Charities Bill 2013

Kirsty Magarey
Law and Bills Digest Section

Contents

Purpose of the Bill .......................................................................................................................... 2
Structure of the Bill ........................................................................................................................ 2
Background .................................................................................................................................. 2
Committee consideration .............................................................................................................. 5
Human Rights ................................................................................................................................. 5
Policy position of non-government parties/independents ............................................................. 8
Position of major interest groups ................................................................................................. 8
Financial implications .................................................................................................................... 12
Key issues and provisions ........................................................................................................... 12
Part 1—Preliminary ..................................................................................................................... 12
Part 2—Definition of Charity ....................................................................................................... 13
Part 3—Definition of charitable purpose .................................................................................... 15
Part 4—Miscellaneous ................................................................................................................ 16
Concluding comments ................................................................................................................. 16
Charities Bill 2013

Date introduced: 29 May 2013

House: House of Representatives

Portfolio: Treasury

Commencement: 1 January 2014.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at http://www.comlaw.gov.au/.

Purpose of the Bill

The purpose of the Charities Bill 2013 (the Bill) is to create a statutory definition of what constitutes a charitable entity.

Structure of the Bill

The Bill has two more significant operative parts (Parts 2 and 3):

- Part 2 provides a definition of charity, including an exploration of what purposes are for the public benefit and what constitutes a ‘disqualifying purpose’ and
- Part 3 provides various definitions of a ‘charitable purpose’, as well as providing, in Division 2, a more in-depth account of various charitable purposes.

Background

The Office for the Not-for-Profit Sector located in the Department of the Prime Minister and Cabinet takes responsibility for driving and coordinating the not-for-profit sector reform agenda. The sector warrants this focus because, as the Office has commented:

> Australia’s not-for-profit sector is large and diverse and plays an important role in building a productive and inclusive Australia. Made up of entities that are neither commercial nor government, the sector plays a central role in enriching communities, culturally, socially, economically and environmentally and most importantly, provides assistance and support to the most vulnerable in our community.

The recent establishment of the national regulator of the not-for-profit sector, the Australian Charities and Not-for-profits Commission (ACNC) and the passage of the Not-for-profit Sector

---


Warning: All viewers of this digest are advised to visit the disclaimer appearing at the end of this document. The disclaimer sets out the status and purpose of the digest.
Freedom to Advocate Act 2013 are further instances of the Government’s active legislative reform agenda in this area.

The Explanatory Memorandum of the Bill puts the changes in a policy context, pointing out that

1.12 The Bill is informed by the 2001 Report of the Inquiry into the Definition of Charities and Related Organisations (Charities Definition Inquiry report), which expressed principles underlying charity and charitable purpose, and the 2003 Board of Taxation’s Consultation on the Definition of a Charity: A Report to the Treasurer....

1.14 In addition to the Charities Definition Inquiry report, a range of later reports and inquiries have recommended a statutory definition. These include:

- the 2010 Australia’s Future Tax System Review;
- the Productivity Commission’s 2010 Research Report Contribution of the Not-for-Profit Sector;
- the Senate Economics Legislation Committee Inquiry into the Tax Laws Amendment (Public Benefit Test) Bill 2010; and

There were legislative amendments made to the common law definition of charities in 2004 in the Extension of Charitable Purpose Act 2004 (the Extension Act). Those amendments gave particular recognition to the charitable nature of non-profit child-care provision, certain self-help groups and certain closed and contemplative religious orders. The Act also recognised the ‘provision of a rental dwelling under National Rental Affordability Scheme’ as potentially charitable. The Extension Act will be repealed by the accompanying Charities (Consequential Amendments and Transitional Provisions) Bill 2013, and, while provisions regarding child-care, self-help groups and closed and contemplative religious orders will be replicated in this Bill, the Extension Act’s coverage of the provision of a rental dwelling under the National Rental Affordability Scheme will not be repeated. The Explanatory Memorandum indicates such arrangements could still be regarded as charitable under the new legislative arrangement.

---


6. The Explanatory Memorandum, Charities Bill 2013; Charities (Consequential Amendments and Transitional Provisions) Bill 2013 comments that this decision has been taken because, ‘following the decision of the High Court of Australia in Federal Commissioner of Taxation v Word Investments Ltd (2008) 236 CLR 204, entities can be charitable despite undertaking commercial activities provided the activities are in aid of, or further their charitable purpose’, p. 35, viewed 2 June 2013,
Common Law Background

At common law, an entity has qualified as a charity if it:

- has a charitable purpose and
- is for a public benefit (which includes that the entity is not for profit).

