

# SUBMISSION TO THE TREASURY, *A DEFINITION OF CHARITY* (CONSULTATION PAPER, OCTOBER 2011)

BY THE NOT-FOR-PROFIT PROJECT, UNIVERSITY OF MELBOURNE LAW SCHOOL

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## INTRODUCTION

The University of Melbourne Law School's Not-for-Profit Project is a three-year research project funded by the Australian Research Council which began in 2010. This project is the first comprehensive Australian analysis of the legal definition, taxation, and regulation of not-for-profit organisations. Further information on the project and its members is attached to this submission as Appendix A.

We welcome this opportunity to contribute to the Treasury's work, especially as a key aspect of our project has been the issue of the definition of charity. We have done a considerable amount of work on this topic, which we refer to here, and which is attached for your reference:

- Joyce Chia et al., *Defining Charity: A Literature Review* (2011).
- Joyce Chia, Matthew Harding and Ann O'Connell, 'Navigating the Politics of Charity: Reflections on *Aid/Watch v Commissioner of Taxation*' (2011) 2 *Melbourne University Law Review* (forthcoming).
- Ann O'Connell, 'Defining Charity—Where to from Here?', Speech presented at the Australian Charity Law Association Conference, Melbourne, 23 September 2011.
- Matthew Harding, 'Finding the Limits of *Aid/Watch*' (2011) 3(3s) *Cosmopolitan Civil Societies Journal* 34.
- Matthew Harding, 'Distinguishing Government from Charity in Australian Law' (2009) 31 *Sydney Law Review* 559.
- Matthew Harding, 'Trusts for Religious Purposes and the Question of Public Benefit' (2008) 71 *Modern Law Review* 159.

With the exception of the forthcoming journal articles, this research is also available at our website, <http://tax.law.unimelb.edu.au/notforprofit>. The website also has a resources page which hosts many of the relevant documents discussed below.

This submission draws upon this research, which has included consideration of the equivalent reform processes in comparable jurisdictions as well as the various documents relevant to the Australian context. These are discussed in detail in the literature review. The submissions also draws extensively on the discussion of the common law of charity in leading textbooks, including Professor Gino Dal Pont's *The Law of Charity* (2<sup>nd</sup> ed, 2010) ('Dal Pont') and Hubert Picarda, *The Law and Practice Relating to Charities* (4<sup>th</sup> ed, 2010) ('Picarda'), as well as the recently released ruling by the Australian Taxation Office ('ATO'), *Income tax and fringe benefits tax: charities* (2011) ('TR 2011/4').

We begin this submission by welcoming the Government's reform in this area, and agreeing with the Government's approach of basing the new statutory definition on the general principles of the *Inquiry into the Definition of Charities and Related Organisations* ('Sheppard Inquiry') as reflected in the Exposure Draft of the Charities Bill 2003 ('Charities

Bill 2003'). We acknowledge that the Government has decided not to re-open for public discussion the wider debate concerning the definition of charity, and our submission proceeds on this basis.

Although we are in general agreement with the Government's approach and agree with many of the recommendations of the Sheppard Inquiry, we consider that there is still a real need to improve upon the Charities Bill 2003 in significant respects. In particular, we consider that there should be an expansion of the list of charitable purposes and that some statutory guidance should be provided in respect of the public benefit test. We also recommend the omission of references to disqualifying activities and purposes, and updating the Bill to reflect the principles of the High Court's decision in *Aid/Watch Incorporated v Commissioner of Taxation* [2010] HCA 42 ('*Aid/Watch*') and *Central Bayside General Practice Association Limited v Commissioner of State Revenue* [2006] HCA 43 ('*Central Bayside*').

Given the significance of this reform and our particular expertise in this area, we have examined the issues in some detail in this submission. We have begun with our general approach to the reform. We then discuss in detail the key issues of charitable purpose and public benefit. We consider purposes and activities, particular types of bodies, and other issues raised in the Consultation Paper. As this does not follow the order of the Consultation Paper, we have provided for ease of reference below a summary of our responses to the questions in the Consultation Paper, as well as a list of the Recommendations we have made throughout our submission as Appendix B.

## SUMMARY OF RESPONSES TO CONSULTATION PAPER

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 recommend that the requirement be changed so that a charity must have 'charitable purposes only'. To avoid doubt, however, it should be specified that this does not preclude the existence of other purposes that further, are in aid of, or are ancillary or incidental to these charitable purposes.

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?*

It is preferable to clarify the charitable status of peak bodies within the statutory definition. The tribunal decision is helpful, but remains the decision of a tribunal only in one State. We recommend that, as in the United Kingdom and Ireland, there should be express reference to the charitable purpose of advancing volunteering, the voluntary sector, and the effectiveness and efficiency of charities.

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

As there is significant complexity in the common law regarding this element of the public benefit test, there should be some clarification through the statutory definition. We recommend that the test be re-stated in the legislation in the following manner:

In determining whether there is a benefit for the public or a sufficient section for the public, regard should be had to:

- 1) the existence of wider benefits to the general community;
- 2) the nature of any limitations on the class to be benefited, including in particular:
  - a. the extent to which the class of potential beneficiaries is open in nature;
  - b. the extent to which such limitations are related to the nature of the charitable purpose; and
  - c. the practical need for such limitations.
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?*

It is desirable to clarify that the 'section of the public' test does not, by itself, disqualify trusts and organisations that benefit people connected by blood ties, as is done in the *Charities Act 2005* (NZ). We also recommend specific legislative provision for the charitable status of prescribed bodies corporate under the *Native Title Act 1993* (Cth).

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?*

There is considerable benefit in clarifying further the public benefit test, as this has been a source of complexity and confusion in the common law. In addition to clarifying the relevant factors with regard to when the benefit is for the public or a 'sufficient section of the public' (see Question 3), we consider it is helpful if the legislation states that:

- The benefit(s) may be tangible or intangible, direct or indirect;
  - The benefit(s) are to be assessed in the light of contemporary needs and circumstances;
  - The benefit(s) may be assessed against potential detriment(s), where appropriate; and
  - The inquiry is not into the merits of the methods or opinions of the organisation.
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?*

As noted above, some clarification of key principles in the public benefit test is preferable. However, such clarification in the statutory definition will not remove the need for the regulator to provide more detailed guidance on the application of such a test to particular circumstances.

7. *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?*

This is perhaps the most difficult and contested issue, as the competing arguments are finely balanced. The principle that all charities should be required to prove public benefit affirmatively furthers objectives of transparency and accountability, and could promote public trust and confidence.

However, we also express reservations about the desirability of removing the presumptions of public benefit. We note that the legal status of the 'presumptions' is often overstated. We consider that the presumptions perform some useful functions, including minimising the evidential (and compliance) burden, and assisting in determinations where public benefit is intangible, diffuse, or which involve conflicts of beliefs and values.

We are also concerned about the removal of the presumptions from a practical and a political perspective. As a practical matter, the determination of public benefit is likely to be resource-intensive, both on the part of charities and on the part of the regulator. We are not convinced that this is the best use of the limited resources of the regulator (or of charities). From a political perspective, we note that the removal of the presumptions is likely to be interpreted as an expression of scepticism towards certain parts of the sector, which may undermine support for this reform and harm relations between government and the sector.

It is, of course, always possible to disprove public benefit. The Australian Charities and Not-for-Profits Commission (ACNC) should have sufficient powers to enable it to require further information from charities where it considers there is a risk that the public benefit test is not met. Further, charities whose purposes do not fall within recognised categories of charities must still prove public benefit, as is currently done.

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?*

As noted above, the ACNC should be required to provide guidance on the public benefit test in a manner similar to that of Charity Commissions overseas. As the charities will report (presumably annually) to the ACNC, the ACNC is also best placed to identify whether charities are continuing to meet this requirement, and should have appropriate powers to request further information where it considers there is a risk it is not meeting such a requirement.

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

This is dealt with in the answer to Question 7.

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

No 'activities' test should be included in the statutory definition. The inclusion of such a test muddles fundamental concepts of charity law and will induce suspicion (and engender confusion) in the charitable sector. However, if such an activities test is included, it should accurately reflect the current common law principles.

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

We see no reason to include any reference to activities in the statutory definition. This is not done in comparable legislation and, as discussed above (see Question 10), is likely to confuse the law or, at least, the intended audience of the law.

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?*

The proposed modification is too limited and does not correctly reflect the principles in *Aid/Watch*. We recommend instead that the entire clause be removed. The issue of whether certain types of political purposes are charitable should instead be left to the general tests of charitable purpose and public benefit. To the extent that charitable engagement in politics raises policy concerns, these should be dealt with in the legal regime that regulates those concerns (for example, in electoral or counter-terrorism legislation) rather than in charity law.

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

As noted above (see Question 12), this prohibition does not reflect the principles of the decision in *Aid/Watch*. Further, the prohibition does not reflect sound policy. There are many good reasons for including charities in Australian political discourse, including their representation of the marginalised and their awareness of relevant policy issues and the consequences of implementation.

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

There is value in clarifying the impact of partnerships, joint ventures, and shared service arrangements on the charitable status of organisations. As a matter of policy, arrangements that encourage collaboration between charities are to be encouraged. Further, arrangements between charities and commercial or government entities that are designed



to facilitate charitable purposes, including through additional financing, should be encouraged.

The reference to ‘partnership’ in the Charities Bill 2003 may inhibit such collaboration because of the breadth of the term ‘partnership’ in tax law. We therefore recommend that it is not specified as a disqualifying entity. We also recommend empowering the ACNC with discretion to consider groups of related organisations together in an application for charitable status, to cater for complex groups of organisations.

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

The distinction between charity and government may be better regarded as a contextual distinction. It may not be necessary therefore to include the distinction at all (in line with some comparable definitions overseas). Alternatively, if the distinction is to be included, it should be restricted to ‘government bodies’ only, or government bodies and a specified level of control, analogous to the threshold of ‘control’ in the *Corporations Act 2001* (Cth).

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 of charitable purposes in the Charities Bill 2003 and the *Extension of Charitable Purposes Act 2004* (Cth) represent a good basis for a list of charitable purposes. However, a major benefit of this reform would be to include other charitable purposes, especially those included in comparable legislation overseas (see Question 17).

We recommend, however, that the format of the Recommendation in the Sheppard Inquiry be followed, so that there is specific reference to particular disputed or novel issues within the major heads of charity. This will improve the accessibility of the definition. In particular, we recommend elevating to their own heads the advancement of civil or human rights; the advancement of reconciliation, conflict resolution, harmonious community relations, and equality or diversity; and the advancement of animal welfare. We also recommend express reference to some other charitable purposes identified in the Explanatory Material accompanying the Charities Bill 2003 (Cth).

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

We recommend including charitable purposes that are included in the legislation of the United Kingdom and Ireland, including: the advancement of citizenship and community development; the advancement of sport and the provision of recreational facilities; and the advancement of conflict resolution. We also recommend considering including a category of promoting access to information and advice.

We also recommend drawing inspiration from overseas legislation by expanding, clarifying and/or modernising some of the listed purposes. These suggestions include: adding the 'saving of lives' to the advancement of health; extending the advancement of culture to include specific reference to the arts, heritage, philosophy and the sciences; extending the advancement of religion to include analogous philosophical beliefs; modernising the head in relation to animal welfare; and providing specific reference to urban and rural regeneration, the promotion of volunteering, the voluntary sector and the effectiveness and efficiency of charities, and the advancement of industry or commerce.

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

The provision of recreational facilities for social welfare (and, in Tasmania, sport) would facilitate a harmonised definition, as this is already deemed to be charitable in several jurisdictions.

A modern statutory definition of charity would assist in the process of rationalising the complexity of legislative references to charities, particularly in the context of State or Territory tax concessions which are unduly complex. However, different policy contexts may justify broader or narrower definitions of charity, particularly in the context of regulatory regimes and trusts legislation. This may be achieved by the use of particular conditions for different types of concessions.

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

We agree that there are limitations in relation to ADRFs, including in their fundraising, time of establishment, capacity for distribution, and the complexity of accessing tax concessions. However, we do not see this as part of the process of the definition of charity and consider that it requires separate consultation.

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

We agree that the statutory definition should be, if anything, broader than the common law and therefore that there should be minimal transitional issues involved. We agree that existing endorsements by the ATO should be 'carried over' to the ACNC, as this will enable the ACNC to operate more efficiently. Rather than a general educational campaign, which may be counterproductive, we consider it is appropriate for peak bodies, voluntary sector service organisations and the like to promote the new definition throughout the sector, linked to appropriate guidance by the ACNC on the impact of the new definition.

We recommend, however, that if the 'poor relations' cases are to be no longer charitable, that a specific provision deem existing testamentary trusts in such cases to be charitable.

## OUR APPROACH TO REFORM GENERALLY

A key goal of our Project is to consider reform issues in a principled way. The following principles have guided us in our consideration of the issues in the Consultation Paper.

There are four good reasons for legislation where there is existing common law on the subject. First, legislation increases the **accessibility** of the law to a general, non-legal audience. This reason justifies the restatement of some principles of common law in legislation.

Second, legislation can **clarify** complex issues of law or where there is either no law or the common law is confused or in flux. This is a very useful function of legislation in the present context, as there are several areas in which the common law definition of charity is unduly complex or where no decision has been made directly on the subject.

Third, legislation can **modernise** the law. The common law's consideration of charity stretches over hundreds of years, and particular decisions clearly reflect a very different social context in different eras. This function is especially useful here as charities are often in the vanguard of identifying and addressing social issues, including controversial or minority viewpoints.

Fourth, legislation can **correct** principles of common law where the underlying policy is mistaken, archaic, or otherwise questionable. While, in general, the common law principles of charity are often sound, there are aspects of the definition which are at least problematic at the level of policy.

In responding to this Consultation Paper, therefore, we have identified which objectives will be furthered by any changes we recommend. We emphasise, however, that this reform is more than just an opportunity to state the principles of common law—it is a chance also to modernise it and to correct mistakes of the common law.

Another guiding principle of our Project is that legal reforms relating to charity should have, at its heart, a coherent contemporary vision of the not-for-profit sector. Such a vision would recognise that the sector does not merely supply social services or services and/or goods that are not supplied by government or the market. Rather, the sector plays a fundamental role in promoting the flourishing of individuals and communities in diverse ways and in diverse dimensions.

The characteristics of diversity, individual autonomy and voluntary association are, in our view, key virtues of this sector, and these should be facilitated and respected by the State. We agree, therefore, with the fundamental principle of the common law of charity that it should not be for the judges to enquire into the quality, effectiveness or efficiency of the methods of achieving charitable purposes, beyond certain minimal constraints.

We also note that a statutory definition of charity for all Commonwealth purposes will not be determinative of access to particular concessions. For example, Commonwealth tax legislation uses a number of different terms to describe bodies that are eligible for various concessions such as “public benevolent institution”. It will, therefore, be necessary to consider that legislation to determine how the statutory definition will be used to determine eligibility. Although not raised in this consultation, we believe that the tax legislation dealing with the NFP sector is itself in need of simplification.

## CHARITABLE PURPOSES (QUESTIONS 16 & 17)

### **Recommendation 1**

The statutory list of charitable purposes should include:

(a) the advancement of health or the saving of lives, including:

(ii) prevention or relief of sickness, disease or human suffering;

(b) the advancement of education;

(c) the advancement of social or community welfare, including:

(i) the prevention or relief of poverty;

(ii) the care, support or relief of those in need by reason of youth, age, ill-health, disability, financial hardship, disaster, geographical location, or other disadvantage, including by the provision of accommodation;

(iii) the integration of, or participation by, the disadvantaged;

(iv) the care or support of members or former members of the armed forces or the civil defence forces and their families; and

(v) the provision of child care services;

(d) the advancement of religion or analogous philosophical beliefs;

(e) the advancement of arts, culture, heritage, the sciences or philosophy, including:

(i) the cultures or customs of Indigenous peoples or ethnic or language groups;

(f) the advancement of the natural environment;

(g) the advancement of citizenship or community development, including:

(i) urban or rural regeneration;

(ii) volunteering, the voluntary sector, or the effectiveness and efficiency of charities;

- (h) the advancement of sport or the provision of facilities for recreation and leisure;
- (i) the advancement of civil or human rights;
- (j) the advancement of reconciliation, conflict resolution, harmonious community relations, or equality or diversity, including:
  - (i) assistance or support for immigrants and refugees;
- (k) the advancement of animal welfare;
- (l) the advancement of industry or commerce;
- (m) the advancement of public access to advice and information; and
- (n) other purposes beneficial to the community.

### **Recommendation 2**

The common law requirement that a purpose should be ‘within the spirit and intendment’ of the preamble to the Elizabethan Statute of Charitable Uses 1601 should be ousted by statute.

### **Recommendation 3**

There should be no definition of religion in the statutory definition.

