

THE DEFINITION OF CHARITY FINALLY ENTERS THE 21ST CENTURY

The Gillard Government's commitment to introduce a new statutory definition of charity to clarify exactly what does - and does not - qualify as a 'charity' and as a 'charitable purpose' is a step closer following the release of a consultation paper today.

Assistant Treasurer and Minister for Financial Services and Superannuation, Bill Shorten, said "The current definition of charity is based on the 1601 Statute of Elizabeth, with over 400 years worth of often confusing case law added on top."

He said a single national definition will make it easier for charities to navigate state and federal regulations, allowing them to spend less time on administration and more time doing what they do best - helping people.

"It is well past time Australia cleans up this mess and creates a modern, workable and Australian definition of charity to clarify the work of our important and valuable not-for-profit sector. I am very pleased to announce that Senator Ursula Stephens has been appointed as a specialist adviser to assist me with the consultation process."

The Government is seeking the views of charities and other stakeholders on a definition of charity and charitable purposes. The consultation builds on a range of previous inquiries including the 2001 *Report of the Inquiry into the Definition of Charities and Related Organisations*, the Charities Bill 2003 and recent court decisions including the High Court's decision in *Aid/Watch Incorporated v the Commissioner of Taxation*.

As this is the first round of consultation on this issue, the Government is seeking important feedback from the community. The Government wants to hear from the sector about how a single definition can best serve the needs of not-for-profits and their clients, as well as encourage charitable giving. The Government will also consult on an exposure draft of the legislation in the first half of next year.

The Government is also working with the States and Territories to achieve greater harmonisation between the Commonwealth and the States and Territories through the Council of Australia Governments.

Minister for Social Inclusion, Tanya Plibersek, said "Charities provide vital services to the Australian community. We want not-for-profits to be able to direct their resources to charitable work rather than unnecessarily complex administration."

"By establishing a modern and workable definition of 'charity' the Government is reducing compliance burden for the sector and making it easier for charities to get on with the job of providing charitable services."

The Consultation paper is available at [the Treasury website](#). Submissions are due on 9 December 2011.

The Implementation Taskforce for the Australian Charities and Not for profit Commission (ACNC), announced in the May Budget, is also well on track.

The Taskforce is responsible for ensuring the ACNC is ready for operation by 1 July 2012. The ACNC will be responsible for determining the legal status of groups seeking charitable, public benevolent institution, and other not-for-profit benefits on behalf of all Commonwealth agencies.

The ACNC will also implement a 'report-once use-often' reporting framework for charities, provide education and support to the sector on technical matters, and establish a public information portal by 1 July 2013.

Minister Plibersek said the Interim Commissioner and Chair of the Taskforce, Susan Pascoe AM, has assembled a strong team from across Government to establish the ACNC.

"I am delighted that David Locke, Executive Director of Charity Services, from the Charity Commission of England and Wales has been brought on board the Taskforce to provide expert

Commission of England and France has been brought on board and tasked to provide expert guidance based on international experience.

Treasury has also recently brought together all of its work on the Government's important not-for-profit reform agenda into one place on its website - www.treasury.gov.au.

"Charities make an important contribution to Australian society, and receive a range of support from Commonwealth, state, territory and local governments, in the form of tax concessions and grants, and the public in terms of donations and volunteering," Mr Shorten said.

"It therefore is important there is a clear framework for both the public and regulatory agencies for recognising entities as charitable. The introduction of a definition of charity will, over time, go a long way to provide the sector with the certainty and clarity they are calling for."

Canberra
28 October 2011

TREASURY'S NOT-FOR-PROFIT REFORM FACTSHEET

INTRODUCING A STATUTORY DEFINITION OF 'CHARITY'

28 October 2011

AT A GLANCE

The Assistant Treasurer, the Hon Bill Shorten MP, today released a consultation paper for a statutory definition of charity. The consultation paper can be found at www.treasury.gov.au.

Submissions to the paper are due on 9 December 2011. Queries and submissions should be sent to NFPReform@treasury.gov.au.

KEY FACTS

The current definition of charity is based on over 400 years of common law.

In the 2011-12 Budget the Government announced that it:

- will consult on and introduce a statutory definition of 'charity'; and
- will provide the new Australian Charities and Not-for-profits Commission (ACNC) with \$2.9 million over four years to develop guidance, implement system changes for the definition and begin a process of re-assessing existing charities' eligibility against the new definition.

The definition will:

- apply for all Commonwealth laws;
- take effect from 1 July 2013; and
- be based on the 2001 *Report of the Inquiry into the Definition of Charities and Related Organisations*, the definition in the Charities Bill 2003 and taking account of the findings of recent judicial decisions such as *Aid/Watch Incorporated v Commissioner of Taxation*.

A great deal of work has been done through previous inquiries and reviews on resolving key aspects of a statutory definition of charity. The consultation paper seeks to address those aspects of a definition that remain unresolved.

The Australian Government is consulting with the States and Territories, with the view of improving uniformity between jurisdictions.

THE CURRENT DEFINITION

The current definition of 'charity' is based on over 400 years of common law, largely based on the Preamble to the Statute of Charitable Uses (known as the Statute of

Elizabeth), enacted by the English Parliament in 1601; *Commissioners for Special Purposes of Income Tax v Pemsel [1891-1894] All ER Rep 28* (Pemsel's case) and subsequent court cases.

The result is a definition which is unclear and confusing, does not meet the needs of contemporary Australian society, and does not necessarily reflect the diversity of organisations which operate for the public benefit.

THE FOUR HEADS OF CHARITY RESULTING FROM PEMSEL'S CASE

1. The relief of poverty.
2. The advancement of education.
3. The advancement of religion.
4. Other purposes beneficial to the community not falling under any of the preceding heads.

DETERMINATION OF CHARITABLE STATUS

- Currently: Australian Taxation Office (ATO) consideration is based primarily on the common law and applies at the Commonwealth level. Charities are required to self assess their eligibility for charity status on an ongoing basis.
- 1 July 2012: ACNC to register new entities based on current law. Charities endorsed by the ATO as income tax exempt will be transitioned to the ACNC at 1 July 2012 and will not need to re-register.
- 1 July 2013: ACNC to register new charities based on statutory definition of charity. Charities remain responsible for self-assessing their eligibility on an ongoing basis. The ACNC will review existing registrations over time.

PROCESS FOR CONSULTATION ON DEFINITION

- Submissions on the consultation paper are due 9 December 2011.
- The Government will also consult on exposure draft legislation (expected in the first half of 2012).
- Introduction of draft legislation into Parliament expected in mid-2012.
- Guidance on new statutory definition will be issued by the ACNC following passage through Parliament.
- The definition will come into effect on 1 July 2013.

FREQUENTLY ASKED QUESTIONS

What advantages will a statutory definition of charity provide?

A statutory definition of charity will:

- provide greater certainty and clarity as to what is considered to be charitable; and
- can be altered by Parliament over time, ensuring it remains appropriate, and reflects community needs and expectations.

Has there been previous support for a statutory definition of charity?

Recent reviews and inquiries have recommended defining charity in law. These include the:

- *Australian Future Tax System* report in 2010;
- Productivity Commission in its 2010 *Report Contribution of the Not-for-profit Sector*; and
- 2010 Senate Economics Legislation Committee report into the Tax Laws Amendment (Public Benefit Test) Bill 2010.

Why is the Government consulting on the presumption of public benefit?

Currently there is a presumption of public benefit for the first three heads of charity, as listed above.

The 2010 Senate Economics Legislation Committee report into the Tax Laws Amendment (Public Benefit Test) Bill recommended the presumption of public benefit be reformed as part of introducing a statutory definition of charity. The Government is consulting on this issue.

Although there is a presumption of public benefit currently, charities under the first three heads are still required to have and show the ATO their public benefit on application or request by the ATO.

The requirement to demonstrate an entity's public benefit will not change if the presumption of public benefit is removed, and it is unlikely that any additional information would be required beyond that which the ATO already requires.

Currently, for the first three heads of charity the onus is on the ATO to demonstrate that a charity does not provide a public benefit. Whereas for those that fall under the 'other purposes beneficial to the community' head of charity must positively demonstrate that they operate for a public benefit. Removing the presumption of public benefit will align all charities in needing to positively demonstrate their public benefit.

The sort of information that the regulator could consider in determining charitable status includes: information that the charity provides to the regulator (for example, in an entity's

annual reports); information that the regulator obtains on the charity from other sources; reports and assessments on the charity made by other government agencies (including regulators); and other relevant publicly available information.

The Government welcomes comments on ways to minimise the compliance burden.

Is the Government seeking to prevent charities from undertaking political advocacy?

No. In developing a definition of charity the Government is looking to build on the existing common law, taking account of recent developments in the common law. This includes the High Court decision in *Aid/Watch*, which states that generating public debate by lawful means about matters under one of the heads of charity is a purpose beneficial to the community.

The Government is consulting on the best way to include the *Aid/Watch* decision in the statutory definition.

Can I comment on areas of the statutory definition not covered by questions included in the consultation paper?

Yes. You can provide views on other parts of the definition, which will be considered as part of the consultation process.

The Government will build on the work done on the Charities Bill 2003, which contains the key common law principles of charity and charitable purposes. The development process resolved many of the key aspects of a statutory definition of charity.

Issues that remain unresolved include whether the presumption of public benefit should be overturned for some charities, and the level of political advocacy a charity can undertake.

What is the difference in the roles between the ATO and the ACNC with respect to charities?

From 1 July 2012 the ACNC will determine whether a new entity (for Commonwealth purposes) is a charity through a registration process. Existing charities, endorsed by the ATO as exempt from income tax will be transitioned into the new regime and will not need to re-register. However charities will still be required to review their charitable status on a regular basis. From 1 July 2013, the ACNC will begin to review the charitable status of existing entities over time.

The ATO will accept the ACNC's registration of charitable status, but will retain responsibility for determining eligibility to access Commonwealth tax concessions which are subject to special conditions.

A DEFINITION OF CHARITY

Consultation Paper

October 2011

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CONSULTATION PROCESS

Request for feedback and comments

All submissions received will be treated as public documents unless the author of the submission clearly indicates the contrary by marking all or part of the submission as 'confidential' prior to the submission being lodged. Public submissions may be published in full on the Treasury website, including any personal information of the authors and/or third parties contained in the submission. If your submission contains the personal information of third party individuals, please indicate on the cover of your submission if they have not consented to the publication of their information.

Closing date for submissions: 9 December 2011

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LIST OF REFERENCES

2001 Report of the <i>Inquiry into the Definition of Charities and Related Organisations</i>	Charities Definition Inquiry
2008 Senate Economics Committee <i>Inquiry into Disclosure Regimes for Charities and NFP Organisations</i>	2008 Senate Inquiry
2010 Productivity Commission Research Report, <i>Contribution of the Not-for-profit Sector</i>	PC Report
2010 <i>Review into Australia's Future Tax System</i>	AFTS Report
2010 Senate Economic Legislation Committee Inquiry into the Tax Laws Amendment (Public Benefit Test) Bill 2010	2010 Senate Inquiry
<i>Final Report of the Scoping Study for a National Not-for-profit Regulator</i>	Final Report
<i>Aid/Watch Incorporated v Commissioner of Taxation</i> [2010] HCA 42	<i>Aid/Watch</i>
<i>Commissioner of Taxation v Word Investments</i> [2008] HCA 55	<i>Word Investments</i>
<i>Commissioners for Special Purposes of Income Tax v Pemsel</i> [1891-1894] All ER Rep 28	<i>Pemsel's case</i>
<i>Central Bayside General Practice Association Ltd v. Commissioner of State Revenue</i> (2006) 228 CLR 168	<i>Central Bayside</i>
ATO Draft Taxation Ruling TR 2011/D2	TR 2011/D2

FOREWORD



I am very pleased to release this consultation paper on a definition of charity for the purposes of Commonwealth laws.

