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# Medical law reporter

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## GOVERNMENT CONTROL OVER HEALTH-RELATED NOT-FOR-PROFIT ORGANISATIONS: AGENCY FOR INTERNATIONAL DEVELOPMENT v ALLIANCE FOR OPEN SOCIETY INTERNATIONAL INC 570 US \_\_\_ (2013)

*The relationship between government and the not-for-profit (NFP) sector has important implications for society, especially in relation to the delivery of public health measures and the protection of the environment. In key health-related areas such as provision of medical services, welfare, foreign aid and education, governments have traditionally preferred for the NFP sector to act as service partners, with the relationship mediated through grants or funding agreements. This service delivery arrangement is intended to provide a diversity of voices, and encourage volunteerism and altruism, in conjunction with the purposes and objectives of the relevant NGO. Under the pretence of “accountability”, however, governments increasingly are seeking to impose intrusive conditions on grantees, which limit their ability to fulfil their mission and advocate on behalf of their constituents. This column examines the United States Supreme Court decision, Agency for International Development v Alliance for Open Society International Inc 570 US \_\_\_ (2013), and compares it to the removal of gag clauses in Australian federal funding rules. Recent national changes to the health-related NFP sector in Australia are then discussed, such as those found in the Charities Act 2013 (Cth) and the Not-for-Profit Sector Freedom to Advocate Act 2013 (Cth). These respectively include the establishment of the Australian Charities and Not-For-Profit Commission, the modernising of the definition of “charity” and statutory blocks on “gag” clauses. This analysis concludes with a survey of recent moves by Australian States to impose new restrictions on the ability of health-related NFPs to lobby against harmful government policy. Among the responses considered is the protection afforded by s 51(xxiiiA) of the Australian Constitution. This constitutional guarantee appears to have been focused historically on preventing medical and dental practitioners and related small businesses being practically coerced into government or large-scale private corporate operations. As such, it may prohibit civil conscription arising not only from “gag clauses” in managed care contracts, but also from “gag clauses” in governmental ideological controls over taxpayer-funded, health-related NFPs.*

### INTRODUCTION

In the past 40 years, conflict has developed between government and the health-related not-for-profit (NFP) sector over the ability of such NFPs to comment on or dissent from official government policy when they are in receipt of public funds.<sup>1</sup> Governments in Australia and the United States have sought to control the NFP sector in general, but have particularly sought control in the ideologically contentious areas of health service delivery. This has been instigated using a variety of mechanisms,

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<sup>1</sup> Casey J and Dalton B, “Ties That Bind? The Impact of Contracting and Project-based Funding Regimes on Advocacy”, paper presented to Australian Political Studies Association Conference, University of Adelaide, 29 September to 1 October 2004, [http://www.adelaide.edu.au/apsa/docs\\_papers/Pub%2520Pol/CaseyAPSA.pdf](http://www.adelaide.edu.au/apsa/docs_papers/Pub%2520Pol/CaseyAPSA.pdf) viewed 18 May 2013.

including requirements for grantees to seek government approval of program-related media releases, control of intellectual output (including reports critical of government policy) and “gag” or “suppression” clauses prohibiting NFP advocacy.<sup>2</sup>

While the tension between NFP freedom and the desire of government to control, manage and hold such entities to account has been longstanding, recent developments in the United States and Australia appear to have taken such interference to a new and disturbing level. This column examines the decision of the United States Supreme Court in *Agency for International Development v Alliance for Open Society International Inc* 570 US \_\_ (2013) (No 12-10) (*AID v AOSI Inc*). The case involved a challenge to legislation which forced NFPs to subscribe to and enforce particular ideological policies concerning HIV/AIDS. The column then considers the appropriate limits on the ability of government to direct the operations and discourse of similar health-related NFPs, either through funding selection criteria or the inclusion of “gag” clauses.<sup>3</sup> Recent reforms introduced by the Australian Government to modernise the NFP sector are then discussed, including the introduction of a new regulatory regime for NFPs, a statutory replacement for the antiquated and problematic common law definition of “charity”, and protection of the freedom of NFPs to engage in advocacy and political activities. These positive reforms are contrasted with recent actions by the conservative governments in New South Wales and Queensland to strip funding from outspoken public health and environmental organisations. Finally, the intention of some Australian political forces to reinstate the original common law system is considered.

## THE HEALTH-RELATED NOT-FOR-PROFIT SECTOR IN AUSTRALIA

Australia possesses a diverse and vibrant NFP sector,<sup>4</sup> with more than 4.6 million Australians volunteering in an estimated 600,000 organisations.<sup>5</sup> In 2006-2007 “economically significant” NFP organisations employed 889,900 staff and contributed “\$43 billion to Australia’s GDP”.<sup>6</sup> A strong NFP sector (or civic society), engaged in a “marketplace of ideas”, is often cited as a sign of a healthy and vibrant society.<sup>7</sup> Charities, especially those established by religious orders, constitute a small segment of the NFP sector, but until the late 19th century were responsible for delivering a range of social services now usually considered core-government health-related responsibilities, including schools, hospitals and care for the poor, invalid or aged.<sup>8</sup> Acknowledging the “charitable”, “altruistic” or

<sup>2</sup> Casey and Dalton, n 1; Thomas M and Knowler K, “Not-for-profit Sector Freedom to Advocate Bill 2013”, *Bills Digest No 116 2012-13* (2013), [http://parlinfo.aph.gov.au/parlInfo/download/legislation/billsdgs/2445957/upload\\_binary/2445957.pdf](http://parlinfo.aph.gov.au/parlInfo/download/legislation/billsdgs/2445957/upload_binary/2445957.pdf) viewed 20 May 2013.

<sup>3</sup> *Agency for International Development v Alliance for Open Society International Inc* 570 US \_\_ (2013). See also SCOTUSBlog, <http://www.scotusblog.com/case-files/cases/agency-for-international-development-v-alliance-for-open-society-international-inc> viewed 15 May 2013.

<sup>4</sup> In this analysis, unless there is a need to draw a distinction, “not-for-profit” refers to organisations identifying as “non-profit”, “not-for-profit”, “charity”, “non-government organisations (NGOs)”, “voluntary associations” or “independent”, “third-sector” organisations. It includes incorporated and unincorporated bodies and associations.

<sup>5</sup> Productivity Commission, *Contribution of the Not-for-Profit Sector (Research Report)* (2010, Canberra) p xxvi. Volunteer figures are for 2006-2007.

<sup>6</sup> Productivity Commission, n 5, p xxvi. “Economically significant” NFPs were defined as “those organisations with one or more paid employees or revenue above a set annual threshold”: Productivity Commission, n 5, p xvi. For further information on Australia’s not-for-profit sector see *Australian Charities and Not-For-Profits Commission Bill 2012* (Cth), *Australian Charities and Not-For-Profits Commission (Consequential and Transitional) Bill 2012* (Cth), Explanatory Memorandum; Commonwealth, House of Representatives, *Parliamentary Debates* (23 August 2012) p 9722 (Mr Bradbury, Assistant Treasurer and Minister Assisting for Deregulation); Thomas M and Pyburne P, “Australian Charities and Not-for-profits Commission Bill 2012”, *Bills Digest No 21, 2012-2013* (2012), [http://parlinfo.aph.gov.au/parlInfo/download/legislation/billsdgs/1927319/upload\\_binary/1927319.pdf](http://parlinfo.aph.gov.au/parlInfo/download/legislation/billsdgs/1927319/upload_binary/1927319.pdf) viewed 15 May 2013; Thomas and Knowler, n 2.

<sup>7</sup> Productivity Commission, n 5, p 17. The “Marketplace of Ideas” has a special relevance in United States First Amendment case law. See eg *Simon & Schuster Inc v Members of New York State Crime Victims Board* 502 US 105 at 116 (1991) (O’Connor J); American Civil Liberties Union (ACLU), *Brief Amicus Curiae of the ACLU* (2013), [http://www.americanbar.org/content/dam/aba/publications/supreme\\_court\\_preview/briefs-v2/12-10\\_resp\\_amcu\\_aclu-nyclu.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v2/12-10_resp_amcu_aclu-nyclu.authcheckdam.pdf) viewed 18 May 2013.

<sup>8</sup> In 2001, the Sheppard Report estimated that over 90% of employment in charities is in the provision of health. At the time of the Sheppard Inquiry, there were over 40,000 entities endorsed by the Australian Tax Office (ATO) as “income tax exempt

“community spirited” focus and objectives of the NFP sector,<sup>9</sup> and the fact that charities work for the public benefit,<sup>10</sup> governments have offered special tax concessions to NFPs which have ranged from income tax exemptions to enabling donors to deduct their contributions from their taxable income.<sup>11</sup> Even when the state took on greater responsibility for providing community services,<sup>12</sup> NFPs continued to deliver key health-related services, either independently of government, or more commonly, with direct funding from the state.<sup>13</sup> Governments have also partnered with NFPs to deliver foreign aid, often through competitive tender processes.<sup>14</sup> We now, however, appear to be entering a period of increasing governmental control over such organisations. The degree to which that control may extend, and the vulnerability of Australian health-related NFPs (given their lack of enforceable constitutional human rights protections against adverse government policy and legislation), may be gleaned from a recent United States Supreme Court decision.