## **APPROACH TO REFORM OF CHARITABLE PURPOSES**

One of the strongest arguments for a statutory definition is to expand the traditional classification of charitable purposes from the four *Pemsel* heads to reflect both case law and contemporary conceptions of charity. In this respect, we disagree in principle with the statement at [130] of the Consultation Paper that the list should be limited only to “those purposes that have strong recognition in the existing common law”. The Paper expects that future extensions, instead, will “fall to Parliament for consideration on a case-by-case basis”.

In our view, merely codifying existing charitable purposes would be a missed opportunity. As noted above, one of the purposes of this reform should be to facilitate a healthy civil society, including by updating and modernising archaic parts of the law. Further, the development of charity law is necessarily incremental. The development of charity law has also been impeded by the reluctance of charities to engage in expensive litigation, and the relative dearth of cases in England and Wales because of the influence of the Charity Commission. In our view, it would be a mistake to omit certain types of charitable purposes simply because they have not yet been litigated. For similar reasons, it would also be a mistake to leave future extensions to the courts. Finally, it is also mistaken to hope that Parliament will consider, on a case by case basis, future extensions of the law. So far, the

Commonwealth Parliament has only managed to extend the definition of charitable purpose marginally, in the *Extension of Charitable Purposes Act 2004* (Cth). Parliamentary time is increasingly precious and charities will rarely have sufficient political power to force ad hoc extensions on to the legislative agenda. We consider that additions that are widely recognised by the community as charitable can and should be included in any list of charitable purposes, and indeed that this would be a major benefit of this reform.

This is especially so because we have the benefit of the legislative definitions passed recently by the various jurisdictions of the United Kingdom and Ireland, which have usefully included clauses both clarifying issues in dispute and extending the scope of particular heads of charitable purpose. It makes no sense for us to ignore the extensions usefully made by those with whom we have shared the heritage of charity law.

Finally, we also note that most of these purposes are already covered by specific tax exemptions in Commonwealth law, and thus have already been recognised as of sufficient 'public benefit' by Parliament to warrant equivalent benefits. This recognition also minimises the transitional costs of adding new charitable purposes. We also consider that their addition may help in the longer-term project of rationalising the tax concessions available for not-for-profits, by bringing within the term 'charity' most of the purposes that are recognised as warranting tax relief.

#### APPROACH TO DEFINING CHARITABLE PURPOSES

We agree that the statutory list of charitable purposes in the Charities Bill 2003, when read in the light of the specific instances mentioned in the accompanying Explanatory Material, should form the basis of the proposed legislation. We agree, in particular, with the broad notion of 'advancement' adopted in the Bill to include prevention as well as relief. The *Extension of Charitable Purposes Act 2004* (Cth) should also be consolidated into this statutory definition. Of course, the listing of a charitable purpose of itself does not mean a particular organisation advancing that purpose will necessarily satisfy the definition of charity.

As discussed above, we consider that the list should also include purposes that have been recognised in the jurisdictions of the United Kingdom and Ireland in their definitions. We have also considered the other categories of tax exemption and tax deductibility in Commonwealth legislation, as well as legislation in South Africa<sup>1</sup> and Europe.<sup>2</sup>

Further, there are advantages in elevating particular purposes to their own head, or referring expressly to instances of charitable purposes. There are also advantages in

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<sup>1</sup> *Income Tax Act 1962* (South Africa) Sch 9.

<sup>2</sup> See generally David Moore, Katerina Hadzi-Miceva and Nilda Bullain, 'A Comparative Overview of Public Benefit Status in Europe' (2008) 11 *International Journal of Not-for-Profit Law* <[http://www.icnl.org/knowledge/ijnl/vol11iss1/special\\_1.htm](http://www.icnl.org/knowledge/ijnl/vol11iss1/special_1.htm)>.

extending or redrafting the language of the definition in line with the definitions adopted elsewhere. Finally, we also consider some minor issues of drafting.

## NEW PURPOSES

We recommend that, in addition to the purposes covered by the Charities Bill 2003 (Cth) and its accompanying Explanatory Material ('EM'), that the list be enlarged to include the following purposes:

- Advancement of citizenship or community development as a separate head, together with promotion of civic responsibility;
- Advancement of sport or provision of recreational facilities;
- Advancement of conflict resolution; and
- Promotion of access to information and advice.

The first three of these purposes have been recognised in the equivalent legislation in the United Kingdom and Ireland. For the purposes of comparison, we have provided as Appendix C a table that compares the lists of purposes in the various jurisdictions of the United Kingdom and Ireland with that of the Charities Bill 2003 and its EM.

### **Citizenship or community development**

In recent years, the flourishing of studies on civil society and third sector organisations has recognised the role of charities in inculcating civic values such as participation,<sup>3</sup> and its contribution to social capital.<sup>4</sup> The inclusion of this head recognises these valuable contributions.

The term 'citizenship', in this context, connotes the political conception of citizenship, namely the promotion of civic values such as (for example) public participation and governance, rather than the legal conception of citizenship. Examples that might fall under this head include organisations that promote digital democracy, or which train community activists. Greater public participation in the political process, and more 'active' citizenship, is clearly of public benefit.

'The promotion of community development' was included by the Sheppard Inquiry as an instance of a charitable purpose under the head of the advancement of social and community welfare. The EM included as an instance of a charitable purpose 'community

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<sup>3</sup> For an excellent overview, see Elisabeth S Clemens, 'The Constitution of Citizens: Political Theories of Nonprofit Organizations' in Walter W Powell and Richard Steinberg (eds), *The Nonprofit Sector: A Research Handbook* (Yale University Press, 2nd ed, 2006) 207.

<sup>4</sup> See, eg, Mark Lyons, 'Non-Profit Organisations, Social Capital and Social Policy in Australia' in Ian Winter (ed), *Social Capital and Public Policy in Australia* (Australian Institute of Family Studies, 2000) 165; J Butcher, 'Government, the Third Sector and the Rise of Social Capital' (2006) 12 *Third Sector Review* 69; Dag Wollebæk and Per Selle, 'Social Capital' in Rupert Taylor (ed), *Third Sector Research* (Springer, 2010) 219.

capacity-building'. Further, 'community development' is already recognised by the common law in a piecemeal fashion. For example, the provision of public works and utilities, the relief of poverty and distress, and the promotion of industry and commerce partly reflect aspects of this head. 'Community service organisations' have also been granted exemption from income tax.<sup>5</sup> However, the elevation of this purpose and its integration with citizenship will enhance conceptual clarity, and recognise and even foster the civic and community dimension of much charitable activity.

### **Sport and recreational facilities**

The recognition of sport has been a vexed issue within the common law, with sporting purposes *per se* not currently considered to be charitable.<sup>6</sup> However, sporting purposes with a nexus to other charitable purposes, such as education, may be charitable.<sup>7</sup> Most recently, the Administrative Appeals Tribunal has acknowledged that the promotion of health through sport may be a charitable purpose.<sup>8</sup>

The common law exclusion of sport has been widely criticised.<sup>9</sup> The principal argument in favour of its inclusion is succinctly stated:

The inclusion of sport as a charitable object recognises the change in society which now considers sport to be integral to a healthy lifestyle and the prevention of illness.<sup>10</sup>

Dal Pont observes that other benefits include mental benefits and social benefits to the community. Further, he adds, it is odd to exclude sport given the value Australians have generally placed upon the "both public participation in sport and ... the uplifting in the national morale of sporting triumphs".<sup>11</sup>

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<sup>5</sup> *Income Tax Assessment Act 1997* (Cth) s 50.10. This was intended to include civic clubs such as Rotary International, and has been interpreted to include a not-for-profit corporation providing face-to-face banking services in a rural town lacking such services: *Wentworth District Capital Ltd v Commissioner of Taxation* [2010] FCA 862.

<sup>6</sup> *Re Nottage* [1985] 2 Ch 649.

<sup>7</sup> G E Dal Pont and S Petrow, *Law of Charity* (LexisNexis Butterworths, 2010) [12.8].

<sup>8</sup> *Bicycle Victoria Inc and Commissioner of Taxation* [2011] AATA 444. See also *Northern NSW Football Ltd v Chief Commissioner of State Revenue* [2009] NSWADT 113.

<sup>9</sup> Ontario Law Reform Commission, *Report on the Law of Charities* (1996), vol 1, 224; P Smith, 'Charity and a Question of Sport' (1998) 5 *Charity Law and Practice Review* 135; James Willis, 'Charitable Trusts and Sport' [2000] *New Zealand Law Journal* 69; Cabinet Office Strategy Unit (UK), *Private Action, Public Benefit: Sport and Charitable Status* (September 2002); David Brown, 'The Charities Act 2005 and the Definition of Charitable Purposes' (2005) 21 *New Zealand Universities Law Review* 589, 617; M. McInnes, 'Charity and Sport: A Canadian Perspective' (2008) 124 *202*; Richard Pidgeon, 'Amateur Sport and the Charities Act' [2009] *New Zealand Law Journal* 65.

<sup>10</sup> Alison MacLennan and Francesca Quint, *Blackstone's Guide to the Charities Act 2006* (Oxford University Press, 2007) [2.09].

<sup>11</sup> Dal Pont and Petrow, *Law of Charity*, above n 7, [12.5].



Logically, it is difficult to justify the exclusion of sport when sport conducted by an educational institution, or restricted to a locality, may be charitable.<sup>12</sup> It is also difficult to justify its exclusion on the basis that it provides pleasure, since (as Picarda points out) this is also true of arts and culture.<sup>13</sup>

The recognition by the various jurisdictions of the UK of the charitable status of sport, and in other jurisdictions as well,<sup>14</sup> indicates that the traditional common law position is out of date. We also note that sport has already been recognised as beneficial to the community for the purposes of income tax exemption,<sup>15</sup> an inclusion that was justified as far back as 1952.<sup>16</sup> Finally, the perception of the ‘public benefit’ of sport is amply testified to by the fact that sports and recreation has one of the largest volunteer rates in Australia.<sup>17</sup>

In addition, several Australian States have also passed legislation deeming recreational facilities for social welfare to be of public benefit,<sup>18</sup> following England in this respect.<sup>19</sup> Most of these Acts require that the facilities are provided in the interests of social welfare. This is defined as meaning “with the object of improving the conditions of life”, either for those who need such facilities by reason of their youth, age, infirmity or disablement, poverty or social and economic circumstances; or where the facilities are available to members of the public at large, or male and female members.

However, s 4(1) of the *Variation of Trusts Act 1994* (Tas) simply provides:

A gift of property to provide opportunities or facilities for sport, recreation or other activities associated with leisure is taken to be, and to have always been, a gift for charitable purposes.

In addition to the principled arguments set out above, the inclusion of sport will therefore also facilitate harmonisation across States and Territories.

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<sup>12</sup> Smith, ‘Charity and a Question of Sport’, above n 9.

<sup>13</sup> Hubert Picarda, *The Law and Practice Relating to Charities* (Bloomsbury Professional, 4th ed, 2010) 178.

<sup>14</sup> For example, amateur sport is also recognised as a public benefit activity in South Africa: *Income Tax Act 1962* (South Africa), Sch 9, Pt 1, it 9. See also *Hutchinson Baseball Enterprises Inc v Commissioner of Internal Revenue* 696 F 2d 757 (Court of Appeals (10th Circuit), 1982); *Re Laidlaw Foundation* (1984) 13 DLR 491. It is also recognised in European countries, including France and Germany: see Council on Foundations, *Country Information United States International Grantmaking* <<http://www.usig.org/countryinfo.asp>>.

<sup>15</sup> *Income Tax Assessment Act 1997* (Cth), s 50.45.

<sup>16</sup> Commonwealth Committee on Taxation, *Report on Exemption of Income of Certain Bodies and Funds (Reference No. 25)* (Parliamentary Paper, No 136, 12 August 1952), [13]–[16].

<sup>17</sup> Australian Bureau of Statistics, *Voluntary Work, Australia, 2006* (No Cat 4441.0, 20 July 2007) <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/productsbyCatalogue/124E5675AD3AED8CCA256A71000019C5?OpenDocument>>.

<sup>18</sup> *Trustee Act 1936* (SA) s 69C; *Charitable Trusts Act 1962* (WA) s 5(1); *Trusts Act 1973* (Qld) s 103(2); *Variation of Trusts Act 1994* (Tas) s 4(1).

<sup>19</sup> *Recreational Charities Act 1958* (UK).

We note that the English provision refers to ‘amateur’ sport and the Scottish provision to ‘participation in sport’. However, we prefer the broader term ‘sport’, which reflects the more expansive scope of the current income tax exemption in Australia as well as the Tasmanian legislation, and which avoids the difficulties of determining the line between ‘amateur’ and ‘professional’ sports.

### **Conflict resolution**

While this head is new, it seems obvious that the promotion of the resolution of conflicts would be for the public benefit. It is clearly in line with the objects of promoting human rights and racial harmony which were recognised in the Charities Bill 2003 and its EM, and with the promotion of reconciliation, mutual respect and tolerance which was recognised by the Sheppard Inquiry and also in the EM.<sup>20</sup> Previously, trusts for peace and international friendship have been in conflict with the political purposes doctrine, which the High Court in *Aid/Watch* has clearly removed (as discussed below).

We consider that this is one of the ‘mistakes’ of the common law that a statutory definition should correct. There is no good policy reason to exclude from charitable status the promotion of peace, which is clearly an object that is of great public benefit. Similarly, it is hard to argue that friendships with other States are not generally of public benefit.

### **Access to advice or information**

There are a range of purposes that have been recognised as charitable in statutes and in the common law that relate to the promotion of access to advice or information. These include:

- The provision of legal services for the disadvantaged (which falls within the category of care, support and relief for the disadvantaged);<sup>21</sup>
- The promotion of access to media and a free press;<sup>22</sup>
- The protection and promotion of consumer rights and the improvement of control and quality with regard to products or services;<sup>23</sup>
- Research into, and dissemination of, information useful to the community;<sup>24</sup> and
- The provision of public amenities such as libraries, reading rooms and centres providing access to the Internet.<sup>25</sup>

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<sup>20</sup> Ian Fitzhardinge Sheppard, Robert Fitzgerald and David Gonski, *Report of the Inquiry into the Definition of Charities and Related Organisations* (2001) <<http://www.cdi.gov.au/html/report.htm>>, 190–191.

<sup>21</sup> *Income Tax Act 1962* (South Africa), Sch 9, Pt 1, it 1m). The Charity Commission of England and Wales has registered a community law centre as charitable: Picarda, *The Law and Practice Relating to Charities*, above n 13, 210.

<sup>22</sup> *Income Tax Act 1962* (South Africa), Sch 9, Pt 1, 1q).

<sup>23</sup> *Income Tax Act 1962* (South Africa) Sch 9, Pt 1, 8b). This is also recognised in Europe: Moore, Hadzi-Miceva, and Bullain, ‘A Comparative Overview of Public Benefit Status in Europe’, above n 2.

<sup>24</sup> Picarda, *The Law and Practice Relating to Charities*, above n 13, 221–222.

Very recently, the Charity Commission recognised the charitable status of the Wikimedia Foundation, which promotes open access to content, under the residual ‘other purposes beneficial to the community’.<sup>26</sup>

Access to information may be conceptualised as charitable under existing heads in a number of ways. Access to advice or information that assists in dealing with disadvantage (for example, legal advice for the poor or health advice for the ill, access to the Internet for the economically disadvantaged) may be conceptualised as advancing social or community welfare in addressing the needs of the disadvantaged. Access to information may also be conceptualised as advancement of education, as Wikimedia argued originally (unsuccessfully). Access to government information may be conceptualised as part of the advancement of citizenship. Provision of access to digital technology may be conceptualised as provision of recreational facilities for the social welfare. Access to information is also a crucial component of the advancement of the arts, culture, heritage, sciences and philosophy.

Further, it is clear that access to information is a human right, as expressed in Article 19 of the *International Covenant on Civil and Political Rights* which includes as part of the right to freedom of opinion and expression a right to “seek, receive and impart information and ideas through any media and regardless of frontiers”. Access to government information, in particular, has been held to be a fundamental human right by human rights courts and is constitutionally guaranteed in 60 countries.<sup>27</sup> The advancement of access to information may therefore be conceptualised as part of advancing civil or human rights.

In the context of our information age, it is likely that access to information will have increasing practical significance. Digital access to information, the promotion of open-access content, open government and digital democracy initiatives, and the emerging not-for-profit media sector<sup>28</sup> are examples of emerging charitable purposes in this arena. There is therefore a good case for addressing this emerging issue directly in the statutory definition. This is particularly so because there has been some complexity in analysing its relevance to existing heads. For example, in *Vancouver Regional Freenet* the provision of a community

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<sup>25</sup> *Vancouver Regional Freenet Association v Minister of National Revenue* [1996] 3 CTC 102. See also the decision of the Charity Commission of England and Wales on Community Server, <<http://www.charitycommission.gov.uk/Library/start/commservdecision.pdf>>.

