

9 December 2011

Mr C Leggett
Manager, Philanthropy and Exemptions Unit
The Treasury
Langton Crescent
PARKES ACT 2600

By email: NFPReform@treasury.gov.au

Dear Mr Leggett,

Definition of Charity – Consultation Paper

PilchConnect appreciates the opportunity to respond to the 'A Definition of Charity - Consultation Paper' (the **Consultation Paper**). The introduction of a modernised statutory definition has been a law reform campaign priority for PilchConnect since its inception in 2008.

One of our most common requests from our clients is assistance to understand (and access) charitable tax concessions.ⁱ Clearly the definition of charity is pivotal to most of these concessions. Therefore we are concerned to ensure that any restatement of charitable purposes promotes clarity and accessibility for the not-for-profit (**NFP**) sector. In our view, it should be possible for a non-lawyer to ascertain from reading the legislation if the NFP they are involved with is clearly eligible for charity status. While specialist charity law advice will always be necessary for those at the margins of the definitions, the need to pay for legal assistance for those which are clearly eligible diverts scarce financial resources away from NFP service delivery. For many small groups, the lack of clarity also means they do not obtain the concessions they are eligible for.

We refer the Treasury to the submission prepared by the University of Melbourne Law School's Not-for-Profit Project (**Melbourne University**) for a detailed analysis of the issues. We acknowledge their excellent research work and note that we enjoy an active collaboration with them (via their membership of PILCH and our membership of their NFP Project consultative reference group).

PilchConnect endorses the recommendations made by Melbourne University in its submission to the Consultation Paperⁱⁱ and we urge the Treasury to recommend their implementation. In particular, we recommend:

1. there should be a 'restatement and clarification' approach to the new statutory definition of charity through a legislative definition that is both clear and flexible and is backed by practical explanatory and guidance material from the Australian Charities and Not-for-profits Commission (**ACNC**);

2. a charity must have charitable purposes only, but we recommend, for the avoidance of doubt, that 'charitable purpose or purposes' be defined as including purposes that further, or are in aid of, or incidental, or ancillary, to its charitable purpose or purposes;
3. the list of charitable purposes proposed by Melbourne University should be adopted, in particular the following should be specifically listed
 - the advancement of civil or human rights
 - the advancement of citizenship or community development
 - the advancement of social or community welfare
 - the advancement of the natural environment
 - the advancement of animal welfarewith a residual category of 'any other purposes beneficial to the community' to ensure flexibility;
4. the legislative definition of charity should clarify the charitable status of peak bodies;
5. 'section of the public' should be expanded to expressly include Indigenous, ethnic and cultural minorities;
6. the presumption of public benefit should be retained across all legislated heads of charity, except for the residual category of 'other purposes beneficial to the community';
7. education and compliance initiatives of the ACNC should be specifically focused around the provision of accessible information, guidance materials and technologies to assist NFPs to understand their obligations (including an online and telephone advice services);
8. activities should not be included in the statutory definition of charity, except to say that they are relevant for assessing if an institution is acting for charitable purposes at any point in time;
9. there should be no reference in the definition to prohibiting 'political' or other causes;
10. harmonisation of the definition of charity and charitable purposes across all Australian governments (local, state, territory and federal) should be a high priority as a means of reducing red tape; governments should only carve out specific types of charitable groups or add additional eligibility criteria where there is sound policy reason to do so; and
11. recurrent core federal government funding should be provided to peak and other sector-based support services to assist NFPs to understand the new definition of charity and other federal NFP reforms such as the role of the ACNC and any new governance requirements.

PilchConnect highlights these as key issues of concern to our client base – small to medium NFPs which are heavily reliant on volunteers and struggle to afford or otherwise access professional assistance on regulatory matters. As this submission is targeted to these issues, we have not separately addressed all the questions raised in the Consultation Paper.

