



Australian Catholic Bishops Conference

Response to - The Treasury Consultation Paper - “A Definition of Charity” -

December 2011

To:
The Manager
Philanthropy and Exemptions Unit
The Treasury
Langton Crescent
PARKES ACT 2600
Email: nfpreform@treasury.gov.au

Contact:
Fr Brian Lucas
General Secretary
GPO Box 368 Canberra ACT 2601
T: 02 6201 9845 F: 02 6247 6083
Email: gensec@catholic.org.au

Table of Contents

Summary	3 -
Introduction	5 -
Definition of Charity	5 -
The Advancement of Religion	7 -
Charitable purposes	8 -
“Advancement”	8 -
Heads of Charity	8 -
Disqualifying Purposes	9 -
Political Advocacy	10 -
Peak Bodies	11 -
Charity “infrastructure entities”	12 -
Presumption of Public Benefit	12 -
Overview	12 -
The Case for Removal?	13 -
The Consultation Paper Arguments	14 -
Problems with Removing the Presumption	14 -
<i>Greater Complexity, Uncertainty and Potential for Disputes</i>	14 -
<i>Greater Burden and Unjustified Costs</i>	16 -
<i>Current Actual or Perceived Problems Can be Addressed Under Current Law -</i>	18 -
Role of the Australian Charities and Not-for-profits Commission	18 -
Dominant Purpose or Exclusive Purpose	19 -
Dominant Purpose	19 -
Recovering Costs	20 -
Conclusion	23 -

Summary

Charity is about how we express our concern for other people in the broadest sense of what it means to advance human wellbeing.

The common law defines charitable purposes under four categories or 'heads' of charity:

- The relief of poverty;
- The advancement of education;
- The advancement of religion; and
- Other purposes beneficial to the community.

The Church has consistently argued that any attempt to codify centuries of common law may narrow the common law interpretation and therefore restrict charitable status for many worthwhile organisations. Having said that, we acknowledge the Government is committed to introducing legislation that provides a statutory definition of charity to streamline regulatory oversight of the sector and over time to reduce unnecessary complexity across a wide range of activities. A statutory definition should add to rather than limit the range of charitable purposes recognised by the law.

The Australian Catholic Bishops Conference (ACBC) would view any restriction on its ability to respond to need, or any legislative framework that makes this more difficult, as detrimental to the community.

Charities should not be prevented from undertaking advocacy or evaluating the policies of political parties, as long as it is relevant to one of the heads of charity and ancillary to their charitable purpose. The Australian Government's National Compact with the not-for-profit sector commits the Government to "protect the Sector's right to advocacy irrespective of any funding relationship that might exist."

Peak bodies should also be accepted as charitable organisations, as long as their work assists the work of charitable organisations that comprise their membership.

Charity "infrastructure entities", or organisations which are owned and controlled by the charity or groups of charities that assist charities with financial, administrative or other services, should also be accepted in the proposed legislation as charities.

Any future legislation should continue to accept existing charitable organisations including schools. Legislation should make it clear that not-for-profit non-government schools registered by the relevant authority are charitable.

Any new legislation should not take away the presumption of public benefit for organisations which have the purposes that the legislation presents as heads of charity. The consultation paper does not offer evidence of any problem that might require removal of the presumption of public benefit for existing charities. Removal of the presumption of public benefit would increase dramatically the burden of regulatory compliance for existing and future charities and the consultation paper does not provide evidence of any benefits to be gained. Where new charities are affiliated with existing charities, the presumption of

public benefit should also apply. Attempts to weight beneficial purposes with harmful activities will be unworkable.

New legislation should also define a charity by its dominant purpose, rather than requiring an exclusive purpose. This means that charities can continue to carry out a variety of work, as long as the dominant purpose of the organisation is charitable. Charities may carry out work that is not exclusively charitable, but this should not prejudice their charitable status.

The new legislation should not restrict the ability of charities to recover the cost of some services by levying fees and charges. No harm has been demonstrated from these arrangements and restricting the ability of charities to recover costs would restrict their operations, resulting in new costs to government. Many charities will not be able to continue their work if they are unable to continue recovering costs.

Introduction

The Australian Catholic Bishops Conference (ACBC) is a permanent institution and the instrumentality used by the Australian Catholic Bishops to act nationally and address issues of national significance.

The role of the Catholic Church in Australia and its agencies (the Church) is well known. The Church contributes in a wide variety of ways across the spectrum of Australian society.

As an integral part of its core mission, the Church seeks to assist people experience the fullness of life. It is concerned with all that impacts on human wellbeing.

The charities sector has been reviewed many times over the past two decades, including:

- 1995 Industry Commission report *Charitable Organisations in Australia* (Charitable Organisations Report)
- 2001 Report of the *Inquiry into the Definition of Charities and Related Organisations* (Charities Definition Inquiry)
- 2008 Senate Economics Committee *Inquiry into Disclosure Regimes for Charities and NFP Organisations* (2008 Senate Inquiry)
- 2010 Productivity Commission Research Report, *Contribution of the Not-for-profit Sector* (PC Report)
- 2010 *Review into Australia's Future Tax System* (AFTS Report)
- 2010 Senate Economics Legislation Committee *Inquiry into the Tax Laws Amendment (Public Benefit Test) Bill 2010* (2010 Senate Inquiry)
- *Final Report of the Scoping Study for a National Not-for-profit Regulator* (Final Report)

These and other reports have been written at a time of considerable change in the charities sector.

The ACBC has made submissions to these inquiries and is willing to continue to play an active role in developing a framework for the regulation of the not-for-profit sector that will promote the sector's contribution to society. The multiple reviews, including several consultations undertaken this year, make it difficult to judge the overall impact of any changes that may occur because of this and other consultations.

