

Submission

on the

Definition of Charity Consultation Paper

to the

Philanthropy and Exemptions Unit

The Treasury

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Introduction

The Government announced in the 2011-12 Budget that it would introduce a statutory definition of charity, applicable across all Commonwealth laws from 1 July 2013. A consultation paper on the definition of charity was released by the Government on 28 October 2011.

Public submissions have been invited by the committee and are due by 9 December 2011.

1. Exclusively charitable purpose

Question 1 is “*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?*” Question 10 and 11 raise issues relating to the activities of a charity.

High Court decision in the *Word Investments* case provides an opportunity for subsidiaries of charities to conduct commercial activities without losing their charitable status.¹ The decision confirms that an entity conducting a business to raise funds for a charity may also have a charitable purpose.² This is a welcome result for charities, churches, welfare organisations and educational institutions that may have been concerned that fund-raising activities would impact their tax-exempt status.

Any statutory definition of a charity should reflect the High Court decision in the *Word Investments* case. A statutory definition should provide that a charity can engage in activities that are not in themselves charitable, provided they are not an end in themselves but undertaken to further the charitable purpose, for example by raising funds for that purpose.

This would ensure that the High Court’s finding in *Commissioner of Taxation v Word Investments* [2008] HCA 55 was not disturbed by the new statutory definition of charity.

Recommendation 1:

Any statutory definition of a charity should provide that a charity can engage in activities that are not in themselves charitable, provided they are undertaken to further the charitable purpose.

If a statutory definition is adopted that requires a charity to have an exclusively charitable purpose, then it should also explicitly allow a charity to engage in activities, including profit making business activities, that are ancillary to the exclusive purpose.

2. Peak bodies

Question 2 is “*Does the decision by the New South Wales Administrative Tribunal provide sufficient clarification on the circumstances when a peak body can be a charity or is further clarification required?*”

The Consultation Paper notes that, in 2003, the New South Wales Administrative Decisions Tribunal held that a body which enhanced the long term viability of charitable organisations by providing educational mentoring and support services was itself a charitable institution.³

To avoid doubt the statutory definition should explicitly provide that a peak body providing mentoring and support services exclusively to charities is itself a charity.

Recommendation 2:

The statutory definition should explicitly provide that a peak body providing mentoring and support services exclusively to charities is itself a charity.

3. Public benefit

Questions 5 to 9 address various issues involving the public benefit test to be incorporated in the proposed statutory definition.

Australian law currently applies the classic definition of charity formulated by Lord Macnaghten in 1891:

*'Charity' in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads.*⁴

As the Full Federal Court observed in 2009, "A common requirement underlies these categories; for a purpose to be charitable it must be able to be construed by the Court as being for the public benefit."⁵

The Commissioner of Taxation in determining whether or not an entity which applies for endorsement as a charitable institution is by law a charitable institution already is required to apply a public benefit test as developed by the case law.

A useful summary of the case law is given in the 2001 report of the Charities Definition Inquiry:

The following summary of principles regarding the interpretation of 'public benefit' have [sic] been established through the common law:

- *The object or purpose must be beneficial in itself, that is, it must be aimed at achieving a universal or common good; by definition, a purpose cannot be beneficial if it is harmful to the public.*
- *'Benefit' is not limited to the delivery of material benefits, but can extend to include social, mental and spiritual benefits. However, it has been held by the courts that a basic requirement of a charitable gift is that it must be seen to have practical utility.*
- *The 'public' is taken to mean the general community or a 'sufficient section of it'. This has been given clearer meaning through what has become known as the Compton/Oppenheim test, which indicates that the number of potential beneficiaries of a charity must not be numerically negligible, and there must be no personal relationship between the beneficiaries and any named person or persons.*

*While the public benefit test applies across all four heads of charity, there is a general presumption that, prima facie, the element of public benefit is satisfied in the case of purposes falling under the first three heads of charity ('relief of poverty', 'advancement of education' and 'advancement of religion'). For purposes falling under the fourth head ('other purposes beneficial to the community') the element of public benefit needs to be expressly demonstrated.*⁶

The *Charities Bill 2003* would have overturned the presumption of public benefit for the first three heads of charity requiring that all entities seeking approval as a charity meet a public benefit test.

In attempting to replace the common law by statute care needs to be taken that the accumulated results of centuries of case law are not replaced by a legal clean slate

This point was made by the British government in relation to reforms to charities law proposed in 2002:

It is not the aim of this reform to do away with existing case law. Removing all reference to existing case law would create significant uncertainty for existing charities, and would mean that many of the same points would have to be unnecessarily explored again by the courts.⁷

Any statutory definition of charity should maintain the common law presumption in relation to the first three heads of charity identified by Lord Mcnaughten – relief of poverty; advancement of education and advancement of religion – without requiring any new public benefit test.

