# The History and Future of the Definition of Charity

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## Abstract

The Australian Government is proposing to enact a statutory definition of charity later this year, some eleven years after it was proposed by the Charities Definition Inquiry, and several years after the various jurisdictions of the United Kingdom and Ireland have adopted one. This paper examines the Australian Government’s proposal, setting it in the context of the historical and contemporary purposes of the definition of charity and in the context of the long-running international debate over the value of a statutory definition. The key elements of the proposal are set out and briefly critiqued, before presenting a proposed statutory definition for discussion by the audience. The paper concludes by considering the prospects of the current proposal.

## Introduction

Good afternoon and welcome. I am especially pleased to be here today as this conference is the major event of Melbourne Law School’s Not-for-Profit Project, a three-year project on which I was, until quite recently, the full-time Research Fellow. I encourage those of you who are unaware of the Project to visit our website (http://www.law.unimelb.edu.au/notforprofit) and its many resources.

None of the Project’s work would have been possible without an all-important grant by the Australian Research Council. In turn, that grant was made possible by the Chief Investigators of that Project, Professors Ann O’Connell, Miranda Stewart and Associate Professor Matthew Harding. I would like to take this opportunity to publicly thank them for all their hard work in getting the money, and for deciding to spend it principally on employing me as well as on this conference. In particular, I would like to thank them for both their intellectual and administrative contributions to the Project and personally for their support, trust and kindness both during and after my employment here at the Law School. I would also like to thank the research assistants, Natalie, Julia and Monique, who have done a fantastic job of picking up the organisation of the conference after I left the Law School for my new employer, the Australian Charities and Not-for-Profits Commission (ACNC), just over a month ago.

I should emphasise that this paper reflects views developed and mostly articulated as a Research Fellow, rather than reflecting any views of my current employer. Indeed, this paper draws heavily upon earlier work of the Project, including a literature review on defining charity, our submission on the statutory definition, and a seminar presentation for the Australian Charity Law Association. All of these materials are available on our website.

I will begin first by discussing why the definition of charity matters, before analysing the surprisingly large literature on the issue of a statutory definition of charity. This sets the background for a brief summary and critique of the current Australian Government’s proposal for a statutory definition. I then draw on our submission concerning the statutory definition to present a draft of a statutory definition of charity for discussion by the audience. (Copies to be made available). Finally, I will reflect briefly on the political prospects of the current proposal for a statutory definition of charity.

## Why the Definition Matters

The short answer to this question is, of course, that the definition of charity matters because it is the gateway to tax concessions. Like most short answers, it is mostly but not entirely true.

Similarly, it is often (but wrongly) said that the law of charity dates from the preamble of the *Statute of Elizabeth 1601.*[[2]](#footnote-3)The true source of the definition of charity, however, is the Catholic Church’s idea of ‘pious causes’. Under ecclesiastical law, gifts to pious causes honoured God and the Church, and included gifts for saying masses, founding chantries, repairing churches and maintaining religious houses.[[3]](#footnote-4) Importantly, they also embraced gifts for the relief of distress and suffering on earth, including bequests for the poor, maimed and suffering, and for the maintenance of infrastructure including hospitals and roads.[[4]](#footnote-5)

The ecclesiastical courts granted bequests for pious causes several privileges, which have since been extended to charitable trusts as Chancery courts took over gradually from ecclesiastical courts.[[5]](#footnote-6) These privileges include: legacies do not fail because they are too indefinite; legacies are generously construed; the legacy could be applied to similar objects if it was impossible to execute the person’s wishes lawfully; and debts must first be satisfied from private rather than charitable legacies.[[6]](#footnote-7) So the first, important, qualification to the question of why the definition matters is that, historically and still today, the definition matters to save trusts from failing.

The Statute of Elizabeth was, however, hugely significant in other ways. It marked an increasing secularisation of charity, with its exclusion of most religious uses.[[7]](#footnote-8) It also marked the transfer of welfare responsibilities from the Church to the Tudor State, most notably in the enactment of poor laws.[[8]](#footnote-9) Finally, it also authorised the first State regulation of charities, as it instituted a system of ad hoc commissions to inquire into the management of charities. Charities within the preamble of the Statute of Elizabeth were subject to those commissions, while other charities were not. This system of commissions led ultimately to the Charity Commission of England and Wales, and through its example to the ACNC. So the second qualification is that the definition of charity mattered and matters for the purposes of regulation.