In accordance with the Australian Government's National Compact with the not-for-profit sector,¹ all the proposals for reform of the regulation of charities should aim to reduce administrative burden and promote clarity and certainty.

Definition of Charity

The ACBC understands it is government policy to establish a statutory definition of charity for the purposes of clarity. If the definition is to improve on the common law, it needs to have a rationale and a precision of language to avoid a series of test cases in the future.

¹ Australian Government, *National Compact: Working Together*, 2011. <http://www.nationalcompact.gov.au/compact>

We offer the following rationale. The word “charity” derives from the Latin word “caritas” or love.

The Judeo-Christian rules for living require love of God and love of neighbour.

There were three Greek words for love: *eros*, *philia* and *agape*. *Agape* was used in the Greek translation of the Old Testament to translate the Hebrew *ahabà*. It became the preferred word for love in the Greek New Testament. *Caritas* is the Latin translation of *agape* and forms the root of the English word charity. They are complex words with manifold meanings. *Caritas* therefore does not refer to emotional or romantic love, but to a concern for human wellbeing resulting from respect for human dignity. This should form the basis for the statutory definition of charity.

Fundamentally, charity is about the good of the other and this is the basis for any test of public benefit. This will be discussed in more detail below.

Human dignity requires access to basic human goods. John Finnis has set out seven basic human goods essential to human wellbeing, fulfilment and flourishing: life, knowledge, play, aesthetic experience, friendship, practical reasonableness and religion.² A charitable act is helping people to access these basic human goods.

The list of basic human goods is aligned with the common law Pemsel³ test, which categorises charitable purposes under the following four heads of charity:

- The relief of poverty;
- The advancement of education;
- The advancement of religion; and
- Other purposes beneficial to the community.

The common law does not set out a definition of charity, but rather an approach to identifying organisations established for charitable purposes. Any statutory definition of charity should be grounded in a clear understanding of the meaning and breadth of human wellbeing and be based on fundamental principle rather than simply repeat the particular examples that have arisen in the case law.

The charitable nature of an organisation is determined by its purpose. The advantage of defining charity by the purpose of the organisation rather than simply by what it does is that it allows charities the flexibility to innovate and change their activities and their approach to offering charity, depending on changing circumstances. Any statutory definition of charity should not restrict that flexibility.

So the defining characteristics of charity include the basic human goods provided, to whom the basic human goods are provided (i.e. the public), and the purpose for providing the basic human goods which is to promote human wellbeing and in turn promote the common good of the whole community.

² Finnis, John (2011), *Natural Law and Natural Rights* (second edition), Oxford University Press, Oxford pp 85-90.

³ *The Commissioners for Special Purposes of the Income Tax v Pemsel* [1891] AC 531.

At the heart of any appreciation of human love is awareness of the other and the wellbeing of the other, and, at its highest, a willing self-sacrifice for the sake of the other. The origin of the word charity suggests a broad meaning encompassing all that promotes human wellbeing. It includes, but is not limited to, practical assistance for those in need.

Charity, or love of the other means love of the other in his or her totality and extends beyond meeting merely physical needs to identifying and responding to spiritual and emotional needs.

From this starting point, we can reflect on the different attributes of the human person and his or her needs. Charity, love of the other, is a recognition and response to those needs.

We might then construct an indicative list of human needs as the basis for discussion and then identify organisations/activities that respond to them.

Finnis's basic human goods might include under "life", health services like hospitals, disability services and aged care facilities. Life, which Finnis defines as "... every aspect of the vitality (*vita*, life) which puts a human being in good shape for self-determination" also includes the relief of poverty and disadvantage, care for people with disability, among many other things.

The human good of "knowledge" might include schools and universities, while "religion" might include the broad gamut of the Church's work through places of worship, parish communities, retreat centres, enclosed orders and pastoral care.

Charity is about how we express our concern for the other in the broadest sense of what it means to advance human wellbeing. While it is not really possible to speak of "society" in an abstract sense, it is fair to say that those individuals, who comprise human society, collectively have an interest in promoting human wellbeing for themselves and for others.

The Advancement of Religion as Charity

To be at peace spiritually, or find purpose and meaning in life through religious faith, is a worthwhile human aspiration. The spiritual dimension of the human person can rightly claim our concern. On that basis, the advancement of the spiritual dimension of human living is charitable in itself.

The ACBC is aware of the discussion in the academic literature of the charitable nature of religious organisations. Consistent with the principle that the spiritual dimension of the human person is an important value, the test for the charitable nature of religious organisations should be the way they advance religion and not the fact that they also provide other charitable benefits in the areas of health, welfare or education.

All organisations recognised as organisations fulfilling the essential purposes of a religious organisation should, by their very nature of promoting the spiritual dimension of human wellbeing, be seen as organisations promoting religion and therefore they are charitable.

Charitable Purposes

“Advancement”

The 2003 Bill defined “advancement” to include ‘protection, maintenance, support, research and improvement.’⁴

The ACBC believes the definition of “advancement” is too narrow.⁵ We submit that “advocacy” should be included as part of the advancement. Political advocacy will be discussed separately below.

The Consultation Paper raises the issue of “whether the definition of ‘advancement’ should be clarified in the new definition to reflect that the current law includes ‘prevention’.”⁶ The ACBC considers that prevention is a fundamental aspect of promoting human wellbeing and sits comfortably with the definition of charity that this submission suggests.

The explanatory material to the 2003 Bill detailed that the “advancement of health includes both curative and preventative purposes.”⁷ It also detailed that the advancement of social and community welfare includes “the prevention and relief of poverty, distress or disadvantage of individuals or families.”⁸

Further, under details of “any other purpose that is beneficial to the community” it lists “the prevention and relief of suffering of animals”.⁹

Details of preventative purposes that thereby promote human wellbeing should be expressly included in the definition of charity.

