

Advocacy in Charity: A Breakaway from the Common Law



Fiona Martin is a senior lecturer at the Australian School of Taxation and Business Law, Australian School of Business at the University of New South Wales. She has an honours law degree and master of laws, is a solicitor of the Supreme Court of New South Wales and Fellow of the Taxation Institute of Australia.

Can advocacy work be considered charitable? Common law systems don't think so, but Australia is the first to break this convention. **Fiona Martin** examines the whys and hows of this historic event.

Australia has moved away from the common law in its interpretation of advocacy, charity and public benefit. This is significant progress, given that the 60 other former colonies of the British Empire, including Commonwealth countries such as England, Canada and New Zealand still cling to the traditional interpretation.

It all started in October 2006 when the Australian Taxation Office (ATO) disqualified the 12-year old Aid/Watch as a charitable organisation claiming that it was involved in political activities. Aid/Watch had criticised the Federal Government's overseas aid policy for being too close to national political and commercial interests.

Aid/Watch appealed the ATO's decision arguing that their work is essentially about poverty alleviation. A four-year legal proceeding ensued with the dispute taken first to the Federal Courts and then to the High Court, the final court of appeal in Australia. Finally, in 2010, the High Court confirmed Aid/Watch's right to engage in political debate, signifying a victory for charities that use advocacy as a means of positive social change.

So what is different about Australia's regulator environment that enabled Aid/Watch to effect this change?

What is Charity?

In many common law countries, there is no exhaustive statutory definition of the legal concept of charity. In Australia, the courts have followed the House of Lords decision in *Commissioners for Special Purposes of Income Tax v Pemsel*¹ and consistently held that the legal concept of charity is much wider than the general public's view. The decision states that the definition of "charitable purposes" follows the general law definition derived from the Statute of Elizabeth:²

- Relief of the aged, impotent and poor
- Maintenance of sick and maimed soldiers and mariners
- Schools and scholars in universities
- Repair of bridges, ports, havens, causeways, churches, sea-banks and highways
- Education and preferment of orphans
- Maintenance of prisons
- Marriages of poor maids
- Aid and help of young tradesmen and handicraftsmen
- Aid and help of persons decayed
- Relief or redemption of prisoners or captives and
- Aid or ease of any poor inhabitants concerning payment of fifteens, setting out of soldiers and other taxes.³

According to William Kitchener Jordan, the statute did not actually create a concept of charitable purposes but rather codified "a body of law badly wanting classical statement."⁴

In *Pemsel's Case*, Lord Macnaghten also formulated four categories of charitable purposes:

- 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.⁵

In 1974 the High Court of Australia confirmed the place of the Preamble to the Statute of Elizabeth in Australian common law and concluded that in order for an institution to be charitable, it must be:

- Within the spirit and intendment of the Preamble to the Statute of Elizabeth and
- For the public benefit.⁶

This reasoning was most recently reaffirmed by the High Court in 2008.⁷

Charities and Advocacy Activities in Major Common Law Countries

Chart 1 provides a comparison of the legal stand on advocacy by charities in major common law countries.

Prior to *Aid/Watch*, the common law applying in Australia stated that the public benefit test may be failed where an organisation with a charitable purpose engages in political activity or social advocacy.⁸ This reasoning still applies in England, Canada and, to some extent New Zealand.⁹ This approach is based on the principle that a trust for the attainment of political objects is invalid because the court has no means of judging whether a proposed change in the law will or will not be for the public benefit.¹⁰

Prior to *Aid/Watch*, the common law applying in Australia stated that the public benefit test may be failed where an organisation with a charitable purpose engages in political advocacy or social advocacy.

As charities must benefit the public, it followed (prior to Aid/Watch at least) that advocacy organisations could not be charitable. Such an approach may be seen by some as an encroachment on our fundamental democratic rights to free speech.

This view narrowly defines charity and decrees that charities can advocate and lobby for a cause only if it is an ancillary activity and takes up a very small part of its resources.

The two dissenting judgments took a similar conservative approach and found that Aid/Watch's purpose was not charitable. This conclusion was based on the view that the entity's objects and activities involved the promotion of particular points of view rather than a more neutral approach to the generation of public debate.

Charities and Advocacy after Aid/Watch

The purpose of Aid/Watch Incorporated, the charity in this case, is researching, monitoring and campaigning in relation to the delivery of environmentally sound overseas aid and programmes for the relief of poverty. However, it does not provide aid directly. In a majority judgement with two strong

dissenting judgements, the High Court held that Aid/Watch was a charity. The High Court stated that the common law as formulated in *Bowman v Secular Society* did not apply to Australian law.¹⁹ The Court found that a purpose of generating public debate about the efficacy of foreign aid directed to the relief of poverty is a charitable purpose.

Reliance was placed by the Court on the system of law in Australia, its basis in the Constitution and that it relies upon "...communication between electors and legislators and the officers of the executive, and between electors themselves, on matters of government and politics."²⁰ This Australian context therefore indicated a public benefit aspect to debate and advocacy which is inconsistent with the earlier *Bowman v Secular Society* principle.