The Reformation also caused the doctrine of ‘superstitious use’ to develop.[[9]](#footnote-10) This doctrine meant that trusts for religions other than the officially established Church of England (and after the *Act of Toleration*, those tolerated religions), were illegal. Until 1700, the key questions concerning charity were whether there was a superstitious use, and whether the charity fell within or without of the Statute of Elizabeth’s preamble. The focus was on “determining the nature and extent of the privileges of charity rather than in marking out its boundaries”.[[10]](#footnote-11)

A key development was that, in 1736, a *Mortmain Act* voided bequests of land to charity in favour of heirs and next of kin. This reflected anti-clerical sentiments and fears that bequests to charity were swallowing up land at the expense of wronged relatives.[[11]](#footnote-12) So the third qualification is that, at a critical period, the definition of charity mattered because it resulted in trusts in effect failing. Paradoxically, however, this encouraged anti-clerical judges to retain broad and generous definitions of charity.[[12]](#footnote-13)

The Statute of Elizabeth’s preamble only became part of the legal definition of charity in 1804, in the case of *Morice v The Bishop of Durham*.[[13]](#footnote-14) It was one of those accidents of history, for the preamble was not referred to until the matter was appealed.[[14]](#footnote-15) Counsel in that case first referred to the four heads of charity that were later elevated to the ‘definition’ of charity in the seminal case of *Pemsel*.[[15]](#footnote-16) In that famous case, the House of Lords ruled that Scottish tax laws were to be interpreted according to the English legal definition of charity, which included the four heads of charity: relief of poverty, advancement of education, advancement of religion, and ‘other purposes beneficial to the community’. This formula is often referred to as the ‘definition of charity’, although it is more accurately considered as a classification. The usage is also inaccurate because the common law meaning of charity includes other key elements, of which the most important is the requirement of public benefit.

However, at least since *Pemsel,* being ‘charitable’ has mostly mattered because it grants access to tax concessions. As taxes have increased in the 20th century, and as the sector has grown, the significance of these tax concessions has also grown. Further, as State taxation has become the default rather than exceptional, charities have increasingly had to justify those tax concessions.[[16]](#footnote-17)

Importantly, however, that the definition of charity is not as practically significant in Australia as it is in the UK, where ‘charitable status’ is almost the exclusive gateway to tax concessions for the not-for-profit sector.[[17]](#footnote-18) In contrast, in Australia the tax exemptions for not-for-profits range more broadly. Indeed, in the 19th century the State income taxes exempted not just charities but all not-for-profits.[[18]](#footnote-19) The Australian system today is far more complex and inconsistent than the regime in the UK because there are other categories, such as public benevolent institutions (PBIs), and because other types of not-for-profits such as hospitals are provided for separately while some deductible gift recipients are specifically named.[[19]](#footnote-20)

Similarly, State and Territory concessions are far from consistent in their definition of which entities are eligible for tax exemptions and concessions. An exception is payroll tax, which has been harmonised.[[20]](#footnote-21) Interestingly, this harmonised exemption extends well beyond charities, exempting all religious institutions, public benevolent institutions and non-profits if they have a sole or dominant charitable, benevolent, philanthropic or patriotic purpose. However, the exemption specifically excludes schools, educational institutions or companies, and State instrumentalities. Further, the exemption has been amended so that the exemption applies only where persons are employed ‘exclusively’ in work of a religious, charitable, philanthropic or patriotic nature, to preclude the use of the exemption for commercial activities of not-for-profits. Other similarly broad phrasing is used in fundraising laws and other legislative exemptions.

Lastly, but very importantly, the term ‘charity’ has also practical benefits in generating legitimacy and supporting fundraising. ‘Charity’ is a powerful brand, and that brand is crucial for raising funds and attracting volunteers and employees. Indeed much of the point of regulating charities is to protect that brand from being undermined.

## History of Definitional Reform

The legal and practical significance of the term ‘charity’ lies behind the surprisingly long and vexed debate over the need to reform the common law definition of charity. In *Pemsel* itself, the House of Lords split 3-2 on the breadth of the concept of charity in the interpretation of tax concessions. But for that extra judge, we would not be here today debating a statutory definition.

For the most part, this long debate came to nothing until the beginning of the 21st century. In the 1970s, concern over the state of charity law led the National Council for Voluntary Organisations (NCVO) to convene an independent inquiry into charity law including the definition, known as the Goodman Inquiry.[[21]](#footnote-22) In the preface of its report, the Chair remarked that they were likely to be criticised for having:

produced no adventurous new definition of charity. Our every inclination was to do just that. We started off, or most of us did, in the firm belief that the old definitions could be discarded like old hats and in no time at all the talented milliners on the committee would produce a totally new model. Discussion and experience have taught us otherwise.[[22]](#footnote-23)

This quote expresses vividly, I think, why proposals for redefinitions of charity law end up looking so much alike. The Goodman Report ended up recommending a more comprehensive definition that they suggested should act as a guideline, rather than as a statutory provision. Nevertheless, Barbados adopted that definition from a UK report produced in the 1970s, the Goodman report, in 1980.[[23]](#footnote-24) In 1999, the Katz report in South Africa recommended that, instead of using ‘charity’, with all the baggage that came with it, tax exemptions should be conferred on ‘public benefit organisations’, with the legislation specifying public benefit purposes in a Schedule.[[24]](#footnote-25) This was also recommended in Canada.