The common law definition of a charitable purpose is well established and has been explored and affirmed in a wide ranging number of cases. The ‘four heads of charity’ were established in the 1891 case, *Income Tax Special Purpose Commissioners v Pemsel* [1891] AC 531. This case drew on the 1601 *Statute of Charitable Uses*, also known as the Statute of Elizabeth. The preamble to that Statute had, inter alia, defined 21 charitable purposes, which, even at that time, was not an exhaustive list of charitable purposes; some obvious omissions being trusts for religious purposes, or for educational institutions, which were considered to be adequately provided for.

In *Pemsel’s* case the categories of charitable purposes were grouped under these four heads:

- the relief of poverty;
- the advancement of education;
- the advancement of religion and
- other purposes beneficial to the community.

These categories have been used ever since as a matter of convenience, although in a scholarly article Dr Matthew Turnour and Professor Myles McGregor-Lowndes, (both of the Australian Centre for Philanthropy and Nonprofit Studies, Queensland University of Technology) have argued that, as an account of *Pemsel’s* case, the four heads of charity reference is inadequate. The summary is derived from only one part of Lord MacNaghten’s judgement and does not provide a comprehensive analysis of that judgement, nor does it sufficiently recognise the principles elucidated in the other majority judgements.

---

10. Ibid.
Nevertheless it has become settled law and the Australian Taxation Office provided a detailed and useful account of the case law regarding what constitutes a charitable purpose in its Taxation Ruling: Income tax and fringe benefits tax: charities.\textsuperscript{11}

The statutory definition being established in this Bill does not seek to change the common law's approach, rather it embeds that definition into statutory form, while adding certain elements. Turnour and McGregor-Lowndes have previously argued that leaving the basic structure unchanged would be misguided. To illustrate this point they refer to the similar approach taken in England and Wales: '[a]t best this form of legislative intervention could only postpone the need for a new legal framework.'\textsuperscript{12} It is argued that the reclassification involved in that overseas jurisdiction, with its additional statutory divisions:

\begin{quote}
... will inevitably lead to a burgeoning final category and, eventually, to the same criticisms that beset the current [pre-legislation] regime.\textsuperscript{13}
\end{quote}

The authors of this critique argue that a ‘list based’ definition is inappropriate and there should be an appeal made to a broader, collectively exhaustive set of classes. As a model of such a comprehensively defined set of classes they nominate three areas of coverage: ‘dealing with disadvantage’; ‘encouraging edification’ and ‘facilitating freedom’.\textsuperscript{14} Their more comprehensive, methodical approach has not found favour in the model epitomised by this Bill, which makes every effort to duplicate the approach taken by the common law, while adding a few clarificatory or more inclusive provisions.

\section*{Committee consideration}

The Bill has, to date, not been referred to any additional committee, and the Standing Committee for the Scrutiny of Bills has reported it has no comment on the Bill.\textsuperscript{15}

\section*{Human Rights}

The Parliamentary Joint Committee on Human Rights felt that the Bill’s compatibility statement\textsuperscript{16} was so well done that it warranted a particular mention in its report covering the Bill:

\begin{quote}
The Charities Bill 2013 and consequential bill introduces a statutory definition of a 'charity' that does not extend to organisations engaged in or promoting activities that are unlawful, contrary to public policy or is for the purpose of promoting or opposing a political party or candidate. The bill is accompanied by a
\end{quote}

\begin{thebibliography}{9}
\bibitem{12} Turnour and McGregor Lowndes, op. cit., p. 810.
\bibitem{13} Ibid.
\bibitem{14} Ibid., pp. 813ff.
\bibitem{16} Which can be found in chapter 3 of the Explanatory Memorandum to the Bill.
\end{thebibliography}
statement of compatibility that provides a clear explanation of why the measures are a necessary, reasonable and proportionate limitation on the rights to freedom of speech and political participation.  

The compatibility statement provides the Government’s assessment of whether the Bill is compliant with the human rights and freedoms recognised or declared in the seven international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth) (the Parliamentary Scrutiny Act). The Committee had no further comment on the Bills, simply listing them in Appendix 1 as ‘Bills unlikely to raise human rights concerns’.  

When the Parliamentary Scrutiny Act was introduced there was some concern that the seven selected instruments were not a broad enough representation of the very broad range of international human rights given protection in treaty form. It was decided at the time that, rather than providing a more comprehensive definition, the matter would be reviewed after the legislation had been in operation for some time.  