Despite expectations that the Federal Government would take a narrow view of the application of the Aid/Watch Case²¹, in 2011, the ATO issued a new public ruling on charities accepting the broad premise of this decision.²² The ATO states that there is no general doctrine in Australia which excludes a charity from having political purposes and that an entity can be charitable if it has a purpose (including

Chart 1: Comparison of Different Countries' Legal Stand on Advocacy by Charities

Country	Legal Stand on Advocacy	Source
England	<ul style="list-style-type: none"> Charities can engage in political activity "if there is a reasonable expectation that the activity concerned will further the stated purposes of the charity...to an extent justified by the resources devoted to the activity."¹¹ Charities may comment on public issues, advocate changes in the law, support, oppose, comment on or promote legislation provided that these activities are likely to promote their charitable causes.¹² 	Charity Commission for England and Wales
Canada	<ul style="list-style-type: none"> Some political activity is only acceptable as long as it is incidental to the main charitable purpose of the organisation. Activities aimed at changing or influencing government opinion are excluded from charitable purposes. Attempts to inform the public on an issue, however, are not excluded. 	Case of Vancouver Society of Immigrant and Visible Minority Women vs. Minister of National Revenue ¹³ Canadian Charities Directorate ¹⁴
New Zealand	<ul style="list-style-type: none"> As long as the organisation's purpose remains charitable, the use of political activities to achieve these purposes is unlikely to disqualify the organisation from registration.¹⁵ A charity may engage in activities aimed at changing government policy as long as this lobbying is focused on one of its charitable purposes.¹⁶ 	New Zealand Charities Commission
Australia (Before Aid Watch)	<ul style="list-style-type: none"> As with common law countries, an organisation is not charitable if its purpose is advocating a political party or cause, attempting to change the law or government policy, or propagating a particular point of view.¹⁷ Political or lobbying activities that were incidental to the charitable purpose of an organisation would not affect its charitable status.¹⁸ 	Australian Taxation Office

a sole purpose) of generating public debate with a view to influencing legislation, government activities or government policy as long as these discussions are within one or more of the four heads of charity.²³ The ruling also states that these debates or discussions do not need to be balanced and that a particular viewpoint may be advocated for by the charity. However, as expected, the ruling clearly states that political parties are not charities as their activities are not considered charitable.²⁴

In 2011, the Australian government released a Consultation Paper on the Definition of Charity stating that charities should be allowed to engage in political and advocacy activities including attempting to change government policy provided that these aims and activities are within one of the charitable purposes (relief of poverty, advancement of education and religion and other purposes beneficial to the community).²⁵ The Consultation Paper then asks for feedback on whether this view is supported.

The government has also stated that it intends to enact a statutory definition of charity. Although the comments regarding advocacy in the Consultation Paper are supportive of the Aid/Watch Case, at the time of writing, there has been no draft legislation.²⁶

Encouragement of Debate in Australia and Aligning Charity to the 21st Century

One of the key statements that the High Court made in the Aid/Watch decision was the importance of the encouragement of debate. Specifically, it referred to "...the generation by lawful means of public debate."²⁷

The result in both Aid/Watch and the ATO's ruling is that Australian charities are allowed an increased ability to carry out campaigning and advocacy activities, rather than just participation in government-led reforms or providing educational information on relevant issues. These activities must however be directed toward purposes which are for the public benefit. Such activities include advocating for improvement in the effectiveness of government policies relating to relief of poverty, advancement of education, advancement of religion or other purposes recognised as beneficial to the community. It goes without saying that the activities and objects in question must not be illegal or contrary to public policy.

It is also likely that representative bodies will have more scope to advocate on behalf of members' interests. This is particularly important for bodies that represent groups of not-for-profit organisations that wish to lobby government about systemic issues either faced by the sector or that arise in relation to government policy. This can be contrasted to the previous legal position where such a purpose was not charitable in its own right.

The (Australian Taxation Office) states that there is no general doctrine in Australia which excludes a charity from having political purposes... However, as expected, the ruling clearly states that political parties are not charities as their activities are not considered charitable.

The comments in the decision are also consistent with the 2008 case *Commissioner of Taxation v Word Investments Ltd*²⁸ which demonstrated that the Australian High Court is open to applying the principles of charity law in the context of the values and expectations of modern society. In this case, the court had accepted that an entity that carried on a commercial business but which had solely charitable purposes in its constitution and which distributed all its income to a related religious charity was itself a charity.

Conclusion

The importance of advocacy to charitable organisations is demonstrated in many of the submissions to the Australian Charities Definition Inquiry which took place in 2000-2001.²⁹ The Central Land Council which represents indigenous Australians in the centre of the Northern Territory argued that, in view of the history of marginalisation and lack of government resources, the ability to advocate on their was an important function of charities representing indigenous Australians.³⁰

Clearly, the Australian government's acceptance of both this arguments and the Aid/Watch case is a milestone, but whether or not Australia formally adopts a statutory definition of charity along the lines of Aid/Watch remains to be seen.