In the 2011-12 Budget, the Minister for Social Inclusion and I announced a package of not-for-profit (NFP) reforms, including the establishment of the Australian Charities and Not-for-profits Commission (ACNC) which will make it easier for the NFP sector to deliver their services for the public benefit.

One of the announced measures is to introduce a statutory definition of 'charity' applicable across all Commonwealth laws from 1 July 2013. The current definition of charity is based on over 400 years of common law. Its meaning can often be confusing and unclear.

There have been a number of reviews and inquiries which have recommended that the common law meaning of charity be restated in legislation. Most recently, 2010 Productivity Commission Research Report, *Contribution of the Not-for-profit Sector* (PC Report) recommended that Australia should adopt a statutory definition of charity.

The *Final Report of the Scoping Study for a National Not-for-profit Regulator* (Final Report) also indicated strong support among stakeholders for a statutory definition of charity. There is general consensus that the public understanding of charities would be improved if the general principles underpinning the meaning of charity were set out in statute.

Because charities make a very important contribution to Australian society, they receive a range of support from Commonwealth, State, Territory and local governments, including tax concessions and grants, and support from the public in terms of donations and volunteering. It is therefore important that there is a clear framework for both the public and regulatory agencies for recognising entities as charitable.

Importantly, a statutory definition of charity will provide an opportunity for greater harmonisation between the Commonwealth and the States and Territories. We are working with the State and Territory Governments to achieve this. A single definition across all levels of Government will greatly reduce administrative costs for charities.

Overseas experience indicates that defining charity can be a difficult process. However, the experience of other jurisdictions will be of valuable assistance in formulating a definition of charity that is most suitable for Australia.

This consultation paper provides the NFP sector, the public and State and Territory governments with the opportunity to comment on the form of a definition of charity and charitable purposes that is most appropriate for Australia. Consultation will also be undertaken on draft legislation.

The Hon Bill Shorten MP
Assistant Treasurer and Minister for Financial Services and Superannuation

1. SUMMARY

1. This consultation paper seeks public views on possible approaches to implement the Government's 2011-12 Budget announcement to introduce a statutory definition of charity.
2. The Government announced in the 2011-12 Budget that it will introduce a statutory definition of charity, applicable across all Commonwealth laws from 1 July 2013. The hope is that in the longer term there will be a single definition of charity and charitable purpose for all purposes and for all levels of government.
3. The development of a definition of charity is consistent with the vision of the *National Compact: Working Together* as it seeks to improve the viability of the NFP sector by providing increased certainty and consistency on the meaning of charity.
4. The current meaning of charity and charitable purpose is largely defined at common law, which has developed over 400 years. As a result the law can often be confusing and unclear.
5. This consultation paper follows the recommendations of a number of reviews and inquiries over the years which have recommended that the common law meaning of charity be restated in legislation.
6. An attempt was made in 2003 to implement a statutory definition of charity at the Commonwealth level, but this did not proceed due to concerns about the definition. A main issue was the amount of political advocacy a charity can engage in. This issue has since been considered by the High Court in the *Aid/Watch* decision.
7. A further issue with the 2003 definition is that it overturned the presumption that charities established for the relief of poverty and the advancement of education or religion are for the 'public benefit'. There was some concern that some charities may have difficulty in demonstrating that they meet a public benefit test.
8. The definition of charity was instead extended by the *Extension of Charitable Purposes Act 2004*.
9. The PC Report recommended that a statutory definition of charity be legislated and based on the Charities Definition Inquiry.¹ The AFTS Report, the 2010 Senate Inquiry, and the Scoping Study also recommended the introduction of a statutory definition of charity.
10. This paper does not revisit all of the issues discussed in the 2001 Charities Definition Inquiry but instead looks at the 2003 definition that was based on that report, and developments since 2003, both in Australia and in comparable jurisdictions. It also considers recommendations made by the Board of Taxation in its review of the exposure draft of the Charities Bill 2003 (referred to in this paper as the Charities Bill 2003) after there was wide consultation on the definition.

1 <http://www.cdi.gov.au/html/report.htm>.

11. Charities and the wider NFP sector are a key part of the Australian community and economy. Providing them with greater certainty as to what is considered charitable will assist in reducing the compliance burden the sector currently faces.
12. A statutory definition of charity will allow Parliament to more easily alter the definition over time to ensure that it remains appropriate and reflects modern society and community needs, rather than having the common law being developed only by the courts as an ad hoc, costly and time consuming process.
13. This consultation paper provides the community with an opportunity to voice their views on the issues that need to be considered as part of the development of a statutory definition.
14. The consultation paper outlines the background to a statutory definition, including previous recommendations and inquiries and developments that occurred since the attempt in 2003 to define charity. It discusses elements of the core definition of charity in the Charities Bill 2003. It also addresses Australian Disaster Relief Funds, State and Territory issues and transitional arrangements.
15. After the responses to this consultation are considered, an exposure draft and explanatory material of a Charities Bill will be released for public comment. It is expected that the exposure draft will be released in the first half of 2012. The Bill will contain a statutory definition of charity that will apply for all Commonwealth purposes from 1 July 2013. The ACNC will administer the statutory definition of charity and is expected to issue guidance materials.
16. The Government remains committed to consulting widely on the NFP reform process and is interested in the views of the NFP sector, the public and State and Territory governments. The Australian Government is committed to harmonising NFP arrangements with the States and Territories where possible in order to minimise compliance costs for the NFP sector.

1.1 BACKGROUND

18. The meaning of charity and charitable purposes is not defined in statute; rather charity is defined at common law. The common law definition is largely based on the Preamble to the Statute of Charitable Uses (known as the Statute of Elizabeth), enacted by the English Parliament in 1601 and *Commissioners for Special Purposes of Income Tax v Pemsel* [1891-1894] All ER Rep 28 (*Pemsel's case*) which classified the categories of charitable under four heads; and subsequent court cases.
19. Pemsel's case identified four categories or 'heads' of charitable purposes which are:
 - the relief of poverty;
 - the advancement of education;
 - the advancement of religion; and
 - other purposes beneficial to the community not falling under any of the preceding heads.
20. A public benefit requirement is central to the concept of what is charitable except where the purpose is the relief of poverty. Under the common law, there is a presumption of public benefit for charities established for the relief of poverty and the advancement of education or religion. For the fourth head of charity, the onus is on the purported charity to prove that it is for the public benefit.

1.1.1 Previous reviews and inquiries

21. The 2001 Charities Definition Inquiry recommended the common law definition of charity be defined in legislation.
22. Following this report, the then Government in 2003 attempted to introduce a statutory definition of charity at the Commonwealth level.
 - The proposed definition contained in the Charities Bill 2003² was largely similar to the previous common law interpretation, but also included not-for-profit child care available to the public, self-help bodies with open and non-discriminatory membership and closed or contemplative religious orders that offer prayerful intervention for the public.
23. In general terms, the proposed definition required that an entity must be not-for-profit, have a dominant purpose or purposes that are charitable and be for the public benefit. The definition also contained a list of charitable purposes.
 - The requirement that a charitable entity be for the public benefit had the effect of overturning the presumption that charities established for the relief of poverty and the advancement of education or religion are providing a 'public benefit'.

2 http://www.taxboard.gov.au/content/reviews_and_consultations/definition_of_a_charity/draft_legislation/downloads/charities_bill.pdf.
http://www.taxboard.gov.au/content/reviews_and_consultations/definition_of_a_charity/draft_legislation/downloads/charities_exposure_draft.pdf.

24. Although the broader reform package did not proceed, the definition of charity was extended by the *Extension of Charitable Purpose Act 2004*³ which conferred charitable status on the provision of child care, self-help groups and closed or contemplative religious orders.
25. More recently, the AFTS Report and the PC Report recommended adopting a statutory definition of charity. The PC Report recommended a definition in accordance with the recommendations of the Charities Definition Inquiry, on the basis it would:
 - ensure an appropriate Australian definition for our modern, social and economic environment;
 - create clearer and more consistent principles; and
 - reduce confusion and costly legal disputes.
26. The 2010 Senate Inquiry⁴ and the Scoping Study also recommended a statutory definition of charity and a reformed public benefit test.

1.1.2 Developments since 2003

27. Since the attempt in 2003 to introduce a statutory definition of charity there have been developments both in Australia and overseas which need to be considered in developing a definition of charity that is most appropriate for Australia.

Australian developments

28. Since 2003 there have been two significant Australian court decisions in relation to the meaning of charitable purposes.
29. In *the Aid/Watch decision* the High Court considered that 'charity' included certain advocacy-type organisations. This decision is considered further at paragraphs 105 to 111.
30. In the *Word Investments decision* the High Court held that an entity would not lose its charitable status if it engages in business activities for the sole purpose of raising funds for its charitable purpose.
31. These court decisions have settled some uncertainties but created others for the charitable sector, the public and government.
32. In the 2011-12 Budget the Government also announced that it will establish an independent statutory office — the Australian Charities and Not-for-profits Commission (ACNC) by 1 July 2012.
 - Similar to overseas jurisdictions, it is expected that the ACNC will provide guidance on interpretative issues on the statutory definition of charity.

3 <http://www.comlaw.gov.au/Details/C2008C00627>.

4 <http://www.comlaw.gov.au/Details/C2010B00096>.

- From 1 July 2012, the ACNC will determine whether an entity (for Commonwealth purposes) is a charity through a registration process (existing charities will be transitioned into the new regime).
 - From 1 July 2012, the Australian Taxation Office (ATO) will endorse an entity as eligible to access individual tax concessions. The ATO will no longer determine whether an entity is a charity but will instead accept the ACNC's registration and then only assess whether other special conditions contained in the taxation laws are met.
33. In 2005, the ATO released Taxation Ruling TR 2005/21 — *Income Tax and Fringe Benefits Tax: charities*. The ATO released a draft update of this ruling, Draft Taxation Ruling TR 2011/D2 (TR 2011/D2), in 2011. This consultation paper refers to the most recent draft ruling which, although it is not the ATO's finalised view, reflects the ATO's latest view on the meaning of charity, taking into account court decisions since 2005.

Overseas developments

34. In 2003 only one common law country (Barbados) had a legislated definition of charity. Since then, other overseas jurisdictions have enacted a statutory definition.
35. England and Wales through the Charities Act 2006 enacted a statutory definition of charity. In addition to the first three heads of charitable purpose, the definition includes an expanded list of charitable purposes as recognised under English and Welsh law under the fourth head of charity.
36. The legislation also overturned the presumption of public benefit, requiring charities which advance education, religion or relieve poverty to expressly demonstrate that they deliver a public benefit. The Charities Commission for England and Wales is tasked with providing guidance as to the operation of the public benefit requirement.
37. Other jurisdictions that have introduced a statutory definition of charity since 2003 include Scotland, Ireland, Northern Ireland and New Zealand. The definitions enacted by these jurisdictions are based on the same body of common law as England and Wales but there are differences in the definitions including the types of charitable purposes that have been added to *Pemsel's* fourth head of charity.
38. Although overseas jurisdictions that have enacted a definition faced difficulties during the consultation and implementation phases, their experience has provided increased clarity to the sector. The definitions adopted by other common law jurisdictions and their experience in implementing a definition will provide valuable guidance in developing a statutory definition, and will contribute to the development of a best practice model.
39. The statutory definitions of a number of overseas jurisdictions are included at **Appendix A**.