Heads of Charity

The Church has consistently argued that any attempt to codify centuries of common law may narrow the common law interpretation and therefore restrict charitable status for many worthwhile organisations.¹⁰

A restricted definition of charity could limit the flexibility necessary for charities to perform the vast and varied tasks expected and needed by the community. The ACBC would view any restriction on its ability to respond to need, or any legislative framework that makes this more difficult as counter-productive. As well, it would be seen as a restriction on religious liberty and religious freedom.

Having said that, the ACBC acknowledges the Government is committed to introducing legislation that provides a statutory definition of charity. If there is to be codification or legislative clarification, it must be comprehensive and clear, not leading to a risk of constant litigation and not susceptible to changing interpretations depending on other political

4 Charities Bill 2003 Exposure Draft, Section 10 (2).

5 Submission to the Board of Taxation on the Definition of a Charity by the Catholic Church in Australia, October 2003, Paragraph 41, p.13.

6 Paragraph 125.

7 Charities Bill 2003 Exposure Draft Explanatory Material, Paragraph 1.59.

8 Charities Bill 2003 Exposure Draft Explanatory Material, Paragraph 1.67.

9 Charities Bill 2003 Exposure Draft Explanatory Material, Paragraph 1.84.

10 See Submission to the Board of Taxation on the Definition of a Charity by the Catholic Church in Australia, October 2003, Paragraph 16, page 7.

influences. Efficiency and innovation will not occur in the charitable sector if organisations are pre-occupied with new regulatory compliance burdens with uncertain outcomes.

Any legislation should be supported by comprehensive explanatory and guidance material from the relevant regulatory authority at least as comprehensive and authoritative as current Tax Rulings (e.g. TR 2011/4).

Our general position would be that the heads of charity be sufficiently comprehensive without being overly prescriptive and limiting flexibility. The list in the 2003 Bill is considered robust and flexible enough.

The ACBC therefore agrees with the conclusion of the Board of Taxation that the heads of charity list is adequate and that further clarification should be addressed in the explanatory material.¹¹

The Church supported the *Extension of Charitable Purpose Act 2004* which legislated that the provision of child care is a charitable purpose and that self-help groups and closed or contemplative religious orders are for the public benefit.¹² Therefore we support the inclusion in the new legislation of a section like Section 11 in the 2003 Bill, titled "Advancement of social or community welfare" that specifically includes at (a) "the care of, and the support and protection of, children and young people, and (b) in particular, the provision of child care services." Similarly the ACBC supports the inclusion in new legislation of a section like Section 4(2) in the 2003 Bill which includes self-help groups and closed or contemplative religious orders. We understand that if such provisions are included in the new legislation that the existing *Extension of Charitable Purpose Act 2004* will be repealed.

Disqualifying Purposes

Australian Taxation Office (ATO) Taxation Ruling (TR) 2011/4 lists six purposes, which the ATO considers are not charitable, where the purpose is:¹³

- to confer private benefits;
- social, recreational or sporting;
- illegal;
- commercial;
- governmental; and,
- vague, has insufficient value or is of indeterminable value for the community.

The new legislation should include such provisions which should be carefully and comprehensively defined.

The ACBC agrees with Catholic Health Australia's submission¹⁴ that the disqualifying purpose "governmental" should be defined to allow charities to carry out work consistent with their

11 Consultation on the Definition of a Charity. Board of Taxation, December 2003, Paragraph 6.23, Page 39.

12 Extension of Charitable Purpose Act 2004, Sections 4 and 5.

13 ATO Taxation Ruling TR 2011/4, Paragraphs 47-69.

14 Catholic Health Australia, *A Definition of Charity: Response to Treasury Consultation*. December 2011

objects even though that work might be on behalf of a government or under some level of government control via a funding agreement or other mechanism.

Commercial activities should be permitted where they are ancillary to, or in furtherance of the charitable purpose or the proceeds support the charitable purpose.

Political Advocacy

It was a contentious issue in Charity Law that any involvement in 'political activity' and 'advocacy' disqualifies or deems non-applicable an organisation's right to be recognised in law as charitable. The High Court decision in *Aid/Watch Incorporated v Commissioner for Taxation* [2010] HCA 42 in December 2010 clarified this.

In the High Court case, *Aid/Watch* argued that it was a charitable institution on the basis that it came within the fourth head of charity (other purposes beneficial to the community) and that its activities contributed to the public welfare. The High Court agreed with *Aid/Watch's* submissions and concluded 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." The High Court held that, "in Australia there is no broad general rule excluding 'political objects' from charitable purposes, and that because *Aid/Watch's* activities contribute to the public welfare, it was entitled to be regarded as a charitable institution."

The new definition of charity should reflect the High Court's decision outlined in the *Aid/Watch* case, acknowledging that being involved in political activity so long as this concerns matters arising under one of the heads of charity is itself an activity beneficial to the community.

The ATO recently issued TR 2011/4 in which it incorporates and adopts the main decisions of the High Court in the *Aid/Watch* case.¹⁵ This ruling sets out the current law on charities and any new statutory definition should reflect this ruling in a clear and comprehensive way, to minimise the risk of any litigation.

If it is accepted that a charity can engage in political activity/advocacy and Treasury is also using the Charities Bill 2003 as its position on this matter, it would also be useful to revisit what exactly is meant by 'political cause' as outlined in 8(2)(a) of the 2003 Bill.

There is potential that one part of the legislation could contradict another. For example, a Catholic organisation could be pursuing a particular theme or agenda for change that underpins its political activity and meets all the requirements to be legally recognised as a charitable organisation as decided by the High Court in the *Aid/Watch* case. It would be necessary to ensure that any 'political cause' definition did not restrict the organisation's capacity to advocate for principles at the core of the organisation's belief system and/or charitable purposes, if interpretation of their application in a political advocacy setting could be misconstrued as a 'political cause'.

