

THE CHURCH OF
JESUS CHRIST
OF LATTER-DAY SAINTS

Submission

**Re: A Definition of Charity – Consultation Paper,
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Submission to:

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Langton Crescent, PARKES ACT 2600**

Re: A Definition of Charity - Consultation Paper, October 2011

1. This Submission is directed only to particular matters raised in the Consultation Paper (CP) in connection with the Charities Bill 2003 (the **Bill**), namely, Dominant Purpose and Public Benefit (including presumption of public benefit and charitable religious organizations) and Consultation Questions 1, 6, 7, 9.

Introduction

2. The High Court in *Aid/Watch Inc v Commissioner of Taxation*¹, after noting the speech of Lord Macnaghten in *Pemsel*² is the source of the modern classification of charitable trusts in four principal divisions, observed,

“But even in 1891, the case law which gave the term “charitable” its technical meaning had developed considerably since the time of the British income tax statute of 1799. The case law may be expected to continue to do so as the cases respond to changed circumstances. As Lord Wilberforce put it³, *the law of charity is a moving subject which has evolved to accommodate new social needs as old ones become obsolete or satisfied.*” (Emphasis added.)

3. Courts have acknowledged that there may be circumstances in which the court will in a later age hold an object not to be charitable which has in earlier ages been held to possess that virtue; and that the converse case may be possible.⁴ This serves to confirm the flexibility of the common law to adapt to the needs of society.

4. The High Court in *Aid/Watch Inc*⁵ went on to point out that a law of the Commonwealth “may exclude or confirm the operation of the common law of Australia upon a subject or ... employ as an integer for its operation a term with a

¹ (2010) 241 CLR 539 at [18].

² *Income Tax Special Purposes Commissioners v Pemsel* [1891] AC 531.

³ *Scottish Burial Reform and Cremation Society v Glasgow Corporation* [1968] AC 138 at 154.

⁴ See e.g., *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31 at 74 and *Gilmour v Coats* [1949] AC 426 at 443.

⁵ 241 CLR 539 at [20].

content given by the common law as established from time to time” - an integer such as “charitable purpose” or “community”. Accordingly, legislation that goes beyond simply using the “integer” and promulgates a statutory definition of say, “dominant purpose that is charitable”⁶ or “public benefit”,⁷ may have repercussions for the common law technical legal meaning of “charity” and “charitable”. Construing the meaning, in the context of legislation that uses it, of a term “with a content given by the common law as established from time to time”, engages principles of statutory interpretation⁸ *a fortiori* where that term in that legislation is subject to a statutory definition or to various statutory definitions.

Consultation questions

5. Brief summary response to Consultation questions:

Q1 *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?*

Yes. Introducing the “exclusively” qualification to charity law terms that are also subject to other statutory definitions, may introduce uncertainty. In the context, “dominant purposes” as defined is adequate to exclude entities engaged in non-charitable activities which are other than the furtherance, in aid of, ancillary or incidental to its charitable purposes.

Q6 *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?*

Reliance on the common law of Australia for the meaning of public benefit is preferable on the grounds it provides greater flexibility and preserves the certainty for religious or educational purposes that currently constitute “advancement” of religion or education as the case may be. On this approach, no provision for formal Guidance should be made.⁹

⁶ The Bill, s.4(1)(b)(i), s.6(1).

⁷ The Bill, s.4(1)(b)(ii), s.6(2), s.7(1).

⁸ *Aid/Watch Inc* 241 CLR 539 at [19].

⁹ The legal correctness of any Guidance would of course be subject to review by the court. In *The Independent Schools Council v The Charity Commission for England and Wales* [2011] UKUT 421 (TCC), the Upper Tribunal (Tax and Chancery Chamber), a Superior Court of Record, concluded that Guidance issued by the Commission dictating what independent schools must do to justify their charitable status was “wrong” and “obscure”.

Q7 *What are the issues with requiring an existing charity or an entity seeking approval as a charity to demonstrate they are for the public benefit?*

Where, as in the case of advancement of religion, the benefits are intangible benefits such as the promotion of mental and spiritual wellbeing, there likely will be unwarranted difficulty in demonstrating a benefit on the criteria described in s.7 of the Bill.