2. ISSUES IN DEFINING CHARITY

40. The Charities Bill 2003 provided a legislative definition of both charity and charitable purpose which essentially legislated the core principles of the existing common law interpretation at that time.
41. It is proposed to base an Australian statutory definition on the work already done on the Charities Bill 2003. This approach is broadly consistent with Recommendation 7.1 of the PC Report that the Australian Government should adopt a statutory definition of charitable purposes in accordance with the recommendations of the Charities Definition Inquiry.
42. This paper considers how the Charities Bill 2003 could be modified to take into account developments in Australian case law and policy since 2003, and also considers overseas models that may provide guidance to best practice in defining charity.
43. The analysis in this Consultation Paper therefore follows the structure of the Charities Bill 2003. That is, it firstly considers all of the elements of the core definition of charity which are contained in Part 2 of the Bill and then charitable purposes which are contained in Part 3 of the Bill.
44. The Board of Taxation in its review of the Charities Bill 2003⁵ considered some of the concerns that were raised on the Charities Bill 2003. These concerns included whether there should be an explicit public benefit test; the level of political advocacy a charity can engage in; clarification around the types of entities that can be a charity; and the list of charitable purposes beyond the common law. The Board of Taxation also noted some confusion in the Charities Bill 2003 around the difference between a charity's activities and a charity's purposes.
 - These concerns are considered as part of this paper and, in particular, where events that have occurred since 2003 have alleviated these concerns.

2.1 CORE DEFINITION

45. The core definition in the Charities Bill 2003 contained the following broad elements that an entity must meet to be a charity:
 - the entity must be a not-for-profit entity;
 - it has a dominant purpose that is charitable;
 - it is for the public benefit;
 - it does not engage in activities that do not further, or are not in aid of, its dominant purpose;
 - it does not have a disqualifying purpose;

5 http://www.taxboard.gov.au/content/content.aspx?doc=reviews_and_consultations/definition_of_a_charity/default.htm&pageid=007.

- it does not engage in, and has not engaged in, conduct that constitutes a serious offence; and
 - is not an individual, partnership, a political party, a superannuation fund or a government body.
46. A discussion on these core elements and their suitability to be included in a definition is outlined below.

2.1.1 Not-for-profit

47. Under the common law meaning of charity, a charity must be a not-for-profit entity.
48. As outlined in the explanatory material to the Charities Bill 2003, the not-for-profit requirement does not imply that a charitable entity cannot generate a profit. Activities can be undertaken which generate a profit where that profit is applied for charitable purposes.
49. The proposed legislation on restating the 'in Australia' special conditions will standardise the use of 'not-for-profit' in the tax laws. It will replace the various definitions of 'non-profit' which are currently used in both a defined and undefined sense throughout the tax law. Consultation on the 'in Australia' special conditions is ongoing.
50. The statutory definition of charity will use the same meaning of 'not-for-profit' as developed by this separate consultation process. The not-for-profit definition applies to all NFPs, not just charities and is therefore being considered as part of a broader consultation process. For further information on the consultation for the 'in Australia' special conditions and the meaning of not-for-profit please see information at www.treasury.gov.au.

2.1.2 Dominant purpose

51. For an entity to be charitable, the Charities Bill 2003 required that it have a dominant charitable purpose. The Bill specified that an entity has a dominant purpose, if it has one or more purposes that are charitable, and any other purposes of the entity further or are in aid of, or are ancillary or incidental to the dominant purpose.
52. The requirements for a charitable purpose for both charitable institutions and charitable funds are discussed in TR 2011/D2⁶, which said:
- for an institution to be a charitable institution it cannot have any independent purposes that are not charitable purposes; and
 - for a fund to be charitable it must be established for charitable purposes and the charitable purposes must be the only purposes for which it is established.
53. If a charitable entity were allowed to have non-charitable purposes there would be no way of working out which part of the assets of the entity were intended to be applied for charitable

6 ATO Draft Taxation Ruling TR 2005/D21 paragraphs 151 to 193, <http://law.ato.gov.au/pdf/pbr/tr2011-d002.pdf>.

purposes and which were to be applied for non-charitable purposes. In the case of a charity which is a trust, this could invalidate the trust through lack of certainty.⁷

54. The Charities Bill 2003 could be altered to reflect the common law position that the purpose or purposes of a charity must be exclusively charitable. The Bill could clarify that an entity cannot have any independent non-charitable purposes. Any other purposes, which if viewed in isolation, would not be charitable, could only be incidental or ancillary to the charitable purpose.
55. These changes would bring the definition closer to those of overseas jurisdictions. For example, the English definition states that a charity means an institution which is established for charitable purposes only.
56. An area of confusion in defining charity (as identified by the Board of Taxation in its review of the Charities Bill 2003) is the difference between a charity's purposes and a charity's activities. An important consideration in determining whether an institution is a charity is not only whether it has a charitable purpose(s) but also whether its activities are in furtherance of its charitable purpose(s) and whether or not those activities must themselves be intrinsically charitable. The role of activities in determining whether an entity is a charity is considered at 2.1.4.

Peak bodies

57. The Board of Taxation recommended that the workability of the Bill could be improved by clarifying whether or not peak bodies could be charitable. In 2003, the New South Wales Administrative Decisions Tribunal held that a body which enhanced the long term viability of charitable organisations by providing educational mentoring and support services was itself a charitable institution.⁸ This decision indicates that while it is not necessary that a peak body deal directly with members of the public, it is the degree of integration and commonality of purpose with its members that determines its charitable status.
 - This decision may have provided greater certainty on the circumstances when a peak body can be a charity and it may now no longer require further clarification.

Consultation questions

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

⁷ *McGovern v A-G* [1981] 3 All ER 493 at page 509

⁸ *Social Ventures Australia Limited v. Chief Commissioner of State Revenue* [2008] NSWADT 331.

2.1.3 For the public benefit

58. The first step for determining whether an entity is charitable is that it must have a purpose that is charitable (see 2.1.2), and the second step is that it must operate for the public benefit. However, there are some limited exceptions to this rule, such as closed and contemplative religious orders.
59. The Charities Bill 2003 provided that to be charitable, an entity must be for the public benefit and it will have a purpose for the public benefit if it:
- is 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.
60. The 2010 Senate Inquiry⁹ proposed that a public benefit test contain the following principles:
- there must be an identifiable benefit arising from the aims and activities of an entity;
 - the benefit must be balanced against any detriment or harm; and
 - the benefit must be to the public or a significant section of the public and not merely to individuals with a material connection to the entity.
61. The term ‘any detriment or harm’ is taken from the guidance material of the Charity Commission for England and Wales, which states that one of the key principles of public benefit is that any benefits that might arise to the public must not be outweighed by any significant detriment or harm.¹⁰

Public

62. As stated above, the Charities Bill 2003 provided that an entity has a purpose which is for the public benefit only if it is directed to the benefit of the general community or to a sufficient section of the general community.
- It further clarified that if a purpose is not directed to the benefit of a sufficient section of the public if the people to whose benefit it is directed are numerically negligible (subsection 7(2)).
63. The Board of Taxation, in its review of the Charities Bill 2003, recommended that ‘sufficient section’ be defined as one which is not ‘numerically negligible’ compared with the size of that part of the community to whom the purpose would be relevant.
64. The Board of Taxation made this recommendation because of concerns that the wording could exclude organisations such as, independent schools in geographically isolated communities, an

9 http://www.aph.gov.au/senate/committee/economics_ctte/public_benefit_test_10/report/report.pdf

10 http://www.charitycommission.gov.uk/Charity_requirements_guidance/Charity_essentials/Public_benefit/pbsummary.aspx.

organisation catering for a small group of people who are profoundly deaf and legally blind, or a single person with a rare disease.

- The definition or explanatory material could clarify that limiting beneficiaries to large groups of the community — residents of a particular geographic area, the adherents of a particular religion, those following a particular calling or profession or sufferers of a particular disability or condition — is not inconsistent with the public requirement, unless the limits are incompatible with the nature of the benefit.

– This is the position outlined in TR 2011/D2.¹¹

65. The definition could also clarify that an entity is not for the public benefit if it is set up to advance the interests of its members in their capacity as members, unless these benefits are incidental or ancillary to the purpose of benefiting the community.¹² There may be value in clarifying this in the definition either as part of the public benefit test or as a disqualifying activity.

- This clarification is not intended to cover pecuniary interests of members which is covered by the not-for-profit requirement as discussed above.

66. Under the common law the purpose of relief of poverty does not require a test of ‘public benefit’ such that those who can benefit need not be a section of the public.¹³ As has occurred in other jurisdictions, this common law rule would be overridden by a general public benefit test. This could mean that an entity which has only the relief or prevention of poverty as a charitable purpose and which has a restricted class of beneficiaries, such as a family or employer connection, may encounter difficulties in demonstrating that it is for the public benefit.

- As explained in TR 2011/D2, placing limits on those who can benefit from a charity is generally incompatible with an intention of benefiting the public if the limits are by reference to some personal tie such as being members of a family or a group, which is based on personal relationships to particular persons.¹⁴

Familial ties

67. There may be some unintentional outcomes if the common law is overridden so that charities whose purpose is the relief of poverty are required to meet a full public benefit test in all situations. For example, an entity established to relieve poverty of native title holders may not meet the current or proposed public benefit test as it is only providing benefits to native title holders who are members of the same family.

68. A modification could be made to take into account circumstances when it would be appropriate to recognise an entity as charitable even though its beneficiaries are related. For example, the *Native Title Act 1993*, the *Aboriginal Land Rights (Northern Territory) Act 1976* (and equivalent State and Territory legislation) provide for payments to be made to native title holders and traditional owners. In the context in which the payments are made, whether or

11 ATO Draft Taxation Ruling TR 2011/D2 paragraph 128.

12 Victorian Women Lawyers’ Association Inc v. Federal Commissioner of Taxation (2008) 170 FCR 318; [2008] FCA 983.

13 ATO Draft Taxation Ruling TR 2011/D2 paragraphs 123 -124.

14 ATO Draft Taxation Ruling TR 2011/D2 paragraph 127.

not for the relief of poverty, it may be appropriate that trusts or other entities established to receive and manage these payments and that would otherwise be charitable (apart from the strict public benefit test) be recognised as charitable.

69. The New Zealand (NZ) definition provides an example of how the rule could be modified to take into account family ties. The rules apply so that:
- entities that qualify as charities will not be excluded from the associated exemption from income tax simply because they benefit people connected by blood ties; and
 - marae on Maori reservations whose funds are solely applied to the administration and maintenance of the marae will qualify for a 'charitable' income tax exemption.
70. Amendments were made to the NZ charity law because it was considered that an entity that meets the 'charitable purposes' requirement should not be automatically excluded from being charitable for income tax purposes, merely because its members are connected by blood ties. However, the entity must still meet the public benefit test. This means that factors such as the nature of the entity, the activities it undertakes, the potential beneficiary class, the relationship between the beneficiaries and the number of beneficiaries, are still relevant when determining whether the entity is charitable.

