



Anglican Church Diocese of Sydney

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Submission to Treasury regarding *A Definition of Charity – Consultation Paper* October 2011

By the Standing Committee of the Synod of the Anglican Church Diocese of Sydney

1 Summary of Submission

- (a) We welcome the Government's commitment to reform the regulation of charities and support the policy aims of simplifying regulatory arrangements and red tape currently impairing the charitable sector and adopting reforms which are world best practice, as suitably adapted to the Australian regulatory and social environment, and which are proportionate and targeted to address the reform needs of the sector.
- (b) We do not consider that increasing public confidence in the sector and achieving more certainty about the meaning of charity can be justified as primary policy drivers for these reforms. Neither do we think that tax policy should drive the formulation of a statutory definition of charity.
- (c) We consider it would be a mistake to miss the opportunity for the expertise of the ACNC to be brought to bear on the formulation of a statutory definition of charity and accordingly recommend that the Government delay preparation and release of an exposure draft for legislation until the ACNC has had an opportunity to contribute.
- (d) We stress the importance of taking the Board of Taxation's concerns about the Charities Bill 2003 into account in formulating an appropriate definition.
- (e) We note the importance of ensuring that any statutory codification of the common law enables the body of case law developed by the courts over many years to continue to inform the meaning of charity. We also note the genuine anxiety within the sector over any proposal to replace the common law meaning of charity with a statutory definition and encourage the Government to carefully assess any departures from the common law meaning against the policy considerations referred to in (a) above.

- (f) We support the use of the expression 'dominant charitable purpose' in preference to the proposed 'exclusively charitable purpose' on the basis that the later expression does not logically accommodate incidental or ancillary purposes which are not charitable.
- (g) For the avoidance of doubt, we support the inclusion in any statutory definition of a provision which confirms that peak bodies would generally qualify as charities.
- (h) We support the extension of the existing heads of charitable purpose under the common law to include purposes which have been found to be charitable by the courts because they are for the public benefit. Such additional heads of charitable purpose should have the presumption of public benefit.
- (i) We submit that the purpose of specifying charitable purposes in legislation is to make it clear what purposes are widely considered as providing a public benefit thereby justifying the application of a presumption of public benefit. We consider that any removal of the public benefit presumption in respect of these purposes will give rise to a significant and unjustified administrative burden on the sector.
- (j) We address the desirability of retaining the public benefit presumption for charities for the advancement of religion or education, noting in particular that the presumption in respect of religious charities has enabled the courts to avoid making determinations that one religion provides more benefit than another. We also point to Australia's international human rights obligations concerning religious freedom as a basis for presuming that entities established for the advancement of religion are for the public benefit.
- (k) We recommend that, in view of the difficulties in articulating a test for public benefit, public benefit should be defined in negative terms, namely any benefit which is not a private benefit. This should be one of the factors relevant for deciding whether the public benefit presumption should be rebutted.
- (l) We accept the requirement that the activities of a charity be in furtherance or in aid of its charitable purposes but consider the inclusion of this requirement in the core definition of any statutory definition will confuse the distinction between activities and purposes.
- (m) We submit that an organisation's charitable status should usually be determined by reference to the purposes of the charity only and not the activities that it proposes to undertake. Any examination as to whether the activities of an organisation are being undertaken in furtherance of its charitable purpose go to the question of whether the organisation is fulfilling its charitable purpose and not whether it has a charitable purpose.

- (n) We submit that in light of the decision in *Aid/Watch*, any political activity by a charity should be permitted when done in furtherance of the charitable purpose of the organisation.
- (o) While we agree that any entity with an unlawful purpose should not be characterised as a charity, we do not consider that illegal activity of itself should be a basis for disqualifying an entity from being a charity. Any illegal activity should be penalised under relevant legislation and should not give rise to a double penalty of disqualification.
- (p) We consider that it would be necessary to consider transitional arrangements if any legislative definition of charity narrows the common law meaning of charity. In particular we consider that if, despite our submissions on this matter, the public benefit presumption were to be removed under a statutory definition it would be important to retain the public benefit presumption for entities that are endorsed or registered as charities before the date the relevant legislation commences.