<sup>26</sup> Wikimedia Foundation, *UK Charity Registration a Milestone in the Recognition of the Wikimedia Movement* (7 November 2011) <<http://blog.wikimedia.org/2011/11/07/uk-charity-registration-a-milestone-in-the-recognition-of-the-wikimedia-movement/>>. See also *Charity Commission Application - Wikimedia UK* Wikimedia Foundation <[http://uk.wikimedia.org/wiki/Charity\\_Commission\\_application](http://uk.wikimedia.org/wiki/Charity_Commission_application)>.

<sup>27</sup> *Constitutional Protections of the Right to Information* Rights2org <<http://www.right2info.org/constitutional-protections-of-the-right-to>>.

<sup>28</sup> *News to You Canada v Minister of National Revenue* [2011] FCA 192; Steve Coll, *Nonprofit Newspapers* (2009) *The New Yorker*; Thomas Ferraro, ‘US bill seeks to rescue faltering newspapers’ *Reuters*, 24 March 2009.

centre to facilitate access to the Internet was characterised as analogous to the provision of highways in the Elizabethan statute, whereas the Charity Commission of England and Wales characterised it as a combination of the provision of public amenities, the provision of recreational facilities for the social welfare, and advancing education. The complexity of the process is well illustrated by the case of Wikimedia Foundation. It apparently encountered difficulty because the provision of a public resource is not an expressly listed charitable purpose, and it originally argued that it advanced education before a change in legal strategy which resulted in its successful argument by analogy to 19<sup>th</sup>-century cases dealing with reading rooms.<sup>29</sup>

A better reading of these instances, we suggest, is that they reflect the broader benefit of access to information. Conceptually, access to information provides at least three types of 'public benefit'. First, it serves an instrumental function in that it is a precondition to the enjoyment of other rights or the fulfilment of charitable purposes (such as the relief of disadvantage). Second, access to information is an essential element in a flourishing democracy and society because of the importance of the free exchange of ideas and communication. Third, access to information ultimately promotes the full flourishing of individuals because of the human need for expression, communication and social interchange. As the Court stated in *Vancouver Regional Freenet*:

Information is the currency of modern life. This has been properly called the information age. The free exchange of information amongst members of society has long been recognized as a public good. It is indeed essential to the maintenance of democracy, and modern experience demonstrates more and more frequently that it, more than any force of arms, has the power to destroy authoritarianism. The recognition of freedom of speech as a core value in society is but one aspect of the importance of freedom of information.

It is important, in our view, to recognise that access to information has a benefit beyond the instrumental benefit of furthering other charitable purposes or enabling the enjoyment of human rights. It also has a broader public benefit in the sense that the free exchange of information is an indispensable requirement of a healthy democracy and society. There is also, in our view, a good case to be made for the non-instrumental value of access to information itself, as its status as a human right indicates.

To embrace these three aspects of public benefit, we have suggested that the list of charitable purposes include the advancement of access to advice or information. We emphasise here that the purpose must be to advance *access*, not simply to provide information. The provision of news, for example, that is already widely available would not promote access to information. Nor would the mere provision of news on the basis that it

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<sup>29</sup> Kaye Wiggins, *Why Wikipedia Is Charitable* (29 November 2011) Third Sector Online <[http://www.thirdsector.co.uk/bulletin/third\\_sector\\_governance\\_bulletin/article/1106308/why-wikipedia-charitable/](http://www.thirdsector.co.uk/bulletin/third_sector_governance_bulletin/article/1106308/why-wikipedia-charitable/)>.

sought to be objective or unbiased.<sup>30</sup> The requirement of public benefit must still be fulfilled, so that the promotion of access to information to serve private interests would not be charitable, and access to the information must be 'beneficial' in some way. Further, the requirement that it be 'not for profit' would exclude the commercial provision of services. Finally, there may be other factors that would negate the 'public benefit' (for example, the promotion of access to classified information is likely to cause harm outweighing the public benefit in access).

While this broader formulation is preferred, there are other more conservative options that would embrace most of the recognised instances of charitable purposes, and probably cover the first two types of public benefit that we have identified. For example, it would be possible to include in the definition of 'advancement' express reference to the promotion of access of information relevant to a listed charitable purpose. This would cover, for example, the provision of free legal advice to the poor or otherwise disadvantaged, or the promotion of access to health information. Another possibility would be to specify as a charitable purpose the advancement of particular classes of information (such as legal or governmental) information.

#### ELEVATION OF, AND EXPRESS REFERENCE TO, CHARITABLE PURPOSES

Certain charitable purposes mentioned in the EM warrant either their own head or express reference in the definition as an instance of charitable purpose. This would improve the accessibility and clarity of the statutory definition. It would also be of expressive value in communicating the social significance of those purposes.

The following charitable purposes warrant their own paragraph in the definition of charitable purposes:

- The advancement of civil or human rights,<sup>31</sup>
- The advancement of reconciliation, conflict resolution, harmonious community relations, or equality or diversity; and
- The advancement of animal welfare.

We also consider that the format of the original Recommendation in the Sheppard Inquiry, which identified as sub-clauses particular points either in dispute in the common law or otherwise obscure, is preferable to the shorter version in the Charities Bill 2003. This would increase accessibility and clarity.

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<sup>30</sup> *News to You Canada v Minister of National Revenue* [2011] FCA 192 .

<sup>31</sup> We prefer here the broader phrasing of the EM to the confined reference to human rights in the legislation of the United Kingdom.

We have therefore included in our Recommendation the specific points mentioned by the Sheppard Inquiry, as well as including the following instances specified in the legislation of the UK and Ireland or in the EM:

- the care, support or relief of those in need by reason of youth, age, ill-health, disability, financial hardship, or other disadvantage, including through the provision of accommodation (UK);
- the relief of those in need by reason of disaster (EM);
- the care or support of members or former members of the armed forces or the civil defence forces and their families (EM);
- the integration of, or participation by, the disadvantaged (Ireland);
- the cultures or customs of Indigenous peoples or ethnic or language groups (EM); and
- assistance or support for immigrants and refugees (EM).

We have incorporated the relief of need by reason of disaster within the general provision dealing with the care, support or relief of disadvantage. In addition, we have made specific reference to 'geographical location' to include charities that work to address the disadvantages faced by rural or remote communities in Australia.

#### MINOR EXTENSIONS

In addition, we recommend redrafting existing purposes along the lines of the UK legislation to:

- Include the saving of lives in the head of advancement of health;
- Expand the head of advancement of culture to include specific reference to the arts, heritage, philosophy and sciences;
- Extend the advancement of religion to include also the advancement of analogous philosophical beliefs;
- Rephrase the 'prevention and relief of animal suffering' to the 'advancement of animal welfare';
- Include in the head of advancement of citizenship or community development the specific instances of urban and rural regeneration, and the promotion of volunteering, the voluntary sector or the effectiveness and efficiency of charities; and
- Include specific reference to the advancement of industry or commerce.

#### **The saving of lives**

This inclusion merely clarifies the existing law. The protection of human life has been upheld as being within the fourth *Pemsel* head. Gifts for providing lifeboats, for the Royal National

Lifeboat Institution and the Royal Humane Society for Saving Life, have been upheld, together with volunteer fire brigades.<sup>32</sup> The uncontroversial status of this extension is underlined by the recent passage of Commonwealth legislation extending gift deductibility status to volunteer fire brigades.<sup>33</sup>

Although arguably this might fall within the head of the ‘advancement of health’, this is not necessarily a natural understanding of the phrase ‘advancing health’. It is therefore desirable to include it in the statutory definition.

### **Arts, culture, heritage and sciences**

All of these purposes have been recognised as charitable, and were referred to in the EM. Although the phrase ‘advancement of culture’ is intended to encompass these elements, we consider that the phrasing in the UK statutes is clearer and more accessible. The addition of ‘sciences’ also expands the notion of ‘culture’ to include aspects that might otherwise have fallen within ‘education’.

### **Philosophical beliefs**

The legislation in Scotland expressly includes the “advancement of any philosophical belief” as analogous to the advancement of religion.<sup>34</sup> The South African legislation similarly includes the promotion and/or practice of a belief, and the promotion of, or engaging in, philosophical activities.<sup>35</sup>

The common law has accepted some ethical or philosophical beliefs as charitable.<sup>36</sup> The promotion of particular philosophical beliefs (such as the discussion of particular strains of liberal philosophy) would generally fall under other heads of charity, especially the advancement of education.

However, the common law has had some difficulty with some broader philosophical viewpoints and its potential overlap with ‘religion’. For example, in *Bowman v Secular Society* it was suggested that humanism would not be a charitable object.<sup>37</sup> Such belief systems clearly do not constitute ‘religions’. However, there is a strong argument for modernising our conception of charity to encompass philosophical belief systems analogous to that of religion in our modern, liberal, and largely secular society. This reflects a broader principle of liberal neutrality towards religions and will counter claims that charity law

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<sup>32</sup> Picarda, *The Law and Practice Relating to Charities*, above n 13, Ch 12.

<sup>33</sup> *Tax Laws Amendment (2010 Measures No. 4) Act 2010* (Cth) Sch 7.

<sup>34</sup> *Charities and Trustee Investment (Scotland) Act 2005* (Scotland) asp 10 s 7(3)(f).

<sup>35</sup> *Income Tax Act 1962* (South Africa), Sch 9, Pt 1, it 5b), c).

<sup>36</sup> See especially *Re South Place Ethical Society, Barralet v Attorney-General* [1980] 1 WLR 1565. Picarda suggests that the promotion of moral or spiritual welfare or improvement may be a separate type of charitable purpose: Picarda, *The Law and Practice Relating to Charities*, above n 13, 220–221.

<sup>37</sup> *Bowman v Secular Society Ltd* [1917] AC 406.

assumes that “any religion is likely to be better than none”,<sup>38</sup> an assumption that is not necessarily accepted by many in society. The public benefit in engaging with philosophy is, in our view, properly analogous to the public benefit in religion and its exclusion reflects an archaic historical context. It will also reduce pressure on the need for judges or the regulator to declare particular controversial beliefs to be a ‘religion’, with its symbolic implication of state sanction. For this reason, we recommend that the advancement of religion be extended to encompass analogous philosophical beliefs.

As a consequence, we have also recommended the addition of philosophy to the head of ‘the advancement of arts, culture, heritage and the sciences’. This is to clarify that it is a charitable purpose to promote other, non-analogous, philosophical beliefs.

### **Animal welfare**

The purpose of protecting animals has been held to be charitable. There are, however, complexities in the case law in interpreting how the protection of animals ‘benefits’ the public, which reflect outdated perceptions of the value of animal life.<sup>39</sup>

The EM to the Charities Bill 2003 included the ‘prevention and relief of animal suffering’ as an instance of a charitable purpose. However, we prefer the more expansive term of ‘animal welfare’ used in the UK legislation to reflect the modern holistic approach to animal welfare. For example, this would more clearly encompass situations where the purposes were targeted at redressing the destruction of an animal’s habitat, although there was not particular ‘suffering’.

### **Urban or rural regeneration**

The Charity Commission of England and Wales recognised the promotion of urban and rural regeneration as a charitable purpose in 1999. Such organisations may conduct a variety of activities, such as providing: assistance to the poor and unemployed, assistance or advice to new or existing businesses to improve unemployment, recreational facilities, and public amenities.<sup>40</sup>

This purpose overlaps with and combines other charitable purposes recognised by the common law, such as relief of poverty, the provision of public works and utilities, the promotion of commerce, and the purpose of benefiting a locality or neighbourhood. However, the addition of this express purpose will clarify the charitable status of organisations that combine such purposes, and allow greater flexibility in the way such organisations structure their activities.

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<sup>38</sup> Picarda, *The Law and Practice Relating to Charities*, above n 13, 100–101.

<sup>39</sup> Dal Pont and Petrow, *Law of Charity*, above n 7, [11.34]–[11.41].

<sup>40</sup> Charity Commission of England and Wales, *Promotion of Urban and Rural Regeneration* (RR, No 2, March 1999) <<http://www.charitycommission.gov.uk/publications/rr2.aspx>>.



## **Volunteering, the voluntary sector, and effectiveness and efficiency of charities**

At present, the charitable status of such bodies requires clarification (as discussed below). Therefore, express reference to this charitable purpose will recognise and encourage the valuable role of volunteering organisations, peak bodies and infrastructure organisations in the modern charitable sector. South Africa also makes similar provision.<sup>41</sup>

## **Industry or commerce**

Under the common law, the promotion of industry or commerce, including in particular fields such as agriculture, can be a charitable purpose, although such organisations may fail where their objects are directed to providing private benefits.<sup>42</sup> The promotion of particular industries is also specifically prescribed as exempt from income tax.<sup>43</sup>

As this is quite a distinct purpose from the others on the list, we consider that it is appropriate that this purpose be specifically mentioned. Of course, any such organisation must also satisfy the general public benefit test.

## **THE EXTENSION OF CHARITABLE PURPOSES ACT 2004 (CTH)**

The *Extension of Charitable Purposes Act 2004* (Cth) deems the following to be a charitable purpose: the provision of non-profit child care services (s 4), and allocations to income-tax exempt entities providing rentals under the National Rental Affordability Scheme (s 4A).

These purposes should be folded into the general statutory definition of charity. We consider that both would fall within the existing instances of charitable purposes, but these could be specified as an instance or example to avoid doubt.

The Act also provides for self-help groups and closed or contemplative religious orders, which are discussed below in relation to public benefit.

## **RESIDUAL CHARITABLE PURPOSES**

We agree that a residual category of ‘any other purposes beneficial to the community’ should be retained for the purposes of flexibility. History has shown time and again that

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<sup>41</sup> *Income Tax Act 1962* (South Africa), Sch 9, Pt 1, it 11a). This includes as a public benefit activity: “the provision of support services to, or promotion of the common interests of public benefit organisations contemplated in section 30 or institutions, boards or bodies contemplated in section 10(1)(cA)(i), which conduct one or more public benefit activities contemplated in this part.”

<sup>42</sup> Picarda, *The Law and Practice Relating to Charities*, above n 13, 218–220; Dal Pont and Petrow, *Law of Charity*, above n 7, [11.46]–[11.47].

<sup>43</sup> *Income Tax Assessment Act 1997* (Cth), s 50.40. This section refers to the development of aviation, tourism, and the following Australian resources: agricultural, horticultural, industrial, manufacturing, pastoral, viticultural, aquacultural and fishing resources, and information and communication technology.

charitable purposes emerge and are recognised in particular historical and social contexts which are difficult to predict.

We prefer that such a category be left open-ended, as in the Charities Bill 2003. The requirement that such a purpose be ‘within the spirit and intendment’ of the Elizabethan Statute of Charitable Uses should be expressly ousted.

We note that s 2 of the *Charities Act 2006* (UK) attempts to restrict this category to those either already recognised as charitable within common law, or analogous to, or within the spirit of, the statutory list of charitable purposes or those already recognised by the common law. (Similar provision is made in Scotland and Northern Ireland, but not in Ireland). In our view, this is unnecessarily restrictive and fails to recognise the variety and diversity of new charitable purposes. It also reflects a suspicion of judicial values and decision-making which we do not believe is justified.

#### DEFINITION OF RELIGION

Clause 12 of the Charities Bill 2003 attempts to codify the principles of the High Court’s decision as to the definition of ‘religion’ in the *Church of Scientology* case.<sup>44</sup> This reflected the recommendation of the Sheppard Inquiry, although the Inquiry identified only characteristics enunciated by Mason ACJ and Brennan J in that case. The additional indicia in the Charities Bill 2003 reflect statements by other judges in that case.

We draw attention to the discussion in our literature review of the controversies over the difficulties of defining religion.<sup>45</sup> As discussed there, the issue is one of constructing a definition that enables an objective determination despite the inherent subjectivity of faith, and which encompasses the diversity of religious practices and beliefs without being so broad as to be meaningless. It is also difficult to define religion in a way that excludes cults.

In our view, while the principles enunciated by the High Court in the *Church of Scientology* case provide an appropriate basis for deciding the question, we would prefer that these principles are not included in the statutory definition as this may unduly restrict the flexibility of the common law principles.

#### DRAFTING POINTS

Our recommendation reflects the format of the Sheppard Inquiry’s list to the more concise version in the Charities Bill 2003, as discussed above. Where additional heads or instances of charitable purposes have been included, we have adopted the language used in the comparable legislation overseas or in the EM. The adoption of language used in overseas

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<sup>44</sup> *Church of the New Faith v Commissioner of Pay-roll Tax (Vic)* (1983) 154 CLR 120.

