



CATHOLIC ARCHDIOCESE OF SYDNEY

9 December 2011

The Manager
Philanthropy & Exemption Unit
The Treasury
Langton Crescent
PARKES ACT 2600

Dear Sir / Madam

A Definition of Charity: response to Treasury Consultation paper

Please find **attached** a response from the Catholic Archdiocese of Sydney to the Treasury Consultation paper proposing the introduction of a statutory definition of charity.

The submission has been made in response to a direct invitation from Minister Shorten and Senator Stephens. It is intended to supplement, reinforce and clarify the submission from the Australian Catholic Bishops Conference, a submission that the Archdiocese contributed to in part.

As you will see from the submission, we have a number of concerns with the proposal to introduce a statutory definition of charity. We would be particularly concerned about the potential impact of any proposal to change the presumption of public benefit which currently applies to existing charitable purposes including the advancement of religion.

We have also highlighted our concern about the possibility the new Australian Charities and Not-for-profits Commission (ACNC) might be vested with responsibilities beyond an executive and administrative role. We would be particularly troubled if the ACNC was established along similar lines to the Charities Commission in England and Wales.

We look forward to further dialogue about these proposals and the reform being considered by Government. In the meantime, if you need any further information, please contact Ms Emma McDonald on (02) 9390 5917 or at emma.mcdonald@sydneycatholic.org.

Thank you for the opportunity to provide our feedback.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Danny Casey'.

Danny Casey
Business Manager

Level 16, Polding Centre, 133 Liverpool Street, Sydney NSW 2000, Australia

T +61 2 9390 5100 ✦ F +61 2 9261 8312 ✦ chancery@sydneycatholic.org ✦ www.sydneycatholic.org

A definition of charity

Consultation Paper, October 2011

Catholic Archdiocese of Sydney

submission

The submission is made on behalf of the Catholic Archdiocese of Sydney (**Sydney Archdiocese**) and is provided in response to a direct invitation from Minister Shorten and Senator Stephens.

The Sydney Archdiocese represents a substantial portion of the community of Sydney. There are approximately 577,000 Catholics in the Sydney Archdiocese, with a total population of 2,085,300. The Catholic population is 27.6% of the total. There are 138 parishes, in the pastoral care of around 231 diocesan priests. There are some 503 priests in total, including religious priests, working within the Sydney Archdiocese, including those on lesser duties and retired priests. There are 1,145 religious sisters and 260 religious brothers and five permanent deacons.¹

The Sydney Archdiocese comprises a diverse range of entities within Sydney and surrounding areas, including:

- **Parishes:** the particular communities of faith in a geographical area. Each parish, administered by a parish priest, advances the faith of the community through religious services and engagement with the community through various social service programs. There are 138 parishes in the Sydney Archdiocese.
- **Catholic Education Office:** this agency is responsible for the Catholic school system in the Sydney Archdiocese, which educates more than 65,000 students in 147 schools.
- **CatholicCare:** this is the official welfare agency of the Sydney Archdiocese. It is a public benevolent institution and endorsed as a Deductible Gift Recipient (**DGR**).
- **Charitable Works Fund:** this is a trust which supports the charitable and pastoral activities of the Sydney Archdiocese. It is a public fund which is endorsed as a DGR.
- **Catholic Development Fund:** this is an agency of the Sydney Archdiocese which generates income through financial activities to

¹ This information is taken from the Official Directory of the Catholic Church in Australia 2011/2012.

support the charitable and pastoral works of parishes, schools and agencies in the Sydney Archdiocese.

- **Priests' Retirement Foundation:** this is a foundation which provides the financial means to care for sick and retired priests including those in necessitous circumstances. It is a public benevolent institution and endorsed as a DGR. Like many other charitable agencies of the Sydney Archdiocese, its activities support those in need and reduce the call on public assistance.
- **Ephpheta Centre:** the agency which provides services to deaf and hearing impaired people in the Sydney Archdiocese and other dioceses. It is a public benevolent institution and endorsed as a DGR.
- **Aged care and retirement villages:** These are aged care facilities in 13 parishes in the Sydney Archdiocese. Many are public benevolent institutions and endorsed as DGRs.
- **Various:** the Sydney Archdiocese also comprises various other religious, pastoral and benevolent agencies of the Archdiocese which are too numerous to mention.

This submission addresses certain aspects of the Consultation Paper, particularly the "head" of charitable purpose relating to the advancement of religion, but also other aspects. It is intended to supplement, reinforce and clarify the submission from the Australian Catholic Bishops' Conference.

Summary of the key points

The review in the Consultation Paper should take account of the uniquely positive role played by Catholic and other religiously-motivated entities in fulfilling a variety of charitable purposes. There is a strong link between religion and other charitable purposes. The advancement of religion, of itself and in conjunction with other charitable purposes, supports and helps to maintain a fair and decent society.

The community represented by the Sydney Archdiocese, through its works and constituent organisations, seeks to fulfil the mission of the Church by living out our shared faith and advancing the common good. The Sydney Archdiocese undertakes various activities to achieve this end, including in the fields of the relief of poverty, the advancement of education, the advancement of religion and other purposes beneficial to the community.

The aim of the review in the Consultation Paper should be to provide an environment which strengthens conventional charities, such as those comprising the Sydney Archdiocese, so that they may enhance their services to the community.

However, the Sydney Archdiocese is concerned that the position for charities, and religious organisations specifically, will be made worse and even less certain under changes which are proposed in the Consultation Paper.

In particular, any system which removes the presumption of public benefit for existing charitable purposes under the current law risks exposing charities to costs and burdens which will compromise their current capacity for service delivery. Whether intended or unintended, the Sydney Archdiocese is concerned that this measure, and others, outlined in the Consultation Paper will weaken the position of entities which currently are accepted without any controversy as charitable under the existing law. This will place a debilitating administrative and financial burden, particularly if the experience in England and Wales under models adopted is repeated in Australia.

The assertion in the Consultation Paper that the experience in England and Wales augurs positively for change in Australia is simply not supported by the evidence. In fact, the evidence points in the opposite direction and some may say it is more than a little misleading to suggest otherwise. The Sydney Archdiocese, along with other members of the charitable sector, would not wish to see a damaging and expensive experience of some charities in England and Wales repeated in Australia.

In summary of the key points in this submission:

- 1 **Common law:** Contrary to the position in the Consultation Paper, the Sydney Archdiocese is not convinced of the need for a statutory definition of charity. The courts have proven to be a most effective agent in developing and adapting the law to changed circumstances

and providing clarity in circumstances where regulators have sought to test the law.

- 2 **Guiding principles for legislation:** If a definition of Charity is to be legislated the essential requirements should be as follows:
 - (a) the major purposes held to be charitable at common law (ie. the relief of poverty, the advancement of education and the advancement of religion) must also be enshrined as charitable under any new law; and
 - (b) organisations which qualify as charitable under the current law must not be subject to any additional requirements or burden to qualify as a charity or to retain its charitable status under any new law.
- 3 **Framework for a definition:** Accordingly, the Sydney Archdiocese supports a position which:
 - (a) retains the existing meaning of charity, including the express recognition in law that the advancement of religion is a charitable purpose;
 - (b) supplements the existing meaning of charity by identifying specific purposes as additional categories of charity (while still retaining the general category of "other purposes beneficial to the community");
 - (c) includes a dominant purpose test within the definition, noting if the Consultation Paper review adopted the requirement of "exclusively charitable purpose", it would risk an interpretation that is too restrictive and prone to excessively rigid and restrictive interpretation; and
 - (d) critically, retains the presumption of public benefit which applies to existing charitable purposes, including the advancement of religion. In this regard:
 - (i) comprehensive previous reviews have not supported the removal of the presumption of public benefit;
 - (ii) no evidence has been presented that the presumption of public benefit is problematic;
 - (iii) concerns about exceptional cases can be addressed under the current law;
 - (iv) there is no evidence that the removal of the presumption of public benefit would be in the interests of the community;
 - (v) removing the presumption of public benefit will:
 - (i) create uncertainty in the law; and
 - (ii) impose a greater burden and unjustified costs on charitable organisations.