Q9 *What are the issues for entities established for the advancement of religion or education if the presumption of benefit is overturned?*

It is arguable that the so-called presumption is not a “presumption” as ordinarily understood. The presumption is an acknowledgement that a purpose properly falling within the “advancement” concept¹⁰ is of itself beneficial to the community. A religious or education purpose that is not “advancement” does not meet the public benefit test and therefore does not qualify as “charitable”.¹¹ Under the Bill the issues for “advancement” charities include those identified for Q7.

DOMINANT PURPOSE – CP 2.1.2

6. We think substituting “exclusively charitable purpose” for “dominant purpose” is not called for. Substitution would add confusion if “exclusively” were to be given its ordinary meaning. Where words of limitation, such as “exclusively”, are included in a statutory provision then those words are to be given effect in interpreting that provision.¹²

7. Current commonwealth legislation using the term “charitable” does so at times in association with, for example, the qualification “exclusively” or “principal”¹³ and

¹⁰ See para 13 below.

¹¹ See paras 13, 14, 21 below. See too G E Dal Pont, *Law of charity*, 2nd (2010) ed at [10.28].

¹² D C Pearce R S Geddes, *Statutory Interpretation in Australia* 7th (2011) edition, para [2.27]. In *Randwick MC v Rutledge* (1959) 102 CLR 54, 93 Windeyer J observed: The presence of “exclusively”, “solely”, or “only” always add emphasis; and is not to be disregarded.”

¹³ The Age Discrimination Act 2004, s.34(2) defines “charitable benefits” as means benefits for “purposes that are exclusively charitable according to the law in force in any part of Australia.” The Copyright Act 1968, s.106 (1)(b), without defining “charitable”, refers to an entity, “the principal objects of which are charitable or are otherwise concerned with the advancement of religion, education or social welfare”.

In NSW, the Succession Act 2006, s.43(7) defines “charity” as “means a body constituted primarily for a purpose that is a charitable purpose under the general law”; and in the Co-

sometimes without any qualification.¹⁴ Pursuant to s.4(1) of the Bill, the core definition (which is subject to s.6(1)) applies to all other Acts. Adding an “exclusive” qualification in s.6(1) would necessarily impact on a statutory provision in some other Act in respect of which the legislature has not included (presumably, deliberately) that qualification.

8. The current “dominant purpose” requirement in s.4(1)(b) of the Bill is consistent with the principle that a purpose which is otherwise charitable is not excluded as a “charitable purpose” by reason of activities which further, are in aid of, incidental or ancillary to that purpose. And further, s.6 of the Bill defines “dominant purpose” to admit only those non-charitable purposes which are purposes that further or are in aid of, are ancillary or incidental to, the charitable purposes. This is consistent with the High Court’s recent observation that, at law, the relevant enquiry is whether the entity’s “main or predominant or dominant objects, as distinct from its concomitant or incidental or ancillary objects, are charitable”.¹⁵

9. In examining the entity’s objects (or in other words, “purposes”), it is necessary to see whether its main or predominant or dominant objects, as distinct from its concomitant or incidental or ancillary objects, are charitable.

10. Even if an entity’s purposes are otherwise a “dominant purpose” as defined in s.6 of the Bill, by force of s.4(1)(c) it cannot be a charitable entity if it engages in activities that do not further or are not in aid of its dominant purpose. This being the case it seems the Bill meets the concern, identified in CP paragraph 54, and the “exclusively” enhancement is, strictly, unnecessary.

operatives Act 1992, s.281(1), “The expression “charitable purpose” includes any benevolent, philanthropic or patriotic purpose”.

¹⁴ The International Criminal Court Act 2002, Schedule 1, the Income Tax Assessment Act 1997, s.50-5 items 1.1 and 1.5, and s.50-100 refer simply to “charitable purposes” or “charitable institution”.

¹⁵ *Commissioner of Taxation v Word Investments Ltd* (2008) 236 CLR 204 at [17]; *Aid/Watch Inc* 241 CLR 539 at [67].

