

Submission to Treasury on the Consultation Paper, 'A Definition of Charity'

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INTRODUCTION

This submission addresses Consultation questions 4 and 9 in relation to the 'advancement of religion' head of charitable purpose. In addition, some general comments are made concerning Consultation question 18 in relation to a 'harmonised definition of charity'. My submission draws upon my work on the legal regulation of religious financing and my expertise in trusts law generally. In particular, my comments in relation to the advancement of religion draw upon a recent draft article, 'Religious Charitable Status and Public Benefit in Australia'. A copy of the article is attached to this submission and the main points from that article are extracted in the following discussion. I request that the article itself **not** be published on your website because it is currently under review by an Australian law journal.

THE PRESUMPTION OF PUBLIC BENEFIT AND THE ADVANCEMENT OF RELIGION (CONSULTATION QUESTION 9)

Consultation question 9 concerns the effects of abolishing the presumption of public benefit. My comments are directed to the advancement of religion head of charitable purpose only.

The relevance of overseas reform experience

The Consultation Paper notes the advantages of being able to draw upon overseas reform experience in reforming Australian charity law. I agree with this, but stress that, of the relevant jurisdictions in this context, the England & Wales charity law reforms which abolish the presumption of public benefit are relatively recent (the statutory definition came into force from April 2008) and their impact upon religious groups is still becoming clear. My research suggests that there are significant cost implications for religious groups in proving public benefit in England and Wales. Therefore, I have strong concerns about the statement at paragraph [92] of the Consultation Paper that, 'in overseas jurisdictions overturning the presumption of public benefit has not resulted in any particular difficulties for most religions.' Some evidence suggests that this is not the case, **but it is too early to draw strong conclusions as to the impact of the abolition of the public benefit presumption on religious groups in that jurisdiction.** Furthermore, the reference to 'most religions' being unaffected by the abolition of the presumption is alarming as research suggests that it is minority and/or new religious groups that we should be most concerned about because they are particularly vulnerable to unacceptable discrimination.¹

¹ See further, Pauline Ridge, 'Religious Charitable Status and Public Benefit in Australia' (article under review and attached to this submission) 27 n 109.

As far as I am aware, the Republic of Ireland's charity law reforms which entrench a public benefit presumption with respect to the advancement of religion are yet to come into full force.

Formulating a defensible legislative scheme for determining public benefit from purely religious purposes

Clearly charitable purposes must provide a public benefit given that the function of charity law is to facilitate non-State, not-for-profit activity that is beneficial to society. The difficult question is how to identify the necessary public benefit, especially in relation to purely religious purposes (for example, prayer, worship, ritual and ceremonial practices, preaching or evangelism) that do not fall under other charitable heads such as the advancement of education or the relief of poverty. The benefits flowing from purely religious purposes are likely to be intangible and not readily susceptible to positive proof of direct benefit. In addition, courts have differed as to whether subjective, faith-based perceptions of spiritual benefit may be taken into account in determining public benefit and, if so, in what way this should occur.²

A defensible Commonwealth legislative scheme for determining the requisite public benefit for religious charitable status must meet three criteria:

- **It must be evidentially sound,**
- **It must comply with human rights norms and**
- **It must be cost-effective.**

An evidentially sound legislative scheme

The recent High Court decision in *Aid/Watch Incorporated v Commissioner of Taxation (Aid/Watch)*³ provides a model for how public benefit could be determined that would avoid the evidential difficulties involved in identifying direct public benefit from specific purely religious purposes. In *Aid/Watch* the High Court had to decide whether a lobby group's purposes were charitable, but it did not wish to evaluate the particular lobbying objectives. The Court 'held that the constitutional foundations of Australia's system of government required there to be open and free communication between the electors, the legislature and the executive. Lobbying activities of the sort undertaken by the appellant were an integral part of these constitutional processes and thus contributed to "the public welfare". It was not necessary to decide upon the merits of any particular changes advocated for by the appellant: benefit could be assumed at the higher level of abstraction.'⁴

The same argument can be made in relation to purely religious purposes; that is, **the public benefit from purely religious purposes is best acknowledged at a higher level of abstraction which ensures objectivity and neutrality and avoids any need to**

² See further, Ridge, *ibid* 16-17; *Gilmour v Coats* [1949] AC 426; cf *O'Hanlon v Logue* [1906] 1 IR 247; *Nelan v Downes* (1917) 23 CLR 546; Matthew Harding, 'Trusts for Religious Purposes and the Question of Public Benefit' (2008) 71 *Modern Law Review* 159.