2 Who we are

- (a) The name of our organisation is the Anglican Church Diocese of Sydney (**Diocese**).
- (b) This submission is made by the Standing Committee of the Synod of the Diocese. The Standing Committee is the executive of the Synod. The Synod is in turn the principal governing body of the Diocese constituted under the *Anglican Church of Australia Constitutions Act 1902 (NSW)*¹. The Diocese is the oldest and largest of the 23 Anglican dioceses which together form the Anglican Church of Australia.
- (c) The Diocese is an unincorporated voluntary association comprising various bodies constituted or incorporated under the *Anglican Church of Australia Trust Property Act 1917 (NSW)* and the *Anglican Church of Australia (Bodies Corporate) Act 1938 (NSW)*. These bodies, together with the diocesan network of 270 parishes, are accountable to the members of the Church through the Synod of the Diocese².
- (d) The Diocese, through its various component bodies and through its congregational life is a provider of a wide range of programs including in social welfare, education, health and aged care, youth work, and for the homeless.

¹ The Synod has 719 members, the majority of which are appointed or elected representatives from our 270 parishes.

² In the last ABS Census 837,917 people in the Sydney region identified as being Anglican. The regular combined membership of our 270 parishes is about 80,000 people.

- (e) In addition to the congregational life of the Diocese, the bodies which provide services to the community across the Diocese include large social welfare institutions such as Anglicare³ and Anglican Retirement Villages⁴, as well as other charitable institutions including Anglican Youthworks⁵, and 40 Diocesan schools⁶.
- (f) The importance of the parishes and their networks of people within congregations to the provision of these services should not be underestimated. These are real communities of people within local communities. They are a natural social infrastructure which is an effective base for the provision of services which contribute to social inclusion.
- (g) Our contact details are –

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3 Policy considerations

3.1 Policy aims that should and should not be driving the reform process

- (a) We welcome the Government's commitment to reform the regulation of the charities and NFP sector and broadly support the policy considerations which underpin the reforms announced by the Government in May this year.⁷
- (b) It is important that any reforms adopted are consistent with the policy of Government outlined in the press release issued jointly by The Hon Bill Shorten MP, Assistant Treasurer and Minister for Financial Services and Superannuation and The Hon Tanya

³ **Anglicare** relates to approximately 40,000 clients on an annual basis with counselling, children and youth services, emergency relief, family relationships and aged care.

⁴ **Anglican Retirement Villages** operates 37 residential facilities (both Independent Living and Residential Care) and 40 community based services throughout the greater Sydney region, caring for more than 6,000 residents and clients and regularly relating to a further 12,000 people (families, staff, volunteers) in the course of its service delivery.

⁵ **Anglican Youthworks** is the co-ordinator of work amongst children and young people and provides materials to 300,000 students, supports 4,000 volunteer and employed scripture teachers, and 8,000 youth leaders attending training events. 50,000 mostly young people and children attend outdoor programs and centres.

⁶ Attended by approximately 33,000 students.

Plibersek MP, Minister for Human Services and Social Inclusion to simplify the regulatory arrangements and red tape currently impairing the NFP and charitable sector from achieving its aims⁸.

- (c) Any reforms adopted by the Government must be world best practice, as suitably adapted to the particular regulatory and social environment in which Australian charities operate.
- (d) The reforms must also empower charities to carry out their charitable purposes in a manner that is flexible and encourages innovation, rather than increasing red tape and administration costs. To this end, great care needs to be taken to ensure that any reforms undertaken are proportionate and targeted to address the reform needs of the sector.
- (e) On the other hand, despite assertions in various consultation papers, including the October 2011 consultation paper *A Definition of Charity (Consultation Paper)*, we do not consider that increasing public confidence in the sector and achieving more certainty about the meaning of charity ought to be primary policy drivers for these reforms. While public confidence in the sector and certainty about the meaning of charity are clearly desirable, there is little or no evidence that the sector is suffering from a widespread erosion of public confidence and little to suggest that the current common law meaning of charity has itself been a significant cause of detriment to the sector. Any issues that may have arisen from time to time in these areas should not be used to justify regulatory changes which are disproportionate and are not targeted to the real reform needs of the sector.
- (f) Similarly, given the intention to use the definition of charity for the purposes of all Commonwealth laws, it would be inappropriate to formulate a narrow definition of charity in order to achieve tax policy outcomes. Any requirements, over and above an entity being a charity, which are necessary to access particular tax concessions should be dealt with in the relevant tax legislation and should not be “factored-in” to the definition of charity itself.

