



CHURCH OF SCIENTOLOGY AUSTRALIA

27 January 2012

The Manager
Philanthropy and Exemptions Unit
Personal and Retirement Income Division
The Treasury
Langton Crescent
PARKES ACT 2600

EXPOSURE DRAFT AUSTRALIAN CHARITIES AND NOT-FOR-PROFITS COMMISSION BILL from the CHURCH OF SCIENTOLOGY AUSTRALIA

SUMMARY OF SUBMISSION

It is submitted that the EXPOSURE DRAFT AUSTRALIAN CHARITIES AND NOT-FOR-PROFITS COMMISSION BILL 2012 is incomplete in its current form and requires further work to cover the matters brought to the attention of the Treasury in the Description of Facts section of the submission, below.

Salient points in this submission include:

1. The EXPOSURE DRAFT AUSTRALIAN CHARITIES AND NOT-FOR-PROFITS COMMISSION BILL 2012 (the Draft of the Bill) has been released while a statutory definition of "charity" has not been finalized.
2. The Commissioner can issue directions in "certain" undisclosed circumstances that place Commission opinion above the law (details below).
3. There are aspects of the Draft of the Bill that are not yet written, so can not be commented on. For example, the whistleblower clause and the penalties clause.
4. The Draft Bill gives wide sweeping powers to suspend or remove trustees in the face of no misdemeanor or crime having been proven as committed.

DESCRIPTION OF FACTS

The aims of reinforcing public trust and confidence in the sector are laudable, as is a regulatory system promoting good governance, accountability and transparency.

The Exposure Draft of the Bill in its current incomplete form (without the coordination of State legislation), however, fails to achieve these aims. It also leaves much of the character of the proposed Act open to change by regulations to be created subsequently and without parliamentary review.

It is further incomplete as it is being prepared without a decision on the statutory definition of 'charity' that remains under review. The Government has stated it will shortly introduce a statutory definition of 'charity' applicable across all Commonwealth agencies. This, as currently proposed, removes the presumption of benefit from education, religion and relief of poverty and constitutes a potentially major philosophical change to the Government's approach to charity after 400 years of common law. Any changes introduced by this statutory definition will impact the operation of the new commission and could be detrimental to the Not-For-Profit and Charitable sector.

RECOMMENDATIONS

It is proposed that the Exposure Draft Australian Charities and Not-For-Profits Commission Bill retain the presumption of benefit from education, religion and relief of poverty and that this not be removed.

Remaining areas of concern with the Exposure Draft of the Bill are as follows:

1. The Commissioner can issue directions in "certain" undisclosed circumstances that place Commission opinion above the law, such as:
 - a. (1.105) If the Commissioner has reason to believe that a direction would help to promote public trust and confidence in an NFP entity, the Commissioner would be able to issue an enforceable direction.
 - b. (1.106) where a specific entity is **not necessarily undertaking illegal activities or breaking the law, but certain aspects of its operations are questionable and could put at risk public trust**. The registered entity has contravened, **or is likely to contravene**, a provision in the Australian Charities and Not-For-Profit Commission (ACNC) Act or any other Australian law that relates to the objects of this Act.
 - c. (1.107) It also ensures that the Commissioner can act if he/or she is of the view that donations or public funds more broadly are not used in line with the purposes funds were initially provided for; and **the Commissioner is able to act in situations where it is not clear that a direct contravention of the exposure draft has occurred and the actions of the regulated entity are questionable**.
- (1.96) If the Commissioner has reason to believe that a registered entity has contravened, **or is likely to contravene** a provision in the exposure draft, **or an**

Australian law that relates to the objects of the exposure draft, the Commissioner would be able to issue an enforceable direction.

Paragraphs 1) a, b, c and d are not in alignment with one of the four key and major pillars of Australian Common Law as there is no presumption of innocence. Being “questionable” or “is likely to contravene” alone should prompt further examination, not a direction given without proof. These paragraphs are too vague and open to too much discretion, opinion and possible abuse. A direction issued by the Commissioner may be based on false information and may be detrimental to the NFP entity concerned. The danger is this clause could inadvertently result in an abuse of process or injustice to the NFP entity concerned.

