

3 May 2013

Philanthropy and Exemptions Unit
Indirect Philanthropy and Resource Tax Division
The Treasury
Langton Crescent, Parkes
ACT 2600

By email: charities@treasury.gov.au

Dear Sir / Madam

Submission on the Charities Bill 2013 and Explanatory Material

PilchConnect welcomes the opportunity to submit our views on the draft Charities Bill 2013 (**the draft Bill**), its associated transitional provisions, and accompanying Explanatory Memorandum (**EM**). PilchConnect is an advocate for the need for a clear statutory definition of charity and we are pleased that the Government has taken steps towards this outcome.

PilchConnect is an independent not-for-profit (**NFP**) legal service for community organisations - a service of the Public Interest Law Clearing House (Vic) Inc. We provide free and low cost legal assistance to NFPs in Victoria, and draw on empirical evidence and practical examples from our work with small 'public interest' groups in our submissions. The clarification and simplification of charitable tax concessions is a key priority for our advocacy work. See [Appendix A](#) for more information about PilchConnect.

In our view, a statutory definition of charity is overdue, having been considered in detail in the 2001 Inquiry into the Definition of Charities and Related Organisations (**2001 Inquiry**), and subsequently endorsed by multiple reviews and inquiries. In 2010 alone, there were two major Government reviews that recommended the adoption of a statutory definition of charity in line with the 2001 Inquiry.¹

We strongly believe that any codification of charity should restate and clarify the common law approach to defining charity. To this end, we support the introduction of a statutory definition of charity by way of the draft Bill, however we provide this submission with the broad aim of improving the proposed definition's:

- accessibility and clarity to the general public and charitable bodies;
- reflection of the common law; and
- flexibility to ensure adaptability over time to reflect community values.

In our opinion, there are some unresolved issues with the draft Bill in its current form which impact on the achievement of the above goals. We discuss these matters in further detail below.

¹ See recommendations 6.5 and 7.1 of Productivity Commission Research Report on the Contribution of the Not-for-Profit Sector (Productivity Commission Report); recommendation 41 of the Henry Tax Review.

Reliance on the Explanatory Memorandum

PilchConnect notes that the Bill is very reliant on the EM for the purpose of interpreting charitable purposes and the public benefit test. PilchConnect is particularly concerned that:

- in order to understand the scope of the definition of a 'charity' and 'charitable purpose', reference must be had to both the draft Bill and the EM, limiting its accessibility for NFPs and laypeople; and
- if the courts are required to interpret section 11 in its current form, there are a number of charitable purposes identified in the EM which are not evident on the face the draft Bill that a Court may not consider are encompassed by the Bill.

Some examples of organisations that are contemplated by the EM but that do not clearly fit into the listed categories in section 11 are: peak bodies², aged care³, organisations which care and support the disadvantaged or disabled,⁴ and groups supporting animal welfare through sanctuaries/accommodation.⁵ While it appears to be the intention of drafters to include these purposes as charitable purposes, they do not fit neatly within a head of charity as currently listed in the draft Bill.

The EM states that the draft Bill intends to provide greater clarity and certainty about the meaning of a 'charity' and 'charitable purpose'.⁶ While we understand that in drafting the definition a purposive approach has been taken, we are concerned that in its simplicity, the draft Bill cannot be fully understood as the drafters intend without reference to the EM, especially when identifying whether a purposes is a charitable purpose.

One of the most common requests from our clients is for assistance to understand (and access) charitable tax concessions. Clearly the definition of charity is pivotal to most of these concessions. Therefore we are concerned to ensure that any restatement of charitable purposes promotes clarity and accessibility for the NFP sector. Without clarifying information within the definition, there is a danger that the Act will not overcome those issues identified in under the current common law. We acknowledge that guidance material published by the ACNC will assist groups to understand the definition of charity, however we consider the legislation itself ought to be clear and accessible.

In respect of our second point, we believe that there is a significant risk that regardless of the intention of the drafters, courts will be prevented from interpreting section 11 to include the fringe purposes listed above, such as peak bodies, as the Bill does not clearly contemplate those organisations. Although the EM expressly contemplates these purposes as charitable, Courts will only look to explanatory materials for guidance in some circumstances. Further, Courts would be unlikely to consider education guidance material published by the ACNC (which organisations will be relying on) when interpreting the definition.

