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8 December 2011

A Definition of Charity Inquiry
Philanthropy and Exemptions Unit
The Treasury
Langton Crescent
PARKES ACT 2600
Email: nfpreform@treasury.gov.au

Dear Sir or Madam,

We welcome the opportunity to participate in this consultation regarding the definition of charity. Our primary concern in this submission is to address the anomalous position of “the advancement of religion” as a “head of charity”, i.e. as an activity that is, of itself, deemed charitable by definition. We regard this as anachronistic, unwarranted and contradictory to the purpose of the definition.

While we recognise that this particular issue is relevant at Consultation Question 16, we would like to deal with it first, as it affects all our other considerations. We welcome the opportunity to express our views, and note that in times past, certainly throughout most of the time that the “advancement of religion” “head of charity” has been operable, we would not have been able to express the views that we now express, for fear of ostracism at best, or at worst, persecution.

We submit that “the advancement of religion” is neither *ipso facto* charitable, nor *ipso facto* a public benefit. We are not of course suggesting that religions cannot be charitable, merely that they are not necessarily so. We argue that the erroneous presumption that religions are automatically charitable introduces so many anomalies that it is far better administratively, equitably, and rationally, that other aspects of the heads of charity are relied on instead to provide an adequate definition.

We submit that the removal of “the advancement of religion” would have many advantages and would not be to the detriment of any group or organisation that is *bona fide* charitable. Indeed it would be more equitable and thus assist them in their operation. While such a change would be a departure from the past, now is an appropriate time to make the change in Australia.

Historical context

The charitable definition of “the advancement of religion” (i.e. its inclusion in the definition) derives from an ancient time in our British heritage in which “religion” was universally presumed to mean the Christian religion, and when government welfare services as we know them today were unavailable. Society has undergone a mammoth transformation since then. We now have a multiplicity of religions, while the adherence to religion in general is declining. The charitable definition of religion is now outdated.

While other jurisdictions, with a similar British heritage to ours, may seek to persist with the charitable definition, there are good reasons why Australia, in particular, should not do so. Australia

was founded on a secular ideal that was deliberately intended to break with the tradition of established religion, which was seen as providing an unwanted source of sectarian conflict.

It was for this reason that the Australian Constitution includes Section 116, which states that the “Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion ...”. The other jurisdictions referred to in the Consultation Paper do not have this provision. We should therefore not follow them in this regard. Whether or not the “advancing” of a religion contributes to the “establishing” of one, this provision should not be disregarded.

Public benefit issues

With the growth in religious diversity, it is now the case that the advancement of religion pertains more to a select group of adherents of the religion, rather than the community as a whole. Thus whatever benefits religious activities may confer, they are more private benefits than public benefits. Where charitable activities of religious groups are publicly beneficial, they are capable of being recognised as such, with reference to other aspects of the definition of charity. The religious adherence of a group should not be relevant in determining whether something is charitable.

It is arguable that fostering the advancement of a multiplicity of mutually contradictory religious beliefs may increase division and disharmony in society. It therefore may be more of a cost than a benefit. We note that the advancement of religion may involve the advancement of Christianity, or of Judaism, or of Islam, or indeed any of sect, cult, superstition or religion, even Scientology. The coercive behaviour of cults can cause severe distress, psychological trauma, and can disrupt the lives of families. We do not need to refer to acts of violence in the name of religion or the activities of paedophile priests in order to indicate that the activities of religious people are not always benign. The inclusion of religion as a “head of charity” is thus quite anomalous.

The cost to the community of these activities is not merely a social cost. Given that inclusion in the definition of charity grants to religious groups a large range of subsidies and tax concessions, there is a significant financial cost as well. The removal of such benefits does not in any way compromise anyone’s freedom of religion.

A further highly anomalous situation regarding the seemingly muddled thinking with regard to religion and the public benefit has occurred with the *Extension of Charitable Purpose Act 2004*. The activities of “closed or contemplative religious orders that offer prayerful intervention for the public” were defined as charitable and being for the public benefit. People are perfectly entitled to engage in such activities if they wish, but there is no justification for regarding this as a charitable purpose for the public good.

Indeed, the available evidence on this matter suggests there is no benefit, even a cost. Clinical trials have been conducted in the United States in which groups suffering from serious illnesses were either prayed for or not. Prayerful intervention was found to make no difference, except in cases where a group knew that prayerful intervention was being undertaken on their behalf by others. The medical outcomes of this group were actually found to be significantly worse. The suggested explanation for this was that the intervention caused psychological damage that adversely affected their recovery.¹ If “evidence-based policy” is the objective, then “prayerful intervention” is disqualified as being a charitable public benefit.

