

HUMANIST SOCIETY OF QUEENSLAND INC

PO BOX 2041 BRISBANE QLD 4001

Submission to Consultation Paper - A Definition of Charity

The Treasury, Langton Crescent, Parkes ACT 2600.

Email: [nfpreform@treasury.gov.au](mailto:nfpreform@treasury.gov.au)

Thank you for this opportunity to make our views known concerning a definition of charity.

## INTRODUCTION

Our submission will focus mainly on one point: that it is not the role of the Commonwealth of Australia to support organisations by means of tax exemption to 'advance religion'. Further, the advancement of religion, and to be consistent, any other personal life-stance, such as atheism, should not be understood as a 'charitable purpose' under any head of charity. To do so is to fly in the face of the principle of the constitutional separation of church and state and the idea of Australia as a secular nation. The situation that obtains in Australian law in relation to religion was well expressed in a Canadian case: 'Religious values rooted in Christian morality are translated into a positive law binding on believers and non-believers alike.'<sup>1</sup>

## NOT A PUBLIC BENEFIT – A PRIVATE BELIEF

The Humanist Society of Queensland (HSQ) believes the advancement of religion should be excised from the definition of charity. This does not include the educational and welfare arms of religious organisations which are charitable under the other heads of charity. HSQ believes that in any framing of the definition of charity the government should make it clear that henceforth the Commonwealth will not consider any organisation advancing any form of personal life-stance, religious or otherwise, to be organisations eligible for tax-exempt charitable status.

HSQ believes there is a qualitative difference between the advancement of religion or any other personal life-stance, and the other three heads of charity.

Precisely, HSQ rejects the 400 year old idea that the taxpayers of the Commonwealth should subsidise organisations whose members believe or do not believe something.

That idea originates in the 16<sup>th</sup>/17<sup>th</sup> centuries when the religiosity of the subjects of the monarch was assumed. We argue that in the 21<sup>st</sup> century we are no longer subjects of a theocratic monarch, we are citizens of a nominal democracy. There has been a dramatic decline in the religiosity of the citizens, as expressed by the decline of religion in every census since federation, and the dramatic decline in citizens practising their religion.

*The key point is that what people choose to believe, or not believe, should be understood as a private matter, not a public benefit. If there is a benefit in what citizens believe, that is a private benefit, personal to them, not a public benefit.*

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<sup>1</sup> *Her Majesty the Queen v Big M Drug Mart Ltd* (1985) 18 DLR (4<sup>th</sup>).

Therefore, HSQ argues, it is not the role of the supposedly secular Commonwealth of Australia to 'advance religion' or any other belief, or to advance non-religious life-stances, such as atheism. HSQ believes the Commonwealth of Australia should be legally secular. By 'secular' we mean that the Commonwealth should protect a citizen's right to believe or not believe anything they wish, but disassociate itself from any taxpayer support of that personal life-stance.

HSQ believes 'secularism' is a technical term and not a philosophy in itself, but refers to a political structure that allows citizens freedom to believe whatever they wish, thereby disassociating itself from whatever its citizens believe. Secularism is the highest form of democracy. It is not an idea *per se*, but the freedom to have one.

HSQ also believes that the advancement of religion, or any other personal life-stance, expressed by a law, contradicts s.116 of the Australian constitution which states in part:

*The Commonwealth shall not make any law for establishing any religion;*

HSQ believes that any new definition of charity, expressed through legislation, which includes the advancement of religion, will be in breach of the above establishment clause of s.116.

HSQ believes that few Australians understand the point made by Professor George Williams that 'Australia's constitution does not separate church and state'.<sup>2</sup> HSQ would support - as it has supported its member, Ron Williams, in his recent High Court case against federal funding of religious chaplains in state schools - a case that would again test the meaning of the establishment clause in the context of any new law which entails the Commonwealth 'advancing religion.' The purpose of this case would be to overturn the High Court's finding in the 1981 Defence of Government Schools Case that the establishment clause of s.116 cannot be interpreted to mean separation of church and state.

#### 'THE ADVANCEMENT OF RELIGION': LESSONS FROM THE LIBERTY TRUST CASE

On 2 June 2011 the New Zealand High Court added another burden on taxpayers there when it ruled that an interest-free mortgage scheme devised by the Christian Liberty Trust organisation of Whakatane 'advanced religion'.<sup>3</sup>

This was on appeal from a 2010 decision of the New Zealand Charities Commission ('the Commission') that the Liberty Trust organisation ([www.libertytrust.org.nz](http://www.libertytrust.org.nz)) did not fit the legal definition of charity and de-registered them from the Charities register. Liberty Trust was registered as a charitable entity in 2007. It is a Christian organisation whose main activity was a mortgage lending scheme funded by donations from 'contributors'. It states that "teaching the Bible's financial principles' has always been their first purpose."<sup>4</sup> The Chairman of the Trustees of Liberty Trust is Kelvin Deal, described in their newsletter as a Chartered Accountant.