3.2 Broader reform process

- (a) While we recognise that the Consultation Paper is directly concerned only with the definition of charity, we submit that reforms of this nature must be considered in the

⁷ *Making it easier for charities to help those that need it, 10 May 2011*

⁸ *Making it easier for charities to help those that need it, 10 May 2011*

context of the broader reform agenda announced by the Government in the Federal Budget handed down on 10 May 2011.

- (b) Given that the legislation arising from this consultation process will not commence until 1 July 2013, 12 months after the commencement of the Australian Charities and Not-for-Profits Commission (**ACNC**), it would be a mistake to miss the opportunity for the expertise of the ACNC to be brought to bear on the drafting and policy intent of the exposure draft, particularly in relation to public benefit and any change to the common law position.
- (c) We therefore recommend the Government delay preparation and release of the exposure draft until the ACNC has had opportunity to contribute.

3.3 Use of 2003 Charities Bill

- (a) We note that the Government's announced starting point for the formulation of the definition of charity will be the 2001 *Report of the Inquiry into the Definition of Charities and Related Organisations* (**CDI**), adjusted to take account of changes to the law affecting charities since that time.⁹ However the Consultation Paper proposes that an Australian statutory definition for charity be based on the work already done on the Charities Bill 2003 (**2003 Charities Bill**).¹⁰
- (b) The Board of Taxation, in its report *Consultation on the Definition of a Charity – A report to the Treasurer*¹¹ (**Board of Taxation Report**) noted that the 2003 Charities Bill contained some departures from the form of definition recommended by the CDI and raised a number of other concerns about the bill. Consequently the Board of Taxation recommended substantial amendment to the 2003 Charities Bill.
- (c) While the Consultation Paper indicates that it has considered these concerns, we remain uneasy about the use of the 2003 Charities Bill as a starting point for any definition. We want to stress the importance of taking the Board of Taxation's concerns into account in formulating an appropriate definition.

⁹ As announced in the Media Release *Making it easier for charities to help those that need it*, 10 May 2011

¹⁰ At paragraph 41

¹¹ Dated December 2003

4 Core definition

4.1 Relationship with the common law

- (a) The Consultation Paper appears to contemplate a statutory codification of the common law meaning of charity. A codification of the common law, if carefully undertaken, should ensure that the body of case law developed by the courts over many years will continue to inform the meaning of charity. It would therefore be helpful if Explanatory Material prepared for the legislative definition clearly indicates that this is an intended outcome of the definition.
- (b) In approaching this matter, the Government needs to be aware that there is genuine anxiety within the sector over any proposal to replace the common law meaning of charity with a statutory definition even if the intention is to codify the common law. In essence the concern is that important aspects of the current meaning of charity will be lost in the translation, as apparently occurred in places with the 2003 Charities Bill.
- (c) An alternative to codifying which we consider should be considered by the Government is enacting legislation which extends and, where considered necessary, clarifies the common law meaning of charity but which otherwise draws directly on the key elements of the meaning of charity as developed by the common law, including the approach taken by the common law in relation to public benefit.
- (d) If the Government does intend to depart from the common law meaning of charity in any way, such departures need to be carefully assessed in light of the policy considerations referred to in item 3.1 above to ensure they support the real reform needs of the sector.

4.2 Exclusively charitable purpose

In our view, the language of 'exclusively charitable purpose' does not reflect the common law and, unlike the expression 'dominant charitable purpose', does not logically accommodate incidental or ancillary purposes which are not charitable. Consistent with the recommendations of the CDI and the approach taken in the Charities Bill 2003, we recommend the use of the term 'dominant purpose' and an express allowance for non-charitable purposes which are ancillary or incidental to the dominant charitable purpose or purposes.

4.3 Peak Bodies

- (a) We consider that the common law clearly enables peak bodies to be charities in their own right. The advancement of a charitable purpose for the public benefit does not and never has required a body to deal directly with members of the public. Such a position

reflects a misunderstanding of the 'public benefit' test and tends to conflate the broader concept of charitable purpose with the benevolent relief directly provided to the public by public benevolent institutions.