³ *Aid/Watch Incorporated v Commissioner of Taxation* (2010) 241 CLR 539, 555-556 [44]-[45].

⁴ Ridge, above n 1, 18.

evaluate specific religious purposes. The requisite evidence could consist of data provided by bodies such as the Productivity Commission,⁵ but my preferred approach is to argue that evidence should be acceptable at a higher level of abstraction as was done in the *Aid/Watch* case. For example, it could be argued that a flourishing religious pluralism is vital to the health of a secular society such as Australia and this is promoted through charitable status being given to purposes for the advancement of religion. It can be argued that religious groups as a whole contribute to the wellbeing of Australian society in ways that are sufficiently well-documented to justify public benefit being accepted at the highest level of abstraction as used in the *Aid/Watch* case.

Accepting public benefit from the advancement of religion at a high level of abstraction of course does not mean that all religious purposes must necessarily be accepted as charitable. **It is still possible in an individual case to show that detriment flowing from particular purposes outweighs the higher level public benefit.**

If the *Aid/Watch* model of accepting public benefit at a high level of abstraction is not adopted and direct evidence of benefit flowing from specific purposes is required, as is the case in England and Wales, then I have one further comment. Unlike the English courts, the Irish and Australian courts have been prepared to accept as evidence of public benefit, the intangible spiritual solace gained by members of a religious group from practicing their faith, even where no tangible objective proof is available. That is, evidence of what members of a religious group *believe* can constitute evidence of a benefit to that group. For example, in *Crowther v Brophy* Gobbo J held that ‘the enhancement in the life, both religious and otherwise, of those who found comfort and peace of mind in their resort to intercessory prayer’ was the relevant criterion for determining public benefit, rather than the ‘success’ or otherwise of intercessory prayer itself.⁶ This approach should be adopted explicitly in setting out a statutory public benefit test or administrative guidance on a statutory requirement of public benefit.

Compliance with human rights norms

Abolishing a presumption of public benefit for the advancement of religion may affect Australia’s compliance with human rights norms because minority religious groups and new religious groups are particularly vulnerable to discrimination in the application of a public benefit test.

I discuss how a public benefit test may affect the human rights of religious groups at length in the attached article. For present purposes, **the main danger is that application of a public benefit test may infringe the right not to be discriminated against on the ground of religion pursuant to articles 2(1) and 26 of the *International Covenant on Civil and Political Rights (ICCPR)*.** The European Court of Human Rights has emphasized that minority religious groups are susceptible to discrimination under public benefit- style tests:

⁵ See, eg, Productivity Commission, *Contribution of the Not-for-Profit Sector* (2010) [3.2].

⁶ *Crowther v Brophy* [1992] 2 VR 97, 100.

if a state sets up a framework for conferring legal personality on religious groups to which a specific status is linked, all religious groups which so wish must have a fair opportunity to apply for this status and the criteria established must be applied in a non-discriminatory manner.⁷

Discrimination between religious groups on the basis of whether or not they are judged to provide public benefit can be justified if the criteria for determining public benefit are ‘reasonable and objective and if the aim is to achieve a purpose which is legitimate under the [ICCPR].’⁸ Given that discrimination is almost inevitable in applying a public benefit test to religious groups, the real question will be how to ensure such discrimination is justified and proportionate to the legislation’s objectives.