The common law has established that each of these in itself is a charitable purpose. An entity which has one of these aims, provided its activities are directed at the public and not just a private group, will be for the public benefit

By failing to specify these heads of charity or to refer to the common law a new statutory definition could have the effect of leaving open a finding that an entity that, say, existed for the advancement of religion by holding religious services open to the public but was not engaged in providing any more tangible benefits such as running a soup kitchen was not providing an identifiable public benefit.

Recommendation 3:

Any new statutory definition should maintain the common law presumption that relief of poverty, advancement of education and advancement of religion are each a charitable purpose without imposing any new requirement to identify a specific public benefit other than one of these three purposes.

4. Balancing benefits against detriment or harm

There have been proposals that in assessing whether an entity is established for the public benefit that the benefit must be balanced against any detriment or harm.

The common law already provides that “*by definition, a purpose cannot be beneficial if it is harmful to the public*”.⁸

The case usually cited in this regard is *National Anti-Vivisection Society v IRC*. In this case Lord Simonds stated:

Where on the evidence before it the court concludes that, however well-intentioned the donor, the achievement of his object will be greatly to the public disadvantage, there can be no justification for saying that it is a charitable object.⁹ [emphasis added]

In this particular case the court was of the opinion that, if the National Anti-Vivisection Society succeeded in its aims of stopping all experimentation on live animals, this would greatly disadvantage the public through the loss of or delay in important research into diseases and medical treatments.

Any reference in a new statutory definition to harm should adopt the language of the court in this case that is it should refer to harm that is “*of great or significant disadvantage to the public*”.

Broader phrases could be interpreted as giving weight even to detriment or harm that is merely alleged or that is controversial.

For example, it could be considered that a religious institution that actively sought to convert adherents of another religion was doing harm by creating discord in the targeted religious community.

Recommendation 4:

Any reference in the proposed new statutory definition to “harm” should adopt the language from National Anti-Vivisection Society v IRC by referring to harm that is “of great or significant disadvantage to the public”. A broader approach requiring a balancing of any harm with any benefit should be rejected.

5. Political activity

Charitable activity does not take place in a political vacuum.

Laws affect in various ways the ability of charities to advance their purposes. In *Aid/Watch Incorporated v Commissioner of Taxation* [2010] HCA 42 the High Court sensibly found that public debate regarding government policy, activities or legislation directed towards subject matters that are within the four heads of charity can be charitable.

For example, if the purpose of a religious charity is the advancement of religion then it should be considered a possible part of this purpose for the charitable body to advocate for laws which are consistent with the religious beliefs of the adherents of the religion it seeks to advance.

Laws are enacted by parliaments whose members are elected by the public. A charity whose purpose or effectiveness could be affected by the outcome of an election should be free to identify those candidates for election who would support or oppose laws considered consistent with the charity’s purpose.

Recommendation 5:

The proposed new statutory definition should reflect the approach to political activity adopted by the High Court in Aid/Watch Incorporated v Commissioner of Taxation. No statutory restrictions should be imposed on charities to prevent them identifying candidates for election who would support or oppose the purposes for which the charity exists.

6. Endnotes

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1. *Commissioner of Taxation v Word Investments* [2008] HCA 55.
 2. Allan Mortel, "Word Investments Case", *Moore Tax News*, 11/12/2008: <http://moorestephensresources.com.au/articles/105/1/WORD-INVESTMENTS-case--High-Court-rules-that-business-activities-of-charities-are-tax-exempt/Page1.html>
 3. *Social Ventures Australia Limited v Chief Commissioner of State Revenue* [2008] NSWADT 331.
 4. *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531 at 583.
 5. *FC of T v Aid/Watch Incorporated* [2009] FCAFC 128.
 6. *Report of the Inquiry into the Definition of Charities and Related Organisations*, June 2001, p 111-112: http://www.cdi.gov.au/report/pdf/Charities_final.pdf
 7. Cabinet Office Strategy Unit Publications, *Private Action, Public Benefit: A Review of Charities and the Wider Not-for Profit Sector* (September 2002), 4.24, p 41: <http://www.cabinetoffice.gov.uk/media/cabinetoffice/strategy/assets/strat%20data.pdf>
 8. *Ibid.*
 9. *National Anti-Vivisection Society v IRC* [1948] AC31 House of Lords.