As is well known to the audience, in 2001 there was a landmark independent inquiry, commonly known as the Charities Definition Inquiry or CDI, into the definition of charity.[[25]](#footnote-26) The inquiry was chaired by a judge, Ian Sheppard, and with Robert Fitzgerald and David Gonski as members. The context was the introduction of the Goods and Services Tax, a tax that required many charities to interact for the first time with the Australian Taxation Office. Much like the Goodman Report, the report proposed a statutory definition largely based on common law but settling particular points of debate. This report was influential in subsequent reform reports, including in New Zealand,[[26]](#footnote-27) Ireland,[[27]](#footnote-28) and the United Kingdom.[[28]](#footnote-29)

As is notorious to many of you, however, the then Australian Government released an Exposure Draft that modified in key respects the proposals of the CDI.[[29]](#footnote-30) In particular, the Draft sought to include an attempt to codify the common law restrictions on advocacy, which provoked much concern. After a further inquiry by the Board of Taxation,[[30]](#footnote-31) the Government decided ultimately instead to limit itself to extending charitable status for some particular purposes, such as non-profit child centres.[[31]](#footnote-32)

In the eleven years since, suddenly much has happened on the definitional front. Most significantly, the Labor Government of the United Kingdom began a much broader agenda for the third sector that included as part of its reforms (slightly different) definitions of reform in England and Wales,[[32]](#footnote-33) Scotland,[[33]](#footnote-34) and Northern Ireland.[[34]](#footnote-35) Ireland has also introduced a statutory definition,[[35]](#footnote-36) although its proposed regulator has yet to be established and looks unlikely to be in the future.[[36]](#footnote-37)

Other jurisdictions, however, did not join the rush for definitional reform. New Zealand has defined charitable purpose only in terms of enacting the *Pemsel* heads and clarifying particular points in relation to the Maori and ancillary purposes (and now amateur sport).[[37]](#footnote-38) Recently, however, the (just disestablished) New Zealand Charities Commission has revived discussion of this pending the statutory review of the *Charities Act 2005* (NZ).[[38]](#footnote-39) Canada also retains the common law definition, although there too it was debated.[[39]](#footnote-40)

The recent spate of charity law reform across the common law world, of which definitional reform is but part,[[40]](#footnote-41) often obscures the older origins of the definitional debate. For the purposes of visualising this, I have created a timeline (hosted on the Project’s website) marking the key moments of this debate across time and the globe. As you can see, there has been sporadic debate on the question of the definition of charity since the early 20th century, with particular ‘bursts’ in England in the 1950s and 1970s, and in Canada in the 1990s.

There is much to be gleaned from this debate, but because of time I will make here only three important points. First, the debate tells us much about that foundational question: what is (so) wrong with the definition of charity? That question itself may presume too much. Indeed, for many decades, the majority view appeared to be that there was nothing really wrong with the common law definition of charity, a position taken by the UK Government as late as 1989.[[41]](#footnote-42) Perhaps a more unusual reading was that of the Ontario Law Reform Commission in 1996 which, in one of its final reports, suggested a ‘real’ meaning of charity that could be inferred from the case law.[[42]](#footnote-43)

Three types of criticism can be identified. One level of criticism are mostly ‘formal’ arguments. These draw on legal values that are so commonly agreed upon that they begin to take on a ‘legalistic’ character—values such clarity and certainty. For many, the argument was simply that the law was too complex, too uncertain and too unclear. For some, the argument was also that there were particular parts of it—such as the so-called *Compton-Oppenheim* test of public benefit—that were unsound. Much academic commentary falls into this camp.[[43]](#footnote-44)

Another type of criticism can be thought of as ‘institutional’ criticisms. These criticisms are directed at the exercise of power over the definition of charity, and in particular rework the age-old debate about the role of judges in making law. Here the question is, who should have the power. For some, judges should not have this power because of each individual harbours particular (and often conservative) ideological conceptions of charity, and because their role is by their nature anti-democratic. For others, judge-made law is more responsive to individual context and circumstance, plays a vital part in correcting democratic deficiencies, may exhibit a more sympathetic approach embedded in society, and even expresses the original genius of the common law. These debates recur in different contexts throughout the common law.