### MESSAGE OR MISSION? THE DEBATE IN AID V AOSI INC

In 2003 the United States Congress passed the *United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003* (the *Leadership Act*). The purpose of this legislation was to counter the “pandemic proportions” of the spread of HIV/AIDS across “all corners of the world”.<sup>15</sup> It also was designed to provide increased resources for bilateral and multilateral efforts to fight HIV/AIDS, tuberculosis and malaria.<sup>16</sup> These purposes were to be partially fulfilled by “encouraging the expansion of private sector efforts and expanding public-private sector partnerships to combat HIV/AIDS”.<sup>17</sup> The *Leadership Act* promotes an “abstinence/fidelity/condom” model for reducing incidence rates of HIV.<sup>18</sup> It requires the promotion of a global policy of eradicating “prostitution” and “sexual victimization”.<sup>19</sup>

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charities”: Hon Ian Sheppard AO QC, *Report of the Inquiry into the Definition of Charities and Related Organisations* (Commonwealth of Australia, Canberra, 2001) p 3 (Sheppard Inquiry). For a United Kingdom perspective on what constitutes “core” government functions see *YL v Birmingham City Council* [2008] 1 AC 95, discussed in Palmer S, “Public Functions and Private Services: A Gap in Human Rights Protection” (2008) 6(3&4) *International Journal of Constitution Law* 585 at 602.

<sup>9</sup>The characterisation of charities and NFP organisations is the subject of academic debate, with attention drawn to their structure, objectives, activities, use of voluntary labour, and spirit of “volunteerism”. See the discussion in Harding M, “Distinguishing Government and Charity in Australian Law” (2009) 31 *Syd LR* 559, <http://www.austlii.edu.au/au/journals/SydLawRw/2009/23.html> viewed 15 May 2013. Justice Kirby referred to the “spark of altruism and benevolence” as “essential” to charity in *Central Bayside General Practice Assoc Ltd v Commissioner of State Revenue* (2006) 228 CLR 168 at [126]. See also Sheppard Inquiry, n 8, pp 91-129.

<sup>10</sup> *Charities Act 2013* (Cth), ss 5, 6.

<sup>11</sup> See the helpful table in Sheppard Inquiry, n 8, pp 159-161. For detailed rules, see Australian Taxation Office (ATO), “Income Tax and Fringe Benefits Tax: Charities”, *TR 2011/4* (2011), <http://law.ato.gov.au/atolaw/DownloadNoticePDF.htm?DocId=TXR%2FTR20114%2FNAT%2FATO%2F00001&filename=pdf/pbr/tr2011-004.pdf&PiT=99991231235958> viewed 21 November 2013.

<sup>12</sup> See eg s 51(xxiiiA) of the *Constitution of Australia*; *National Health Act 1953* (Cth); *Social Security Act 1991* (Cth); *Aged Care Act 1997* (Cth) and the multitude of State and Territory public education and health Acts.

<sup>13</sup> See eg the *Schools Assistance Act 2008* (Cth) under which Commonwealth funding is provided to approved non-government schools. Approved schools must be conducted “not for profit”: *Schools Assistance Act 2008* (Cth), s 4.

<sup>14</sup> Australia’s main foreign aid agency, AusAID, provided “roughly \$500 million” to NGOs in 2011-2012, with between \$700 million and \$800 million expected to be spent by 2015-2016: AusAID, *Helping the World’s Poor through Effective Aid: Australia’s Comprehensive Aid Policy Framework to 2015-16* (Commonwealth of Australia, Canberra, 2012) p 17; AusAID, *AusAID NGO Cooperation Program*, <http://www.ausaid.gov.au/ngos/ancp/Pages/home.aspx> viewed 20 May 2013.

<sup>15</sup> 22 USC § 7601(1).

<sup>16</sup> 22 USC § 7603(3).

<sup>17</sup> 22 USC § 7603(4).

<sup>18</sup> “The United States has the capacity to lead and enhance the effectiveness of the international community’s response by ... promoting healthy lifestyles, including abstinence, delaying sexual debut, monogamy, marriage, faithfulness, use of condoms, and avoiding substance abuse”: 22 USC § 7603(22)(E), (20); 22 USC § 7611(12)(A)-(C).

<sup>19</sup> 22 USC § 7601(23).

Two crucial elements of the legislation proved controversial. These are contained in § 7631(e), and § 7631(f). The first subsection prohibits the use of United States funding “to promote or advocate the legalization or practice of prostitution or sex trafficking”.<sup>20</sup> The latter provides:

No funds made available to carry out this chapter... may be used to provide assistance to any group or organization that does not have a policy *explicitly opposing* prostitution and sex trafficking ...<sup>21</sup>

Certain international agencies, including the Global Fund to Fight AIDS, Tuberculosis and Malaria, the World Health Organisation and the International AIDS Vaccine Initiative, are specifically exempt from this policy requirement.<sup>22</sup> But 80% of United States funding under the *Leadership Act* is conditioned on the program partners pledging their opposition to prostitution to US AID.<sup>23</sup> This swearing of a “loyalty oath”, or “Anti-Prostitution Pledge”, denies the NFP the option of adopting a “neutral” position, or having no policy on prostitution.<sup>24</sup> The legislation requires funded NFPs to “oppose the practices of prostitution” regardless of the legal status of prostitution in the donee jurisdiction. This requirement must be adhered to both in the NFP’s “Government speech” (speech during the delivery of the funded services) and in their “private” speech, including in published papers, public debates in the United States or internationally, or even when testifying before governmental committees.<sup>25</sup>

Claiming that § 7631(f) of the *Leadership Act* created unconstitutional “view-point discrimination”, four NGOs – the Alliance for Open Society International Inc, Pathfinder International, Global Health Council, and InterAction (the plaintiffs) – sought an injunction against US AID to stop it enforcing the provisions of § 7631(f) and the funding guidelines therein.<sup>26</sup> The plaintiffs were successful in both the District Court of New York, and on appeal to the United States Court of Appeals for the Second Circuit.<sup>27</sup>

The government defendants appealed to the United States Supreme Court.<sup>28</sup> Oral arguments on the merits were heard on 22 April 2013. On 22 June 2013, the Supreme Court, by a six-to-two vote,

<sup>20</sup> 22 USC § 7631(e).

<sup>21</sup> 22 USC § 7631(f) (emphasis added).

<sup>22</sup> A point of relevance to Sotomayer and Ginsburg JJ: “I would have less problem accepting ... [the Government’s position] if there weren’t four major organizations who were exempted from the policy requirement”: *Agency for International Development v Alliance for Open Society International Inc* (US Supreme Court, No 12-10, Transcript of Proceedings, Sotomayer J, 22 April 2013) p 56; see also the view of Ginsburg J, p 56; *Alliance for Open Society Intl Inc v US Agency for Intl Development* 651 F 3d 218 at 238 (2011), especially fn 7 (BD Parker Jr J).

<sup>23</sup> “[B]y accepting this award or any subaward, a non-governmental organization or public international organization awardee/subawardee agrees that it is opposed to the practices of prostitution and sex trafficking because of the psychological and physical risks they pose for women, men, and children”: USAID, “Implementation of the United States Leadership Against HIV/AIDS, Tuberculosis and Malaria Act of 2003, as amended”, *AAPD 12-04* (15 February 2012), [http://transition.usaid.gov/business/business\\_opportunities/cib/pdf/aapd12\\_04.pdf](http://transition.usaid.gov/business/business_opportunities/cib/pdf/aapd12_04.pdf) viewed 20 May 2013.

<sup>24</sup> Chief Justice Roberts makes reference to the “Loyalty Oath” in *Agency for International Development v Alliance for Open Society International Inc* (US Supreme Court, No 12-10, Transcript of Proceedings, 22 April 2013) p 4; references to the anti-prostitution pledge are made on pp 8, 50 and 56.

<sup>25</sup> *Agency for International Development v Alliance for Open Society International Inc* (Transcript of Proceedings, US Supreme Court, No 12-10, 22 April 2013) p 52. There are parallels with the former “global gag rule”: see Baird KL, “Globalizing Reproductive Control Consequences of the “Global Gag Rule”” in Tong R, Donchin A and Dodds S (eds), *Linking Visions: Feminists Bioethics, Human Rights, and the Developing World* (Rowman & Littlefield Publishers Inc, USA, 2004) pp 133-146.