¹⁵ Australian Taxation Office, Taxation Ruling TR 2011/4: "*Income Tax and Fringe Benefits Tax: charities*", 12 October 2011. <http://law.ato.gov.au/atolaw/print.htm?DocID=TXR%2FTR20114%2FNAT%2FATO%2F0001andPiT=99991231235958andLife=20111012000001-99991231235959>.

A further implication under Section 8(2) of the Charities Bill 2003 is the definition or interpretation of ss. 8(2)(a) and 8(2)(b). For example, in election periods at both the Federal, State and Territory levels, it is not unusual for organisations to compare the various policies of political parties/independents. Given the High Court's decision to accept political activity as a bona fide activity of a charitable organisation in support of its charitable purpose, it is important for any section of new legislation relating to this issue to ensure there is no 'loophole' whereby one could contest that assessing one policy as better than another necessarily translates into support for one political party or candidate over another.

As an added protection to a charitable organisation's right and justifiable role within the democratic process in Australian society, this legislation should make it unlawful for government departments and organisations contracting the services of charitable organisations to impose any 'gag' clauses as part of service contracts, agreements or other arrangements.

The Rudd Government removed the 'gag' clauses in government contracts with the not-for-profit sector. This was reflected in the Australian Government's National Compact with the not-for-profit sector.¹⁶ Four of the ten Shared Principles touch either directly or indirectly on advocacy. The second Priority for Action commits the Government to "protect the Sector's right to advocacy irrespective of any funding relationship that might exist."

The Government should ensure that a charity's right to advocate and engage in political activity related to its charitable purposes is not compromised when holding contracts with government departments, organisations or agencies and that this is protected in legislation.

Peak Bodies

In *Social Ventures Australia Limited v Chief Commissioner of State Revenue* (2008), the NSW Administrative Decisions Tribunal held that a body whose objects were to "improve the management and operational performance and to enhance the long term viability of charitable organisations by providing educational mentoring and support services to charitable organisations" was itself a charitable institution.

According to the Tribunal, Social Ventures' "activities are essentially to ensure that public charities function efficiently and effectively to help those in need and the disadvantaged" and, as a result satisfied the public benefit requirement. The relevant criteria in the Social Ventures Australia Ltd case for application to an assessment of peak bodies are those related to:

- certainty about a charitable purpose or objects in its constitution
- its role in advising and assisting other charities, and
- that it operates for the public benefit. It must have no private beneficiaries.

The proposed legislation should reflect these criteria.

¹⁶ National Compact, pages 2 and 4.

Because a central function of a peak body's role for its members is to engage in public debate and to seek to influence government legislation and policy, the *Aid/Watch Incorporated v Commissioner of Taxation* (2010) case is also relevant. The High Court found that an entity can be charitable if it has a purpose of generating public debate with a view to influencing legislation, government activities or government policy in relation to subject matters that come within one or more of the four heads of charity.

Charity “infrastructure entities”

The Consultation Paper does not address, or refer in any way, to the issue of how entities, created to support the work of charitable entities, should be treated. These are the entities covered by the ATO's TR 2005/22 and the 2011 addendum and might be usefully described as “infrastructure entities”.

Best practice in modern governance of charitable organisations often requires that direct and supporting activities be housed in connected, but separate, organisations. For example, a church or other charity may have a dedicated entity to manage property allowing the entity directly delivering a charitable service to focus on its core activity, such as education or services for the homeless.

The proposed legislation should deal with this issue explicitly. These organisations are supportive of the mission of the charity or group of charities that have established them and control their activities. These entities provide the necessary practical, financial and administrative services to support the purpose of the charity. The ACBC believes these infrastructure entities, providing such things as equipment or financial services, should be accepted as charities because they form an integral part of wider charity work.

Presumption of Public Benefit

Overview

The legislation must not contract the boundaries set by the current definition in relation to the conventional and uncontroversial heads of specific charity, being the relief of poverty, advancement of education and advancement of religion.

Consistent with this position, the presumption of public benefit for these heads of charity and any other additional heads of charity should be expressly retained in any new legislation. The inclusion of a head of charity in legislation should, of itself, indicate that public benefit is presumed.

The ACBC agrees that one dimension of the public benefit test, namely that the charitable purposes be directed to a significant section of the community, is legitimate. What is at issue is the attempt to remove the presumption that the purpose is for the public benefit and engage some form of attempted weighing of the benefits and harms of that purpose. In reality the weighing is between the charitable purposes of the entity and alleged harmful activities that may be associated with it. This is conceptually difficult and impossible in practice.

The Case for Removal?

There seems to be an implicit assumption in the Consultation Paper that the removal of the presumption of public benefit has been endorsed in previous reviews. This is not the case. In fact, most comprehensive reviews of charity law in Australia did not state a case for removal of the presumption:

- (a) - The Charities Definition Inquiry¹⁷ recommended that the definition of charity be set down in legislation providing that charities established for the advancement of religion, health, education, social and community welfare, culture or the environment should be presumed to be for the benefit of the community.
- (b) - The PC Report¹⁸ recommended that the Australian Government adopt a statutory definition of charitable purposes in accordance with the recommendations of the Charities Definition Inquiry.
- (c) - The Final Report recommended that a statutory definition of charity be implemented and stated:

“a statutory definition seeks to codify the key principles of the common law definition of charity and not replace the common law.”¹⁹ [Emphasis added]

- (d) - The AFTS Report concluded:

“Consistent with the recommendations of previous inquiries, a national charities commission should be established to monitor, regulate and provide advice to all not-for-profit (NFP) organisations (including private ancillary funds). The charities commission should be tasked with streamlining the NFP tax concessions (including the application process for gift deductibility), and modernising and codifying the definition of a charity.”²⁰ [Emphasis added]

The reference in paragraph 81 of the Consultation Paper to the Charities Bill 2003 “overturning” the presumption of public benefit test is misleading. The Charities Bill 2003 merely proposed removal of the presumption of public benefit test and the position was rejected. It cannot be cited with any substance as support for removing the presumption now.