Any removal of the presumption of public benefit must not result in the disqualification of mainstream organisations which are currently accepted as charitable under the existing law, nor should they result in additional administration costs.

- 4 **Legislation:** The legislation should be drafted afresh, rather than using the Charities Bill 2003 as the template, bearing in mind that the model in that Bill is more than eight years old and, more importantly, was rejected by the community at that time.
- 5 **Role of the ACNC** The Australian Charities and Not-for-profits Commission (**ACNC**) should be invested with no more than an administrative and regulatory role. It should not be invested with responsibility for supplementing the legislation with its own determinations. The task of interpreting the legislation in determinations with legal effect should be left to the courts.

The Sydney Archdiocese believes that this represents the common ground among stakeholders and removes those contentious aspects which have defeated previous legislative models.

1 The approach in the Consultation Paper

Why change?

- 1.1 The Sydney Archdiocese consistently has maintained that the common law approach, which identifies three specific heads of charity and a fourth category of general application for other purposes beneficial to the community, has served society well. The courts have been able to adapt the meaning of charity over time as circumstances change. As the High Court observed in *Aid/Watch Incorporated v Commissioner of Taxation* [2010] HCA 42:

“18. The speech of Lord Macnaghten in *Pemsel* is the source of the modern classification of charitable trusts in four principal divisions, namely, trusts for the relief of poverty, for the advancement of education, for the advancement of religion and for other purposes beneficial to the community. But even in 1891, the case law which gave the term “charitable” its technical meaning had developed considerably since the time of the British income tax statute of 1799. The case law may be expected to continue to do so as the cases respond to changed circumstances. As Lord Wilberforce put it, the law of charity is a moving subject which has evolved to accommodate new social needs as old ones become obsolete or satisfied.” [Emphasis added]

- 1.2 The position which has prevailed over time ought not to be replaced now unless there is a strong case for change.

What are the current issues?

- 1.3 The Consultation Paper notes that certainty and consistency of meaning of charity are objectives of the review (paragraph 3) . However, the assertion that “the law can be confusing and unclear” (paragraph 4) is not supported by any evidence. The Consultation Paper cites the High Court cases of *Word Investments* and *Aid/Watch* as recent developments “which have settled some uncertainties but created others for the charitable sector, the public and government” (paragraph 31). It must be remembered that the High Court in each case found in favour of the *Word Investments* and *Aid/Watch* entity, which argued successfully that it qualified as a charitable institution. That is, in each case, the entity interpreted and applied the law correctly. . It was the Australian Taxation Office’s position that required correction by the courts. It was rulings by the Australian Taxation Office which created uncertainty about the law, and the courts which provided certainty. This will continue to be the case under any new regulatory arrangements.
- 1.4 Overseas developments also are interesting but they do not make the case for change in Australia. A case for change in Australia must

demonstrate that there are substantial problems arising under current Australian law, and tangible benefits for adopting similar systems in Australia. It is noted since Barbados was the first country to introduce a statutory definition of charity in 2003 and only in a handful of jurisdictions located predominantly in the British Isles and New Zealand have followed suit.

Previous reviews and Charities Bill 2003

- 1.5 The Consultation Paper cites previous reviews which have concluded that the definition of charity should be the subject of legislation. To put those reviews into more accurate context, their core recommendations were about codifying the current meaning of charity while clarifying certain additional categories and other matters. None of the inquiries suggested any contraction of the meaning or making it more difficult for an organisation which qualifies currently as a charity under the conventional meaning. The key principle in the Charities Definition Inquiry was stated as follows (at page 5):

“The recommended definition of a charity builds on the principles that have been developed from the common law, but provides greater clarity and certainty, while maintaining flexibility.”

- 1.6 The PC Report, at Recommendation 7.1, stated:

“The Australian Government should adopt a statutory definition of charitable purposes in accordance with the recommendations of the 2001 Inquiry into the Definition of Charities and Related Organisations.”²

- 1.7 The AFTS Report, at Recommendation 41, stated:

“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.”³

- 1.8 The above recommendations support the Sydney Archdiocese’s position that if the current review is to follow the recommendation of

² PC Report at page 168.

³ AFTS Report at page 88.

previous reviews, the guiding principles should be as stated in our summary points at page 3 above.

- 1.9 Attempts at change which go beyond the core recommendations from the Charities Definition Inquiry, as endorsed by the PC Report and AFTS Report, have been rejected in the past. Seeking to go beyond these core recommendations in the current exercise under the Consultation Paper simply invites failure again. It should be accepted that there has been extensive consultation on these matters already and any support the community has expressed is limited to the core recommendations in the Charities Definition Inquiry.

2 The advancement of religion as a charitable purpose

- 2.1 The advancement of religion is a recognised head of charity. As noted in the Charities Definition Inquiry:

“The ‘advancement of religion’, in one form or another, has been part of charity throughout the history of charity law.

The Committee affirms that ‘the advancement of religion’ should continue as a head of charity. It is clear that a large proportion of the population have a need for spiritual sustenance. 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. Religious organisations satisfy these needs by providing systems of beliefs and the means for learning about these beliefs and for putting them into practice.”⁴

- 2.2 Other inquiries have consistently supported the advancement of religion as a charitable purpose.
- 2.3 The case law also has consistently supported the advancement of religion as a charitable purpose. Dixon J in *Lawlor Roman Catholic Archbishop of Melbourne v Lawlor* [1934] HCA 14 stated:

“A trust for the purpose of religion is prima facie a trust for a charitable purpose. ...

A gift made for any particular means of propagating a faith or a religious belief is charitable; moreover, a disposition is valid which in general terms devotes property to religious purposes or objects. ... The law has found a public benefit in the promotion of religion as an influence upon human conduct;”

⁴ Pages 175 and 178.

- 2.4 Most recently, the High Court (including the minority judgment) in *Word Investments* recognised the same position:

“its true construction states a charitable purpose – a purpose of advancing religion in a charitable sense.”

- 2.5 It is implicit in the inclusion of the advancement of religion as a charitable purpose that it is beneficial to the community. Various writers have explained the position in different ways. For example:

“Having religious organisations is good for society as a whole – social inclusion is inclusion into a group of people, not a concept. We would argue that the Australian community accepts that there is inherent value for society as a whole in having religious organisations which facilitate connectedness of people into religious groups. ... Provided the religious groups do not engage in anti-social or illegal behaviour, most Australians would consider them to have a broader social good”⁵

- 2.6 Cardinal Pell, Archbishop of the Catholic Archdiocese of Sydney has written in the following terms:⁶

“religion makes a moral life easier to achieve because it provides a comprehensive ethical code, a motive for being good and ideals which challenge us to be better and battle against our lower selves. Christians believe that religion also gives an enhanced capacity to be good through the gift of grace or spiritual energy, received especially through regular worship and the celebration of the sacraments.”⁷

Religion enhances local communities where relationships can flourish for the wellbeing of both the individual and the community and more widely. People of faith gather to worship together, for friendship and mutual support, and to work to advance the collective good of both their own ‘little platoon’ and of the wider community. Religious belief also imposes obligations on us about how we should treat one another and draws us away from our temptation to self indulgence and obsession. Christianity calls us to pursue the greater good and thereby enhances the capacity of our society to provide a framework for citizens to flourish.”

⁵ Brian Lucas and Anne Robinson, “Religion as a head of charity”, *Modernising charity law*, 2008, 186.

⁶ Cardinal George Pell, “Religion, Christianity and Social Capital”. Contributed chapter to Brett Mason (ed.), *Future-proofing Australia: the right answers for our future..* Forthcoming.

