Submission

Treasury Consultation Paper: 'A Definition of Charity'

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In a separate email I have forwarded papers from a special journal issue on the AidWatch case and its impact on charitable status. Here I would like to respond directly to the consultation paper. I was the main litigant in the AidWatch case and would like to make this submission on behalf of AidWatch, and in my capacity as a university academic.

Overall Assessment

The paper constructs a definition of charity using the 2003 draft Bill. The key feature of the 2003 Bill is the imposition of a public benefit test on all charities. Under common law such a test only applies to the 4th Head of Charity: currently, charities for education, poverty-alleviation and religion are automatically deemed to be charitable.

The rationale for this major departure from the common law is not established. There is some reference the legislation in the UK, which also imposes such a test. There is also a suggestion that the test would increase public confidence in charities – although it is not established that there is any public concern about charities, except about religious 'cult-like organisations' (para 89). No public concerns are cited regarding charities under the other two heads of charity, namely educational charities and charities dedicated to poverty alleviation.

Public benefit test to increase disqualifications

The upshot of the new public benefit test would be that the more than 40,000 organisations coming under the first three heads of charity would now have to convince the authorities that they comply with how the government defines public benefit. They would have to do so because the Government is concerned about a small number of 'cult-like organisations' being able to automatically claim charitable status as religious groups (para 89). This does not seem to be particularly sensible, unless there is another unstated motivation in play.

Compliance with the public benefit test is said to have a minimal impact and for the bulk of charities it is envisaged that their public benefit will be easily established as currently they are already required to notify the authorities if they cease to be a charity (para 83). Yet clearly an annual requirement to demonstrate compliance is quite different from a requirement to notify on ceasing to operate as a charity. Major problems arise for organizations that do not easily meet the criteria as here we may expect the ACNC to require these organizations to demonstrate that their activities conform to the claimed pubic benefit, and thus with charitable purposes. This is an onerous task, as it essentially imposes an annual audit of activities, requiring organisations to police themselves.

Definition of public benefit politically skewed

If there is a public benefit test then the key question is how is this to be defined. The Consultation paper takes the 2003 definition of public benefit, which is tighter than that currently in place for

the 4th Head of Charity, under TR 2011/D2.

Specifically, the 2003 definition requires 'practical utility' of 'universal or common good' for 'a sufficient section of the general community' (para 59). The current requirement under the 4th Head is that the organisation be altruistic, intend social value and provide a recognized benefit to the community. It is not clear why the definition of public benefit should be further circumscribed and there is little guidance on the likely impact.

We can, though, suggest how the impacts may be played out. At Para 74 in the consultation paper it is claimed that 'practical utility' does not refer only to material benefit, although this claim is drawn from the Charities Definition Inquiry, so has no legal effect. Hence we can expect that charities that indirectly pursue charitable purposes – for instance in seeking changes to the administration of welfare rather than directly providing relief for the poor, or in seeking changes to the administration of overseas aid rather than providing it directly, or in seeking changes to forest policy rather than directly planting trees - will find their charitable status under threat.

There are also obvious problems with the requirement that a 'sufficient section of the community' benefits from the charity. The problems are demonstrated by the consultation report where it suggests an exception may be needed for indigenous organizations that benefit only a small section of the community: such situations are likely to apply in many contexts, meaning the requirement will raise rates of disqualification. The same applies to the requirement to have 'universal or common good': how is this to be defined, whose universality is to be recognized and whose disqualified?

The cumulative impact of all three questions – practical utility, community scope, universality – is likely to be heavily biased against organizations that seek to address systemic issues, rather than directly providing a service. Charities addressing the causes of social and environmental problems (rather than the symptoms) are likely to be disadvantaged. This will accentuate political censorship in the sector (contrary to the requirements of the AidWatch judgement – see below).

A more restrictive regime – why?

The net effect of using the architecture of the 2003 Bill as the basis for the proposed statutory definition is to delimit the definition of charitable activity in Australia. There are two key elements:

First, it imposes a public benefit test that is explicitly designed to disqualify certain types of charity deemed to be of public concern: only 'cults' are cited but it is clear that the public benefit test applies not just to religious organizations but also to educational and anti-poverty groups. Second, it imposes a tighter definition of 'public benefit', designed to disqualify organizations that have limited 'practical utility' or have appeal for a section of the community deemed not to be 'sufficient'.