Guidance on when discrimination would be justified and proportionate could be sought in the permissible restrictions on freedom to manifest religion set out in article 18(3) of the ICCPR, which do not apply directly, but could be applied by analogy:

Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.⁹

The Human Rights Committee’s General Comment No 22 provides further guidance on the application of article 18(3). In particular,

[I]imitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated.¹⁰

Thus, if the Commonwealth’s legislative scheme were to provide for criteria that excluded charitable status, along the lines of the Republic of Ireland’s legislative model, it should frame those criteria in terms of ‘public safety, order, health, or morals or the fundamental rights and freedoms of others’. The same should apply to any administrative arrangements for determining public benefit.

Cost-effective

My preliminary view, based upon my research to date regarding the effects on religious groups of abolishing the public benefit presumption in England and Wales, is that the abolition of the presumption does pose a significant burden upon religious groups. Not

⁷ *Jehovah’s Witnesses v Austria* (2009) 48 EHRR 17, 445.

⁸ Human Rights Committee, General Comment 18, HRI/GEN/1/Rev 9 (Vol 1) 195, para 13.

⁹ The preferred interpretation is that ‘public’ is a descriptor of ‘order, health, or morals’ as well as ‘safety’: Malcolm D Evans, *Religious liberty and international law in Europe* (Cambridge University Press, 1997) 223.

¹⁰ UN Doc HRI/GEN/1/Rev (1994) para 8.

only can it be administratively costly, but in some cases it may lead to a distortion of a religious group's purposes.¹¹

For established religious groups, it is correct that abolition of the presumption is unlikely to undermine charitable status, but it imposes significant administrative costs for little obvious benefit. The example of the Charity Commission for England and Wales' public benefit assessment of the Church Mission Society (CMS) is illuminating in this respect.¹² The CMS is a long-established, mainstream Protestant Christian religious group. As I state in my article: 'the 10 page report of the Commission concluded without any apparent difficulty that public benefit flowed from its activities. Yet this appears a costly exercise for both parties to reach what surely must have been an entirely predictable outcome.'¹³ The CMS public benefit assessment is also of concern because the Commission appear only to have accepted the CMS's arguments as to their beneficial impact upon 'the development of civil society' (that is, intangible, higher level of abstraction benefit)¹⁴ because the combination of tangible and intangible benefits (the 'totality' of benefits) was significant. This suggests that newer religions may find it harder to rely upon intangible benefits, particularly if there are no, or few, tangible benefits.'

It may be that the comments at paragraph [82] of the Consultation Paper regarding entities with 'self-evident' public benefit are intended to encompass established religious groups analogous to the CMS, but it is not clear to me how the 'self-evident public benefit' test would be any less onerous than a straight public benefit test. It also has the potential to impermissibly discriminate.

APPLYING THE 'PUBLIC' ASPECT OF THE PUBLIC BENEFIT TEST: RELIGIOUS GROUPS CONNECTED BY BLOOD TIES (CONSULTATION QUESTION 4)

The Consultation Paper discusses the consequences of changing the common law so as to require purposes for the relief of poverty to satisfy the 'public' aspect of the public benefit requirement. This is the requirement that the persons eligible to participate in the charitable purpose must be an inclusive, public group, rather than an exclusive, private group. The Consultation Paper suggests that an undesirable consequence of applying the 'public' requirement to purposes for the relief of poverty would be that 'an entity established to relieve poverty of native title holders may not meet the current or proposed public benefit test as it is only providing benefits to native title holders who are members

¹¹ See Ridge, above n 1, 9-10 which discusses the distorting effect of the England and Wales public benefit requirement upon the purposes of the Druid Network, a new religious group seeking charitable status in 2009.

¹² Charity Commission for England and Wales, *Church Mission Society – A public benefit assessment report*, July 2009.

¹³ Debra Morris, 'Public Benefit: the long and winding road to reforming the public benefit test for charity' in McGregor-Lowndes and O'Halloran, (eds) *Modernising Charity Law: Recent Developments and Future Directions* (Edward Elgar, 2010) 103, 120.