About PilchConnect

PilchConnect is a service of the Public Interest Law Clearing House (Vic) Inc – an independent, specialist community legal service. PilchConnect provides NFPs with access to free or low cost, high quality, practical and plain language legal help (information, advice and training). We support small to medium NFP community organisations to be better run. By being better run they are more likely to achieve their mission, and trust and confidence in the NFP sector is likely to be improved. By supporting NFPs in this way, we aim to contribute to a better civil society with more connected communities.

We fill a niche role, sitting between regulators and the private legal profession. If those involved in running an NFP are not sure about how to comply or realise they have not complied with the law, they will often tell us with a view to rectifying the situation, whereas they would be concerned about approaching a regulator. As an independent, sector-based intermediary they know we will understand the practical constraints they operate under. We often help them work out if they really do have a legal problem, how serious it is and what are the possible next steps (including approaching the regulator). We help those NFPs which cannot afford or otherwise access private legal advice.

Our law reform work is based on empirical evidence and practical examples drawn from our legal inquiry, advice and case work. Our service is unique within Australia.

Policy context

The Consultation Paper comes at a time of other significant reforms to regulatory arrangements for NFPs, including the establishment of the ACNC. Importantly, the Federal Government has committed to wide-ranging NFP regulatory reform with the aim of delivering smarter regulation for the sector, removing regulatory complexity and duplication, and reducing red tape. We applaud these overarching policy objectives and urge that they be at the forefront of assessing and formulating the new statutory definition of charity.

A statutory definition of charity is long overdue, having been considered in detail in the 2001 Inquiry into the Definition of Charities and Related Organisations (**2001 Charity Definition Inquiry**), and subsequently endorsed by multiple reviews and inquiries. In 2010 alone, there were two major Government reviews that recommended the establishment of an independent regulatory body and the adoption of a statutory definition of charity in line with the 2001 Charity Definition Inquiryⁱⁱⁱ.

The Consultation Paper indicates that the Charities Bill 2003 is 'broadly consistent with' Recommendation 7.1 of the Productivity Commission Final Report which, in turn, recommends that a statutory definition be adopted in line with the 2001 Charity Definition Inquiry.^{iv} However, it is important to note that the adoption of the Charities Bill 2003 would not implement recommendation 7.1 of the Productivity Commission Report – there are numerous and significant differences between the Charities Bill 2003 definition and the recommendations of the 2001 Charity Definition Inquiry.^v

PilchConnect endorses the recommendations made by Melbourne University in its submission to the Consultation Paper and we urge the Treasury recommend their implementation. The following is a discussion of the 11 key points we have highlighted above.

1. **New definition should restate and clarify**

In our view it should be possible for a non-lawyer to ascertain from reading the legislation whether it is at least likely that the NFP they are involved with is a charity (and therefore eligible for the tax concessions) without the need for specialist charity law advice. While legal advice will always be necessary for those at the margins of the definitions, the need to pay for legal assistance for those that are clearly 'in' diverts scarce financial resources away from NFP service delivery. For many small groups, the lack of clarity also means they do not obtain the concessions they are eligible for.

We recommend that there should be a 'restatement and clarification' approach to the new statutory definition of charity through a legislative definition that is both clear and flexible and is backed by practical explanatory and guidance material from the ACNC.

2. **The 'dominant purpose' requirement (Consultation Paper, question 1)**

PilchConnect agrees with Melbourne University that the definition should state that a charity must (except as provided below), have 'charitable purposes'. As explained by the Melbourne University submission,^{vi} the legislation should expressly state that non-charitable purposes which further, or are in aid of or incidental or ancillary to its charitable purpose or purposes, do not violate this requirement.

We acknowledge that a 'dominant purpose' requirement creates an impression that non-charitable purposes are permissible, as long as they are outweighed by those that are charitable. Conversely, a 'sole' or 'only' purpose test has the potential to go too far the other way, leading some organisations to a conclusion that no incidental or ancillary purposes may be present if, in their own right, they are not charitable.