FOR THE PUBLIC BENEFIT – CP 2.1.3

Benefit; Presumption of benefit; Charitable religious organizations

11. Save for the exception of the “poor relations” cases, effectively “charitable purpose” and “public benefit” are not independent and disconnected concepts; a purpose cannot be a charitable purpose in the absence of the public benefit element.

12. It is trite that public benefit is a critical element of the legal concept of “charity”.¹⁶ “Charitable” purposes, in the technical legal sense, are public purposes.¹⁷ This is sometimes stated in the proposition that charity must benefit the community or a section of the community;¹⁸ the requirement of public benefit is that there must be a *benefit* which benefit must be a *public* benefit¹⁹ - a trust or gift for religious purposes is not excused from meeting this criterion of legal charity²⁰ if it is to qualify as made for a charitable purpose.

13. Not all religious purposes are charitable purposes.²¹ But at common law “advancement of religion” *is* a charitable purpose. The word “advancement” in the phrase “advancement of religion” (and “advancement of education”) connotes the concept of public benefit.²² To advance religion, in the “advancement of religion” sense, means to promote spiritual teaching in a wide sense, to spread its message, or to take positive steps to sustain and increase religious belief in ways that are pastoral or missionary.²³

14. Case law establishes that for purposes within the first three Pemsel classifications of charity the court will assume the purpose to be for the benefit of the

¹⁶ Dal Pont at [8.23]; *Verge v Somerville* [1924] AC 496 (PC) at 499 per Lord Wrenbury; *Re Compton* [1945] 1 Ch 123, 129 per Lord Greene MR.

¹⁷ *Latimer v CIR (NZ)* [2004] 1 WLR 1466 (PC) at [37] per Lord Millett.

¹⁸ *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297, 305 per Lord Simonds; Hubert Picarda, *The Law and Practice relating to Charities*, 4th (2010) ed at 29; Dal Pont at [3.31].

¹⁹ See e.g., *Gilmour v. Coats* [1949] AC 426. Picarda at 29, Dal Pont at [3.2], [3.4]ff, [3.37]ff.

²⁰ *Gilmour v. Coats* [1949] AC 426; *Joyce v Ashfield MC* [1975] 1 NSWLR 744, 752.

²¹ *Gilmour v Coats* [1949] AC 426 at 449.5; *Radmanovich v Nedeljkovic* (2001) 52 NSWLR 641 at [180].

²² *National Deposit Friendly Society Trustees v Skegness Urban District Council* [1959] AC 293 HL at 322 per Lord Denning. Dal Pont at [20.27].

²³ *Keren Kayemeth Le Jisroel Ltd v IRC* [1931] 2 KB 465, 477; *United Grand Lodge of Ancient Free & Accepted Masons of England v Holborn Borough Council* [1957] 3 All ER 281, 285; *Presbyterian Church (New South Wales) Property Trust v Ryde Municipal Council* [1978] 2 NSWLR 387 CA at 407; *National Deposit Friendly Society Trustees v Skegness UDC* [1959] AC 293, 322.

community, and therefore charitable unless the contrary is shown²⁴ - or in other words, if the purpose is within one of the first three Pemsel classifications, “the court will easily conclude that it is a charitable purpose”.²⁵

15. In relation to the “presumption” of benefit to the community for purposes that fall within the first three Pemsel classifications, the following commentary in Picarda²⁶ is apposite-

“The mythical presumption - The text books on the law of evidence made no mention of a presumption of public benefit in relation to charities. The history of the matter corroborates the absence of any presumption that requires such textbook coverage. *Public benefit was so inherent and embedded in the concept of charity in the statute of 1601 that its presence hardly needed to be articulated. It was the key to the statute. The twin themes of relief of poverty and public utility were plain to behold in the designated purposes set out in the preamble.* Public utility was perceived in municipal betterments for the improvement of divers communities, bridges, harbours streets and other public works and of course in education and learning. *This was not a matter of some kind of artificial presumption. It was a self-evident accepted truth that generated a huge body of case law enunciating what is charitable.*” (Emphasis added.)

