

Catholic Diocese of Bunbury

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

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Background

The Treasury's consultation paper "A Definition of Charity" follows on from the 2011-12 Federal Budget not-for-profit reforms which include the formation of the Australian Charities and Not-for-profits Commission (ACNC). Several studies have investigated the introduction of a statutory definition of charity and this consultation paper is the latest attempt to legislate in this area. The previous draft bill introduced in 2003 was rejected.

It is important to note that two significant High Court decisions have been handed down in the time since 2003. The *Aid/Watch* and *Word Investments* decisions found in favour of charities where the government attempted to assert that certain activities were incompatible with charitable purposes. The overall concern of the Catholic Diocese of Bunbury is that the stance taken by the government in these cases should be assumed to be the natural legislative bias when drafting and enforcing charitable legislation. In other words, the courts arguably can be seen as the friend of charities whereas government seeks to restrict charitable activities principally for revenue and political reasons. The proposals contained in the consultation paper and recent legislative activity bear this out as will be outlined below.

Summary

The Catholic Diocese of Bunbury (the Diocese) objects to the proposed legislation to define a charity on a number of grounds:

- i. Once a common law term is given a statutory definition it becomes subject to change by government based essentially on ideology and political views. The consultation paper specifically assumes that this will be the case at item 12 which states a "*statutory definition will allow parliament to more easily alter the definition over time*". Given that the definition of charity under common law has been reasonably consistent over a long period of time, one wonders why the government sees a need to alter it?
- ii. The statutory definition of Marriage introduced in 2004 is a prime example of a well established natural and common law principle falling into the realm of ideology and redefinition at the discretion of the government of the day. The notion of charity is expected to be subject to similar pressures as evidence presented below would indicate.
- iii. The application of a sector wide definition is problematic as evidenced by the 2010 Productivity Commission NFP Report where it states:

*A clear definition is required for measuring the contribution of the sector, and wherever the sector is treated differently from the 'for profit' business, 'government' or 'household' sectors. **Yet the diversity of the sector suggests that such sector-wide treatment is unlikely to be appropriate as different***

segments warrant regulation and concessional treatment (p4) (emphasis added)

- iv. The piecemeal presentation of reform in the not-for-profit sector is not conducive to clear decision making. The many streams of consultation being progressed at the moment make it difficult to determine the overall impact of any single change.
- v. The introduction of a statutory definition coupled with the reversal of presumption of public benefit for religious charities will add to compliance costs.
- vi. The 2010 Productivity Commission report recommended measures which would assist charities overcome these detrimental changes, yet there does not seem to be any move by government to enact these beneficial proposals which include:
 - i. Expanding scope of gift deductibility to cover all endorsed charitable entities and funds (recommendation 7.3)
 - ii. Assisting in the development of sustainable markets to access debt financing (recommendation 7.5)
 - iii. Increasing government funding to finance market wages to attract staff (recommendation 10.2)
 - iv. Ensuring appropriate independence and "not impose conditions associated with the general operation of the funded organisation beyond those essential to ensure the delivery of the agreed funding outcomes" (recommendation 11.3).
- vii. The timeframe for the introduction of the NFP reforms is not consistent. The Better Targeting of NFP Tax Concessions measures apply as from 1 July 2011, yet the statutory definition does not apply until 2013.
- viii. The problems that the government seem to be attempting to resolve for charitable entities principally relate to those of inter-jurisdictional activities and diverse reporting regimes. In our view, these problems could be better solved by harmonisation of state and Commonwealth laws and the Standard Business Reporting initiative rather than a quantum change such as proposed in the definition of charity consultation paper.

Specific Issues Relating to the Proposals

In the event that the definition is legislated, the Diocese wishes to raise the following matters which in our view require attention to maintain fairness and equity for the charitable sector in general, and religious entities in particular.

Consultation Question

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

The Diocese strongly recommends that the concept of "dominant purpose" be retained. The adoption of "exclusive" leads to looking at purposes in isolation which then potentially leads to invalidation of charitable status.

Many entities would have potential issues with distinctions between purposes and activities in their constitutional documents. Abandoning dominant purposes means that significant legal work is required to categorically ensure all purposes are explicitly charitable.

Further, as shown below in the discussion about activities, what is currently a charitable purpose may at some point be redefined as non charitable. This would invalidate the charitable concession even if the purpose is only "incidental or ancillary".

Consultation Questions

5. 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?

6. 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?