 In the context of charity law, this debate surfaces particularly because by its nature, charity law thrusts judges into political controversies. For example, judges have had to determine whether vivisection was a benefit to the public,[[44]](#footnote-45) whether Scientology was a religion,[[45]](#footnote-46) and whether Amnesty International was political.[[46]](#footnote-47) The tenor of the debate has shifted as the composition of judges has become more diverse. Whereas much of the debate in England in the 1970s focused on how out of touch judges were, charity advocates in Australia have had much reason to cheer the High Court, with its liberalising trilogy of decisions in *Central Bayside,[[47]](#footnote-48) Word Investments[[48]](#footnote-49)* and *Aid/Watch*.[[49]](#footnote-50)

Another institutional issue has been the structural factor that charities are reluctant to risk expensive litigation and, therefore, the development of charity law can seem painfully slow. It was for this reason that in England and Wales a Charity Tribunal was formed, and similar proposals have been made in Canada.[[50]](#footnote-51)

At the base of all criticisms, however, is an underlying contest over the scope of charity. Those who wish to change the definition have done so because they believed it was too wide—a view that prevailed in the first half of the century—or that it is too narrow, a view that has tended to prevail in more recent times.

In earlier periods, the concern tended to be that the legal definition of charity was much more expansive than the so-called ‘popular’ meaning of charity. For example, in 1920, the Colwyn Commission in England recommended restricting charity to those affecting people with small incomes or relieving the burden of the State, and which would include charities with the objects of saving lives, relieving the poor, or caring for the sick and aged.[[51]](#footnote-52) In Australia, Justice Isaacs made the same point repeatedly on the Bench:[[52]](#footnote-53)

Litigation, perhaps protracted and expensive, is inevitable unless Parliament by a few words declares whether by “charitable” it means to use that word in its ordinary modern sense, or in the technical Elizabethan sense that some quaint Chancery decisions in connection with trusts have affixed to it as its primary legal meaning, extending to objects which include, as I have said, purposes quite outside what any ordinary person would understand by charitable.[[53]](#footnote-54)

This cry was ultimately the origin of the creation of that unique category of entities, the ‘public benevolent institution’.[[54]](#footnote-55)

 A more unusual type of reform proposal, originally advanced by Lord Cross, was to divide the term charity by policy function: there would be one meaning for charity for tax, and another for trusts.[[55]](#footnote-56) This proposal, too, assumed a narrower definition for tax purposes.

In the middle of the 20th century, a more conservative approach sought merely to codify the common law for the purposes of increasing accessibility. For example, the Nathan Committee in England in 1952 found that most witnesses thought the common law meaning was “about right”, but considered that statutory form would improve accessibility.[[56]](#footnote-57) For some, that extended to settling particular doctrinal points.[[57]](#footnote-58)

In later periods, the sector has tended to push for the meaning to be ‘modernised’, partly as a result of the effect of progressive movements on charities as well as different approaches to ‘doing’ charity. A key player in this field has been the National Council for Voluntary Organisations in England, which instituted a series of reports on this issue from the 1970s onwards.[[58]](#footnote-59) The NCVO has also been instrumental in elevating the discourse of public benefit in the debate.[[59]](#footnote-60)

In the contest over the scope of charity, we argue over our differing intuitions of charity. Like obscenity, we ‘know’ charity when we see it, even if we can’t define it. Yet there are two other ways in which charity is like obscenity. First, what is obscene to one person is not necessarily so to another. Second, our understanding of charity is highly contextual and is shaped by time and practice. Most significantly, our understanding is profoundly shaped by the historical shifts between the charitable sector, the State and the commercial sector. For those in the pre-modern era, charity was the chief source of welfare; for those in the era of the welfare State, charity was often seen as patronising and reinforcing class structures.[[60]](#footnote-61) Indeed, in this era ‘charity’ became almost a dirty word, with its connotations of relief and patronage, as well as its narrowness. This led in part to the renewed emphasis on the focus of ‘public benefit’ and on broader terms such as not-for-profit sector, civil society, and the third sector. Perhaps the last is the most ironic, for in historical terms charity was first, preceding both the free market or government in their modern senses.

