

Submission to  
Inquiry into the Definition of Charities  
and Related Organisations

**Australian Catholic Church  
Tax Working Party**

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Throughout **Part One** of this submission the left-hand margin indicates those specific issues or questions raised within the Issues Paper that are being discussed in the adjacent body of text.

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## EXECUTIVE SUMMARY

1. This submission is made on behalf of the Catholic Church in Australia under the auspices of the Australian Catholic Bishops' Conference and the Australian Conference of Leaders of Religious Institutes.
2. The Submission does not address all of the terms of reference but only those which are directly germane to the operation of the Church and its agencies in Australia.
3. The Church supports, as a matter of principle, the common law approach in relation to the four-fold identification of charitable organisation as articulated by Lord Macnaghten in *Pemsel's Case*.
4. The common law approach is supported for two reasons. First, it allows broad principle to be applied to the manifold expressions of human generosity and creativity. Moreover, courts have often indicated that "it is probably impossible to define what is a charitable [trust], and it is certainly not advisable to attempt to do so."
5. The second reason for supporting the common law approach is that it facilitates, in a non-prescriptive manner, the nurturing and education of individuals and the community generally in relation to the virtues of compassion and justice.
6. In short, charitable organisations are legally recognised vehicles, so to speak, which facilitate human endeavour for the common good of the community, and especially in relation to those who, as a matter of justice, should be the object of the community's care and attention.
7. It follows that the Church favours neither legislation to establish a broader definition of 'charitable organisation', nor the establishment of a Charities Commission akin to the Charity Commission operating in the United Kingdom.

## RECOMMENDATIONS

- *Organisations should be considered charitable if their sole or dominant purpose is charitable, that is, if they are established for one of the four purposes set out in the Pemsel test. The form of the activity undertaken, or the nature or the good or the service provided, is not a sufficient guide to the charitable nature of an organisation.*
- *Entities which are established to provide necessary infrastructure support services to their charitable parent organisation should also be recognised as charitable. Where there is any perceived ambiguity as to their charitable purpose, governments should, as a matter of policy, direct that they be considered as charitable organisations.*
- *That policy makers be encouraged to develop a broader interpretation of what constitutes a charitable purpose under the head of “other purposes beneficial to the community”. To this end, the Commonwealth Government should either:*
  - (a) *direct the Australian Taxation Office to adopt a broader interpretation of this purpose; or*
  - (b) *establish within Government a specialised advisory body, similar to the Charities Consultative Committee, that draws upon experts within the community, to make recommendations about charitable status.*

*Using legislation to bring about this end would be unnecessary and probably counter-productive.*

- *The category of Public Benevolent Institution should be maintained, and the determination of Public Benevolent Institution status should be based on the nature of the deprivation that is being overcome by some form of direct provision of a good or service.*

## PART ONE

# DEFINING 'CHARITY' AND CHARITABLE ORGANISATIONS

### 1. INTRODUCTION

The Roman Catholic Church in Australia welcomes this Inquiry as an opportunity for the Australian community, through its legal system, to reaffirm the vital social and educative role of charitable institutions in our society.

Although the Inquiry is not concerned with the tax treatment of charities, the outcome of the Inquiry will have important consequences for this area of policy, especially given that the origin of the inquiry was in part the political negotiations about tax reform. The Australian Catholic Bishops' Conference and the Australian Conference of Leaders of Religious Institutes<sup>1</sup> have extended the mandate of the Australian Catholic Church Tax Working Group ('ACCTWG'), initially established to address issues arising from the introduction of the New Tax System, to prepare this submission on behalf of the Catholic Church.

**Major social and economic factors affecting the behaviour and attributes of the charitable sector.**

This Inquiry takes place amidst significant, and for many, troubling and uncertain social and economic changes in which age-old social needs, and the structures which facilitate a response to them, are the subject of discussion and contest. A number of social and economic characteristics of modern Australia constitute the context within which charitable organisations are operating. Increased pressures on family finances mean that an increasing number of families have two incomes by necessity rather than by choice. The time that many people used to devote to community-based and volunteer activities is now being used to earn additional income. This is particularly the case in many rural and regional areas.

As well as being sapped by these external pressures, networks of social relationship and support are also weakened by the cultural hegemony of an individualistic strand of liberalism which undermines notions of shared responsibility for the health of one's community and of a common system of values. These changes have led many policy makers to propose the concept of "social capital" as a means of enhancing the quality of life for many disadvantaged citizens. Current thinking in social policy focuses on strategic partnerships between governments, business and the charitable sector as the way to generate innovative responses.

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<sup>1</sup> For a description of the Australian Catholic Bishops' Conference and the Australian Conference of Leaders of Religious Institutes refer to **Attachment One**.

The Commonwealth Government's current concept of "social coalitions" is one example of this kind of thinking. Another expression of this approach to policy is the increased tendency of governments to contract out service delivery to community and other private agencies. These developments are not unambiguously positive. In many instances, competitive tendering and contracting of human services has itself undermined the ability of community-based organisations to work effectively with local communities and has encouraged greater bureaucratisation.

This means that as such government-community partnerships evolve, the distinctive contribution of each partner must be recognised and valued. Charities are vehicles within society which facilitate justice between individuals and between society and its members, especially its more vulnerable members. Policy makers and those shaping the legal framework within which charitable organisations operate must take great care to protect and nurture the character and role of charitable institutions. It is important that charities not be turned into arms of the state nor treated in law as if they were no different from businesses.<sup>2</sup>

Policy frameworks, and especially the legal framework, must be developed carefully and with great sensitivity to the need to protect the unique character of non-government institutions established for charitable purposes and to educate the community in general of the value and worth of charities for the common good.

## **2. THE ROLE OF THE JUDEO-CHRISTIAN TRADITION IN BUILDING SOCIAL CAPITAL**

Some appreciation of the need to maintain the special character and role of charitable organisations in Australia today is gained by reflecting on the role of such institutions in the evolution of our society. The moral precepts that have arisen out of the Judeo-Christian tradition, the role played by the churches and the example of their institutions in meeting social needs, have nurtured the ethical attitudes that today find expression in the democratic state's action on behalf of social justice for its citizens. Those ethical attitudes have also contributed the development of free and fair markets that have met many social needs through exchange.

For example, the establishment of hospitals was, as the name suggests, an expression of the charitable virtue of hospitality fostered by the Judeo-Christian tradition.

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<sup>2</sup> The review of business taxation is seen by one commentator as an appropriate framework within which reform to the taxation treatment of charities should be implemented. See Elaine Abery, (Dec., 2000) "Charities: A target for Ralph?" Australian Tax Review. Vol. 29. pp.224-230.

Christianity made its mark through action. Jewish traditions of help and hospitality were extended, and Christ's instruction to his disciples to care for the sick and needy assumed institutional form through the appointment of deacons charged with distributing alms. By 250 the Church in Rome had developed an elaborate charitable outreach, with wealthy converts providing food and shelter for the poor. After Constantine's official recognition of Christianity, alms found expression in bricks and mortar...Christianity planted the hospital: the well-endowed establishments of the Levant and scattered houses of the West shared a common religious ethos of charity.<sup>3</sup>

Again, the feudal concept of *noblesse oblige*, which has evolved into the modern state's concern to establish the conditions that allow its citizens to fulfil their potential and contribute to the common good, was an expression of the Christian ethic. Before the evolution of modern social legislation regulating child labour and providing income support and universal education and health care, Church organisations were providing such services. In many cases social legislation came into being only as the result of insistent advocacy by church-related organisations.

Likewise, honesty and trustworthiness, which are two of the virtues necessary for the flourishing of trade and commerce, were moral virtues promoted by the Judeo-Christian tradition. The philanthropic activity of many business people is a response to the urgings of a conscience formed either directly or indirectly in the traditions of charity and justice instilled and encouraged by religion.

Furthermore, there would not be any quasi-markets in the areas of health care and welfare provision today, markets which for-profit businesses are now seeking to enter, had it not been for governments following the example and promptings of the churches and establishing comprehensive systems for service delivery in these areas of need.

In recent years the term "social capital" has been used by social policy analysts to describe the way in which the civic virtues of trust, courtesy, compassion, hospitality and sociability contribute to a society's capacity enhance the lives of its citizens. The level of volunteerism is a measure of the social capital resources available. Such virtuous habits are the cultural heritage handed down and given practical expression by charitable organisations. The special legal status given to these organisations has not only been vital to their continuing strength but is recognition of the important role they play in our social ecology. Any attempt to refine a definition of the charitable sector for the purposes of public policy must take care to support rather than undermine, albeit unintentionally, their special role.

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<sup>3</sup> Roy Porter, (1997) *The greatest benefit to mankind: A medical history of humanity from antiquity to the present*. Fontana Press. pp.87, 88.

It is important to recognise the fact that there is a substantive difference between what is being provided to the community by charitable organisations as opposed to for-profit providers in emerging government sponsored quasi-markets. The charitable provider is not only providing a particular human service, but is giving expression to the benevolent aspects of human nature, seeking simply to meet human needs as an end in itself. The for-profit provider of a similar service gives expression to a quite different set of values, as the meeting of human needs is a means to another end, namely return on financial investment. It is this difference in essence, nature and purpose that gives rise to the need for different legal status.