⁷ Citing Peter Kreeft, *Because God is Real*, Ignatius Press, San Francisco, 2008, p 162.

2.7 In various ways, studies have demonstrated that Australian believers who worship regularly are more likely to volunteer and to give more to charity and in the process to display a willingness to reach out beyond their own worshipping community⁸ and, in respect of young people, “to have positive civic attitudes, to demonstrate high levels of social concern and to be actively involved in service to the community.”⁹

2.8 We repeat the explanation provided by the Australian Catholic Bishops’ Conference in its submission to the 2001 Charities Definition Inquiry:

“Religion provides a basic motivation for acting virtuously and in the interests of the common good. The religious underpinning for the life of virtue can be either conscious and direct or it can be indirect and mediated through historical developments in law and culture ... the promotion of religious faith through word and deed is a vitally important educative function in society by positing a basis for moral action.”

2.9 Many of the entities that comprise the Sydney Archdiocese are charitable institutions in reliance on the advancement of religion as their main purpose.

*In particular, each **Parish** is a charitable institution whose exclusive purpose is the advancement of religion. Other special purpose entities which support the objectives and activities of the Sydney Archdiocese, such as the **Charitable Works Fund** and the **Catholic Development Fund**, also support the advancement of religion by providing essential infrastructure and finance to enable religious purposes and activities to be pursued.*

⁸ Mark Lyons & Ian Nivison-Smith, “The relationship between religion and volunteering in Australia”, *Australian Journal on Volunteering*, volume 11 (2), 2006, p 25 and Leonard, Rosemary et al, “Volunteering among Christian church attendees 1991-2006”, *Australian Journal on Volunteering*, volume 14 (7), 2009.

⁹ Mason, Michael et al, *The Spirit of Generation Y: Young People’s Spirituality in a Changing Australia*, John Garratt, 2007, p 304.

In many cases, bodies established for the advancement of religion have existed for decades and been accepted as charitable institutions without any controversy. The Sydney Archdiocese submits that any proposal for change would need to ensure their continued acceptance as charitable institutions. These entities must not be exposed to any greater burden or cost to qualify as charitable than applies under the current law.

- 2.10 The review in the Consultation Paper should reflect:
- (a) the express recognition of the advancement of religion as a charitable purpose; and
 - (b) the continuing presumption of public benefit for the advancement of religion (this is commented on further in this submission).

3 The relief of poverty, advancement of education and other purposes beneficial to the community as charitable purposes

- 3.1 Entities within the Sydney Archdiocese are not solely reliant on the advancement of religion to support their status as charitable institutions. Many qualify as charitable institutions under the heads of the relief of poverty, the advancement of education or purposes otherwise benefit the community, just as non-Catholic entities engaging in similar activities would so qualify.
- 3.2 Although there are numerous examples of charitable institutions in the Sydney Archdiocese which qualify under heads of charity other than religion, it is an essential feature of many organisations within the Sydney Archdiocese that members of the Church are motivated through their faith to engage in the activities for the relief of poverty, advancement of education and purposes beneficial to the community.
- 3.3 The connection between faith and service to the community is strong within the Church. One cannot fully appreciate the services undertaken through Sydney Archdiocese entities which relieve poverty, advance education or otherwise benefit the community without understanding that it is part of life as a Catholic to engage in these pursuits. The following statement from the Sydney Archdiocese's website reflects the point:

"The Sydney Archdiocese is committed in providing the necessary services and support for the wellbeing of individuals, families and communities through its various charitable works and activities."¹⁰

¹⁰ <http://www.sydneycatholic.org/charity/>.

- 3.4 The historical link between religion and benevolent works/social services and its current context is discussed in an article by Fr Brian Lucas and Anne Robinson:

"The first thing to note is that the way in which social service is delivered in Australia is quite distinctive. Prior to the Second World War, social services were almost entirely delivered by charities and most of them were religious-based (Christian). ... Christian charities dominate in Australia in a way that they do not elsewhere. ... Twenty-three of the 25 largest Australian charities by income are Christian. ... The charitable activities are not undertaken in isolation: institutions may be separate entities for various legal reasons, but they are inherently part of, and come out of, communities of faith."¹¹

- 3.5 This is not to say that all works to relieve poverty, advance education or otherwise benefit the community are necessarily religious. Rather, it is important to recognise that it is not a simple exercise to demarcate the care provided through Catholic agencies within the Sydney Archdiocese from the faith which inspires people to provide that care.
- 3.6 Further, the care and other services provided through Catholic agencies within the Sydney Archdiocese (as is the case for agencies throughout the wider Church) are provided to the community, not just to Catholics. This is demonstrated most clearly in the example of the works of CatholicCare, the Catholic Education Office, the Priests' Retirement Foundation and Parish Aged Care Facilities (see below).

For example:

- **CatholicCare** is endorsed specifically as a PBI, delivering programs in the areas of Ageing, Dementia and Disability Care; Children and Youth; Family Support; Parenting Education; Relationship Counselling; and Employment, Training and Support. As noted on its website: "The services provided by CatholicCare are inclusive of the whole community regardless of circumstance, ethnicity, religion, economic situation, age, gender or ability."
- **The Catholic Education Office** is responsible for policy implementation, services and personnel in Archdiocesan Catholic schools in the Sydney Archdiocese. Its role in the advancement of education is clear cut and self-evident. Over 20 per cent of students attending Catholic systemic schools

¹¹ Brian Lucas and Anne Robinson, "Religion as a head of charity", *Modernising charity law*, 2008, 186 at 188 to 191.

in the Sydney Archdiocese are from religions other than Catholic.

- **The Priests' Retirement Foundation** (a PBI) and the various **Aged Care Facilities** are further examples of entities whose purposes are charitable because they benefit the community in other ways (in this case, care for the aged and infirm).

As is the case for the entities which advance religious purposes, many of these bodies are long standing and have been accepted as charitable institutions without any controversy. The Sydney Archdiocese submits that any proposal for change would need to ensure their continued acceptance as charitable institutions. These entities ought not be exposed to any greater burden or cost to qualify as charitable than applies under the current law. Increased burdens or costs would also compromise their capacity for service delivery to the community.

- 3.7 The community represented by the Sydney Archdiocese, and its works and organisations, seek to relieve poverty, advance education and further other purposes beneficial to the community, because these purposes are part of living out their shared faith. The review in the Consultation Paper should take account of the uniquely positive role played by Catholic and other religiously-motivated entities in fulfilling a variety of charitable purposes and creating numerous organisations for this end. The link between religion and charity demonstrates the folly of any proposals which seek to isolate and weaken the advancement of religion as a head of charity. Such an exercise also strikes at other charitable purposes which the advancement of religion supports and encourages among Australians, and which helps to maintain a fair and decent society.
- 3.8 The review in the Consultation Paper should ensure that all existing conventional and long standing charitable purposes are not in any way compromised by any reform proposal.

4 Specific questions

- 4.1 In this section, the Sydney Archdiocese comments on specific consultation questions which are considered to be of most relevance to its charitable works. The absence of commentary on other questions in the Consultation Paper should not be taken as endorsement or opposition by the Sydney Archdiocese.

Question 1

Are there any issues with amending the 2003 definition to replace the 'dominant purpose' requirement with the requirement that a charity have exclusively charitable purposes?

4.2 It is instructive to consider two extracts from the recent High Court judgments in *Word Investments*. The majority judgment stated:

“17. ... In examining the objects, it is necessary to see whether its **main or predominant or dominant** objects, as distinct from its concomitant or incidental or ancillary objects, are charitable.” [Emphasis added]

4.3 The minority judgment stated:

“190. ... The common law has long insisted that, to be a "charitable institution", the purpose of the institution must be *exclusively* charitable (with non-charitable activities no more than ancillary).”