The principle of 'rule of law' lies at the heart of individual freedom and democracy. The rule of law embodies the simple principle that all state officials, whether elected or non-elected, should act within the law and the Constitution, on the basis of powers that are legally circumscribed. The power and independence of the judiciary is central to the rule of law, only through the existence of an independent judiciary can there be confidence that the law is administered without 'fear or favour'. As Justice Michael Kirby of the High Court has noted, 'when you take the independence of the judges away, all that is left is the power of guns or of money or of populist leaders or other self-interested groups.' The rule of law itself presupposes equality of treatment before the law. This means that no-one is to be above the law, that justice is available for all, that the law protects all citizens including NFPs.

The Draft Exposure Bill should include protection mechanisms for Churches and other NFPs from vexatious complainants which depletes both public and NFP funds.

Directions should be issued by court order upon the presentation of legal evidence (not hearsay, accusation or rumour) and the directions are only of limited duration until appropriate legal proceedings can be undertaken.

2. The penalties' section has not yet been written and remains unknown.

This is key to the dimension of justice involved and needs to be written as part of a completed Draft Exposure and presented anew for the sector to review.

3. There is to be a “whistleblower” clause which is not yet written. One could speculate that this section would provide ‘whistleblowers’ with confidentiality and indemnity. This has the potential to open NFPs to campaigns of harassment from undisclosed groups of individuals, including hate campaigns.

Any such clause must be written as part of a completed Draft Exposure and presented anew for the sector to review. It should include protection

mechanisms for Churches and other NFPs from repeated and vexatious complainants which deplete both public and NFP funds.

4. In the matter of trustee suspension or removal of trustees of an NFP, the proposed legislation gives the ACNC sweeping powers to suspend or remove Trustees without any misdemeanor or crime having been proven:

See Division 2-5(1) (Object of this Act).

The proposed section is not in accord with Australian Common Law as there is no presumption of innocence.

In an extreme case a suspension could be made upon a court order being obtained with the period not exceeding the time taken to bring prompt legal action. Removal of Trustees without due process of law would seem wholly unnecessary.

The criterion "may cause harm to, or jeopardise, the public trust" has no place in legislation in a democratic and free society. The "public trust" can never be defined and could vary from one week to the next in terms of what is acceptable or not. Under such terms certainly most religious groups could wrongly come into question if they simply decide to erect a temple, synagogue, mosque or church with parishioner donations. Such a clause would disempower all NFP entities as they wrestle with these clauses, wondering what the "public trust" may mean and how they should act to accommodate what might be considered the "public trust". It would also leave groups in this sector wide open to attacks based upon an idea, not facts.

"Public trust" was certainly lacking when the Salvation Army first came to Australia in the early part of the 20th century. They weren't welcome because they were a temperance group and actively protested in English pubs to stop people drinking. Today the Salvation Army can collect money in the streets to fund their community activities because they have the "trust" from the public. There are many similar examples throughout history.

5. The Government has said it will introduce a statutory definition of 'charity' applicable across all Commonwealth agencies from 1 July 2013.

The definition is to be used for all Commonwealth laws, and was supposed to be based on the "2001 Report of the Inquiry into the Definition of Charities and Related Organisations, taking account of the findings of recent judicial decisions". It is in fact based on the failed 2003 proposed legislation instead which is substantially different. This, as proposed, introduces a removal of the presumption of benefit. Mason A-C.J. and Brennan JJ in their joint judgment in *The Church of the New Faith v The Commissioner of Pay-Roll Tax (Victoria)* when considering whether special leave should be granted stated:

“Two circumstances combine to give an affirmative answer: the legal importance of the concept of religion and the paucity of Australian authority. Freedom of religion, the paradigm freedom of conscience, is the essence of a free society. The chief function in the law of the definition of religion is to mark out an area within which a person subject to the law is free to believe and to act in accordance with his belief without legal restraint. Such a definition affects the scope and operation of section 116 of the Constitution and identifies the subject matter which other laws are presumed not to intend to affect”. [Emphasis added].