Section 15AB of the *Acts Interpretation Act 1901* (Cth) provides that in order for a court to rely on or refer to an explanatory memorandum for the purpose of applying a different interpretation of a provision which would otherwise have been arrived at, it is necessary for the court to conclude, without referring to the EM or other extrinsic material, that one of the conditions of s.15AB(1)(b)(i) or (ii) has been met which include that:

- (i) the provision in question is 'ambiguous' or 'obscure'; or

² EM, Paragraph 1.38-1.39

³ EM, paragraph 1.89

⁴ EM, paragraph 1.89

⁵ EM, paragraph 1.103

⁶ EM, at paragraph 1.3

- (ii) taking account of its context and underlying purpose or object, the ordinary meaning leads to a result that is ‘manifestly absurd’ or ‘unreasonable’.⁷

When the conditions in s.15AB(1)(b) of the Acts Interpretation Act are applied to the definition of a charitable purpose, there is a risk that a court will be prevented from interpreting the definition to include matters listed in the EM, which are not explicitly detailed in the draft Bill.

Recommendation 1

- (a) Inclusive sub-clauses should be added to section 11 to expressly list charitable purposes currently recognised in the EM yet not apparent from the wording of the draft Bill.**

Achieving greater clarity through sub-clauses

PilchConnect recognises the value of a definition of charity that is not unwieldy and overly prescriptive. However, in our view comparative jurisdictions have achieved greater clarity of legislative intent by providing inclusive subsections that clarify the intention of various heads of charitable purpose.⁸ While we appreciate that the draft Bill’s intent is to provide a non-exhaustive list, we believe there is benefit in including sub-clauses to address ambiguity and lessen the reliance that the public, regulators and charities must have on explanatory materials. This approach also better reflects the evolution of the definition under common law.

However, if the Government is not minded to introduce inclusive sub-clauses in s.11, at a minimum, further detail should be provided on the definition of ‘the purpose of advancing social or public welfare’ at s.13. Section 13, as currently drafted does not provide adequate guidance about the meaning of social or public welfare beyond covering two very discrete areas, being child care and disaster relief. An approach in line with the *Charities Act 2011 (UK) (England and Wales Act)* is preferred by PilchConnect, as it clarifies the breadth of coverage contemplated by this head of charity. The exact wording used by those jurisdictions is:

“the relief of those in need by reason of youth, age, ill-health, disability, financial hardship or other disadvantage”⁹

A sub-clause could be included to clarify that ‘relief given by the provision of accommodation or care to the persons mentioned in that paragraph’ is indeed charitable. This ensures full coverage for such organisations as aged care facilities, financial counselling services and emergency accommodation. Alternatively, s.13 should be amended to include a broad statement designed to include all purposes which are proposed to be within this head.

Recommendation 2

- (a) That sub-clauses be inserted in s.11 under the head ‘advancing social and public welfare’ to reflect the intention demonstrated in the Explanatory Memorandum, consistent with Recommendation 1(a).**
- (b) That, in the alternative, s.13 be expanded to include reference to care, support, accommodation for those in need ‘by reason of youth, age, ill-health, disability, financial hardship or other disadvantage’.**

⁷ Pearce DC and Geddes RS (2006) *Statutory Interpretation in Australia* (6th Ed), p.80

⁸ See for example the *Charities Act 2011 (UK) c 25, s.3*; *Charities Act (Northern Ireland) 2008 (NI) c 12, s.2*; *Charities Act 2009 (IR) no.6, s.3*

⁹ *Charities Act 2011 (UK) c 25, s.3*

Additional charitable purpose: ‘advancement of citizenship or community development’

