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Bridle on outspoken charities was wrong

George Williams
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A High Court decision last week provided a big win for charities, and another big loss for the Tax Commissioner. At issue was whether an organisation can retain its charitable status and tax benefits while engaging in political debate. The High Court held that it could. This redefined what it means to be a charity, and provided a boost to freedom of speech.

The test case concerned Aid/Watch, a self-described "activist" group concerned with the relief of international poverty. It seeks to achieve its goals through unorthodox means for a charity. Rather than raising money for or engaging directly in anti-poverty initiatives, it campaigns for improvements in the delivery of Australia's overseas aid. It has been sharply critical of government, and has not been shy in proposing major reforms to aid policy.

Australian charities have tended to be wary of such advocacy. They have feared that engaging in public debate could jeopardise their charitable status, and so their entitlement to the income tax, fringe benefits tax and GST exemptions and concessions upon which their livelihood depends. This fear was realised in 2006 when the Commissioner of Taxation revoked Aid/Watch's standing as a charity.

Aid/Watch has spent four years seeking to have the decision overturned. Its legal battle has focused upon the meaning of the term charitable institution in federal tax laws.

In contrast to the modern practice of parliaments seeking to explain key terms with extraordinary precision, charitable institution is not at all defined. This leaves the courts to fill in an enormous gap in the law.

Fortunately, judges have a long history of working out what a charity is. As the High Court recognised, the "modern" starting point lies in the opening words of the Statute of Elizabeth of 1601 as distilled by a 1891 decision of the House of Lords. In that case, Lord Macnaghten found that "charity" in its legal sense comprises four principal divisions: 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.

The primary question in the Aid/Watch case was whether its public advocacy fitted into the fourth category as being for "other purposes beneficial to the community".

A majority of the High Court held that Aid/Watch did fit within the definition. The judges found that the group's generation of public debate about how best to deliver foreign aid was a beneficial purpose. Charitable status was not inconsistent with freedom of speech in matters of government and public policy.

The court reached this conclusion after recognising that, like other judge-made law, the definition of a charity can change over time to accommodate new thinking and new social needs. Of central importance was the fact that Australia's constitution provides people with a freedom to communicate about government and politics. This suggested that charities are also entitled to agitate for legal and policy change in pursuit of their goals.

The Aid/Watch decision is merely an interpretation of federal tax legislation. Parliament can change those laws to narrow the definition of what it means to be a charity. However, the High Court's reliance upon the constitution

hints at a possible barrier. If the definition of a charity was altered to prevent bodies from engaging in public debate, this could run foul of the constitutional freedom of political communication and be struck down.

The Aid/Watch decision is a good outcome for democracy. It means that organisations such as World Vision, the Smith Family and the Cancer Council can take part in public debate with greater freedom and confidence.

Organisations dedicated to fighting poverty will be able to criticise governments where their policies are inadequate in areas like mental health and homelessness.

Organisations with years of on-the-ground experience of disadvantage, research and education have an important role to play in public debate. Having seen governments come and go, they can take a longer-term, non-partisan perspective on what needs to be done to fix problems and policy challenges. These bodies should not be muzzled by the threat that playing a public role could threaten their status as a charity.

George Williams is the Anthony Mason Professor of law at the University of NSW.

This story was found at: <http://www.smh.com.au/opinion/society-and-culture/bridle-on-outspoken-charities-was-wrong-20101206-18mpd.html>