**The point can be summed up using an analogy from the business sector: our society's deposits or stock of social capital have been built up over centuries by the ethical attitudes given expression in word and deed by our charitable institutions, especially our religious institutions, while our political and economic institutions make withdrawals on that social capital, using it to further develop and refine our laws and our economy.<sup>4</sup> But our social capital resources, like our natural resources, cannot be taken for granted. Once depleted, they are not easily restored.<sup>5</sup> They are fragile and must be carefully nurtured and afforded the protection of the law.**

### 3. WHAT IS CHARITY?

#### 3.1 Basic Human Goods

This submission seeks to define “charities and related organisations” by adopting an approach based on “first principles”. It begins with the concept of charity, then asks whether the current legal approach to identifying organisations with charitable purposes is adequate to the task in modern Australia.<sup>6</sup>

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<sup>4</sup> The Hon. Murray Gleeson, Chief Justice of the High Court of Australia, in his Occasional Address to the Christmas Service for Lawyers, St James Church, Sydney, 29 November 2000, published on High Court of Australia website at <http://www.hcourt.gov.au/speeches/cj/stjames.htm>.

<sup>5</sup> Francis Fukuyama, (1995) Trust: the social virtues and the creation of prosperity. London: Hamish Hamilton. p.321: “The art of association may thus appear quite healthy today, with new groups, associations, and communities springing up all the time. But interest groups in the political arena or “virtual” communities in cyberspace are not likely to replace older moral communities of shared value in the impact on ethical habit. And as the cases of the low-trust societies that we have examined indicate, once social capital has been spent, it may take centuries to replenish, if it can be replenished at all.”

<sup>6</sup> This is the approach taken by the Ontario Law Reform Commission (OLRC) 1989 Report on the Law of Charities. This submission follows closely the argument set out in Chapter 6 of that report.



It is well known that the origin of the word charity is “caritas”, meaning love. In the Christian tradition, this refers both to God’s love for humankind and the love that Christians, following the example of Christ, have for one another and for other human beings. It is not an emotional attachment, as in romantic or familial love, but a concrete commitment to the well-being of others that goes beyond emotion and is more properly seen as a voluntarily assumed duty of one human being to another, a duty owed to them for no other reason other than by virtue of their human dignity.

This dignity demands that they have the means of gaining access to basic goods that comprise human well-being, fulfilment and flourishing. The notion of *basic human goods* has evolved through the classical natural law tradition that originated with Heraclitus and Aristotle, was further developed by the Stoics and then by Augustine, Gratian and Aquinas. Natural law theory has provided much of the jurisprudence underpinning the development of our legal system. John Finnis, writing within but reinterpreting this tradition, has usefully distilled these basic human goods, which are the objects of the virtuous life and underived ends in themselves, to the following list: life, knowledge, play, aesthetic experience, friendship, religion, practical reasonableness.<sup>7</sup>

The Ontario Law Reform Commission (‘OLRC’) Report on the law of charities relied heavily on Finnis’ work. In the passage cited here, it summarises Finnis’ approach and draws conclusions about the concept of charity (it used the term “altruism” to speak about the concept of charity):

By “life”, Finnis means “every aspect of vitality which puts a human being in good shape for self-determination”. Hospitals, medical schools, the work of surgeons and nurses, famine relief, soup kitchens, road safety laws, etc., all participate in the good of life. By “knowledge”, Finnis means simply, the good we achieve when we get “to the truth of the matter”, or the good we identify when we speak of “knowledge for its own sake”, or what we mean when we say, “It would be good to find out”. Thus, for example, we consider the well-informed person, to that extent, to be well off, and not only for the profitable use he can make of his knowledge. Truth, in short, is self-evidently worth pursuing. By “play”, Finnis means “performances which no point beyond the performance itself, enjoyed for its own sake.” The performance may be “solitary or social, intellectual or physical, strenuous or relaxed, highly structured or relatively informal, conventional or ad hoc.” It is sufficient to explain the behaviour of those people involved in a game to say,

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<sup>7</sup> John Finnis, (1980) Natural law and natural rights. Oxford: Clarendon Press. Ch. 4, cited by the OLRC.

Finnis’ list does not include work, which the Commission adds, but its inclusion is supported by the ACCTWG especially as it is consistent with the teaching of Pope John Paul II in his 1980 Encyclical Letter, *Laborem exercens* (‘On the dignity of human work’), in which the most important characteristic of work is its potential for creativity, mirroring the divine work.

“They enjoy playing”. The good of “aesthetic experience” points to the self-evident goodness, “the-to-be-pursuedness” of beauty. The good of sociability or “friendship” can range from a minimum of peace and harmony among persons, to acting for the sake of one’s friend. By “religion”, Finnis means the “establishing and maintenance of a proper relationship between oneself and the divine”, the arrangement of all orders in an ultimate order of things. Secular humanism has brought with it scepticism over whether religion is a basic human good. Finnis argues that the sceptic must admit, at the very least, that whether in fact God exists or not, the question of God’s existence is crucially important for everyone. Finally, there is “practical reasonableness” or reasonableness, the basic good of being able “to bring one’s own intelligence to bear effectively...on the problems of choosing one’s actions and life-style and shaping one’s own character...[T]his involves that one has a measure of effective freedom,...it [also] involves that one seeks to bring an intelligent and reasonable order into one’s own action and habits and practical attitudes.”

Altruism, then, is the provision of the material, social and emotional means to pursue these basic human goods, these common or universal goods, to others so that they may flourish. When we help the poor, our object is to provide them with the material advantages or shelter and sustenance (life), as well as the means to pursue the other goods, (knowledge, play, religion). Material or financial support for a primary school provides the means for others to pursue not only the good of knowledge, but, especially among children, the good of practical reasonableness, that is, the ability to live a balanced, well-ordered life. Donations to hospital foundations go exclusively to the purposes that hospitals pursue, such as care of the sick or health research, the point of which is to contribute to the health of others.<sup>8</sup>

The argument presented by the OLRC, namely that the legal definition of a charitable organisation ought to have some correspondence to the real definition of charity, is central to this submission. Before one can determine what is a charitable purpose in terms of public policy, one must set out clearly one’s understanding of charity. The Finnis list of basic human goods identifies the “what” of charity, namely what is being provided in an act of charity.

### **3.2 Religion is a Basic Human Good**

In view of the opinion of some that there should be a distinction between religious and charitable activity, a view that appears to be supported by the Issues Paper, it is appropriate that this submission provide additional argument on the value of religion. Religion provides a basic motivation for acting virtuously and in the interests of the common good. The religious

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<sup>8</sup> OLRC, Ch.6, p.3.

underpinning for the life of virtue can be either conscious and direct or it can be indirect and mediated through historical developments in law and culture such that, in a modern secular or pluralist society, the influence of religion upon one's motivations can be unnoticed, unacknowledged and even denied. Nevertheless, the promotion of religious faith through word and deed is a vitally important charitable purpose for the benefit of individuals and society. It serves an important educative function in society by positing a basis for moral action. As Lord Devlin stated, "no society has yet solved the problem of how to teach morality without religion."<sup>9</sup> Hence it is appropriate that the state give special recognition and support to organisations that promote religion. As the Second Vatican Council stated in its declaration on religious freedom, *Dignitatis humanae*,

the private and public acts of religion by which men direct themselves to God according to their convictions transcend by their very nature the earthly and temporal order of things. Therefore the civil authority, the purpose of which is the care of the common welfare, must recognise and look with favour on the religious life of the citizens.<sup>10</sup>

The state, then, should not be neutral about religion but should regard religion favourably. The intrinsic value of religion, considered as a *basic human good*, provides a rational motive not only for government to respect religious freedom, but also for government to encourage and support religious reflection, faith and practice, though without using external coercion, and in a way that promotes tolerance.<sup>11</sup>

Religion, however, is not synonymous with spirituality. Religion has been legally defined in Australian law, as "a set of beliefs that include a belief in a supernatural Being, Thing or Principle and the acceptance of canons of conduct which give effect to that belief, but which do not go against the ordinary laws."<sup>12</sup> Defining spiritual well-being is more difficult.

The common practice of resorting to such terms as spirituality in order to hide ignorance or mask incoherence or disguise a void immeasurably increases and complicates the incoherent vagueness of the language of spirituality...

"Spirituality" may indicate stoic attitudes, occult phenomena, the practice of so-called mind-control, yoga discipline, escapist fantasies,

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<sup>9</sup> Lord Devlin, *The Enforcement of morals*, p.25, Cited by Gleeson, *supra*

<sup>10</sup> *Dignitatis humanae*, ('Declaration on religious freedom'). In W. Abbott & J. Gallagher, (Eds) (1967) *The documents of Vatican II*. London: Geoffrey Chapman. n3. p.681.