<sup>26</sup> Viewpoint discrimination arises as a First Amendment issue. For a background to the litigation and the cases presented by both sides see *Alliance for Open Society Intl Inc v US Agency for Intl Development* 651 F 3d 218 (2011); Denniston L, “Argument Preview: He Who Pays the Piper...”, *SCOTUSblog* (20 April 2013), <http://www.scotusblog.com/2013/04/argument-preview-he-who-pays-the-piper> viewed 15 May 2013; Caruvana D and Holton-Basaldua C, “AID v Alliance for Open Society International”, *LII Supreme Court Bulletin* (no date), <http://www.law.cornell.edu/supct/cert/12-10> viewed 15 May 2013.

<sup>27</sup> *Alliance for Open Society Intl Inc v US Agency for Intl Dev* 430 F Supp 2d 222 (2006); *Alliance for Open Society Intl Inc v US Agency for Intl Development* 651 F 3d 218 (2011).

<sup>28</sup> *Agency for International Development v Alliance for Open Society International Inc* (US Supreme Court, No 12-10, cert granted 11 January 2013). See also *SCOTUSblog*, n 3.

upheld the plaintiff's arguments and struck down § 7631(f) as a violation of the First Amendment.<sup>29</sup> The court held that the provision was impermissible, since it compelled, as a condition of federal funding, the affirmation of the beliefs of the government of the day.<sup>30</sup> The court, in other words, held that the government may not use funding and the threat of the loss of funding as a method for government coercion or regulation of the speech and policies of NFPs. Associate Justice Scalia, in dissent, argued that the government has the right to choose to give financial support only to groups which share its views on how to address a particular issue.<sup>31</sup> Speech could be free, in that judge's opinion, provided it was free in the direction the government wanted.

The debate before the court and the subsequent judgment explored the extent to which government can and should control the speech and activities of funded NFPs. While the legislature's desire to eradicate practices which are "degrading" to women such as prostitution and sex-trafficking was held to be admirable,<sup>32</sup> the statutory requirement that health care organisations adopt a position opposing prostitution was considered by the majority to not be "germane" to such worthy aims.<sup>33</sup> Furthermore, such a requirement was held to actually impede an organisation's ability to work with highly vulnerable groups such as sex workers, and thus frustrate the efforts of the international community to improve the relevant health outcomes. For instance, in 2011, the United Nations General Assembly adopted Security Council Resolution 1983 which encouraged efforts to combat the HIV/AIDS epidemic.<sup>34</sup> The General Assembly expressed concern that sex workers remained one of the most vulnerable groups,<sup>35</sup> and called on members to "partner with local leaders and civil society, including community-based organizations" to delivery community-led HIV services.<sup>36</sup> Arguably, "community-based" organisations need flexibility in their approach to different clients – flexibility the *Leadership Act* denied.

In addition, polices compelling NFPs to adopt a government's message "as their own" were found to undermine the independence of NFPs and their legitimacy within certain countries and

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<sup>29</sup> Conservative Chief Justice Roberts delivered the opinion of the court, while fellow conservative Associate Justice Scalia wrote a dissent with which Thomas J agreed. Justice Kagan did not participate in the case.

<sup>30</sup> *Agency for International Development v Alliance for Open Society International Inc* 570 US \_\_ (2013) (Roberts CJ) at pp 6-15.

<sup>31</sup> *Agency for International Development v Alliance for Open Society International Inc* 570 US \_\_ (2013) (Scalia J dissenting) at p 4.

<sup>32</sup> 22 USC § 7601(23). The current analysis does not consider the debate over whether any meaningful distinction can or should be drawn between a sex work sector based on consent, and prostitution. For an emotive argument in favour of allowing the United States to compel an anti-prostitution message see Coalition Against Trafficking in Women, *Brief Amicus Curiae of Coalition Against Trafficking in Women* (2013), [http://www.americanbar.org/content/dam/aba/publications/supreme\\_court\\_preview/briefs-v2/12-10\\_reversal\\_catw-etal.pdf](http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs-v2/12-10_reversal_catw-etal.pdf) viewed 18 May 2013.

<sup>33</sup> *Agency for International Development v Alliance for Open Society International Inc* (US Supreme Court, No 12-10, Transcript of Proceedings, 22 April 2013) pp 5, 6, 10, 11, 25. The majority of the court held that the anti-prostitution pledge was not simply a "Policy Requirement [but an] ongoing condition on recipients' speech and activities, a ground for terminating a grant after selection is complete ... it is about compelling a grant recipient to adopt a particular belief as a condition of funding": *Agency for International Development v Alliance for Open Society International Inc* 570 US \_\_ (2013) (Roberts CJ) at p 12; cf Scalia J dissenting at p 4.

<sup>34</sup> *Political Declaration on HIV and AIDS: Intensifying Our Efforts to Eliminate HIV and AIDS*, GA Res 65/277, UN GAOR, 65th sess, 95th plen mtg, Agenda Item 10, UN Doc A/RES/65/277 (adopted 10 June 2011).

<sup>35</sup> *Political Declaration on HIV and AIDS: Intensifying Our Efforts to Eliminate HIV and AIDS*, GA Res 65/277, UN GAOR, 65th sess, 95th plen mtg, Agenda Item 10, UN Doc A/RES/65/277 (adopted 10 June 2011) at [29]; UNAIDS, *Global Report: UNAIDS Report on the Global AIDS Epidemic* (2012) pp 9-10, [http://www.unaids.org/en/media/unaids/contentassets/documents/epidemiology/2012/gr2012/20121120\\_UNAIDS\\_Global\\_Report\\_2012\\_with\\_annexes\\_en.pdf](http://www.unaids.org/en/media/unaids/contentassets/documents/epidemiology/2012/gr2012/20121120_UNAIDS_Global_Report_2012_with_annexes_en.pdf) viewed 15 May 2013.

<sup>36</sup> *Political Declaration on HIV and AIDS: Intensifying Our Efforts to Eliminate HIV and AIDS*, GA Res 65/277, UN GAOR, 65th sess, 95th plen mtg, Agenda Item 10, UN Doc A/RES/65/277 (adopted 10 June 2011) at [57]. A range of measures were also adopted (at [59]).

communities.<sup>37</sup> There is, the court found, a difference between hiring a spokesperson and engaging a funding “partner”.<sup>38</sup> NFPs should not be forced to act as a mere mouthpiece for the government’s viewpoints, especially where the *delivery* of aid, rather than the promotion of a message, is the key legislative objective.<sup>39</sup>

Few would disagree that governments should be entitled to set criteria to determine whether organisations should be funded by taxpayers. Appropriate governance constraints could include determining whether program partners are appropriately skilled, and whether they are capable of handling public moneys to achieve relevant outcomes.<sup>40</sup> Certainly, the trend towards bureaucratic managerialism requires mechanisms that ensure NFPs and contractors are accountable for their use of public revenue.<sup>41</sup> The government defendant in *AID v AOSI Inc* pressed this point, and argued that the government’s responsibility to “monitor” the use of funds in foreign jurisdictions justified the legislated pledge, since requiring an organisation to “pledge” its support for the government’s message was a way of ensuring the program’s “integrity”.<sup>42</sup>

The Supreme Court was not persuaded that such requirements applied in this instance. The majority held that § 7631(e) of the *Leadership Act* (which prohibited the spending of federal funding on advocacy for prostitution and sex trafficking) was sufficient to ensure that the purpose of the Act was not subverted.<sup>43</sup> Policy advocacy constraints, like those demanded in § 7631(f), went well beyond what was required to maintain program integrity. For example, various individuals and organisations, like doctors and universities, receive public funding but their accountability does not depend on a pledge to promote or agree with a particular viewpoint.<sup>44</sup> Moreover, in the case of the *Leadership Act*, the pledge occurred prior to the funding allocation and was therefore a selection-criteria matter, rather than a monitoring and accountability mechanism.<sup>45</sup> The practical effect of the pledge was to exclude organisations with a particular viewpoint, in preference to organisations that support the government’s ideological position. As is often the case, “accountability” mechanisms were more focused around control than the responsible use of public funds.

<sup>37</sup> *Agency for International Development v Alliance for Open Society International Inc* 570 US \_\_ (2013) (Roberts CJ) at pp 12-13; *Agency for International Development v Alliance for Open Society International Inc* (US Supreme Court, No 12-10, Transcript of Proceedings, Breyer J, 22 April 2013) p 16. For a recent example of the undermining of NFP work by government action see Vines T and Faunce T, “Civil Liberties and the Critics of Safe Vaccination: Australian Vaccination Network Inc v Health Care Complaints Commission [2012] NSWSC 110” (2012) 20 JLM 44 at 56.

<sup>38</sup> *Agency for International Development v Alliance for Open Society International Inc* (US Supreme Court, No 12-10, Transcript of Proceedings, 22 April 2013) pp 35, 36, 44; *Alliance for Open Society Intl Inc v US Agency for Intl Development* 651 F 3d 218 at 223 (2011) (BD Parker Jr J); cf *Rust v Sullivan* 500 US 173 (1991).