For clarity, we recommend:

- **a charitable institution must have charitable purpose or purposes; and**
- **'charitable purpose or purposes' should be defined as including purposes that further, or are in aid of or incidental or ancillary, to its charitable purpose or purposes.**

3. **Including a list of charitable purposes (Consultation Paper, questions 16 & 17)**

In our experience, the current common law definition of 'charitable purposes' is archaic and confusing. NFPs spend substantial amounts of time and incalculable funds (including on legal advice) trying to understand whether they fit into certain categories and in some instances inappropriately skewing their activities to do so.^{vii}

PilchConnect considers the formulation of a statutory definition of charity is an important opportunity to provide clarity to a broad range of organisations. To this end a comprehensive list of the most common charitable purposes should be included in the definition.

Broadly, PilchConnect endorses the list of charitable purposes as set out in the Melbourne University submission.^{viii} In particular, we support the inclusion of the following heads of charity, which are of particular relevance to the organisations we assist:

- **the advancement of civil or human rights;**
- **the advancement of citizenship or community development;**
- **the advancement of social or community welfare;**
- **the advancement of the natural environment;**
- **the advancement of animal welfare; and**
- **a residual category of “any other purposes beneficial to the community” to ensure flexibility.**

In line with our comments under heading 1 above, expanding the statutory list of charitable purposes in this way and including the ‘other purposes’ limb, provides clarity and ensures flexibility and consistency with community expectations.

We note the importance of limiting proposed heads of charity to altruistic motives and accepted notions of ‘charity’. We believe this is a matter addressed by the ‘public benefit’ requirement, particularly given that the ACNC will be specifically tasked with its assessment and monitoring. It will be important for the ACNC to provide clear guidance and direction on charitable purposes, however defined in the proposed legislation.

The Consultation Paper (at paragraph 125) queries whether the term ‘advancement’ in proposed legislation ought to be clarified to reflect that current law considers this to include ‘prevention’. We submit that the inclusion of ‘prevention’, a negative term, in a legislative definition of ‘advancement’ has the potential to create uncertainty and confusion.

We recommend the definition of advancement include references to those matters included in clause 10(2) of the 2003 Charities Bill – protection, maintenance, support, research or improvement – with the addition of indirect advancement of a charitable purpose through means such as the generation of public debate and advocacy. For those heads of charity requiring ‘prevention’, we submit that this ought to be expressed within the relevant subsection, as is the approach adopted by Melbourne University.

4. Peak bodies (Consultation Paper, question 2)

PilchConnect assists many small, volunteer-run organisations who individually lack the necessary resources to independently achieve outcomes that impact their particular sector as a whole. To leverage their impact and contribution, and enhance their sustainability, many of these small organisations elect to belong to a peak body. A peak body in the NFP sector (for example, for community service organisations) quintessentially operates for the benefit of its members – who are themselves NFP organisations. Currently, a peak body is not precluded from operating for the gain or benefit of its members (who are charitable entities) or entities furthering the charitable purposes of the peak body itself.

Noting the Consultation Paper's reference to the 2003 decision of the NSW Administrative Decisions Tribunal, PilchConnect agrees with Melbourne University that it is preferable to clarify the charitable status of peak bodies within the statutory definition. It is not sufficient to rely on the decision of a state tribunal that is fact-specific.^{ix}

We recommend that this could be achieved by express reference to the charitable purpose of advancing volunteering, the voluntary sector, and the effectiveness and efficiency of charities, which is included in the list suggested by Melbourne University.^x

5. Beneficiaries with family ties and benefit to a 'sufficient section of the public' (Consultation Paper, question 4)

PilchConnect agrees with Melbourne University that 'section of the public' should include Indigenous, ethnic and cultural minorities. This would greatly enhance clarity for organisations which seek to further the development and other interests of such communities.

In line with the Melbourne University submission, PilchConnect recommends that the definition of public benefit should provide that the purpose of a trust, society, or institution is a charitable purpose if it would satisfy the public benefit requirement apart from the fact that the beneficiaries of the trust, or the members of the society or institution, are related by blood. The definition should further specify that prescribed corporate bodies under the Native Title Act 1993 (Cth) are charitable.^{xi}

6. Removal of the 'public benefit' presumption (Consultation Paper, question 7)

PilchConnect has concerns about removing the 'public benefit' presumption, particularly at a time when a new national regulator is finding its feet. PilchConnect considers that, in addition to the compliance burden on the NFP sector, removing the public benefit presumption will create significant additional duties for the ACNC, which it would in turn require further funding and resources to discharge.