<sup>11</sup> See Samuel Gregg, "*Dignitatis humanae* and the Catholic human rights revolution: past successes, future problems". Unpublished lecture given to the St Thomas More Society of NSW, 23 March 2000. Available from author at the Centre for Independent Studies, Crows Nest, Sydney.

<sup>12</sup> *Church of the New Faith v Commissioner of Pay-roll Tax (Vic)* (1983) 154 CLR 120, at 137.

interior journeys, an appreciation of Eastern religions, multifarious pietistic exercises, superstitious imaginations, intensive journals, dynamic muscle tension, assorted dietary regimens, meditation, jogging cults, monastic rigors, mortification of the flesh, wilderness sojourns, political resistance, contemplation, abstinence, hospitality, a vocation of poverty, non-violence, silence, the efforts of prayer, or, I suppose, among these and many other things, squatting on top of a pillar.<sup>13</sup>

**To equate, in order to replace, “the promotion of religion” with “the promotion of spiritual well-being” as a head for the identification of charitable purposes is fundamentally flawed and would lead to greater confusion and increased litigation as disputes arise as to what constitutes spiritual well-being.**

### 3.3 The Importance of “Purpose”

Resuming the argument outlined in Section 3.1 above, a charitable act, then, involves the provision of the means of accessing any of these basic human goods in their various forms. However, it is not sufficient for identifying whether an act is charitable simply to look at *what* is provided. To be a charitable act, these basic human goods must be provided “to others so that they may flourish.” In other words, it must be provided to someone who is “other”, someone who has no familial or friendship connection to you, someone who could effectively be a stranger. Furthermore, the *purpose* of the provision is for the sake of that other person, not for the purpose of making profit. In other words, whether an act is charitable depends on the motives of the person providing the good. Actions which appear to be the same in form may actually be quite different in essence depending on the motives of the agent and the purpose of the action.

For example, it might be argued that when a charitable organisation provides a good or service and asks the recipient of that good or service to contribute to the cost of that service through some form of payment, perhaps financial, then this is not a charitable act. However such a view does not take account of a number of factors. First, there is the fact that the purpose of charitable activity is to enhance the dignity of those to whom goods and services are provided. It may be that asking for payment assists in preserving the dignity of the recipient by allowing them to make a contribution to the cost of the good or service, as opposed to being the recipient of a “hand-out”.

Secondly, the charging of fees may allow a charitable organisation to cross-subsidise other charitable activities. In other words, one must look behind the form of the activity to its motive. The for-profit company charges for its services so as to make a return on capital for investors, and this is the key

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<sup>13</sup> William Stringfellow, (1984) The politics of spirituality. Philadelphia: The Westminster Press. pp.16, 19.

consideration in its pricing strategy. On the other hand, the pricing decisions of those whose motives are charitable are driven by other priorities, such as the need to keep the service available to those who need it or make it more widely available or to help underwrite other activities with a charitable purpose.

**The defining characteristics of charity are determined by:**

- (a) what is provided (the basic human goods listed above),**
- (b) to whom it is provided (someone to whom there is no familial or friendship connection, i.e. the public), and**
- (c) the motivation or rationale for its provision (to assist that person, in some practical way, to flourish).**

**Thus charity is the provision of these basic human goods to others so that they may flourish which, in turn, is for the common good of the whole community.**

## **4. IMPLICATIONS FOR POLICY AND THE LEGAL DEFINITION OF CHARITABLE ORGANISATIONS**

### **4.1 The *Pemsel* test and the Finnis list**

**A comprehensive definition of the sector**

Neither the common law nor statute currently “defines” charitable organisations at all. Rather, the common law has adopted an approach to identifying organisations established for charitable purposes, and this approach is set out in Paragraph 18 of the Issues Paper. This method has served the Australian community well and should continue to be the approach adopted for the purposes of government policy. This method reflects the *Pemsel* test<sup>14</sup>. The approach of this submission is that the *Pemsel* test remains the most appropriate because it conforms closely to the definition of charity set out in Section 3 of this submission, which provides the basis for the proper interpretation of what the law should accept as charitable purposes.

As argued by the OLRC in its Report, Finnis “identifies a range of human goods almost identical in scope and meaning to the common-law list.” The list of basic human goods in that definition can be correlated with the charitable purposes set out in the *Pemsel* test:

- (i) the relief of poverty,
- (ii) the promotion of religion,
- (iii) the promotion of education, and

**Do the four purposes of charity in the common law continue to have relevance?**

<sup>14</sup> Lord Macnaghten in *Income Tax Special Purpose Commissioners v Pemsel* (1891) AC 531.

- (iv) purposes beneficial to the community (not falling under any of the preceding heads).

#### 4.2 Purpose of the Organisation v Nature of the Activity

It is important to note that Section 3 above defined charity as a certain kind of *activity*, whereas the common law identifies charity with a certain kind of *organisation*, institution or “body”. This is because charitable activity is coordinated and carried out by organisations established for that purpose. Individuals who wish to contribute to society’s charitable activity usually do so by donating to or joining an organisation whose purpose is to coordinate a charitable response to various needs.

Should definitions be based on the purpose of the activities carried out by the organisation only, or on the nature of the activity?

The common law approach of identifying an organisation as charitable serves the very important function of facilitating the identification of the *motives* for performing the activity.

For example, two bodies could carry on the same activity that appears charitable in *form*, but would be quite different in *essence* once the different motivations and purposes of the agents are known. Thus, a private company, with the intention of making a profit in the long-term, might open a hospital and charge low fees. It is able to sustain losses in the short-term, however due to the shareholders’ imperative to gain good returns on investment, some services would be discontinued and other lucrative ones aggressively pursued. Consequently, the investor-owned hospital takes decisions concerning the services it will conduct based on the financial needs of its shareholders. A not-for-profit hospital’s imperative is to meet the health needs of the community served, irrespective of the relative profitability or otherwise of the treatments or procedures.

In a competitive environment, where only profitable services are sustainable, hospitals lacking commitment to the full range of health needs of the local community will undermine the sustainability of social capital. In this environment, not-for-profit hospitals take decisions to conduct essential non-profitable as well as profitable services in order to enhance the social safety net for the local community. Nevertheless, difficult decisions sometimes need to be taken about which services should or should not be provided in light of resources constraints and the availability of similar services from other providers. These decisions are not motivated by the desire to maximise return on shareholder investment but by a desire to maximise the range of services available to meet local needs.

In the above example, whilst both providers have delivered a basic human good (life and health care) their motivations are starkly different. It is possible to say one was carrying on a charitable activity and the other was not. The sole or dominant purpose of the for-profit hospital was to make a profit, whereas the sole or dominant purpose of the not-for-profit hospital was to

provide sustainable health care to its patients so that they may have the means of “human flourishing”.

It is possible to discern the motivation or purpose of the activity, by reference to the nature of the organisation that is carrying out the activity. That is, whether an activity is charitable or not can be determined by whether the body carrying it out is one that is established either, on the one hand, *for profit* or, on the other hand, *not for profit* but *so that others may flourish*.

**Thus if an organisation is identified as having a charitable purpose, then the activities carried out by that organisation are essentially charitable.**

***Recommendation***

***Organisations should be considered charitable if their sole or dominant purpose is charitable, that is, if they are established for one of the four purposes set out in the Pemsel test. The form of the activity undertaken, or the nature or the good or the service provided, is not a sufficient guide to the charitable nature of an organisation.***

**4.3 “Core” and “Non-core” Activities and “Partially Charitable” Bodies**

The Issues Paper, in exploring options for reform, draws a distinction between the purpose of an organisation and the purpose of its activities. For example it draws a distinction between “core” and “non-core” religious activities. For example, the in Paragraph 13, the Issues Paper states:

...religious organisations may conduct a wide range of activities in addition to core worship, pastoral and religious education services – for instance, the provision of nursing home services to the aged or welfare services to the homeless or primary and secondary education services.

However, this submission rejects the validity of this distinction. In respect of the Church’s mission, there is no such distinction between the promotion of the Christian message through word and deed. Both “worship, pastoral and religious education services” and “the provision of nursing home services”, etc are forms of promoting that message. **The provision of such basic human goods to others so that they may flourish is not an option for the Church, but is integral to or constitutive of its mission.**

The same attempted distinction has been drawn by the Human Rights and Equal Opportunity Commission ('HREOC') with respect to religious liberty. The Catholic Bishops' Committee for Social Welfare said in its submission to HREOC on the subject of proposed guidelines for avoiding religious

discrimination in employment, in relation to the purported distinction between “core” and “non-core” activities:

The Guidelines presume to distinguish between “core ‘religious’ activities” and other, “non-core” activities. For the reasons noted above, especially that the Catholic tradition attests consistently to the fact that there cannot be any separation between one’s faith and the practical manifestation of it in “good works”, the distinction promoted by the Guidelines between “core” and “non-core” is inapt. Indeed it is inimical to the foundational mission of the Church.<sup>15</sup>

While the particular *form* of that provision may vary according to the needs of the community, the Church would not be fulfilling its mission if it restricted its activities to those characterised by the Issues Paper as “core activities”.