<sup>39</sup> But compare the situation where, “[if] the government were to fund a campaign urging children to ‘Just Say No’ to drugs, we do not doubt that it could require grantees to state that they oppose drug use by children. But in that scenario, the government’s program *is*, in effect, its message. That is not so here. The stated purpose of the *Leadership Act* is to fight HIV/AIDS, as well as tuberculosis, and malaria”: *Alliance for Open Society Intl Inc v US Agency for Intl Development* 651 F 3d 218 at 237 (2011) (BD Parker Jr J) (emphasis in original). See also Scalia J’s dissent in *Agency for International Development v Alliance for Open Society International Inc* 570 US \_\_ (2013) at p 1.

<sup>40</sup> The Deputy Solicitor General for the United States Department of Justice suggested the government’s ability to “monitor” the use of funds in foreign jurisdictions was a key policy reason justifying the anti-prostitution pledge: *Agency for International Development v Alliance for Open Society International Inc* (US Supreme Court, No 12-10, Transcript of Proceedings, 22 April 2013) pp 15, 27, 55.

<sup>41</sup> Flinders M and Moon DS, “The Problem of Letting Go: The ‘Big Society’, Accountable Governance and ‘the Curse of the Decentralizing Minister’” (2011) 26(8) *Local Economy* 652; Palmer, n 8 at 602.

<sup>42</sup> *Agency for International Development v Alliance for Open Society International Inc* (US Supreme Court, No 12-10, Transcript of Proceedings, 22 April 2013) pp 15, 27, 55.

<sup>43</sup> *Agency for International Development v Alliance for Open Society International Inc* 570 US \_\_ (2013) (Roberts CJ) at p 11.

<sup>44</sup> *Agency for International Development v Alliance for Open Society International Inc* (US Supreme Court, No 12-10, Transcript of Proceedings, Alito J, 22 April 2013) p 11; *Alliance for Open Society Intl Inc v US Agency for Intl Development* 651 F 3d 218 at 237 (2011) (BD Parker Jr J).

<sup>45</sup> *Agency for International Development v Alliance for Open Society International Inc* 570 US \_\_ (2013) (Roberts CJ) at p 11.

In argument before the United States Supreme Court, the Deputy Solicitor General for the Department of Justice suggested that NFPs could create “affiliated” bodies who would take the “pledge” to secure funding, while allowing the parent body to continue with a pro-legalisation or neutral position.<sup>46</sup> This argument followed the jurisprudence established in *Regan v Taxation with Representation of Washington* 461 US 540 (1983) where the Supreme Court upheld a legislative requirement that NFPs seeking tax exempt status did not engage in efforts to influence legislation. In that case it was held that the NFP had the ability to separate its lobbying function from the component of the organisation that received the tax exemption.<sup>47</sup> However, the majority in the Supreme Court distinguished *AID v AOSI Inc* on the basis of the reasonableness by which an organisation could separate its functions, and on the reach of the requirement, finding in this instance that the legislative effect went further.<sup>48</sup> In *AID v AOSI Inc* the Supreme Court majority held that the government was not merely ensuring that federal funds were being used correctly, but were leveraging the federal funds to unconstitutionally regulate speech beyond the scope of the program.<sup>49</sup>

The argument over the division of NFPs into multi-limbed organisations, with different limbs providing different services from different funding bases, reveals a distinction between the operations of NFPs and for-profit bodies. The latter were more capable of establishing affiliate bodies that give purpose to or promote different products and services (or, as has been the subject of recent discussion, to escape their community obligations, namely corporate taxation).<sup>50</sup> For-profit corporations may not consider adherence to a consistent moral framework “in the best interests” of the company, except to the extent that it intrudes into their fiduciary duty to shareholders.<sup>51</sup> An NFP’s purpose of advancing the “universal or common good” cannot be easily abandoned, especially where charitable status depends on adherence to such a goal.<sup>52</sup>

In Australia the lack of constitutional free speech rights means that NFPs are much more exposed to legislative and policy mechanisms that require the pledging or adherence to a government’s ideological goals.<sup>53</sup> It is a great deficiency in these current constitutional arrangements that they do not strongly protect the right of NFPs engaged in public health activities to pursue their objectives through a variety of means, including through advocacy of the broader (or narrower) objectives of their cause,

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<sup>46</sup> See *DKT Int’l Inc v US Agency for Int’l Dev* 477 F 3d 758 (2007) and the dissenting judgment of Circuit Court Judge Straub in *Alliance for Open Society Intl Inc v US Agency for Intl Development* 651 F 3d 218 at 267 (2011); cf *Agency for International Development v Alliance for Open Society International Inc* (US Supreme Court, No 12-10, Transcript of Proceedings, Ginsburg J, 22 April 2013) p 18.

<sup>47</sup> *Regan v Taxation with Representation of Washington* 461 US 540 at 544 (1983); *Agency for International Development v Alliance for Open Society International Inc* 570 US \_\_\_ (2013) (Roberts CJ) at pp 8-9.

<sup>48</sup> *Agency for International Development v Alliance for Open Society International Inc* 570 US \_\_\_ (2013) (Roberts CJ) at pp 12-13; *Rust v Sullivan* 500 US 173 (1991).

<sup>49</sup> *Agency for International Development v Alliance for Open Society International Inc* 570 US \_\_\_ (2013) (Roberts CJ) at pp 9-10.; *FCC v League of Women Voters of California* 468 US 364 (1984).

<sup>50</sup> Hon David Bradbury MP, “Board of Taxation Reviews of the Thin Capitalisation Arm’s Length Test and Australia’s Debt and Equity Tax Rules”, *Media Release* (4 June 2013), <http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2013/101.htm&pageID=003&min=djba&Year=&DocType=> viewed 29 July 2013; Tingle L, “Budget Hit to Business Tax Breaks”, *Australian Financial Review* (30 May 2013), [http://www.afr.com/p/national/budget\\_hit\\_to\\_business\\_tax\\_breaks\\_WNPNRLGbh0UMR3Ro9uSmUM](http://www.afr.com/p/national/budget_hit_to_business_tax_breaks_WNPNRLGbh0UMR3Ro9uSmUM) viewed 29 July 2013.

<sup>51</sup> *Corporations Act 2001* (Cth), ss 180, 181.

<sup>52</sup> This phrase was used in the exposure draft of the *Charities Act 2013* but was subsequently dropped for the final legislation, in preference for language which clarified that the public benefit test could be satisfied if a charity’s activities were “available to the general public ... or a sufficient section of the general public”: *Charities Act 2013* (Cth), s 6.

<sup>53</sup> To borrow a United States term, perhaps such mechanisms should be subject to “strict scrutiny” by the courts. See eg Hurst D, “Gag Clauses Help ‘Stop Grant Abuse’”, *Brisbane Times* (19 September 2012), <http://www.brisbanetimes.com.au/queensland/gag-clauses-help-stop-grant-abuse-20120919-265tm.html> viewed 22 May 2013; Patty A, “State Funds Come with Proviso Not to Protest”, *Sydney Morning Herald* (24 May 2013), <http://www.smh.com.au/nsw/state-funds-come-with-proviso-not-to-protest-20130523-2k3wb.html> viewed 24 May 2013; Casey and Dalton, n 1.

such as by promoting evidence linking global warming to human health, or by agitating for certain rights for the environment in order to protect human health.<sup>54</sup>

## AUSTRALIAN GOVERNMENT INTERFERENCE WITH HEALTH-RELATED NFP ACTIVITIES

Interference with the wider activities of funding recipients has a long history in the United States and Australia, especially with respect to those organisations directed towards family planning.<sup>55</sup> Since the 1970s, the United States Government and Congress have sought to prevent aid recipients from speaking about, promoting or providing abortion services to women in developing countries, despite the known risks of unsafe abortions to women.<sup>56</sup> This “global gag rule” was only recently repealed by President Obama, and could be reinstated by a future Congress or President.<sup>57</sup>

While the community debate over abortion and reproductive rights in Australia has been less heated and visceral than in the United States, conservative politicians have still sought to gag or defund NFPs which run family planning programs as part of, or separate to, their foreign aid programs. For example, until a 2009 revision to the *Family Planning Guidelines*, AusAID funding was not available “for activities that involve abortion training or services, research trials or activities which directly involve abortion drugs”.<sup>58</sup> Changes in 2009 that allowed funding to be used for these purposes were controversial and the then Prime Minister Kevin Rudd was overruled on them by his own caucus.<sup>59</sup> While the gag has been removed, NFPs that advocate for safe abortion overseas, or run family planning programs, can expect extra scrutiny from parliamentarians.<sup>60</sup> The abolition of Australia’s aid agency (AusAID) in the first days of the new Coalition Government in 2013, and the explicit linking of aid to foreign policy outcomes by the Foreign Minister, suggest that the funding rules that were relaxed in 2009 may be tightened again, in line with the conservative viewpoint of the new Australian Government.