4.4 In TR 2011/D2, the Australian Taxation Office states:

“25. An institution is charitable if:

- its only, or its 'main or predominant or dominant' purpose is charitable in the technical legal sense; and
- it was established and is maintained for that charitable purpose.

In this draft Ruling, we typically refer to the required purpose as the 'sole purpose' of the institution because a charitable institution cannot have an independent non-charitable purpose (regardless of how minor that independent non-charitable purpose may be).

'Main or predominant or dominant' purpose

26. A purpose is the 'main or predominant or dominant' purpose of an institution if any other purpose the institution has is no more than incidental or ancillary to that purpose.” [Emphasis added]

4.5 It is apparent that the use of different terminology currently causes confusion of meaning. The 2001 Charities Definition Inquiry stated (at page 107):

“Many terms have been used to describe the 'overriding' purpose, for example, main, sole, dominant and exclusive. For purposes of clarity, it is preferable that only one word be

used to describe the position of an entity's charitable purpose in relation to other purposes. The Committee recommends the use of the term *dominant* purpose.

The issue before the Committee is then to define the sense in which a charity's purpose is dominant. That is, if and on what terms should non-charitable purposes of an entity be allowed?

Charities will have purposes that are non-charitable when viewed in isolation. For example, a youth development charity may have a purpose of promoting sport among its members. The Committee considers that such purposes should not deny charitable status where they further, or are in aid of, the dominant charitable purpose, or are incidental or ancillary to the dominant charitable purpose."

- 4.6 The Sydney Archdiocese endorses the position in the Charities Definition Inquiry and considers that it is most consistent with the approach adopted in practical terms by the courts. If the Consultation Paper review adopted the requirement of "exclusively charitable purpose", it would risk an interpretation that is too restrictive and prone to excessively rigid and restrictive interpretation. Further, it would assist to elaborate on the meaning of "dominant purpose" in the explanatory materials for any new legislation, in order to make clear that it is acceptable for an entity to undertake incidental or ancillary activities that support the charitable purposes.

Question 3

Are there changes required to the Charities Bill 2003 to clarify the meaning of 'public' or 'sufficient section of the general community'?

- 4.7 The Sydney Archdiocese supports the change recommended by the Board of Taxation, as described at paragraph 63 of the Consultation Paper.
- 4.8 In this regard, there are many entities within the Sydney Archdiocese which currently qualify as charitable without any discernible controversy. Any reform proposal must ensure that they continue to be acceptable as charitable.
- 4.9 It is important to ensure that existing entities, which undertake activities in the public benefit on a relatively small scale and for a relatively small section of the community, continue to be accepted as charitable under any proposed changes.

For example:

- **Aboriginal Catholic Ministry:** *this is an agency that promotes reconciliation and mutual understanding, taking responsibility for the pastoral care of Catholic Aboriginal people and supporting them in the living of their faith. The work of the Ministry also provides an interface between all Indigenous people and the Catholic Church, represents the concerns of Aboriginal and Torres Strait Islander peoples and acts as an advocate on their behalf, as well as providing certain services such as counselling and practical assistance to access education.*
- **Ephpheta Centre:** *this is an agency which provides services to deaf and hearing impaired people in the Sydney Archdiocese. It provides sacramental, counselling, support and advocacy services and is an important resource for this community, which may not be numerically significant but would be more clearly so by reference to the part of the community to whom the purpose would be relevant.*
- **The Priests' Retirement Foundation:** *this is a foundation re-established in 2007 to ensure all priests can receive the accommodation, health care and support they need in their retirement. There are over 60 retired priests in Sydney. Whether they would constitute a significant section of the public is doubtful under the wording of the Charities Bill 2003. However, it should more clearly satisfy this requirement if the test is by reference to a number of people compared with the size of that part of the community to whom the purpose would be relevant (ie retired Catholic priests).*

It would be a regressive step in the development of charity law if these entities, which pursue purposes and activities that any reasonable person in the community would endorse as worthy of charitable status, could not qualify as charitable under any reformed law owing to the small or special community they serve.

Question 4

Are changes to the Charities Bill 2003 necessary to ensure beneficiaries with family ties (such as native title holders) can receive benefits from charities?

- 4.10 There is a long history of the Church working to alleviate disadvantage within Aboriginal and Torres Strait Islander communities.
- 4.11 As noted above, the Sydney Archdiocese conducts a ministry for Aboriginal and Torres Strait Islander peoples. Consistent with its

other submissions in this document, the Aboriginal Catholic Ministry and other organisations with charitable purposes directed towards advancing the interests of Aboriginal and Torres Strait Islander peoples, should continue to be accepted as charities under any revised law.

- 4.12 Accordingly, the Sydney Archdiocese supports changes which will ensure that beneficiaries with family ties (such as native title holders and persons related by blood ties) are not disqualified from being charitable. It should be expressly stated that an organisation may be considered to be for the public benefit notwithstanding that it advances purposes for people connected by blood ties or other defined relationships which will ensure continued charitable status for existing entities which exist for Aboriginal and Torres Strait Islander peoples.

Questions 5 & 6

Could the term 'for the public benefit' be further clarified, for example, by including additional principles outlined in ruling TR 2011/D2 or as contained in the Scottish, Ireland and Northern Ireland definitions or in the guidance material of the Charities Commission of England and Wales?

Would the approach taken by England and Wales of relying on the common law and providing guidance on the meaning of public benefit, be preferable on the grounds it provides greater flexibility.

- 4.13 The Sydney Archdiocese counsels against seeking to define in a prescriptive way the meaning of a concept like "for the public benefit", which needs to be flexible enough to adapt to new charitable needs and new ways of responding to them.
- 4.14 It is instructive that there is no single authority from the case law on the meaning of "for the public benefit". The comments of French J (as he then was) in *Victorian Women Lawyers' Association Inc v FC of T* [2008] FCA 983 go some way to explaining the challenges:
- "117 The question whether the purpose of an organisation is "beneficial" or of "service" to the community is relevant to characterisation under the applicable provisions of the ITAA. To the extent that the answer requires assessment of social norms or community values, it may sometimes rest upon an uncertain and shifting foundation. Nevertheless such judgments are often required of the courts in a variety of jurisdictions, civil and criminal." [Emphasis added]
- 4.15 Many of the cases have turned on the distinction between public and private benefits. We are not aware of any authority which has sought to definitively state a merits-based assessment for when a purpose is, and is not, "for the public benefit".

- 4.16 In the circumstances, it seems ambitious to attempt a definition in legislation which relies on an "assessment of social norms or community values" which may shift from time to time. It is better to allow the concept of public benefit to adapt to changed circumstances over time.
- 4.17 Therefore, we would prefer to leave the meaning of "for the public benefit" to continue to be developed by the courts which are best placed to make these judgments, as (now) Chief Justice French recognised in the *Victorian Women Lawyers' Association* case.
- 4.18 Of the models raised for consideration in the Consultation Paper:
- (a) the Scottish, Ireland and Northern Ireland definitions are flawed in their focus on "disbenefit" or "detriment" as a key factor. Whether or not something is for the public benefit is an evaluative judgment having regard to all factors. It is not a balancing exercise of weighing positives and negatives and we are not aware of any support for such an approach in the cases. It must be remembered that the reviews of broad based-support cited in the Consultation Paper support the essential elements of the common law on this question. They do not support supplementing the common law with novel untested concepts.
 - (b) the approach taken in England and Wales represents an even greater disservice to sound principles of legislative reform. The approach of leaving the meaning of words in legislation to be supplemented (with legislative recognition) by an administrative body must be rejected, as it blurs the distinction between legislative and administrative functions. The problems experienced in England and Wales are discussed further below and must be avoided in Australia by rejecting a model which invests a quasi legislative and judicial role in an administrative body. This does not provide greater flexibility. It simply invests an inappropriate level of power in a body whose role is not to "make" the law and which is not accountable to the community.
 - (c) the Irish model is most in tune with the existing common law, in focussing on the public/private distinction but it is less helpful in focussing on charges payable, which may present problems for existing conventional charities such as schools and (not for profit) aged care operators.
- 4.19 If a definition of public benefit is to be legislated, on balance, the proposed definition in the Charities Bill 2003, amended to take account of the Board of Taxation's recommended changes, would be the most appropriate. This would incorporate the following features:
- (a) universal or common good;

- (b) practical utility; and
- (c) benefit of the community (as modified for the Board of Taxation's recommendations).