This problematic distinction is continued Paragraph 13 of the Issues Paper:

Some non-profit organisations may be involved in charitable, religious or community service activities but also engage in other activities that in isolation would not be defined as charitable, religious or community service. For example, an organisation may support its core activities by lobbying on behalf of disadvantaged client groups. Or an organisation may undertake commercial activities to raise funds to support its core activities.

The Issues Paper overlooks the *purpose* of the so-called “non-core” activity. Once the purpose of such activity is recognised, by looking to the nature of the organisation carrying it out, it becomes clear as to whether the activity is essentially charitable or not. The Issues Paper would have been more accurate if it had instead said, “some non-profit organisations may...also engage in other activities that would not *appear* charitable [etc] if their basic *purpose* is overlooked.”

In Paragraph 14 the Issues Paper considers defining organisations as “partially charitable” by reference to the character of their activities. But the Issues Paper conflates the *form* of the activities with the *purpose* of these activities. The *form* of the activity may be that of a business enterprise, just like any for-profit business enterprise, but as is made clear in the definition of charity set out in Section 3, what makes an activity charitable is not just its *form*, but its *purpose*. As the OLRC stated

Some acts which appear political or commercial or otherwise non-charitable may, in fact, be formally charitable. Acts which appear political, but which are ancillary and incidental to an act of charity, or are necessary or purely instrumental to it, are essentially charitable...[A]n organisation which is legally required to be

**Commercial activities, their definition and their role in the definition of the organisation.**

<sup>15</sup> Letter from Bishop Patrick Power, Chairman, Catholic Bishops’ Committee for Social Welfare, to HREOC. 20 September 2000.



exclusively charitable...does not jeopardise that status by engaging in apparently political activities which are, in fact, merely ancillary and incidental to its charitable activities. Similarly, in another important example, when such an organisation runs its annual bazaar or charity golf tournament, or invests its savings to generate income, or engages in fundraising, these activities are best described as formally charitable as fund raising or investing *for* charity not businesses, since these activities are purely instrumental to the altruistic purposes and activities of the organisation, and are therefore, in essence, charitable.<sup>16</sup>

**Is it appropriate to distinguish between commercial and non-commercial activities?**

For example, a large charitable organisation such as the Catholic Church cannot function effectively and efficiently without a number of essential infrastructure services such as financial services, superannuation, insurance, telecommunications and bulk purchasing. In order to streamline this aspect of the Church's operations, specialised bodies have been established. The fact that they must conform to various regulatory regimes for these particular industries gives rise to the *appearance* that these bodies are no different to their for-profit counterparts in the industry, and could therefore lead one to conclude that therefore their purpose is not charitable when in fact its sole or dominant purpose is to support the charitable aims of the Church.

Nevertheless, it is acknowledged that policy-makers may make determinations about the charitable status of such infrastructure support organisations on the basis that the nature of their activities does not give the appearance of being directly charitable. In such cases, where there is any perceived ambiguity of their primary purpose, the government as a matter of policy ought to make it clear that the purposes of such organisations are charitable.

In other words, if an organisation has a charitable purpose, its activities will also have a charitable purpose, even though some of those activities may have the *appearance*, if their purpose is overlooked, of being non-charitable.<sup>17</sup>

**This submission contends that it is wrong to define organisations as partially or wholly charitable by reference to the form of its various activities. In fact, it would constitute a serious threat to the ability of those organisations to raise funds if their charitable status was wound back because the purpose of their activities was overlooked.**

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<sup>16</sup> OLRC, Ch 6, p.6

<sup>17</sup> On the other hand, there may exist organisations whose *stated* purpose is charitable and whose activities also *appear* charitable, but which in fact are set up to exploit this appearance and whose *real* intention and purpose is to provide profit for those involved in the organisations activities. The law must be careful in how it handles these bodies, as in attempting to restrict the ability of non-charitable organisations to exploit the appearance of being charitable there is a danger that genuine charitable organisations may be penalised indirectly and unfairly.

***Recommendation***

***Entities which are established to provide necessary infrastructure support services to their charitable parent organisation should also be recognised as charitable. Where there is any perceived ambiguity as their charitable purpose, governments should, as a matter of policy, direct that they be considered as charitable organisations.***

**Are there factors which impact differently on for-profit organisation delivering similar services?**

**4.4 “Level Playing Field”**

It is anticipated that the Committee will receive some submissions, most likely from for-profit providers of services similar to those offered by charitable organisations, and possibly from government departments such as Finance and Treasury, which will argue that giving special legal status to charitable organisations which allows them to receive differential and – relative to private for-profit providers – 'advantageous' tax treatment, is unfair on the for-profit provider and encourages inefficiency. Such submissions could well argue for an extension to the charitable sector of the principles of “competitive neutrality” that apply to those public sector entities competing with private for-profit companies. The term “competitive neutrality” was originally limited to the context of National Competition Policy:

Australia’s governments have taken the logical view that the disciplines imposed by the effective competition, being the greatest drivers for improving productivity and encouraging innovation, need to be extended throughout all sectors of the economy for Australia’s standard of living to rise...The removal of advantages available to government businesses because of their public ownership will enhance the ability of private businesses to compete with those owned by governments.<sup>18</sup>

However, the term “competitive neutrality” has taken on a life of its own, being equated with other terms such as “the level playing field”. The argument for competitive neutrality or the level playing field is likely to be applied particularly in respect of markets for those services which are (a) characterised by high levels of government funding for both non-profit and for-profit providers where for-profit providers have entered those fields initially established by the non-profits, or (b) ancillary or incidental to the charitable purpose of the organisation (e.g. financial services or enterprises designed to generate surpluses for use in subsidising the provision of other human services).

The rationale behind such submissions is the contention that such differential tax treatment gives the charitable provider a competitive advantage over the

<sup>18</sup> National Competition Council, *Competitive neutrality reform: Issues in implementing clause 3 of the Competition Principles Agreement*. January 1997, pp.1, 3.

for-profit provider, thus having a negative impact on the profitability of the enterprise and efficiency due to decreased competition. If such treatment could be removed, then, it is likely to be argued, competitiveness and profitability will increase.

The argument for similar tax treatment with for-profit providers of human services is inherently flawed because it overlooks the advantages that for-profit providers already have over non-profit providers in the fundamental area of the ability to attract capital resources. For-profit providers attract capital investment precisely because they can offer investors a return on that investment. Non-profit providers do not offer any such return to contributors. The differential tax treatment for non-profits can be seen as a means of levelling the playing field already tipped in favour of for-profits and so arguments for removing the special tax status of charitable bodies turn out to be arguments for maintaining the competitive advantages of for-profit providers. Without government support in various forms, such as deductible gift recipient status and exemptions from various forms of taxation, the ability of many charitable organisations to attract donations, pay salaries and meet other costs would be substantially reduced. Overall, their ability to continue functioning at current levels of activity, providing basic human goods to those in need, would be seriously compromised.

The argument for abolishing special tax status for charities is often accompanied by the suggestion that what is lost to the charities in this fashion could be paid in the form of direct grants. There are two major flaws with this proposal.

First, most charities that currently enjoy these special tax advantages are not part of any government programme. Replacing the income lost and compensating them for higher costs by paying them direct grants would require bringing thousands of bodies under one government programme or another. It is highly unlikely that when governments are looking to promote self-sustaining communities and community organisations, they would adopt a direction that would increase the need for government bureaucracy to manage the massive increase in grantees.

**Secondly, and more fundamentally, such an approach would dissolve any distinction between for-profit and non-profit providers, and there would be no special support or recognition by government of the vital role of charities in enhancing social capital. The positive externalities delivered by charitable organisations to society, such as the sense of satisfaction one gains when making a conscious contribution to the good of another and of society generally through a generous donation or through some volunteer work, would be at risk.**

**Civil society organisations would be indistinguishable from for-profit organisations carrying out the policies of the state. Such an outcome would be detrimental to the development of social capital.**

**Do current definitions allow regard to be taken of the social and economic environment?**

#### **4.5 The Value of a Broad Definition**

There is another important practical advantage of assessing the purpose of an activity by looking to the purpose of the organisation carrying out that activity. It allows charitable organisations maximum flexibility and adaptability to innovate in order to meet changing needs and circumstances. An activity-based criteria for the assessment of charitable purpose would mean that every time a charitable organisation determined that a new approach to meeting needs was required, it would have to consider the implications of whether this new type of activity or service conformed to the description of charitable activity.

It is far better to have the flexibility that comes with knowing that the law will recognise whatever is performed as having a charitable purpose.

Such flexibility is also a consequence of having no statutory definition of charity, but of leaving it to the evolving common law to determine what kinds of organisations and activities have charitable purposes in specific contexts. Statutory restriction on the range of charitable purposes risks stifling the very flexibility and innovation that is admired by policy-makers who look to charitable organisations as key players in the future of social programmes. In respect of the context specificity of proper determinations of whether an activity has a charitable purpose, this submission concurs with the view of the OLRC that

little is to be gained by the law in attempting to define charity in any but the most general terms. Although it [context specificity] does not preclude searching for something more definitive than the *Pemsel* definition, it does suggest that significantly more specificity may well be impossible and, in any event, probably would be unhelpful in achieving any greater clarity in the law.<sup>19</sup>

The common law approach to identifying charitable organisations is flexible enough to allow new kinds of activity and organisation to be recognised as charitable in light of changing economic and social conditions. This submission does not believe that legislating charitable purposes will add any value to the process of defining the sector, and is in fact only likely to bring with it a higher degree of unnecessary public and private bureaucracy and regulation.