Here again the Goodman Report hit the nail on the head on its very first page, where the Chair observed that the principal problem in the definition is the

dichotomy in relation to charities between those whose objects are the relief of poverty and illness and other forms of misery and deprivation and those whose objects are of a modern hedonistic nature which contribute to the quality of life. There are austere thinkers who believe that the latter category should not be charities at all but we have come down on what we hope is the side of common sense in that anything that can effectively contribute to the cause of humanity without special advantage to any individuals is in general terms eligible for consideration as a charity.[[61]](#footnote-62)

This succinctly goes to the heart of the two distinct, although related, components of the legal definition of charity. At the core of our understanding of charity, I think, is the idea of the purpose of addressing disadvantage. Relieving poverty or sickness, promoting equality of participation, and promoting international development all fall squarely into this hallowed core, for which there is strong societal support. However, the legal definition of charity also encompasses other purposes that speak to the non-economic dimensions of what we might consider a ‘full life’, such as the arts, philosophy, and religion.[[62]](#footnote-63) Since we naturally differ on the elements required to sustain a ‘full life’, we naturally differ on the extent to which the legal definition of charity should encompass particular purposes. The secular might not support tax concessions for the religion; those who don’t like art might object to subsidising galleries; and those who don’t see sport as spiritually enriching baulk at including sport.

Yet this picture of charity is complicated by the fact that the non-economic dimensions of life turn out to be important in addressing inequality. For example, the promotion of classical music in Venezuela among the disadvantaged gave them an alternative activity, one that gave them discipline, skills and hope.[[63]](#footnote-64) For, in the end, for many of us art, religion, sport, philosophy and all those non-economic dimensions are what make life worth living.

## Context of the Proposal

The present Australian Government’s proposal should be read in light of these currents of debate. It must also be read in the context of the Australian Government’s broader not-for-profit reform agenda. While for many of you this agenda may be familiar, it is useful to briefly recap the elements and drivers of the agenda.

The Labor Rudd Government came to power in 2007, after twenty years of a Coalition government, with an agenda of social inclusion that married well with an agenda of strengthening not-for-profits. Early achievements in this vein included the signing of a National Compact between the sector and the government,[[64]](#footnote-65) the establishment of an Office for the Not-for-Profit Sector in the Department of Prime Minister and Cabinet and the NFP Reform Council,[[65]](#footnote-66) some harmonisation of Australian government contracts and the commissioning of the Productivity Commission to report on the sector’s contribution to Australia.[[66]](#footnote-67) The Gillard Government, before the 2010 election, launched an agenda that included the establishment of a national regulator for not-for-profits – the Australian Charities and Not-for-Profits Commission – as well as a statutory definition of charity.[[67]](#footnote-68) In its budget of 2010-2011, it also announced an unrelated business income tax[[68]](#footnote-69) and a proposal to restrict the tax concessions for not-for-profits geographically (known as the ‘in Australia’ conditions).[[69]](#footnote-70) There are also other elements of the agenda, such as new conditions for private and public ancillary funds, and a promised review of companies limited by guarantee.

The drivers behind this reform agenda were multiple, and not always in harmony. The not-for-profit reform agenda meshed with the Rudd Government’s promises of a socially inclusive society that borrowed heavily from the consensus of New Left ‘Third Way’ ideology. It also fit in well with sporadic calls for increased accountability and transparency of charities.[[70]](#footnote-71) These calls came in part from leaders of the sector, who were both aware of the sector’s vulnerability to scandals (as had happened overseas) and were also genuinely interested in professionalising the sector. Another key theme was the desire by the sector to reduce its regulatory burden, a theme that also sat well with the deregulatory drive of modern governments. The reform agenda also gave the government an opportunity to address the tax implications of recent High Court decisions, most notably *Word Investments*.[[71]](#footnote-72)

In many ways, too, this reform agenda seemed ‘belated’. It followed extensive reforms and debates in comparable jurisdictions. There had also been a number of earlier reform processes in Australia, including the Charities Definition Inquiry and other reports and inquiries, which had made numerous recommendations.[[72]](#footnote-73) In some ways, then, the agenda may have seemed easy enough to fulfil–simply adopt the earlier recommendations or overseas models, and fine-tune the details. This may account for the stringent timetable that was set for the agenda (approximately a year), although that it is more than likely that the timetable was set with an eye to the volatile fortunes of the governing ALP minority coalition.

Perhaps not surprisingly, that timetable has proved optimistic. Agenda items that had been largely supported by the sector, in particular the establishment of the ACNC and a statutory definition of charity, have become entangled with more controversial tax measures. Not-for-profits have increasingly come to feel they are facing a dilemma: the tension between the desire to do reform right (slowly) and the desire to ensure reform is done at all.

## The Consultation Paper

The promised proposal for a statutory definition manifested itself publicly in a consultation paper of 28 October 2011.[[73]](#footnote-74) The Paper set out several standard justifications for introducing a statutory definition: to improve the clarity of the law;[[74]](#footnote-75) to increase certainty for charities;[[75]](#footnote-76) and to modernise the law.[[76]](#footnote-77)

The Paper originally proposed an Exposure Draft in the first half of 2012 and a statutory definition to commence from 1 July 2013,[[77]](#footnote-78) a year after the original expected date of commencement of the ACNC. However, the mooted Exposure Draft has been delayed until ‘later 2012’ as priority has been, naturally, placed on the establishment of the ACNC.