The Diocese disagrees with the codification of the concepts of "practical utility" and "public benefit". These matters, once in legislated form, will be dependent on subjective assessments of what constitutes practical utility or public benefit. As noted below, public hostility to religion in general and freedom to express one's religion coupled with increasing political aggravation constitutes a threat to the historical reality of the utility and benefit religion has provided to the fabric of our society.

There are practical problems with legislating a public benefit test for churches in that church members (ministers of religion) also receive benefits from the church. On a strict interpretation, the church could fail such a test and it seems that intervention from the regulator is necessary to assist charities to substantiate this requirement.

With the Catholic Church, active ministers of religion are dependent on the church (their parish community) for their personal, accommodation and living expenses. Retired clergy and clergy appointed to diocesan positions are dependent on the Church itself for the same "benefits". The England and Wales approach provides less security in interpretation as changes are subject to current administrative views without necessarily being approved by an elected legislature.

Consultation Questions

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?

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?

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

The Diocese strongly recommends that the presumption of public benefit rebuttal be retained in any legislation for the first three heads of charitable purposes identified in Pemsel's case.

Item 79 in the discussion paper is confusing. Whether a charity meets one of the three heads of charitable purpose should be a question of fact. If the government has concerns that a particular charity's activities do not match its purposes then it is appropriate that these are challenged by the government.

It should not mean that charities have the burden of proving they are for the public benefit. The three heads of charity in Pemsel's case have historically proven to be for the public benefit. Overturning this tradition and precedence seems to be more a matter of convenience for the government so that it avoids the "*administratively difficult and costly*" process of rebutting the presumption.

Item 83 is dismissive of the onus of proof placed on charities to prove public benefit. To argue that compliance costs "*may not increase*" for charities because they already have to review their status pays little regard to the difference between substantiating a situation where one is presumed to be a charity and one where there is an onus of proof to defend such status. With constantly changing legislation and interpretations over time, there will be significant compliance costs including legal reviews to justify the public benefit test.

Item 84 seeks to reassure, some might say via platitudes, the potential approach of the ACNC in supporting charities demonstrating public benefit. Such reassurances are hollow in the light of progressive restrictions and compliance costs imposed on charitable entities' operations.

If an entity proves public benefit, why is it then proposed to be subject to further compliance and administration in the form of ongoing obligations to make statements of the actual public benefit provided? This seems meaningless particularly when related to the concept of intangible spiritual benefits "offered" by religious entities. The concept of practical utility is a real risk to religious entities in view of current political trends. Spiritual benefits could be discounted at the whim of a change in policy.

Item 90 exposes the risks the reversal of the presumption of public benefit rebuttal poses to the Catholic Church; in particular,

"If there are concerns that a religion is causing detriment or harm, this would be considered in assessing whether they pass the public benefit test. An organisation that has been approved as a charity will be at risk of losing its status as a charity if it is able to be demonstrated that it is causing significant detriment or harm."

Examples of instances where religious entities have been portrayed as causing detriment or harm can be taken from the contents of a presentation by Hon Greg Smith SC at the Thirteenth Meeting of Experts of the International Religious Liberty Association hosted by the Sydney Law School (*quotes taken from The Quadrant, October 2011*). These include:

- *"The Boycotts Divestment and Sanctions Resolution against Jewish businesses passed in December 2010 by the Marrickville Council"*. Here local government policy specifically targeted an ethno religious group. This example shows the trend in a particularly public ideology which is hostile to religious belief and practice.
- The Victorian parliament passed legislation concerning abortion in 2008. *"Section 8 of the Victorian Abortion Law Reform Act, eliminates the right to conscientious objection by mandating doctors to either participate in the abortion process or recommend a doctor who will do so"*. Advocating that Catholic doctors and health professionals act in accordance with their faith and the Catholic Church's teaching on abortion would contravene this law and expose the Church to a disqualifying activity.
- *"Senator Xenophon recently announced that he would introduce a private members' bill in the Senate to, in effect, repeal section 127 of the Evidence Act, according to which a person who is a member of the clergy of any church or religious denomination is entitled to refuse to divulge to a court the contents of a religious confession made to that member of the clergy"*. If such a law was

passed and the Church continued to exercise its right to freely express religion, it would be in contravention of the new law, engaging in a disqualifying activity and perceived as causing detriment or harm (presumably to any form of official enquiry).

In our view any of the above examples would be potential grounds for the Catholic Church to fail the tests outlined in item 90 and therefore lose its status as a charitable entity. This is an unacceptable situation for religious charities.