This comes closest to articulating the common law position and is not overly prescriptive. However, the Sydney Archdiocese holds that the definition of "practical utility" should include a statement in the legislation to make clear that practical utility also encompasses the less tangible benefits such as social, mental well-being and spiritual benefits arising from the advancement of religion as a head of charity.

For example:

- **Parishes:** *A parish is a certain community of Christ's faithful stably established within a particular Church, whose pastoral care, under the authority of the diocesan Bishop, is entrusted to a parish priest as its proper pastor (Canon 515). Although Parishes invariably engage in social service, their role in fostering faith in a community is one that is inextricably linked to the advancement of religion and ought to be recognised as "for the public benefit", having regard to the historical and contemporary role of religion as a head of charity. Demonstrating the "tangible" benefits of the advancement of religion may be more difficult than, say, the relief of poverty (which other Sydney Archdiocese entities are engaged in as a dominant purpose). Due recognition needs to be given to the various charitable purposes under any reformed law.*
- **The Catholic Development Fund:** *this is a body with the purpose of advancing religion through the dedication and application of their resources and support which are availed by other entities within the Sydney Archdiocese. The Catholic Development Fund exists for the benefit of the membership of the Sydney Archdiocese and other members of the Church community by managing funds, facilitating transactions and supporting charitable and pastoral works of the Sydney Archdiocese. Its purposes are inherently religious and should continue to be recognised as charitable under any reformed law.*

Question 7

What are the issues with requiring an existing charity or an entity seeking approval as a charity to demonstrate they are for the public benefit?

- 4.20 This response addresses only the suggestion in the Consultation Paper that the presumption of public benefit should be removed for

organisations whose purposes are the relief of poverty, advancement of education or advancement of religion.

- 4.21 The Sydney Archdiocese is absolutely opposed to any measure to remove the presumption of public benefit on the basis:
- (a) the comprehensive previous reviews have not supported the removal of the presumption of public benefit;
 - (b) no evidence has been presented that the presumption of public benefit is problematic currently;
 - (c) concerns about exceptional cases can be addressed under the current law;
 - (d) there is no evidence that the removal of the presumption of public benefit would be in the interests of the community;
 - (e) removing the presumption of public benefit will:
 - (i) create uncertainty in the law; and
 - (ii) impose a greater burden and unjustified costs on charitable organisations.

Presumption of public benefit – the case for removal?

Previous reviews

- 4.22 Previous reviews do not support removal of the presumption of public benefit.
- 4.23 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, as further detailed below, most comprehensive reviews of charity law in Australia did not state a case for removal of the presumption.
- (a) The Charities Definition Inquiry 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. After identifying 6 specific categories of charitable purposes which the Inquiry recommended for inclusion in the definition of charitable purposes, it was observed (at page 190):
 - “once a purpose has been established to fall under the advancement of health, education, social and community welfare, religion, culture or the environment, it would be presumed to be for the benefit of the community unless evidence to the contrary were presented.” [Emphasis added]

- (b) The above statement is the foundation for all subsequent endorsements in comprehensive reviews. To be clear, the starting point is to retain a presumption of public benefit for existing heads of charity and extend it for new categories.
- (c) The PC Report recommended that the Australian Government adopt a statutory definition of charitable purposes in accordance with the recommendations of the Charities Definition Inquiry.
- (d) 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.”¹² [Emphasis added]
- (e) 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.”¹³ [Emphasis added]

4.24 Despite all of this, only the 2010 Senate Inquiry supported the application of a public benefit test. 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.

4.25 The Sydney Archdiocese submits that the 2010 Senate Inquiry does not provide the appropriate basis for assessing the presumption of public benefit. The genesis of the Bill under consideration in the 2010 Senate Inquiry was Senator Xenophon’s well publicised concerns about a single organisation. It simply defies common sense to frame the current Consultation Paper around an initiative arising over an isolated and exceptional inquiry, rather than the comprehensive reviews which endorsed a purer and more limited codification exercise.

¹² The Final Report, page 33.

¹³ AFTS Report, page 88.

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

“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.”

- 4.27 The Sydney Archdiocese 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

- 4.28 There is no case for removal of the presumption of public benefit. The Sydney Archdiocese submits that before consideration is given to removal of the presumption, there must be clearly articulated and justifiable reasons for doing so.

- 4.29 The Consultation Paper fails to establish why the presumption should be removed. The only factors referred to in the Consultation Paper are:

“79. ... the presumption means a government authority must in seeking to regulate and enforce law, rebut the presumption of public benefit, which can often be administratively difficult and costly.

...

82. ... A reformed public benefit test should increase public confidence in the charitable sector and public support for the granting of tax concessions to charities.

- 4.30 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 an ongoing basis. It is both any initial cost and ongoing cost associated with removal of the presumption of public benefit which are of real concern to the Sydney Archdiocese.
- 4.31 Every hour spent gathering information and submitting reports is an hour not spent on core mission. Sample reports on the Charity Commission for England and Wales website show they typically run to 10 to 15 pages. These reports must be written, received by senior staff and then typically taken to a supervisory Board for

approval. Maintaining the common law position overcomes this difficulty by not imposing this cost and burden on charities.

- 4.32 One would expect that it is the relevant Government agency's function, for which it is (or should be) adequately resourced, to review, monitor and enforce compliance. In any event, there is no evidence presented in the Consultation Paper of material non-compliance in the sector requiring excessive allocation of resources. The only instance of which the Sydney Archdiocese is aware in recent times of the Australian Taxation Office seeking to challenge a charitable organisation relying on classification under one of the specific heads of charity is *Word Investments*, in which the High Court rejected the ATO's views. Relevantly, public benefit was not at issue.
- 4.33 In relation to the comment at paragraph 82, the Consultation Paper does not put forward any evidence of a lack of confidence in the charitable sector which would justify removal of the presumption. The suggestion that (only a few) other jurisdictions may have gone down this path itself does not make the case for removal.
- 4.34 Rather, the fact that:
- the common law, developed carefully over several centuries, has seen fit to retain a presumption of public benefit for charities for the relief of poverty, advancement of education and advancement of religion; and
 - there is no evidence put forward in the Consultation Paper seeking to justify the removal of the presumption,
- should point to the good policy sense in retaining the status quo.

Problems with removing the presumption

Greater complexity, uncertainty and potential for disputes

- 4.35 From a policy perspective, one would expect that existing charitable organisations would continue to qualify as a charitable organisations under the existing law as such where they are schools (whether primary or secondary, religious or secular, public or private, Catholic or independent). Indeed, the Sydney Archdiocese is not aware of the Australian Taxation Office or other regulators seeking to disqualify a conventional school from charitable status under the current law and such a school should not to be disqualified under any change to the law.
- 4.36 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.”