16. Lord Macnaghten, in the well-known passage from *Pemsel*²⁷, said “charity” in its legal sense “comprises four principal divisions”, which his Lordship recited as:

“trusts for the relief of poverty, trusts for the advancement of education, trusts for the advancement of religion, and trusts for other purposes beneficial to the community not falling under any of the preceding heads”.

In this passage the “beneficial to the community” qualification is expressed solely in respect to “trusts for other purposes not falling under any of the preceding heads”.

This is properly explicable, in relation to religious purposes, on the basis satisfaction of the “beneficial to the community” requirement is inherent in the “advancement” concept.

17. The purposes of a contemplative order were in *Gilmour v Coats*²⁸ held not charitable. It seems that decision does not represent the law in Australia in regard to

²⁴ *National Anti-Vivisection Society* [1948] AC at 42, 65; *Nelan v Downes* (1917) 23 CLR 546, 573 per Powers J; *Re Lambert* [1967] SASR 19, 24.

²⁵ *National Anti-Vivisection Society* [1948] AC at 65.

²⁶ At p.39B.

²⁷ [1891] AC 531, 583.

²⁸ [1949] AC 426.

gifts to contemplative religious orders.²⁹ Gobbo J in *Crowther v Brophy*³⁰ said it may be that “the success of intercessory prayer” (the public benefit test recited in *Gilmour v Coats*) is an inappropriate test, and 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 a more appropriate consideration to adopt.³¹

Public benefit in “advancement of religion”

18. As to “benefit” in religious purposes that are otherwise charitable, Lord Simonds said, in *Gilmour v Coats*³², “The law may assume, without inconsistency, that all intercessory prayer for spiritual benefits, offered by devout persons of no matter what religion, is capable of benefiting the public generally or a section of it”. In the same case Lord Reid said, “A religion can be regarded as beneficial without it being necessary to assume that all its beliefs are true and a religious service can be regarded as beneficial to all those who attend it without it being necessary to determine the spiritual efficacy of that service or to accept any particular belief about it.”³³

19. Cross J in *Neville Estates Ltd v Madden*³⁴ thought the court entitled to assume that some benefit accrues to the public from the attendance at places of worship of persons who live in this world and mix with their fellow citizens.³⁵

20. Slade J noted in *McGovern v AG*³⁶ that in some cases a purpose may be so manifestly beneficial to the public that it would be absurd to call evidence on this point.

²⁹ See *Crowther v Brophy* [1992] 2 VR 97, 100 and *Joyce v Ashfield MC* [1975] 1 NSWLR 744, 750-751 per Reynolds JA.

³⁰ [1992] 2 VR 97, 100.

³¹ Gobo J cited Australian decisions which recognize that the contemplative life may convey sufficient elements of public benefit to make assistance for the pursuit of such life “charitable”: [1992] 2 VR at 100.

³² [1949] AC at 453.

³³ [[1949] AC at 459.

³⁴ [1962] 1 Ch 832, 853.

³⁵ It would appear to be the case that all world religions promote as dogma some equivalent to the “Golden Rule” for Christians: “whatsoever ye would that men should do to you, do ye even so to them” - see Gospel of Matthew 7:12, New Testament, King James Version; see too Appendix II of H. R. Sorensen & A.K. Thompson, “The Advancement of Religion is Still a Valid Charitable Object in 2001” (Centre for Philanthropy and Non-Profit Studies, Queensland University of Technology, 2000, Working Paper No. CPNS13) which provides a list of world religions, including Confucianism, Hinduism, Judaism, Buddhism, Islam, Zoroastrianism, Bahai, Jainism and Sikhism which hold a similar belief.

³⁶ [1982] 1 Ch 321, 333-4.

21. The public benefit requirement is not satisfied if the purpose is unlawful or contrary to public policy, notwithstanding it is otherwise a charitable purpose.³⁷ It follows that a religious purpose that is unlawful or contrary to public policy does not qualify as “advancement of religion”. If the purpose has elements of harm or detriment as well as public benefit and the former are found by the court to outweigh the latter, then a purpose that would otherwise be charitable, is not.³⁸

22. In an Address entitled “The Relevance of Religion”,³⁹ which briefly examines the nexus between religion, morality, and law, the then Chief Justice of the High Court of Australia, The Honourable Murray Gleeson, expressed these views-

“... Our community prides itself on being multicultural. Multiculturalism necessarily involves a multiplicity of values, including religious and moral values. We do not equate religion with morality. Many people have strong moral values without basing those values on religious doctrine....