The public benefit issue can not be dismissed by asserting that no "particular difficulties" have arisen in overseas jurisdictions (item 92). The problems will arise in the future, not in the past. Is there any evidence provided to substantiate whether any difficulties have been avoided? Were overseas charities surveyed?

Consultation Questions

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

11. Should the role of activities in determining an entity's status as a charity be further clarified in the definition?

The Word Investments case highlights the conflict between statute and common law. As circumstances change in the future, statute could prevent the fair adaptation of charities to meet their mission. The government's more restrictive views as to what constitutes charitable activity as argued in the Word Investments case, one would assume, constitute the future trend in legislation should a definition be enshrined in statute law.

Item 97 refers to Draft Taxation Ruling 2011/D2 and uses the terms "isolated or insignificant" when the regulator considers whether an activity would affect charitable status. These terms are not in accordance with the common law or even the final version of the ruling TR 2011/4. The Diocese does not see the need for activities to be clarified in the regulation on the following grounds:

- i. TR 2011/4 paragraph 198 states that *"it does not matter that [the entity's] activities may not be intrinsically charitable. It is the purpose in furtherance of which the activities are carried out, and not the character of the activities themselves, that determines whether an institution has a charitable purpose"*; and
- ii. It is not "isolated or insignificant" that determines whether an activity supports a charitable purpose but rather *"incidental or ancillary" if it tends to assist or naturally goes with the achievement of the charitable purpose.*

It does not mean a purpose that is minor in quantitative terms" TR2011/4 paragraph 28.

Consultation questions

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?

13. Are there any issues with prohibiting charities from advocating a political party, or supporting or opposing a candidate for political office?

The Diocese considers that the political advocacy proposals contained in the Charities Bill 2003 are redundant and do not need to be enacted in current legislation. The Aid/Watch case clearly determined that there is no doctrine in Australia that excludes political purposes from being charitable (item 105).

It is therefore puzzling why the consultation paper proposes the removal of only paragraph 8(2)(c) from the Charities Bill 2003 list of political activities? Advocating a party (paragraph 8(2)(a)) or a candidate (paragraph 8(2)(b)) in support of the change to government law or policy should not be a disqualifying activity as it is aimed at the same purpose as 8(2)(c).

Any codification of political advocacy activities will adversely impact the Catholic Church. Religious leaders must retain the ability to express religious belief and values even if this included identifying parties or candidates with policies at odds with the Church's teachings.

If the charitable purpose is presumed, the onus should be to prove activities are incompatible with that purpose, not that they are incompatible with third party or outside perceptions of what the Church should be doing.

With the reversal of the presumption of public benefit, the religious charity is now obliged to prove that such political activities are for the public benefit. The retention of clauses 8(2)(a) and 8(2)(b) arguably represents a restriction on freedom of religious expression and contravenes section 116 of the Constitution:

*The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, **or for prohibiting the free exercise of any religion**, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth (emphasis added)*

Item 111 requires political activities satisfy a public benefit test whereas the Diocese argues that it is the established charitable purpose test that should be satisfied.

The Diocese believes the suggested changes in item 112 to the Charities Bill 2003 are unwarranted for the above reasons and are only recommended based on trends in other countries which do not operate under Australian constitutional law.

Item 113 is not specific as to how party political advocacy conflicts with electoral laws. It does not recognise that the Electoral Act 1918 is subject to section 116 of the Constitution. The Electoral Act should not prevent freedom of expression of religion. The issue of compromised independence of charities and loss of confidence is an issue for religious charities to contend with. The Diocese opposes any clauses purporting to restrict comment on political parties or candidates.

Items 115 and 116 concerning "illegal activities" have potential to adversely affect the Catholic Church, particularly if the "illegal" conduct is downgraded to examination at an activity level as opposed to the purpose level. As explained above, legislation such as the Victorian Abortion Law Reform Act or the proposed change to Section 127 of the Evidence Act places the Catholic Church in the position of conducting or condoning "illegal" activities and therefore placing itself at risk of losing charitable status.

Conclusion

The 2010 Productivity Commission NFP Report acknowledges that a sector wide definition is unlikely to be appropriate. The above arguments outline that this is indeed the situation in respect of legislating a definition and particularly the case with the accompanying removal of the presumption of public benefit rebuttal. The proposed changes present significant problems for the Catholic Church in terms of:

- its ability to freely express religious beliefs and values;
- placing significant administrative and compliance burdens on the church;
- identifying the overall impact when considered in isolation from other NFP reforms recommended by the Productivity Commission.