<sup>45</sup> Joyce Chia et al., *Defining Charity: A Literature Review* (Not-for-Profit Project, Melbourne Law School, 23 February 2011) <<http://tax.law.unimelb.edu.au/download.cfm?DownloadFile=560AEA8E-5056-B405-51449B7990F9ABEF>>, 47–50.

legislation will provide Australian courts (and charities) with the benefit from the guidance of decisions from those jurisdictions, and ensure that differences in language are not misinterpreted as intending differences in scope.

We also note that the disjunctive 'or' should be used instead of the 'and' preferred in some aspects of the recommendation in the Sheppard Inquiry (such as 'prevention and relief'), to ensure that the definition is not misinterpreted as requiring both aspects of prevention and relief.

## PUBLIC BENEFIT (QUESTIONS 3–9)

### **Recommendation 4**

The statutory definition should state, in relation to the 'public benefit' test, that regard should be had to the following principles.

In relation to whether there is 'benefit':

- (a) the benefit(s) may be tangible or intangible, direct or indirect, present or future;
- (b) the benefit(s) should be assessed in the light of contemporary needs and circumstances;
- (c) the benefit(s) may, where appropriate, be assessed against potential detriment(s); and
- (d) the inquiry is not into the merits of the methods or opinions of the organisation.

In relation to whether the benefit is for the 'public' or a 'sufficient section of the public':

- (a) the existence of wider benefits to the general community;
- (b) the nature of any limitations on the class to be benefited, and in particular:
  - (i) the extent to which the class of potential beneficiaries is open in nature;
  - (ii) whether such limitations are reasonably related to the nature of the charitable purpose; and
  - (iii) the practical need for such limitations.

### **Recommendation 5**

The Australian Charities and Not-for-Profits Commission should be required to provide further guidance on the test of public benefit.

### **Recommendation 6**

There should be no exception for the relief of poverty in relation to the public benefit test for 'poor relations'.

**Recommendation 7**

There should be no legislative reference to the requirement that a sufficient section of the public should be more than 'numerically negligible'.

**Recommendation 8**

The standard legislative definition of 'not-for-profit' should be incorporated as a requirement of charitable status. In addition, the definition should require that, where a benefit is conferred on a person other than in his or her capacity as a member of the public or a section of the public, any such benefit is reasonable in all of the circumstances, and is ancillary to or otherwise furthers the public benefit.

**Recommendation 9**

If the presumptions of public benefit are retained, they should apply equally to all the listed instances of charitable purposes, excepting the residual category of 'other purposes beneficial to the community'.

**Recommendation 10**

The definition of public benefit should provide that the purpose of a trust, society, or institution is a charitable purpose if it would satisfy the public benefit requirement apart from the fact that the beneficiaries of the trust, or the members of the society or institution, are related by blood. The definition should further specify that prescribed corporate bodies under the *Native Title Act 1993* (Cth) are charitable.

**Recommendation 11**

To avoid doubt, reference should be made either in the legislation or in the Explanatory Memorandum to clarify that self-help groups and closed or contemplative religious orders may meet the public benefit test. There should not, however, be a requirement of intercessory prayer for closed or contemplative religious orders to be of public benefit.

APPROACH TO PUBLIC BENEFIT

As discussed in our literature review, the meaning of 'public benefit' has been controversial for many years.<sup>46</sup> As the Ontario Law Reform Commission observed, there is "considerable confusion ... over the meaning and significance of [the public benefit] test".<sup>47</sup>

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<sup>46</sup> Ibid 28–30.

<sup>47</sup> Ontario Law Reform Commission, *Report on the Law of Charities*, above n 9, vol 1, 176.

In our view, therefore, there is considerable merit to clarifying the ‘public benefit’ test in a statutory definition, especially given its practical significance. In our view, the recent decision of the Upper Tribunal in England and Wales regarding ‘public benefit’ illustrates the complexity that surrounds the issue and the desirability of further statutory guidance.<sup>48</sup>

However, it would be impossible to exhaustively define the concept. We agree, therefore, that much of the detail must necessarily be left to the ACNC, which should (as in the UK) provide guidance on this issue. We are, however, concerned about the current definition in the Charities Bill 2003. The first two limbs to the definition import new tests and concepts which do not reflect the current common law. We address this in detail below.

We recommend instead that some guiding principles be inserted to clarify the definition of ‘public benefit’. In relation to ‘benefit’, we draw these principles directly from the common law. In relation to ‘public’, we provide a clarifying conceptual framework that is broadly consistent with the approach taken by the common law, the Australian Taxation Office, and the Charity Commission of England and Wales. In relation to the prohibition against ‘private benefit’, we recommend the adoption of a provision similar to that in the legislation in Northern Ireland.

We express significant reservations about the desirability of removing the presumptions of public benefit in respect of the first three heads. The policy concerns about the presumptions are, to some extent, overstated. The presumptions perform some useful functions, the most important of which is ensuring the appropriate balance between judicial (and regulatory) scrutiny and the autonomy of charities. Further, the abolition of the presumptions is likely to divert considerable resources of the ACNC away from its core functions, and is likely to be politically counterproductive.

Finally, we address the practical role of the ACNC and charities in the implementation of the public benefit test.

#### DIFFICULTIES WITH THE PROPOSED TEST

The definition of public benefit in the Charities Bill 2003, with its three-part test of ‘aimed at achieving a universal or common good’, ‘has practical utility’, and ‘is directed to the benefit of the general community or to a sufficient section of the general community’, derives ultimately from the 1996 report on charities by the Ontario Law Reform Commission (‘OLRC’).<sup>49</sup>

This report is of considerable intellectual interest and its analysis of the definitional issues is illuminating and original. However, this analysis departs from an orthodox understanding of

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<sup>48</sup> *The Independent Schools Council v The Charity Commission* [2011] UKUT 421.

<sup>49</sup> Ontario Law Reform Commission, *Report on the Law of Charities*, above n 9, vol 1, Chs 6 and 7; see Sheppard, Fitzgerald, and Gonski, *Sheppard Inquiry*, above n 20, 116–117.

the common law definition in its attempt to construct a ‘real’ definition of charity. Importantly, also, the report’s analysis is used merely to clarify and provide analytical guidance to the common law. The report itself recommends against a statutory definition, or if one is adopted, recommends only a codification of the *Pemsel* test or a “modestly improved” version of it.<sup>50</sup> It also expressly recommends against statutory reform of the ‘public benefit’ test.<sup>51</sup>

In particular, while the third element of the test is conventional,<sup>52</sup> the first and second elements are not conventional parts of the common law definition of public benefit. Rather, the orthodox analysis is that while the term ‘public benefit’ must be understood as a whole, it comprises two constituent elements, namely the concept of ‘public’ and the concept of ‘benefit’.<sup>53</sup>

The first two limbs therefore introduce novel concepts into charity law which are likely to cause difficulties. In relation to the idea of a ‘universal or common good’, we note that the OLRC here drew upon the idea of ‘basic human goods’ developed by the natural law philosopher John Finnis. These basic human goods are “our ultimate purposes; they are the ones that give all their right-thinking actions their point, making them intelligible to ourselves and others”.<sup>54</sup> Finnis includes the following as ‘basic human goods’: life,<sup>55</sup> knowledge, play,<sup>56</sup> aesthetic experience, friendship, religion and practical reasonableness.<sup>57</sup> The OLRC considered work should also be included on the list.<sup>58</sup>

The OLRC then uses the term “common or universal goods” to capture these basic human goods. However, the term “common or universal goods” is novel to charity law and, so too, are Finnis’ concepts of basic human goods. We are concerned that this may lead to unintended consequences. In particular, Finnis’ expansive concept of ‘basic human goods’ may be misinterpreted as requiring that the ‘benefit’ of public benefit must be “common or universal” in a more lay sense of those terms. Another concern is that the philosophical

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<sup>50</sup> Ontario Law Reform Commission, *Report on the Law of Charities*, above n 9, vol 1, 164–166.

<sup>51</sup> *Ibid* vol 1, 176.

<sup>52</sup> Dal Pont and Petrow, *Law of Charity*, above n 7, [3.5].

<sup>53</sup> See, eg, *Ibid* [3.2]; *Income Tax and Fringe Benefits Tax: Charities* (Taxation Ruling, No TR 2011/4, 12 October 2011), [129].

<sup>54</sup> Ontario Law Reform Commission, *Report on the Law of Charities*, above n 9, vol 1, 148.

<sup>55</sup> This is defined as ‘every aspect of vitality which puts a human being in good shape for self-determination’: John Finnis, *Natural Law and Natural Rights* (Clarendon Press, 1980) 86. The OLRC saw hospitals, medical schools, famine relief, soup kitchens, and road safety laws as participating in this good: Ontario Law Reform Commission, *Report on the Law of Charities*, above n 9, vol 1, 148.

<sup>56</sup> This is defined as “performances which have no point beyond the performance itself, enjoyed for its own sake”: Finnis, *Natural Law and Natural Rights*, above n 55, 87.

<sup>57</sup> This is defined as the good of being able to “bring one’s own intelligence to bear effectively ... on the problems of choosing one’s action and life-style and shaping one’s character”: *Ibid* 88.

<sup>58</sup> Ontario Law Reform Commission, *Report on the Law of Charities*, above n 9, vol 1, 146.

origin of the theory of ‘basic human goods’ is natural law theory, a school of philosophy that is not easily reconciled with the aims of a liberal state like Australia.

We express greater concern about the introduction of the second limb of ‘practical utility’. The OLRC defines this as requiring that the project “actually contribute to the improvement of the world”.<sup>59</sup> But the OLRC also acknowledges that there is “only limited explicit recognition in the case law and commentary of the practical utility of the project [as] a formally relevant consideration”.<sup>60</sup>

In our view, a test of ‘practical utility’ adds nothing to a wider test of ‘public benefit’ unless it is interpreted in a way that we regard as problematic. To the extent that there is any discussion of ‘practical utility’ in the cases considered by the OLRC in its report, it is used only to exclude gifts that are considered entirely useless.<sup>61</sup> Such gifts would be struck down anyway under a broader ‘public benefit’ test.

Our real concern is not that a ‘practical utility’ test would be moribund. Our real concern is that courts (and the regulator) would breathe life into such a test by interpreting it in problematic ways. For example, it may be interpreted as requiring some tangible benefit or welfare return on a utilitarian calculus. While such benefits or assessments have some role, they do not exhaust the public benefit test. For example, in *Aid/Watch*, the High Court found that the public benefit test was satisfied by a purpose that generated an intangible benefit, understood as a benefit in light of non-utilitarian thinking about the value of free speech in a liberal democracy. The public benefit test should be broad enough to reflect the diverse ways in which charitable purposes may be understood to make contributions to the good: some of those ways are captured by the notion of ‘practical utility’, but others are not. To insist on a test of ‘practical utility’ within the public benefit test is to risk taking a too narrow approach.

We therefore recommend that the statutory definition revert to the orthodox ‘public benefit’ test, which focuses on two limbs: ‘public’ and ‘benefit’.

## BENEFIT

We address first the issue of benefit, as it is more straightforward. Although the *Charities Act 2006* (UK) is silent on the public benefit test, the definitions in Scotland and Northern Ireland do provide some further guidance on the notion of ‘benefit’, namely:

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<sup>59</sup> Ibid vol 1, 182.

<sup>60</sup> Ibid vol 1, 182.

<sup>61</sup> The OLRC cited, for example, a case in which a testator had left his “atrociously bad” artworks to the National Museum, and the judges there considered there was “virtual certainty on [the] balance of probabilities that no member of the public will ever extract one iota of education from the disposition”: *Re Pinion; Westminster Bank v Pinion* [1965] Ch 422.

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In determining whether a body provides or intends to provide public benefit, regard must be had to—

(a) how any—

(i) benefit gained or likely to be gained by members of the body or any other persons (other than as members of the public), and

(ii) disbenefit incurred or likely to be incurred by the public.<sup>62</sup>

This provision addresses only one of the principles in the common law regarding benefit, namely the balancing of benefit and detriment. In our view, this gives undue prominence to the concept of detriment and does not meet the objectives of accessibility and clarification. We therefore recommend that this should be complemented in the statutory definition with some of the other key principles concerning the nature of ‘benefit’.

In relation to ‘benefit’, we suggest that the following principles drawn from the common law could usefully be stated in the definition:

- The benefit(s) may be tangible or intangible, direct or indirect, present or future;
- The benefit(s) should be assessed in the light of contemporary needs and circumstances;
- The benefit(s) may, where appropriate, be assessed against potential detriment; and
- The inquiry is not into the merits of the methods or opinions of the organisation.<sup>63</sup>

These principles communicate the appropriate scope and approach to the understanding of ‘benefit’. The first principle directs attention to the breadth of the term, especially in relation to intangible and non-instrumental benefits. We have included reference to ‘future’ benefits to encompass benefits to future generations, an issue that has particular relevance for environmental charities.

The second principle is reflected in the common law, but deserves specific mention as a method of facilitating the modernisation of the law of charity. Charitable purposes emerge in specific historical and political contexts, and over time issues that were not considered charitable may become charitable. Further, the ‘benefit’ in particular activities may need to be re-assessed over time. For example, the common law has had difficulty in the past in characterising the intrinsic value of animal welfare and environmental protection, in a way that no longer accords with contemporary conceptions.

The third principle enables consideration of harm. The common law test, in our view, is less stringent than that specified in Scotland or Northern Ireland. As Dal Pont explains, the

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<sup>62</sup> *Charities and Trustee Investment (Scotland) Act 2005* (Scotland) asp 10, s 8(2); *Charities Act (Northern Ireland) 2008* (NI) s 3(3).

<sup>63</sup> Dal Pont and Petrow, *Law of Charity*, above n 7, [3.37]–[3.45].



balancing test must involve “all elements of benefit and harm, tangible or intangible, direct or indirect”, and where there is evidence of public benefit, “judges justifiably require clear evidence of harm or detriment”.<sup>64</sup> We therefore recommend that this principle should be restated to enable, rather than require, judges to consider potential detriment where appropriate.

The final principle directs attention to the underlying principle, discussed above, of respecting the autonomy and diversity of the sector in defining and achieving its purposes.

## PUBLIC

The issues relating to the ‘public’ element are somewhat more difficult. There is no real problem if the benefit is to the general public, such as in the case of the conservation of the environment.

However, it is worth clarifying that a wider, often intangible or indirect, benefit to the public may co-exist with tangible or direct benefits to a smaller section of the public, as is reflected in the first paragraph of our recommendation defining ‘public’. As the Charity Commission of England and Wales note,

in the case of a professional body or learned society, membership may be restricted to members of a particular profession or to people who have certain academic qualifications. Where people are able to benefit from learned articles published by the society for example, or from the application of the knowledge gained by the professional from being a member of the professional body, the restriction on membership does not affect public benefit since membership is not the only, or main, means by which people generally can benefit.<sup>65</sup>

The real difficulty concerns how to distinguish a ‘section of the public’ from a private group of individuals. The leading test in the common law in this regard is the *Compton-Oppenheim* test.<sup>66</sup> The first part of this test is that

if the quality that distinguishes the possible class of beneficiaries from other members of the community depends on a link by blood, contract, family, association membership or employment, that class does not constitute the public or an appreciably important class of the community to fulfil the element of public benefit.<sup>67</sup>

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<sup>64</sup> Ibid [3.43]–[3.44].

<sup>65</sup> The Charity Commission for England and Wales, *Charities and Public Benefit* (January 2008) <[http://www.charity-commission.gov.uk/Charity\\_requirements\\_guidance/Charity\\_essentials/Public\\_benefit/public\\_benefit.aspx](http://www.charity-commission.gov.uk/Charity_requirements_guidance/Charity_essentials/Public_benefit/public_benefit.aspx)>, F8. See also Dal Pont and Petrow, *Law of Charity*, above n 7, [3.16].

<sup>66</sup> Named after the cases *Re Compton* (1945) 1 Ch 123; *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297.

<sup>67</sup> Dal Pont and Petrow, *Law of Charity*, above n 7, [3.8].

The judges also stated that the size of the beneficiary class should not be “numerically negligible”.<sup>68</sup> This was the genesis of clause 7(2) of the Charities Bill 2003 (Cth). As Dal Pont explains, this leading test defines ‘public’ by what it is not, by focusing on whether the connecting link between the beneficiaries is “essentially impersonal or essentially personal”.<sup>69</sup>

The test has been much criticised, principally on the ground of its artificiality, as the trust in that case could have been simply defined differently to capture the same beneficiaries.<sup>70</sup> The OLRC also thought it was “seriously misleading” because, if taken literally, it would exclude gifts in favour of any class identified by a relationship with any named person.<sup>71</sup> However, Dal Pont notes that “no viable alternative” has been developed by the case law.<sup>72</sup>

As long ago as 1945, one scholar considered it necessary to clarify the concept of ‘public’ by statute.<sup>73</sup> We agree that this aspect of the law is unduly complicated and that statutory guidance could usefully clarify the law.