After a complaint was made in 2008, the Commission investigated the interest-free mortgage scheme and became concerned that it was 'an illegal pyramid scheme'. The Commission decided

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<sup>2</sup> G. Williams, 'Chaplaincy challenge reveals legal failure', *Sydney Morning Herald*, 24 May 2011. See also M. Wallace, *The Purple Economy: supernatural charities, tax, and the state*, ANSA, Melbourne, 2007.

<sup>3</sup> *Liberty Trust v Charities Commission (NZ)* CIV 2010-485-00831.

<sup>4</sup> See *Liberty Matters*, newsletter of Liberty Trust, Vol. 2, no. 44, June 2010.

to remove Liberty Trust from the Charity register arguing that the loan scheme did not have a charitable purpose. It said:

*The activity of providing interest free loans to people and the promotion of the teachings of Biblical financial principles are two independent activities, and not ancillary to each other.*<sup>5</sup>

The Commission cited a 1934 Australian case *Roman Catholic Archbishop of Melbourne v Lawlor* concerning the charitable status of a Catholic daily newspaper. In denying the newspaper charitable status, the court made a distinction between the 'advancement of religion' and activity that was 'conducive to religion'. In addition, the Commission cited British and Canadian precedents, it argued that there was no 'public benefit if the private benefits were an end in themselves.' They also argued mutual benefit arrangements, such as mutual funds and cooperative schemes have been held to be not charitable because of insufficient public benefit.<sup>6</sup>

Liberty Trust appealed the Commission decision to the New Zealand High Court and won. The matter came before Justice Mallon on 28 March 2011 and the Judgment delivered on 2 June 2011.

To quote Justice Mallon

*Those who contribute to Liberty Trust for five to ten years are eligible for an interest free loan. Once there are sufficient funds, loans are offered in the order of joining Liberty Trust. The standard contribution rate is 20 per cent of the loan application for ten years. For this the contributor can expect to be offered a seven year interest free loan of five times their contribution balance. To receive a longer repayment period the contributor can choose to wait longer or contribute more. Similarly, to receive a loan sooner the contributor can contribute more than 20 per cent. Loans are offered for up to 100 per cent of the valuation of a property and are secured by mortgage over the property.*<sup>7</sup>

Justice Mallon states that anyone can join the scheme and cites Liberty Trust's words:

*We do not know if any of our donors follow the Christian religion because Liberty Trust exists to serve all people regardless of their beliefs (or lack of beliefs for that matter) . We seek to assist all people socially, physically, spiritually and emotionally as a demonstration of Christian care, and for the advancement of the Gospel of the Kingdom of God.*<sup>8</sup>

The surprising weakness of Justice Mallon's decision, we submit, is contained in the next paragraph. While the paragraph above states clearly that anyone is eligible for join the Trust and apply for a loan, the application form moves the goalposts considerably. Whereas anyone can apply, the application form requires that an applicant 'covenants' to

- *contribute \$\_\_\_\_\_per week/fortnight/month, to be applied by the Trustees in furtherance of the Trust's charitable objectives;*
- *to research and teach principles relating to finance from God's Word; and*
- *to outwork those principles by practical ministries.*

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<sup>5</sup> *Liberty Trust v Charities Commission*, 2 June 2011, para 36.

<sup>6</sup> *Ibid.*, para. 48.

<sup>7</sup> *Ibid.*, para.14.

<sup>8</sup> *Ibid.*, para 18.

It concludes:

*I desire that my contribution to Liberty trust be regarded as a non-refundable charitable donation for the benefit of God's Kingdom.*

It seems to have escaped Justice Mallon's notice that one of the characteristics of the advancement of religion as a head of charity is that any religion remains an option for the public, not an obligation. For example, churches must remain open to the public to wander in and leave as they so wish. A function of a religion's charitable, tax-exempt status is that one can take a church's religion or leave it.

That is not the case, in principle at least, with Liberty Trust's loan application. To get the loan, as cited above, one must undertake to become practically involved in Christian work.

But, in all likelihood, after one has signed on the dotted line to undertaken practical Christian activity for the duration of paying off one's interest-free mortgage, one's obligation in practical terms probably ceases as soon as an application is accepted. Liberty Trust could surely not enforce its application form requirements by checking whether applicants are in fact doing what they agreed to do to - promote Christianity - and enforce them.