- (b) However since this matter is raised as an area of uncertainty in the Consultation Paper, we consider it would be prudent, for the avoidance of doubt, to act on the recommendation of the Board of Taxation report¹² and confirm that peak bodies would generally qualify as charities.
- (c) The SVA case¹³ is of limited relevance in considering this matter since the decision is based on an administrative decision of a NSW government authority, and does not necessarily have application in respect of Commonwealth law or the law in other states (and in previous decisions, the High Court has determined that NSW Payroll Tax Cases are not necessarily applicable to Commonwealth law).

5 Charitable purposes

5.1 List of Charitable purposes

- (a) We consider that it would be helpful to enact legislation which extends the three distinct heads of charitable purpose under the common law to include purposes which have been found to be charitable by the courts because they have been accepted as having a public benefit. As outlined below, we consider that the presumption of public benefit should be extended to such additional purposes.
- (b) We also consider it would be helpful to retain, as a residual category of charitable purpose, other purposes which are beneficial to the community but without the presumption of public benefit.

6 Public benefit

6.1 The public benefit presumption

- (a) Under the common law, the first three heads of charitable purpose are presumed to be for the public benefit. They are presumed to be for the public benefit not because they lack the character of public benefit without the presumption but because their

¹² Board of Taxation recommendation 4.33

¹³ *Social Ventures Australia Limited v Chief Commissioner of State Revenue* [2008] NSW ADT 331 handed down on 12 December 2008

widespread acceptance as being for the public benefit usually makes an inquiry into the matter unnecessary. The presumption is however rebuttable.

- (b) Similarly, the purpose of specifying 'charitable purposes' in legislation is to make clear what purposes are considered by the courts, community and the legislature as providing a public benefit. This view is supported by both the CDI and the explanatory memorandum to the Charities Bill 2003. Not to take this view would significantly diminish the value of specifying in legislation any charitable purposes.
- (c) The explanatory memorandum to the 2003 Charities Bill, in the section discussing the residual category of charity 'other purposes beneficial to the community', provides that 'in determining the purposes that will fall under this category, the term 'beneficial to the community' is given prime importance. The other six categories of charitable purposes have been included on the basis that they represent a significant benefit to the community.'¹⁴
- (d) Consequently, in our view and in the view of the CDI and the drafters of the 2003 Charities Bill, the categories of charitable purposes represent a high order acceptance of the public good based solely on the purposes of the organisation. Logically therefore, an organisation with purposes falling within the distinct categories of charitable purpose stated in the legislation should be presumed, in the absence of evidence to the contrary, to have purposes that are beneficial to the public.
- (e) This presumption can however, be rebutted by evidence to the contrary, showing that the organisation's purposes are not compatible with public benefit – that is, they are for private benefit, against public policy, unlawful, or harmful or detrimental. The factors to be taken into account in arriving at this conclusion could be set out in the legislation.¹⁵ Further guidance about the application of these factors could be provided by the ACNC following its establishment.
- (f) In approaching the question of whether an entity is for the public benefit, a presumption needs to exist one way or the other – either an entity is presumed to be for the public benefit unless evidence is raised to the contrary (the common law position re the stated heads of charity), or an entity is presumed not to satisfy the public benefit requirement unless there is sufficient evidence to prove public benefit. In our view, it is both logical and appropriate that the presumption favour charities by 'casting on the party which

¹⁴ Explanatory Memorandum to the 2003 Charities Bill at [1.83]

¹⁵ Such as in section 177D of the *Income Tax Assessment Act 1936* that outlines the factors to take into account in determining whether a scheme is for the purpose of obtaining a tax benefit.

challenges the presence of (net) benefit an evidential onus'.¹⁶ On this basis, it is appropriate to retain the presumption for purposes that have been determined over a long period of time to be charitable unless the contrary is shown.