- 4.37 The experience, reports and anecdotal evidence suggests, however, that the assertion at paragraph 85 of the Consultation Paper is not accurate and the recent experience in England gives rise to substantial concern.
- 4.38 In England, 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 & 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. Hopefully, this outcome is not intended to apply in Australia. Yet it is the outcome of the very system which the Consultation Paper seems to endorse as being appropriate.
- 4.39 In a similar way, in 2009, the England & 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 was applied in Australia, many aged care and other care facilities may struggle to comply, particularly those facilities where margins are such that they cannot afford to provide unfunded places. In a recent Australian survey of the financial performance of residential aged care facilities, 34 per cent of 225 *high care* residential aged care facilities across Australia experienced a negative end of year financial result in the 2010 financial period while 36.3 per cent of 320 *low care* facilities experienced a negative facility result.¹⁴
- 4.40 Using aged care as an example, framing the public benefit test in the same way as the England & Wales Charity Commission has the potential to impact an operator’s future growth and service delivery. Even for larger providers of community and residential aged care services in Australia, compromising service delivery would further affect the development of future aged care places and the situation would be even worse for the smaller providers. In a climate where demand will outstrip supply for aged care places over the next 40 years, the impact of this in light of the Australian Treasury’s Intergenerational Report 2010 which refers to the projected population rates of older people to the future is of great concern. These predictions suggest that the population rate for people 64 years to 85 years will double over the next 40 years and the

¹⁴ Stewart Brown *Business Solutions, Aged Care Financial Performance Benchmark Report* November 2011.

population rate of people 85 years and older will quadruple. Clearly, good policy dictates measures to enhance the involvement of the charitable aged care providers in meeting this growing need of the community. It is not the time to increase the burden and risks by introducing uncertainty about their charitable status and additional monitoring and reporting.

- 4.41 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. In our view, the case itself demonstrates the problems with removing the presumption of public benefit. Such a case would not arise under current Australian law and it is essential that it does not arise under any revised law.
- 4.42 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 & 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 5 parties as stakeholders or interveners, including the Attorney General.
 - The relevant Tribunal deciding the case issued a decision of more than 100 pages.
 - The England & Wales Charity Commission ultimately was found to have issued incorrect guidance.
- 4.43 The point is not to highlight the error of the England & Wales Charity Commission (which is concerning in itself). Rather, the point is to highlight that what is presently a simple matter of absolute certainty under the current law became a cause of significant trouble and expense for the charitable parties affected, because of uncertainty created by an apparently well meaning but ill-conceived legislative change and/or and a misguided charities regulator.
- 4.44 What is certain and uncontroversial under current law risks becoming the subject of lengthy and costly dispute resolution under a revised law. Whereas it is only issues at the margin which are the subject of dispute under the current law, the removal of the presumption risks making issues out of matters which are not of controversy under the current law and which are part of settled law concerning charities.

- 4.45 Where is the guarantee that such an undesirable, inefficient and wasteful proceeding will not occur under a revised law in Australia?
- 4.46 The Sydney Archdiocese 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. This is a highly undesirable outcome which can be easily avoided simply by retaining the presumption of public benefit. The risk of uncertainty will lead to disputes and the unnecessary and wasteful dedication of resources by Government and the charitable sector away from core purposes of service delivery. Moreover, there is no evidence of systemic problems which necessitates any change to the law. The Sydney Archdiocese repeats that the case for changing the current law is insufficient on the merits.

Greater burden and unjustified costs

- 4.47 The Sydney Archdiocese has argued consistently that measures should not be implemented which increase the cost of compliance and red tape for conventional charities. Implementing such measures is contrary to the Federal Government "National Compact: working together" because it imposes a cost on charities which does not currently exist. The Sydney Archdiocese, like other members of the charitable sector, takes the Government's commitment to the "National Compact" principles seriously. The Government should demonstrate its commitment to it with consistent action, as stated at paragraph 3 of the Consultation Paper.
- 4.48 In an environment in which funds are scarce and charitable organisations more than ever must be vigilant in cost control, the imposition of any additional regulatory burden and costs is something which needs careful consideration.
- 4.49 The assertion in the Consultation Paper that altering the presumption "may not increase compliance costs for most charities" and that charities may incur "some minor incidental compliance costs" is unfounded. We welcome practical initiatives to enhance or improve scrutiny and transparency in the sector. However, the recommendation of Treasury for charities to have to regularly demonstrate public benefit will place a debilitating administrative and financial burden on the NFP sector. Based on the experience in England, there is a real risk of consuming increased charitable organisation's efforts and resources in administration and disputes which would not occur under the current law. An England and Wales model is very likely to involve Charities being tied up in wasting resources on unnecessary compliance. This is contrary to the Government's objective in attempting to reduce the cost of 'red tape'.

- 4.50 The Sydney Archdiocese is very wary of a change to the law for which no strong reason has been advanced, and with risk of adverse cost consequences, which may result in certain Sydney Archdiocese charities being unable to continue their good works.

Current actual or perceived problems in relation to public benefit can be addressed under the current law

- 4.51 If there are actual or perceived problems under the current law, they are not articulated in the Consultation Paper or the comprehensive reviews to date. Indeed, of the significant legal cases concerning charities in recent times, none have involved questions about the presumption of public benefit.
- 4.52 It must be remembered that the presumption of public benefit is only a presumption. It is not an absolute condition which allows organisations acting contrary to the public interest to be 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.”¹⁵

- 4.53 For those exceptional cases where public benefit is an issue, the current law provides a mechanism for testing and achieving an appropriate outcome. In this regard, unless there is evidence of widespread and inappropriately granted charitable status for organisations, the Sydney Archdiocese submits that the appropriate position is to start from a presumption of public benefit, consistent with the long standing case law, and then identify by way of exception those matters which would exclude charitable status. For example, where purposes and activities are harmful to members of the public, or there are private benefits only, the current law provides for exclusion of such entities from qualifying as charitable. Further, rather than ask conventional charities to show why there is a public benefit, and be exposed to the cost, burden and inefficiencies which that entails, the appropriate setting for testing public benefit, where required, is for regulatory authorities to carry the burden of rebutting the presumption.

¹⁵ Page 112.

Presumption of public benefit – summary

4.54 In summary:

- (a) the case for overturning centuries of carefully developed law which has served society well in developing certainty for charities is insufficient on the merits. The absence of disputes about the meaning of public benefit is strong evidence that the current law is working. The incidence of disputes about the meaning of public benefit in England indicates that the revised law in that jurisdiction is leading to uncertain and costly outcomes;
- (b) the experience in England demonstrates a heightened level of uncertainty and disputation and detailed review of organisations which would be regarded as clearly charitable in Australia, with greater complexity and uncertainty of the law and the potential for costly and time consuming disputes;
- (c) there is a strong likelihood of a greater burden and unjustified costs on charitable organisations. The potential for increased costs in understanding, applying and responding to enquiries needs to be justified only if there are tangible benefits for charitable organisations. No such benefits are identified in the Consultation Paper.

4.55 The Consultation Paper 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. As set out above, previous inquiries have not supported the removal of the public benefit presumption.

4.56 If the presumption of public benefit is removed, it will be left to the government (ultimately the ACNC) to decide whether or not an organisation meets the test of “public benefit”. Aside from cost to the organisation in demonstrating public benefit, the Sydney Archdiocese considers this to be an unjustified and ineffective use of government resources. Rather than considering each charity’s purpose, the government should focus on organisations of genuine concern and not waste its, or conventional charities’, resources to confirm public benefit.

4.57 The Sydney Archdiocese has invested substantial effort and resources in addressing this question, as it believes in it strongly as a matter of principle, and considers that a detailed response is required in order to balance the skewed position in the Consultation Paper which gives undue regard to the 2010 Senate Inquiry and insufficient regard to the Charities Definition Inquiry. The Sydney Archdiocese is deeply concerned about how some of its more significant entities might be assessed under a public benefit test.