Judged in relation to the matters covered by the seven instruments the Parliamentary Joint Committee is empowered to consider, there may well be no further human rights issues raised by the Bill. This is, in part, because the proposed definition of ‘human rights’ in the Bill actually relies on the Committee’s founding document – the Parliamentary Scrutiny Act. The Bill proposes to define ‘human rights’ in proposed section 3 by referring to the Parliamentary Scrutiny Act’s definition of human rights (in that Act’s section 3). There is an argument, however, that this account of the matter is inadequate and that other human rights will be neglected under this narrow construction of ‘human rights’. Thus, for instance, an entity may choose to devote itself to promoting the human rights of asylum seekers by promoting observance of the UN’s Refugee Convention. That Convention does not fall within the Bill’s proposed definition of ‘human rights’ (nor the Parliamentary Scrutiny Act’s definition, obviously), and so it would not fall within the definition of the charitable purpose of promoting or protecting human rights in proposed paragraph 12(1)(g).

If an entity devoted to the promotion of the UN Refugee Convention were seeking to satisfy the definition of a charitable purpose it would need to rely on other grounds.  

---

18. Ibid., p. 69.
20. Australia is a party to both the Convention Relating to the Status of Refugees done at Geneva on 28 July 1951 (the Refugee Convention) and the Protocol relating to the Status of Refugees done at New York on 31 January 1967.
21. It is likely that an entity devoted to directly assisting refugees (as opposed to promoting compliance with the UN Refugee Convention) would more easily fall within one of the charitable purposes listed in proposed section 12. For example, see the discussion in the Explanatory Memorandum of the charitable purpose of ‘advancing social or public
within the recognition of public benefit in proposed paragraph 7(c) – ‘the purpose of relieving the poverty, distress or disadvantage of individuals or families’ or the catch all reference to ‘analogous charitable purposes’ ‘within the spirit’ of the listed charitable purposes in proposed paragraph 12(1)(k). It seems counterintuitive, however, and arguably an inappropriate reading of ‘human rights,’ that activities defending the human rights of refugees would not naturally fall within the criteria of ‘promoting or protecting human rights’.

The Parliamentary Joint Committee on Human Rights clearly shared the conclusion of the compatibility statement that ‘[t]hese Bills are compatible with human rights.’ Ironically the Bill’s compliance with human rights is not so much the human rights issue raised by the Bill – the human rights issue raised is whether the Bill’s own definition of human rights is appropriate. The Bill may not violate any human rights in the stipulated Conventions, but the question with respect to the suitability of the Bill’s drafting is whether it recognises and promotes a wide enough range of human rights treaties and declarations such as should enable a charity to claim a charitable purpose. The Bill is designed to empower charities to act with respect to human rights – it is not, in this part, designed to evaluate whether human rights have been violated.

At the time of its passage there were rationales offered for the narrow definition of human rights in the Parliamentary Scrutiny Act – including the viability of the Committee’s workload. In the case of the charities sector, however, this rationale is not so compelling. Part of that sector’s vigour is the wide range of causes and actions that community members may choose to engage with.

Had an outcome such as is envisaged by this Bill been understood as the eventual consequence of accepting a narrow definition of human rights in the Parliamentary Scrutiny Act, those who were reluctant to consent to this arrangement would have had more reason to question its wisdom. Using the limited definition of human rights called upon in the Parliamentary Scrutiny Act as a template for other references to human rights would preclude a wide variety of ‘human rights’ traditionally thought to fall within that term. The definition used in the Australian Human Rights Commission Act 1986 is more all encompassing. Its section 3 defines human rights as:

> ... human rights means the rights and freedoms recognised in the [International Covenant on Civil and Political Rights], declared by the Declarations or recognised or declared by any relevant international instrument.

The more encompassing definition might be better suited to assisting charities to promote human rights.

---

22. The purposes mentioned in proposed section 7 are encompassed in the definition of charitable purpose in proposed section 12 – see Note 1 to proposed section 7.
Policy position of non-government parties/independents

The Bill had not excited a high degree of general public interest or controversy before being debated in the House of Representatives. However during that debate the Coalition opposed the Bill. Indeed Mr Andrews, the Shadow Minister for Families, Housing and Human Services, announced the Coalition would not only oppose the Bill, but if elected it would seek to repeal the Bill. Mr Andrews referred to the Coalition’s earlier legislative achievement with respect to the Extension Act, and went on to give his rationale for opposing the Bill:

[W]hy create a statute where the common law has and does serve us well? Why depart from 400 years of clarity and consistency?23

In the House of Representatives Mr Bandt, a member of the Australian Greens, voted with the Government in favour of the Bill. The Australian Greens have a history of supporting the Government’s legislative agenda in the NGO field.24

With respect to other independents, Senator Xenophon has previously supported the Government’s legislative agenda in this field, for instance he was strongly supportive of the legislation establishing the Australian Charities and Not-for-Profit Commission.25 It is significant to note that part of the rationale for Senator Xenophon’s interest in that Bill was an ongoing concern regarding questions as to the charitable status of the Church of Scientology.26 There are issues regarding the drafting of the Bill with respect to religious organisations which are discussed in the ‘Key issues and provisions’ section of this Digest.