Only the 2010 Senate Inquiry²¹ supported the application of a public benefit test. With respect, this Inquiry directed its attention to how a particular organisation could be dealt with and failed to appreciate that concerns about the legality of some of its activities could be dealt with under the broad category of “disqualifying purposes” rather than through the introduction of what is essentially an unworkable public benefit definition.

As set out in the submission of the ACBC to the 2010 Senate Inquiry:

¹⁷ *Report of the Inquiry into the Definition of Charities and Related Organisations*, June 2011.

¹⁸ Productivity Commission, *Contribution of the Not-for-Profit Sector*, January 2010, page 33.

¹⁹ *Final Report: Scoping Study for a National Not-for-Profit Regulator*, April 2011, page 33.

²⁰ *Australia's Future Tax System: Report to the Treasurer*, December 2009, page 88.

²¹ Senate Economics Legislation Committee, *Report on the Tax Laws Amendment (Public Benefit Test) Bill 2010*, September 2010.

“A particular concern is that the apparent problem with one organisation, referred to in the explanatory memorandum, could be addressed without the imposition of considerable uncertainty as to the status of many thousands of other organisations.”

The ACBC submits that the 2010 Senate Inquiry should be given substantially less (if any) weight than the Charities Definition Inquiry, PC Report, Final Report and AFTS Report.

The Consultation Paper Arguments

The ACBC submits that before consideration is given to removal of the presumption, there must be clearly articulated and justifiable reasons for doing so.

The Consultation Paper fails to establish why the presumption should be removed.

The Consultation Paper does not put forward any evidence of a lack of confidence in the charitable sector or material non-compliance that would justify removal of the presumption. It does not discuss any benefits (if there are any) of requiring an existing charity or an entity seeking approval as a charity to demonstrate that it is for the public benefit. The fact that only a few jurisdictions have gone down this path itself does not make the case for removal.

Problems with Removing the Presumption

Greater Complexity, Uncertainty and Potential for Disputes

The removal of the presumption of public benefit would present both greater political and legal uncertainty.

The consultation paper states that, “a statutory definition of charity will allow Parliament to more easily alter the definition [of charity] over time to ensure that it remains appropriate and reflects modern society and community needs ...”.²² This raises the possibility of ongoing changes to the definition of charity and therefore ongoing uncertainty in an area which has been relatively stable over time.

The removal of the presumption of public benefit should not result in the disqualification of mainstream organisations that are currently accepted as charitable under the existing law. Where a charity has as its purpose one of the purposes in the legislated heads of charity, that should be sufficient. It is unduly burdensome to then expect that it must go further to explicitly demonstrate how its purposes are then for the public benefit.

The Consultation Paper states:

“85. Overseas experience demonstrates that in practice the removal of the presumption of public benefit for all charities (for example, in England and Wales), has not caused significant issues for the charitable sector more broadly.”

The experience, reports and anecdotal evidence suggests, however, that this assertion is not accurate and the recent experience in England gives rise to substantial concern.

²² Paragraph 12.

Despite assurances from the Minister to the contrary, some local legal advisers are concerned that some diocesan and congregational schools, as well as church institutions and necessitous circumstances foundations, might have difficulties meeting a public benefit test, as interpreted by the England and Wales Charity Commission. By way of example, the Charity Commission has issued a directive to two out of a sample of five preparatory schools (St Anselm's Preparatory School, Bakewell and Highfield Primary, Preston) that these schools provide insufficient bursaries to satisfy the public benefit requirement to be a charity.

In a similar way, in 2009, the England and Wales Charity Commission found that the Penylan House Jewish Retirement and Nursing Home in Cardiff, Wales was spending too small a proportion of its income on ensuring that people who could not afford their fees had an opportunity to benefit. If such a stringent test were applied in Australia, many aged care and other care facilities might struggle to comply, particularly those facilities whose margins are such that they cannot afford to provide unfunded places.

Perhaps of most concern, the Consultation Paper cites the experience in relation to the *Independent Schools Case* in England (cited at paragraph 86) without any acknowledgement of the problems that case represents. The UK Upper Tribunal handed down its decision in *Independent Schools Case*²³ on 14 October 2011. The unanimous judgement declares that the legislation is confusing, stating that, "We see the ... legislation as ... capable of meaning different things depending on the point of view of the reader" (paragraph 2). Such a case would not arise under current Australian law and nor should it arise under any revised law.

Under the current law, it is unquestionable that a school providing conventional education is a charitable organisation. In contrast, under the revised law in England as applied in the *Independent Schools Case*:

- The England and Wales Charity Commission sought to issue guidance on the meaning of public benefit for such a school (by reference to a generic description of an archetypal school)
- The guidance was challenged in formal legal proceedings involving five parties as stakeholders or interveners, including the Attorney General
- The relevant Tribunal deciding the case issued a decision of more than 100 pages, and
- The England and Wales Charity Commission ultimately was found to have issued incorrect guidance.

What was a simple matter of absolute certainty under the law became a cause of significant trouble and expense for the charitable parties affected, because of the removal of the presumption. This risks making issues out of matters that are not of controversy under the current Australian law.

The ACBC does not wish to see this experience repeated in Australia.

²³ [2011] UKUT 421 (TCC) *Independent Schools Council v The Charity Commission* TCCJR/ 03/2010; and a referral by the Attorney General FTC/99/2010.

There are 1701 Catholic schools in Australia with 712,000 students and 81,000 teaching and non-teaching staff. The schools account for 20 per cent of school students in Australia. Catholic schools are not-for-profit and make a substantial contribution to the common good and public benefit through their advancement of public education.