**In other words, attempting to define too closely by statute what is charitable and what is not will lead to increased litigation and dispute, not less. This suggests that there may be some social benefit by moving in the opposite direction, that of encouraging policy makers to recognise a greater range of organisations as charitable, for example those organisations whose purpose is to prevent individuals from falling into a**

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<sup>19</sup> OLRC, *op.cit.*

**state of need, or to promote care and protection of the environment, or to advocate for policy change for the benefit of the disadvantaged.**

***Recommendation:***

*That policy makers be encouraged to develop a broader interpretation of what constitutes a charitable purpose under the head of “other purposes beneficial to the community”. To this end, the Commonwealth Government should either:*

- (a) *direct the Australian Taxation Office to adopt a broader interpretation of this purpose; or*
- (b) *establish within Government a specialised advisory body, similar to the Charities Consultative Committee, that draws upon experts within the community, to make recommendations about charitable status.*

*Using legislation to bring about this end would be unnecessary and probably counter-productive.*

#### **4.6 Public Benevolent Institutions**

Within that broad category of charitable organisations, however, there is a case for making further distinctions which attract differential treatment in policy.

Finnis posits that all the basic human goods in his list are of equal value<sup>20</sup> and that there is no hierarchy among them. Yet there are degrees to which individual recipients or classes of recipients lack the means of attaining these goods. The OLRC Report argues thus:

The economically destitute are bereft of any means;<sup>21</sup> the young dancer’s chances of perfecting his art are merely diminished by his lack of resources. True we can easily imagine cases in which our sympathy and, therefore, even our altruism is directed more strongly towards the promising dancer who lacks means, than it is towards the derelict who will not change his ways. Nonetheless, there are degrees of need and degrees of deprivation of the means to live a fulfilling life. “Charity” in the narrow sense identifies the most wanting end of the continuum, “philanthropy” the least. The critical observation is that what seemed to be a difference in kind is now

**Is the concept  
of PBI of  
continuing  
relevance?**

<sup>20</sup> Finnis, *op.cit.*, p.92

<sup>21</sup> ACCTWG would take issue with this – the materially poor do not necessarily lack the basic goods of religion and knowledge.

seen only as a difference in degree. Perhaps this explains the law's wisdom in its more inclusive use of "charity".<sup>22</sup>

So within the general category of "charitable organisation" there is a case for identifying and giving special protection and support to those charitable organisations whose activity is oriented to overcoming the most serious deprivations, such as the deprivation of the basic human good of life (such as hospitals and organisations for the relief of the "destitute"). For example, currently within the category of organisations identified as charities, there are those that are further categorised as Public Benevolent Institutions which are established for the purpose of meeting the most serious forms of deprivation of basic human goods such as food and shelter, or health, to name just a few general purposes that might be the object of organisations categorised as Public Benevolent Institutions.<sup>23</sup> It is important that Public Benevolent Institutions be involved in the direct provision of the means to attaining such basic human goods.

There are also non-profit organisations whose activities are directed to the provision of aesthetic experience and enjoyment for its own sake (play). Their activities are charitable in the sense outlined by Finnis, and their identification as charitable organisations is appropriate under the head of organisations established for "other purposes beneficial to the community". Consequently, their treatment in terms of policy should reflect their relatively lower place in a notional hierarchy of deprivation.

**In other words there are some charitable organisations which, because the kinds of need that they meet, should receive additional government support.**

***Recommendation***

***The category of Public Benevolent Institution should be maintained, and the determination of Public Benevolent Institution status should be based on the nature of the deprivation that is being overcome by some form of direct provision of a good or service.***

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<sup>22</sup> OLRC, Ch.6, p.4.

<sup>23</sup> The ACCTWG notes that in late 2000 the Australian Taxation Office issued Draft Tax Ruling 2000/D14 on Public Benevolent Institutions. It is the view of the ACCTWG that the ruling may impede unnecessarily the establishment of Public Benevolent Institutions, with a corresponding loss of benefit that such bodies may deliver to the community.

## CONCLUSION

The term charitable organisation can and, in law, does encompass those organisations which the Issues Paper has divided into three separate categories, namely charitable, religious and community-service not-for-profit organisations. Religious and community-service not-for-profit organisations are not separate from charitable organisations, but are a subset of them, as they are established for charitable purposes, namely for the provision of basic human goods to others so that they may flourish.

The current approach to identifying charitable organisations (as opposed to defining them) through the application of the common law *Pemsel* test has served the community very well; however, there is scope for broadening the interpretation of what constitutes “other purposes beneficial to the community”.

**Do the terms  
charity, religious  
organisation and  
community  
service not-for-  
profit  
organisation  
continue to be  
relevant?**

Categorising charitable organisations as “partially charitable” on the basis of an arbitrary and invalid distinction between the “core” and “non-core” nature of the activities they carry out, or the kind of goods and services they provide, is inappropriate as it overlooks the purpose of that activity, and it is purpose which is fundamental to the character of charitable organisations. There is a danger that the legal and practical distinction between charitable organisations and for-profit organisations operating in similar fields of activity will be broken down if purpose is overlooked. Furthermore, a definitional focus on sole or dominant purpose remains the approach most likely to encourage a charitable sector that is innovative and responsive to changing community needs over time.

Maintaining the distinctive character of charitable organisations is vital to the development of social capital in our community. Charitable organisations give expression to the better side of our natures, to generosity, compassion, concern for the disadvantaged, mutual responsibility for one another.

Such values are nurtured in a special way by religious organisations, whose teachings and moral precepts have been “a traditional well-spring of such charitable activity.”<sup>24</sup>

The special character and role of charitable organisations in society should be maintained. Pursuing a statutory definition of charity is counterproductive. However, other legislative and administrative options could be explored which would be aimed at maintaining or enhancing the special role and character of charitable organisations in society.

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<sup>24</sup> OLRC, Ch 6, p.8.

## PART TWO

### RESPONSES TO QUESTIONS

- 1. What are some of the major social and economic factors affecting the 'attributes, purpose and behaviour' of your organisation, and what are the implications for how your organisation is or should be defined?***

The Church is conscious of the social and economic characteristics of modern Australia which constitute the context within which charitable organisations must now operate. For example, increased pressures on family finances mean that many, if not most, families must now earn two incomes to maintain their standard of living. The time that many people used to devote to community-based and volunteer activities is now being used to earn additional income. Networks of social connectedness have been weakened, in large part by the hegemony of an individualistic strand of liberalism, which has acted to undermine notions of shared responsibility for the community and a common system of values.

Current thinking in social policy focuses on strategic partnerships between government, business and the charitable sector, exemplified by the current government's concept of "social coalitions". Governments have also tended to contract out service delivery to community and other private agencies. In fulfilling its mission in both word and deed, the Church has often responded to this environment by adopting organisational structures, which are typically legally required by government policy, in order to facilitate a response to changing community needs. Accompanying the adoption of new organisational and legal structures, the Church has also responded to demands for professionalism in service delivery. Consequently, the Church has become a larger employer of professional staff.

Conscious of these factors, policy makers and those shaping legal frameworks within which charitable organisations operate must take the greatest care to protect and nurture the character and role of charitable institutions. It is vital that charities not be turned into arms of the state nor treated in law as if they were no different from businesses. Policy and legal frameworks must be developed with great sensitivity to the need to protect the unique character of those non-government institutions established for charitable purposes.

- 2. What do you think will be some of the major influences on the environment in the coming decade, and what might this mean for how your organisation is defined?***

The Australian and international environments have seen global pressures impact disproportionately upon vulnerable communities, families and individuals. Governments, both here and overseas, have responded by seeking partnerships with Churches and other non-profit organisations. It is expected that charitable organisations will respond to an environment in which governments, both in Australia and internationally, continue to withdraw from direct service provision. Government maintains that church agencies are closer to the communities they seek to serve and may therefore be more effective in providing human services.



The Catholic Church has responded by creating structures and organisations to meet specific needs. The creation of these organisations recognises the particular social, legal and sometimes contractual requirements of government. The legal and organisational form of particular services may vary to suit the legal requirements of government policy, but are always subservient to mission of the Catholic Church. It is likely that increasing requirements for accountability to government for contracted services will require the adoption of more accountability systems.

In order to meet government requirements in tendering for human services, the Church has increasingly established structures that have the form of commercial entities. In so far as for-profit bodies are involved in the provision of the same services, there is a risk that the Church's organisations may be perceived simply as other businesses. However, this would confuse the structure or form of organisations with their purpose, which in the case of the Church is always and necessarily charitable.

