

Our ref: NFP/10: RDC

2 May 2013

The Manager
Philanthropy and Exemptions Unit
Indirect Philanthropy and Resource Tax Division
The Treasury
Langton Crescent
PARKES ACT 2600

By Post and Email to: charities@treasury.gov.au

Dear Manager

Exposure Draft - Charities Bill 2013

The Queensland Law Society welcomes the opportunity to make a submission in relation to the Exposure Draft of the *Charities Bill 2013*.

Before commencing our submission the Queensland Law Society would like to put on record, again, the importance of allowing adequate time for consultation. In this case the Government announced its intention to introduce a statutory definition of charity in May 2011. It now appears that this Bill is to be introduced into the House of Representatives in May 2013, some two years later. Notwithstanding the potential for an extremely long consultation period, given the time between the announcement and introduction of the Bill, less than one month has been allocated for consultation and that month is immediately prior to its intended introduction. Inadequate consultation not only limits the Government's capacity to obtain the best possible feedback and consequently produce the best possible legislation, it also potentially undermines community confidence. Citizens may easily draw the conclusion that the Government has withheld legislation from it until the last possible moment. The Queensland Law Society therefore submits again that the government develop a practice of releasing legislation for consultation with ample time for consideration, and in any event develop a practice of allowing not less than three months for consultation periods.

Our members report that charities are being forced to stretch their already limited resources across the multitude of changes they are facing and the Society submits the Government be guided by the Code of Practice on Consultation adopted by the Charity Commission in the United Kingdom in July 2008, which provides a criterion of duration of consultation of at least 12 weeks, with consideration given to longer timescales where feasible and sensible.

Turning to the substance of the Bill, the Government is to be commended, in broad terms, for the work done on what is acknowledged to be a difficult project. The government is particularly to be commended for having preserved the common law presumption of charitable purpose given the experience in the United Kingdom, where attempts to alter this have not, as the courts explained in the *Independent Schools Council case*, brought 'the clarity for which [parties] were hoping'.¹

The premise underpinning the draft Bill is that it is purportedly a restatement of the common law. In an endeavour to assist in ensuring that the Bill is in fact a restatement of common law the Society sets out below the aspects of the Bill which do not appear to be a restatement of the common law:

1. In the definition section, the definition of '**advancing**' is new. The common law concept is 'advancement'. Whether the switch is material is moot but if the intent is to restate the common law then the word used should be the gerund 'advancement'. Further, it provides clarity that the meaning is intended to be the same as the use of a different term could lead to the uncertainty that a different meaning was intended.
2. In section 4 careful consideration should be given to whether or not any of these entities are presently charities and might now fall within the definition of 'government entity' and thus be excluded from the class. An example of entities which might be affected by this provision would include grammar schools in Queensland currently established under the *Grammar Schools Act 1975*, universities within Queensland, Opera Queensland and Queensland Theatre Company. Given the short time frame for submissions it is beyond the capacity of the Society to do more than identify potential issues.
3. The definition of '**charity**' (section 5) at subparagraph (a) is novel. For almost 400 years the common law meaning of charity has not referenced 'not-for-profit'. A correct statement of the elements of charity law can be found in most charity law textbooks. As the common law stands at present, a purpose is charitable if it is within the spirit and intendment of the Preamble to the *Statute of Elizabeth* and for public benefit.² As proof of this in an Australian context, take a brief review of chapters 1 and 2 of Dal Pont's *Law of Charity* (2010). In those chapters 'Context' and 'The concept of charity' are introduced and the only reference to not-for-profit is to the sector as a whole.³ Therefore, it is not a correct restatement of the law to elevate 'not-for-profit' to one of the two essential features of charity. It is also confusing. The concept of 'not-for-profit' gained ascendancy in the late 20th century in the United States corporations law context. It is a corporations law jurisprudence concept, not a concept embedded in the equity jurisprudence of which charitable trust law is a part. The work of Gareth Jones and a careful reading of *Pemsel's case* suggest that behind the preamble lies

¹ *Independent Schools Council case* [2011] UKUT 421 (TCC), [260].

² J Warburton, D Morris and N F Riddle, *Tudor on Charities* (2003) 4.

³ G. Dal Pont *Law of Charities* (2010), see chapters 1 and 2 particularly page 14.

the concept of pious use.⁴ An accurate restatement of the common law doctrine of charitable purpose would require either reference to the preamble to the *Statute of Elizabeth* or another equitable concept of performance of the same function, such as 'pious use'. The corporations law concept of not-for-profit is not that concept. Neither tax rulings nor the ACNC website provide a common law definition of not-for-profit. So far as the Society is aware not-for-profit is always only a factor to be taken into account as an indicator of being charitable in the first sense required by the preamble not the factor; see e.g. *Liberty Trust v Charity Commission* [2011] NZHC 577 at [113]. Further, so far as the Society can discern in the short time available for this submission there is no case law elevating the concept of not-for-profit in the way this statute is drafted.

The protection against a charity not being for the personal gain of a narrow group of people is of course addressed in both "purpose" and "public benefit."