Consultation questions

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

Benefit

71. As outlined above, the Charities Bill 2003 provided clarification of the meaning of benefit as being aimed at achieving a universal or common good, and has practical utility.
72. The Board of Taxation considered that the public benefit test in section 7 of the Charities Bill 2003 was adequate and that further clarifications could be made in the explanatory material.
73. Ruling TR 2011/D2 provides guidance on the meaning of beneficial to the community. For example, it states a charity is altruistic and intends social value or utility, and provides a recognised benefit to the community. The draft ruling states that there are two aspects to the public benefit test — there has to be a value or benefit, and that the value or benefit has to be for the community. The ruling discusses some indicators of benefit such as the structures or objects of an organisation and who is intended to benefit. Further, a benefit cannot, on

balance, be harmful. The draft ruling also states that the charging of fees to members is unlikely of itself to prevent a purpose being charitable.¹⁵

74. An issue is whether the meaning of benefit should include practical utility. There may be concerns that entities that provide social, mental or spiritual benefits cannot meet this requirement, for example, entities providing religious teachings or cultural benefits. However, as noted by the 2001 Charities Definition Inquiry, practical utility can be broader than material benefits.¹⁶
75. Scotland, Ireland and Northern Ireland have definitions which can provide guidance as to whether an entity is for the public benefit. These definitions provide that regard should be had to: whether the benefit is likely to be provided to a certain section of the public only; and whether conditions (including charges or fees) and class of individuals who may benefit on obtaining the benefit is unduly restrictive.
76. In contrast, England favoured a non-statutory approach for reasons such as flexibility, certainty and its capacity to accommodate the diversity of the sector. The Charity Commission for England and Wales provides extensive guidance on the meaning of public benefit. Some of these principles in their guidance material include: there must be an identifiable benefit or benefits; the benefits must be related to the aims; benefits must be balanced against any detriment or harm; benefits must not be unreasonably restricted; individuals in poverty must not be restricted from benefit; and any private benefits must be incidental.¹⁷
77. The meaning of public benefit could be further clarified in the statutory definition, to better reflect the common law. This could be done by incorporating more of the principles outlined in the ruling TR 2011/D2, or those contained in the guidance material of the Charities Commission of England and Wales. Recommendation 7 of 2001 Charities Definition Inquiry was that the public benefit test be strengthened by requiring that the purpose of a charitable entity must be altruistic.

Consultation questions

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?
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?

Presumption of public benefit

78. The common law applies so that entities within the first three heads of charity are presumed (subject to evidence to the contrary) to be providing a public benefit. Only an entity

15 ATO Draft Taxation Ruling TR 2011/D2 paragraphs 117- 135.

16 2001, *Report of the Inquiry into the Definition of Charities and Related Organisations*, Page 124

17 http://www.charitycommission.gov.uk/Charity_requirements_guidance/Charity_essentials/Public_benefit/pbsummary.aspx.

considered to be charitable under the fourth head needs to positively demonstrate that it is for the public benefit.

79. Even though there is a presumption of public benefit for the first three heads of charity these charities must nonetheless ensure they have been established for the public benefit. However, the presumption means a government authority must in seeking to regulate and enforce the law, rebut the presumption of public benefit, which can often be administratively difficult and costly.¹⁸
80. The 2010 Senate Inquiry supported the application of a public benefit test. The Senate Committee concluded that Australia should be guided by international best practice in this area.
81. The Charities Bill 2003 overturned the presumption of public benefit for the first three heads of charity requiring that all entities seeking approval as a charity to meet a public benefit test. This approach has been taken in England and other jurisdictions which have explicitly overturned the presumption of public benefit. However, Ireland did not overturn the presumption of public benefit in respect of charities for the advancement of religion.
82. A public benefit test means that entities seeking approval as a charity must demonstrate that they are established for the public benefit, unless the public benefit provided is self-evident. A reformed public benefit test should increase public confidence in the charitable sector and public support for the granting of tax concessions to charities.
 - In considering whether it is self-evident that a charity meets the public benefit test the ACNC could consider: information that the charity provides to the ACNC (for example, in its annual reports); information that the ACNC obtains on the charity from other sources; reports and assessments on the charity made by other government agencies (including regulators); and other relevant publicly available information.
83. Altering the presumption of public benefit may not increase compliance costs for most charities. This is because charities are already required to review their activities and purpose to ensure they remain charitable and to notify relevant government authorities if they are no longer charitable. A charity generally risks losing government grants and concessions if it is not providing a public benefit, and therefore is not charitable.
84. While some charities may incur some minor initial compliance costs in demonstrating that they are providing a public benefit it is not expected that these charities will incur costs on an on-going basis. The ACNC will determine what is needed to demonstrate whether an entity is operating for the public benefit. It would be expected that little will be required where the public benefit is self-evident and additional work will only be required where the ACNC has raised doubts about an entity's application or on review.
85. Overseas experience demonstrates that in practice the removal of the presumption of public benefit for all charities (for example, in England and Wales), has not caused significant issues for the charitable sector more broadly. The most common effect of removing the presumption of public benefit has been that charities have had to state publicly the public benefit they

¹⁸ From 1 July 2013 this will be an issue for the ACNC which will have the role of determining whether an entity is eligible to be endorsed as a charity.

provide, whereas previously they did not. The Charities Commission of England and Wales have issued guidance to assist charities in meeting the requirement.

86. In particular, in England issues arose for certain charities that in substance operate exclusively such as some limited independent schools. The Charity Commission of England and Wales issued guidance which states that such charities need to ensure that people who cannot afford to pay the fees have an opportunity to benefit in a way that relates to the charity's aims.¹⁹ However, as a result of the *Independent Schools Case*,²⁰ the Charity Commission of England and Wales has advised that it will need to clarify the content to reflect the Tribunal's findings. This decision has clarified what is required for independent schools to meet the public benefit requirement.
- While the same issues may not arise in Australia because of differing school systems, it is nonetheless expected that guidance similar to that issued by the Charities Commission of England and Wales will be provided in Australia but modified where necessary to suit Australian conditions and laws.
87. Other jurisdictions have issued similar guidance to their respective sectors about the public benefit test and charities in those jurisdictions have now publicly stated the public benefit they provide.

Charitable religious organisations

88. For the purposes of charity law, a religion is a system of belief with characteristics that have been determined under case law. These characteristics are outlined in the Charities Bill 2003 (section 12).
89. The 2010 Senate Inquiry recognised that charities play an important role in the community and the economy. However, it noted that there is concern in the community about the activities of some religious groups (cult like organisations) on the grounds they may cause detriment or harm to their members.
90. Under the terms of the Charities Bill 2003, charities (including religious charities) would need to be able to demonstrate a public benefit. If there are concerns that a religion is causing detriment or harm, this would be considered in assessing whether they pass the public benefit test. An organisation that has been approved as a charity will be at risk of losing its status as a charity if it is able to be demonstrated that it is causing significant detriment or harm.
91. In the Board of Taxation review of the Charities Bill 2003, several religious entities raised concerns with needing to meet a public benefit test. They were concerned that administrative costs could be considerably increased if it became necessary for religious entities to demonstrate public benefit for each of their constituent entities.
92. However, it is important to note that in overseas jurisdictions overturning the presumption of public benefit for the advancement of religion has not resulted in any particular difficulties for most religions. Overseas experience will assist religious entities in determining the impact that a public benefit test will have on them.

19 <http://www.charitycommission.gov.uk/Library/guidance/pbfeechatext.pdf>

20 [2011] UKUT 421 (TCC), TCC-JR/03/2010

Consultation questions

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

2.1.4 Activities to be in furtherance of charitable purpose

93. Under the common law, both the activities and purposes of an institution need to be considered in determining whether the entity is a charitable institution. This requirement ensures that the entity must give effect to its charitable purpose.
94. The Charities Bill 2003 required that a charity not engage in activities that do not further, or are not in aid of, its dominant purpose. As discussed above, consideration is being given to whether the term 'dominant purpose' should be replaced by differing language, for example, 'exclusively charitable purpose' and that this test may also need to be altered to reflect this requirement.
95. The High Court clarified in the *Word Investment* decision that the activities undertaken by the entity need not be intrinsically charitable for the institution to be charitable. It was only necessary that the activities of the charity be in furtherance of the entity's charitable purpose. The Government has accepted that a charity can undertake activities that are unrelated, or not intrinsically charitable, so long as those activities are in furtherance or in aid of its charitable purpose.
96. As part of the 2011-12 Budget, the Government has announced that it will reform the tax law so that concessions provided to NFP entities are better targeted at those activities of a NFP that directly further its altruistic purpose. The Government's measure to better target NFP tax concessions is being considered through a separate consultation process and does not form part of this paper.²¹
97. Ruling TR 2011/D2 considers the importance of a entity's activities in determining whether the entity is charitable.²² For example, where the governing rules of an institution indicate its purpose is charitable, but it undertakes activities that are inconsistent with its charitable purpose, it will not be a charitable entity. On the other hand, activities that may be inconsistent with its charitable purpose but are isolated or insignificant should not affect the charitable status the entity.

21 On 27 May 2011 the Government has released a consultation paper *Better targeting of not-for-profit tax concessions*

22 ATO Draft Taxation Ruling TR 2011/D2 paragraphs 179-190.

98. Other comparable overseas jurisdictions have not included an activities condition in their statutory definitions, but they have included provisions which strengthen the requirement that a charity's activities must be in furtherance of its charitable purpose.
- For example, Ireland has defined charity so that it is an organisation that promotes a charitable purpose only and that, under its constitution (apart from certain exceptions), is required to apply all of its property (both real and personal) in furtherance of that purpose.

Consultation questions

10. Are there any issues with the requirement that the activities of a charity be in furtherance or in aid of its charitable purpose?
11. Should the role of activities in determining an entity's status as a charity be further clarified in the definition?

2.1.5 Disqualifying activities

99. As outlined above, the Board of Taxation review pointed to the confusion in section 8 of the Charities Bill 2003 between activities and purposes. Consideration needs to be given to changing section 8 of the Bill to remove this confusion. This section of the consultation paper refers to 'activities' rather than 'purposes' (including the heading) even though the Charities Bill 2003 referred to both 'purposes' and 'activities'. 'Charitable purposes' are dealt with elsewhere in this consultation paper.
100. There are some activities that are inconsistent with the overall charitable character of an entity. These activities are referred to in the Charities Bill 2003 as disqualifying activities. Disqualifying activities included the activity of engaging in illegal activities and political activities that are more than ancillary or incidental.
101. A discussion on political advocacy activities and illegal activities of a charity is below.

Political advocacy

102. The Charities Bill 2003 included political advocacy as a disqualifying activity if that purpose is more than 'ancillary or incidental'.
103. Political activities are listed in paragraph 8(2) of the Bill as follows:
- advocating a political party or cause (paragraph a);
 - supporting a candidate for political office (paragraph b); and
 - attempting to change the law or government policy (paragraph c).
104. The Charities Bill 2003 requirement that a charity's political activities be restricted to 'ancillary or incidental' was intended to reflect the common law position prior to the decision by the High Court in the *Aid/Watch* decision.