Funding gag rules present a dilemma for medical practitioners volunteering with public health NFPs. The practitioner may follow the government rule and thus ensure funding for vital clinical services. But he or she does so at the cost of being limited in their ability to offer (or even discuss) safe and legal (depending on the jurisdiction) options that may be in the best clinical interests of their patient. In the alternative, the doctor, nurse or health worker may insist on discussing the outlawed topic, or providing the treatment that is banned under the gag rule, but does so at the risk of placing the entire health program into financial peril. For the professional, gag rules subvert and interfere with

<sup>54</sup> Vines T, Bruce A and Faunce T, “Planetary Medicine and the Waitangi Tribunal Whanganui River Report: Global Health Law Embracing Ecosystems as Patients” (2013) 20 JLM 528.

<sup>55</sup> The gag extended to organisations that “provide financial support to any other foreign nongovernmental organization that conducts such activities”. For more on the Global Gag Rule see Baird, n 25, pp 133-146.

<sup>56</sup> See generally World Health Organisation (WHO), *Unsafe Abortion: Global and Regional Estimates of the Incidence of Unsafe Abortion and Associated Mortality in 2008* (6th ed, WHO, Geneva, 2008).

<sup>57</sup> Charatan F, “Obama Overturns Ban on Federal Funding of Family Planning Organisations that Promote Abortion” [News], *British Medical Journal* (27 January 2009), <http://dx.doi.org/10.1136/bmj.b320> viewed 20 May 2013.

<sup>58</sup> Commonwealth, Senate, *Parliamentary Debates* (14 May 2008) p 1936 (Senator Faulkner, Special Minister of State and Cabinet Secretary); Keane B, “AusAid Conservatives have Blood on Their Hands”, *Crikey* (10 June 2008), <http://www.crikey.com.au/2008/06/10/ausaid-conservatives-have-blood-on-their-hands> viewed 18 May 2013.

<sup>59</sup> Stephen Smith MP, “Australian Government Committed to Maternal and Child Health in Developing Countries”, *Media Release* (25 February 2013), <http://www.ausaid.gov.au/MediaReleases/Pages/Australian-Government-Committed-to-Maternal-and-Child-Health-in-Developing-Countries.aspx> viewed 18 May 2013; O’Malley S, “Govt Ends Foreign Aid Ban on Abortions”, *Sydney Morning Herald* (10 March 2009), <http://news.smh.com.au/breaking-news-national/govt-ends-foreign-aid-ban-on-abortions-20090310-8tsj.html> viewed 18 May 2013.

<sup>60</sup> See eg questions asked during recent Senate Estimates Hearings: Commonwealth, Foreign Affairs, Defence and Trade Legislation Committee, *Senate Estimates* (3 June 2010) pp 53-55 (Senator Boswell); Commonwealth, Foreign Affairs, Defence and Trade Legislation Committee, *Senate Estimates* (2 June 2009) pp 81-88 (Senator Boswell).



the traditional doctor-patient relationship and, more broadly, undermine medical norms which have developed over centuries, and which linked medical service to volunteerism and charity.<sup>61</sup>

Australia does not have a constitutionally guaranteed right to free speech such as is enshrined in the United States *Constitution's* First Amendment. The present High Court appears reluctant to extend the limited, implied right of political communication to speech between a medical professional and their patient.<sup>62</sup> Potentially, however, Australian doctors may be able to prevent the Federal Government interfering in the doctor-patient relationship via gag clauses, by relying on the constitutional prohibition on “civil conscription”.<sup>63</sup> The protection afforded by s 51(xxiiiA) of the Australian *Constitution* appears to have been focused historically on preventing small medical businesses being coerced into government or large-scale private corporate operations. Yet there is no obvious reason why medical services rendered under a foreign aid arrangement with the Commonwealth fall outside the definition of “medical and dental services”.<sup>64</sup> Similarly prohibited civil conscription can just as easily arise from “gag clauses” in managed care contracts as it can from “gag clauses” in governmental ideological controls over taxpayer-funded, health-related NFPs.

Judicial views on s 51(xxiiiA) suggest its interpretation should not be “limited to the circumstances, experiences, purposes or objectives of those who adopted them”.<sup>65</sup> Changes in the international community since 1946 and the commitment of the Australian Government to the United Nations Millennium Development Goals and research on the importance of multidisciplinary team integration in effective medical and dental service delivery, support the case for adopting the widest possible interpretation of “medical and dental services”. This should include extending protection to the activities of health professionals engaged by NFPs in receipt of public funds.<sup>66</sup> If the use of a mandated prescription pad by a doctor can constitute prohibited civil conscription, then the protection should extend to the – arguably more important – matter of governments or multinational corporations attempting to conscript to their own ideological agendas what medical advice passes between a doctor and patient.<sup>67</sup>

In the immediate future, however, Australia’s NFPs and charities will need to rely on recent legislative and policy reforms to protect their right to engage in commentary and advocacy.

## **A NEW PUBLIC ROLE FOR CHARITIES IN AUSTRALIA: SOME RECENT REFORMS**

Because of their limited ability to attract capital via traditional markets, donations, grants, bequests and membership dues are the key sources of funding and finance for most small to medium NFPs.<sup>68</sup> Many NFPs can access special tax concessions, including income tax and GST exemptions, while

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<sup>61</sup> This principle is reflected in a different context in Curfman GD, Morrissey S, Greene MF et al, “Physicians and the First Amendment” (2008) 359(23) NEJM 2484; Annas GJ, “The Supreme Court and Abortion Rights” (2007) 356(23) NEJM 2201 at 2206. See generally, Australian Medical Association, *Code of Ethics* (2004, revised 2006), <https://ama.com.au/codeofethics> viewed 10 March 2013; World Medical Association, *International Code of Medical Ethics*, adopted by the 3rd General Assembly of the World Medical Association, London, England, October 1949 (as amended at the 57th WMA General Assembly, Pilanesberg, South Africa, October 2006), <http://www.wma.net/en/30publications/10policies/c8> viewed 10 March 2013. This relationship and spirit of volunteerism is not only a feature of the Western medical tradition: Devereux JA, *Australian Medical Law* (3rd ed, Routledge-Cavendish, London, 2007) pp 106-118.

<sup>62</sup> See eg *Monis v The Queen* (2013) 87 ALJR 340; [2013] HCA 4; *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 87 ALJR 289; [2013] HCA 3; *Wotton v Queensland* (2012) 246 CLR 1.

<sup>63</sup> *Constitution of Australia*, s 51(xxiiiA), provides that a law of the Commonwealth providing “medical and dental services” must not “authorize any form of civil conscription”; *Wong v Commonwealth* (2009) 236 CLR 573; Faunce T, “Selim v Lele and the Civil (Industrial) Conscription Prohibition: Constitutional Protection Against Federal Legislation Controlling or Privatising Australian Public Hospitals” (2008) 16 JLM 36.

<sup>64</sup> Indeed, the protection prohibits certain measures which amount to “practical compulsion”: *Wong v Commonwealth* (2009) 236 CLR 573; *General Practitioners Society v Commonwealth* (1980) 145 CLR 532.

<sup>65</sup> *Wong v Commonwealth* (2009) 236 CLR 573 at [102] (Kirby J).

<sup>66</sup> United Nations, *Millennium Goals*, <http://www.un.org/millenniumgoals> viewed 24 May 2013.

<sup>67</sup> *British Medical Association v Commonwealth* (1949) 79 CLR 201.

<sup>68</sup> Productivity Commission, n 5, pp 155-195.

their salaried employees can take advantage of generous fringe benefit tax allowances.<sup>69</sup> Some of these concessions increase the attractiveness of NFPs to certain donors, with “endorsement” by the Australian Tax Office as a deductible gift recipient the most valuable tax-status for charitable NFPs.<sup>70</sup> Donations to a deductible gift recipient are tax deductible for the donor under the *Income Tax Assessment Act 1997* (Cth). Recent cases in the United States have demonstrated that tax concessions and their denial can be used as a political tool against organisations that take a position that is critical of the government of the day.<sup>71</sup>

With the exception of named entities (such as Amnesty International), deductible gift recipient status is only available to a narrow range of charitable NFPs, whose activities fall within a correspondingly narrow range.<sup>72</sup>

Until the final week of the 43rd Parliament, the definition of two key charity law terms, “charity” or “charitable purpose”, were understood according to the common law as informed by the preamble to an Elizabethan-era statute.<sup>73</sup> These rules traditionally confined “charitable purposes” to the relief of poverty, the advancement of education, the advancement of religion, and to other purposes beneficial to the community.<sup>74</sup> Those same rules have historically held that charitable trusts that engaged in political activities were invalid, including where the trust advocated for a change in law or government policy. These principles have extended to many modern NFP tax concessions.<sup>75</sup>

The rationale for courts denying charitable status to a trust advocating legal reform was justified by Parker LL in *Bowman v Secular Society Ltd* [1917] AC 406 at 442, on the basis that

a trust for the attainment of political objects has always been held invalid, not because it is illegal, for every one [sic] 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 a charitable gift.<sup>76</sup>

<sup>69</sup> See Australian Taxation Office (ATO), n 11. Proposed changes to fringe benefit tax laws – not yet legislated – announced after this article was drafted, will impact on the NFP sector.