But the point remains. The application form builds in an obligation which is inconsistent with the notion that the tax-exempt status of the 'advancement of religion' as it stands as a form of charity is partly dependent on the obligation-free nature of religion as required for a religious 'charity' to retain its tax-exempt status. On that ground alone, the charitable status of Liberty Trust should have been denied.

### *The Decision*

Liberty Trust argued that the advancement of religion did not preclude

*... personal management of money lending ... approximately a third of the teachings of Jesus were in regard to finances, such as sowing and reaping, stewardship, giving and lending. Martin Luther saw three conversions necessary for the believer, conversion of the heart, of the mind, and of the wallet.<sup>9</sup>*

Rendering unto Caesar does not get a mention here.

Importantly, in terms of support for our argument above, in her decision, Justice Mallon noted there has been disquiet about the tax exemption for religion.

A case commentary on the 1985 New Zealand case *Centrepont Community Trust v Commissioner of Inland Revenue* considered that 'whether there is a social utility in the advancement of religion is 'a very much more doubtful proposition''. This, it was argued, was because the effect of religion 'is usually of a very personal nature' and the question was asked 'why should some members of the community bear a heavier burden of taxation merely because the beliefs of others entitle their organisations to exemption from taxation?'

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<sup>9</sup> *Ibid.*, para 40.

Her Honour also cited the 2005 NZ case *Hester v Commissioner of Inland Revenue* where the point was made that

*... given the very considerable concessions made to charities, and given contemporary agnosticism and seeming indifference in many quarters to religion, what is it that today supports the concession in favour of religious charities, and more particularly, where are the edges of this head of charity to be drawn?*<sup>10</sup>

HSQ has argued above that the wording of the charity and tax acts should be amended to simply excise religion as a head of charity altogether on the grounds, noted above, that the advancement of religion flies in the face of the twentieth century principle of separation of church and state and thus compromises the notion of Australia as a secular state. How to remove the tax-exempt status of other alternatives to religion needs to be researched following a review of the common law decisions allowing that status.

But, Justice Mallon went in the completely opposite direction. Rejecting the Charities Commission's arguments in an analysis of the cases it cited, Her Honour cited other Australian cases including the property trusts of the Presbyterian Church where the court held that the advancement of religion included preservation and confirmation of the faith as expressed by the ownership of property.

Other examples were cited as Liberty Trust's argument was accepted. HSQ believes Her Honour erred, as noted above, when she stated that 'Membership is not restricted – it is open to all regardless of faith.'<sup>11</sup> She emphasised this point in her conclusion saying 'the benefits of the scheme are not focussed too narrowly on its adherents. It is open to anyone and the money donated is 'recycled' for the benefit of others. Overall it is a scheme about 'giving' in order to lead a Christian life free from the burden of debt.'<sup>12</sup>

As noted above, membership of the Trust through the application form was conditional. It is a very idealistic assumption to think that a Bible-based organisation would happily lend money to say, an atheist, who refused to agree to the Christian conditions of the loan. How then, is it 'open to anyone'?

What a pleasing result for Liberty Trust's Christian members! New Zealand taxpayers, the majority of whom have mortgages where they constantly dread a rise in interest rates, and a third of them at least non-believers, are now obliged to subsidise 'a Christian life free from the burden of debt' for Liberty Trust's members.

This case is a perfect example of what happens when a nation does not have a constitutional separation of church and state, the will to enforce it, but retains a definition of charity that includes the advancement of religion. Lack of separation, and the errant notion that the advancement of religion is legitimate as a form of charity leaves the door wide open for the religious to find ways to advance their cause though their tax-exempt status.

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<sup>10</sup> Ibid., para. 54.

<sup>11</sup> Ibid para. 113.

<sup>12</sup> Ibid., para 125.

By not paying tax on its income, partly generated by borrowers' contributions, Liberty Trust is able to parlay its income into interest-free mortgages that privilege its Christian members. Meanwhile, the majority of mortgaged New Zealand taxpayers pay significant amounts of interest to banks, who in turn are obliged to pay company tax. The rate of tax that banks pay feeds into the interest rate that borrowers have to pay, affecting their financial life, for the duration of their mortgage, often twenty five years. New Zealand taxpayers are now obliged to subsidise those taxpayers who are allowed an interest-free mortgage simply because they are Christian.

This precedent could be copied in New Zealand and in other jurisdictions.