The UK *Independent Schools Case* demonstrates that the presumption of public benefit from schools should be put beyond doubt in Australia. Legislation should make it clear that not-for-profit non-government schools registered by the relevant authority are charitable.

The ACBC is concerned that the position specifically for religious organisations will be made worse and even less certain under any system that removes the presumption of public benefit. It is particularly concerned about a subjective approach to determining “public benefit” which may be influenced by political or secular considerations.

The ACBC submits that the evidence of the experience in England above demonstrates uncertainty, confusion and costly outcomes for conventional charities under the legislation that is now proposed for Australia.

Greater Burden and Unjustified Costs

The ACBC has argued consistently that measures should not be implemented which increase the cost of compliance and red tape for charities. Implementing such measures is contrary to the Federal Government’s National Compact with the not-for-profit sector²⁴ because it imposes a cost on charities that does not currently exist. The ACBC takes the Government’s commitment to the National Compact principles seriously. In particular, the National Compact shared principle that, “we recognise concerted effort is needed to develop an innovative, appropriately resourced and sustainable sector.”²⁵

While at paragraph 79, the cost to government has been raised as a justification, there is no meaningful consideration in the Consultation Paper of the costs to charities if the presumption is removed. Paragraph 84 of the consultation paper concedes that some charities may incur some minor costs but it says that it is not expected that these charities will incur costs on regular basis. There is a significant difference between substantiating a presumed status as a charity and having to build a case to be given charitable status. It is both the potential initial and ongoing costs associated with removal of the presumption of public benefit that are of real concern to the ACBC.

Based on the experience in England, if charitable organisations are scrutinised and required to demonstrate public benefit in similar ways to the requirements of the England and Wales Charity Commission, there is a risk of depleting charitable organisation’s resources in disputes that would not occur under the current Australian law.

Aside from cost to the organisation in demonstrating public benefit, the ACBC considers this an unjustified and ineffective use of government resources. Rather than trying to pursue the task of weighing benefits and harms, the regulator should focus on organisations whose purposes do not appear to be genuine and not waste its, or charities’, resources to confirm

24 National Compact, pages 3 and 4.

25 National Compact, page 2.

public benefit in each and every case. The Consultation Paper concedes that in many cases the purposes are self-evidently beneficial to the community (paragraph 84).

The proper way to deal with any alleged mischief of the sort considered in the 2010 Economics Committee Inquiry is through carefully worded disqualifying provisions.

Apart from the obvious test, that the charity must direct its purposes to the public and not be simply a private venture, any other public benefit test should be abandoned. It is simply impossible to engage in any meaningful way in a balancing of “benefits” and “harms” especially where they are not of the same quality, e.g. spiritual benefits and material harms.

One can presume that a school is for the public benefit, but the classical example in the literature and case law of the “school for pickpockets” is clearly contrary to the public policy. This is the better test rather than relying on an assessment of benefits and harms.

In relation to organisations established for the advancement of religion, the Courts and commentators have repeatedly identified the public benefit that they provide. The Charities Definition Inquiry concluded:

“Organisations that have as their dominant purpose the advancement of religion are for the public benefit because they aim to satisfy the spiritual needs of the community.”²⁶

The issues regarding the removal of the presumption of public benefit have been the subject to commentary in the courts. In *Joyce v Ashfield Municipal Council* [1975] NSWLR 744, the Court observed:

“This doctrine that religious activities are subject to proof that they are for the public benefit could give rise to great problems in that it might lead to the scrutiny by the courts of the public benefit of all religious practices.”

Other commentators have observed:

“If the public benefit presumptions are removed there is real risk that only those which are politically popular institutions or causes will be accepted as charitable. We do not want to return to discrimination similar to the sectarianism of the past or to create a situation where marginalised peoples and causes are not considered to be charitable purposes – this would be in direct conflict with the appropriate application of the charities definition.”²⁷

The special place of religion and, in certain instances, its intangible benefits are difficult to assess in a forensic exercise such as the one that will be required by the removal of the presumption of public benefit.

In the absence of evidence of widespread or even significant concerns about the numerous religious organisations qualifying as charitable, the ACBC supports the maintenance of the status quo, which has served the community well over a long period.

²⁶ 2001 Charities Definition Inquiry, page 178.

²⁷ Brian Lucas and Anne Robinson, “Religion as a head of charity”, *Modernising Charity Law*, 2008, at page 192.

Current Actual or Perceived Problems can be Addressed under the Current Law

If there are actual or perceived problems under the current law, they are not articulated in the Consultation Paper.

The presumption of public benefit is not an absolute condition that allows organisations acting contrary to the public interest to be classified as charitable. As noted in the Charities Definition Inquiry:

“With regard to the first three heads, we can assume (subject to evidence to the contrary) that benefit will result from bodies for the relief of poverty or the advancement of education or religion.

However, public benefit can still be found not to be present under the first three heads of charity.”²⁸

For those exceptional cases where public benefit is an issue, the current law already provides a mechanism for testing and achieving an appropriate outcome. This should be the approach taken in the proposed legislation.

Role of the Australian Charities and Not-for-profits Commission

The Australian Charities and Not-for-profits Commission (ACNC) should play a role similar to the Non Profit Centre of the Australian Taxation Office, as a regulator which interprets and enforces the legislation and provides guidance to charitable organisations. The guidance should be in the form of public rulings. If such rulings have the force of law it is critical that the legislation binds the ACNC to work within and not beyond the definition of charities stated in the act.

The ACNC should predominantly play an administrative role. Where the ACNC has any formal statutory function to promulgate guidance under the charities legislation, there needs to also be an avenue of appeal, similar to that which applies with decisions by regulatory bodies such as the Australian Competition and Consumer Commission.

The initial focus of the ACNC should be on identifying abuses and dealing with organisations of particular concern. The ACNC recognises that the ACNC may need some statutory powers of information gathering to be able to undertake this role properly.