PilchConnect takes the view that s.11 should include a separate head recognising volunteering, the promotion of civic responsibility and the promotion of the effectiveness of charities. It is not clear from either s.11(1)(c) or s.13 of the draft Bill whether the purpose of ‘advancing social or public welfare’ would encompass such purposes. In our view, a better approach is to explicitly recognise this important charitable purpose. While this is obviously a policy decision, we note that of the international jurisdictions which have adopted a statutory definition of charity, England and Wales, Scotland, and Northern Ireland have adopted a separate head of charitable purpose for ‘the advancement of citizenship or community development’. This is further clarified by way of a sub-clause which states that the head includes:

- i. ...
- ii. *The promotion of civic responsibility, volunteering, the voluntary sector or the effectiveness or efficiency of charities.*¹⁰

We endorse this approach and note that it appears to reflect the draft Bill’s intention (apparent in the EM but not otherwise evident in the draft Bill) that ‘an entity that has a charitable purpose may advance that purpose through activities that increase the effectiveness or enhance the long term viability of other charities.’¹¹

This additional head of charitable purpose would make it clear, on a plain English reading, that organisations that broker volunteering arrangements or otherwise advocate for greater levels of volunteerism in the community clearly to have a charitable purpose.

We note that the Melbourne University Law School’s 2011 submission to the earlier consultation paper also advocates that a separate head for ‘the advancement of citizenship or community development’ with express reference to ‘volunteering’ and the ‘volunteering sector’ should be included in any statutory definition. In doing so, that earlier submission stated:

*“At present, the charitable status of such bodies requires clarification ... Therefore, express reference to this charitable purpose will recognise and encourage the valuable role of volunteering organisations, peak bodies and infrastructure organisations in the modern charitable sector.”*¹²

Recommendation 3

- (a) That an additional head be included in s.11(1), being ‘the purpose of advancing citizenship or community development’.**
- (b) That a sub-clause containing at the very least, ‘the promotion of civic responsibility, volunteering, the voluntary sector or the effectiveness or efficiency of charities’ be included.**

¹⁰ *Charities Act 2011* (UK) c 25, s.3(2)(c), *Charities Act (Northern Ireland) 2008* (NI) c 12, s.2(3)(c), *Charities and Trustee Investment (Scotland) Act 2005* (Scot) asp 10, s.7(3)(b)

¹¹ EM at paragraph 1.39

¹² Melbourne University Law School - *A definition of Charity (Consultation Paper, October 2011, page 25*

The scope of the residual head of charity at s.11(1)(k)

Section 11(1)(k) of the draft Bill is an important residual clause, however we have some concern that the section has been drafted too narrowly to properly serve its purpose. This is a product of two drafting issues:

- the requirement that any other purpose be beneficial to the ‘general public’; and
- that any other purpose must be “analogous to, or within the spirit of” any of the other purposes listed in s.11.

The linking of charitable purpose to the term ‘general public’ at s.11(1)(k) is concerning, as this term has the potential to limit the operation of this clause to those purposes that benefit a large proportion of the public. Given the explicit contemplation in the EM¹³ of charities that benefit only a small section of the general public (such as those suffering from a rare disease) and in the draft definition of public benefit at section 6, we submit that a more appropriate term should be adopted such as ‘community’. Such an approach would be consistent with the existing language used in discussion of charitable purposes, and is consistent with many recommended approaches and overseas definitions in current operation (the product of similar reform processes).

Further, we submit that the requirement to demonstrate that a purpose is analogous to a purpose listed in s.11(1)(a)–(j) restricts the concept of charitable purpose from evolving beyond its current meaning. There is no doubt the passage of time brings with it an evolution in the conception of charity as well as an evolution of needs that charity can address. Section 11(1)(k), as currently drafted, may not be able to encompass new types of charitable purposes that, while being considered for the public benefit, do not neatly fit alongside the listed purposes.