<sup>70</sup> Unless prescribed in law as a Deductible Gift Recipient (s 30.227 of the *Income Tax Assessment Act 1997* (Cth)), an “entity” must be endorsed by the Tax Commissioner under s 30.120 of that Act. Note that subsequent to the decision in *Aid/Watch Inc v Commissioner of Taxation* (2010) 241 CLR 539 the ITAA was amended by the *Australian Charities and Not-For-Profits Commission (Consequential and Transitional) Act 2012* (Cth) and a different regime in relation to the “registration” of charities and NFPs now operates. In the absence of a statutory definition of “charity”, the common law rules continue to apply.

<sup>71</sup> The White House, “President Obama Appoints Daniel Werfel as Acting Commissioner of Internal Revenue”, *Media Release* (16 May 2013), <http://www.whitehouse.gov/the-press-office/2013/05/16/president-obama-appoints-daniel-werfel-acting-commissioner-internal-reve> viewed 22 May 2013; Fram A, “IRS Battling Tea Party Groups Over Tax-exempt Status”, *Huffington Post* (3 January 2012), [http://www.huffingtonpost.com/2012/03/01/irs-tea-party-tax-exempt\\_n\\_1314488.html](http://www.huffingtonpost.com/2012/03/01/irs-tea-party-tax-exempt_n_1314488.html) viewed 21 May 2013; “[G]roups with the words ‘tea party’ or ‘patriot’ in their applications for tax-exempt status had received greater scrutiny”: Blumenthal P, “IRS Apologizes for Targeting Conservative Groups in 2012 Election”, *Huffington Post* (10 May 2013), [http://www.huffingtonpost.com/2013/05/10/irs-conservative-groups\\_n\\_3254180.html](http://www.huffingtonpost.com/2013/05/10/irs-conservative-groups_n_3254180.html) viewed 21 May 2013; “The question of whether the IRS personnel who targeted tea party groups acted in a partisan way has implications for whether they broke laws such as the Hatch Act, which forbids government employees from engaging in partisan political activity”: Ward J, “IRS Commissioner Contradicts Earlier Testimony, Says Tea Party-Targeting Was Partisan”, *Huffington Post* (21 May 2013), [http://www.huffingtonpost.com/2013/05/21/irs-tea-party-partisan\\_n\\_3313720.html](http://www.huffingtonpost.com/2013/05/21/irs-tea-party-partisan_n_3313720.html) viewed 22 May 2013.

<sup>72</sup> *Income Tax Assessment Act 1997* (Cth), s 30.125.

<sup>73</sup> New definitions will apply from 1 January 2014 under the *Charities Act 2013* (Cth), discussed below.

<sup>74</sup> *Aid/Watch Inc v Commissioner of Taxation* (2010) 241 CLR 539 at [18] (French CJ, Gummow, Hayne, Crennan and Bell JJ); *Special Commissioners of Income Tax v Pemsel* [1891] AC 531.

<sup>75</sup> For example “promoting or opposing a change to any matter established by law, policy or practice” of a domestic or foreign government. *Charitable Uses Act 43 Eliz I*, c 4 (1601); *Special Commissioners of Income Tax v Pemsel* [1891] AC 531; *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31; Chia J, Harding M and O’Connell A, “Navigating the Politics of Charity: Reflections on *Aid/Watch Inc v FCT*” (2011) 35(2) MULR 353 <http://www.austlii.edu.au/cgi-bin/sinodisp/au/journals/MelbULawRw/2011/13.html> viewed 13 May 2013; cf *Charities Act 2013* (Cth), s 11. Special rules exist for formal political parties that are not relevant to this discussion.

<sup>76</sup> Cited and distinguished in *Aid/Watch Inc v Commissioner of Taxation* (2010) 241 CLR 539 at [27] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

Arguably, adherence to these foundational rules provides a means for the Executive to utilise tax policy in such a way as to disadvantage NFPs which scrutinise or critique government policy. The strict application of these rules was recognised in a 2001 government inquiry, as failing to acknowledge the pluralistic nature of Australian democracy, wherein policy development is not an exclusive function of government.<sup>77</sup> The inadequacy of these rules was highlighted in a number of key Australian cases which sought to judicially expand the scope of both “charity” and “charitable purpose”.

In 2010 the High Court was presented with an opportunity to modernise the rules concerning charities and engagement in political activities. In *Aid/Watch Inc v Commissioner of Taxation* (2010) 241 CLR 539 (*Aid/Watch Inc*) an NFP, Aid/Watch, challenged the ATO’s revocation of its tax concessions.<sup>78</sup> The ATO argued that Aid/Watch was ineligible for tax concessions because its purpose was to monitor Australia’s aid program, rather than deliver aid, and thus was not acting for the purpose of the relief of poverty. Aid/Watch also engaged in “political” activities, including “urging the public to write to the government to put pressure on the Burmese regime; delivering an ironic birthday cake to the World Bank; and raising concerns about the developmental impacts of the Australia–US Free Trade Agreement”.<sup>79</sup> Aid/Watch in its defence argued (at [46]) that “the generation by it of public debate as to the best methods for the relief of poverty by the provision of foreign aid” meant its activities were beneficial to the public – and thus charitable.

The High Court took into account the social and political environment in which NFPs operate, the logical connection between delivering charity to a segment of society and lobbying for its advancement, and the Australian constitutional setting. The majority accepted the submissions of Aid/Watch and rejected the narrow conception of charitable purpose preferred by the ATO and the English legal authorities (at [48], French CJ, Gummow, Hayne, Crennan and Bell JJ). It was held (at [47]) that “the generation by lawful means of public debate ... concerning the efficiency of foreign aid directed to the relief of poverty, itself is a purpose beneficial to the community”. This decision can be seen as a victory for the NFP sector and has important implications for those organisations which are engaged in public health, where clinical service delivery, education and political advocacy are often inseparable.<sup>80</sup>

In 2013, in response to the decision in *Aid/Watch Inc*, and a Productivity Commission Inquiry into the NFP sector,<sup>81</sup> the Labor Government established a national regime for the regulation of charities and NFPs, to be overseen by an Australian Charities and Not-For-Profit Commission (ACNC).<sup>82</sup> The ACNC was intended to play an important role in the functioning and administration of NFPs that included public health organisations, hospitals and research bodies. It is relevant to outline its function and powers.

The objectives of the *Australian Charities and Not-For-Profits Commission Act 2012* (Cth) (the Act) are:

- (a) to maintain, protect and enhance public trust and confidence in the Australian not-for-profit sector;
- and

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<sup>77</sup> Sheppard Inquiry, n 8, pp 209-218.

<sup>78</sup> For an outline of the early Administrative Appeals Tribunal and Federal Court decisions leading up to the High Court’s decision see Chia, Harding and O’Connell, n 75.

<sup>79</sup> The ATO had previously granted tax concessions to Aid/Watch: Chia, Harding and O’Connell, n 75; *Aid/Watch Inc v Commissioner of Taxation* (2010) 241 CLR 539.

<sup>80</sup> See eg Queensland Association for Healthy Communities, which engaged in health services, education and political advocacy: <http://www.qahc.org.au> viewed 21 November 2013. This NFP was defunded by the Queensland Government in 2012: ABC, “Funding Stripped from Sexual Health Campaigns”, *ABC News Online* (21 May 2012), <http://www.abc.net.au/news/2012-05-20/funding-stripped-from-hiv-awareness-body/4022456> viewed 22 May 2013.

<sup>81</sup> Productivity Commission, n 5; *Victorian Women Lawyers’ Association Inc v Commissioner of Taxation* (2008) 170 FCR 318; [2008] FCA 983.

<sup>82</sup> Australian Charities and Not-For-Profits Commission, <http://www.acnc.gov.au> viewed 18 May 2013; *Australian Charities and Not-For-Profits Commission Act 2012* (Cth); *Australian Charities and Not-For-Profits Commission (Consequential and Transitional) Act 2012* (Cth).