It would seem that the Exposure Draft directly offends the emphasised part of the passage quoted above by imposing an unspecified hurdle that may apply to some religious or charitable institutions but not all of them and potentially on a quite arbitrary basis.

As currently drafted the Bill provides no guidance as to how “public benefit” is to be assessed weighted; against presumably what is subjectively determined to be public “detriment or harm”.

The presumption of public benefit in respect of religious organisations should be retained as per the Charities Act 2009 (Ireland).

The approach taken by England & Wales of relying on common law on the meaning of public benefit is preferable provided it does not unduly disadvantage any charity, does not try and weigh benefit against harm and retains the presumption of a public benefit for the advancement of religions.

The greatest issues for religion are:

- The first point is “who decides?” Spiritual activities do not present a benefit when judged from an atheistic viewpoint, one religion’s beliefs do not present a benefit when judged from the viewpoint of another religion i.e. Buddhist beliefs do not present a benefit when judged from a Christian viewpoint. The presumption of benefit is essential to avoid this as neither the ACNC or the Parliament are qualified to make judgment on this issue.
- The second issue follows from the above point. Benefits should be defined as both tangible and intangible as by its own definition, spiritual belief and values are intangible.
- On a more general note, it is worth considering what the presumption of public benefit in the advancement of religion really means and begs the question why it was granted and has remained a key element of the charitable definition for four centuries. In the English case of *Holmes v HM Attorney General* (1981) Mr Justice Walton posits: “It has long been settled that the law presumes that it is better for a man to have a religion - a set of

beliefs which take him outside his own petty cares and lead him to think of others - rather than to have no religion at all".

There are a number of issues for religious entities if the presumption of benefit is overturned.

These are:

Who would be qualified to assess whether a religion was of a benefit or not? The proposal to remove the presumption of benefit for the advancement of religions infers that there is some belief that some religions are of a benefit and some are not. This belief does not forward religious freedom and liberty in Australia. The removal of the presumption of benefit would open the door to intolerable religious discrimination.

One man's religious belief could be blasphemous to another man. An atheist would be unlikely see a benefit in religion. An apostate would say that their former religion had no benefit when thousands of followers would disagree. A minor religion could be denied charitable status simply because it is not liked by the assessing body or because it is not understood or 'popular'.

In the *'Church of the New Faith v Victorian Commission of Payroll Commissioner'*, Justice Murphy stated 'the policy of the law is 'one in all''. The Advancement of Religion is a public benefit for all religions and their communities.

Who decides and what constitutes an "identifiable benefit"? How is that benefit to be measured? Benefits should be defined as both tangible and intangible as by its own definition spiritual belief and values are intangible.

The amount of spiritual benefits and knowledge gained from religious teachings by a member of a religion cannot be evaluated by an external body. A person who has improved himself morally is a benefit to his family, friend, work place and the community in general - but how is this assessed?

A requirement that the public benefit is weighed against detriment and harm is again open to intolerable religious discrimination and bigotry. The belief of one religion may well be that their way to salvation is the only way. With that viewpoint any other religion is of detriment to salvation. An atheist may hold that any and all religions are of detriment.

A 'complainant' (or any number thereof) can make any number of allegations against a religious entity without any of it being proven as true and this can be perceived as a 'detriment'. Is detriment or harm to be proven in a court for it to be valid? Again the danger is "who decides?"

Similarly how is 'detriment' and 'harm' measured? Most importantly what objective criteria will form the basis of determining when any public benefit the charity provided outweighs any "harm" it causes.

The advancement of religion has always been held to be of a public benefit and should remain so. This is still true today as reported by the Australian Bureau of Statistics regarding volunteerism ^{*1}.