A simply phrased equivalent of section 11(1)(k) without a requirement that a purpose be analogous or within the spirit of a list of purposes, and also without use of a restrictive term such as ‘general public’, has been recommended in many reports and submissions, for example:

- recommendation 13 of the 2001 Charity Definition Inquiry, proposed the following definition:
‘other purposes beneficial to the community, which without limitation include:
 - *the promotion and protection of civil and human rights; and*
 - *the prevention and relief of suffering of animals’;*¹⁴
- in response to the 2001 Charity Definition Inquiry, the Government proposed a residual definition of *‘other purposes beneficial to the community’;*¹⁵
- in Ireland, a residual clause was adopted following a similar reform process, and was phrased as *‘any other purpose that is of benefit to the community’;*¹⁶ and
- similarly, New Zealand has adopted the phrase *‘any other matter beneficial to the community’.*¹⁷

¹³ EM at paragraphs 1.51-1.52

¹⁴ Charities Definition Inquiry - Report of the Inquiry into the Definition of Charities and Related Organisations June 2001, Recommendation 13. See www.cdi.gov.au/html/report.htm

¹⁵ Treasurer's Press Release No. 049 of 29 August 2002 at www.treasurer.gov.au/DisplayDocs.aspx?pageID=&doc=pressreleases/2002/049.htm&min=phc

¹⁶ *Charities Act 2009* (IR) no.6, s.3(1)(d)

¹⁷ *Charities Act 2005* (NZ), section 5(1)

We acknowledge that the charitable purposes recognised by the England and Wales Act do not follow our recommended approach, retaining a requirement that non-listed purposes be ‘analogous to, or within the spirit of’ the listed purposes.¹⁸ However the definition of charity in the England and Wales Act includes sub-clauses that flesh out some, but not all, of the 12 listed charitable purposes and, as such, the residual category will be required to do less work than its Australian equivalent (see Recommendation 2(a) above).

Recommendation 4

- (a) That s.11(1)(k) be replaced with the phrase ‘any other purpose that is of benefit to the community’.**
- (b) If the current wording remains, reference to ‘general public’ in s.11(1)(k) be replaced with ‘community’.**
- (c) The requirement that a purpose be analogous to or within the spirit of the other listed purposes be removed to ensure the longevity and flexibility of the definition.**

The use of a ‘general public’ test in s.11(1)(h)

Similar to the issue raised above in relation to s.11(1)(k), we believe that the use of the term ‘general public’ in s.11(1)(h) should be amended as it imposes an additional and unnecessary threshold requirement. We make this submission in the context of the two limbed test imposed pursuant to s.5 of the draft Bill which already requires, amongst other things, that a charity must be a NFP entity whose purposes are charitable and for the public benefit.

Given that a charity is already required to demonstrate that its purpose is for the public benefit, there is no reason why the purpose in s.11 (including subsections (1)(h) and (k)), should be for the benefit of the ‘general public’ rather than a smaller subset of the ‘general public’. Accordingly, we recommend that s.11(1)(h) be amended to refer to ‘the community’ and s. 11(1)(k) be amended as recommended in accordance with Recommendations 4(a) and 4(b) above.

We note by way of comparison that Ireland’s *Charities Act 2009*, relies on a public benefit test¹⁹ and uses the term ‘community’ when defining charitable purposes.²⁰ The *Charities Act 2005* (NZ) and the England and Wales Act also rely on this term.

Recommendation 5

- (a) The reference to ‘general public’ in s.11(1)(h) should be replaced with reference to ‘community’**

ACNC Guidance

We have argued above that we support a definition which is not overly prescriptive but that we believe that the charity definition should be able to stand alone, without undue reliance on explanatory materials. We nonetheless consider the ACNC should play a key role in educating the public about the definition, and assisting charities to assess whether they are complying with requirements on an ongoing basis. PilchConnect strongly supports an engaged and educative ACNC and notes the high standard of materials already produced by the ACNC. The ACNC’s educational role is contemplated by section 110-10 of the *Australian Charities and Not-for-profit Commission Act*

¹⁸ *Charities Act 2011* (UK) c 25, s.3(1)(m)(ii) and (iii)

¹⁹ *Charities Act 2009* (IR) no.6, s.3

²⁰ *Ibid*

2012 (**ACNC Act**) which provides that ‘the Commissioner has the function of assisting registered entities in complying with and understanding this Act, by providing them with guidance and education.’

However, there is currently an absence of detail about the existence or nature of guidance material to be published by the ACNC in respect of the definition of Charity, and in particular whether that guidance will be binding.