Position of major interest groups

The Government states that the extensive reports and consultations conducted by both Treasury and the Office for the Not-for-Profit Sector demonstrate that the Bill has the support of the NGO sector, particularly in so far as it may make the understanding of charities law more straightforward.

24. For example Senator Siewert’s response to the passage of the Australian Charities and Not-for-profit Commission Bill 2012, was to comment: ‘The Australian Greens and the Government have worked hard to improve this Bill, which will enable the operation of a more efficient and effective not-for-profit sector.’ R Siewert, Greens’ recommendations strengthen Charities Bill as Coalition ignores the not-for-profit sector, media release, 31 October 2012, viewed 25 June 2013, http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F2014393%22
26. Ibid.
The Human Rights Commission observed in its submission on the Exposure Draft of the Charities Bill 2013 that ‘[c]harities are often experts in areas of law and policy relevant to their particular concerns.’27 This is certainly demonstrated in the range of submissions and commentary received by Treasury in response to the Exposure Draft of this Bill. Significant and numerous suggestions for change were contributed. As a result of these submissions Treasury documented various changes that were made to the exposure Bill. 28 Unfortunately, while the Department has noted the changes made to the original Bill as a result of submissions from the sector, there is no systematic documentation as to which changes weren’t accepted and the rationale for these decisions. In many cases it is also not obvious whether the relevant entity would support passage of the Bill in the absence of its suggested changes. In the absence of a comprehensive report on the matter by Treasury we are left to speculate.29 There was significant discernible support for the changes in a number of submissions – sometimes without any accompanying suggestion for change, but most of the submissions made suggestions for improvements or changes in the drafting of the Bill.

During the course of debate on the Bill in the House of Representatives a press release was issued by thirteen charitable organisations pointing out the benefits of the Bill.30 In particular it was commented that:

> Greater certainty about what constitutes a charity and what activities are charitable is key to growing high impact philanthropy in Australia. The money foundations spend on legal advice to work out what they can legitimately fund could be better spent on organisations doing good works. 31

In the timeframe it is not possible to discuss all the issues raised in the various submissions, particularly the concerns that may have been left unaddressed. However, just to range across a miscellaneous selection of submissions:

28. The list of changes made to the Bill is attached to the press release from D Bradbury and M Butler, Statutory definition of charity legislation introduced into Parliament, joint media release, 29 May 2013, viewed 29 May 2013, http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F2482481%22
29. The list of the 91 submissions made to the Department of Treasury can be viewed here: http://www.treasury.gov.au/ConsultationsandReviews/Submissions/2013/A-statutory-definition-of-charity/Submissions
30. ‘Joint media statement: Charities Bill 2013’, by a range of Charitable organisations, including Philanthropy Australia (the national peak body for philanthropy); PilchConnect (a specialist legal service set up by Public Interest Law Clearing House to provide free and low-cost legal assistance to not-for-profit community organisations and to advocate on their behalf); the Community Council for Australia (an independent, non-political member-based organisation dedicated to building flourishing communities primarily by enhancing the extraordinary work and effort undertaken within the not-for-profit sector in Australia) and Changemakers Australia (an independent not-for-profit organisation with a mission of increasing philanthropic support for social change, through advocacy for public policy reform, education and collaborative initiatives), 17 June 2013, viewed 18 June 2013, http://www.changemakers.org.au/charities-bill-media-statement/
31. Ibid.
Amnesty International welcomed the Bill and Vision Australia was following it with interest (once it had been established that it would encompass that Agency). There was a more cautious endorsement from the Association of Independent Schools of South Australia, while the Anglican Church Diocese of Sydney made several recommendations for amendments to the Bill or the Explanatory Memorandum, not all of which were picked up in the revised Bill. Both the Anglican Church Diocese of Sydney and the Australian Catholic Bishops’ Conference were concerned that neither the text of the Bill nor the Explanatory Memorandum gave enough recognition to the important ongoing role of the common law in developing the meaning of a ‘charity.