**3. *How have your organisation's 'attributes, purpose and behaviour' changed over recent years, and has this involved any change in how your organisation has been or should be defined for various purposes?***

The increasing requirement for accountability, particularly to government for contracted services, has required the adoption of accountability systems and there has been a consequent increase in bureaucratisation. Task-specific organisational structures have been established to meet the program requirements of government policy and these have varied in form over time. However, this does not imply that Catholic Church organisations have become 'commercial' or that they seek to compete with for-profit organisations.

While the attributes and behaviour of Church organisations have responded to changing policy environments, the purpose of Church service provision has remained constant. The Church seeks to promote the Christian message through word and deed.

**4. *What are the key characteristics of the current social and economic environment for the sector as a whole, and what significance do these characteristics have on how various parts of the sector are or should be defined?***

In some sectors, Catholic Church organisations now find for-profit organisations seeking income-generating opportunities, particularly in highly expensive human services such as health. We note that some of these sectors were once the sole province of churches, prior to public provision. The ability now to generate profits from these activities comes following decades of investment by churches and more latterly government. This has particularly occurred where government has partially withdrawn from direct service delivery and instead opted to provide funding to non-government organisations via contracts. Catholic Church organisations in these circumstances consider seriously their role to provide the most appropriate and holistic of services and not merely focus on contract requirements. We believe that the presence of Church organisations in a sector has the effect of enhancing efficacy of services, rather than a potentially more narrow focus on unit cost and measures of efficiency.

With the shift to contracting-out of service provision and greater emphasis being placed on preventative work, the Church has increasingly established organisational structures which meet the requirements of government and facilitate the Church in meeting social needs according to its mission. It is likely that with further contracting out there will be increasing points of contact between for-profit and charitable organisations and the possibility that further ambiguity may arise.

**5. *Do these influences impact differently, with different definitional consequences, on various parts of the sector?***

There is a substantive difference between what is being provided to the community by charitable organisations as opposed to for-profit providers in emerging government sponsored quasi-markets, such as health and aged care. The charitable provider is not only providing a particular social service, but is giving expression to the benevolent aspects of human nature, seeking simply to meet human needs as an end in itself. The for-profit provider of a similar service gives expression to quite a different set of values, as the meeting of human needs is a means to another end, namely return on investment.

The shift towards contracting-out of government funded services has increased the need for the Catholic Church to support its organisations with appropriate infrastructure bodies and advisory secretariats. Some of these supporting organisations have not been appropriately recognised by government as having the same charitable status as the direct (or “overtly charitable”) service organisations they support. This appears to fly contrary to any reasonable interpretation of mutuality principles.

**6. *Are there factors which impact differently on for-profit organisations delivering similar services to not-for-profit organisations?***

Catholic Church organisations do not seek to compete with for-profit organisations. However, with the privatisation of welfare services, there has been an expansion of private for-profit involvement in a range of areas, such as health and welfare, which were once almost exclusively the province of governments and charities. Their relatively recent appearance in these sectors has not altered the motivation and purpose of Church activity. The Church seeks to meet human needs as an end in itself and to give expression to the benevolent aspects of human nature. Charitable organisations generate positive externalities and are an expression of society’s concern for the common good. They are a stimulus to virtuous action, and contributors to the vital social capital that facilitates the development of free, open and sustainable communities. The for-profit provider of a similar service gives expression to quite a different set of values, where the meeting of human needs is simply a means to making a return on investment.

It is now commonly alleged that differential tax treatment accords charities an unfair competitive advantage over for-profit providers. It is simplistically claimed that like activities ought to be treated in like manner for tax purposes. There is a call for neutral tax treatment between charities and those for-profit organisations now seeking to make larger profits in sectors in which the Church has an integral and historic role. This is considered to justify the imposition of taxes on charities so as to “level the playing field”. Such arguments are inherently flawed because they overlook the advantages that for-profit providers already

have over non-profit organisations in their fundamental ability to attract capital resources. For-profit providers attract shareholder funds precisely because they can offer investors a return on that investment. A requirement that for-profit organisations cease to distribute dividends is clearly absurd. It is equally absurd to tax charities as though they were for-profit organisations.

The differential tax treatment for non-profits may itself be seen as an attempt to level the playing field and consequently, arguments for removing the tax status of charitable bodies is revealed to be an argument for further tipping the balance in favour of for-profit providers.

Crucially, without government support in various forms, such as deductible gift recipient status and various exemptions, the ability of charitable organisations to attract donations, pay salaries and meet other costs would be substantially reduced. In consequence, the ability of charitable organisations to continue functioning at current levels of activity and to respond to changing and prospective needs would be seriously compromised. The special character and role of charitable organisations in society should be maintained, if not enhanced, through appropriate legal recognition and protection.

**7. *Should definitions be based on the purpose of the activities carried out by the organisation only, or on the nature of the activity?***

The Church maintains that the sole or dominant purpose of a body, as opposed to the nature of its various activities, ought to remain the basis for defining charitable and related organisations.

Charitable activities may be identified by the motive of the person or organisation carrying out the activity. That is, whether an activity is charitable or not can best be determined by whether the body carrying it out is one that is established either for profit, or *not for profit and for the provision of basic human goods so that others may flourish*. Thus, for an activity to be charitable, it must be carried out for the sole or dominant purpose of the benefit of the recipient and the common good. If an organisation is identified as having a charitable purpose, that is, if they are established for one of the purposes set out in the *Pemsel* test, then the activities carried out by that organisation are essentially charitable.

The nature of the good or service provided is not a sufficient guide to the charitable nature of an organisation. For example, two bodies could carry on the same activity that appears charitable in *form* (e.g the provision of health care services), but would be quite different in *essence* once the different motivations and purposes of the agents are known.

For the Church, the nature of a particular activity carried on cannot be understood apart from the purpose of the Church, which is a body established for the promotion of religion through word and deed. All the activities of the Church are directed to this same end and all that the Church does contributes to its charitable purpose; whether it be conducting religious services, operating schools, hospitals or welfare agencies. The Church seeks to live out its mission *through* its activities which vary over time in response to changing needs.

The common law approach continues to have manifest practical benefits, for instance in allowing charitable organisations to adapt and respond flexibly to changing needs and

circumstances. Statutory restrictions on the range of charitable purposes risks stifling the very flexibility and innovation that is admired by policy-makers who look to charitable organisations to provide services more effectively than through bureaucratic provision. The common law approach has served the Australian community very well and should continue to be the approach adopted for the purposes of government policy.

**8. *Should account be taken of multiple purposes, or is it appropriate to rely on the sole or dominant purpose of an organisation in order to define it?***

It is appropriate to consider only the sole or dominant purpose of an organisation in order to define it.

All activities of the Church are carried on to contribute to this one purpose: the provision of a basic human good – the promotion of religion - so that others may flourish. No other purpose can be ascribed to Church activities or organisations.

At a practical level also, attempting to disaggregate by purpose an organisation of the complexity of the Church would involve intolerable bureaucratic and invasive processes that would certainly stifle innovation in charitable service provision.

**9. *What methodology is appropriate to determine when a purpose is secondary?***

As an inherently charitable institution, it is invalid to ascribe a “secondary” purpose to any of the Church’s activities or entities. For the Church, all activities and organisations are directed to the same end and all contribute to its one charitable purpose; whether it be conducting religious services, operating schools, hospitals or a range of internal and ancillary services.

It is absolutely vital that policy-makers do *not* confuse the Church’s ancillary, internal and infrastructure services with “secondary” purpose. Large and highly complex organisations such as the Church necessarily require internal ancillary services. These organisations exist to support the Church’s direct human services which could not be provided without them and which, in many cases, must also exist to meet government requirements. Insofar as there is any perceived ambiguity as to their purpose, government must as a matter of policy ensure that these ancillary and infrastructure entities meet the charitable test.

**10. *For organisations, such as religious organisations, that perform a wide spectrum of activities, is it appropriate to define the various activities differently?***

It is not appropriate to define the various activities undertaken by the Church differently. It is a false distinction to claim to separate “core” and “non-core” religious activities carried on by the Church. In respect of the Church’s mission, there is no distinction between the promotion of the Christian message through word and deed. Both “worship, pastoral and religious education services” and the “provision of nursing home services” and so on are forms of promoting that same message. The provision of such basic human goods to others so that they may flourish is not an option for the Church, but is integral and constitutive of its mission. While the particular *form* of that provision may vary according to the needs of the community, the Church would not be fulfilling its mission if it restricted its activities to those characterised as “core activities”.

**11. *Is it appropriate to distinguish between commercial and non-commercial activities undertaken by charities and related organisations?***

It is not appropriate to distinguish between commercial and non-commercial activities undertaken by charities.

Large and highly complex charitable institutions such as the Catholic Church cannot function effectively without a number of internal and supporting infrastructure services such as financial services, superannuation, insurance, telecommunications and bulk-purchasing. These services are provided to support the mission of the Church and a number of specialised bodies have been established to this end. The fact that they must conform to various regulatory regimes, and some must exist to meet statutory requirements, gives rise to the appearance that these bodies are no different to their for-profit counterparts. In fact, the sole purpose of these bodies is to support the charitable aims of the Church. Insofar as there is any perceived ambiguity as to their purpose, government must as a matter of policy ensure that these infrastructure organisations are deemed to meet the charitable test.