When an organisation does not pay tax it obliges all other taxpayers to subsidise it through a higher level of taxation. This case creates a dangerous 'them and us' – usually, privileged religious, and others – precedent.

It is not the role of the secular Commonwealth of Australia to advance religion or any other personal life-stance or unbelief. This completes our argument. What follows is related comment concerning loss of charitable status as the law presently stands.

#### **CONCERNING RELIGIOUS HARM**

At paragraph 88 Treasury's Consultation Paper comments that a 2010 Senate inquiry noted 'there is concern in the community about the activities of some religious groups (cult like organisations) on the grounds they may cause detriment or harm to their members.' Further, paragraph 90, referring to the Charities Bill 2003: '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.'

As noted above, HSQ argues organisations based on religion or other personal life-stances are private, not public, organisations and should not be characterised as charitable.

Having said that, it is curious that the Treasury document fails to recognise the track record of the major churches, especially the Catholic Church, concerning child sexual and other abuse which would clearly count as 'significant detriment or harm'.

The Treasury document overlooks the 29 June 2010 Senate inquiry exchange between Senator Xenophon and Father Brian Lucas, General-Secretary of the Australian Catholic Bishops Conference:

Senator Xenophon asked Father Brian Lucas: "what happens in circumstances where there are allegations or evidence of child abuse, the hierarchy of the organisation becomes aware of that and they do not act appropriately - they either do not report it to the authorities which would be an offence in terms of the requirement to notify that in most states, or they actually cover it up?"

... do you think it is reasonable that in those circumstances the organisation should be held to account in the context of the public benefit test?"

Father Brian Lucas: "If we have got the leader of an organisation behaving badly, criminally, that leader ought to be prosecuted to the full extent of the law."

Senator Xenophon persisted: "That is not quite what I asked though."

Father Brian Lucas: "I know, but that is the answer I am giving because that in fact is what needs to happen. The organisation itself need not necessarily have its charitable status put at risk because it has, at that particular time, a bad leader. If that bad leader, who has done whatever wicked thing is alleged the leader has done, needs to be replaced and needs to be prosecuted, that in itself ought not necessarily affect the charitable status of the organisation he has ineptly led."

Senator Xenophon persisted. He raised a hypothetical instance where it has been established there was a cover-up of abuse, the organisation had been warned that it must change its ways and report abuse but "the systems do not change for reporting and ensuring those responsible are brought to account, what would you then say in those circumstances that the public benefit of that organisation is compromised if they do not change their ways?"

Father Brian Lucas: "the difficulty in answering your question is knowing who they 'they' are who have not changed their ways."

Senator Xenophon countered: "the 'they' would be those responsible at a senior level where the protocols and the processes of an organisation do not change to ensure that there is mandatory reporting, for instance, and that people are brought to account to the authorities. If a blind eye continues to be turned, would that compromise the whole issue of public benefit?"

Father Brian Lucas: "Not necessarily, because you have to then draw the connection between the organisation itself, how big it is, who the other parties to the organisation are and what other people within the organisation can do to remedy the ineptitude of a particular group who have acted illegally. The connection between the inept, illegal, criminal, wicked activity of a leader, if such is the case, and the consequences for the organisation that they have ineptly led needs to be drawn more precisely, with respect."

It should be noted at the point that *The Newcastle Herald*<sup>13</sup> reported a month before Father Brian Lucas gave evidence, that in October 1995 his church sought to secretly defrock a priest. It therefore conceded he was guilty of offences against children, but waited until 2005 before contacting police about the allegations about the priest "shortly before the priest died".

HSQ raises this dialogue in order to point out that the British High Court has recently found the Catholic Church vicariously liable for child abuse by members of the clergy.

Solicitor Tracey Emmett said: "This is a key decision with potentially far-reaching implications, effectively extending the principle of vicarious liability. Although the relationship between the priest and his bishop lacked any of the features of formal employment, this did not prevent Mr Justice MacDuff from finding that the church could be held liable for his actions."<sup>14</sup>

HSQ notes this case potentially undermines Father Brian Lucas's reasoning concerning the continuing application of a public benefit for a religious organisation when that organisation has harboured an offender. It speaks to Senator Xenophon's concerns in this matter, going to the question of when religious organisations of any kind may reasonably lose their tax-exempt status on the grounds of 'causing significant detriment or harm.'

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<sup>13</sup> J. McCarthy, 'Claimed knowledge about paedophile priest', *The Newcastle Herald*, 19 May, 2010.

<sup>14</sup> V. Wozniak, 'Catholic Church responsible for child abuse, High Court rules', *The Lawyer*, 9 November 2011.