- (g) The consultation paper observes that 'the presumption means a government authority must in seeking to regulate and enforce the law, rebut the presumption of public benefit, which can often be administratively difficult and costly'¹⁷, but yet also argues that 'altering the presumption of public benefit may not increase compliance costs for most charities'¹⁸ and that 'some charities may incur some minor initial compliance costs in demonstrating that they are providing a public benefit'¹⁹. It is difficult to see how it can be administratively difficult and costly for the government to rebut the presumption but not also difficult and costly for a charity to prove that it is of public benefit (particularly where the benefit is intangible).
- (h) We question the wisdom of requiring any charity (but particularly an entity such as a start-up charity, suffering from a lack of resources) to bear a significant new administrative burden that has, until now, been borne by the government. Such a proposal runs counter to one of the stated aims of this legislative process, namely to reduce the compliance burden and administrative costs faced by the sector.
- (i) A change to the common law to remove the public benefit presumption will result in a need for new guidelines to be formulated by the regulator, and by the courts in appeals to decisions of the regulator, thereby giving rise to costs to both Government and the charities sector. In this regard we note that preparation of and consultation in relation to the huge volume of guidance on this topic prepared by the Charities Commission of England and Wales has resulted in costs to both the regulator and the charities, and cannot necessarily be simply adopted in the Australian context.
- (j) Indeed we note the clarification that now needs to be provided by the Charity Commission of England and Wales in relation to the guidance it has given on this topic, following the 116 page judgment in the *Independent Schools Case*. We do not believe that costly litigation of this type arising from the removal of the public benefit presumption in England and Wales is in the best interests of the Australian sector or broader community.

¹⁶ Dal Pont *Law of Charity* 2010 at paragraph [3.38]

¹⁷ Consultation paper at paragraph [79]

¹⁸ Consultation paper at paragraph [83]

¹⁹ Consultation paper at paragraph [84]

- (k) Ultimately, if the aim of reform is to improve regulation, reduce red tape and empower and encourage charities²⁰, removing the presumption will not achieve these aims. Rather, it will give rise to an onus of proof in relation to public benefit the burden of which will be borne by the organisation along with the increased costs this will involve.
- (l) The CDI considered views that the presumption be overturned and yet did not conclude this should be the case in Australia. This notion that the presumption should be overturned emerged in the 2003 Charities Bill without support from the CDI and as such we would question the grounds upon which the Government has concluded that it is an advisable course to follow. The Board of Taxation Report noted that some concerns were raised in relation to the removal of the public benefit presumption, particularly in relation to charities for the advancement of religion, but did not make any further comment or recommendation in this regard.²¹
- (m) Further, we note that there are fundamental differences between the treatment of charities in Australia and the UK. Unlike Australia, in England and Wales, deductible gift recipient style benefits²² are provided to all charities thereby potentially justifying a narrower public benefit test. We note in this regard that the Productivity Commission report recommended extending deductibility to all charities²³ and we submit that to impose the burden of a UK model through the removal of the presumption of public benefit without extending deductibility to all charities demonstrates an inconsistent approach to reform. The Irish legislation also retains a presumption that a gift for the advancement of religion is of public benefit, unless the contrary can be proved.²⁴ It also requires that the consent of the Attorney-General be obtained before such a finding can be made.²⁵
- (n) We also note that numerous other jurisdictions, including New Zealand, Ireland and Canada have kept all or part of the presumption of public benefit.

6.2 Removal of the public benefit presumption for charities for the advancement of religion or education

- (a) As outlined above, in our view the first three heads of charitable purpose under the common law, including the advancement of education and advancement of religion,

²⁰ As outlined in paragraph 3.1 above

²¹ Board of Taxation Report, chapter 6

²² That is, Gift-Aid, which increases the value of the donation to the charity by 20%, and allows the donor to claim a further deduction where they have a higher tax rate - see for example *Income Tax Act 2007* (UK) part 8, chapter 2, sections 414-430

²³ Productivity Commission report recommendation 7.3

²⁴ Section 3(4) of the *Charities Act 2009* (Ireland).

²⁵ Section 3(5) of the *Charities Act 2009* (Ireland)

should continue to be presumed to be for the public benefit as they are categories that are widely recognised as providing a benefit to the public.

- (b) The CDI, in talking about education and religion as charitable purposes, states that ‘they are purposes that are regarded by the community as providing a public benefit.’²⁶ Further, the CDI noted that:

*“the advancement of religion’ should continue as a head of charity. It is clear that a large proportion of the population have a need for spiritual sustenance. Organisations that have as their dominant purpose the advancement of religion are **for the public benefit** because they aim to satisfy the spiritual needs of the community”*²⁷ (our emphasis).