The Australian Red Cross had various concerns with how disaster relief was treated, making several suggestions for changes to the Explanatory Memorandum or the Bill itself. For example, the organisation wanted it recognised that disaster relief and the rebuilding of communities may continue for some time after a disaster occurs, so that the recognition that these behaviours constitute charitable work needs to continue on past the first emergency response (the Explanatory Memorandum reflects that the thrust of these concerns was attended to in the revised materials). The Australian Sports Group had concerns with how the Commonwealth laws would interact with the state laws regarding deductible gift recipient status and, while the Australian Sports Foundation is non-charitable (the Bill explicitly excludes certain sporting entities, which reflects the common law)32, it was concerned that the Bill could function to discourage private and public ancillary funds from donating to groups such as the Australian Sports Group.33

The Australian Council of Social Services (ACOSS) also had a list of suggested changes – some of which made it into the introduced version of the Bill and some of which did not. ACOSS had recommended that:

- the advancement of citizenship or community development including volunteering... ‘be specifically included as a charitable purpose’

32. The Explanatory Memorandum comments that ‘1.146 A purpose that is essentially social, recreational or sporting is not charitable regardless of motivation or the benefits to the general public that can result.’
33. Just to give a further sample of submissions amongst the alphabetical ‘A’ list, which gives an impression of how numerous and varied the suggestions were: The Australian Conservation Foundation made several precise suggestions for changes to the Bill, including that the reference to the charitable purpose of ‘advancing the natural environment’ should refer instead to the ‘natural or urban environment’. The Australian Federation of AIDS Organisations ‘welcomed the Exposure Draft of the Charities Bill 2013’ while the Australian Major Performing Arts Group was ‘delighted that, after a decade of discussion, the thorny issues surrounding the definition of charities have now been resolved.’ The Australasian Mens’ Health Forum believed that groups that seek to promote the health of a particular population, rather than a particular condition, should be entitled to recognition as a charity but that the law and practice has not followed this line of reasoning. The Australian Treaties and Negotiated Settlements Project made various suggestions for changes to the entities that should be covered by the clauses recognising native title holders, who may be likely to share a familial heritage. So, for instance, it recommended that prescribed bodies corporate formed for the purposes of the Native Title Act should be given presumptive charitable status. It also recommended that the purpose of relief or prevention of poverty should be explicitly included as a charitable purpose. The Australian Christian Lobby was concerned that there had been insufficient consultation opportunities offered to interested organisations and called into question several drafting decisions – including the requirement that a charity have a non-profit status.

Warning: All viewers of this digest are advised to visit the disclaimer appearing at the end of this document. The disclaimer sets out the status and purpose of the digest.
• greater guidance should be provided as to what kinds of political engagement will be considered to be a disqualifying purpose
• Deductible Gift Recipient status should be extended to those charities whose purpose is altruistic and for the public benefit (which would cover most charities recognised in the Bill)
• the provision of not-for-profit housing should be included in the list of specific charitable purposes
• guidance should be provided on how the presumption of public benefit will be reversed, and also on how an entity can demonstrate its charitable status without the presumption of public benefit
• the concept of ‘public benefit’ should be tied to human rights recognised by Australia and a clear statement about the public benefit test only being failed ‘where the detriment or harm occasioned by any charitable purpose is so serious that it far outweighs the public benefit.

ACOSS’ concern regarding the lack of clarity with respect to processes for deciding when an entity lacks the element of ‘public benefit’ is shared by ANU Academic, Associate Professor Pauline Ridge. Her submission to Treasury questioned the clarity of the phrase in proposed section 7 ‘In the absence of evidence to the contrary...’ which is the opening to the section dealing with the presumption of public benefit in the case of the listed purposes (including ‘the purpose of advancing religion’ in proposed subsection 7(e)). She points out the phrase gives no guidance as to what constitutes ‘evidence to the contrary’ nor as to who may challenge the presumption. She also points to inadequacies in the Explanatory Memorandum regarding this issue.34

Just before voting took place in the House of Representatives the Minister tabled an ‘Addendum to the Explanatory Memorandum’. This addressed a number of concerns raised by certain agencies. For instance the Australian Conservation Foundation’s concern that the charitable purpose of ‘advancing the natural environment’ should refer instead to the ‘natural or urban environment’. The new paragraph refers to ‘promoting sustainable development, including through promoting ecologically sustainable urban environments and resource sustainability...’.35

Similarly there is a new paragraph 1.125A which gives a particular recognition to the provision of what is termed ‘charitable housing’. This may not be entirely what ACOSS had in mind with respect to recognising community housing as a charitable purpose, but it goes some way in that direction.