The Paper’s discussion can be summarised briefly as follows:

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| **Issue** | Paras | Suggestions |
| **‘Not-for-profit’**  | 47-50 | Referred to parallel consultation on this in ‘in Australia’ process |
| **Dominant charitable purpose**  | 51-56 | Replace with ‘exclusively charitable’ or similar |
| **Peak bodies**  | 57 | Suggestion that adequately clarified by tribunal decision in NSW |
| **Public benefit**  | 58-76 | Statutory clarification of ‘public benefit’ or ‘public’ and ‘benefit’, overriding ‘poor relatives’ case law, change to allow familial ties in case of Indigenous |
| **Presumption of public benefit**  | 78-87 | Removal of the presumption of public benefit |
| **Religion** | 88-92 | Statutory definition of religion based on common law (Church of New Faith) |
| **Political advocacy**  | 103-113 | Removal of attempting to change the law or policy from ‘disqualifying activities’; clarification of requirement that political advocacy would still need to relate to existing charitable purposes; definition of political activities; specific exclusion of party political activities; addition of ‘political’ to cause |
| **Illegal activities**  | 115-116 | Make illegal activities disqualifying activity rather than core element |
| **Type of entity**  | 118-123 | Definition of ‘government body’ to include local government; clarification of ‘partnership’ |
| **Charitable purposes**  | 124-135 | Clarification of ‘advancement’; exclusion of sport and recreation; different ways of listing purposes |
| **Harmonisation with States or Territories**  | 136-143 | Single statutory definition for all purposes; narrowing down from charity to subsets; inclusion of sport or recreation; mixed charitable/non-charitable trusts |
| **Australian disaster relief funds**  | 145-152 | Definition of charity to be used for ADRFs |
| **Transitional**  | 153-154 | Existing charities to self-assess eligibility |

The Consultation Paper, like most such papers, was far from perfect. There were, to be sure, some welcome indications. Importantly, it was not intended to change the outcome of *Aid/Watch*. There were some useful suggestions, such as ensuring charitable status was available to Indigenous groups.

However, there were also some significant issues. To begin with, the Paper was expressly based on the 2003 Exposure Draft and the further inquiry into that Draft, as well as legislative developments overseas and judicial developments in Australia.[[78]](#footnote-79) This itself set off alarm bells for some.

There were also some confused passages that reflected an imperfect grasp of charity law. These included a failure to recognise the equivalency between the ‘dominant’ charitable purpose and ‘exclusively charitable’ purpose test; a mistaken understanding of the role of activities in determining charitable purposes; the assumption that the removal of the presumption of public benefit was ‘best practice’; and its understanding of the implications of the *Aid/Watch* decision (which, to be fair, is difficult even for charity lawyers). It also assumed that a single statutory definition of charity would serve all the different policy contexts equally. It did not detail the extensions made in the statutory lists of charitable purposes overseas. Rather interestingly, it made no proposal in relation to the *Word Investments* decision on the relationship between commercial activities and charitable status. Perhaps most problematically, it argued that the list of charitable purposes should be “limited to those purposes that have strong recognition in the existing common law”, leaving it up to courts and future Parliaments to change that list.[[79]](#footnote-80) This, of course, removes one of the main purposes of enacting a statutory definition.

## Principles to Guide Law Reform

In all its submissions, the Not-for-Profit Project followed three key principles in thinking about law reform:

1. We should recognise and embrace the contemporary sector, rather than trying to impose limits as to what we think charity should be.
2. We should respect the autonomy of the sector. The sector will pursue goals in diverse ways, and following diverse values and beliefs. It is not the purpose of charity law to approve some and disapprove other social goals. There must be limits, but they should be broadly drawn.
3. We should facilitate the sector to achieve its own goals.

Additionally, it is important to bear in mind the four reasons for adopting such a definition. First, a statutory definition will improve the accessibility of the law. Second, the statutory definition will clarify particular areas of charity law. Third, the statutory definition will modernise charity law. Lastly, and perhaps too readily glossed over, a statutory definition will enable us to correct illogical or unsound parts of charity law.

## Our Submission

Our submission on the statutory definition dealt with all of the issues raised in the Consultation Paper. However, for present purposes it is convenient to set out the submission in the form of a draft statutory definition (to be distributed). This definition combines the definition set out in the Charities Definition Inquiry with amendments as appropriate from the English, Scottish, Northern Irish and Irish definitions for the main part. In this, it follows the well-trodden path signalled so clearly by the Goodman Report: a lengthy inclusive list of charitable purposes, together with some clarification of unsettled aspects of charity law.