4. The failure to limit the disqualifying characteristics in the definition of '**charity**' at subparagraphs 5(b) and (c) as to purposes which are more than incidental or ancillary may be problematic. For clarity it would be better to make it clear in the Act itself that the most minor infractions do not trigger loss of charitable status.
5. The definition of '**charity**' at subparagraph 5(d) may be problematic in so far as it refers to 'an individual', if there are charities that are defined by reference to an individual holding a particular office such as 'the Bishop of ...'.
6. The additional requirement imported by section 6(1)(b) that 'the benefit is a universal or common good', is not an accurate statement of the common law doctrine of charity. An accurate statement of the common law would finish at the end of section 6(1)(a) (stated positively). If 6(1)(b) is deleted, section 6(5) should also be deleted. Additionally, the Society submits that section 6(5) is inconsistent with section 6(1)(a)(ii).
7. Section 6(2)(b) is either meaningless or confusing. It is meaningless if it means that something which cannot be identified is to be disregarded. If it is intended to mean that an intangible/unquantifiable (as distinct from not identifiable) benefit is to be disregarded, that is not the law and it is confusing. Either way the drafting would be improved by deletion of the subsection as the law is adequately summarised in section 6(2)(a) (stated positively).
8. If section 6(2)(a) is to properly reflect the common law it should be stated positively, namely – "For the purposes of this Act, a benefit may be tangible or intangible."

⁴ Gareth Jones, *History of the Law of Charity 1532-1827* (1969) 3, 4. The word pious has at law (or at least had at the time of Pemsel's case) a broader meaning than in common parlance. Lord Watson reviewed the law in relation to pious uses in Pemsel's case and found '[s]o far as I am able to discover, godly and pious as applied to trusts or uses, had, in early times much the same significance in Scotland as in England. Their meaning was not limited to objects of a religious or eleemosynary character, but embraced all objects which a well-disposed person might promote from motives of philanthropy.' See Pemsel's case [1891] AC 531, 558 (Lord Watson).

9. The latter part of section 6(3)(b) is novel. Some case law supporting the initial wording -‘any possible detriment from the purpose to the general public;’ [or] ‘a section of the general public’ - can be found (eg. *Cocks v Manners*), but we are not aware of any support for the idea that charity law must have regard to detriment to a particular individual. The Society submits that “a section of the public” should be qualified by “a sufficient section of the public” as it is in section 6(1)(a)(ii); and that “a member of the general public” be deleted.

Further in a practical sense it would make decision-making by the boards of charities particularly difficult in some contexts as there will almost invariably be detriment to someone. Further, Australians are familiar with the concept of 'possible detriment' in competition and consumer legislation. In that context the detriment must be to the market as a whole and not to individuals. Thus it would seem that the onus placed on charities is to be greater than that placed upon businesses. These additional words appear then to be without foundation in case law, difficult to understand and apply, and more onerous than that expected in the marketplace by businesses.

10. Section 6(4) is not an accurate statement of the law, although it is conceded that the law in this area is very difficult to state. At best the section would seem to state factors which ought to be taken into consideration. It is submitted that nothing is gained and much could be lost by limiting regulatory and judicial discretion to only the two factors listed in (a) and (b) of the subsection rather than directing that those two factors be taken into account in assessing public benefit as a whole.
11. Section 7 imports the categories presumed to be for public benefit at common law. Insofar as it goes the clause is probably correct, but what it does not spell out is that the common law cases make it clear that the presumption applies differently to each of the classes. A more accurate statement of the common law would be to spell out that, in applying the presumption, regard is to be had to common law precedent.
12. It is submitted that section 10(b) transcends the common law requirements which are adequately stated in 10(a). In Australia post the *Aid/watch* case it is impossible to state whether or not 10(b) is the common law, as the High Court seems to have deliberately left open the question in *Aid/Watch*.
13. In section 11(1)(l) and (2) there appears to be an attempt to scope and limit the operation of the majority decision in *Aid/Watch*. The difficulty with this is that the High Court majority decision in *Aid/Watch* is deliberately open textured. The High Court makes it clear that it is inviting an extension of the boundaries through the implied doctrine of political speech. Some thought should be given to the possibility that if the operation of these sections is to narrow freedom of political speech the sections may be unconstitutional. This concern is raised particularly having regard to clause 10(b).
14. Section 14 is intelligible but some have found the draft to be confusing. Perhaps this could be redrafted. The Society also queries whether it is adequate or whether express reference to state legislation is required.

In summary, there is much to commend the Bill on, but it seems in many regards to have overreached or failed to adequately grasp the nuances of the common law. This is understandable because the case law is quite confusing. It is hoped that the submissions assist in developing this Bill to something which the Australian Parliament is willing to pass. In its present form it is foreseeable that some members of parliament familiar with this body of law, either as legal practitioners or through their roles with charities, may have concerns with the present drafting.

Yours faithfully

A handwritten signature in black ink, consisting of a series of overlapping, fluid strokes that form a stylized, somewhat abstract representation of the name 'Annette Bradfield'.

Annette Bradfield
President