34. Associate Professor Ridge’s submission is listed as being provided by the ‘ANU’ on Treasury’s website. P Ridge, Submission to Treasury on the Exposure Draft of the Charities Bill 2013, viewed 29 May 2013, http://www.treasury.gov.au/~/media/Treasury/Consultations%20and%20Reviews/2013/A%20statutory%20definition%20of%20charity/Submissions/PDF/Australian%20National%20University.ashx

Financial implications

The Explanatory Memorandum specifies that the financial impact is ‘unquantifiable’ but affirms that it will only have a ‘small revenue cost impact’. Similarly it is estimated that the compliance costs for charities will be minimal. In most cases the charities will automatically continue their status as charitable.

Key issues and provisions

There is a proposed preamble to the legislation. This was apparently added in to the original consultation Bill after representations were made by NGOs. The proposed preamble affirms the importance of charities and also expresses the implicit hope that the definition provided in the Bill is 'modern and comprehensive' while expressing a belief it will provide 'clarity and certainty' as to the meanings.

Part 1—Preliminary

The first Part contains some technicalities and some definitions. Definitions of interest include the definition of 'entity', which is dependent on the definition in the recently operative *Australian Charities and Not-for-profits Commission Act 2012*. The definition of 'human rights' also calls on a definition in other legislation - the *Human Rights (Parliamentary Scrutiny) Act 2011*. This definition of human rights will serve to narrow the meaning of human rights to the seven selected international treaties recognised as constituting ‘human rights’ in that Act.

There is another appeal to external legislation in the definition of 'government entities'. This definition relies on *A New Tax System (Australian Business Number) Act 1999* and makes a broad call to cover entities 'established under a law of a state or territory' and of a kind prescribed by the Minister. It also covers foreign government agencies.

36. See, for example, the submission by the Australian Council of Social Services to the Treasury Department.
37. The Act’s definition of Entity, at section 205-5, is lengthy and rather convoluted, but it opens with these inclusions:
   (a) an individual;
   (b) a body corporate;
   (c) a body politic;
   (d) any other unincorporated association or body of persons;
   (e) a trust.

**Warning:** All viewers of this digest are advised to visit the disclaimer appearing at the end of this document. The disclaimer sets out the status and purpose of the digest.
Part 2—Definition of Charity

The centrally significant definition of ‘charity’ in proposed section 5 stipulates that to be a charity an entity must be a not-for-profit entity and all of its purposes must be charitable purposes that are for the public benefit. The entity can have incidental or ancillary purposes, but their focus must be as laid out (that is, not-for-profit and all charitable purposes for the public benefit). It is a logical corollary of this definition that, as proposed paragraph (c) of the definition of charity provides, none of the purposes can be ‘disqualifying purposes’ (defined in proposed section 11 as a purpose of engaging in, or promoting, activities that are unlawful or contrary to public policy or for promoting or opposing a political party or a candidate for political office). Along similar lines, proposed paragraph (d) of the definition of charity excludes from the definition of a charity ‘an individual, a political party or a government entity’. This provision reflects the common law, which has long sought to distinguish between governmental and non-governmental ‘charitable’ works. (Note that proposed section 13 establishes that while a government entity cannot be a charity, a charity can have a charitable purpose of giving money or resources to a ‘government entity’ when that entity would qualify as a charity, were it not for its governmental status.)

Public Benefit

Proposed section 6 defines what it is to be for the public benefit. It stipulates that the achievement of a purpose must be of public benefit, and that this means it is available to benefit the general public or a ‘sufficient section’ of the general public. Proposed section 6 goes on to explain how to ascertain whether the achievement of purpose would be of public benefit, which would include weighing what benefits may result, whether the benefits are ‘tangible or intangible’ and ‘any possible, identifiable detriment... to members of the general public or a section of the general public’ from achievement of the purpose.39 The requirement that the purpose be of public benefit follows the common law definition of a charity.

In determining whether a public benefit is suitably available to the ‘public’ the decision maker is directed to whether possible benefits are more available to ‘the founders, owners, members, trustees, employees, officers or agents of, or donors to’, the relevant entity - a consideration which is to take into account ‘the associates’ of such entities.40 The provisions suggest that when ascertaining whether the benefit is suitably available to the general public, particularly whether it is directed to a particular section of the general public, regard should be had to 'the numerical size' of the relevant populations.41

39. Proposed subsection 6(2).
40. The meaning of ‘associates’ refers to the meaning of section 318 of the Income Tax Assessment Act 1936, which is a broad ranging definition designed to capture all the standard meanings of an associate (for example, a family member, a partner or partnership, a company under the influence of, a trustee and a wide range of relationships that might be hidden by more complex ‘at a distance’ relationships, but which would nevertheless be captured by this provision). See generally Income Tax Assessment Act 1936, section 318, viewed 26 June 2013, http://www.comlaw.gov.au/Details/C2013C00040/Html/Volume_4#_Toc346213291
41. Proposed subsection 6(4).
Presumption of Public Benefit

Proposed section 7 supplies an expanded list of charitable purposes which can be presumed to be for the purposes of the public benefit. It is akin to the 'four heads of charity' expanded to cover six heads of charity. Examples include advancing education and caring for and supporting the aged or individuals with disabilities. There are also two specifications made which provide relief from the need to demonstrate public benefit. Proposed section 8 covers the 'relief of necessitous circumstances'. There is an elaborate jurisprudence around what constitutes the 'relief of necessitous circumstances.'