¹ See H. Benson, J. Dusek, J. Sherwood, P. Lam , C. Bethea, W. Carpenter, S. Levitsky, P. Hill, D. Clem, Jr. , M. Jain, “Study of the Therapeutic Effects of Intercessory Prayer (STEP) in cardiac bypass patients: A multicentre randomised trial of uncertainty and certainty of receiving intercessory prayer”, *American Heart Journal* , Volume 151 , Issue 4 , Pages 934 – 942. <http://linkinghub.elsevier.com/retrieve/pii/S0002870305006496>

Evidentiary issues

If we are to continue with the presumption that the advancement of religion is of itself charitable, then we are obliged to come to terms with the issue of what constitutes a religion and on what basis particular organisations are eligible to qualify. It is not satisfactory that the incoming Australian Charities and Not-for-profits Commission (ACNC) be burdened with this responsibility.

As mentioned in the Appendices to the Consultation paper, in England and Wales, religion involves a belief in a god, “more than one god, or no god”. In Northern Ireland it may include “any analogous philosophical belief”. A similar wording obtains in Scotland. The reliance on such vague definitions in so important a matter cannot be justified. None of these definitions provides a degree of clarity that would appear to justify the inclusion of religion as a charitable motivation. In Ireland, religious privileges are protected, provided the religion does not employ “oppressive psychological manipulation”. Given that all the most popular religions employ a belief in eternal punishment in hell, we would wonder, perhaps, how they might still qualify.

In Australia, the High Court, in the 1983 Scientology case, offered that a religion should comprise a “belief in a Supernatural Being, Thing or Principle”. We can appreciate the generosity of this definition, in that it accommodates a wide range of possibilities. We wonder, however, whether the High Court, in its wisdom, has offered a definition that is actually coherent or useful. “Principle” is an abstract noun, which of itself cannot be measured. “Supernatural” is beyond the natural and therefore beyond detection in the natural world. A “supernatural principle”, then, is the intersection of the immeasurable with the undetectable.

We humbly submit that in our view a “supernatural principle” is a nebulous concept, and that it is most unsatisfactory that the laws of Australia should be predicated on such a concept. This is especially the case when billions of dollars in taxpayer funds are expended in the form of subsidies and tax concessions, contingent upon the advancement of such a concept. In our view this is a gross misallocation of scarce financial resources.

Apart from these issues, we feel compelled to point out that none of these definitions of religion in any way imposes the slightest requirement that there be a even a possibility that any of the esteemed beliefs could actually be true. Yet providing evidence regarding the truth of assertions is normally regarded as being an important part of the legal process. In the case of religion, however, this seems to be a convenient oversight that allows for the presumption that any religion could be true, even though all religions are largely mutually contradictory, thereby precluding the possibility of truth in all but possibly one case.

The perverseness of this logic alone should be sufficient to disqualify religion from the definition of charity. It is time that reason and evidence, as applied to what is measurably beneficial and tangible, should form the basis of the definition of charity. We now turn to the Consultation Questions.

1. Are there any issues with amending the 2003 definition to replace the ‘dominant purpose’ requirement with the requirement that a charity have an exclusively charitable purpose?

We submit that it should be a requirement that a charity should have a purpose that is exclusively charitable. The demarcation difficulties in discriminating between dominant and non-dominant purposes make such a definition untenable. No doubt there are religious groups that express their difficulty in demonstrating a public benefit of their activities. The lack of a public benefit of what is currently deemed charitable will be largely overcome by removing “the advancement of religion” from the definition.

2. Does the decision by the New South Wales Administrative Tribunal provide sufficient clarification on the circumstances when a peak body can be a charity or is further clarification required?

Further clarification is required, in that the activities of the peak body should be in themselves charitable, otherwise there is no guarantee that this is the case. For example a group such as the Australian Christian Lobby may be considered a peak body, representing the views of groups deemed to be charities, but merely representing the views of sectional interests is not of itself charitable.

3. Are any changes required to the Charities Bill 2003 to clarify the meaning of ‘public’ or ‘sufficient section of the general community’?

Current proposals to clarify the meaning may be adequate, provided that religion is removed as a “head of charity”. This would resolve anomalies arising from the fact that even exclusive sects and cults are currently beneficiaries of the definition. “Prayerful intervention” should not be deemed charitable nor excluded from the public benefit test.

4. Are changes to the Charities Bill 2003 necessary to ensure beneficiaries with family ties (such as native title holders) can receive benefits from charities?

We endorse the suggestion that trusts or other entities be set up in these circumstances.

5. Could the term ‘for the public benefit’ be further clarified, for example, by including additional principles outlined in ruling TR 2011/D2 or as contained in the Scottish, Ireland and Northern Ireland definitions or in the guidance material of the Charities Commission of England and Wales?

The term ‘for the public benefit’ should be clarified to ensure that benefits have practical utility. A benefit should be tangible and measurable. Notions such as “spiritual benefit”, that come from a perceived realm of the supernatural, are immeasurable and undetectable, and are susceptible to subjective interpretation and manipulation. They should be excluded from the definition of benefit. Placebos may have a recognised medical benefit, but we do not include them in the Pharmaceutical Benefits Scheme.