- (b) to support and sustain a robust, vibrant, independent and innovative Australian not-for-profit sector; and
- (c) to promote the reduction of unnecessary regulatory obligations on the Australian not-for-profit sector.<sup>83</sup>

The Act centralises many functions relating to the endorsement of charities and NFPs. Registration with the ACNC is now a “prerequisite for an entity to access certain Commonwealth tax concessions”.<sup>84</sup> The Act provides that an “entity” is entitled to be registered as a charity if it has a charitable purpose and if:

- (a) the entity is a not for profit entity;
- (b) the entity is in compliance with the governance standards and external conduct standards ...;
- (c) the entity has an ABN; ...<sup>85</sup>

Prior to the recent enactment of a statutory definition, “registered charity” was confined to entities established for the purpose of the relief of poverty or sickness, the needs of the aged, the advancement of education, or the benefit of the community. The ACNC is also able to register institutions “whose principal activity is to promote the prevention or the control of diseases in human beings” and “public benevolent institutions”.<sup>86</sup> With the passage of the *Charities Act 2013* (Cth), which is intended to commence on 1 January 2014, the Commonwealth will expand the range of entities eligible to register with the ACNC as a “registered charity” and, more importantly, will bring the legal understanding of charity in line with modern reality.<sup>87</sup>

Although registration brings advantages, it also imposes a level of accountability and control onto an organisation. Importantly, registered organisations must follow certain “Governance Standards”, which may:

- (a) require the entity to ensure that its governing rules provide for a specified matter; or
- (b) require the entity to achieve specified outcomes and:
  - (i) not specify how the entity is to achieve those outcomes; or
  - (ii) specify principles as to how the entity is to achieve those outcomes; or
- (c) require the entity to establish and maintain processes for the purpose of ensuring specified matters.<sup>88</sup>

The Act also introduces record-keeping and reporting requirements for NFPs.<sup>89</sup> The ACNC will also have the power to monitor registered entities, compel the production of their documents and records, and enter into enforceable undertakings (including suspension) of non-compliant entities.<sup>90</sup>

Importantly in regard to the previous discussion, the Governance Standards cannot be a muzzle, and they must not restrain an entity from the ability “to comment on, or advocate support for, a change

<sup>83</sup> *Australian Charities and Not-For-Profits Commission Act 2012* (Cth), s 15-5(1)(a)-(c).

<sup>84</sup> *Australian Charities and Not-For-Profits Commission Act 2012* (Cth), s 15-5(3).

<sup>85</sup> *Australian Charities and Not-For-Profits Commission Act 2012* (Cth), s 25-5(1), (3). An ABN is an Australian Business Number, a taxation identifier.

<sup>86</sup> *Australian Charities and Not-For-Profits Commission Act 2012* (Cth), s 25-5(5).

<sup>87</sup> In 2011 the Australian Treasury released a Paper on the definition of charity. Draft legislation was prepared in 2012 and an exposure draft was released for consultation in April 2013 with a very short one-month period for comments: David Bradbury and Mark Butler MPs, “Public Consultation on a Statutory Definition of Charity”, *Media Release* (8 April 2013), <http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2013/045.htm&pageID=003&min=djba&Year=&DocType=> viewed 21 November 2013; The Treasury, “A Statutory Definition of Charity” (8 April 2013), <http://www.treasury.gov.au/ConsultationsandReviews/Consultations/2013/A-statutory-definition-of-charity> viewed 22 November 2013.

<sup>88</sup> *Australian Charities and Not-For-Profits Commission Act 2012* (Cth), s 45-10(2). The Governance Standards are subject to the approval of Parliament: *Australian Charities and Not-For-Profits Commission Act 2012* (Cth), s 45-20.

<sup>89</sup> *Australian Charities and Not-For-Profits Commission Act 2012* (Cth), ss 55-5, 60-5. The Act also establishes a system of mandatory notification, whereby NFPs must notify the ACNC if they have contravened a provision of the Act or not complied with a Governance Standard in a material respect: *Australian Charities and Not-For-Profits Commission Act 2012* (Cth), s 65-5.

<sup>90</sup> *Australian Charities and Not-For-Profits Commission Act 2012* (Cth), ss 70-5 to 70-20 (information gathering powers); 75-15 to 75-40 (monitoring powers); Pt 4-2 (enforcement powers).

to any matter established by law, policy or practice in the Commonwealth, a State, a Territory or another country”, provided “the comment or advocacy furthers, or is in aid of, the purpose of the entity ... [and] ... the comment or advocacy is lawful”.<sup>91</sup> While the requirement for comments and advocacy to “further”, or “be in aid of” the purpose of an NFP seem like a significant intrusion into organisational autonomy, in truth it is a relaxation of the previous rules governing charitable purpose. It also entrenches a right of lawful advocacy in federal legislation, which was subsequently strengthened by the *Not-for-profit Sector Freedom to Advocate Act 2013* (Cth).

This final reform, the *Not-for-profit Sector Freedom to Advocate Act 2013*, is intended to prevent future Commonwealth agreements from including gag clauses in contracts or service agreements with NFPs. This Act was also enacted in the final weeks of the 43rd Parliament and received bipartisan support in both Houses. Previously, gag clauses, usually justified as protecting confidential information, were used as a tool by Australian governments to limit the ability of NFPs to advocate for changes in government policies or programs.<sup>92</sup> The *Not-for-profit Sector Freedom to Advocate Act 2013* will “prohibit Commonwealth agreements from restricting or preventing not-for-profit entities from commenting on, advocating support for or opposing changes to Commonwealth law, policy or practice, and for related purposes”.<sup>93</sup> This Act follows, and entrenches via legislation, changes to the *Commonwealth Grant Guidelines*, which prohibit departments from including gag (or “suppression”) rules in “grant application and selection processes or clauses in grant agreements”.<sup>94</sup> The Act applies to existing and future agreements, and voids any existing suppression clause.<sup>95</sup> Exceptions remain for the protection of personal information, and for a limited range of confidential material – primarily trade secrets, or information that, if released, would compromise national security.<sup>96</sup>

It is important to note that these reforms do little to protect the rights of individuals who apply for or receive community services run by government-funded health-related NFPs, or government-funded for-profits, such as migrant detention centres and aged care facilities.<sup>97</sup> The outsourcing of services creates a risk that individuals in need of assistance will be excluded because of race, sexuality, religion or response to profit-driven factors.<sup>98</sup> While the motives of a NFP may differ from a for-profit body, both sectors are limited in their resources. Human rights legislation in the Australian Capital Territory and Victoria has provided some level of protection to individuals, and has provided a cause of action against NFPs which, in the course of providing a government-funded service, infringed upon a human rights standard.<sup>99</sup> The absence of a comprehensive, national human rights Act, with provisions that could apply to government-funded services,<sup>100</sup> constitutes a missing piece of the wholesale reform of the Australian NFP sector.

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<sup>91</sup> *Australian Charities and Not-For-Profits Commission Act 2012* (Cth), s 45-10(6).

<sup>92</sup> Thomas and Knowler, n 2.

<sup>93</sup> *Not-for-profit Sector Freedom to Advocate Act 2013* (Cth), long title.

<sup>94</sup> Department of Finance and Deregulation, *Commonwealth Grant Guidelines* (2nd ed, Commonwealth of Australia, Canberra, 2013) at [3.24].

<sup>95</sup> *Not-for-profit Sector Freedom to Advocate Act 2013* (Cth), ss 4, 5, 7.

<sup>96</sup> *Not-for-profit Sector Freedom to Advocate Act 2013* (Cth), ss 3, 5(2).

<sup>97</sup> For example, for-profit companies, Serco and G4S Ltd, run the Christmas Island and Villawood Detention Centres, while for-profit and NFP organisations provide almost all residential care places in Australia: Department of Health and Ageing (DoHA), “Data on Approved Service Providers and Aged Care Places”, *DoHA* (2 October 2012), <http://www.health.gov.au/internet/main/publishing.nsf/Content/ageing-rescare-servlist-providers-services.htm#pt02> viewed 24 May 2013.

<sup>98</sup> Palmer, n 8.

<sup>99</sup> *Human Rights Act 2004* (ACT), Pt 5A; *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 38; *Metro West Housing Services Ltd v Sudi (Residential Tenancies)* [2009] VCAT 2025; *Canberra Fathers and Children Services Inc & Michael Watson (Residential Tenancies)* [2010] ACAT 74; cf *YL v Birmingham City Council* [2008] 1 AC 95.

<sup>100</sup> This article does not propose applying such provisions to all of an organisation’s activities, merely those funded by government. See generally Palmer, n 8.