Another set of entities relieved from the burdens imposed regarding ‘public benefit’ are those entities which handle native title benefits or the benefits of ‘traditional Indigenous rights of ownership’ for the benefit of Indigenous individuals (and only for the benefit of Indigenous individuals) (proposed section 9). This provision recognises ‘the issue of relationship by kin is of particular concern to native title claimants and holders, as these groups are commonly defined as an anthropological and legal matter, in the legal process of determining native title, with reference to common descent from an apical ancestor.’

The final categories given relief from needing to prove ‘public benefit’ are provided for in proposed section 10. Proposed subsection 10(1) covers self-help groups – closely defined so as to require ‘open and non-discriminatory membership’ and that the body be comprised of and ‘controlled by’ those affected by the relevant condition. Similarly the definition of a ‘contemplative religious order’ which is to be given relief from ‘public benefit’ is quite detailed. They are required to ‘regularly’ undertake ‘prayerful intervention at the request of members of the general public’. This definition would seem to preclude an order who only undertakes prayerful intervention at the request of members of the clergy, for instance. It would also seem to preclude an order who irregularly undertakes such interventions, as well as those who do not pursue intercessory prayer at all. Thus, for instance, Buddhist monks belonging to a closed and a contemplative order may spend their time engaging with matters zen, rather than making ‘prayerful interventions’. The language adopted is the language of the Extension Act, and it may never be litigated over, however it would seem to discriminate against religions that do not seek ‘prayerful interventions’. Ironically the provision is designed to encompass closed and contemplative orders, but in extending out the definition in this way the drafters of the provision seem to have found it necessary to tie it back into a traditional concept of ‘public benefit’ by requiring ‘prayerful interventions’ made at the behest of the ‘general public’, which may have been regarded as better fitting the need for a public benefit.

As mentioned above, proposed section 11 defines two ‘disqualifying purposes’:

- a. engaging in, or promoting, activities that are unlawful or contrary to public policy or

---


43. Extension Act, section 5.

Warning: All viewers of this digest are advised to visit the disclaimer appearing at the end of this document. The disclaimer sets out the status and purpose of the digest.
b. promoting or opposing a political party or a candidate for political office.

There is an important note made which recognises that a charity is not precluded from ‘distributing information or advancing debate’ and this may involve them in making assessments of candidate’s observance or promotion of their particular charitable purpose. There is also a note recognising the right of a charity to campaign for or against changes to law, policy or practice which they assess as necessary for the purposes of their charity – and that this can, in turn, be a charitable purpose in itself.  

There may be charities which could conclude that their charitable purpose would best be promoted by running candidates. So, for instance, a single parents entity, might have the charitable purpose of promoting social justice and equality for single parent families. If the members of such an entity believed that successive government policies and legislation have created institutional obstacles to the full enjoyment of human rights for people living in extreme poverty and an increase in discrimination against sole parents, they might conclude that the only hope for change is to run a candidate for political office to give themselves a parliamentary voice. There might be an argument to be made that they were simply pursuing this course of action as an ancillary purpose to their primary charitable purpose (proposed subparagraph (b)(ii) of the definition of ‘charity’ in proposed section 5). They would, however, be pursuing a disqualifying purpose, and therefore they would be precluded from recognition as a charity. (Should they reconstitute themselves as a successful political party there may be alternative, financially beneficial, arrangements they could access.)

Part 3—Definition of charitable purpose

Proposed section 12 provides for 10 distinct heads of ‘charitable purpose’, including health, education, social or public welfare, religion, culture and reconciliation. There is also a catch all provision, proposed paragraph 12(1)(k) which would recognise ‘any other purpose beneficial to the general public that may reasonably be regarded as’ analogous to the other paragraphs. Finally proposed paragraph 12(1)(l) would classify the promotion or resistance of legislative or policy-based changes, when they are related to an original charitable purpose, as charitable within themselves. The recognition of purpose in proposed paragraph 12(1)(l) is to be applied with respect to such systematic campaigns both within Australia and with respect to other jurisdictions.