¹⁴ Charity Commission for England and Wales, *Church Mission Society – A public benefit assessment report*, July 2009, 6. The CMS argued that less tangible or quantifiable benefits flowed from the promotion of its moral framework, namely, a 'contribution towards the development of civil society through imparting positive values, attitudes and skills.' This was attributed to 'the contribution of faith to people's well-being and the subsequent creation of societal bonds and cohesion.' It then itemised specific outcomes such as 'encouraging altruism and volunteering' and 'encouraging people to live with simplicity and a commitment to serve other people...'

of the same family.’ A solution suggested by the Paper is to not disqualify charitable purposes merely because they ‘benefit people connected by blood ties’.

In my view, this approach also should be taken to the advancement of religion head of charity. The ‘public’ aspect of the public benefit requirement in relation to religious purposes is problematic and encompasses several distinct elements that are not always properly differentiated in the case law. The element of the public requirement that is relevant here is the principle that religious purposes that are restricted to family members cannot be charitable because a family does not constitute a public group.¹⁵ In my view, removing the ‘blood ties’ restriction for religious purposes would remove a longstanding inequity in the application of charity law to those (albeit few) religious groups that, by their nature, are *necessarily* restricted to family groups (eg Chinese ancestor worship).¹⁶ Such groups should not be excluded from charitable status on the ‘public’ ground if they otherwise satisfy the requirements for charitable status. Such an approach would not allow charitable status to religious purposes that were not necessarily restricted to a family group (eg a trust for the religious education of the settlor’s grandchildren).¹⁷

A HARMONISED DEFINITION OF CHARITY: CONSULTATION QUESTION 18

Australia’s federal system self-evidently presents problems for the reform of charity law that have not been present in overseas jurisdictions. It is not clear from the Consultation Paper how the proposed legislative reforms (that only apply to charity for Commonwealth legislative purposes) will interact with the common law of charity applying to trusts for purposes. Clearly, in relation to most trusts there will be fiscal incentives to meet a Commonwealth statutory definition of charity as well as the common law definition. But imagine the scenario of a testamentary trust for purposes where the testator has not paid regard to, and may not meet, a statutory definition. Here, there is the potential for litigation to determine:

1. is there a valid charitable trust at common law or does the trust fund fall into the residuary estate?
2. is there a valid charitable trust for State or Territory fiscal and other purposes?
3. is there a valid charitable trust for Commonwealth purposes?

A change to the current common law can only be effected by State and Territory legislation and this should be a priority in order to avoid confusion and complexity in the law of trusts.

SUMMARY OF MAIN POINTS

Consultation Questions 7-9

¹⁵ *Yeap Cheah Neo v Ong Cheng Neo* (1875) LR 6 PC 381.

¹⁶ *Ibid.*

¹⁷ See *Re Coats’ Trusts* [1948] 1 Ch 340, 345.

- Australian legislators should be wary of uncritically adopting recent overseas reforms. It is too early to properly evaluate the effects of abolishing the public benefit presumption in England and Wales.
- A legislative definition of religious charitable purposes that retains a presumption of public benefit, but sets out exclusionary criteria for where the presumption will not apply is the best way to balance the rationale of charity law with the evidential difficulties of proving public benefit from purely religious purposes. It will also minimize the potential for human rights violations and minimize costs.
- whether or not the presumption of public benefit is retained, the question of proof of public benefit flowing from purely religious purposes should be determined at a high level of abstraction modeled on the approach taken by the High Court in the *Aid/Watch* decision.
- Exclusionary criteria should be framed in terms of ‘public safety, order, health, or morals or the fundamental rights and freedoms of others’ and must be a proportionate response to the objectives of charity law.

Consultation Question 4

- The Paper’s suggestion in relation to the relief of poverty to not disqualify charitable purposes merely because they ‘benefit people connected by blood ties’ should also be adopted in relation to religious purposes that by their nature are necessarily restricted to family members.

Consultation Question 18

- Unless and until the common law is amended by State and Territory legislation that harmonises with Commonwealth legislation there is the potential for three different definitions of charitable purpose to apply in relation to trusts. This is highly undesirable.

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