Having reviewed the common law, proposed redefinitions, and the legislative definitions overseas, we consider that the following three principles provides a sounder conceptual framework for determining whether there is benefit to a ‘sufficient section of the public’. These accord with the thrust of the common law and encompass the scenarios addressed by *Taxation Ruling TR 2011/4* and the guidance of the Charity Commission of England and Wales. We emphasise that the principles are guides rather than hard-and-fast rules, so it will remain a “matter of fact and degree” as to whether the purpose is for the public benefit.<sup>74</sup> Nevertheless, the principles direct attention to the relevant factors that should guide the decision.

In our view, the focus of the enquiry should be on the nature of limitations on the class to be benefited. Three principles in particular should be borne in mind: 1) the extent to which the class of potential beneficiaries is open in nature; 2) whether such limitations are reasonably related to the nature of the charitable purpose; and 3) the practical need for such limitations.

The first principle reflects, in our view, the broader underlying policy motivating the *Compton-Oppenheim* test. It also encompasses the principle that membership of exclusive clubs can often lack ‘public’ benefit, and helps explain concerns about ‘exclusive’ religions.

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<sup>68</sup> *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297, 306.

<sup>69</sup> Dal Pont and Petrow, *Law of Charity*, above n 7, [3.8].

<sup>70</sup> *Ibid* [3.11].

<sup>71</sup> Ontario Law Reform Commission, *Report on the Law of Charities*, above n 9, 179.

<sup>72</sup> Dal Pont and Petrow, *Law of Charity*, above n 7, [3.12].

<sup>73</sup> John Brunyate, ‘The Legal Definition of Charity’ (1945) 61 *Law Quarterly Review* 268.

<sup>74</sup> *Taxation Ruling TR 2011/4*, above n 53, [139].

This aspect has been the focus of much of the case law, and is also the focus of the relevant provision in South Africa, which requires that the public benefit activity:

is for the benefit of, or is widely accessible to, the general public at large, including any sector thereof (other than small and *exclusive* groups)<sup>75</sup> (emphasis added).

The second principle, which is set out clearly in the Charity Commission's guidance and is implicit in the common law,<sup>76</sup> reflects the fact that the particular benefit (for example, advancing women's health, or women in the legal profession)<sup>77</sup> may dictate or justify limitations on the class to be benefited. In addition, we believe that the second principle explains why Indigenous, ethnic and cultural minorities are legitimate 'sections of the public' notwithstanding the lack of 'openness' of the group.

The final principle reflects the fact that limits on access may be required as a practical matter. This caters for the examples, cited in the recently released TR 2011/4, of "enrolment procedures of schools, referral policies of medical clinics, and borrowing rules of libraries".<sup>78</sup> It should also cater for situations where there are restrictions on access to facilities, where limitations are related to resource management, and to some extent for cases where fees are charged for services.

We note that the legislation in Scotland and Northern Ireland and Ireland expressly refer to the factor of fees in their definitions.<sup>79</sup> Section 3(7) of the *Charities Act 2009* (Ireland) also provides:

In determining whether a gift is of public benefit or not, account shall be taken of—

(a) any limitation imposed by the donor of the gift on the class of persons who may benefit from the gift and whether or not such limitation is justified and reasonable, having regard to the nature of the purpose of the gift, and

(b) the amount of any charge payable for any service provided in furtherance of the purpose for which the gift is given and whether it is likely to limit the number of persons or classes of person who will benefit from the gift.

The issue of fee-charging is unduly prominent in these statutory definitions. In our view, the question of fees is more accurately analysed as relevant to the openness of the class and the practical need for financial resources. We note that its appearance in the UK legislation results from a particular political context to deal with independent schools in the UK, and

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<sup>75</sup> *Income Tax Act 1962* (South Africa), s 30(1)(c).

<sup>76</sup> The Charity Commission for England and Wales, *Charities and Public Benefit*, above n 65, F5, F6.

<sup>77</sup> *Victorian Women Lawyers' Association Inc v Commissioner of Taxation* [2008] FCA 983.

<sup>78</sup> *Taxation Ruling TR 2011/4*, above n 53, [143].

<sup>79</sup> *Charities and Trustee Investment (Scotland) Act 2005* (Scotland) asp 10, s 8(2); *Charities Act (Northern Ireland) 2008* (NI), s 3(3).

carries with it an attitude of suspicion towards such schools which is not helpful. We also note that on the question of fees there is a strong argument that the Charity Commission of England and Wales has departed from the common law.<sup>80</sup>

We also do not prefer the Irish language of s 3(7)(a) dealing with limitations on classes (which deals with charitable gifts only). In our view, this provision is too vague to serve the purpose of clarification. It also imports language of ‘justification’ and ‘reasonableness’ which is not present in the common law and which misdirects attention from the critical question of whether the benefit is for a ‘sufficient’ section. Arguably, this language also encourages an inappropriate degree of judicial (and regulatory) scrutiny.

We also recommend the abolition of the common law exception from the public benefit test for the relief of poverty, which has resulted in an “anomalous” recognition of ‘poor relations’ or ‘poor employees’ cases.<sup>81</sup> In this regard, we agree with the “tide of commentators ... against maintaining that exception”,<sup>82</sup> and the Sheppard Inquiry.<sup>83</sup> The poor relations cases are anomalous and reflect a particular class structure and history that are not relevant to modern Australia. However, as discussed below, existing testamentary trusts established on this basis should be deemed to retain their charitable status.

We also consider that there is no need to refer to the “numerically negligible” test because, as the OLRC has suggested, the size of the class is not formally relevant. Rather, the small size may evidence the lack of openness of the class.<sup>84</sup>

#### PROHIBITION OF PRIVATE BENEFIT

Another aspect of the ‘public’ benefit test is that it is used to exclude cases in which there is private profit or benefit. As Dal Pont explains, the distinction is between the intended beneficiaries and others who profit or benefit from the charity’s operations.<sup>85</sup> However, this rule does not exclude cases in which a personal benefit is incidental to the purposes of the gift or the association; does not preclude charitable organisations from making a profit; does not preclude charitable organisations from paying for its operating costs; and does not prevent charities from charging fees for its services.<sup>86</sup>

To some extent, the issue of private benefit is covered by the requirement that a charity be ‘not for profit’, which is the subject of a separate consultation regarding the ‘in Australia’ requirements. We have already made a submission in regard to that definition in which we

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<sup>80</sup> Mary Synge, ‘Poverty: An Essential Element in Charity After All?’ (2011) 70 *The Cambridge Law Journal* 649.

<sup>81</sup> See Dal Pont and Petrow, *Law of Charity*, above n 7, [3.9].

<sup>82</sup> *Ibid* [8.26].

<sup>83</sup> Sheppard, Fitzgerald, and Gonski, *Sheppard Inquiry*, above n 20, Rec 10.

<sup>84</sup> Ontario Law Reform Commission, *Report on the Law of Charities*, above n 9, vol 1, 179–181.

<sup>85</sup> Dal Pont and Petrow, *Law of Charity*, above n 7, [3.23].

<sup>86</sup> *Ibid* [3.29]–[3.34].

recommended that the standard legislative definition of ‘not for profit’ continue to apply.<sup>87</sup> The standard definition defines a not-for-profit as:

a body that is not carried on for the purposes of profit or gain to its individual members and is, by the terms of the body’s constituent document, prohibited from making any distribution, whether in money, property or otherwise, to its members.<sup>88</sup>

To enhance accessibility and clarity, the definition of not-for-profit should be included directly in the statutory definition of charity, rather than as a cross-reference.

To the extent that the standard legislative definition does not address the issue of private benefit, we consider that s 3(3)(b) of the *Charities Act 2009* (NI) is a good model, which provides that a gift shall not be of public benefit unless:

in a case where it confers a benefit on a person other than in his or her capacity as a member of the public or a section of the public, any such benefit is reasonable in all of the circumstances, and is ancillary to, and necessary, for the furtherance of the public benefit.

In our view, this covers the situations discussed above and is sufficiently flexible to cover the situation where (for example) a trustee is being paid excess remuneration and therefore infringes the proscription against private benefit. We consider, however, that the definition should not include the term ‘necessary’ for the furtherance of the public benefit. For example, charging fees may increase the operational efficiency of a charity without strictly being ‘necessary’ for furthering the public benefit.

#### PRESUMPTIONS FOR PUBLIC BENEFIT (QUESTIONS 7–9)

This is one of the more difficult aspects of statutory reform of the definition. We acknowledge that the competing arguments here are finely balanced, and that there is room for disagreement on the underlying issues of policy.

We agree that it is a fundamental principle that all organisations must benefit the public in order to attain charitable status. In principle, the requirement that all charities should be required to prove affirmatively public benefit furthers objectives of transparency and accountability. This demonstration of public benefit could ultimately promote public trust and confidence in the sector. As well, the abolition of the presumptions will ensure equality across the various heads of charity.<sup>89</sup>

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<sup>87</sup> Not-for-Profit Project, *Restating in Australia Conditions* (Submission to Treasury, 18 August 2011) <<http://tax.law.unimelb.edu.au/download.cfm?DownloadFile=8EAAADCC-5056-B405-51115658032B73B7>>.

<sup>88</sup> See, eg, *Electronic Transactions Act 1999* (Cth) s 3. The same definition is used in the mirror legislation of the States and Territories.

<sup>89</sup> Picarda, however, argues that “[c]harities are not equal animals and the need to have a ‘level playing field’ among disparate charities appears to have ideological origins”: Picarda, *The Law and Practice Relating to Charities*, above n 13, 38.

However, we also note that the presumptions serve useful functions which may be overshadowed by the rhetoric regarding their removal. It is necessary to put the legal effect of the presumptions in context.

First, all charities are still required to fulfil the requirement of public benefit. All the presumptions do is shift the evidential onus of establishing public benefit. The presumptions are merely tools designed to minimise the requirements of evidence and/or to provide for situations where there is no evidence. In this respect, they are helpful to courts in situations where the benefits are intangible, diffuse or yet to be realised, as will be the case with new charities.

Arguably, these presumptions are also helpful to courts in enabling them to determine public benefit in a context where there are likely to be political controversies rooted in diverse views of the good. In such cases, by relying on presumptions courts (and regulators) may more successfully operate in applying charity law without inflaming political sensitivities.

Second, the legal force of the presumptions may be overstated. Dal Pont suggests that they “may lack the full force of a legal presumption”.<sup>90</sup> The case law certainly suggests that judges have not been slow to consider competing evidence.

Indeed, some commentators go further in casting doubt on the presumptions. Picarda calls the presumptions “mythical”.<sup>91</sup> A recent article in the *Cambridge Law Journal* argued that it was “misleading to suggest that public benefit, as understood in charity law, was ever presumed” and argued that the UK legislation did not in fact change the legal position as to public benefit.<sup>92</sup> Similarly, Picarda notes that there is continuing controversy “as to whether, or to what extent, the public benefit element developed by the courts has been changed”, especially given the “elliptical and non-specificatory” nature of the language in the Act.<sup>93</sup>

Third, the drive to oust the presumptions in the UK arose largely from a push from the National Council of Voluntary Organisations, principally in the context of independent schools, and also in its desire to emphasise ‘public benefit’ as the key to the definition of charity.<sup>94</sup> The desire to oust the presumptions was primarily a matter of symbolic and

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<sup>90</sup> Dal Pont and Petrow, *Law of Charity*, above n 7, [3.38].

<sup>91</sup> Picarda, *The Law and Practice Relating to Charities*, above n 13, 39B. In argument in the High Court in *Aid/Watch*, Heydon J also noted the “very fragile support” for the argument that the presumptions applied to the first three heads: *Commissioner of Taxation v Aid/Watch Incorporated* [2010] HCA Trans 154.

<sup>92</sup> Synge, ‘Poverty’, above n 80, 649–650.

<sup>93</sup> Picarda, *The Law and Practice Relating to Charities*, above n 13, 39A.

<sup>94</sup> See especially Commission on the Future of the Voluntary Sector, *Meeting the Challenge of Change: Voluntary Action in the 21st Century* (National Council for Voluntary Organisations, 1996); National Council for

political significance. Picarda describes how the Home Office and the Charity Commission “reached a hasty compromise” prior to the enactment of the *Charities Act 2006* (UK) in the form of a Concordat which included the principle that “an organisation which wholly excluded poor people from any benefits direct or indirect would not be established and operate for the public benefit”.<sup>95</sup> In our view, this process does not necessarily reflect “international best practice” (as stated at [80] in the Consultation Paper), but rather a particular political outcome. It also is directed to the ‘public’ aspect of the test, rather than the general benefit of education.

The other controversy regarding the public benefit test is that of religion. Historically, advancing religion was seen as obviously of benefit. This has, of course, changed with increasing secularism and pluralism of religions, and there are those who object to particular religions (or their status as religions) and atheists who object to religion in general. Nevertheless, we agree with the OLC that “whether in fact God exists or not, the question of God’s existence is crucially important for everyone”.<sup>96</sup> Spirituality, in all its manifestations, is an important dimension of the human experience, although not everyone may choose to explore that dimension. In our view, there is clearly benefit in enabling individuals to explore that spirituality in the form of religions.

Indeed, an analogy may be drawn between the proper treatment of the advancement of religion and the treatment of political purposes in the recent *Aid/Watch* case: just as free political speech is of value to a liberal society and political purposes satisfy the public benefit test on that basis, so too is freedom of religion of value to such a society and religious purposes should be regarded as being for the public benefit on that basis.

Ultimately, the main argument for removing the so-called presumptions is the expressive effect of doing so. We note, however, that an incidental expressive effect of removing the presumptions is a scepticism towards parts of the charitable sector which may undermine support for the reform and harm relations between the government and the sector.

On a more practical note, we are also concerned that removing the presumptions may create an unnecessary compliance burden on the regulator as well as the charities. Recently, for example, the Charity Commission of England and Wales issued a 21-page decision on the ‘public benefit’ of Druidry.<sup>97</sup> The Druid Network reported it had taken over 5 years to gain recognition.<sup>98</sup> There is no doubt that this case imposed a significant burden

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Voluntary Organisations, *For the Public Benefit? A Consultation Document on Charity Law Reform* (2001). These are discussed in Chia et al., *Defining Charity: A Literature Review*, above n 45, 21–22.

<sup>95</sup> Picarda, *The Law and Practice Relating to Charities*, above n 13, 38–39.

<sup>96</sup> Dal Pont and Petrow, *Law of Charity*, above n 7, 148.

<sup>97</sup> ‘The Druid Network’ (2011) 13 *Ecclesiastical Law Journal* 127.

<sup>98</sup> AFP, ‘Druidry Recognised as Religion in UK’, *ABC News*, 2 October 2010 <<http://www.abc.net.au/news/stories/2010/10/02/3028033.htm>>.

not only on the Network but on the Commission itself. The recent litigation between the Independent Schools Council and the Charity Commission regarding the guidance on public benefit is another recent example of the time and energy devoted to this issue.<sup>99</sup> Despite this energy, the issue of public benefit relating to independent schools is still unclear, and indeed the matter is still unsettled, with the parties returning for a further hearing before the Tribunal on 22 November 2011.<sup>100</sup> It is clear that the Charity Commission has directed extensive resources into producing guidance, conducting public benefit assessments and surveying the public and charities on the public benefit requirement.

There is a real question whether undue emphasis on the public benefit test is the best use of the new regulator's resources. We note that the Charity Commission of England and Wales in 2009-2010 spent £32.7m and had 466 staff.<sup>101</sup> In comparison, the ACNC's budget is \$53.6 million over four years, and much of that will necessarily be devoted to start-up costs.

We note that the Consultation Paper states at [85] that the removal of the presumption did not cause significant issues in England and Wales. However, we are not sure that this is entirely accurate. There has been considerable concern about the Charity Commission's interpretation of the public benefit test, which has inspired academic criticism,<sup>102</sup> also litigation and certainly scepticism from parts of the sector. Further, we note that the Charity Commission had assessed public benefit as a matter of practice at registration before the presumptions were ousted.

We also note that other jurisdictions have chosen differently. Ireland, for example, has expressly retained a presumption for the public benefit of religion, and requires in addition that a contrary determination can only be made with the consent of the Attorney-General.<sup>103</sup> Further, it has been reported recently that the Northern Ireland executive is

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<sup>99</sup> *The Independent Schools Council v The Charity Commission* [2011] UKUT 421.

<sup>100</sup> *Fee-charging Schools Public Benefit Case Returns to Upper Tribunal* (1 December 2011) Third Sector Online <[http://www.thirdsector.co.uk/bulletin/third\\_sector\\_governance\\_bulletin/article/1107421/fee-charging-schools-public-benefit-case-returns-upper-tribunal/](http://www.thirdsector.co.uk/bulletin/third_sector_governance_bulletin/article/1107421/fee-charging-schools-public-benefit-case-returns-upper-tribunal/)>.