The *Aid/Watch* decision

105. The High Court, in the *Aid/Watch* decision, held that generation of public debate by lawful means, concerning matters arising under one of the established heads of charity, is itself an activity beneficial to the community. It also decided that there is no general doctrine in Australia that excludes political purposes from being charitable.
106. The *Aid/Watch* decision brings Australia into closer alignment with overseas jurisdictions, although in some cases is Australia may now be broader, for example, in comparison in England and Wales a charity can only engage in political activity that is in furtherance of its charitable purposes.
107. A summary of the practice in overseas jurisdictions to restrict political advocacy activities of charities is at [Attachment B](#).

Revising the 2003 definition

108. The Charities Bill 2003 could be altered to remove from disqualifying activities, activities of the type which is attempting to change the law or government policy (paragraph c).
 - The definition may also need to provide that a charity can engage in paragraph (c) type political activities but must nevertheless have a purpose that falls within the existing heads of charity (for example, seeking to change government policy on the most effective way of relieving poverty).
 - The definition may need to specify the meaning of political activities which is essentially those that seek to attempt to change the law or government policy, or decisions of governmental authorities.²³
109. As a result of these changes, charities would be able to engage in political activities, so long as those activities are in furtherance and in aid of its charitable purpose. It may not be necessary for charities to amend their objects to enable them to carry out political activities, as for most charities the change will only affect the type of political activities the charity can engage in.
110. An issue that needs to be considered is whether the definition should clarify the meaning of political activity. The Charity Commission of England and Wales has provided some guidance on the meaning of political activity.²⁴ The statutory definition could define this term. Alternatively, further clarification could be provided in explanatory material or, similar to England, the ACNC could issue guidance on acceptable political activities, including how charities can engage with political parties.
111. The High Court, in the *Aid/Watch* decision, held that public debate regarding government policy, activities or legislation directed towards subject matters that are within the four heads of charity can be charitable. This does not mean that all political activity or debate will be for the public benefit. Whether an entity that undertakes political activities is charitable would still

23 *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31, *Royal North Shore Hospital of Sydney v Attorney-general* (1938) 60 CLR 396, *McGovern v Attorney-General* [1982] 1 CH 321 and *Bowman v Secular Society Ltd* [1917] AC 406.

24 http://www.charitycommissionni.org.uk/Charity_requirements_guidance/Your_charitys_activities/Campaigning/Guidance_on_campaigning_and_political_activities.aspx p 7-8.

need to be determined according to whether it meets the public benefit test, comes within the spirit and intendment of the preamble to the State of Elizabeth, or is deemed charitable by legislation.

Party political activities

112. The Charities Bill 2003 could be modified to prevent a charity from engaging in party political activities, for example supporting a candidate for political office (that is, activities covered by paragraphs 8(2)(a) and (b) of the Bill), even if the activity is ancillary or incidental.
- This change would incorporate a feature that is included in overseas models such as England, Scotland and Canada which have strong prohibitions in relation to party political activities.
113. Charities engaging in such political activities will bring about a conflict between charity and electoral laws, particularly around disclosure, funding and fundraising activities. This conflict may also compromise the independence of charities, and erode public confidence in charities.
- Furthermore, such activities may put charities in a position where they could breach the *Commonwealth Electoral Act 1918*. It could also put charities in direct conflict with the strict regulation of political parties, elections, and funding and disclosure requirements and limitations.
114. The Board of Taxation suggested that the Charities Bill 2003 could be amended to clarify in paragraph 8(2)(a) whether 'cause' is intended to apply to 'political cause', or have a more general application and that paragraph 8(2)(b) should also refer to opposing a candidate for political office. A clarification of the definition could be made if it was considered necessary. Consideration could also be given to whether or not a reference to 'cause' is necessary.

Consultation questions

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

Illegal activities

115. The Charities Bill 2003 included as a core requirement, that an entity will not be a charity if it engages in, or has engaged in conduct (or omits to engage in conduct) constituting a serious offence. The Charities Bill 2003 also included an illegal purpose as a disqualifying purpose.
116. It may be preferable to remove this core requirement and instead include it as a disqualifying activity. That is, supporting illegal activities could also be a disqualifying activity. As outlined above, the Board of Taxation pointed to the confusion in section 8 of the Charities Bill 2003 in relation to purposes and activities, and shifting this condition could improve clarity.
117. A new regulatory regime is being proposed that will allow the ACNC to impose penalties as an alternative to the deregistration of a charity which has engaged in inappropriate conduct. This will be the subject of separate consultations.

2.1.6 Type of entity

118. The Charities Bill 2003 provides that a charity cannot be an individual, a political party, a superannuation fund or a government body. The term 'entity' is given the meaning in section 960-100 of the *Income Tax Assessment Act 1997*.
- The effect is that a charity can be structured in a number of other legal forms such as a trust, or an incorporated or unincorporated body.
119. The Charities Bill 2003 defines a 'government body' to include a body controlled by the Commonwealth, a State or a Territory, as well as a body controlled by the government of a foreign country.
120. The Board of Taxation recommended that the definition be amended to provide a clear definition of 'government body', including whether local government is included, and a clear definition of 'controlled by government'. Another issue is whether the definition of 'government body' should be replaced or take into account the definition of 'government entity' in the *A New Tax System (Australian Business Number) Act 1999*.
121. In the 2003 *Central Bayside* decision, the High Court, considered the meaning of government control, and whether on the facts the extent of government control and influence meant the entity was carrying out the functions of government. There were a number of factors that were taken into account in determining that it was not controlled by government. As outlined in ruling TR 2011/D2, this case has since provided further clarification of the meaning of government control.
122. The explanatory materials could further clarify that a government body includes local government, and be updated to reflect the *Central Bayside* decision.
123. The Board of Taxation also recommended that the term 'partnership' be clarified in the explanatory material, or as a by note in the Bill, so it is clear that joint ventures will not be excluded from being a charity. It is common for charities to work in a joint venture arrangement with other partners, which are not considered to be a partnership for tax purposes. It could be clarified in the explanatory materials to the definition that these joint ventures are not considered to be partnerships, for tax or charity registration purposes.

Consultation questions

14. Is any further clarification required in the definition on the types of legal entity which can be used to operate a charity?
15. In the light of the *Central Bayside* decision is the existing definition of 'government body' in the Charities Bill 2003 adequate?

2.2 CHARITABLE PURPOSES

124. In the Charities Bill 2003, charitable purpose was defined in Part 3 of the Bill and was as follows:
- the advancement of health;

- the advancement of education;
 - the advancement of social or community welfare;
 - the advancement of religion;
 - the advancement of culture;
 - the advancement of the natural environment; and
 - any other purpose that is beneficial to the community.
125. The Bill further clarified the meaning of ‘advancement’, ‘advancement of social welfare’ and ‘religion’. An issue is whether the definition of ‘advancement’ should be clarified in the new definition to reflect that the current law includes ‘prevention’.
126. The explanatory material to the Charities Bill 2003 elaborated on the kind of entities that would be recognised as charitable under the listed charitable heads. For example, the types of entities that would be considered as charitable under the head ‘other purposes beneficial to the community’ would include:
- the promotion and protection of civil and human rights;
 - the promotion of reconciliation, mutual respect and tolerance between various groups within Australia;
 - the protection and safety of the general public; and
 - the prevention and relief of suffering of animals.
127. This head of charity may be of key importance in providing flexibility in the definition. It will allow the meaning of charitable purpose to continue to develop in accordance with societal needs and expectations, either by court cases or by Parliament.
128. The *Extension of Charitable Purpose Act 2004* altered the definition in relation to the provision of child care and self-help groups.
129. The Board of Taxation noted that there were many suggestions for clarifying or expanding the definition of charitable purpose in the draft Bill. Suggestions for increasing clarity incorporating some of the purposes listed in the explanatory material into the legislation, and providing clarification of the term ‘the advancement of social or community welfare’.
130. While a comprehensive list of permissible charitable purposes will provide greater certainty and clarity for the sector and the public, it is important to ensure that the list is limited to those purposes that have strong recognition in the existing common law.
131. In addition to court cases, any future extensions to the common law meaning of charitable purposes may also fall to Parliament for consideration on a case-by-case basis, in accordance with contemporary Australian societal needs and expectations.

132. Another issue is whether purposes that have been found not to be charitable should be listed as 'disqualifying purposes'. Ruling TR 2011/D2 outlines purposes which under the common law have been held not to be charitable. These purposes include:
- to confer private benefits;
 - sporting, recreational or social;
 - against public policy;
 - governmental; and
 - vague or of insufficient value to the community.
133. In relation to sporting or recreational the 2001 Charities Definition Inquiry recommended that the encouragement of sport for recreation for amusement or competition should not be charitable. However, the Inquiry recognised that such purposes may be charitable if sufficiently connected with a recognised charitable purpose, such as education or health care.
134. Overseas jurisdictions have taken different approaches in listing charitable purposes. England has listed twelve charitable purposes. England's arguments for having an expanded list of charitable purposes were that these purposes were already charitable under the existing law, and were significant enough to warrant a specific place of their own in a list.
135. In comparison, Ireland preserved the four *Pemsel* heads of charity in its legislation, but provided clarity on a range of charitable purposes that are considered to come under the fourth head.

Consultation questions

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

2.3 OTHER ISSUES

2.3.1 State and Territory issues

136. A statutory definition of charity for Commonwealth purposes will provide a platform to have a harmonised definition for all levels of government.
137. A single statutory definition of charity across Commonwealth, State and Territory jurisdictions would provide significant benefits to the charitable sector. For example, an entity could be assessed as being charitable for all purposes by a single agency such as the ACNC. This is expected to greatly reduce the administrative burden on charities and will provide consistency of treatment for a range of purposes.

138. In formulating a definition of charity, it is therefore necessary to take into account the longer term goal that the statutory definition of charity be harmonised across the Commonwealth, and the States and Territories. The terms 'charity' and 'charitable purposes' are not only found in State and Territory taxation laws but also in other legislation such as trust law, fundraising, collections law, and incorporation laws.
139. Commonwealth, State and Territory legislation can often refer to a subset of charity, for example, a trust established for the relief of poverty or a religious institution.
140. While this is intended to limit a concession to a subset of charities, it is not clear whether that entity needs to nonetheless be a charity. This may have the unintended effect of not requiring an entity to meet the other requirements of a charity, such as the public benefit test.
141. Other cases may introduce confusion by referring to charities as well as subsets of charities, for example, charities and religious institutions.
142. Therefore, it may be preferable to instead describe the entity firstly as a registered charity before seeking to narrow those charities that are being identified as eligible for a tax concession. Examples include 'a registered charity established for the relief of poverty' or 'a registered charity established for the advancement of religion'.
143. There is some inconsistent treatment in the recognition of charitable purposes. For example, there are differences between States and Territories on the acceptance of sporting bodies as charitable. Case law in Australia indicates that sporting and recreational bodies are not charitable.²⁵ A definition of charity at the Commonwealth level will not preclude States and Territories from modifying the statutory definition of charity as is appropriate for their purposes.
144. There are circumstances where an entity that is currently recognised as being a charity at the State or Territory level is not recognised as being a charity at the Commonwealth level. It may be desirable that the statutory definition take account of some of these circumstances. This will facilitate the process of harmonisation in the future.
- Example 1: the trust legislation of some States or Territories recognise as charitable certain trusts which distribute to non-charitable deductible gift recipients (DGRs) such as, under some state and territory legislation, certain ancillary funds which distribute to public hospitals, public museums or public art galleries are recognised as charitable.
 - Example 2: Some States sever non-charitable purposes from a mixed purpose trust to leave a valid charitable trust (which is recognised for tax purposes).