The ACNC’s guidance function should enable it to issue formal guidance on the definition of charity or ongoing compliance with that definition in a manner similar to the rulings provided by the Australian Taxation Office. This formal guidance could aid the development and application of the definition of charity, and reduce ambiguity inherent in the definition, as well as assist groups in relation to their particular circumstances. Provision for formal guidance to be issued by the ACNC would also clarify the admissibility of ACNC guidance materials when the definition of charity comes before the Courts.

A formal guidance approach is taken in England and Wales, where section 17 of the England and Wales Act requires the Commission to issue guidance in pursuance of the England Wales Act’s public benefit objective (the public benefit objective is to promote awareness and understanding of the operation of the public benefit requirement.)

The England and Wales Act requires that this guidance to be:

- published;
- had regard to by the charity trustees of a charity when exercising their powers to which the guidance is relevant; and
- made available for appropriate consultation (public or otherwise) before the guidance is issued unless the Commission considers such consultation unnecessary.

A formal guidance scheme (in respect of complying with duties or performance of functions by charities) has also been adopted in Northern Ireland²¹. These approaches are supported by the Melbourne University Law School’s earlier submission on the statutory definition of charity.²²

Further points for consideration

Interaction between sections 7 and sections 11

We support the draft Bill’s maintenance of the presumption of public benefit for recognised categories of charitable purpose. In our view, all five of the purposes listed in s.7 – *Certain purposes presumed to be for the public benefit* – should be individually recognised as charitable purposes in section 11. Currently, s.11 does not expressly include 3 of the 5 purposes in s.7, being:

- the purpose of relieving illness;
- the purpose of relieving the needs of the aged; or
- the purpose relieving poverty.

While Note 1 to section 7 and the EM each state that these purposes are encompassed by the higher level descriptions of charitable purposes in section 11, we believe that in addition to the matters raised above in relation to the categories of charitable purposes, the failure to expressly include these purposes within s.11 creates unnecessary confusion when section 7 and 11 are read together.

²¹ *Charities Act (Northern Ireland) 2008*, s.49,

²² Melbourne University Law School - *A definition of Charity (Consultation Paper, October 2011* at pages 7-8

Section 11(1)(g) – human rights

Section 11(1)(g) introduces the purpose of “promoting or protecting human rights”. While we support the definition of human rights in the *Human Rights (Parliamentary Scrutiny) Act 2011*, a more expansive or flexible definition could be adopted in the draft Bill to ensure that future understandings of ‘human rights’ will be reflected in the statutory definition, for example by making the definition inclusive, such as:

- *human rights* includes “human rights” as defined in the *Human Rights (Parliamentary Scrutiny) Act 2011*

Recommendation 6

- a) That all five of purposes listed in section 7 of the Bill be included by way of sub clause in s.11 of the Act.**
- b) That the draft Bill’s definition of ‘human rights’ be amended to an inclusive definition as described above.**

Thank you for the opportunity to contribute to this consultation. We would be happy to elaborate on any of the issues raised in this submission on request.

Yours sincerely



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Contributions

This submission has been informed and prepared as a result of the valuable work of the PilchConnect team, in particular Kate Fazio, Charlotte Ahearne and Patrick Purcell.

Endorsements

- Volunteering Victoria

APPENDIX A

About PilchConnect

PilchConnect is an independent, specialist community legal service that provides not-for-profit (NFP) organisations with access to free or low cost legal help (information, advice and training). We support small-medium NFP community organisations to be better run. We do this because when organisations are well run, they are more likely to achieve their mission, and trust and confidence in the NFP sector is likely to be improved.

By supporting NFPs in this way, we aim to contribute to a better civil society with more connected communities.

We fill a niche role; sitting between regulators and the private legal profession. As an independent, sector-based intermediary we understand the practical constraints that small community organisations operate under, and are trusted by them to provide practical, NFP-relevant legal help or direct them to other assistance. We often help organisations work out if they really do have a legal problem, how serious it is and what possible next steps are. We prioritise NFPs that assist marginalised and disadvantaged people and in rural and regional areas.

Our submission work is based on empirical evidence and practical examples drawn from our legal inquiry, advice and case work.