<sup>101</sup> Charity Commission of England and Wales, *Annual Report* (2010 2009) <[http://www.charitycommission.gov.uk/Library/about\\_us/Charity\\_Commission\\_Annual\\_Report\\_09\\_10.pdf](http://www.charitycommission.gov.uk/Library/about_us/Charity_Commission_Annual_Report_09_10.pdf)>, 14–15.

<sup>102</sup> See, eg, Peter W Edge and Joan M Loughrey, 'Religious Charities and the Juridification of the Charity Commission' (2001) 21 *Legal Studies* 36; Picarda, *The Law and Practice Relating to Charities*, above n 13, 39A–39F; Synge, 'Poverty', above n 80.

<sup>103</sup> *Charities Act 2009* (Ireland) s 3(4), (5). This in fact represented a relaxation, as previously gifts for religion were conclusively presumed to be for the public benefit: *Charities Act 1961* (Ireland) s 45.



considering applying the presumption specifically to religion and possibly educational purposes to meet concerns from the sector.<sup>104</sup>

Although we acknowledge, therefore, the arguments in favour of removing the presumptions (to the extent that they exist), we are not convinced that there is a compelling case for their removal. It may, instead, be preferable to clarify the strength of the presumptions. For example, it could be stated that, a court (and the regulator) may assume that a listed charitable purpose is also for the public benefit unless there is evidence to the contrary.

If these presumptions are retained, we consider that logically the presumptions should apply equally to all the charitable purposes in the statutory list, excepting the residual head of 'other purposes beneficial to the community'.

#### ADMINISTERING THE PUBLIC BENEFIT TEST (QUESTION 8)

As noted above, there will remain a need for further, more detailed, guidance on the application of the public benefit test. This should be a function of the ACNC, as it is overseas.

As discussed above, we are not convinced that the ACNC should emphasise enforcement of the 'public benefit' test to the same extent as appears to have occurred in England and Wales. However, the ACNC should have sufficient powers to require further information if it considers that the public benefit test may not be met, which it will be best placed to do as presumably such charities will report to the ACNC.

#### INDIGENOUS ORGANISATIONS (QUESTION 4)

As discussed above, the 'section of the public' should include class limitations that are reasonably related to charitable purposes, including Indigenous, ethnic and cultural minorities. This would distinguish between trusts and associations which, for example, aim to relieve societal disadvantage of marginalised groups, and trusts and associations that unfairly discriminate against particular races or groups. This is preferable to the distinction suggested elsewhere of distinguishing between them on the basis of motivation.<sup>105</sup>

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<sup>104</sup> David Ainsworth, *Public Benefit Quandary in Northern Ireland* (1 November 2011) Third Sector Online <<http://www.thirdsector.co.uk/Resources/Governance/Article/1101287/Public-benefit-quandary-Northern-Ireland>>.

<sup>105</sup> Committee of Inquiry into the Effect of Charity Law and Practice on Voluntary Organisations, *Charity Law and Voluntary Organisations* (1976), [42]–[43]; Ontario Law Reform Commission, *Report on the Law of Charities*, above n 9, 217.

While most Australian courts have upheld trusts and associations dealing with Indigenous communities,<sup>106</sup> it is sensible for the statutory definition to put the matter beyond dispute. This is especially the case if the exception for the relief of poverty in relation to the public benefit is removed, as recommended above.<sup>107</sup>

This can be done by providing that the ‘section of the public’ test does not automatically exclude trusts and organisations that benefit people connected by blood ties, in equivalent terms to section 5(2) of the *Charities Act 2005* (NZ):

the purpose of a trust, society, or institution is a charitable purpose under this Act if the purpose would satisfy the public benefit requirement apart from the fact that the beneficiaries of the trust, or the members of the society or institution, are related by blood[.]

Such an organisation is still required to prove, however, benefit to a sufficient section of the public in the ordinary way.

Further, again along the lines of the legislation in New Zealand,<sup>108</sup> the statutory definition should clarify that prescribed bodies corporate under the *Native Title Act 1993* (Cth) should be regarded as charitable. Currently, such prescribed bodies corporate must be constituted by groups of native title holders who will commonly be linked by blood, which may be interpreted as infringing the *Compton-Oppenheim* test. This is an issue of some practical import and would further Indigenous community development.<sup>109</sup>

#### SELF-HELP GROUPS AND CLOSED OR CONTEMPLATIVE RELIGIOUS ORDERS

Section 5 of the *Extension of Charitable Purposes Act 2004* (Cth) deems “open and non-discriminatory self-help groups” to be for the public benefit. It also deems that closed or contemplative religious orders that regularly undertake prayerful intervention at the request of the public satisfy the public benefit test.

In relation to self-help groups, this legislation clarifies when self-help groups are sufficiently open to the ‘public’ to be charitable. Section 5(2) of the *Extension of Charitable Purposes Act 2004* (Cth) specifies that the group is for the public benefit if it: is established to assist individuals affected by a particular disadvantage or discrimination, or a need arising from a

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<sup>106</sup> See generally Fiona Martin, ‘Is the Aim of Preserving and Enhancing Indigenous Culture a Charitable Purpose?’ (2007) 6 *Indigenous Law Bulletin* 11; Fiona Martin, ‘The Legal Concept of Charity in the Context of Australian Taxation Law: The Public Benefit and Commercial Activity, Important Issues for Indigenous Charities’ (2010) 25 *Australian Tax Forum* 275.

<sup>107</sup> See especially Fiona Martin, ‘Prescribed Bodies Corporate Under the Native Title Act 1993 (Cth): Can They Be Exempt from Income Tax as Charitable Trusts?’ (2007) 30 *University of New South Wales Law Journal* 713, 725–726.

<sup>108</sup> The legislation specifically refers to the charitable status of marae: *Charities Act 2005* 2005 (NZ) s 5(2)(b).

<sup>109</sup> Martin, ‘Prescribed Bodies Corporate Under the Native Title Act 1993 (Cth): Can They Be Exempt from Income Tax as Charitable Trusts?’, above n 107.

disadvantage or discrimination that is not met; is made up of, or controlled by, individuals affected by the disadvantage or discrimination; all of its membership criteria relate to its purpose; and its membership is open to any individual who satisfies the criteria.

In our view, all of these elements are present in the overall guidance on the public benefit test proposed above. If anything, the present test may be too restrictive. For example, on its face it would appear to exclude the possibility of requiring, as a condition of membership, pragmatic matters such as a minimal membership fee or restrictions based on locality. We do not therefore consider it necessary to replicate this provision in the general statutory definition, but to avoid doubt it is helpful to include a clarifying provision or example.

In relation to closed or contemplative religious groups, we agree with the comments by Gobbo J in *Crowther v Brophy* [1992] 2 VR 97 about the appropriateness of the test requiring intercessory prayer as a requirement of public benefit, which derives from the English case of *Gilmour v Coats*.<sup>110</sup> In that case, his Honour stated:

It is at least open to doubt whether *Gilmour v Coats* represents the law in Australia where there has been a number of decisions recognising that the contemplative life may convey sufficient elements of public benefit to make assistance for the pursuit of such life charitable within the traditional description of charity [footnotes omitted]. Lord Simonds in *Gilmour v Coats*, at 446, spoke of the court requiring proof that the particular purpose satisfies the test of benefit to the community and said that the gift to the contemplative order was a purpose manifestly not susceptible of such proof. With great respect to that distinguished judge, it may be that the test of the success of intercessory prayer 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.<sup>111</sup>

We agree with the critiques, discussed at pages 51–52 of our literature review, of the decision in *Gilmour v Coats* as failing to recognise the core benefit of religion in terms of spirituality, and of inappropriately favouring some types of religion.<sup>112</sup> We therefore consider that, while it may be appropriate to clarify that closed or contemplative religious orders may satisfy the public benefit test, this should not depend upon the undertaking of intercessory prayer.

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<sup>110</sup> *Gilmour v Coats* [1949] AC 426.

<sup>111</sup> *Crowther v Brophy* [1992] 2 VR 97, 100.

<sup>112</sup> See also Dal Pont and Petrow, *Law of Charity*, above n 7, [10.47].

## PURPOSES AND ACTIVITIES (QUESTIONS 1, 10–13)

### DOMINANT PURPOSE (QUESTION 1)

#### **Recommendation 12**

The definition should state that a charity must have a purpose or purposes that are charitable only. To avoid doubt, however, it should be specified that this does not preclude the existence of other purposes that further, are in aid of, or are ancillary or incidental to these charitable purposes.

Both the terms ‘exclusive’ and ‘dominant’ are potentially misleading in this context. The term ‘exclusively charitable’ is apt to convey to the layperson a higher threshold than the common law actually requires. As Dal Pont explains in detail in Chapter 13 of his textbook, *The Law of Charity* (2010), the judicial interpretation of the phrase ‘exclusively charitable’ “is not as unyielding as may appear on its face”.<sup>113</sup> In particular, non-charitable purposes that are merely incidental and ancillary do not violate the ‘exclusively charitable’ requirement.

It is for this reason that alternative language, such as ‘main’, ‘dominant’, ‘chief’, and ‘primary’ has been used by judges in describing the test. No substantive difference is intended by this change in language, contrary to what is suggested at [94] of the Consultation Paper. The term ‘dominant’ appears to have been adopted by the Sheppard Inquiry merely as a more accessible term.

However, the term ‘dominant’ as commonly used in tax law may itself convey the misleading impression that only a majority of the purposes need be charitable. It is for this reason that *Taxation Ruling TR 2011/4* uses the language of ‘sole’ purpose, although this is misleading for the same reasons as the term ‘exclusive’ (and may also convey the impression that only one purpose is allowed, although there may be multiple charitable purposes).

For these reasons, we prefer the language used in the legislation of the United Kingdom or Ireland that a charity must be established for charitable purposes ‘only’.<sup>114</sup> However, to ensure clarity, we recommend that the statutory provision should clarify that this does not preclude a charity from having purposes that further, are in aid of, or are ancillary or incidental to the charitable purposes.<sup>115</sup>

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<sup>113</sup> Ibid [13.1].

<sup>114</sup> *Charities and Trustee Investment (Scotland) Act 2005* (Scotland) asp 10, s 7(1)(a); *Charities Act 2006* (UK) c 50 s 1(1)(a); *Charities Act (Northern Ireland) 2008* (NI), s 1(1)(a); *Charities Act 2009* (Ireland), s 2, “charitable organisation.”

<sup>115</sup> Sheppard, Fitzgerald, and Gonski, *Sheppard Inquiry*, above n 20, Recommendation 3.

## ACTIVITIES GENERALLY (QUESTIONS 10 &amp; 11)

**Recommendation 13**

The statutory definition should not refer to the activities of a charity. However, if such an activities test is included, it should accurately reflect the current common law principles.

The Consultation Paper inaccurately states in [93] that under the common law both activities and purposes of an institution are considered in determining charitable status. The true position is, as Dal Pont states, that “the purposes of an association ... determine its charitable status”, and indeed that “an activity, taken in the abstract, can rarely be deemed charitable or non-charitable”.<sup>116</sup>

As Dal Pont then explains, activities are relevant in three main circumstances: 1) where there is doubt that the main object is really the main purpose of the association or a stated subsidiary object may be the main purpose; 2) where the rules do not indicate with clarity the main object(s); and 3) if an association lacks a written constitution or rules or these are informal and incomplete.<sup>117</sup>

This is not merely a legal quibble, because as Cullity forcefully points out, the “distinction between ends and means is fundamental in the law of charity.”<sup>118</sup> As stated above, we also consider it a basic principle that it is not generally for the courts (or regulators) to assess the quality or merits of the means by which a charity should further its objects. Practically, too, in the case of the regulator, its function will often be to register charities at their inception, when they have not carried out any activities.

Proposed section 4 of the Exposure Draft of the Charities Bill 2003 defined a charity as one which (among other things) “does not engage in activities that do not further, or are not in aid of, its dominant purpose”. On face value, this phrase is somewhat inscrutable. It appears to have originated in Recommendation 5 of the Sheppard Inquiry, namely that “the activities of a charity must further, or be in aid of, its charitable purpose or purposes.”<sup>119</sup>

In coming to that recommendation, the Sheppard Inquiry relied partly on the statement by the ATO in its then Ruling that “[f]inding an institution’s sole or dominant purpose involves an objective weighing of all its features. They include its constitutive or governing documents, its activities, policies and plans, administration, financial history and control, and any legislation ...”<sup>120</sup> It did so even though it acknowledged the ATO’s ruling did not follow the ‘orthodox’ approach outlined in the textbooks.

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<sup>116</sup> Dal Pont and Petrow, *Law of Charity*, above n 7, [13.19].

<sup>117</sup> *Ibid* [13.19].

<sup>118</sup> M C Cullity, ‘The Myth of Charitable Activities’ (1990) 10 *Estates, Trusts & Pensions Journal* 7.

<sup>119</sup> Sheppard, Fitzgerald, and Gonski, *Sheppard Inquiry*, above n 20, 109.

<sup>120</sup> *Ibid* 102, citing TR 1999/D21, paras 24 and 105–106.

The Sheppard Inquiry came to that conclusion also in part because the “ATO’s approach seems to have an element of practicality and thus common sense about it”, and because it could not see why a “short investigation of the nature of the activities of an organisation may not be beneficial”.<sup>121</sup> The Inquiry’s recommendation came even though submissions to the Inquiry “argued overwhelmingly that an organisation’s purpose should be the prime determinant of its charitable status.”<sup>122</sup>

We note that the current *Taxation Ruling TR 2011/4* more accurately reflects the law. It states:

[Where] the objects or objectives in the constituent documents of an institution indicate it has a sole\* purpose which is charitable, but its activities and other relevant factors indicate the substance and reality is to the contrary, the institution will not be charitable. ...

Where the constituent documents of an institution indicate it has been established solely for a charitable purpose, it can be charitable even if its activities are not intrinsically charitable. In these circumstances, the enquiry centres on whether it can be said that the activities are carried on in furtherance of the institution’s charitable purpose.<sup>123</sup>

We see no reason to unsettle this principle of law. If there is concern about activities that reveal a non-charitable purpose, the current law already enables activities to be taken into account, as discussed above. We also expect that the regulator will require publication of reports that will include activities, and to that extent the promotion of public trust and confidence will be strengthened. We see therefore no reason to include an ‘activities’ test in the legislation. The inclusion of such a test not only muddles fundamental concepts of charity law but is likely to induce confusion in the sector. However, if such a test is included, it should accurately reflect the current common law principles.

Finally, we also note that the example given of Ireland ‘strengthening’ the definition of charity (at [98]) is misleading. The Irish requirement that an organisation can ‘promote a charitable purpose only’ simply reflects the statutory language used to express the ‘exclusivity’ test, discussed above. The requirement that a charity must apply all its property (both real and personal) in furtherance of a charitable purpose simply reflects the current ‘non-profit’ requirement that prohibits distribution of private profit.

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<sup>121</sup> Ibid 109.

<sup>122</sup> Ibid 104.

\* This term is cross-referenced to the definition of ‘sole purpose’ in *Taxation Ruling TR 2011/4*. This terminology is explained above.

<sup>123</sup> *Taxation Ruling TR 2011/4*, above n 53, [32]–[33].

## POLITICAL PURPOSES (QUESTIONS 12 &amp; 13)

**Recommendation 14**

The statutory definition should not include clause 8 of the Exposure Draft of the Charities Bill 2003 (Cth), or any other express reference to political purposes or activities. In any event, there should be no reference whatsoever prohibiting 'political' or other causes.

The Consultation Paper recommends removing paragraph (c) of clause 8 of the Charities Bill 2003, which provided that the purposes of attempting to change the law or government policy was a 'disqualifying purpose'. We would prefer that the entire clause be omitted from the statutory definition.

The High Court in *Aid/Watch* clearly affirmed that there is no rule against political purposes in Australian law.<sup>124</sup> Clause 8 is intended to reflect this rule, and should therefore be removed as inconsistent with the decision in *Aid/Watch*.

Removal of the entire clause does not, however, mean that a purpose of advocating a political party or cause, or supporting a candidate for political office, will be necessarily charitable. Indeed (with the possible exception of the 'political cause') these are unlikely to be charitable because of a lack of public benefit. However, they are not separately 'disqualified'.

As a matter of policy, we consider that it is legitimate for charitable organisations to identify, for example, political parties or candidates that support their policies, and to (for example) have politicians speak at their functions on debates that affect their organisation. Charities should be able to engage in and enrich Australian political discourse, and such engagement will enrich our democracy. Indeed, charities are often best placed to speak for the marginalised and to reflect on the consequences of government policies. We have recently explored these issues in detail in our forthcoming article.<sup>125</sup> We discuss there, in particular, the tension between the constitutional and fundamental principles of freedom of expression and representative democracy (among others) and the rule against political purposes.