- (c) If benefit is defined as proposed in the 2003 Charities Bill,²⁸ the removal of the presumption of public benefit is likely to have a particular adverse impact on smaller, minority religions or education facilities, as their direct benefit to the public will be determined based on what constitutes a ‘universal or common good’, and what is considered to be a significant proportion of the community; both of which are quite subjective notions.
- (d) In our view however, the presence in the community of organisations that educate, and the presence in the community of organisations that encourage spiritual growth, is inherently beneficial to the entire Australian community – not merely to those who are the direct recipients of the education or spiritual encouragement.
- (e) We note that, in the case of charities for the advancement of religion, retention of the presumption will assist the regulator and the courts by preventing the need to determine that one religion provides more benefit than another. Arguably, this contributes to the effective separation of church and state. In this regard, the Not-for-profit Project of Melbourne Law School observes that ‘the presumption helped preserve religious neutrality by enabling judges to avoid determining the worth of a religion’.²⁹
- (f) Further, it seems illogical to retain a presumption of public benefit (or removing the requirement for public benefit) in relation to self help groups and closed contemplative orders, but to remove that presumption in relation to charities for the advancement of religion and advancement of education.

²⁶ Report of the Charities Definition Inquiry, 2001, chapter 16

²⁷ Report of the Charities Definition Inquiry, 2001, p178

²⁸ Discussed further at paragraph 6.5 below

²⁹ *Defining Charity: a literature review* by Melbourne Law School Not-for-Profit Project at page 50

6.3 International Obligations under human rights instruments

- (a) We consider that Australia's international obligations under human rights instruments also have significant implications in relation to the operation of presumed public benefit associated with the advancement of religion.
- (b) Freedom of religion is a fundamental, non-derogable human right protected by Article 18 of the International Covenant on Civil and Political Rights (ICCPR), ratified by Australia and enacted in Australian law³⁰. The United Nations General Assembly has also enacted a subsequent declaration dealing with religious freedom in more detail, the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief³¹ (1981 Declaration). On 8 February 1993 the Attorney-General made a declaration³² in respect of the Religion Declaration. The Attorney-General's declaration became effective on 24 February 1993.
- (c) The preamble to the 1981 Declaration states, inter alia, that:

“...religion or belief, for anyone who professes either, is one of the fundamental elements in his conception of life and that freedom of religion or belief should be fully respected and guaranteed...”
- (d) We submit that this is justification in and of itself for the presumed public benefit of the advancement of religion; the profession, expression and diffusion of religious belief is, to many, a fundamental ingredient in their ‘conception of life’, necessary for their mental and spiritual wellbeing.
- (e) Perhaps even more relevant to the present discussion is Article 6 of the 1981 Declaration, which lists specific inclusions in the right to freedom of religion. Subparagraph (b) stipulates a right: ‘to establish and maintain appropriate charitable or humanitarian institutions’, while subparagraph (f) guarantees a right to ‘solicit and receive voluntary financial and other contributions from individuals and institutions’.
- (f) We submit that the above provisions, and in particular the right to establish and maintain appropriate charitable or humanitarian institutions, are unequivocal in their protection of the prima facie right of religious communities to establish charitable entities in pursuit of their religious beliefs and must, at the very least, give rise to a presumption that such entities exist for the public benefit.

³⁰ As Schedule 2 to the *Australian Human Rights Commission Act 1986* (Cth)

³¹ UN General Assembly, Document A/RES/36/55, 25 November 1981

³² under s 47(1)(b) of the *Australian Human Rights Commission Act 1986* (Cth)

6.4 'Public'

- (a) In our view, the characterisation of 'public' in the 2003 Charities Bill as a 'sufficient section of the general community'³³, being a number that is not 'numerically negligible'³⁴ is problematic, especially in relation to organisations assisting smaller groups or seeking to relieve suffering in relation to rarer conditions³⁵.
- (b) We note the view stated in the Board of Taxation Report that it should be clear that any determination of whether the number of people to whom a benefit may be provided is 'numerically negligible' should be determined by reference to the 'size of that part of the community to whom the purpose would be relevant'.³⁶
- (c) However, Dal Pont considers this test to be misleading, on the basis that:

*'what constitutes a section of the community is not a numerical inquiry; it is more concerned with the criteria that govern access by the relevant class of beneficiaries to the charitable benefits and, to a greater or lesser degree, whether benefits targeted to one or only a few individuals nonetheless generate a benefit to a broader section of the community.'*³⁷

6.5 'Benefit'

- (a) In our view, any determination of benefit should not be limited to benefits that are merely direct and present, but should include both direct and indirect benefits, both tangible and intangible benefits, both present and future benefits, and benefits that constitute both majority and minority views. Further, the determination of benefit should look to the purpose of the organisation, not the effectiveness of the organisation in achieving those purposes.
- (b) In the case of religion, it is likely to be difficult to prove public benefit, as the benefits provided by religion are generally intangible, and to determine the benefit of religion only by reference to direct benefits or by-products 'fails to grasp the true benefit of religion'³⁸, that is, 'spirituality itself'³⁹.

³³ Section 7(1)(c)

³⁴ Section 7(2)

³⁵ Although we note in this regard that curing and improving the treatment of diseases and other conditions, even if only rare, should be considered to provide both present and future benefit to the public as a whole.

³⁶ Board of Taxation report, recommendation 6.25

³⁷ Dal Pont *Law of Charity* 2010 at paragraph [3.6]

³⁸ *Defining Charity: a literature review* by Melbourne Law School Not-for-Profit Project at page 51

³⁹ *Defining Charity: a literature review* by Melbourne Law School Not-for-Profit Project at page 51

- (c) Further, it should be clear who determines whether a purpose is beneficial. We have some concerns in relation to the idea of a need for ‘universal or common good’ and the seeming subjective and ‘majority focussed’ nature of this test.

6.6 ‘For the Public Benefit’

- (a) Any determination of whether something is for the public benefit should be determined objectively – that is, the consideration should be whether there is a public benefit, not whether the public perceives there to be a benefit. The former inquiry allows flexibility, particularly in relation to minority views, while the latter inquiry encourages only majority or popularly held views to be considered beneficial. History tells us that in many cases, it is the minority views that have ultimately resulted in real benefit to the community,⁴⁰ and it is healthy for democracy for dissenting voices to be heard.
- (b) We note that the guidance in England and Wales in relation to public benefit extends the concept too far – and arguably imports a ‘relief of poverty’ requirement in determining whether something is for the public benefit by requiring that, in order to be for the public benefit the services provided by a charity must be accessible to the poor and therefore sufficient free treatments or bursaries (for example) must be provided to a sufficient number of poor people in order to satisfy this requirement. In fact, the case law requires that charity is not merely limited to the poor.

6.7 Recommended test for public benefit

- (a) In view of the above difficulties in articulating what is for the public benefit, we recommend that public benefit should be defined in negative terms, namely any benefit which is not a private benefit. This would then be included in a list of factors included in the legislation relevant to determining whether the presumption of public benefit should be rebutted.
- (b) Any requirement to determine public benefit in the positive sense, for example for the purposes of determining whether a purpose is charitable under a residual category of purpose in the legislation, could be left to the common law.

⁴⁰ Such as the Suffragette movement, the abolition of slavery, the rights of children etc.

7 Activities in furtherance of charitable purpose

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

- (a) We agree that it is appropriate for a charitable organisation that all activities undertaken by the charity must be in furtherance of the charitable purpose, and consider that this requirement should already be considered to be inherent in the determination of whether an organisation is charitable.
- (b) It is unclear how, if this requirement is included, there will be any scope for a tax on the unrelated commercial activities of a charity since all activities must be conducted in furtherance of the charitable purpose.
- (c) We consider however that the inclusion of this requirement in the core definition of a charity confuses the distinction between activities and purposes.