Proposed Division 2 of proposed Part 3 provides a number of additional explorations of various heads of charity. So, for instance, it is explained that, without limiting the meaning, ‘the purpose of advancing social or public welfare’ includes the purpose of caring for and supporting the aged or

---

44. Interestingly the note to the disqualifying purpose in proposed paragraph 11(a) defines public policy to include ‘the constitutional system of government of the Commonwealth’. If, to rephrase the section, it is a disqualifying purpose to engage in, or promote, activities that are contrary to the constitutional system of government of the Commonwealth this could leave otherwise charitable entities which are campaigning for constitutional reform in a potentially awkward situation. Statutory interpretation and commonsense should serve to avoid any startling effects of this provision, however, the language of the Bill’s provisions become important when rendering common law into statutory form.
individuals with disabilities. The only two definitions which are not immediately obvious are that ‘advancing the security or safety of Australia or the Australian public includes the purpose of promoting the efficiency of the Australian Defence Force’ (proposed section 17), and a fairly complex definition of ‘advancing social or public welfare’, which includes the qualification that, in order to be recognised as a charitable purpose, rebuilding after a disaster requires (among other things):

- the disaster to have developed rapidly and
- the disaster resulted in the death, serious injury or other physical suffering of a large number of individuals or
- caused distress to a large number of individuals and resulted in widespread damage to property or the natural environment

Part 4—Miscellaneous

Finally, proposed section 18 recognises ‘Cy pres and similar schemes.’ The meaning of a cy pres scheme can be summarised thus:

Abbreviated form of cy pres comme possible, French for “as near as possible.” The name of a rule employed in the construction of such instruments as trusts and wills, by which the intention of the person who executes the instrument is effectuated as nearly as possible when circumstances make it impossible or illegal to give literal effect to the document. 45

The note also points out that in certain circumstances the purposes of a trust can be altered to remove purposes that are not charitable purposes. The Explanatory Memorandum comments that such schemes are given legislative recognition in trust laws and charity laws in New South Wales, Victoria, Queensland, Western Australia and South Australia. 46

Concluding comments

The Bill stems from any number of recommendations that the sector be provided with a statutory definition of ‘charities’. 47 Nevertheless the Coalition is opposing the Bill on the grounds that such a change is unnecessary. The passage of the Extension Act addressed a number of issues with respect to the definition of a charity. It was understood that the common law was inadequate to deal with

---

47. As mentioned above, the Explanatory Memorandum, at page 7, supplies the following list:
   In addition to the [2001 Report of the Inquiry into the Definition of Charities and Related Organisations], a range of later reports and inquiries have recommended a statutory definition. These include:
   • the 2010 Australia’s Future Tax System Review;
   • the Productivity Commission’s 2010 Research Report Contribution of the Not-for-Profit Sector;
   • the Senate Economics Legislation Committee Inquiry into the Tax Laws Amendment (Public Benefit Test) Bill 2010; and
   • the 2011 Final Report of the Scoping Study for a National Not-for-profit Regulator.
these issues. Ironically the passage of the Extension Act may have also strengthened the case for a more comprehensive statutory definition: when common law was the only source of authority in this field it was at least obvious where to ascertain the relevant rules – that is, search the case law. By introducing a dual source of authority the Extension Act arguably made it more complex to ascertain the relevant law, making the case for a comprehensive statutory basis stronger.

There are benefits and disbenefits to relying on the courts for determinations of the law in this area, just as there are with relying on statute. Various accounts of the difficulties of the common law exist. Most recently a group of predominantly charitable organisations commented:

Currently small, volunteer led organisations have the unenviable task of trying to comply with laws that are unclear and sometimes inconsistent. By transferring 400 years of case law into one Plain English statute, the bill will make life easier for hard working individuals, serving the community. 48

One of the disbenefits, however, of statute based provisions is that the courts are less able to innovate or adapt when a statute is in place. While leaving matters in the hands of the courts can result in unfortunate or uncertain results, rendering the area a creation of statute can also mean that the courts have even less scope to adapt or innovate -- their role becomes simply that of statutory interpretation. In such a case the drafting of the relevant statute becomes entirely crucial, because the courts are less able to ‘fix’ problems. Providing parliamentary opportunities to consider the statutory provisions with rigour becomes similarly crucial.

Members, Senators and Parliamentary staff can obtain further information from the Parliamentary Library on (02) 6277 2500.

**Warning:** All viewers of this digest are advised to visit the disclaimer appearing at the end of this document. The disclaimer sets out the status and purpose of the digest.