However, the other focus planned for the ACNC, that of reviewing periodically existing charities in relation to their status under the Charities, needs to be carefully thought through with a view to effecting light-handed regulation with good will between the regulator and existing charities of good standing. If and when any such review role is contemplated the review processes need to be carefully developed in consultation with recognised charities,

and sufficient time should be allowed for charities to gather and present relevant information to the ACNC.

It is critically important too that the Commissioners of the ACNC be persons of repute with considerable experience in the charities sector.

Dominant Purpose or Exclusive Purpose?

The main reason for maintaining the existing “dominant purpose” test is that this provides greater flexibility to taxation authorities in assessing the very diverse range of organisational circumstances found in the not-for-profit sector and because there is no compelling reason to change to an “exclusively charitable purpose”.

The Government’s “Better Targeting of Not-for-Profit Tax Concessions” Consultation Paper²⁹ recognised that charities have ancillary and incidental purposes and may legitimately be engaged in unrelated business activities. The proposed legislation for a charities definition should reflect this recognition rather than move to an exclusive purpose definition.

Dominant Purpose

Numerous cases illustrate the fact that a charitable institution may have non-charitable objects incidental or ancillary to its charitable objects; but this does not invalidate gifts to the institution. However, it does mean that the trustees will be restricted in how they might direct such a gift for a charitable purpose.³⁰

It should be noted, that this would not result in a loss of charitable status to the institution in relation to statutory concessions or exemptions.

The leading case is *Congregational Union of New South Wales v Thistlethwayte*,³¹ where the objects of the Congregational Union included maintenance of philanthropic agencies and preservation of civil and religious liberty. The High Court of Australia held that although these objects taken by themselves were non-charitable, they did not prevent the Union from existing exclusively for charitable purposes, as they were to be read as ancillary to the religious objects of the Union. The constitution was to be construed as enabling the Union to maintain philanthropic agencies *only to the extent to which* such agencies were conducive to the achievement of the Union's main object; it was entitled to seek the preservation of civil and religious liberty so that Congregationalists might worship according to their religious beliefs.

²⁹ May 2011, paragraph 47.

³⁰ see *Re Hood*; *Public Trustee v Hood* [1931] 1 Ch 240; [1930] All ER Rep 215 (CA); *Congregational Union of New South Wales v Thistlethwayte* (1952) 87 CLR 375; [1952] ALR 729; *Presbyterian Church (NSW) Property Trust v Ryde Municipal Council* [1978] 2 NSWLR 387; *Re De Vedas* (dec'd) [1971] SASR 169 at 204 per Wells J; *Alliance for Life v Minister for National Revenue* (1999) 174 DLR (4th) 442 (Federal Court of Appeal).

³¹ *Congregational Union of New South Wales v Thistlethwayte* (1952) 87 CLR 375; [1952] ALR 729; *Navy Health Ltd v DCT* (2007) 163 FCR 1; 68 ATR 215; 2007 ATC 4568; [2007] FCA 931; (where, following *Downing*, Jessup J held that the provision of health insurance coverage to members of the armed services and their dependants was a charitable object, but declined to find that the fund in question was charitable because its objects were not exclusively charitable.

A trust or institution is not denied charitable status merely because non-charitable benefits may be conferred in the course of promoting its principal charitable purpose.³²

There will always be activities of a charity that could seem not to be exclusively charitable. These might include activities in relation to financing (development funds, passive investments), commercial activities (opportunity shops) or any fee to cover costs associated with services related to a religious purpose (e.g. weddings).

TR 2011/4 appears to be a much narrower and stricter requirement than the case law sets out as articulated above.

The proposed legislation should reflect the common law approach, which has served the community well for so many years. However, it should recognise the full breadth of the common law in regards to charities, not cherry pick the provisions that give the life to a particular interpretation.

The approach of other jurisdictions does not necessarily reflect the Australian experience. The overseas examples have in many instances led to a greater reliance on donations or direct giving. Australians have a natural desire to see someone “having a go” rather than just asking for a handout. There is a preference in Australian culture for receiving something for your contribution, whether that be a legacy badge, a raffle ticket or something with a more tangible character than simply handing over cash.

The charitable activities may well suffer if their sources of income are restricted and community support declines due to donor fatigue resulting from an increase in direct appeals.

Recovering Costs

At various points, the discussion paper raises the prospect of restricting, limiting, or ending the current common practice of enabling charities to recover the cost of providing some services by way of levying of fees or charges. The Discussion Paper raises the possibility of restricting, limiting, or ending cost recovery at paragraphs:

- 75, where reference is made to Scotland, Ireland, and Northern Ireland’s practice of assessing if the levying of a fee or charge by a charity is considered so burdensome so as to restrict parts of the public from being a beneficiary of a charity and therefore negating the public benefit to the extent that the entity is no longer deemed a charity;
- 86, where reference is made to the Charity Commission of England and Wales having issued a directive requiring a charity to demonstrate how those who are unable to pay a fee charged by a charity are otherwise able to benefit from its aims in order for the entity to demonstrate its public benefit such that it remains deemed a charity;

³² Incorporated Council of Law Reporting (Qld) v FCT (1971) 125 CLR 659 at 670; [1972] ALR 127 at 134; (1971) 2 ATR 515 per Barwick CJ. See, for example, *Monds v Stackhouse* (1948) 77 CLR 232; [1949] ALR 299 (trust for public hall charitable notwithstanding that non-charitable events would take place in the hall); *Commissioner for Inland Revenue v Medical Council of New Zealand* [1997] 2 NZLR 297 (the Medical Council held to be a charitable institution — any benefits to registered medical practitioners were incidental and consequential to the council’s purpose). See further G E Dal Pont, *Law of Charity*, LexisNexis Butterworths, 2010, [13.14]–[13.31].