We note the suggestion at [113] of the Consultation Paper that charities engaging in political activities could breach electoral law. These concerns, if valid, should be regulated by electoral law, not charity law. That is the more appropriate context for considering such policy concerns.

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<sup>124</sup> *Aid/Watch Incorporated v Commissioner of Taxation* [2010] HCA 42, [48].

<sup>125</sup> Joyce Chia, Matthew Harding and Ann O'Connell, 'Navigating the Politics of Charity: Reflections on *Aid/Watch v Commissioner of Taxation*' (2011) 35 *Melbourne University Law Review* (forthcoming). This is attached to the submission.

We also note the suggestion in [114] of the Consultation paper that ‘cause’ be amended to ‘political cause’. As indicated above, this could be read widely to embrace many social issues which happen to be controversial, such as climate change. This element should not be included in any version of the statutory definition.

#### ILLEGAL PURPOSES AND ACTIVITIES

##### **Recommendation 15**

The statutory definition should not refer to illegal activities or purposes.

#### **Charity engaging in conduct constituting serious offence**

Although the Consultation Paper does not specifically ask a question about illegal activities or purposes, it does discuss at [115]-[117] the possibility of removing from the core definition the requirement that a charity not engage in conduct constituting a serious offence (s 4(e)).

We agree that this provision is seriously misguided and should be removed, for several reasons. First, as noted by the Consultation Paper, there is confusion between the purposes and activities of a charity. While there is some case law suggesting that illegal purposes will not be charitable (as discussed below), there is no rule currently that if a charity engages in illegal activities it necessarily loses its status as a charity. As the ATO’s Ruling states:

The issue turns on purpose. The mere fact that an institution or its employee has breached a law would not, in itself, show that the institution has a non-charitable purpose. Instances of illegality in relation to occupational health and safety, employee entitlements and regulatory requirements would be unlikely to point towards a non-charitable purpose. Toward the other extreme would be a planned and coordinated campaign of violence.<sup>126</sup>

However, engagement in illegal activities may evidence a non-charitable purpose, or be evidence of harm that may outweigh any public benefit.

Second, if an activity is illegal, then the appropriate punishment for that activity is through the law governing the offence itself, and not through charity law. If, for example, charity trustees have defrauded the charity or others, then the appropriate reaction is to remove the charity trustees and punish them, rather than disqualifying the charity itself from charitable status. In such a situation, the charity—its donors, stakeholders, and beneficiaries—may be innocent victims of such fraud. In this case, it would be more appropriate for the ACNC to have powers to sanction such conduct, including the sanction of deregistration.

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<sup>126</sup> *Taxation Ruling TR 2011/4*, above n 53, [270].



Third, in the modern world, there are a plethora of offences which vary greatly in seriousness. Such a provision is, however, 'black and white', recognising no shades of seriousness, and therefore disqualification from charitable status may well be a disproportionate response to a particular offence.

### **Illegal activity as a disqualifying activity**

We disagree, however, with the suggestion in the Consultation Paper that this requirement might be shifted to a clause regarding 'disqualifying activity'.<sup>127</sup> This is in line with our view, expressed above, that there should be no reference to activities in the statutory definition. In substance, this will have the same adverse effects as above: namely, it will introduce a new requirement into charity law that muddles the distinction between purposes and activities; it fails to recognise that illegality should be dealt with through the provisions specific to the offence; and it is a black and white rule that will likely trigger a disproportionate response.

Instead, we consider that the statutory definition should not include any references to illegal activities. Instead, illegal activities can continue to be considered as relevant to the existence of a charitable purpose and public benefit.

### **Illegal purpose as a disqualifying purpose**

While the Consultation Paper does not raise this particular issue, we are concerned about the existing provision in the Charities Bill that provides that the purpose of engaging in unlawful activities is a disqualifying purpose (s 8(1)). Although the drafting of this appears narrower than the common law rule against illegal purposes, we still express concerns about reflecting this rule in the statutory definition.

Our concerns about this are twofold. First, the scope and existence of this rule in the common law is far from clear. The cases cited for this position at [269]-[270] of *Taxation Ruling TR 2011/4* do not, in our view, support such a blanket rule.<sup>128</sup> Nor do the cases cited by Picarda.<sup>129</sup> The only clear expression of this rule is in a very short passage in *Re Collier*

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<sup>127</sup> In this regard, we note that this appears to derive from the Sheppard Inquiry's recommendation that some types of activities should be disqualifying, including activities that are "illegal, contrary to public policy, or that promote a political party or a candidate for political office": Sheppard, Fitzgerald, and Gonski, *Sheppard Inquiry*, above n 20, 109, Rec 5. There is surprisingly little discussion of these rules within the report itself, however.

<sup>128</sup> *Re Pinion; Westminster Bank v Pinion* [1965] Ch 85, 105; *Auckland Medical Aid Trust v Commissioner of Inland Revenue* [1979] 1 NZLR 382. The former merely refers to an argument by counsel that a school for pickpockets would fail because of the rule against public policy or morality. In the latter, it was expressly held that the trust had not in law performed any illegal activities. Its reference to illegal activities (rather than purposes) appears to refer to the principle, stated above, that illegal activities may be evidence of a non-charitable purpose.

<sup>129</sup> Picarda, *The Law and Practice Relating to Charities*, above n 13, 451. The author cites here only two 19<sup>th</sup>-century cases which expose the underlying policy issues discussed above. In one, a bequest to make seats for

(*deceased*) [1998] 1 NZLR 81, which was free of authority. In our view, the better analysis is (as Dal Pont analyses it) that illegal purposes are better understood as offending the rule against public policy.<sup>130</sup>

Second, there is a policy issue about the breadth and appropriateness of such a rule. As noted above, there are many shades of illegality in the contemporary world, not of all which necessarily offend against public policy. Further, there are at least some cases in which the rule might infringe against legitimate causes of law reform. A historical example is that of advocacy for the abolition of slavery. A contemporary example is that of abortion, which remains illegal in parts of Australia.<sup>131</sup> An organisation that, for example, promotes women's health and reproductive rights, including providing advice on abortions, may well infringe this rule. The rule therefore is potentially in conflict with the decision of the High Court in *Aid/Watch* which recognised the need for the public to debate important issues, including those involving changes to the law, as an essential part of representative democracy.

The same concern applies even more strongly, however, to the rule against public policy. The scope of 'public policy' is potentially broad, although so far courts have wisely been reticent to invalidate gifts on this ground. There is certainly potential that advocacy of controversial viewpoints may be considered to contravene such a rule, and that this rule could be used to stifle a healthy and diverse civil society.

We consider that it is more appropriate to consider questions of illegality as raising questions about public policy that are best considered in the overall context of the public benefit test. This enables a more contextual assessment of the strength and value of the public policy involved, directed to the ultimate question of whether it benefits the public. We do not consider, however, that is necessary to include specific reference to such issues in the statutory definition.

## PARTICULAR TYPES OF BODIES (QUESTION 2, 14–15)

### GOVERNMENT BODIES (QUESTION 15)

<b>Recommendation 16</b>
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poor people to beg (when begging was a criminal offence) was not charitable; in the other, a bequest to release imprisoned debtors was held not to be charitable. The other cases in this passage refer to the rule against public policy.

<sup>130</sup> Dal Pont and Petrow, *Law of Charity*, above n 7, [3.46].

<sup>131</sup> See generally Victorian Law Reform Commission, *Law of Abortion: Final Report* (March 2008) <[http://www.lawreform.vic.gov.au/wps/wcm/connect/justlib/Law+Reform/Home/Completed+Projects/Abortion/LAWREFORM++Law+of+Abortion\\_+Final+Report](http://www.lawreform.vic.gov.au/wps/wcm/connect/justlib/Law+Reform/Home/Completed+Projects/Abortion/LAWREFORM++Law+of+Abortion_+Final+Report)>, Ch 2.

Clause 4(1)(f) of the Exposure Draft of the Charities Bill 2003 (Cth) should be omitted. However, if some reference to government bodies is desired, the reference should be to 'government bodies' only, or should be confined by including a specific legislative test of 'control'.

The distinction between charitable and government purposes is an area that lacks clarity in the common law. As Dal Pont states, "[a]ny clear charity-government divide is no longer", particularly with the outsourcing of government functions to charities, especially in the form of detailed tenders. This contextual shift, together with the removal of the doctrine against political purposes, means "there is in modern law far less compulsion to distinguish charitable from governmental purposes".<sup>132</sup> Although the distinction was not "obliterate[d]" by the High Court in *Central Bayside*, the ruling "suggests a porosity in the relevant concepts".<sup>133</sup>

One of our Chief Investigators, Matthew Harding, has written a detailed article on distinguishing government from charity, which is attached.<sup>134</sup> This article argues that the feature that best distinguishes charity from government in the case law is a concept of 'voluntarism', namely the pursuit of the public good individually and autonomously, as distinct from administration, in which the public good is pursued collectively by the community as a whole through deliberative and democratic processes of the State.<sup>135</sup> A charity may be established by statute, receive most of their funding from government, align their objectives with those of government, and seek to achieve outcomes specified by government contracts, and yet ultimately retain its autonomy in the sense that the trustees or directors are free to choose not to follow government objectives or policies.

The correct policy position, in our view, is to recognise that there are, and will continue to be, shifts in the relationship between government and charity over time. Historically, the modern State has taken over many of the functions first performed by charities, which has increased the overlap between government and charitable purposes. Further, there has been a shift towards a contracting relationship between government and the sector which has been driven, in large part, by government. In our view, therefore, the distinction between government and charity is best regarded not as an analytical distinction but rather as a contextual distinction shaped by shifting attitudes and conceptions of the role of State and society. Therefore, the distinction between government and charity should, if drawn at all in the statute, be drawn loosely and in favour of charitable status.

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<sup>132</sup> Dal Pont and Petrow, *Law of Charity*, above n 7, [2.21].

<sup>133</sup> *Ibid* [2.22].

<sup>134</sup> Matthew Harding, 'Distinguishing Government from Charity in Australian Law' (2009) 31 *Sydney Law Review* 559.

<sup>135</sup> *Ibid* 572.

There are several possible options for dealing with this attenuated distinction. One option is not to refer to the distinction at all in the statute. This is the position taken by most of the legislative definitions in the United Kingdom and Ireland. In practice, it is difficult to think of a not-for-profit organisation that exhibits such a high level of ‘governmental’ features as to fail the test in *Central Bayside*. Indeed, if the government desired control to that degree, it should openly establish a government body. We note also that tax exemptions commonly cover government bodies and public lands in any event,<sup>136</sup> so as a practical matter this distinction is less important.

A second option is a minimalist version which would exclude only ‘a government body’ from the definition of the charity. In the facts of a particular case, it could be argued that the level of identification between a particular organisation and the government was so close that it was, in fact, a ‘government body’ for practical purposes. This would seem to accord with the reasoning in *Central Bayside*, which required a much higher degree of control over management and funding before the body could be seen to be ‘governmental’ rather than ‘charitable’. Alternatively, a legislative definition of ‘government entity’, such as that in s 41 of *A New Tax System (Australian Business Number) Act 1999* (Cth) could be used, although we would prefer that the definition be expressly stated rather than through a legislative cross-reference. We note, however, that this definition should make express reference to local government.

Alternatively, one could be more precise about what might constitute effective ‘control’ by the government. An obvious legislative precedent would be the concept of ‘controlled entities’ in the *Corporations Act 2001* (Cth). Section 50AA of that Act deems an entity to ‘control’ a second entity if the “first entity has the capacity to determine the outcome of decisions about the second entity’s financial or operating policies”.<sup>137</sup> This is a matter determined on the facts and examines the level of control in practice. This would seem to correspond with the High Court’s view that *Central Bayside* had retained control over its management and funding allocation to a sufficient extent that distinguished it from a government body.

A further example is provided by the Scottish legislation, which excludes a charity where “its constitution expressly permits the Scottish Ministers or a Minister of the Crown to direct or otherwise control its activities”.<sup>138</sup> In New Zealand, the *Income Tax Act 2007* (Cth) uses the concept of ‘council-controlled organisations’ as a way of distinguishing organisations controlled by local government for the purposes of access to tax exemptions.<sup>139</sup> These more stringent definitions are analogous to the threshold required to be a ‘subsidiary’ under

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<sup>136</sup> See, eg, *Income Tax Assessment Act 1997* (Cth), s 50.25.

<sup>137</sup> *Corporations Act 2001* (Cth).

<sup>138</sup> *Corporations Act 2001* (Cth) s 7(4).

<sup>139</sup> This is defined in s 6(1) of the *Local Government Act 2002* (NZ) in terms of a majority of voting rights or power to appoint directors and managers.

Div 6 of Pt 1.2 of the *Corporations Act 2001* (Cth). A similar definition is provided in relation to the payroll tax exemption for non-profit organisation in s 48(4) of the *Payroll Tax Act 2007* (NSW), which excludes educational companies controlled by an educational institution.<sup>140</sup> These are other possible legislative precedents.

## PEAK BODIES (QUESTION 2)

In our view, it is desirable to clarify the charitable status of peak bodies in the proposed definition. First, as already discussed, the purpose of a statutory definition is to provide greater clarity and accessibility. There seems no good reason to leave this particular issue buried in the common law, inaccessible to the layperson.<sup>141</sup> Second, although the decision of the Administrative Tribunal is useful, it is not conclusive. It is a decision of a tribunal, not a superior or a federal court. Third, the decision is inevitably fact-specific.

As discussed above, the purposes of peak bodies and also infrastructure organisations should be expressly recognised as a charitable purpose, namely in its promotion of volunteering, the voluntary sector or the effectiveness or efficiency of charities.<sup>142</sup> Recommendation 1 therefore includes our response to this question.

## COLLABORATIVE ARRANGEMENTS (QUESTION 14)

### **Recommendation 17**

The legislation should not refer to disqualifying types of entities.

### **Recommendation 18**

The legislation should empower the ACNC with a discretion to treat some entities as forming part of a related charity or as a single charity.

We consider that clause 4(1)(f), which excludes from the scope of the term ‘entity’ particular entities including individuals, partnerships, and superannuation funds, is unnecessary and confusing, and should be removed. There is no reference in the 2003 Bill to “institutions”, a term which does feature in the income tax legislation. This term has acquired a particular meaning in tax law. *Taxation Ruling TR 2011/4* summarises the position as follows:

An institution is an establishment, organisation or association, instituted for the promotion of an object, especially one of public or general utility. It connotes a body called into existence to

<sup>140</sup> An ‘educational institution’ is defined as one providing education beyond secondary level.

<sup>141</sup> We note that although the decision in *Social Ventures Limited v Chief Commissioner of State Revenue* [2008] NSWADT 331 is available on the website of the Tribunal, it is not reported in any law reports, is not available in Austlii, and is not indexed by either major law publisher.

<sup>142</sup> *Charities Act 2006* (UK) c 50 c 50, s 2(3)(c)(ii); *Charities and Trustee Investment (Scotland) Act 2005* (Scotland) asp 10, s 7(3)(b)(ii); *Charities Act (Northern Ireland) 2008* (NI), s 2(3)(c)(ii).

translate a defined purpose into a living and active principle. It may be constituted in different ways including as a corporation, unincorporated association or trust. However it involves more than mere incorporation. A structure with a small and exclusive membership that is controlled and operated by family members and friends and undertakes limited activities is not an institution.

This imposes a limitation on newly formed bodies. It may be desirable to address this in the definition of charity or to ensure the references in the tax legislation are changed to entity.

The Sheppard Inquiry's purpose in including the tax definition of "entity" in s 960-100 of *Income Tax Assessment Act 1997* (Cth) was to provide a "clear and flexible" term that covered the range of possible legal types of entity which could be charitable.<sup>143</sup> They considered that some of these entities, however, could not be charities, including individuals, partnerships and superannuation funds. They were concerned about problems of accountability if individuals could be charities, and considered that superannuation funds were entities formed for the benefit of members. They did not separately address the question of partnerships.

This express exclusion appears to be superfluous in the cases of individuals and superannuation funds. It is not clear how individuals could also satisfy the definition of 'not-for-profit' or otherwise be 'established for charitable purposes only'. Similarly, superannuation funds are clearly not established for charitable purposes only.

In relation to partnerships, we note that the term is defined in s 995-1 of the *Income Tax Assessment Act 1997* (Cth) more broadly than it is in State and Territory partnership legislation,<sup>144</sup> which would require that partnerships be formed "with a view of profit".<sup>145</sup> The term 'entity', however, expressly excludes "non-entity joint ventures".<sup>146</sup> We observe some concern was expressed by stakeholders in the Board of Taxation Inquiry that the exclusion of partnerships might impede collaboration between not-for-profits.<sup>147</sup> The view of the Inquiry was that the term 'partnership' was used by the sector more loosely to cover a range of collaborative arrangements and that the Bill or EM should clarify that its strict

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<sup>143</sup> Sheppard, Fitzgerald, and Gonski, *Sheppard Inquiry*, above n 20, 95–96.