The situation in Australia is now much less restrictive than in England, Wales and Canada where, at best, any advocacy activities must be ancillary to the main charitable purpose of the entity. Even New Zealand has shied from taking the broader Australian approach on both the legislative and judicial front. Singapore, too, follows the common law with the result that advocacy activities of charities are very restricted.³¹

There are no indications that any of these jurisdictions will follow the Australian lead in the near future.



¹ [1891] AC 531.

² 43 Eliz. 1, c 4. The decision confirmed that as long as the purpose of the charity fell within the Preamble or its "spirit" and a sufficiently large group of the public stood to benefit, it was charitable.

³ Gareth Jones, *History of the Law of Charity 1532-1827* (Cambridge University Press, 1969) 224.

⁴ William Kitchener Jordan, *Philanthropy in England 1480-1660: A Study of the Changing Pattern of English Social Aspirations* (Russell Sage Foundation, 1959)112.5 [1891] AC 531, 583.

⁵ [1891] AC 531, 583.

⁶ *Royal National Agricultural and Industrial Association v Chester* [1974] 48 ALJR 304, 305. That this is the law in Australia was originally decided by the Privy Council in *Chesterman v Federal Commissioner of Taxation* (1925) 37 CLR 317.

⁷ *Central Bayside General Practice Association Limited v Commissioner of State Revenue of the State of Victoria, and Commissioner of Taxation v Word/Investments Limited* [2008] HCA 55.

⁸ Gino Dal Pont, *Charity Law in Australia and New Zealand* (Oxford University Press, 2000) 203.

⁹ Commonwealth of Australia, The Treasury, "A Definition of Charity", Consultation Paper, October 2011, Appendix B: Overseas Jurisdictions 41-43.

¹⁰ *Bowman v Secular Society Ltd* [1917] AC 406, 442. The source of the principle can be found in Lord Parker's judgement. In particular, he stated:
A trust for the attainment of a political object has always been held invalid, not because it is illegal, for everyone is at liberty to advocate or promote by any lawful means a change in the law, but because 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 charitable.

¹¹ Charity Commission for England and Wales, *Speaking Out: Guidance on Campaigning and Political Activity by Charities*, CC9.

- ¹² E Cairns, *Charities: Law and Practice* (3rd ed, 1996) 29-30.
- ¹³ (1999) 99 DTC 5034.
- ¹⁴ Commonwealth of Australia, The Treasury, "A Definition of Charity", Consultation Paper, October 2011, Appendix B: Overseas Jurisdictions 42.
- ¹⁵ New Zealand Charities Commission, Political Activities and Registration, www.charities.govt.nz/news/information-sheets/political-activities/. Advocacy is a non-charitable purpose according to New Zealand's *Charities Act 2005*.
- ¹⁶ New Zealand Charities Commission, Political Activities and Registration www.charities.govt.nz/news/information-sheets/political-activities/.
- ¹⁷ Taxation Ruling TR 2005/21, [102]. This was considered to be the case even if the subject matter of the change concerned the relief of poverty, education or religion. Taxation Ruling TR 2005/21, [107].
- ¹⁸ Taxation Ruling TR 2005/21, [121].
- ¹⁹ [2010] HCA 42 [44]-[48].
- ²⁰ [2010] HCA 42 [44].
- ²¹ Changemakers Australia, Charity Law Reform Project (Esther Abram, 2011) 31.
- ²² TR2011/4.
- ²³ *Ibid* [70]-[71].
- ²⁴ *Ibid* [72].
- ²⁵ Consultation Paper [105]-[107].
- ²⁶ Commonwealth of Australia, The Treasury, "A Definition of Charity," Consultation Paper, October 2011.
- ²⁷ [2010] HCA 42 [47]. The majority also made some comments indicating a broader approach, namely that within a charity for the advancement of education or religion or relief of poverty, encouragement of public debate about changing government policy or government activities will be charitable.
- ²⁸ [2008] HCA 55.
- ²⁹ For example, Philanthropy Australia Inc Submission to the *Inquiry into the Definition of Charities and Related Organisations* 19 January 2001 www.philanthropy.org.au/pdfs/submission-to-inquiry.pdf Recommendation 2.2; Central Land Council Submission to the *Inquiry into the Definition of Charities and Related Organisations* 25 January 2001 www.cdi.gov.au/submissions/328%20-%20Central%20Land%20Council.doc 4; Australian Council for Social Service Submission to the *Inquiry into the Definition of Charities and Related Organisations* January 2001 www.cdi.gov.au/submissions/134-ACOSS.doc Part 3(3).
- ³⁰ Central Land Council Submission to the Inquiry into the Definition of Charities and Related Organisations, 25 January 2001, www.cdi.gov.au/submissions/328%20-%20Central%20Land%20Council.doc 4.
- ³¹ Kerry O'Halloran, Myles McGregor-Lowndes and Karla W Simon, *Charity Law & Social Policy: National and International Perspectives on the Functions of the Law Relating to Charities* (Springer, 2008) 361.