7.2 Should the role of activities in determining an entity's status as a charity be further clarified in the definition?

- (a) In our view, determination of whether an organisation is charitable should be determined by reference to the purposes of the charity only not the activities that it proposes to undertake.
- (b) In order to determine whether an organisation has a charitable purpose, the principal enquiry is whether the express objects of an organisation are charitable. If the express objects of an organisation are charitable, then the organisation has a charitable purpose.
- (c) Any subsequent examination as to whether the activities of the organisation are being undertaken in furtherance of its charitable purpose go to the question of whether the organisation is fulfilling its charitable purpose not whether it has a charitable purpose⁴¹. The answer to this question may impact on whether the organisation continues to be entitled to endorsement as a tax concession charity.
- (d) In *Word Investments*, the Court held⁴² that 'the charitable purposes of a company can be found in a purpose of bringing about the natural and probable consequence of its

⁴¹ *Commissioner of Taxation of the Commonwealth of Australia v Word Investments Limited* [2008] HCA 55 at paragraph [26]

⁴² *Word Investments* at paragraph [38]

immediate and expressed purposes, and its charitable activities can be found in the natural and probable consequence of its immediate activities.’

- (e) We submit that this statement of the court indicates that where it is clear from the natural and probable consequence of an organisation’s immediate and expressed purposes that the organisation is charitable, that is sufficient to find that the entity has a charitable purpose. Where however it is unclear from the objects of the organisation, it may be necessary to look to the natural and probable consequences of its immediate activities in order to determine whether an entity in fact has a charitable purpose.

7.3 Political Activities

- (a) Following the decision in *Aid/Watch*⁴³, any political activity by a charity should be permitted when done in furtherance of the charitable purposes of the organisation.
- (b) Under our constitutional legal system, which includes the requirement for compulsory voting, it should be appropriate for a charity to campaign against a particular candidate or party, or a particular policy of the candidate or party, where such campaign is in furtherance of the charitable purposes of the organisation.

7.4 Illegal activities

- (a) We agree that an organisation with unlawful purposes should not be characterised as a charity. Such purposes should be taken into account in determining whether the presumption of public benefit is rebutted in respect of an entity.⁴⁴
- (b) We are concerned however, that the inclusion of an illegal activities disqualifier creating a once for all time test entities which are found guilty or convicted of an indictable offence is unduly restrictive and ignores the reality that an entity is ultimately operated by individuals. In this regard, we support the recommendation of the Board of Taxation to remove this requirement ‘so that an instance of unlawful conduct would not disqualify an entity from obtaining or retaining charitable status.’⁴⁵ Any penalty for unlawful activity should be administered under the relevant legislation and should not give rise to a further penalty of disqualification from charitable status.

⁴³ *Aid/Watch Incorporated v Commissioner of Taxation* [2010] HCA 42

⁴⁴ As discussed in paragraph 6.1 above.

⁴⁵ Board of Taxation recommendation 5.15

8 Other issues

8.1 Achieving a harmonised definition

Any attempt to improve regulation of charities by creating a clear definition of 'charity' will fail if issues currently governed by state legislation are not adequately addressed.

8.2 Transitional issues

- (a) If legislation enacted in respect of the definition of charity is strictly a codification or enlargement of the common law it is unlikely that significant transitional issues would arise. However if legislation narrows the meaning of charity in some respects, appropriate transitional arrangements for entities endorsed or registered as charities before the date of commencement of the new definition need to be considered.
- (b) In particular, if, despite our earlier submissions, the public benefit presumption were to be removed under a statutory definition, it would be important for both certainty within the sector and for the work of the ACNC as it administers the transition to a new system of registering charities, that the public benefit presumption be retained for entities that are endorsed or registered as charities before the date the relevant legislation commences.
- (c) More extensive grandfathering arrangements may also be necessary to avoid unforeseen legal consequences and also as a matter of fairness. For example, if the definition of charity were to be applied so as to deny existing charities the benefit of exemptions under Commonwealth revenue laws it may have the consequence of making charities unviable. This would mean that the real and personal property of those former charities that could no longer be applied to the charitable purpose.
- (d) Further, if the definition of charity was applied in the States and Territories to existing trusts, it is unclear what the legal consequence would be of an existing charitable trust losing its charitable status by reason of not coming within the definition. One possibility is that the trust would then be invalid by reason of being perpetual. This would have very significant adverse consequences. Not only would the legal consequences need to be determined (including what would happen to real and personal property that could no longer be applied to the charitable purpose), but there would also be the substantial injustice in having the basis on which people had made gifts or established charitable trusts overturned after the event.

9 December 2011