We note that although under Australian common law public benefit is 'presumed' for those falling under the relief of poverty, advancement of education and advancement of religion heads of charity, it is possible for the contrary to be proved (namely, for the presumption to be overcome).^{xii} In this regard, we refer to a previous submission by Dr Matthew Turnour where he explains in some detail that the common law definition of charity already has the ability to exclude organisations pursuing purposes that are illegal or against public policy.^{xiii}

The presumption of public benefit may also be overcome if there is new evidence that the nature of the organisation's practices and its accessibility to the public are such that any benefits can be determined to be of a 'personal' as opposed to a 'public' nature.^{xiv}

PilchConnect acknowledges that the underlying policy objective for removing the public interest presumption is to enhance transparency and accountability, in turn, boosting public confidence. However if the presumption remains, public confidence in the sector can still be promoted, and concerns regarding whether an organisation meets the public interest requirement at any point in time, can be alleviated to some extent by annual reporting obligations and compliance monitoring by the ACNC.

PilchConnect notes that a key benefit offered by the establishment of an independent regulator is the establishment and maintenance of a centralised reporting portal for NFPs. Information will be collated by the ACNC and held on a publically accessible database. The reporting model needs to be tailored to minimise the compliance burden while enhancing transparency and accountability in the sector. We suggest a tiered annual reporting model whereby:

- small charitable organisations would be required to report only basic information, such as a description of its purposes and activities during the year; and
- larger charitable organisations would be required to formulate how they have contributed to the public benefit.

Further, any unintended consequences which may arise as a result of expanding the heads of charitable purposes and retaining the presumption of public benefit could be appropriately and effectively addressed by the ACNC's own internal processes. For example, the ACNC could adopt guidelines for its staff which require a closer examination of whether the presumption is in fact rebutted where an organisation seeks endorsement under certain heads of charitable purposes (for example, a closer examination of the benefit to the public may be appropriate in respect of the 'advancement of industry or commerce' head).

We note that the ACNC will require adequate funding and powers to remove, review or refuse an organisation's charitable status where there is no public benefit. However, in our view, the resources (and funding) required for the ACNC to review (or refuse to register) an organisation where a 'red flag' has been raised, would be substantially less than, in all likelihood, the resources required to review each and every organisation if the presumption is removed altogether.

In line with the Melbourne University submission, PilchConnect recommends that if the presumptions of public benefit be retained and they should apply equally to all the listed instances of charitable purposes, excepting the residual category of ‘other purposes beneficial to the community’.

7. Role of the common law and the regulator in providing guidance on the meaning of public benefit (Consultation Paper, question 8)

PilchConnect considers the role of the ACNC in working with and guiding the NFP sector will be of critical importance. While PilchConnect supports the creation of a national regulator with real enforcement powers and a presence and influence in the sector, it cautions against the creation of a regulator focused on a heavy handed deterrence model of regulation that seeks to ‘police’ the sector.

Unlike companies, NFPs are mission-driven, not profit-driven and are more likely to react to regulation as social actors and responsible citizens. From our experience assisting the Victorian NFP sector, failure to comply with regulatory requirements is seldom motivated by calculated self-interest. Rather, it is nearly always the result of a lack of knowledge or confusion about the complexity of the current regulatory regime and how to comply with applicable laws.

In line with the Melbourne University submission, PilchConnect recommends that the ACNC be required to provide further guidance on the test of public benefit.

Finally, PilchConnect considers that the courts will always have a role in defining charities, we suggest that this role should be minimal and only called upon when the scope of the definition is called into question. The Charity Commission of England and Wales’ test cases on charitable status demonstrate that courts still have a role, however this has been lessened by the legislative definition and regulator’s proactive stance on providing certainty and clarity.