## BACK TO THE FUTURE? NEW SOUTH WALES, QUEENSLAND AND THE FUTURE OF THE NFP SECTOR

The progressive and tolerant approach to the NFP sector adopted by the Labor Federal Government was not replicated at the State level. In the past two years conservative governments in Queensland and New South Wales have:

- introduced “gag” clauses into funding agreements between Queensland Health and NFPs, where the NFP receives 50% or more of its funding from the Queensland Government;<sup>101</sup>
- introduced requirements that recipients of funding from New South Wales consolidated revenue or discretionary spending from the Public Purpose Fund must refrain from “political advocacy or political activism”;<sup>102</sup>
- allegedly threatened the future funding of NFPs whose members have, in a private capacity, attended protests against government budget measures;<sup>103</sup>
- defunded public health organisations which advocated in favour of gay, lesbian, transgender, bisexuals and intersex persons;<sup>104</sup> and
- reduced funding to the New South Wales Environmental Defenders Office (EDO) because of its public interest litigation and advocacy.<sup>105</sup> Allegedly the EDO was defunded in response to lobbying by the mining industry.<sup>106</sup>

<sup>101</sup> The reported Queensland Health gag clause is included in Graeff N (Queensland Law Society), “Gag Clauses Concerning”, *Media Release* (29 August 2012), [http://www.qls.com.au/About\\_QLS/News\\_media/Media\\_releases/Gag\\_clauses\\_concerning](http://www.qls.com.au/About_QLS/News_media/Media_releases/Gag_clauses_concerning) viewed 24 May 2013; Hurst D, “Gag Clauses Help ‘Stop Grant Abuse’”, *Brisbane Times* (19 September 2012), <http://www.brisbanetimes.com.au/queensland/gag-clauses-help-stop-grant-abuse-20120919-265tm.html> viewed 22 May 2013; Viellaris R, “PM Julia Gillard has Queensland in Her Sights as She Moves to Stop Government Gag Orders on Not-for-Profit Groups”, *Courier Mail* (4 March 2013), <http://www.couriermail.com.au/news/pm-julia-gillard-has-queensland-in-her-sights-as-she-moves-to-stop-government-gag-orders-on-not-for-profit-groups/story-e6freon6-1226589428968> viewed 22 May 2013; Passmore P, “Premier Campbell Newman’s Public Servant Gag Orders a Return to Bad Old Days”, *Courier Mail* (7 November 2012) <http://www.couriermail.com.au/news/queensland/premier-campbell-newmans-public-servant-gag-orders-a-return-to-bad-old-days/story-e6freoof-1226511819827> viewed 22 May 2013.

<sup>102</sup> Defined to include “lobbying governments and elected officials on law reform and policy issues” and “public campaigning and advocacy, including the use of traditional and social media, participation in rallies or demonstrations for causes seeking changes to government policies or laws”: Patty A, “State Funds Come with Proviso Not To Protest”, *Sydney Morning Herald* (24 May 2013), <http://www.smh.com.au/nsw/state-funds-come-with-proviso-not-to-protest-20130523-2k3wb.html> viewed 24 May 2013. Note, the Public Purpose Fund is not consolidated revenue but is sourced from the interest earned on solicitors’ trust accounts: Greg Smith SC MP, “Greater Access to Justice for Disadvantaged”, *Media Release* (20 December 2012), [http://www.lawlink.nsw.gov.au/lawlink/Corporate/ll\\_corporate.nsf/vwFiles/201212\\_MR\\_Access\\_to\\_justice\\_disadvantaged.pdf/\\$file/201212\\_MR\\_Access\\_to\\_justice\\_disadvantaged.pdf](http://www.lawlink.nsw.gov.au/lawlink/Corporate/ll_corporate.nsf/vwFiles/201212_MR_Access_to_justice_disadvantaged.pdf/$file/201212_MR_Access_to_justice_disadvantaged.pdf) viewed 24 May 2013.

<sup>103</sup> Passmore, n 101.

<sup>104</sup> Hurst D, “Surrogacy Promise a Mistake’: Newman”, *Courier Mail* (3 June 2012), <http://www.brisbanetimes.com.au/queensland/surrogacy-promise-a-mistake-newman-20120702-21cyw.html> viewed 24 May 2013.

<sup>105</sup> Environmental Defenders Office (EDO), NSW, *Annual Report 2011-2012* (2012), [http://www.edo.org.au/edonsw/site/pdf/annualreports/annual\\_report\\_1112.pdf](http://www.edo.org.au/edonsw/site/pdf/annualreports/annual_report_1112.pdf) (in particular the auditor’s report on p 60) viewed 21 May 2013; Thorpe A, “Environmental Defenders Under Attack: Why Funding Must be Restored”, *The Conversation* (2 November 2012), <https://theconversation.com/environmental-defenders-under-attack-why-funding-must-be-restored-10484> viewed 22 May 2013.

<sup>106</sup> “Documents released under freedom of information laws show the New South Wales Minerals Council and the Australian Coal Association lobbied the Premier to cancel the EDO’s annual public subsidy ... there was a reference to the attendance of the EDO’s principal solicitor, Kirsty Ruddock, at a Greenpeace-convened meeting in the Blue Mountains”: Heath A, “Miners Lobbied O’Farrell to Pull the Plug on Legal Centre”, *Sydney Morning Herald* (11 January 2013), <http://www.smh.com.au/nsw/miners-lobbied-ofarrell-to-pull-the-plug-on-legal-centre-20130110-2cixj.html> viewed 22 May 2013; Environmental Defenders Office (EDO), “EDO NSW Funding Update – Mining Industry Lobbied NSW Premier to Cut EDO NSW Funding”, *EDO Weekly Bulletin No 792* (18 January 2013), <http://www.edo.org.au/edonsw/site/bulletin/bulletin792.php#01> viewed 22 May 2013.

As both jurisdictions lack human rights legislation, these groups have few legal avenues and are generally ill equipped to pursue costly challenges against these policy and funding decisions. Moreover, the protections provided by the *Not-for-profit Sector Freedom to Advocate Act 2013* (Cth) do not apply to agreements between the States and NFPs.

In Opposition, the Liberal National Coalition expressed antipathy towards the ACNC, and voted against the enabling legislation in 2012.<sup>107</sup> The Coalition also opposed the passage of the *Charities Act 2013* (Cth), and expressed confidence in the former common law rules. Indeed, the *Charities Act 2013* (Cth) only passed due to Labor and Greens Senators joining together to “guillotine” debate in the Senate. Although it has expressed support for the NFP sector,<sup>108</sup> the Coalition indicated that it would repeal or amend the *Australian Charities and Not-For-Profits Commission Act 2012* (Cth). In place of the ACNC that the legislation currently describes, the Coalition envisioned an alternative “small organisation [acting] as an educative and training body”.<sup>109</sup> It also stated that it intended to restore the common law definition of charity, and maintain the traditional tests. With regard to taxation, the Coalition urged that taxation issues not be “conflated” with NFP governance, and indicated that it perceived the taxation reforms as “a Trojan Horse to impose a burdensome new regulatory system on the sector”.<sup>110</sup> The issues of taxation and status for NFPs will continue to be a contentious area, and despite the cross-party support for the *Not-for-profit Sector Freedom to Advocate Act 2013*, the law was viewed as an attempt to limit future governments.<sup>111</sup>

## CONCLUSION

Following the decision in *AID v AOSI Inc*, and in the shadow of the 2013 Australian federal election, it is timely to re-examine what constitutional and/or legislative protections NFPs should be afforded when they partner with, or receive funding from, governments. Through suppression clauses, discriminatory selection criteria (such as the requirement to make a pledge), and the threatened or real loss of tax concessions and funding, an NFP’s independence can quickly be destroyed or undermined.

While it is reasonable for governments to require that public revenue be spent in a responsible and accountable manner, “accountability” should not be used to justify onerous grant conditions which undermine the freedom of NFPs to engage in political advocacy that furthers their objectives. Recent reforms at the national level may provide significant protection for the independence of NFPs, if these reforms can avoid the chopping block of a cost-cutting government.

While these reforms have not completely addressed the fragmented regulation of Australia’s NFP sector, they are positive steps.<sup>112</sup> Nevertheless, recent decisions in New South Wales and Queensland highlight the danger for NFPs when they seek to challenge existing power structures, or when, in their haste to secure ongoing funding, they become dependent on the whims and budgetary priorities of government. Although extra funding brings greater capabilities and kudos, NFPs risk being brought under the control of government, and becoming vulnerable to the snuffing out of the “spark of

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<sup>107</sup> Commonwealth, House of Representatives, *Parliamentary Debates* (Division on Second Reading, 18 September 2012) p 11096.

<sup>108</sup> Liberal Party of Australia, “Charities Need Our Support National Op Shop Week: 24-30 September 2012”, *News* (26 September 2012), <http://www.liberal.org.au/latest-news/2012/09/26/charities-need-our-support-national-op-shop-week-24-30-september-2012> viewed 24 May 2013; Liberal Party of Australia, “Charities and Community Groups”, *News* (15 June 2012), <http://www.liberal.org.au/latest-news/2012/06/15/charities-and-community-groups-0> viewed 21 November 2013.

<sup>109</sup> The HonKevin Andrews MP, “Civil Society and the Role of Government”, Speech delivered at the Centre for Independent Studies, Sydney, 23 April 2013.

<sup>110</sup> Andrews, n 109.

<sup>111</sup> Thomas and Knowler, n 2.

<sup>112</sup> For example, State and Territory legislation still governs important activities of NFPs, including fundraising: *Charitable Fundraising Act 1991* (NSW); *Charitable Trusts Act 1993* (NSW); *Charities Act 1978* (Vic).

benevolence and altruism” that defines their very nature. The best solution may be a broad interpretation by the Australian High Court of the anti-civil conscription guarantee for medical and dental services in s 51(xxiiiA).

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