For example:

- **CatholicCare:** as this entity is endorsed specifically as a PBI, we expect that it should be self evident that it would satisfy the public benefit test. If it is self evident that entities like CatholicCare would satisfy the public benefit test, why remove the presumption?
- **Charitable Works Fund:** this is an ancillary fund which supports the charitable and pastoral activities of the Sydney Archdiocese of Sydney. It should be self evident that it would satisfy the public benefit test. Again, why remove the presumption?
- **The Catholic Education Office:** as the agency responsible for policy implementation, services and personnel in Catholic schools in the Sydney Archdiocese, it should be accepted as acting for the public benefit by advancing education across a large section of the community. The CEO is responsible for schools which charge fees for students. It also manages schools which provide funded places by way of exemptions and reductions in fees as well as bursaries. In 2010 alone the CEO oversaw the total of fee exemption/reductions and bursaries to the value of approximately 10 per cent of all fees billed. But the test of public benefit should not be whether an educational body provides bursaries. This adds a condition to the law which does not currently apply and would make it difficult for borderline fee paying institutions operating on tight margins to satisfy the public benefit test. The approach adopted by the Charities Commission in England and Wales has demonstrated the folly of this approach. Instead, the advancement of education should be accepted as being for the public benefit simply because education is a social good which improves society as a whole. The public benefit presumption exists because it is self evident that educating people from all parts of society is a common and universal good for society as a whole.
- **The Priests' Retirement Foundation (a PBI) and the various Parish Residential Aged Care Facilities:** although there is no presumption in respect of these entities, care for the aged and infirm is such a universally accepted good that it seems almost self evident that it is for the public benefit. However, similar considerations apply for aged care facilities as for education, as many involve some level of fee paying.

Any new legislation must not create a situation where conventional charitable bodies under the current law pursuing universally accepted beneficial purposes become subject to new and unreasonable requirements under reformed law.

Question 8

What role should the ACNC have in providing assistance to charities in demonstrating this test, and also in ensuring charities demonstrate their continued meeting of this test?

- 4.58 The 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 which do not have the force of law but instead set out the ACNC's interpretation of the law only.
- 4.59 The ACNC should play an executive or administrative role only. The Sydney Archdiocese strongly opposes the ACNC having any formal statutory function for promulgating guidance about the charities legislation. The experience in England with the Charity Commission and the *Independent Schools Case* bears out the pitfalls in investing a quasi-legislative function in an administrative body.
- 4.60 The focus of the ACNC should not be conventional charities in good standing, but organisations where there are particular concerns and sufficient evidence to suggest that the presumption of public benefit may be rebutted.

Question 9

What are the issues for entities established for religious purposes for the advancement of religion or education if the presumption of benefit is overturned?

- 4.61 The general content above has discussed the issues for educational organisations being required to demonstrate public benefit. It has led to outcomes in England whereby conventional schools have been denied charitable status, based on their operation under accepted models of the provision of education in Australia.
- 4.62 The courts and commentators have repeatedly identified the public benefit provided by organisations established for the advancement of religion, and warned against inviting potentially divisive public enquiry on the issue.
- 4.63 As noted by the ATO in TR 2011/D2, citing *In re Watson (deceased)*; *Hobbs v Smith* [1973] 3 All ER 678 at 688:

“some benefits or values to the community are not scrutinised to such a degree. For example, spiritual benefits are not analysed to draw a distinction between one religion and another.”

4.64 Specifically in relation to religious organisations, 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.”¹⁶

4.65 The Charities Definition Inquiry further observed, citing Bradshaw:

“For the most part religious bodies either desire to spread their beliefs or provide religious ordinances that the public may participate in or at least observe. Since all religions are to be deemed equal in the eyes of the law, and as the advancement of religion is a charitable object, it must be assumed that this action in spreading their views or even merely making available to the public their ordinances of worship, satisfies the requirement of the necessary public element.”¹⁷ [Emphasis added]

4.66 The Sydney Archdiocese considers that the 2001 Charities Definition Inquiry provides the appropriate touchstone for supporting the retention of the presumption of public benefit. It is the most comprehensive inquiry into the charities to date.

4.67 The ways in which the advancement of religion has been explained as being for the public benefit has been the subject of extensive research, which is quoted below:

“Three nineteenth century American cases discussed by Picarda ground the charitable function of advancement of religion and the role religion plays in encouraging concern for others and self restraint. This is because these qualities are essential to civilisation and the welfare of society. In *Holland v Peck* the court held that religion was ‘the surest basis on which to rest the superstructure of social order.’ In *People ex rel Seminary of Our Lady of Angels v Barber* religion was described as necessary to the advancement of civilisation and the promotion of the welfare of society’. In *Gass and Bonta v Wilhite* it was held that religion is a ‘valuable constituent in the character of our citizens’. In such a context, advancement of religion is recognised as a charitable purpose enjoying the favour it does because of its role in underpinning the social order and creating social cohesion. These ostensibly charitable purpose cases ... point to advancement of religion cases forming part of a wider

¹⁶ 2001 Charities Definition Inquiry, page 178.

¹⁷ Bradshaw, FM 1983, *The Law of Charitable Trusts in Australia*, Butterworths, Sydney, p 62.

stream of common law jurisprudence related to the foundations of society. It is not just the American judges and Picarda who draw this connection. Chief Justice Gleeson of the High Court of Australia is reported to have declared similarly that religion continues to be relevant in Australian society because it provides a bridge between "private conscience" and "the general acceptance of values that sustains the law and social behaviour." The *Nathan Report* of 1952-53 pointed to a similar connection. Analogous observations were made by the Australian *Charities Definition Inquiry*.

That religion operates as a force obliging people to be good and thus underpins society is anchored in a widely accepted proposition that even though there is a great diversity of belief amongst religions, in the out-workings of behaviour, all of the major religions teach the equivalent of what is known in most common law countries as the golden rule. The golden rule which is often articulated as, 'do to others as you would have them do to you' exhorts adherents to behave altruistically.

This role of religion arguably underpins the judicial pronouncement by Lord Cross, that the law 'assumes that any religion is at least likely to be better than none.' This role for religion also seems acknowledged by the famous humanists Ariel and Will Durant, who observed that no society has yet formed a way of developing morality without reference to religion. In a legal context Lord Devlin, has noted that no society has yet solved the problem of how to teach morality without religion."¹⁸

- 4.68 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."

- 4.69 Other commentators have observed:

"If the public benefit presumptions are removed there is real risk that only those which are politically popular institutions

¹⁸ Matthew Dwight Turnour, "Beyond Charity: Outlines of a Jurisprudence for Civil Society", The Australian Centre for Philanthropy and Nonprofit Studies, QUT, paper submitted for award of Doctorate of Philosophy, 23 September 2009. Footnotes removed.

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.”¹⁹

4.70 Further, another commentator has observed:

“the case law reveals that a presumption of public benefit has, up to now, assisted courts to a considerable degree and in several ways in cases on trusts for religious purposes.

...

... once the presumption of public benefit is removed from the law, possible approaches to the question of public benefit that may be drawn from the existing case law on trusts for charitable purposes will not be problem-free in their application to cases on trusts for religious purposes.”²⁰

4.71 This author argues that evidence will need to be led about the public benefit of religious purposes which requires evaluations to be made by administrators or courts on matters which may be difficult to analyse and apply by reference to the criteria relevant for other charitable organisations. The special place of religion and, in certain instances, its intangible social, mental well-being and spiritual benefits are difficult to assess in a forensic exercise such as the one which will be required by the removal of the presumption of public benefit.

4.72 Investing an administrative body like the ACNC with a power and obligation to inquire into the public benefit provided by conventional and long standing religious entities, which have contributed immensely and fundamentally to the fabric of Australian society since its earliest days, seems wholly unjustified. Further, it represents an intrusion into the internal arrangements of religious communities and the potential for bodies to form judgments on matters which are protected under section 116 of the Australian Constitution.

4.73 The Sydney Archdiocese would be sceptical of the motives of the legislature if it moved to reverse the presumption of public benefit for the advancement of religion. It would view this as an unjustified attempt to intrude into the affairs of religious communities and organisations, and a direct attempt to weaken the status and

¹⁹ Brian Lucas and Anne Robinson, “Religion as a head of charity”, *Modernising charity law*, 2008, at page 192.