**Section 1**

(1)(a) To qualify as a charity, an entity must have a purpose or purposes that are **charitable only**.

(b) To avoid doubt, 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) **Charitable purposes** 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.

(3)In determining whether a purpose is charitable under section 2(n), a court need not consider whether the purpose is within or analogous to a purpose in the preamble of the *Statute of Elizabeth 1601.*

(4) If a purpose is listed in s 2(1)(a)-(m), the purpose is for the public benefit unless otherwise proven.

(5) Prescribed corporate bodies under the *Native Title Act 1993* (Cth) are taken to be charitable organisations.

**Section 3.** *Public benefit*

(1) In determining whether an organisation is established to ‘benefit’ the public, a court should have regard to the following:

(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.

(2) In determining whether an organisation benefits ‘the public’, a court should consider:

 (a) whether there are 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.

(3) The Australian Charities and Not-for-Profits Commission must provide guidance on the meaning of public benefit.

(4) Organisations established after the commencement date for the relief of poverty must satisfy the public benefit test.

(5) 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.

(6) Self-help groups may satisfy the public benefit test provided there are no unreasonable restrictions on membership.

(7) Closed or contemplative orders may satisfy the public benefit test even if they do not make intercessory prayers.

For the most part, much of what is in the proposed list of charitable purposes is common law or in existing charity definitions. There are some controversial inclusions. Sport is one of them, with other definitions restricting it to ‘amateur sport’. The inclusion of sport and recreation is in part to reconcile the federal definition with state or territory legislation that provides that sport or the provision of recreational facilities for the social welfare is charitable. However, in Tasmania there is no reference to the need to advance social welfare. As sport attracts some of the highest volunteering numbers in Australia, the exclusion of sport is out of line with community understanding. We also note that organisations for the advancement of professional sport are, in any event, already tax-exempt.

Another potentially controversial head is that of promotion of access to information. It is important to note that this does not make charitable the mere provision of information. Rather, it is the access that is key here. Deprivation of information is, in my view, a significant disadvantage in our information society. The category also includes several recognised charitable types, such as community Internet facilities or community legal centres, as well as extending that principle more broadly to cases such as Wikimedia, the owner of Wikipedia (recently recognised as charitable in England and Wales).[[80]](#footnote-81)

Although there are arguments both ways, we also suggested that the presumptions of public benefit played a useful evidential role, and that their removal would have significant symbolic and administrative drawbacks while making little legal difference. In our view, rather than removing them, we thought it would be logical to extend them to all the identified charitable heads, on the basis that identifying a purpose as charitable prima facie meant it had to be for the public benefit.

We also proposed expressly ousting the reference to the preamble of the Statute of Elizabeth. Here we would differ from the UK model which generally retains the requirement that any other purposes be within the spirit or intendment of that preamble. As already noted, that preamble has gained a rather unwarranted status, and the most plausible explanation of this is that judges have sought some reliable limit to their discretion in determining the rather broad phrase of ‘other purposes beneficial to the community’. Yet that limit is not founded on logical, and in our view judges are more than capable of assessing public benefit openly on a proper consideration of relevant contextual factors without resorting to the preamble.

Another aspect in which we departed was by trying to make a little more sense to the public benefit requirement. The case law here is confused and needs correction as well as clarification. For the sake of clarity, we also included the current legislative references to self-help groups and closed or contemplative orders in the *Extension of Charitable Purposes Act 2004* (Cth) in this section.

Finally, I note that we proposed that no reference should be made at all to political activities, or illegal activities, and that no definition be inserted for religion or government bodies. In our view, there were dangers in doing so because of the indefinite limits of both the *Aid/Watch* decision and the doctrine against illegality, as well as the complexity of defining religion or government bodies. However, given the controversy concerning political activities, it may be desirable to simply state in section 1 that an entity may be a charity notwithstanding that its purpose or activities challenge laws or government policies. This states the core ruling of *Aid/Watch* without trespassing on some of its wider implications.

In particular, I was concerned that the breadth with which the doctrine of illegality is often stated both raises a real risk of inhibiting legitimate law reform and advocacy and fails to reflect the true operation of the law. For example, one of the few cases that deal with this issue had the effect of impeding relief to beggars on the basis that, at the time, begging was illegal. Similarly, one can think of legitimate objects of charity (for example, the provision of reproductive health services including abortion) that may offend one of the numerous laws that now govern our lives.