Consultation question

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

²⁵ *Northern NSW Football Ltd v Chief Commissioner of State Revenue* [2011] NSWCA 51

2.3.2 Australian Disaster Relief Funds

145. Australian Disaster Relief Funds (ADRFs) are a general category of DGR established in 2006 for assistance after disasters. Eligibility for DGR status under the ADRF category is restricted to:
- ‘public funds established and maintained for charitable purposes solely to provide money for relief of people and re-establishing a community in distress as a result of declared disasters which occur in Australia’.
146. Charitable disaster relief activities can cover a broad range of activities which vary according to the nature of the disaster and types of distress being suffered. It can include emergency shelter, health care and food supplies, and providing relief for people through trauma counselling and through repair or reconstruction work on buildings, amenities, locations and infrastructure.²⁶
147. Currently, ADRFs are able to be set up with a declaration by the relevant Treasury minister that the disaster meets the conditions in section 30-45A or by a state or territory minister under section 30-46 of the *Income Tax Assessment Act 1997*. The current legislative arrangements mean that ADRFs must establish and expend funds in relation to one disaster. They cannot exist to collect funds prior to a disaster occurring, or hold funds over from one disaster to another.
148. In the wake of the devastating Victorian bushfires in 2009, stakeholders raised concerns with the existing arrangements concerning disaster relief funds. The concern was that there is a lack of flexibility in the current charitable framework as to how donated funds can be applied. It was difficult for the Victorian Bushfire Appeal Fund to spend the money collected within the current framework. In contrast, many charities and other disaster relief responses struggle to raise funds for essential charitable disaster-response activities.
149. Under the existing framework, an ADRF is limited in the manner it can spend donations on rebuilding communities, or provide relief for other disasters, or distribute to other DGRs including DGRs that would be charitable if they were not government entities (noting that governments are not considered charitable as they do not have the necessary altruistic purpose). Currently ADRFs may rebuild community infrastructure damaged in a disaster, but only to replacement standard.
150. If a charity uses donations in a manner that is inconsistent with the existing framework they jeopardise their status as charitable, as they are acting outside the definition of charitable purposes.
151. The existing arrangements for ADRFs (as well as related integrity issues) could be considered as part of the process of defining charity. Issues for consideration could be:
- providing more flexibility in establishing funds, collecting donations, and distributing funds in response to a disaster;
 - increasing the scope of allowable activities;
 - encouraging the efficient and timely use of funds collected for a disaster; and

26 ATO Gift Pack for DGRs (ato.gov.au)

- standardising the approach to triggering Commonwealth disaster-response tax concessions.

152. Consideration of the existing framework for ADRFs will give effect to the decision of the National Emergency Management Committee (NEMC) of the Council of Australian Governments which agreed to review and report on the legal structures of charities with particular reference to the application of taxation laws, and to the principle of charitable purposes in the context of natural disasters.

Consultation question

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

2.3.3 Transitional issues

153. There may be some transitional issues with enacting a statutory definition of charity. It is expected that these issues will be minimal as the definition is substantially being drawn from the common law.

- Consideration could be given to an appropriate educational campaign to ensure the sector is aware of the likely impacts of a statutory definition.

154. An issue is whether existing charities that have been endorsed by the ATO prior to the commencement date will retain their charitable status from the commencement date. It is proposed that existing charities will not need to reapply for registration by the ACNC but continue to self-assess eligibility against the statutory definition from the commencement date. Charities in existence at the commencement date will retain their registration as a charity but registration will be reviewed by the ACNC over time.

Consultation question

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

APPENDICES

APPENDIX A: DEFINITIONS IN OVERSEAS JURISDICTIONS

Below are relevant excerpts from legislation regulating charities in jurisdictions that have codified the definition of charity.

ENGLAND AND WALES

Charities Act 2006

Part 1 — Meaning of ‘charity’ and ‘charitable purpose’

1 — Meaning of ‘charity’

1. For the purposes of the law of England and Wales, ‘charity’ means an institution which:
 - (a) is established for charitable purposes only; and
 - (b) falls to be subject to the control of the High Court in the exercise of its jurisdiction with respect to charities.
2. The definition of ‘charity’ in subsection (1) does not apply for the purposes of an enactment if a different definition of that term applies for those purposes by virtue of that or any other enactment.
3. A reference in any enactment or document to a charity within the meaning of the Charitable Uses Act 1601 (c. 4) or the preamble to it is to be construed as a reference to a charity as defined by subsection (1).

2 — Meaning of ‘charitable purpose’

1. For the purposes of the law of England and Wales, a charitable purpose is a purpose which:
 - (a) falls within subsection (2); and
 - (b) is for the public benefit (see section 3).
2. A purpose falls within this subsection if it falls within any of the following descriptions of purposes:
 - (a) the prevention or relief of poverty;
 - (b) the advancement of education;
 - (c) the advancement of religion;
 - (d) the advancement of health or the saving of lives;

- (e) the advancement of citizenship or community development;
- (f) the advancement of the arts, culture, heritage or science;
- (g) the advancement of amateur sport;
- (h) the advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity;
- (i) the advancement of environmental protection or improvement;
- (j) the relief of those in need by reason of youth, age, ill-health, disability, financial hardship or other disadvantage;
- (k) the advancement of animal welfare;
- (l) the promotion of the efficiency of the armed forces of the Crown, or of the efficiency of the police, fire and rescue services or ambulance services; and
- (m) any other purposes within subsection (4).

3. In subsection (2):

- (a) in paragraph (c) 'religion' includes:
 - (i) a religion which involves belief in more than one god; and
 - (ii) a religion which does not involve belief in a god.
- (b) in paragraph (d) 'the advancement of health' includes the prevention or relief of sickness, disease or human suffering;
- (c) paragraph (e) includes:
 - (i) rural or urban regeneration; and
 - (ii) the promotion of civic responsibility, volunteering, the voluntary sector or the effectiveness or efficiency of charities.
- (d) in paragraph (g) 'sport' means sports or games which promote health by involving physical or mental skill or exertion;
- (e) paragraph (j) includes relief given by the provision of accommodation or care to the persons mentioned in that paragraph; and
- (f) in paragraph (l) 'fire and rescue services' means services provided by fire and rescue authorities under Part 2 of the Fire and Rescue Services Act 2004 (c. 21).

4. The purposes within this subsection (see subsection (2)(m)) are:
 - (a) any purposes not within paragraphs (a) to (l) of subsection (2) but recognised as charitable purposes under existing charity law or by virtue of section 1 of the Recreational Charities Act 1958 (c. 17);
 - (b) any purposes that may reasonably be regarded as analogous to, or within the spirit of, any purposes falling within any of those paragraphs or paragraph (a) above; and
 - (c) any purposes that may reasonably be regarded as analogous to, or within the spirit of, any purposes which have been recognised under charity law as falling within paragraph (b) above or this paragraph.
5. Where any of the terms used in any of paragraphs (a) to (l) of subsection (2), or in subsection (3), has a particular meaning under charity law, the term is to be taken as having the same meaning where it appears in that provision.
6. Any reference in any enactment or document (in whatever terms):
 - (a) to charitable purposes; or
 - (b) to institutions having purposes that are charitable under charity law.

is to be construed in accordance with subsection (1).
7. Subsection (6):
 - (a) applies whether the enactment or document was passed or made before or after the passing of this Act; but
 - (b) does not apply where the context otherwise requires.
8. In this section:

‘charity law’ means the law relating to charities in England and Wales; and

‘existing charity law’ means charity law as in force immediately before the day on which this section comes into force.

3 — The ‘public benefit’ test

1. This section applies in connection with the requirement in section 2(1)(b) that a purpose falling within section 2(2) must be for the public benefit if it is to be a charitable purpose.
2. In determining whether that requirement is satisfied in relation to any such purpose, it is not to be presumed that a purpose of a particular description is for the public benefit.
3. In this Part any reference to the public benefit is a reference to the public benefit as that term is understood for the purposes of the law relating to charities in England and Wales.
4. Subsection (3) applies subject to subsection (2).

4 — Guidance as to operation of public benefit requirement

1. The Charity Commission for England and Wales (see section 6 of this Act) must issue guidance in pursuance of its public benefit objective.
2. That objective is to promote awareness and understanding of the operation of the requirement mentioned in section 3(1) (see section 1B(3) and (4) of the Charities Act 1993 (c. 10), as inserted by section 7 of this Act).
3. The Commission may from time to time revise any guidance issued under this section.
4. The Commission must carry out such public and other consultation as it considers appropriate:
 - (a) before issuing any guidance under this section; or
 - (b) (unless it considers that it is unnecessary to do so) before revising any such guidance.
5. The Commission must publish any guidance issued or revised under this section in such manner as it considers appropriate.
6. The charity trustees of a charity must have regard to any such guidance when exercising any powers or duties to which the guidance is relevant.

5 — Special provisions about recreational charities, sports clubs etc.

1. The Recreational Charities Act 1958 (c. 17) is amended in accordance with subsections (2) and (3).
2. In section 1 (certain recreational and similar purposes deemed to be charitable) for subsection (2) substitute.
3. '(2) The requirement in subsection (1) that the facilities are provided in the interests of social welfare cannot be satisfied if the basic conditions are not met.
 - 3.a The basic conditions are:
 - (a) that the facilities are provided with the object of improving the conditions of life for the persons for whom the facilities are primarily intended; and
 - (b) that either:
 - (i) those persons have need of the facilities by reason of their youth, age, infirmity or disability, poverty, or social and economic circumstances; or
 - (ii) the facilities are to be available to members of the public at large or to male, or to female, members of the public at large.'
4. Section 2 (miners' welfare trusts) is omitted.
5. A registered sports club established for charitable purposes is to be treated as not being so established, and accordingly cannot be a charity.

6. In subsection (4) a 'registered sports club' means a club for the time being registered under Schedule 18 to the Finance Act 2002 (c. 23) (relief for community amateur sports club).