6. The initial proposal by the Treasury to include an "In Australia clause" and we understand it was withdrawn following criticism from the sector. It is therefore essential that the replacement draft is written and made available for exposure to the sector as part of the completed draft exposure document.
7. Clause 1.33 in the explanatory memorandum says that **if the reason the Commissioner revokes an entity's registration is that the entity is not entitled to be registered**, or the registered entity provided (in connection with its application for registration) false or misleading information in a material particular, the Commissioner could retrospectively revoke registration. This first reason makes no exception on being retrospective for existing charities newly deemed not to qualify but registered under the previous laws. This leaves currently legally accepted charities open to retrospective penalties.
8. The legislation is incomplete. Key elements are not yet written and there is significant scope for major change by delegated regulations.

As regulations may not be amended by either House of Parliament but are required to be withdrawn in entirety the detail contained in the regulations will be denied the normal process of Parliamentary debate and amendment.

This can be resolved by completing the legislation in its entirety including the proposed regulations being written as legislation and reissued as a draft exposure for the charity sector.

9. The legislation has been rushed without adequate time for review. This has also been at a time of year when many interested parties have been busy with Christmas or are on holiday. The review period granted constitutes the busiest time of year for Churches and the peak time of year for holidays for all other organisations.

This can be addressed by reissuing a complete document for a further review period by the sector.

10. There is a financial forecast of significant cost (approx \$55million) without details on its recoupment. Is it intended that this will be funded by reduced taxation concessions for NFPs?

Treasury should provide an explanation of the funding for this and a financial forecast and explanation of taxation intended to be levied on the sector.

11. As the legislation is incomplete without the coordination of corresponding State legislation, it is not therefore adequately simplified. The coordination of State legislation in streamlining all regulations for NFPs should be part of this process.
12. The access and inspection powers proposed for the Commission appear to exceed police powers. This makes no provision for the confidentiality of counseling or Priest Penitent files of any NFP undertaking counseling. Other government agencies will be able to use the ACNC to access NFPs with these powers. The work conducted by ministers of religion and counselors working in the NFP sector who require strict confidentiality with the work they do in helping people in all walks of society.

The proposed legislation should have an additional clause to protect this confidentiality.

The proposed Bill needs to have a section created that gives confidentiality to Priest Penitent and client material held by Charities and Churches who undertake counseling.

SUMMARY

In summary, the Church submits that the aims of reinforcing public trust and confidence in the sector are desirable, as is a regulatory system promoting good governance, accountability and transparency.

We hold that the exposure draft in its incomplete form does not yet achieve these aims and relies too heavily on the concept of "public trust" which can never be defined as it belongs to the public relations profession, not the legal profession. It also leaves much of the character of the proposed Act open to later change by completion of missing sections and the outcome of the work on a new definition of Charity. There is also scope for important parts of the document being delegated to regulations without parliamentary review.

Any changes introduced in the introduction of a statutory definition will impact the operation of the new commission.

The ACNC should have full responsibility for educating the various charities across Australia in any and all changes that are made to the current law that they were created under. The ACNC would have the role to inform charities and fully educate them on all changes in law and procedure through training and comprehensive advice and clear guidelines. This must be done in a gradient manner and with benevolence. As always with new regulations there is confusion and a period of

fluctuation as changes are introduced. Ignorance about any one given charity or sector could result in damage and additional costs for charities. Many of these charitable organisations are small and unable to bear undue compliance costs while carrying out valuable work to contribute to their communities. There is a concern that the ACNC could become a purely regulatory and enforcement body rather than an advisory committee.

We therefore submit that the above issues should be addressed and that a new and complete version of the exposure draft is provided with enough time for its review by the NFP sector in a timely manner prior to its introduction into the Parliament.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Vicki Dunstan', with a long, sweeping underline.

Vicki Dunstan
President
Church of Scientology Australia

1. (4102.0 - Australian Social Trends, 2004)