The lack of meaningful rationale for the proposed changes raises the question of why the 2003 Bill is being revived.

One driver appears to be the balance of power in the House of Representatives and specifically the influence of the Senate cross-bencher who initiated the 2010 Senate Inquiry, which was principally focused on the Church of Scientology (this is mentioned at para 80). But, as noted, it is not good policy to conduct a root-and-branch transformation of the definition of charity,

introducing a new restrictive test for the whole sector, simply to deal with the claimed abuses of one charity.

Another driver may be financial, as the 2011 budget requires the ACNC to find $41m over four years through 'increased compliance activity': the main means of increasing tax revenue from charities is to increase disqualification rates. A $41 million increase in ATO income means $41 million less in the sector, and is clearly not to be welcomed.

Constitutional protection against restrictions – AidWatch

The consultative paper acknowledges the need to recognize the AidWatch case, although it confines discussion of its impacts to the question of whether charities may engage in political activities that are in furtherance of its charitable purposes. In fact the AidWatch judgement explicitly states that the promotion of public debate on government policy is itself a charitable purpose. Hence there is no need to establish a link between activity and purpose – political activity is in itself a charitable purpose. This is stated at para 105 in the paper, but is not addressed in the section on charitable purposes, from para 124.

Furthermore, the AidWatch judgement is grounded in constitutional law – in the implied right to freedom of political communication – and thus any restriction on the ability of a charity to have political purposes in relation to government policies is potentially unconstitutional. This is of great significance as it is the only constitutional constraint on a statutory definition – yet is not addressed in the paper. Indeed, it may be argued the proposed 'public benefit test' imposes a new restriction on the capacity of charities to engage in public debate about government policy, and as such should be struck down by the High Court.

Consultation questions

1. Exclusive charitable purpose required
This provision should be interpreted in the context of a requirement that activities be incidental to purposes: that is, a charity may be disqualified if its activities suggest it has a purpose that is other than charitable. Requiring exclusive purpose will lead to a narrowing of activity.

2. NSWAAT decision on Peak Bodies
The decision seems to be in conflict with the proposed definition of public benefit at para 58 in relation to 'practical utility'.

3. Definition of 'public' / 'sufficient section' for public benefit test
These are subjective criteria: any attempt to refine them is likely to be exclusionary, and certainly contestable.

4. Family ties
The proposed exception demonstrates the exclusionary character of the proposed criteria.

5. 'Benefit' definition
There is a clear skewing of charitable status with a definition stressing 'practical utility'.

6. Non-statutory definition
A non-statutory definition may enable more arbitrary decision-making.

7. Demonstrating public benefit
As outlined in section 2.2, certain purposes are understood to be intrinsically charitable, and thus of public benefit. It is a policy tautology to require an additional public benefit compliance test.

8. ACNC powers
Clearly the public benefit test is designed to empower the ACNC to step up compliance regulation: it is not clear to what end, other than financial.

9. Education + Religion
The third head, of alleviating poverty, is not addressed – why not? As to religion, how would the public benefit test impact on freedom of religion? And in relation to education, it is unclear why the need in the UK to provide an exception for exclusive fee-paying schools would not apply to similar entities in Australia.

10/11. Activities and purposes
The process of inferring purposes from activities is not at all clear.

12. Political activities
As noted, AidWatch both permits political activities in pursuit of charitable purposes, and defines some political purposes, including 'agitation' for political change, as charitable. This is not addressed in the paper.

13. Political parties
Advocating for a political candidate needs to be distinguished from 'political advocacy': there is a danger that the two become conflated here.

16/17. List of Purposes
The list does not include the purpose of agitation for political change, which in AidWatch is positioned as a charitable purpose arising from the need for public debate about political matters in representative democracy. As noted, with AidWatch this has recognition in both common law of charity and constitutional law (para 130 refers).

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