SCOTLAND

Charities and Trustee Investment (Scotland) Act 2005

Chapter 2 Scottish Charity Register

7 — The charity test

1. A body meets the charity test if:
 - (a) its purposes consist only of one or more of the charitable purposes; and
 - (b) it provides (or, in the case of an applicant, provides or intends to provide) public benefit in Scotland or elsewhere.
2. The charitable purposes are:
 - (a) the prevention or relief of poverty;
 - (b) the advancement of education;
 - (c) the advancement of religion;
 - (d) the advancement of health;
 - (e) the saving of lives;
 - (f) the advancement of citizenship or community development;
 - (g) the advancement of the arts, heritage, culture or science;
 - (h) the advancement of public participation in sport;
 - (i) the provision of recreational facilities, or the organisation of recreational activities, with the object of improving the conditions of life for the persons for whom the facilities or activities are primarily intended;
 - (j) the advancement of human rights, conflict resolution or reconciliation;
 - (k) the promotion of religious or racial harmony;
 - (l) the promotion of equality and diversity;
 - (m) the advancement of environmental protection or improvement;
 - (n) the relief of those in need by reason of age, ill-health, disability, financial hardship or other disadvantage;
 - (o) the advancement of animal welfare; and

- (p) any other purpose that may reasonably be regarded as analogous to any of the preceding purposes.
3. In subsection (2):
- (a) in paragraph (d), 'the advancement of health' includes the prevention or relief of sickness, disease or human suffering;
 - (b) paragraph (f) includes:
 - (i) rural or urban regeneration; and
 - (ii) the promotion of civic responsibility, volunteering, the voluntary sector or the effectiveness or efficiency of charities.
 - (c) in paragraph (h), 'sport' means sport which involves physical skill and exertion;
 - (d) paragraph (i) applies only in relation to recreational facilities or activities which are:
 - (i) primarily intended for persons who have need of them by reason of their age, ill-health, disability, financial hardship or other disadvantage; or
 - (ii) available to members of the public at large or to male or female members of the public at large.
 - (e) paragraph (n) includes relief given by the provision of accommodation or care; and
 - (f) for the purposes of paragraph (p), the advancement of any philosophical belief (whether or not involving belief in a god) is analogous to the purpose set out in paragraph (c).
4. A body which falls within paragraphs (a) and (b) of subsection (1) does not, despite that subsection, meet the charity test if:
- (a) its constitution allows it to distribute or otherwise apply any of its property (on being wound up or at any other time) for a purpose which is not a charitable purpose;
 - (b) its constitution expressly permits the Scottish Ministers or a Minister of the Crown to direct or otherwise control its activities; or
 - (c) it is, or one of its purposes is to advance, a political party.
5. The Scottish Ministers may by order disapply either or both of paragraphs (a) and (b) of subsection (4) in relation to any body or type of body specified in the order.

8 — Public benefit

1. No particular purpose is, for the purposes of establishing whether the charity test has been met, to be presumed to be for the public benefit.
2. 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.

in consequence of the body exercising its functions compares with the benefit gained or likely to be gained by the public in that consequence; and

- (b) where benefit is, or is likely to be, provided to a section of the public only, whether any condition on obtaining that benefit (including any charge or fee) is unduly restrictive.

9 — Guidance on charity test

OSCR must, after consulting representatives of the charitable sector and such other persons as it thinks fit, issue guidance on how it determines whether a body meets the charity test.

Ireland

Charities Act 2009

Part 1 — Preliminary and general

‘charitable gift’ means a gift for charitable purposes;

‘charitable organisation’ means:

- (a) the trustees of a charitable trust; or
- (b) a body corporate or an unincorporated body of persons:
 - (i) that promotes a charitable purpose only;
 - (ii) that, under its constitution, is required to apply all of its property (both real and personal) in furtherance of that purpose, except for moneys expended:
 - in the operation and maintenance of the body, including moneys paid in remuneration and superannuation of members of the staff of the body; and
 - in the case of a religious organisation or community, on accommodation and care of members of the organisation or community; and
 - (iii) none of the property of which is payable to the members of the body other than in accordance with *section 89*, but shall not include an excluded body.

‘charitable purpose’ shall be construed in accordance with section 3;

‘charitable trust’ means a trust:

- (a) established for a charitable purpose only;
- (b) established under a deed of trust that requires the trustees of the trust to apply all of the property (both real and personal) of the trust in furtherance of that purpose except for moneys expended in the management of the trust; and

- (c) none of the property of which is payable to the trustees of the trust other than in accordance with *section 89*.

'excluded body' means:

- (a) a political party, or a body that promotes a political party or candidate;
 - (b) a body that promotes a political cause, unless the promotion of that cause relates directly to the advancement of the charitable purposes of the body;
 - (c) an approved body of persons within the meaning of section 235 of the Taxes Consolidation Act 1997;
 - (d) a trade union or a representative body of employers;
 - (e) a chamber of commerce; or
 - (f) a body that promotes purposes that are:
 - (i) unlawful;
 - (ii) contrary to public morality;
 - (iii) contrary to public policy;
 - (iv) in support of terrorism or terrorist activities, whether in the State or outside the State; or
 - (v) for the benefit of an organisation, membership of which is unlawful.
1. For the purposes of this Act each of the following shall, subject to *subsection (2)*, be a charitable purpose:
 - (a) the prevention or relief of poverty or economic hardship;
 - (b) the advancement of education;
 - (c) the advancement of religion;
 - (d) any other purpose that is of benefit to the community.
 2. A purpose shall not be a charitable purpose unless it is of public benefit.
 3. Subject to *subsection (4)*, a gift shall not be of public benefit unless:
 - (a) it is intended to benefit the public or a section of the public; and
 - (b) 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.

4. It shall be presumed, unless the contrary is proved, that a gift for the advancement of religion is of public benefit.
5. The Authority shall not make a determination that a gift for the advancement of religion is not of public benefit without the consent of the Attorney General.
6. A charitable gift for the purpose of the advancement of religion shall have effect, and the terms upon which it is given shall be construed, in accordance with the laws, canons, ordinances and tenets of the religion concerned.
7. 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.
8. A limitation referred to in *subsection (7)* shall not be justified and reasonable if all of the intended beneficiaries of the gift or a significant number of them have a personal connection with the donor of the gift.
9. There shall be no appeal to the Tribunal from a determination of the Authority to which *subsection (5)* applies.
10. For the purposes of this section, a gift is not a gift for the advancement of religion if it is made to or for the benefit of an organisation or cult:
 - (a) the principal object of which is the making of profit; or
 - (b) that employs oppressive psychological manipulation:
 - (i) of its followers; or
 - (ii) for the purpose of gaining new followers.
11. In this section 'purpose that is of benefit to the community' includes:
 - (a) the advancement of community welfare including the relief of those in need by reason of youth, age, ill-health, or disability;
 - (b) the advancement of community development, including rural or urban regeneration;
 - (c) the promotion of civic responsibility or voluntary work;
 - (d) the promotion of health, including the prevention or relief of sickness, disease or human suffering;
 - (e) the advancement of conflict resolution or reconciliation;

- (f) the promotion of religious or racial harmony and harmonious community relations;
- (g) the protection of the natural environment;
- (h) the advancement of environmental sustainability;
- (i) the advancement of the efficient and effective use of the property of charitable organisations;
- (j) the prevention or relief of suffering of animals;
- (k) the advancement of the arts, culture, heritage or sciences; and
- (l) the integration of those who are disadvantaged, and the promotion of their full participation, in society.

NORTHERN IRELAND

Charities Act (Northern Ireland) 2008

Part 1 — Introductory

Meaning of ‘charity’

1. For the purposes of the law of Northern Ireland, ‘charity’ means an institution which:
 - (a) is established for charitable purposes only; and
 - (b) falls to be subject to the control of the Court in the exercise of its jurisdiction with respect to charities.
2. The definition of ‘charity’ in subsection (1) does not apply for the purposes of a statutory provision if a different definition of that term applies for those purposes by virtue of that or any other statutory provision.
3. A charity shall be deemed for the purposes of this Act to have a permanent endowment unless all property held for the purposes of the charity may be expended for those purposes without distinction between capital and income, and in this Act ‘permanent endowment’ means, in relation to any charity, property held subject to a restriction on its being expended for the purposes of the charity.
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.

Meaning of ‘charitable purpose’

1. For the purposes of the law of Northern Ireland, a charitable purpose is a purpose which:
 - (a) falls within subsection (2); and

- (b) is for the public benefit (see section 3).
2. A purpose falls within this subsection if it falls within any of the following descriptions of purposes:
- (a) the prevention or relief of poverty;
 - (b) the advancement of education;
 - (c) the advancement of religion;
 - (d) the advancement of health or the saving of lives;
 - (e) the advancement of citizenship or community development;
 - (f) the advancement of the arts, culture, heritage or science;
 - (g) the advancement of amateur sport;
 - (h) the advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity;
 - (i) the advancement of environmental protection or improvement;
 - (j) the relief of those in need by reason of youth, age, ill-health, disability, financial hardship or other disadvantage;
 - (k) the advancement of animal welfare; and
 - (l) any other purposes within subsection (4).
3. In subsection (2):
- (a) in paragraph (c) 'religion' includes:
 - (i) a religion which involves belief in one god or more than one god; and
 - (ii) any analogous philosophical belief (whether or not involving belief in a god).
 - (b) in paragraph (d) 'the advancement of health' includes the prevention or relief of sickness, disease or human suffering;
 - (c) paragraph (e) includes:
 - (i) rural or urban regeneration; and
 - (ii) the promotion of civic responsibility, volunteering, the voluntary sector or the effectiveness or efficiency of charities.
 - (d) in paragraph (g) 'sport' means sports or games which promote health by involving physical or mental skill or exertion;
 - (e) paragraph (h) includes the advancement of peace and good community relations; and

- (f) paragraph (j) includes relief given by the provision of accommodation or care to the persons mentioned in that paragraph.
4. The purposes within this subsection (see subsection (2)(l)) are:
- (a) any purposes not within paragraphs (a) to (k) of subsection (2) but recognised as charitable purposes under existing charity law or by virtue of section 1 of the Recreational Charities Act (Northern Ireland) 1958 (c. 16);
 - (b) any purposes that may reasonably be regarded as analogous to, or within the spirit of, any purposes falling within any of those paragraphs or paragraph (a) above; and
 - (c) any purposes that may reasonably be regarded as analogous to, or within the spirit of, any purposes which have been recognised under charity law as falling within paragraph (b) above or this paragraph.
5. Where any of the terms used in any of paragraphs (a) to (k) of subsection (2), or in subsection (3), has a particular meaning under charity law, the term is to be taken as having the same meaning where it appears in that provision.
6. Any reference in any statutory provision or document (in whatever terms):
- (a) to charitable purposes; or
 - (b) to institutions having purposes that are charitable under charity law, is to be construed in accordance with subsection (1).
7. Subsection (6):
- (a) applies whether the statutory provision or document was passed or made before or after the passing of this Act, but
 - (b) does not apply where the context otherwise requires.
8. In this section:

'charity law' means the law relating to charities in Northern Ireland; and

'existing charity law' means charity law as in operation immediately before the day on which this section comes into operation.

3: The 'public benefit' test

1. This section applies in connection with the requirement in section 2(1)(b) that a purpose falling within section 2(2) must be for the public benefit if it is to be a charitable purpose.
2. In determining whether that requirement is satisfied in relation to any such purpose, it is not to be presumed that a purpose of a particular description is for the public benefit.
3. In determining whether an institution 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 institution or any other persons (other than as members of the public); and
- (ii) detriment incurred or likely to be incurred by the public.

in consequence of the institution exercising its functions compares with the benefit gained or likely to be gained by the public in that consequence; and

- (b) where benefit is, or is likely to be, provided to a section of the public only, whether any condition on obtaining that benefit (including any charge or fee) is unduly restrictive.

4: Guidance as to operation of public benefit requirement

1. The Commission must issue guidance in pursuance of its public benefit objective.
2. That objective is to promote awareness and understanding of the operation of the requirement mentioned in section 3(1) (see section 7(3) and (4)).
3. The Commission may revise any guidance issued under this section.
4. The Commission must carry out such public and other consultation as it considers appropriate:
 - (a) before issuing any guidance under this section; or
 - (b) (unless it considers that it is unnecessary to do so) before revising any such guidance.
5. The Commission must publish any guidance issued or revised under this section in such manner as it considers appropriate.
6. The charity trustees of a charity must have regard to any such guidance when exercising any powers or duties to which the guidance is relevant.