**12. *Is there an expectation that charities and related organisations will undertake commercial activities in order to perform their core purpose effectively? How should these activities be defined and should they have a role in determining the definition of the organisation?***

Activities that may appear to be ‘commercial’ (e.g. for the purposes of the GST) and charitable activities are not necessarily mutually exclusive. Church activities that appear commercial, such as the range of infrastructure services, are essentially charitable as they are necessary for the Church’s mission. The sole purpose of these bodies is to support the charitable aims of the Church. Again, insofar as there is any perceived ambiguity as to their purpose, government must as a matter of policy ensure that these infrastructure organisations are deemed to meet the charitable test.

**13. *Is your organisation ‘defined’ as a charity, PBI, religious organisation or community service not-for-profit organisation for the purposes of any law or administrative practice?***

All Catholic Church organisations are defined as charities and some also have Public Benevolent Institution status.

**14. *Is your organisation ‘defined’ differently by different agencies or jurisdictions?***

Much of current case law relating to the definition of charity and Public Benevolent Institution has been informed by an understanding of the various organisations and activities of the Catholic Church in particular and the churches in general. Therefore, there is general consistency in the treatment of Catholic Church agencies.

**15. *If so, does operating under different definitions affect your ability to provide services?***

Some anomalies have occurred when supporting or infrastructure organisations have been established within the Church and there has not been proper recognition of their essentially charitable status.

**16. *Does the current definition of your organisation impose any constraints on the ability of your organisation to provide services?***

Generally no, but on occasions there is discouragement for appropriate updating of organisational structures.

**17. *Does the current definition of your organisation impose any constraints on your ability to adjust your 'attributes, purpose and behaviour' to respond to changing demands?***

As above.

**18. *Do current definitions allow regard to be taken of the social and economic environment that your organisation operates in?***

Generally yes.

**19. *Do the terms 'charity', 'religious organisation' and 'community service not-for-profit organisation' continue to have relevance in the current social and economic environment?***

The term 'charitable organisation' can and, in law, does encompass those identified as charitable, religious and community service not-for-profit organisations. Religious and community service not-for-profit organisations are not separate from charitable organisations but are a subset of them, as they are established for charitable purposes, namely for the provision of basic human goods to others so that they may flourish.

The current approach to identifying charitable organisations (as opposed to the specific nature of their activities) through the application of the common law *Pemsel* test has served the community very well.

The term 'charity' derives from the Latin *caritas*, or love. The continued use of the term charity serves to remind communities and governments of this vital link between Church service provision and its motivation in Christian love. Its relevance, for the Church at least, is fundamental.

**20. *Do the four 'purposes' of charity in the common law continue to have relevance?***

The common law approach has served the Australian community well and should continue to be adopted for the purposes of government policy. This approach identifies charitable organisations by reference to the four purposes set out in the *Pemsel* test. These purposes retain their relevance. The purposes in common law conform closely to the definition of

charity, described in this submission, which identifies charity as necessarily involving the provision of basic human goods to others so that they may flourish.

With changing community perspectives, there may be some social benefit from encouraging policy makers to recognise a greater range of organisations as charitable, such as those which promote care for the environment or advocate for policy change for the benefit of the disadvantaged. Accordingly, the Church recommends that a broader interpretation of what constitutes a charitable purpose under the head of “other purposes beneficial to the community” be developed.

Specifically, the Commonwealth Government should either (a) direct the Australian Taxation Office (‘ATO’) to adopt a broader interpretation of this purpose, or (b) establish within the Government a specialised advisory body, similar to the Charities Consultative Committee, that draws upon experts from the community to make recommendations about charitable status. This agency would have a membership that is able to bring to such decisions a wider variety of considerations and perspectives about the charitable sector and its role in the Australian community.

**21. *Is the concept of PBI of continuing relevance?***

The category of Public Benevolent Institution is of continuing relevance and should be maintained. The determination of Public Benevolent Institution status should be based on the nature of the deprivation that is being addressed by some form of direct good or service provision.

**22. *Is there a place for ‘direct’ assistance to be distinguished from other forms of assistance?***

Again, the Church recognises no distinction in purpose between ‘direct’ and other forms of assistance. All forms of assistance are directed to the one purpose, which is the promotion of religion through word and deed.

**23. *Should the definitions of charitable, religious and community service not-for-profit organisations be left to the courts or enacted in legislation? What are the advantages and disadvantages of the different approaches?***

Allowing the courts to define what constitutes charitable purposes has proven to be remarkably adaptable over many years and has proven to be effective in permitting charitable organisations the flexibility to innovate in response to changing needs and circumstances. The common law approach is also flexible enough to allow new kinds of activity and organisation to be recognised as charitable in light of changing economic and social conditions.

Attempting to define closely by statute what is charitable and what is not may prove far more litigious and give rise to a greater number of disputes, not less. An activity based criteria for the assessment of charitable purposes or statutory restrictions on the range of charitable purposes may appear to provide clarity for the immediate future, but risks stifling the

flexibility and innovation admired and sought after by policy-makers. This approach may also prove far less adaptable over time.

The common law approach has served the Australian community very well. It is strongly recommended that it be left to the evolving common law to determine what kinds of organisations and activities have charitable purposes in specific contexts.

**24. *If your organisation operates overseas, are there any particular issues regarding the definitions used in Australia compared to those in other countries that affect the international activities of your organisation?***

The overseas charitable work of the Church is not impeded by definitional issues in Australia.

**25. *What do you regard as the framework and key criteria that could form the basis for the classification of charitable, religious and community service not-for-profit organisations?***

The current framework should be retained and policy-makers encouraged to develop a broader interpretation of what constitutes a charitable purpose under the head of “other purposes beneficial to the community”. In this way a greater range of organisations may be recognised as charitable to conform with contemporary values, for example, to promote the care and protection of the environment or for advocacy on behalf of the disadvantaged.

Entities that are established to provide necessary infrastructure support services for the Church should also be recognised as charitable. Where there is any perceived ambiguity as to their purpose, government should, as a matter of policy, direct that they be considered as charitable organisations.

A definitional focus on sole or dominant purposes of organisations rather than activities remains the approach most likely to encourage a responsive and flexible charitable sector into the future.

**26. *Do you have a preferred definition of a charitable, religious or community service not-for-profit organisation and, if you believe relevant, PBI?***

The current definitions ought to be retained.

**27. *Would it be desirable to split out different types of activities into separate entities for definitional purposes? What would be the implications of such an approach for your organisation?***

There would be considerable risks to the provision of charitable services if this were to be pursued. The approach of disaggregating various activities is both bureaucratic and likely to stifle responsiveness by charities in meeting community needs.



**28. *Is there anything else you consider to be relevant in developing options for new definitions?***

The Church is *opposed* to using legislation to establish a broader definition of charitable organisations and to the establishment of a Charities Commission similar to the Charity Commission operating in the United Kingdom.

It is likely to be far more effective and efficient to recommend that government develop a broader interpretation of the meaning of “other purposes beneficial to the community” under the Pemsel test, and to direct the ATO to interpret this head of definition more broadly or to establish within government a specialised charitable status advisory body.

## ATTACHMENT ONE

### WHAT IS THE CATHOLIC CHURCH?

#### INTRODUCTION

Numerically, the Catholic Church in Australia represents a quarter of Australia's population. Its various ministries and services extend to all aspects of every day life in Australia. In particular, the Church plays a direct and major role in the education, health, general welfare and spiritual well-being of Australian society.

Structurally, the Catholic Church is organised around geographical areas called dioceses headed by a bishop and further sub-divided into parishes administered by priests. There are 1,421 parishes across Australia. Over and above this structure are those of various self-governing groups, i.e. religious orders, of which there are around 200 operating in Australia (e.g. Sisters of Mercy, Christian Brothers, etc.). In addition to these diocesan and religious groups there are an array of associations of lay people (e.g. Society of St Vincent de Paul, Catholic Women's League, Knights of the Southern Cross) whose operations are not confined to diocesan structures but who do require the approbation of the local bishop to minister within the diocese.

The Catholic Church is a vast and diverse 'entity'. There are 3,290 priests, 7,359 religious sisters and 1,189 religious brothers working in the Church who together with lay personnel, make the Church the largest 'employer' in Australia. These personnel engage in a variety of activities, ministries or apostolates including preaching, sacramental celebration, education, health, welfare and other works that are an outward sign of the Gospel mission of the Church in the modern world. For example, there are 1,749 schools and other educational facilities, 58 hospitals, 306 nursing homes and hostels and approximately 1,100 social welfare organisations operating under the auspice of the Catholic Church in Australia.

The charitable works performed in the name of the Catholic Church are particularly represented by two peak Church bodies known as: the Australian Catholic Bishops' Conference and, the Australian Conference of Leaders of Religious Institutes.