## Prospects for the Statutory Definition

The delay in issuing the Exposure Draft on the statutory definition of charity can be interpreted in one of two ways. First, it might indicate that a statutory definition will not make into the current Government’s legislative agenda and mark yet another landmark of failed charity reform in Australia. I should note that this would not necessarily be the end of the road for definitional reform. The Charity Commission of England and Wales, prior to getting a statutory definition, began reviewing the definition to update and modernise key aspects of it. If no statutory definition came, the ACNC could begin a similar exercise.

That is not, however, my first choice, and nor is it my view. Instead, I take the optimist’s view. The truth is that this agenda item should be one of the easiest in the not-for-profit reform agenda. There is a great deal of agreement within the sector as to what should be included. We have decent examples from four jurisdictions with very similar legal systems. The definition itself is only a starting point for tax concessions. Therefore, the definition should be liberal and inclusive. If desired, the tax legislation should carve out particular purposes. Finally, at the end of the day, the proposal amounts to no more than two or three sections of legislation.

The optimist in me says that the delay in issuing the Exposure Draft is, if anything, an opportunity. It is an opportunity for the sector to come together and decide on key principles and, in the ideal world, a workable draft. If the sector is able to seize the opportunity and could present to this Government a reasonable draft of a statutory definition before they have time to turn to it themselves, it would surely be an unwise Government that looked such a gift horse in the mouth. And, I would suggest, it would also be unwise for the sector to do the same, and to let slip the opportunity to finally achieve the statutory definition of charity for which it has advocated for many years.

1. \* BA(Hons)/LLB(Hons), PhD (UCL). This paper was written as a Research Fellow of the Not-for-Profit Project, Melbourne Law School. The author is now employed by the Australian Charities and Not-for-Profits Commission. The views in this paper express personal views developed as a Research Fellow. [↑](#footnote-ref-2)
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3. Gareth H Jones, *History of the Law of Charity, 1532–1827* (Cambridge University Press, 1969) 3–4. [↑](#footnote-ref-4)
4. Ibid 4. [↑](#footnote-ref-5)
5. Ibid 59–80. [↑](#footnote-ref-6)
6. Ibid 5. [↑](#footnote-ref-7)
7. Most religious uses, except the repair of churches, were not included in the preamble. [↑](#footnote-ref-8)
8. Blake Bromley, ‘1601 Preamble: The State’s Agenda for Charity’ (2001) 7 *Charity Law and Practice Review* 177–211. [↑](#footnote-ref-9)
9. T. Bourchier-Chilcott, ‘Superstitious Uses’ (1920) 36 *Law Quarterly Review* 152. [↑](#footnote-ref-10)
10. Jones, *History of the Law of Charity*, above n 3, 58. [↑](#footnote-ref-11)
11. Ibid 107–108. [↑](#footnote-ref-12)
12. Ibid 107. [↑](#footnote-ref-13)
13. *Morice v Bishop of Durham* [1804] 9 Ves 399; 32 ER 656. [↑](#footnote-ref-14)
14. Jones, *History of the Law of Charity*, above n 3, 122–126. [↑](#footnote-ref-15)
15. *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] 1 AC 531. [↑](#footnote-ref-16)
16. See generally Joyce Chia et al., *Taxing Charities: A Literature Review* (Not-for-Profit Project, Melbourne Law School, 28 February 2011) <http://tax.law.unimelb.edu.au/index.cfm?objectid=053E24C1-B048-8204-A721A46DFB996924&flushcache=1&showdraft=1#Publications>. See also Myles McGregor-Lowndes, Matthew Turnour and Elizabeth Turnour, ‘Not for Profit Income Tax Exemption: Is There a Hole in the Bucket, Dear Henry?’ (2011) 26 *Australian Tax Forum* 601. [↑](#footnote-ref-17)
17. There are some exemptions for a small list of ‘eligible bodies’ (mostly public institutions) and also for scientific research associations: see, eg, UK, ‘Corporation Tax Act’ (2010). [↑](#footnote-ref-18)
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20. See, eg, *Payroll Tax Act 1948* (Vic) s 48. [↑](#footnote-ref-21)
21. Committee of Inquiry into the Effect of Charity Law and Practice on Voluntary Organisations, *Charity Law and Voluntary Organisations* (1976). [↑](#footnote-ref-22)
22. Ibid i. [↑](#footnote-ref-23)
23. Barbados, ‘Charities Act’ (1980). [↑](#footnote-ref-24)
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32. UK, ‘Charities Act’ c 50 (2006); UK, ‘Charities Act’ (2011). [↑](#footnote-ref-33)
33. Scotland, ‘Charities and Trustee Investment (Scotland) Act’ (2005). [↑](#footnote-ref-34)
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