5: Special provisions about recreational charities, sports clubs, etc.

1. The Recreational Charities Act (Northern Ireland) 1958 (c. 16) is amended in accordance with subsection (2).
2. In section 1 (certain recreational and similar purposes deemed to be charitable) for subsection (2) substitute:

'(2) The requirement in subsection (1) that the facilities are provided in the interests of social welfare cannot be satisfied if the basic conditions are not met.

2.a The basic conditions are:

- (a) that the facilities are provided with the object of improving the conditions of life for the persons for whom the facilities are primarily intended; and
- (b) that either:
 - (i) those persons have need of the facilities by reason of their youth, age, infirmity or disability, poverty, or social and economic circumstances; or

- (ii) the facilities are to be available to members of the public at large or to male, or to female, members of the public at large’.
- 3. A registered sports club established for charitable purposes is to be treated as not being so established, and accordingly cannot be a charity.
- 4. In subsection (3) a ‘registered sports club’ means a club for the time being registered under Schedule 18 to the Finance Act 2002 (c. 23) (relief for community amateur sports club).

NEW ZEALAND

Charities Act 2005

Part 1 — Charities Commission

5: Meaning of charitable purpose and effect of ancillary non-charitable purpose

- 1. In this Act, unless the context otherwise requires, charitable purpose includes every charitable purpose, whether it relates to the relief of poverty, the advancement of education or religion, or any other matter beneficial to the community.
- 2. However:
 - (a) 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; and
 - (b) a marae has a charitable purpose if the physical structure of the marae is situated on land that is a Maori reservation referred to in Te Ture Whenua Maori Act 1993 (Maori Land Act 1993) and the funds of the marae are not used for a purpose other than:
 - (i) the administration and maintenance of the land and of the physical structure of the marae;
 - (ii) a purpose that is a charitable purpose other than under this paragraph.
- 3. To avoid doubt, if the purposes of a trust, society, or an institution include a non-charitable purpose (for example, advocacy) that is merely ancillary to a charitable purpose of the trust, society, or institution, the presence of that non-charitable purpose does not prevent the trustees of the trust, the society, or the institution from qualifying for registration as a charitable entity.
- 4. For the purposes of subsection (3), a non-charitable purpose is ancillary to a charitable purpose of the trust, society, or institution if the non-charitable purpose is:
 - (a) ancillary, secondary, subordinate, or incidental to a charitable purpose of the trust, society, or institution; and
 - (b) not an independent purpose of the trust, society, or institution.

Part 2 — Charitable entities — Subpart 1—Register of charitable entities

13 Essential requirements

1. An entity qualifies for registration as a charitable entity if:
 - (a) in the case of the trustees of a trust, the trust is of a kind in relation to which an amount of income is derived by the trustees in trust for charitable purposes; and
 - (b) in the case of a society or an institution, the society or institution:
 - (i) is established and maintained exclusively for charitable purposes; and
 - (ii) is not carried on for the private pecuniary profit of any individual.
 - (c) the entity has a name that complies with section 15; and
 - (d) all of the officers of the entity are qualified to be officers of a charitable entity under section 16.
2. The trustees of a trust must be treated as complying with subsection (1)(a) if:
 - (a) in accordance with a ruling made under Part 5A of the Tax Administration Act 1994:
 - (i) an amount of income derived by the trustees in trust is treated as having been derived by the trustees in trust for charitable purposes for the purposes of section CW 41 of the Income Tax Act 2007; or
 - (ii) income is treated as having been derived directly or indirectly from a business carried on by, or for, or for the benefit of the trustees in trust for charitable purposes for the purposes of section CW 42 of the Income Tax Act 2007.
 - (b) the income derived by the trustees is deemed to be income derived by trustees in trust for charitable purposes under section 24B of the Maori Trust Boards Act 1955.
3. A society or an institution must be treated as complying with subsection (1)(b) if, in accordance with a ruling made under Part 5A of the Tax Administration Act 1994, that society or institution is treated as being a society or institution that is established and maintained exclusively for charitable purposes and not carried on for the private pecuniary profit of any individual for the purposes of section CW 41 or CW 42 of the Income Tax Act 2007.
4. Subsections (2) and (3) cease to apply in relation to an entity if:
 - (a) the period for which the ruling applies has expired;
 - (b) the ruling has ceased to apply because of section 91G of the Tax Administration Act 1994; or
 - (c) the ruling has otherwise ceased to apply to the entity.
5. Despite subsections (1) to (3), an entity does not qualify for registration as a charitable entity if:

- (a) the entity is a designated terrorist entity as defined in section 4(1) of the Terrorism Suppression Act 2002; or
- (b) the entity has been convicted of any offence under sections 6A to 13E of the Terrorism Suppression Act 2002.

Charitable Trusts Act 1957

Part 4 — Schemes in respect of charitable funds raised by voluntary contribution

38 Meaning of term charitable purpose in this Part of Act

In this Part of this Act, unless the context otherwise requires, the term Charitable purpose means every purpose which in accordance with the law of New Zealand is charitable; and includes the following purposes, whether or not they are beneficial to the community or to a section of the community:

- (a) the supply of the physical wants of sick, aged, destitute, poor, or helpless persons, or of the expenses of funerals of poor persons;
- (b) the education (physical, mental, technical, or social) of the poor or indigent or their children;
- (c) the reformation of offenders, prostitutes, drunkards, or drug addicts;
- (d) the employment and care of discharged offenders;
- (e) the provision of religious instruction, either general or denominational;
- (f) the support of libraries, reading rooms, lectures, and classes for instruction;
- (g) the promotion of athletic sports and wholesome recreations and amusements;
- (h) contributions towards losses by fire and other inevitable accidents;
- (i) encouragement of skill, industry, and thrift;
- (j) rewards for acts of courage and self sacrifice;
- (k) the erection, laying out, maintenance, or repair of buildings and places for the furtherance of any of the purposes mentioned in this section.

APPENDIX B: OVERSEAS JURISDICTIONS — TREATMENT OF ADVOCACY

Different jurisdictions approach and regulate advocacy activities differently.

ENGLAND AND WALES

The Charity Commission of England and Wales has issued guidance on campaigning and political activity that can be undertaken by a charity which is based on case law and charity law (*Speaking Out Guidance on Campaigning and Political Activity by Charities*). It advises that a charity cannot have a political purpose but can engage in campaigning or political activity provided it stays within certain boundaries.

Whilst there is no limit on the extent to which charities can engage in campaigning in furtherance of their charitable purposes, political activity can only be a means of supporting or contributing to the achievement of those purposes, although it may be a significant contribution.

Hence, political activity cannot be the *only* way in which a charity pursues its charitable purposes. Further, the activities must be a legitimate and reasonable way for the trustees to further those purposes, and must never be party political.

In *Hanchett-Stamford v Attorney General & Ors* [2008] EWHC 330 (Ch) the court indicated that charities can engage in advocacy if that is a means by which they achieve their charitable purpose. The court reiterated, however, that political advocacy cannot be a valid charitable purpose in England and Wales.

SCOTLAND

Charities are not prevented from campaigning or lobbying to change the law or the policy of public bodies where this is in furtherance of their charitable purposes. These activities can also be the main activity of a charity. However under the Charities and Trustee Investment (Scotland) Act 2005 organisations which are political parties or one of its purposes are to advance a political party are disqualified from being charitable.

It should be noted that the Scottish definition of charity is not used for tax purposes. For this purpose English law and therefore the English definition of charity applies.

IRELAND

The 2009 Charities Act excludes the following bodies from being charitable:

- (a) a political party, or a body that promotes a political party or candidate; and
- (b) a body that promotes a political cause, unless the promotion of that cause relates directly to the advancement of the charitable purposes of the body.

NORTHERN IRELAND

The Charity Commission for Northern Ireland is yet to release any guidance on advocacy activities, in furtherance to the Charities Act (Northern Ireland) 2008. However, it states on its website that the Commission recognises the independent nature of the charitable sector is of fundamental importance to society, and is greatly valued by the public. It further adds that the guiding principle of charity law in terms of campaigning, political activity and elections is that charities should be, and be seen to be, independent from party politics.

CANADA

To be registered as a charity in Canada, the organisation needs to meet certain requirements of the Income Tax Act (the Act) and common law. A registered charity is required to devote all of its resources to charitable purposes and activities, and an organisation established for a political purpose cannot be a charity. This is because a purpose is only charitable if it is for the public benefit. Furthermore, the courts have determined political purposes to be those that seek to further the interests of a particular political party; or support a political party or candidate for public office, or retain, oppose, or change the law, policy, or decision of any level of government in Canada or a foreign country.

Notwithstanding this general rule, the Act allows a small amount of resources to be used for political activity that is not partisan and is connected to, but also subordinate to, the charity's purpose. The Canada Revenue Agency requires that substantially all of a charities resources must be devoted to charitable activities, limiting use of resources for political activities to 10 per cent of the organisation's resources (but with an increased percentage for smaller charities).

The Charities Directorate has issued guidance where it states that political activities no longer include many attempts to inform public opinion on an issue. This change in policy allows charities to more effectively carry out their public awareness programs.

UNITED STATES OF AMERICA

The Internal Revenue Code (the Code) distinguishes between types of advocacy activities such as:

- political campaign activity such as endorsing a candidate or making contributions to the candidate or a political committee;
- lobbying which includes any attempts to influence specific pieces of legislation; and
- general advocacy which consists of trying to influence public opinion on issues.

Charitable organisations under section 501(c)(3) of the Code must be organised and operated exclusively for an exempt purpose, that is charitable, religious, educational and other purposes. Charitable organisations are prohibited from engaging in political campaign activity but can engage in a limited amount of lobbying activity, but this cannot be a substantial activity of the organisation, and also general advocacy about their issues when it consists of education activity because 'educational' is one of the accepted purposes and activities listed in section 501(c)(3).

- There are two tests of what is ‘substantial’ — an ‘expenditure test’ which provides a sliding scale of permissible expenditures capped at \$ US 1 million and a ‘substantial part test’ which looks at all the activities of the organisation;

Political organisations under section 527 of the Code can attempt to influence elections so they can engage in unlimited political campaign activity.

- The exemption from income tax for these organisations is more limited than other tax-exempt organisations because certain income, such as investment income is subject to income tax and contributions are not tax-deductible.

NEW ZEALAND

In New Zealand (NZ), the Charities Act 2005 (NZ) specifies that advocacy is a non-charitable purpose. However, the presence of this purpose does not prevent the entity from registering as a charity if this purpose is merely ancillary to a charitable purpose of the entity.

The NZ Charities Commission advises that examples of political activities that charities may carry out are:

- political campaigning such as public awareness and influencing and changing public attitudes or to influence government policy or legislation; and
- activities aimed at securing or opposing any change in the law or in the policy or decisions of a government.

Non-permissible activities include where the political activity is not aimed at achieving its purposes, for example supporting an individual political party or candidate or the focus on political activity is so great that it becomes a main purpose. A charity with exclusively charitable purposes may carry out political activities, provided they are a legitimate means of furthering their purposes.

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