<sup>144</sup> The definition refers to "an association of persons (other than a company or a limited partnership) carrying on business as partners or in receipt of ordinary income or statutory income jointly", or a limited partnership.

<sup>145</sup> See, eg, *Partnership Act 1892* s 1(1).

<sup>146</sup> This is further defined as a contractual arrangement (a) under which 2 or more parties undertake an economic activity that is subject to the joint control of the parties; and (b) that is entered into to obtain individual benefits for the parties, in the form of a share of the output of the arrangement rather than joint or collective profits for all the parties: *Income Tax Assessment Act 1997* (Cth), s 995.1. This was inserted by Sch 7 of the *Indirect Tax Legislation Amendment Act 2000* (Cth).

<sup>147</sup> The Board of Taxation, *Consultation on the Definition of a Charity* (December 2003) <[http://www.taxboard.gov.au/content/content.aspx?doc=reviews\\_and\\_consultations/definition\\_of\\_a\\_charity/default.htm&pageid=007](http://www.taxboard.gov.au/content/content.aspx?doc=reviews_and_consultations/definition_of_a_charity/default.htm&pageid=007)>, [4.10]–[4.11].

legal meaning was intended, in which case the concept was only relevant to a for-profit entity.<sup>148</sup>

In principle, policy should encourage and facilitate collaboration between not-for-profits. In our view, the specific exclusion of partnerships is confusing and serves no policy purpose, so should be removed. We note that none of the other jurisdictions specifically refer to types of entities, but rather speak generally of ‘institutions’ or ‘bodies’.

We also refer to our view, expressed above, that one category of charitable purpose should include the promotion of volunteering, the voluntary sector, and the effectiveness and efficiency of charities. This would address arrangements in which charities pool or share services.

In relation to complex groups of related entities, which are a particular feature of religious institutions, we note that special provision has been made in relation to GST to such entities and sub-entities. However, rather than applying this complicated regime to the statutory definition, we prefer the simple solution provided in the legislation of Northern Ireland:

(4) The Commission may direct that for all or any of the purposes of this Act an institution established for any special purposes of or in connection with a charity (being charitable purposes) shall be treated as forming part of that charity or as forming a distinct charity.

(5) The Commission may direct that for all or any of the purposes of this Act two or more charities having the same charity trustees shall be treated as a single charity.<sup>149</sup>

In our view, this provision gives the Commission sufficient scope to consider all the circumstances that may be appropriate in relation to complex groups of entities.

## OTHER ISSUES (QUESTIONS 18–20)

### STATE AND TERRITORY DEFINITIONS (QUESTION 18)

#### **Recreational and sporting purposes**

As discussed earlier, the extension of the definition to include the advancement of sport and the provision of recreation facilities will facilitate harmonisation.

#### **Charitable trusts legislation**

The Consultation Paper raises the issue of trusts legislation in States and Territories that extend recognition of charitable trusts (at [144]) in cases where specific trusts are deemed charitable, and to ‘save’ mixed purposes trusts (commonly known as ‘savings’ legislation).

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<sup>148</sup> Ibid [4.28].

<sup>149</sup> *Charities Act (Northern Ireland) 2008* (NI), s 1(4), (5).

Different policy issues are raised when charitable status is considered as a requirement for the validity of trusts. As Lord Cross argued in 1956, the scope of charitable status ought to be more generous in this context, given the limited range of legal privileges.<sup>150</sup> Others have suggested that all public purposes, and not only charitable ones, should be validated.<sup>151</sup> We agree that there is a significant contextual difference between ‘saving’ a gift that falls short of charitable status because of the technicalities of the interpretation of charity, and charitable status for the purpose of access to tax concessions. We therefore do not consider that this legislation necessarily raises a problem for harmonisation.

We also note that other legislation specifically deem certain trusts to be charitable. This ensures the validity of the trust, as well as the application of relevant State or Territory legislation governing trusts (including, for example, curial powers and accountability requirements). Again, this raises different policy considerations from charitable status for the purposes of tax concessions, which need to be considered in the process of harmonisation.

### **Other issues**

There are many other legislative references to the term ‘charity’ and its cognates. These principally arise in the following contexts:

- privileges or preferences, including:
  - tax concessions;
  - exemptions from anti-discrimination legislation;
  - exemption for gambling or lotteries;
  - exemptions from volunteers’ or other liability; and
  - facilitative provisions enabling participation by charities in particular schemes such as adoption and housing; and
- regulatory provisions, including:
  - fundraising legislation;
  - facilitative legislation;
  - inclusion or exclusion of particular regulatory regimes.

Ultimately, the appropriate scope of the term ‘charity’ depends upon the context. For example, it is usual (although by no means universal) to see in regulatory provisions a broad definition that would encompass (for example) “benevolent, philanthropic or patriotic purposes”, since the purpose is to regulate the general activity being undertaken.

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<sup>150</sup> Geoffrey Cross, ‘Some Recent Developments in the Law of Charity’ (1956) 72 *Law Quarterly Review* 187.

<sup>151</sup> N P Gravells, ‘Public Purpose Trusts’ (1977) 40 *Modern Law Review* 397; Susan Bright, ‘Charity and Trusts for the Public Benefit—Time for a Rethink?’ [1989] *Conveyancer* 28; G Dal Pont, ‘Why Define Charity? Is the Search for Meaning Worth the Effort?’ (2002) 8 *Third Sector Review* 5; Nuzhat Malik, ‘Defining “Charity” and “Charitable Purposes” in the United Kingdom’ (2008) 11 *International Journal of Not-for-Profit Law* <[http://www.icnl.org/knowledge/ijnl/vol11iss1/special\\_2.htm](http://www.icnl.org/knowledge/ijnl/vol11iss1/special_2.htm)>.



For practical purposes, the harmonisation project should focus on the issue of privileges and preferences, of which perhaps the most significant is that of tax concessions. The scope of such concessions and the relative importance of the definition of charity varies widely, both between and within jurisdictions. Of all the jurisdictions, Victorian tax concessions depend most on the general law definition. In some other jurisdictions, particularly NSW and Queensland, the scope is more closely defined (sometimes more restrictively, sometimes more generously, and sometimes being narrower in some respects and wider in others). Finally, a range of concessions are extended broadly to encompass other “benevolent, philanthropic or patriotic”, or even “similar public” purposes. Importantly, this last category includes the now-harmonised exemptions for payroll tax.

Therefore, the definition of ‘charity’ is less critical in State or Territory tax concessions, for the most part, than in Commonwealth tax legislation. However, a modern statutory definition of charity at a Commonwealth level may provide a good starting point in assisting States and Territories to rationalise the scope of their exemptions, which are often unnecessarily complex and inconsistent.

#### AUSTRALIAN DISASTER RELIEF FUNDS (QUESTION 19)

We agree with the concerns expressed in the Consultation Paper at [145]-[151] about the need to provide greater flexibility within the regime governing Australian Disaster Relief Funds. We agree, in particular, that there should be flexibility in:

- establishing such funds prior to disasters, in order to facilitate timely delivery of services;
- allowing funds to expend funds in relation to other disasters; and
- increasing the scope of allowable activities; and
- applying and distributed donated funds.

The details of these issues concern matters of policy that are best addressed by the sector, and are not clearly relevant to the statutory definition of charity. We suggest that, while there is a need to review these issues, there ought to be a separate consultation on this issue.

#### TRANSITIONAL ISSUES (QUESTION 20)

##### **Recommendation 19**

Existing testamentary trusts for poor relatives should be deemed charitable by the legislation.

Our view is that the statutory definition of charity should, in almost all respects, be broader than that of existing charities. It should therefore cause minimal transitional difficulties.

We observe that, in light of this minimal impact, the suggestion of a general education campaign may be counterproductive, as charities may mistakenly think they are adversely affected. We would expect, of course, that existing sector organisations will communicate the news to affected organisations together with appropriate links to training or guidance on the matter.

However, one particular issue that may cause difficulty is the removal of the ‘poor relations’ cases from charitable status. This may adversely affect existing testamentary trusts, which are difficult to change, as the Board of Taxation Inquiry discussed.<sup>152</sup> That Inquiry considered that grandfathering existing charitable bodies would be “too wide” an exemption that might defeat the purpose of the bill. However, we consider it is unfair to prejudice existing trusts which were charitable at the time of creation. We recommend including a provision deeming existing testamentary trusts for cases for poor relatives to be charitable. Such a provision is not, in our view, unduly wide.

## CONCLUSION

We hope the above discussion is useful. We should emphasise that, despite the comprehensive and detailed nature of our submission, we are in general agreement with this particular reform. However, the recommendations we have made will help to ensure that this important reform fully achieves the goals of accessibility, clarification, modernisation and correction.

Please feel free to contact us if you wish to discuss any matters further, or would like access to any of the material to which we have referred. Our contact details are listed in Appendix A. We look forward to engaging further with Treasury on the agenda of not-for-profit reform.

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<sup>152</sup> The Board of Taxation, *Consultation*, above n 148, [4.30]–[4.31].

## APPENDIX A: NOT-FOR-PROFIT PROJECT, MELBOURNE LAW SCHOOL

A group of academics from the University of Melbourne Law School is undertaking the first comprehensive and comparative investigation of the definition, regulation, and taxation of the not-for-profit sector in Australia (the Not-for-Profit Project). The Australian Research Council is funding this project for three years, beginning in 2010. The project aims to identify and analyse opportunities to strengthen the sector and make proposals that seek to maximise the sector's capacity to contribute to the important work of social inclusion and to the economic life of the nation. In particular, the project aims to generate new proposals for the definition, regulation and taxation of the not-for-profit sector that reflect a proper understanding of the distinctions between the sector, government, and business.

The project investigators of the Not-for-Profit Project are:

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Ann is Co-Director of Taxation Studies and teaches taxation and securities regulation at the Law School. She is also Special Counsel at Allens, Arthur Robinson, a member of the Advisory Panel to the Board of Taxation and an external member of the Australian Taxation Office's Public Rulings Panel.

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Miranda is Co-Director of Taxation Studies and teaches tax law and policy at the Law School. She is an International Fellow of the Centre of Business Taxation at Oxford University and is on the Tax Committee of the Law Council of Australia. She has previously worked at New York University School of Law, US and as a solicitor and in the Australian Taxation Office.

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Matthew is an Associate Professor at the University of Melbourne. He holds a BCL and PhD from Oxford University. His published work deals with issues in moral philosophy, fiduciary law, equitable property, land title registration, and the law of charity. Matthew has also worked as a solicitor for Arthur Robinson & Hedderwicks (now Allens, Arthur Robinson).

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Joyce is the Research Fellow on the Not-for-Profit Project. She holds a PhD from University College, London. She has worked at the Australian Law Reform Commission, the Federal Court of Australia, and the Victorian Court of Appeal.

More information on the project can be found on the website of the [Melbourne Law School Tax Group Not-for-Profit Project](#).

## APPENDIX B: CONSOLIDATED LIST OF RECOMMENDATIONS

### **Recommendation 1: List of charitable purposes**

The statutory list of charitable purposes should include:

- (a) the advancement of health or the saving of lives, including:
  - (ii) prevention or relief of sickness, disease or human suffering;
- (b) the advancement of education;
- (c) the advancement of social or community welfare, including:
  - (i) the prevention or relief of poverty;
  - (ii) the care, support or relief of those in need by reason of youth, age, ill-health, disability, financial hardship, disaster, geographical location or other disadvantage, including by the provision of accommodation;
  - (iii) the integration of, or participation by, the disadvantaged;
  - (iv) the care or support of members or former members of the armed forces or the civil defence forces and their families; and
  - (v) the provision of child care services;
- (d) the advancement of religion or analogous philosophical beliefs;
- (e) the advancement of arts, culture, heritage, the sciences or philosophy, including:
  - (i) the cultures or customs of Indigenous peoples or ethnic or language groups;
- (f) the advancement of the natural environment;
- (g) the advancement of citizenship or community development, including:
  - (i) urban or rural regeneration;
  - (ii) volunteering, the voluntary sector, or the effectiveness and efficiency of charities;
- (h) the advancement of sport or the provision of facilities for recreation and leisure;
- (i) the advancement of civil or human rights;
- (j) the advancement of reconciliation, conflict resolution, harmonious community relations, or equality or diversity, including:

- (i) assistance or support for immigrants and refugees;
- (k) the advancement of animal welfare;
- (l) the advancement of industry or commerce;
- (m) the advancement of access to advice or information; and
- (n) other purposes beneficial to the community.

### **Recommendation 2: Ousting of the preamble of Statute of Elizabeth**

The common law requirement that a purpose should be 'within the spirit and intendment' of the preamble to the Elizabethan Statute of Charitable Uses 1601 should be ousted by statute.

### **Recommendation 3: Definition of religion**

There should be no definition of religion in the statutory definition.

### **Recommendation 4: Public benefit test**

The statutory definition should state, in relation to the 'public benefit' test, that regard should be had to the following principles.

In relation to whether there is 'benefit':

- (a) the benefit(s) may be tangible or intangible, direct or indirect, present or future;
- (b) the benefit(s) should be assessed in the light of contemporary needs and circumstances;
- (c) the benefit(s) may, where appropriate, be assessed against potential detriment(s); and
- (d) the inquiry is not into the merits of the methods or opinions of the organisation.

In relation to whether the benefit is for the 'public' or a 'sufficient section of the public':

- (a) the existence of wider benefits to the general community;
- (b) the nature of any limitations on the class to be benefited, and in particular:
  - (i) the extent to which the class of potential beneficiaries is open in nature;
  - (ii) whether such limitations are reasonably related to the nature of the charitable purpose; and
  - (iii) the practical need for such limitations.

**Recommendation 5: Guidance on public benefit test**

The Australian Charities and Not-for-Profits Commission should be required to provide further guidance on the test of public benefit.

**Recommendation 6: Removal of exception for relief of poverty**

There should be no exception for the relief of poverty in relation to the public benefit test for 'poor relations'.

**Recommendation 7: Removal of reference to numerically negligible class**

There should be no legislative reference to the requirement that a sufficient section of the public should be more than 'numerically negligible'.

**Recommendation 8: Prohibition of private benefit**

The standard legislative definition of 'not-for-profit' should be incorporated as a requirement of charitable status. In addition, the definition should require that, where a benefit is conferred on a person other than in his or her capacity as a member of the public or a section of the public, any such benefit is reasonable in all of the circumstances, and is ancillary to or otherwise furthers the public benefit.

**Recommendation 9: Application of presumptions**

If the presumptions of public benefit are retained, they should apply equally to all the listed instances of charitable purposes, excepting the residual category of 'other purposes beneficial to the community'.

**Recommendation 10: Indigenous organisations**

The definition of public benefit should provide that the purpose of a trust, society, or institution is a charitable purpose if it would satisfy the public benefit requirement apart from the fact that the beneficiaries of the trust, or the members of the society or institution, are related by blood. The definition should further specify that prescribed corporate bodies under the *Native Title Act 1993* (Cth) are charitable.

**Recommendation 11: Self-help groups and closed or contemplative religious orders**

To avoid doubt, reference should be made either in the legislation or in the Explanatory Memorandum to clarify that self-help groups and closed or contemplative religious orders may meet the public benefit test. There should not, however, be a requirement of intercessory prayer for closed or contemplative religious orders to be of public benefit.

**Recommendation 12: Charitable purposes only**

The definition should state that a charity must have a purpose or purposes that are charitable only. To avoid doubt, however, it should be specified that this does not preclude the existence of other purposes that further, are in aid of, or are ancillary or incidental to these charitable purposes.

**Recommendation 13: Activities**

The statutory definition should not refer to the activities of a charity. However, if such an activities test is included, it should accurately reflect the current common law principles.

**Recommendation 14: Political purposes or activities**

The statutory definition should not include clause 8 of the Exposure Draft of the Charities Bill 2003 (Cth), or any other express reference to political purposes or activities. In any event, there should be no reference whatsoever prohibiting 'political' or other causes.

**Recommendation 15: Illegal purposes or activities**

The statutory definition should not refer to illegal activities or purposes.

**Recommendation 16: Government bodies**

Clause 4(1)(f) of the Exposure Draft of the Charities Bill 2003 (Cth) should be omitted. However, if some reference to government bodies is desired, the reference should be to 'government bodies' only, or should be confined by including a specific legislative test of 'control'.

**Recommendation 17: Partnerships or other entities**

The legislation should not refer to disqualifying types of entities.

**Recommendation 18: Complex groups of entities**

The legislation should empower the ACNC with a discretion to treat some entities as forming part of a related charity or as a single charity.

**Recommendation 19: Transitional provisions**

Existing testamentary trusts for poor relatives should be deemed charitable by the legislation.