8. Requirement that activities be in furtherance or in aid of its charitable purposes (Consultation Paper, question 11)

PilchConnect refers to the Melbourne University submission which adopts the position that ‘activities’ should not be referred to in the statutory definition.^{xv}

If there is to be reference to activities, we think this should be limited to a provision which clarifies when the activities of an organisation will be relevant to determining whether it continues to operate as a charity. It is a charity’s activities that will attract public attention and any complaints, so there needs to be legislative clarity on this point. PilchConnect would support the adoption of a provision which recognises that activities will only be relevant to the extent that they assist in determining whether or not an organisation is carrying out its charitable purposes at any point in time.

We note that undertaking activities which are not in furtherance of relevant charitable purposes is often a governance issue. Such conduct should not give rise to a loss of charitable status. It may be

appropriate to impose a fine or other penalty in such circumstances. Further, in PilchConnect's experience, the activity in question is often likely to be in furtherance of a charitable purpose, just not one which is prescribed by the entity's constituent documents. For example, a charity set up to provide nursing services to disabled people in a particular catchment, may over time expand to help disabled people by providing transport and meals outside of its originally stated area. In this example, the organisation is carrying on activities which are not in furtherance of the charitable purposes, but clearly it should not cease to be a charity as a result of an expansion in activities of this nature.

We recommend that, while activities are useful in assessing an institution against its charitable purposes at any point in time, it ought not to be included in the statutory definition of charity, except to say that it is only relevant for this purpose.

9. Engaging in political activities (Consultation Paper, questions 12 & 13)

In the seminal decision of *Aid/Watch Incorporated v Commissioner of Taxation* [2010] HCA 42 the High Court emphasised that:

...the provisions of the Constitution mandate a system of representative and responsible government... Communication between electors and legislators and the officers of the executive, and between electors themselves, on matters of government and politics is "an indisputable incident" of that constitutional system...it is the operation of these constitutional process which contribute to public welfare.^{xvi}

Charities in particular are often representative of the marginalised and disadvantaged members of society who face considerable barriers to engaging in political debate. Charities are often at the forefront of issues in relation to systemic wrongs and public importance or issues involving the rights or obligations affecting the community or a significant sector of the community. PilchConnect submits that the proposed changes to the Charities Bill 2003, as outlined in the Consultation Paper do not reflect the principles of the *Aid/Watch* decision or sound policy.

In line with the Melbourne University submission,^{xvii} PilchConnect recommends that the statutory definition should not include clause 8 of the Exposure Draft of the Charities Bill 2003 (Cth), or any other express reference to political purposes or activities. In any event, there should be no reference whatsoever prohibiting 'political' or other causes.

10. Harmonisation (Consultation Paper question 18)

There are 15 Commonwealth Acts and 163 State and Territory Acts under which entitlement to a benefit or some other legal outcome turns on the charitable purpose or status of an organisation.^{xviii} This has led to duplication of processes, inconsistencies and increased administrative burden on charities and the regulators.

PilchConnect recommends harmonisation of the definition of charity across all federal, state and local government laws.

However care needs to be taken when seeking to facilitate a harmonised definition of charity and the potential repercussions need to be properly evaluated. For example, a benefit derived under legislation may currently be available if the relevant organisation meets charitable or other criteria. Following the adoption of the statutory definition of charity, these other criteria may need to be expressly prescribed in order to preserve the benefit for all the organisations in respect of which it was originally intended to benefit.

PilchConnect recommends that all Australian governments should only carve out specific types charitable groups from the applicable legislation, or add additional eligibility criteria, where there is sound policy reason to do so.

11. Transitional issues (Consultation Paper question 20)

PilchConnect recognises the important role the ACNC will play in facilitating access to information and advice for NFPs on registration and on-going obligations and compliance. However, we believe that ‘intermediaries’ such as peak bodies and sector-based support services are best placed to provide tailored advice and training to NFPs.