- 8.2(b) on page 30 where it is stated that listing on the Scottish Charity Register requires fees charged by charities not to be “unduly restrictive,” and where this same requirement of the Northern Ireland charitable definition is referred to on page 37 at paragraph 3.3(b).

In each of these instances drawn from the United Kingdom and Ireland, the presumption of public benefit has been removed from the definition of charity. As already argued above, the removal of the centuries-old presumption of public benefit in these countries has given rise to an uncertain application of the law, where charities are being forced to have courts work out just what lawmakers meant by the operation of public benefit where cost recovery for services occurs.

The Independent Schools Council v The Charity Commission of England and Wales [2011] UKUT 421 (TCC) is one of what will likely be many English cases that will seek to ascertain the operation of public benefit where cost recovery for service delivery by a charity occurs. This period of legal uncertainty is causing disruption in service planning by charities in England, and is already causing concern among charities in Australia which depend on cost recovery for service delivery.

Retaining the presumption of public benefit would avoid the almost impossible task of having to define in legislation exactly what service and charge could be subject to cost recovery, and those services and charges that could not.

The definition of charity need not impose an “unduly restrictive” test in considering if a charity is of public benefit where it recovers its costs through the fees, charges, levies, or memberships. We make this argument for the following reasons:

- The principle of cost recovery is good public policy: Those Church charities, which recover some of their operating costs by way of fees and charges, include health services, aged care services, welfare services, schools, universities, colleges, and an array of other social and human service entities. These entities are performing a public good, and deliver services that government would most likely have to deliver if cost recovery practices were restricted, limited, or ended. Costs recovered from those who utilise services are levied on grounds of the capacity of the individual to pay. No profit or shareholder dividend is paid to any third party. All funds derived from cost recovery are applied to service delivery. These elements of the principle of cost recovery are good public policy.
- A large but unquantified number of charities would be impacted: It is not known how many charities in Australia currently derive operating revenue from cost recovery for their services through the levying of fees and charges. The Productivity Commission³³ did not assess how many charities actually levied fees and charges, but the Commission did state that, “most rely on private contributions such as fees and charges.” The Commission found, for culture and recreation not-for-profits, fees represented three quarters of total operating revenue. An ACOSS survey³⁴ cited in the Commission report found \$150 million, or nine per cent, of total operating revenue of community service organisations (comprising welfare, community care,

³³ Productivity Commission, *Contribution of the Not-for-Profit Sector, Research Report*, Canberra, 2010.

³⁴ Australian Council of Social Service, *Australian Community Sector Survey*, Sydney, 2009.

aged care, child care, and employment training) was derived in 2008 from client fees. Removing access to this form of operating revenue would adversely impact a large portion of charitable service delivery across the nation.

- There is no substantiated detriment under current arrangements: The Discussion Paper does not outline the current detriment arising from existing arrangements that allow charities to recover their costs.
- Applying an “unduly restrictive” test would be difficult to administer: The English application of the requirement to test if a cost recovery charge negates public benefit has proven itself complicated to administer. The *Independent Schools Council v The Charity Commission of England and Wales* case is the first key ruling, that if applied in Australia would disrupt educational service delivery. The need for this test to be litigated underscores the difficulty of overturning several centuries of the presumption of public benefit and replacing it with a subjective formula.
- Restricting charities from recovering their costs would result in service cuts, leading to new costs for governments: No Catholic charities, like most other charities, are solely dependent on cost recovery to fund their services. Most derive revenues from multiple sources. Specific services of charities that are funded by way of cost recovery would, however, be at risk of being scaled back or ceased if the fees or charges that fund them were restricted or ended. The types of services that might be at risk would be counselling services to people with mental health challenges, home nursing visits to older Australians otherwise unable to care for themselves, and accommodation services to people with disability among others. If these or other services had to be wound back or ceased, demand for the services would continue. Government would be expected to step into the market to ensure the continued smooth delivery of services.
- The Church in Australia would be significantly impacted: Churches in Australia are major providers of human services, and the Church is the largest. It is common for different Church charitable agencies to seek cost recovery for services delivered to clients based on the capacity of a client to pay. Cost recovery across Catholic health services, aged care services, welfare services, schools, universities, colleges, and an array of other social and human service entities enables service delivery, at partial or no cost to government and taxpayers. Disrupting this long-established arrangement would disrupt human service delivery across the nation to many vulnerable and disadvantaged people.

Many charities and churches have established other activities to support their charitable goals or specific needs of the charity. . The examples of charitable activities mixed with activities which might be perceived as commercial are numerous; ultimately, the outcomes of these activities and the demonstrated benefits to the overall charity should be the important factor.

This is consistent with the policy intent of the better targeting of tax concessions, which concedes that charities may engage in unrelated business activities provided the proceeds are directed to the charitable purposes of the organisation. The proposed legislation should be explicit in dealing with this element of the definition of what is a charity.

The entrepreneurial aspect of some activities has always derived from a desire to achieve the charitable outcome. In fact, in some cases the commercial operation fulfils the charitable purpose, such as workshops for people with disability. The focus on the activity is likely to lead to outcomes that are not desirable. A church raffle might be considered a gambling activity, but the objective is clearly charitable since the proceeds support the charitable purpose.

Conclusion

The ACBC contends that any statutory definition of charity should be clear and precise in its wording and implementation. There should only be a public benefit test to the extent that the purposes are for the public and not private – determination of whether a “benefit” is achieved and outweighs “a harm” is too problematic, as indicated above. The existing presumptions of public benefit should be maintained. Clear disqualifying provisions relating to illegality and activities that are contrary to public policy can be used to deal with problematic organisations such as cults that do not genuinely meet the test relating to the advancement of religion.

Any new legislation should also define a charity by its dominant purpose, recognising that charities can carry out a variety of work, as long as the dominant purpose of the organisation is charitable.