²⁰ Matthew Harding, “Trusts for Religious Purposes and the Question of Public Benefit”, *The Modern Law Review* Volume 71, March 2008, 159 at page 165.

standing of religion in Australian society. Rather than providing opportunities for religious communities to demonstrate and state the public benefits they bring to our country, an obvious inference would be that such a measure would be more likely motivated to serve minority special interests of those who are vocal opponents of the religion.

- 4.74 The difficulties posed by the removal of the presumption of public benefit have the potential to create discord in the community in ways which do not arise under the current law. The Sydney Archdiocese submits that the prevailing law should continue and that any concerns about particular organisations with religious purposes not serving the public benefit can be dealt with under it. It is more desirable to start from the presumption of public benefit and identify any harmful or private consequences of individual examples which may disqualify an otherwise religious organisation from being a charity. In the absence of evidence of widespread or even significant concerns about the numerous religious organisations qualifying as charitable, the Sydney Archdiocese supports the maintenance of the status quo, which has served the community well over a long period.

Question 10

Are there any issues with the requirement that the activities of a charity be in furtherance or in aid of its charitable purpose?

- 4.75 The majority of the High Court in *Word Investments* recognised the importance of examining an entity's activities:

"17. ... That is, it is necessary to examine the objects, and the purported effectuation of those objects in the activities, of the institution in question. In examining the objects, it is necessary to see whether its main or predominant or dominant objects, as distinct from its concomitant or incidental or ancillary objects, are charitable.

...

26. ... The inquiry, so far as it is directed to activities, must centre on whether it can be said that the activities are carried on in furtherance of a charitable purpose. ... The activities of Word in raising funds by commercial means are not intrinsically charitable, but they are charitable in character because they were carried out in furtherance of a charitable purpose."

- 4.76 It is already part of the law relating to charities that an entity must pursue activities in furtherance of its charitable purposes. The position is clearly stated by the High Court. The Sydney Archdiocese sees no need to alter (by supplement or subtraction) the position stated by the High Court. To do anything else is to complicate the

position unnecessarily, with adverse consequence for charities and their contribution to the community.

Question 12

Are there any issues with the suggested changes to the Charities Bill 2003 as outlined above to allow charities to engage in political activities?

- 4.77 The Consultation Paper notes at page 1 that a substantial reason for the rejection of the proposed amendment in the Charities Bill 2003 was the restriction on charities engaging in the political process. In particular, the proposal in the Charities Bill 2003 to disqualify an entity for "attempting to change the law or government policy" as a more than incidental or ancillary purpose attracted opposition because of concerns, among others, of the restriction on a charity to engage in the debate about appropriate policy to achieve outcomes which are considered to be for the public welfare.
- 4.78 In *Aid/Watch*, the High Court explained that a constructive contribution to policy debate is healthy for the Australian political system:
- "45. The system of law which applies in Australia thus postulates for its operation the very "agitation" for legislative and political changes of which Dixon J spoke in *Royal North Shore Hospital*. ... it is the operation of these constitutional processes which contributes to the public welfare. A court administering a charitable trust for that purpose is not called upon to adjudicate the merits of any particular course of legislative or executive action or inaction which is the subject of advocacy or disputation within those processes."
- 4.79 In the spirit of the above, there are entities within the Sydney Archdiocese that engage in advocacy for particular positions or outcomes which would advance the purposes of the entity in its relevant field. Further, from time to time, the Sydney Archdiocese may publish critiques of policies of particular political parties as a means of informing Catholics and the public and contributing to healthy debate about proposed initiatives particularly when they may have adverse impacts on the relief of poverty, the advancement of education, the advancement of religion, and other purposes such as the promotion of human rights.
- 4.80 Advocacy activities are by no means the dominant or even a significant part of the activities of an entity. However, such activities should not be restricted under any new legislation. As noted by the High Court in *Aid/Watch*, it is critical for the proper functioning of the system of government in Australia that constituents and entities are able to participate in policy debate and discussion in relevant fields of interest. For the Sydney Archdiocese, this would include subjects

which touch on fundamental tenets of the Catholic faith and consequences for the mission of the Church, as well as fundamental teachings and doctrines which Catholics believe are an essential part of promoting the common good.

- 4.81 In light of the rejection of the Charities Bill 2003 and the clear statements in *Aid/Watch*, the Archdiocese considers that the approach in the Charities Bill 2003 of listing “disqualifying purposes” is flawed and should be abandoned.
- 4.82 It is already a part of the law of charity in Australia that any “political” activities must be undertaken in advancement of the entity’s charitable purposes. As such, it should be left to the common law to continue to develop the appropriate boundaries for the activities of an entity which may be described as “political” while still being consistent with advancing charitable purposes. Attempts to define boundaries (positively or negatively) in legislation risk rejection of the entire legislative package again. It also seems to contradict the position advocated by the High Court in *Aid/Watch* about potential encroachments on “communication between electors and legislators and the officers of the executive, and between electors themselves, on matters of government and politics [which] is ‘an indispensable incident’ of that constitutional system”.²¹
- 4.83 Having regard to the above, the Sydney Archdiocese suggests that the most sensible position is to remove the concept of “disqualifying purposes” in any new legislation and leave it to the common law position which has been clarified in *Aid/Watch*. Attempting to alter that position would create uncertainty.

Question 15

In light of the Central Bayside decision is the existing definition of “government body” in the Charities Bill 2003 adequate?

- 4.84 As noted at paragraph 3.4 above, there is an historical link between religion and benevolent works/social services, with the consequence that many of the services delivered by governments in other countries actually were delivered in the early days of Australia (and continue to this day to be delivered) by religious organisations, principally Christian charities.
- 4.85 The evolution of the delivery of social services such as health and aged care in Australia means that there are religious organisations undertaking services which are highly regulated by legislative and executive action. For example, parish aged care facilities are conducted by the Parish in the Sydney Archdiocese subject to

²¹ Paragraph 44.

regulation under the *Aged Care Act 1997* (Cth) and supervision by Government bodies.

- 4.86 The Sydney Archdiocese does not consider that the operators of such aged care facilities are “controlled” by Government and would expect that the Government agrees with this assessment. However, the Sydney Archdiocese is concerned to ensure that the definition of “government body” proposed in the *Charities Bill 2003* is not misinterpreted. At the least, the Sydney Archdiocese suggests that the explanatory materials for any new legislation should clarify explicitly that an entity which conducts services which may happen to be conducted by government and which are subject to government regulation is not an entity which is “controlled by government”. The explanatory materials should refer expressly to health and aged care operators and providers of social and welfare services.

Question 16

Is the list of charitable purposes in the Charities Bill 2003 and the Extension of Charitable Purposes Act 2004 an appropriate list of charitable purposes?

- 4.87 Having regard to the focus of this submission on religious purposes as a head of charity, the Sydney Archdiocese emphasises that the list of charitable purposes must continue to include the advancement of religion as well as other conventional categories of charity which are recognised under the current law.
- 4.88 The Sydney Archdiocese considers that the common law of Australia sufficiently states the meaning of religion for the purposes of the law in *Church of New Faith v Commissioner of Pay-roll Tax* (1983) 154 CLR 120. The Sydney Archdiocese is wary of any measure to define religion in any new legislation and considers it is not the place of the Parliament to attempt to do so.

Question 20

Are there any other transitional issues with enacting a statutory definition of charity?

- 4.89 The Sydney Archdiocese considers that it is important for acceptance of any new legislation that existing charities are given automatic recognition as charities under any new regime. That is, existing charities should not be exposed to any additional compliance burden in order to be recognised by the ACNC as charitable organisations. The process should be similar to the automatic endorsement granted to existing charitable institutions and funds as income tax exempt charities on transition to the endorsement regime for income tax purposes.

4.90 As noted in the Charities Definition Inquiry (page 190):

“The Committee does not intend that anything currently held to be charitable under the head of ‘other purposes beneficial to the community’ should cease to be so.”

4.91 This principle should be applied to all charities on transition to any new regime.