#### **Australian Catholic Bishops' Conference**

The Australian Catholic Bishops' Conference ('ACBC') is the assembly of the Catholic bishops of Australia who come together to cooperatively exercise certain pastoral offices for the people of Australia. The 1983 Code of Canon Law (i.e. the laws governing the operations of the Church) defines bishops' conferences as the forms and the means of the apostolate "to promote, in accordance with the law, that greater good which the Church offers to humankind."

The ACBC has a President, a Central Commission, a number of Bishops' Committees and a General Secretariat. The current President is the Most Rev. Francis Carroll.

In order to assist the bishops interact with an increasingly complex world, the Australian Bishops have established a series of national commissions and associations. The purpose of this commission structure, *inter alia*, is to provide the Church with an effective and efficient national framework to coordinate, advise, interact with, and where necessary to respond to, those areas of most intensive common concern to. The work performed by the national commissions is supervised by a corresponding Bishops' Committee.

Examples of these national structures include Australian Catholic Social Welfare Commission, Caritas Australia, Catholic Health Australia, National Catholic Education Commission. In total there are 22 national organisations with responsibility for specific areas of Church or community life.

### **Australian Conference of Leaders of Religious Institutes**

The Australian Conference of Leaders of Religious Institutes ('ACLRI') purpose is to "promote and support religious life in the Australian Church" and to foster collaboration among its members and other Church bodies in working for Gospel concerns. It is recognised by the Vatican as the official voice for more than 180 of the Religious Orders in Australia

Some of the Religious Orders (also known as 'Institutes') are large in members, e.g. 1,000 or more, but the majority are small with membership below 80 persons. Many of these groups have their headquarters overseas, mainly in Europe or Asia. They live as apostolic Religious, serving others through a multiplicity of works of mercy (e.g. care of the sick, education, spiritual direction, personal development programs, chaplaincy, etc.) or in an enclosed, monastic life providing opportunities to the public for retreats and prayer guidance.

The ACLRI has an elected President, an Executive Committee, various Standing Committees and a Secretariat. Representatives from the ACLRI participate on the ACBC Bishops' Committees and the national commissions and associations. The current President is Br Michael Godfrey cfc.

Besides the national body there are also State-based associations of Religious in direct liaison with ACLRI. They also connect with the Church leadership structures in their dioceses and in their State and with the various State/Territory Governments and civic bodies with whom they may have dealings. ACLRI has a number of Committees made up of both religious and lay people, e.g. its Education Committee represents the concerns of those Orders owning non-systemic schools to the National Catholic Education Commission.

## **GEOGRAPHICAL DIVISIONS OF THE CATHOLIC CHURCH IN AUSTRALIA**

The Catholic Church in Australia is administratively and geographically divided into seven

Archdioceses, and 21 Dioceses that are administered according to Canon Law. The capital cities of the Australian States are Archdioceses, as is the national capital. However, the boundaries of each Archdiocese are by no means restricted to the respective city. For example, in the case of the national capital, the Archdiocese of Canberra-Goulburn includes the Australian Capital Territory and part of New South Wales.

The Archdioceses and Dioceses are gathered into Provinces that, as a general rule, have the same boundaries as the Australian States and Territories. The Provinces are known by the names of those Archdioceses ('Metropolitan Sees') that are central to them, i.e. the Provinces of Sydney, Melbourne, Brisbane, Adelaide and Perth; the Province of Adelaide includes the Diocese of Port Pirie which is partly in the Northern Territory and the Diocese of Darwin, which covers the remainder of the Northern Territory.

The Dioceses within a Province are described as Suffragan. The Archdioceses of Hobart and Canberra-Goulburn have no Suffragan Dioceses, and they collaborate at the Provincial level with the Province of Melbourne and the Province of Sydney respectively.

Each Diocese is under the jurisdiction of a Bishop with the Bishops of Archdioceses having the title of Archbishops. To assist Diocesan Archbishops or Bishops, Auxiliary Bishops (of episcopal or archiepiscopal rank) or teams (clergy, religious and lay people) are sometimes appointed.

There a number of additional administrative divisions of the Church in Australia which cover the whole geographical area and, therefore, are not part of any Province. These are the Diocese of St Maroun of Sydney for Maronite Catholics, the Eparchy (or Diocese) of Sts Peter and Paul of Melbourne for Ukrainian Catholics of the Byzantine Rite, the Melkite Diocese of Sydney for Melkite Catholics and the Military Ordinariate for the Armed Services of Australia. The Archbishops and Bishops of all the Dioceses and the Ordinariates together with the Auxiliary Bishops, constitute the ACBC.

By virtue of this structure, the Catholic Church in Australia is comprised of around 4.8 million adherents to the Catholic faith and ministers directly to the needs of many Australians regardless of their creed.

## **STRUCTURES AND ATTRIBUTES OF THE CATHOLIC CHURCH IN AUSTRALIA**

Historically, the structure and attributes of the Catholic Church in Australia, like other churches, were relatively uncomplicated. Over time, as the social and economic environment of Australia has become increasingly complex, all churches have had to adapt to this changing environment and the increasing prescriptions required by civil legislation and institutional requirements. Hence, the structures, attributes and behaviour of churches have likewise become more complex and have, at times, been the cause of churches mistakenly being identified as institutions similar to secular commercial entities. The reality, however, is far from this misconception.

The changing nature of society and the commercial reality which this brings has dictated a need for the Catholic Church to create separately incorporated entities to carry out its broad range of charitable activities. The conduct of the Church's mission in the modern environment has necessitated it to establish itself in ways mandated by statutory and regulatory provisions in order to allow it to interact with secular institutions. For example, the regulatory environment created by the Australian Securities and Investment Commission has made it absolutely necessary for the Church to organise its activities in such a way that these comply with the regulations and the requirements that principally have been designed for the activities conducted by commercial entities.

Today, the charitable works of the Church are carried out by a complex conglomerate of organisations including, but not limited to, archdioceses, dioceses, Religious Orders, a number of national bodies created by the ACBC, the ACLRI and other legitimate Church bodies. In complying to external regulatory forces, the Church has had to develop and establish such intra-Church structures in order to conduct its wide spectrum of activities in the most efficient and effective manner.

All of the organisations created by the Church have a clear and direct charitable purpose. A very small number of these organisations, such as the Church's insurance and development facilities, provide the necessary support to perform the works of the Church by providing normal ancillary support services and functions.

These entities are an integral part of the wider charitable Church. They provide direct assistance mainly to members of the Church rather than to the general public (e.g. Catholic Church Insurance provides accident insurance for children attending Catholic schools). The Catholic Church does not operate as a business in any sense as defined under the Competition Principles Agreement<sup>25</sup>. All Catholic Church organisations are registered as charities under the new taxation requirements for the Goods and Services Tax. The Australian Taxation Office, in recognition of the Church's charitable status, has agreed to the creation of a GST Church Grouping for GST purposes. There are 4,577 Catholic Church organisations as part of this GST Group.

### **Charitable Works of the Catholic Church**

As stated in Part One of this submission, once the nature of the term 'charity' is identified, it can be used to determine whether particular institutions or entities are 'charitable' by their very nature.

The Catholic Church is a body established for the purpose of promoting religion. Its mission is to preach the Good News of Jesus Christ both in word and in deed. Those who accept the Christian message also accept the responsibility of participating in that very same mission which led them to faith.

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<sup>25</sup> National Competition Council. (1997) *Competitive neutrality reform: Issues in implementing Clause 3 of the Competition Principles Agreement*. Commonwealth of Australia: AGPS.

All the organisations of the Church are directed to this end, to the promotion of basic good of religion. There is nothing the Church does that does not have this as its sole or dominant purpose, whether it be running worship services for parishioners or operating schools and hospitals and welfare agencies. Many of the Church's organisations established to operate these services could be considered charitable in their own right as they provide basic goods such as health services, knowledge (education), employment opportunities, emotional counselling, shelter, clothing, etc.

Such activities are doubly charitable because they also have the purpose of promoting religion through action.

There are other organisations within the Church whose activity is essentially supportive of the mission of the Church if not directly engaged in its evangelising mission. Organisations that provide necessary financial, administrative and other ancillary services to support the purpose of the Church are essentially religious organisations. That is, organisations established for the purpose of promoting religion.

When an organisation of the Church runs its annual fete or raffle, or invests its savings to generate income, or engages in commercial-like enterprises in order to raise money that will be used to keep the 'overt' charitable operations of the Church viable, then these activities are essentially religious<sup>26</sup>. All funds raised by the Church are used for charitable purposes. The Church is not a business and there are no dividends paid to individuals within the Church. Hence, these enterprises are purely instrumental to the charitable purposes and activities of the Church.

The Australian Catholic Church Tax Working Party therefore submits that all the organisations that are officially recognised as organisations of the Catholic Church in Australia should, by their very nature as organisations directed to the purpose of promoting the Christian message as taught by the Catholic Church, be seen as organisations established for the promotion of religion, and therefore charitable.

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<sup>26</sup> OLRC, Ch.6.