...

The influence of religion on various aspects of civil and criminal law is indirect, and largely by way of the influence of religion on morality.

...

This brings me to the point I want to make about the continuing public importance of religion. Lord Devlin contended that “no society has yet solved the problem of how to teach morality without religion”.

.... There can be morality without religion; just as there can be religion without true morality. But having an individual and personal conviction is not the only thing that is important. It is the general acceptance of values that sustains the law, and social behaviour; not private conscience. Whether the idea is expressed in terms of teaching, or communication, there has to be a method of getting from the level of individual belief to the level of community values. Religion is one method of bridging that gap....

This aspect of the contribution of religion to society, and to the law, is often overlooked or underestimated.”

23. It would seem open to conclude as self-evident, that activities comprising “advancement of religion” encompass or involve a benefit to the community at large.

³⁷ Dal Pont [3.38].

³⁸ Dal Pont [3.43].

³⁹ (2001) 75 ALJ 93.

Charities Bill 2003 – exclusions, public benefit and religious societies

24. The Bill, by s.4(1)(d), excludes from being a charitable entity an entity which has a “disqualifying purpose” as defined in s.8; pursuant to s.8(1) “engaging in activities that are unlawful” is a “disqualifying purpose”. Under the common law an entity’s unlawful purposes disqualify it from being a “charitable” entity by denying that the entity’s purposes satisfy the public benefit requirement.⁴⁰

25. Pursuant to s.4(1) of the Bill an entity does not qualify as charitable except it is an entity that-

- (e) does not engage in, and has not engaged in, conduct (or an omission to engage in conduct) that constitutes a serious offence.

The thinking behind this provision confuses purposes and activities. If an entity’s purposes are unlawful then the public benefit requirement is not satisfied.⁴¹ Section 4(1)(e) operates to deny charitable status for all time and is therefore manifestly harsh. Even more so given that the unlawful activity of an entity is in fact conduct of an individual or individuals representing the entity, and that a “serious offence” would most likely see the individuals concerned being, in the very least, relieved of their representative status by the entity.

26. The s.4(1)(e) “fit-and-proper-person” style test should not be part of a core definition of “charity” intended to apply to that term in every other Act. Defaults involving offences under the law should be, and is more appropriately, dealt with by authorities tasked with the administration of those laws.

27. By force of s.10 of the Bill, a reference in any Act to “charitable purpose” is a reference to *inter alia* “the advancement of religion”. As previously indicated,⁴² according to case law “advancement of religion” is a charitable purpose at law, it being a particular class of purpose that is beneficial to the community.

28. Pursuant to s.7(1) of the Bill a purpose is for the “public benefit” if and only if:

- “(a) it is aimed at achieving a universal or common good; and
- (b) it has practical utility; and

⁴⁰ See para 21 above.

⁴¹ See para 21 above.

⁴² See para 13 above.

- (c) it is directed to the benefit of the general community or to a sufficient section of the general community.”

On its terms s.7 does not appear to allow, unlike the common law on charities, that a public benefit may “benefit” directly or indirectly;⁴³ or that the public benefit requirement allows that different standards may apply to different categories of charity - it does not follow that a section of the public sufficient to support a valid charity in one category must as a matter of law be sufficient to support a trust in any other category.⁴⁴ The following is an example of the latter: “There might well be a valid trust for the promotion of religion benefiting a very small class. It would not at all follow that a recreation ground for the exclusive use of the same class would be a valid charity, though it is clear ... that a recreation ground for the public is a charitable purpose.”⁴⁵

Section 7(1)(a) and (b)

29. In s.7(1)(a) the term, “a universal or common good” (the meaning of which is not defined and therefore at large) may not have the flexibility of “beneficial to the community”. It is, perhaps, more nebulous in its scope than “beneficial to the community”, which has, at least, the advantage of a case law history of its application. Section 7(1)(b) is also problematic. Apart from the fact that a “purpose” (unlike an activity) cannot have, in the sense of conferring a benefit, a “practical utility” - whatever that may intend. It is not clear from the terms of the Bill whether or not “a universal or common good” and “practical utility” are limited to tangible benefits. If they do not include an intangible such as spiritual benefits, a sense of well-being, then activities that constitute “advancement of religion” may not satisfy s.7. If those terms are intended to include intangibles then, to remove doubt, this should be expressly provided for in the legislation.

