



# AUSTRALIAN CATHOLIC BISHOPS CONFERENCE

## General Secretariat

3 May 2013

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Indirect Philanthropy and Resource Tax Division  
The Treasury  
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PARKES ACT 2600  
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Dear Sir/Madam

### **Consultation on a Statutory Definition of Charity**

The Australian Catholic Bishops Conference (ACBC) is a permanent institution of the Catholic Church in Australia and the instrumentality used by the Australian Catholic Bishops to act nationally and address issues of national significance.

The Catholic Church contributes in a wide variety of ways across the spectrum of Australian society. As an integral part of its core mission, the Church seeks to assist people experience the fullness of life. It is concerned with all that impacts on human wellbeing. It comprises many thousands of different entities which have different purposes and modes of governance.

The ACBC appreciates the opportunity to comment on the proposed statutory definition of charity.

The ACBC acknowledges that the legislation is following closely the current common law relating to the definition of charity and we are supportive of that approach. One area of uncertainty, however, relates to the question of how the common law will be taken into account in the future. A comment in the Explanatory Memorandum clarifying the policy intent, that this legislation is not intended as a complete codification of the common law, would be helpful. For example, there should continue to be scope for the Courts to interpret the key principles in the legislation and adapt them appropriately to changing circumstances over time, as has been the hallmark of the common law to date.

The ACBC is supportive of the extension of the definition to those areas of activity that are of social benefit that are now explicitly mentioned in section 11.

The ACBC notes the proposal to repeal the specific legislation relating to closed or contemplative orders and the inclusion of the substance of that legislation in this legislation.

There has been some comment within the sector about the possible difference in scope between “advancing” as used in the legislation and “advancement” as used in the case law. If it is intended that there be a difference this should be acknowledged and explained. Otherwise the current language of “advancement” may be preferable.

### **Presumption of public benefit**

The ACBC welcomes the fact that the presumption of public benefit is retained in clause 6(2)(a) for what the Explanatory Memorandum describes as “... spiritual benefits derived from the activities of religious organisations.” All organisations recognized as organisations fulfilling the essential purposes of a religious organisation should, by their very nature of promoting the spiritual wellbeing of people, be seen as organisations advancing religion and therefore charitable.

### **Purposes for the public benefit**

Clause 6(2)(b) of the bill states that for the purposes of the legislation “disregard any benefit that is not identifiable.” The ACBC proposes these words be deleted as it is not clear how anyone could have any knowledge of an unidentifiable benefit.

Clause 6(3)(b) refers to a possible detriment to an individual member of the general public. This reference should be deleted because it will invite any number of people to seek to gain notoriety by claiming that they are suffering some detriment. To a lesser extent this may also occur with “sections of the public” which may be a group with some antipathy to a particular charity, eg on religious or racial or other ideological grounds, and likewise seek notoriety by challenging registration. Consideration should be given to limiting this section to the more general assessment of benefit to the public.

The wording that seeks to balance benefit and detriment is unclear. It is very difficult to know how to objectively balance possible benefits and possible detriment. There is no indication of the criteria that will be used to accord the respective weighting. The common law approach involves assessing benefits within a context that may also involve some detriments. A specific reference to detriments in this legislation, however, appears to go further and involve a process for identifying benefits and detriments, even to a section of the public, and then undertake the assessment of relative weight of benefits and detriments. Some guidance as to how this will now occur would be helpful.

Section 6(3)(a)(i) refers to benefits to owners and members. This may need some qualification to exclude owners or members that are themselves charities and control the particular entity. This is connected with other comments the ACBC has made with respect to the “not for profit” definition in other legislation. It may happen that a group of charities

establish a charity for a specific purpose and upon winding up they would receive the benefit of any surpluses that have accrued from the specific charitable activity they owned.

This section is problematic in the context of large charities with many members, for instance, churches, where the beneficiary (as a participant in a programme relating to relief of poverty) also happens to be a member of the charity. It should be qualified to cover only cases where it is in the capacity as a member that the benefit is accrued. It should also be made clear that this does not cover reasonable reimbursement for services rendered.

### **Infrastructure entities**

During consultation in 2011 on the definition of charity the ACBC pointed out that the consultation paper did not address or refer in any way to the issue of how entities, created to support the work of charitable entities, should be treated. These are the entities covered by the Australian Taxation Office's Tax Ruling 2005/22 and the 2011 addendum and might usefully be described as "infrastructure entities".

Best practice in modern governance of charitable organisations often requires that direct and supporting activities be housed in connected, but separate, organisations. For example, a church or other charity may have a dedicated entity to manage property allowing the entity directly delivering a charitable service to focus on its core activity, such as education or services for the homeless.

The Explanatory Memorandum should deal with this issue explicitly so the Government's approach to these organisations is clear. These organisations are supportive of the mission of the charity or group of charities that have established them and control their activities. These entities provide the necessary practical, financial and administrative services to support the purpose of the charity. The ACBC believes these infrastructure entities, providing such things as equipment or financial services, should be accepted as charities because they form an integral part of and are supportive of the charitable purposes of the entities which have established and control them.

We understand that Treasury Officials are agreeable to this approach and that the policy intent is that the position in TR 2005/22 and the addendum is not affected by the legislation.

### **Other Drafting comments**

Section 9(1) (a) and its relationship to Sections 9(1) (d) and (e) is not clear and could be further explained.

Section 10(b) should be amended by omitting a reference to "a candidate". It may happen that a particular candidate states a policy position that is precisely contrary to the purposes of a charity and this will invite disputation about the application of the sub-section.

The drafting of section 11(1)(l) and section 11(2) is not clear as to the policy intent and application and could be given further attention in the Explanatory Memorandum.

More generally on “disqualifying purpose” in section 10(b), the ACBC considers it important that the legislation does not restrict a charity from engaging in a debate about appropriate policy to achieve outcomes which are considered to be for the public welfare. From time to time, entities within the ACBC may publish critiques of policies of particular political parties as a means of informing Catholics and the public and contributing to healthy debate about proposed initiatives, particularly when they may have adverse impacts on the mission of the entity. Such activities should not be restricted but we are concerned that the inclusion of section 10(b) may have that effect through uncertain application. Further, section 10(a) seems to be unnecessary given its self-evident status. In the circumstances, the legislation would fulfil its objective of codification better if section 10 was removed. Alternatively, if it is retained, the comment in the Explanatory Memorandum at paragraph 1.81 should be included as a note in the text of the legislation.

I would welcome the opportunity to provide further information as may be required.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Rev Brian Lucas', written in a cursive style.

Rev Brian Lucas  
General Secretary