6. Would the approach taken by England and Wales of relying on the common law and providing guidance on the meaning of public benefit, be preferable on the grounds it provides greater flexibility?

A public benefit should be defined specifically to be of tangible practical utility. It should not be left to common law.

8. What role should the ACNC have in providing assistance to charities in demonstrating this test, and also in ensuring charities demonstrate their continued meeting of this test?

Organisations should be assisted with the provision of standard ACNC forms that they should complete, showing what benefits of practical utility they provide. The form should include a list of eligible benefits. Organisations should be required to complete an annual statement indicating the extent to which they have provided the relevant benefits.

9. What are the issues for entities established for the advancement of religion or education if the presumption of benefit is overturned?

It is likely that religious entities may have difficulty in establishing that some of their activities provide a public benefit, due to the fact that they do not provide a public benefit. We should all seek to understand that in the 21st century, public expenditures need to be disbursed on a rational basis, and that religious charities must comply with the same requirements as all other charities.

10. Are there any issues with the requirement that the activities of a charity be in furtherance or in aid of its charitable purpose?

There should be a requirement that the activities of a charity be in furtherance or in aid of its charitable purpose. Anomalies in this regard will be largely overcome by removing “the advancement of religion” from the definition of charity.

11. Should the role of activities in determining an entity’s status as a charity be further clarified in the definition?

The role of activities in determining an entity’s status as a charity should be further clarified in the definition. Anomalies in this regard will be largely overcome by removing “the advancement of religion” from the definition of charity.

12. Are there any issues with the suggested changes to the Charities Bill 2003 as outlined above to allow charities to engage in political activities?

It is again the case that removing “the advancement of religion” from the definition of charity will overcome an anomaly in this regard. Political lobbying with regard to education or the alleviation of poverty may be regarded as being consistent with a charitable activity, but political lobbying to further the advancement of religion should not be. We refer to the example of the Australian Christian Lobby, already cited.

13. Are there any issues with prohibiting charities from advocating a political party, or supporting or opposing a candidate for political office?

Political activity undertaken by charities should not be prohibited, provided it is consistent with their charitable purpose. Religious entities are able to participate in any political activity, however such activity should not be regarded as charitable.

14. Is any further clarification required in the definition on the types of legal entity which can be used to operate a charity?

The definition of the types of legal entity that can be used to operate a charity appears adequate, although partnerships could be included.

15. In the light of the Central Bayside decision is the existing definition of ‘government body’ in the Charities Bill 2003 adequate?

It could be clarified that a government body includes local government.

16. Is the list of charitable purposes in the Charities Bill 2003 and the Extension of Charitable Purposes Act 2004 an appropriate list of charitable purposes?

The list is not appropriate, primarily because it includes “the advancement of religion”. The inclusion of this item is anachronistic, it describes an activity that may be, but is not inherently charitable, and its inclusion causes numerous anomalies, such as we have highlighted throughout this submission. The genuinely charitable activities of religious entities are adequately accounted for under other items in the list.

We also oppose the inclusion of “the advancement of culture” in this list, as it would introduce another range of definitional and public benefit anomalies similar to those caused by “the advancement of religion”. While we may sympathise with the aim, there are a range of intractable issues, such as what constitutes culture, which cultures are eligible, who benefits, and how benefits are measured.

17. If not, what other charitable purposes have strong public recognition as charitable which would improve clarity if listed?

We do not see an advantage in significantly broadening the definition of charity. We consider “any other purpose that is beneficial to the community” is a sufficient “catch all” item. Some guidance could be provided by the ACNC. It should be up to the entity to demonstrate a community benefit.

18. What changes are required to the Charities Bill 2003 and other Commonwealth, State and Territory laws to achieve a harmonised definition of charity?

A statutory definition of charity for Commonwealth purposes should provide the basis of a harmonised definition for all levels of government.

19. What are the current problems and limitations with ADRFs?

Anomalies regarding the timely disbursement of funds from Australian Disaster Relief Funds may be assisted by clarifying disaster relief as a charitable purpose.

20. Are there any other transitional issues with enacting a statutory definition of charity?

The removal of “the advancement of religion” from the definition of charity will cause some transitional issues for existing entities that are not *bona fide* charities, and we propose that they be given sufficient time to adjust and reorganise their affairs.

We understand that what we propose in this submission will not be welcomed by those whose role and privileges in society may be questioned by it. However what we propose is forward looking, in the public interest and for the public benefit. Ethical principles such as compassion, honesty, freedom and justice are independent of any religion. The tradition of granting undue status to “the advancement of religion” is one that is hallowed by time but not by reason.

We appreciate the opportunity to forward our views and trust that they will be evaluated on their merits, and will not be in any way discounted on the basis of the type of organisation that we represent.

Yours sincerely,

John L Perkins

President
Secular Party of Australia.

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