30. Where ordinarily the benefit is intangible, such as would be the case with advancement of religion and to some extent advancement of education, then demonstrating the benefit on the s.7 criteria (taken at face value) may prove a difficult

⁴³ *Pemsel* [1891] AC at 583; Dal Pont at [3.37]-[3.44]; Picarda at 39B.

⁴⁴ Picarda 35-36. *IRC v Baddeley* [1955] AC 572, 615; Picarda 38; *Joyce v Ashfield MC* [1975] 1 NSWLR 744, 752E per Reynolds JA, “In my opinion, it is not correct to attempt to apply principles as to the public element which have been laid down in respect of the other heads of charitable trusts to trusts for the benefit of religion.”

⁴⁵ *Baddeley* [1955] AC at 615 per Lord Somervell.

matter. It is not clear what s.7 intends as matters that would suffice as “evidence” establishing intangible or indirect benefits and satisfy the requirements of “a universal or common good” and “practical utility”. The benefit of religious worship may less easily be established by, in relative terms, a new religious body as opposed to one of significantly longer standing, notwithstanding the nature and goals of the worship are much the same.

Section 7(1)(c)

31. At common law “community” includes a section of the community. In s.7(1)(c) the term “general community” is undefined; *prima facie* “general community” is more limited than “community” as understood in charity law, and to that extent may exclude some religious purposes which under the current law fall within “advancement of religion”.

32. In respect to the public benefit element in connection with a hall used for meetings by the religious sect known as the Exclusive Brethren, Reynolds JA, in *Joyce v Ashfield Municipal Council*⁴⁶ said-

“Even if the ceremonies of the Exclusive Brethren in the hall can be regarded as a temporary withdrawal from the world, those ceremonies are a preparation for the assumption of their place in the world in which they will battle according to their religious views to raise the standards of the world by precept and example. *From the fact that they prepare themselves in private nothing can be deduced to deny the conclusion that these religious ceremonies have the same public value in improving the standards of the believer in the world as any public worship.... and, from the fact that their religious ceremonies cannot be classed as public worship, it cannot be deduced that they are not for the public benefit.*” (Emphasis added.)

33. Referring to the dissenting judgment of Menzies J in *Thompson v Federal Commissioner of Taxation*⁴⁷, (a case relating to the Exclusive Brethren), Reynolds JA went on to say-

“[Menzies J] pointed out that *members of a religious community of themselves constituted a section of the community for the purposes of the principle that a charitable purpose must have a public element. In other words, it is not to the point, where a trust is for the benefit of religion, that such advantages are not available to the public generally.* The same had also been pointed out by Lord

⁴⁶ [1975] 1 NSWLR 744, 751-2.
⁴⁷ (1959) 102 CLR 315 at 329.

Reid in his dissenting judgment in *Inland Revenue Commissioners v Baddeley* [1955] AC 572, at 612.... *Though these are dissenting judgments it is obvious they must be correct on this issue. The exclusiveness which is so notable a feature of the Brethren is recognized as a legitimate feature of many religious sects and trusts to support religious observances confined to quite small groups of worshippers have always been treated as charitable. In my opinion, it is not correct to attempt to apply principles as to the public element which have been laid down in respect of the other heads of charitable trusts to trusts for the benefit of religion.*" (Emphasis added.)

34. In relation to public benefit, the common law ought to be left to apply but supplemented by legislative provisions which (as with s.4(2) of the Bill) enable such other purposes as the legislature may from time to time consider appropriate to qualify as "charitable". This approach is sufficient to the need without the unnecessary burden of administrative rules and practices that would fall upon religious societies and the Charities Commission.

Dated: 09 December 2011