PilchConnect recommends that:

- **education and compliance initiatives of the ACNC be specifically focused around the provision of accessible information, guidance material and technologies to assist NFPs to understand their obligations (including both an online and telephone advice service); and**
- **additional government funding be made available for peak and other sector-based support services to assist NFPs in meeting their compliance obligations, promote good governance and to promote understanding of the ACNC and its role.^{xix}**

Conclusion

The introduction of a statutory definition of charity has the potential to remove regulatory complexity and duplication. If all Australian governments adopt the same definition and accept a charity ‘passport’ from the ACNC, this change could significantly reduce red tape. This would allow charities to preserve scarce volunteer and financial resources for activities and services that benefit disadvantaged and vulnerable Australians.

Endorsements

The Human Rights Law Centre endorses the PilchConnect submission.

We would be happy to discuss our submission with you.

Yours sincerely,



Sue Woodward
Director: PilchConnect

sue.woodward@pilch.org.au

phone (03) 8636 4430



Sarah Shnider
Secondee Lawyer

sarah.shnider@pilch.org.au

phone (03) 8636 4400

Endnotes

- ⁱ See the case study of the Post-Polio Victoria Inc in the PILCH 2010-11 Annual Report <http://www.pilch.org.au/annualreport2011/> – by attending training, reading web portal materials and receiving telephone advice from PilchConnect, this small volunteer-run group were able to obtain DGR status despite having considerable difficulty working out the ‘right box’.
- ⁱⁱ See <http://tax.law.unimelb.edu.au/index.cfm?objectid=053E24C1-B048-8204-A721A46DFB996924#Publications>
- ⁱⁱⁱ See recommendations 6.5 and 7.1 of Productivity Commission Research Report on the Contribution of the Not-For-Profit Sector (Productivity Commission Report); recommendation 41 of the Henry Tax Review.
- ^{iv} See paragraph 41 of the Consultation Paper.
- ^v For example the 2001 Charity Definition Inquiry recommended a complete restructure into three distinct categories, being Benevolent Charities, Charities and Altruistic Community Organisations.
- ^{vi} See section titled ‘Dominant Purpose (Question 1)’.
- ^{vii} See Productivity Commission Final Report at p 164.
- ^{viii} See Melbourne University Submission Recommendation
- ^{ix} See section titled “Peak Bodies (question 2)”
- ^x See Melbourne University Submission Recommendation 1
- ^{xi} Recommendation 10 of Melbourne University
- ^{xii} See p. 1, Submission no. 47 to the Tax Laws Amendment (Public Benefit Test) Bill 2010 Inquiry by the Melbourne University.
- ^{xiii} See p.7, Submission no. 1 to the Tax Laws Amendment (Public Benefit Test) Bill 2010 Inquiry by Dr Matthew Turnour, and ATO Ruling TR2011/4
- ^{xiv} In this regard we note that the Church of Scientology was denied charitable status in the UK in 1999, seven years before a legislative public benefit test was introduced in that jurisdiction. In forming this view, the Charity Commission of England and Wales concluded that because of the private conduct and nature of the Church of Scientology’s practices, together with their general lack of accessibility, meant that the benefits were of a personal as opposed to a public nature and therefore not within the common law meaning of charitable. We understand that should this particular determination need to be reconsidered, the Commission does not believe it would need to rely on the new statutory requirement to prove public benefit. See Charity Commission of England and Wales decision of the Commissioners: <http://www.charitycommission.gov.uk/library/start/cosfulldoc.pdf>
- ^{xv} See Recommendation 13 of the Melbourne University submission.
- ^{xvi} At [44] – [45].
- ^{xvii} See Recommendation 14 of the Melbourne University submission.
- ^{xviii} See National Roundtable of Nonprofit Organisations The assessment of charitable status in Australia, November 2007: http://www.aph.gov.au/senate/committee/economics_cte/charities_08/submissions/sub170c.pdf
- ^{xix} See PilchConnect Submission, A ‘one stop shop’ opportunity for better not-for profit regulation, February 2011, Section 8.