by the Australian Taxation Office in 2005, in the form of an information sheet entitled “Charities – political, lobbying and advocacy activities.”⁶ That information sheet in turn refers to the greater detail included in Taxation Ruling TR2005/21, which is binding on the Commissioner of Taxation, entitled “Income tax and fringe benefits tax: charities.”

I agree with the view expressed in the Changemakers 2007 paper that “the laws surrounding what can legitimately be funded are less restrictive than many

⁶ Australian Taxation Office 2005 “Charities – Political lobbying and advocacy activities.” Accessed 15 July 2008 www.ato.gov.au/nonprofit/content.asp?doc=Content/62779.htm

people assume.” Part of the reason for that assumption may be the language used in the ATO publications. The 2005 Ruling contains statements which if read in isolation suggest a very restrictive approach to advocacy by charities, such as this passage under the heading “Purposes which are not charitable”:

18. “Political and lobbying purposes are not charitable. While such purposes may use educational means, this is not sufficient to show a charitable purpose.”

19. However, political or lobbying purposes and activities that are merely incidental to a purpose that is otherwise charitable do not by themselves prevent that purpose being charitable.”

Elsewhere the Tax Ruling appears to recognise the use of advocacy as appropriate for charitable organisations, but does so in terms that would certainly raise many doubts:⁷

“126. Of course, to be a charitable institution, such an organisation should act in conformance with its charitable purposes. Contrary activities cannot be ignored, and the reality of the situation could point to a different conclusion:

‘It is also possible that activities directed at political change may demonstrate an effective abandonment of indubitably charitable objects.’

Clear examples would include supporting a political party, seeking to persuade members of the public to vote for or against particular candidates or parties in an election for public office, participating in party political demonstrations, and

⁷ Tax Ruling 2005/21 paragraphs 126, 127 – footnotes omitted

distributing material designed to underpin a party political campaign. Consequently the organisation will not be a charitable institution.

127. On the other hand, an organisation that is clearly carried on for charitable purposes could participate in many ways in engagement with government, in presenting its views to the public, and in the democratic process. Such activities would, of course, need to be for the sake of carrying out the charitable purposes and not for their own sake (footnotes omitted)."

My personal view is that the position taken by the 2005 Tax Ruling is still unduly restrictive, and that the Ruling needs revision, to take account of developments in case law and philanthropic activity, both in Australia and overseas.

In particular, the 2005 Ruling does not seem consistent with the very recent decision of the Federal Court in Victorian Women Lawyers Association Inc v Commissioner of Taxation [2008] FCA 983 (27 June 2008). French J held that the VWLA should be classified as a tax exempt charity despite engaging in some advocacy activities, noting in the judgment at par. [117] that "the political purposes limitation is not well defined and is more difficult of application today having regard to the change in social conditions since 1917 and the involvement of legislatures in areas unthought of at that time."

The United Kingdom has gradually moved to a more liberal position on advocacy for charities, as shown by the March 2008 publication of the Charity Commission for England and Wales, "Speaking Out – Guidance on Campaigning

and Political Activity by Charities.”⁸ The publication provides a good example of much clearer guidance about advocacy for charities.

The forward includes these statements by Dame Suzi Heather, Chair of the Commission and Andrew Hind, the Chief Executive:

“All charities are united by having a vision of a better society. They have many different purposes, and are focused on different needs. But in the main they are united by a desire to achieve change, whether for a particular group of people in need, or for the wider common good. It is not surprising then that many charities wish to speak out, to use their voice and influence, and to campaign for the changes that would best help them achieve their purposes.

We have produced this updated guidance at a time of major change for charities. A new Charities Act has just come into force. There has also been considerable public debate about the campaigning role of charities. Although the fundamentals of charity law on campaigning and political activity have not changed, we have rewritten our guidance in order to ensure its relevance to today’s trustees. In particular we have tried to find a more helpful way of describing the terms “dominant” and “ancillary”, which many users of our previous guidance told us they found difficult to understand.

The experience of charities means that it is right that they should have a strong and assertive voice. Often they speak for those who are powerless, and cannot make their case themselves.

⁸ The Charity Commission for England and Wales (2008) “CC9 – Speaking Out – Guidance on Campaigning and Political Activity by Charities” Version – March 2008 Accessed 15 July 2008

Sometimes charities confront extreme social injustice, which they will want to tackle head-on. The work that charities do, and the major role they play in public life, is something they should be proud of.”

In conclusion, I should bring to your attention that on 18 June 2008, the Senate referred the Disclosure regimes for Charities and not-for-profit organisations to the Senate Standing Committee on Economics for report by the last sitting day of November 2008.

The inquiry will examine:

- the relevance and appropriateness of current disclosure regimes for charities and all other not-for-profit organisations;
- models of regulation and legal forms that would improve governance and management of charities and not-for-profit organisations and cater for emerging social enterprises; and
- other measures that can be taken by government and the not-for-profit sector to assist the sector to improve governance, standards, accountability and transparency in its use of public and government funds.

These terms of reference would encompass the regulation of advocacy activities by charities, and I would invite all of you to make submissions to this inquiry. The closing date for submissions is Friday 29 August 2008.

Mark Dreyfus QC MP
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