Submission

on the

Tax Laws Amendment (Public Benefit Test) Bill 2010

to the

Senate Economics Committee

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1. Introduction

On 13 May 2010 the Senate referred the *Tax Laws Amendment (Public Benefit Test) Bill 2010* to the Senate Economics Committee for inquiry and report. The Bill is a private senator's bill introduced by Senator Nick Xenophon.

The *Tax Laws Amendment (Public Benefit Test) Bill 2010* would amend the tax laws to require that religious and charitable institutions meet a public benefit test to justify their exemption from taxation.

Public submissions have been invited by the committee and are due by 18 June 2010. The committee is due to report on 31 August 2010.

2. The current law

The *Income Tax Assessment Act 1997* provides that the total ordinary and statutory income of religious institutions is exempt from income tax.[1]

The income of charitable institutions is exempt from income tax only if the institution applies for exemption and is endorsed by the Commissioner for Taxation.[2]

Religious institutions do not need to apply for endorsement; they are exempt from income tax whether or not they are charities. However, most religious institutions in Australia will also be charities because they engage in the advancement of religion which is, by common law, considered to be a charitable purpose.[3]

Whether or not an entity is a 'charitable institution' for the purposes of the *Income Tax Assessment Act 1997* is a question of common law.

Australian law continues to apply the classic definition of charity formulated by Lord Macnaghten in 1891:

> *"'Charity' in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads."* [4]

As the Full Federal Court observed in 2009: "*A common requirement underlies these categories; for a purpose to be charitable it must be able to be construed by the Court as being for the public benefit.*"[5]

The Commissioner of Taxation, in determining whether or not an entity which applies for endorsement as a charitable institution is by law a charitable institution, already is required to apply a public benefit test as developed by the case law.

A useful summary of the case law is given in the 2001 report of the Charities Definition Inquiry:

> *The following summary of principles regarding the interpretation of 'public benefit' have* [sic] *been established through the common law:*
>
> > *• The object or purpose must be beneficial in itself, that is, it must be aimed at achieving a universal or common good; by definition, a purpose cannot be beneficial if it is harmful to the public.*

> • *'Benefit' is not limited to the delivery of material benefits, but can extend to include social, mental and spiritual benefits. However, it has been held by the courts that a basic requirement of a charitable gift is that it must be seen to have practical utility.*
>
> • *The 'public' is taken to mean the general community or a 'sufficient section of it'. This has been given clearer meaning through what has become known as the Compton/Oppenheim test, which indicates that the number of potential beneficiaries of a charity must not be numerically negligible, and there must be no personal relationship between the beneficiaries and any named person or persons.*
>
> *While the public benefit test applies across all four heads of charity, there is a general presumption that, prima facie, the element of public benefit is satisfied in the case of purposes falling under the first three heads of charity ('relief of poverty', 'advancement of education' and 'advancement of religion'). For purposes falling under the fourth head ('other purposes beneficial to the community') the element of public benefit needs to be expressly demonstrated.*[6]

3. New public benefit test

The Bill would require the making of regulations to formulate a public benefit test "against which the aims and activities of an entity may be assessed".

The public benefit test established by the regulations would be required to include three key principles:

> *(a) there must be an identifiable benefit arising from the aims and activities of an entity;*
>
> *(b) the benefit must be balanced against any detriment or harm;*
>
> *(c) the benefit must be to the public or a significant section of the public, and not merely to individuals with a material connection to the entity.*

There is a danger that in attempting to replace the common law by statute the accumulated results of centuries of case law is replaced by a legal clean slate. There is therefore likely to be more litigation before it becomes clear whether and to what extent the proposed new principles differ from the common law.

This point was made by the British government in relation to reforms to charities law proposed in 2002:

> *It is not the aim of this reform to do away with existing case law. Removing all reference to existing case law would create significant uncertainty for existing charities, and would mean that many of the same points would have to be unnecessarily explored again by the courts.*[7]

3.1 Identifiable benefit

It is quite unclear how proposed principle (a) would operate in relation to the first three heads of charity identified by Lord McNaughten – relief of poverty; advancement of education and advancement of religion.

The common law has established that each of these in itself is a charitable purpose. An entity which has one of these aims, provided its activities are directed at the public and not just a private group, will be for the public benefit.

By failing to specify these heads of charity or to refer to the common law, the Bill could have the effect of leaving open a finding that an entity (say) that existed for the advancement of religion by holding religious services open to the public, but was not engaged in providing any more tangible benefits such as running a soup kitchen, was not providing an "*identifiable benefit*".

If the intention is not to change the common law at all it is hard to see the purpose of incorporating this provision in a regulation. The common law already requires that there be a benefit with "*practical utility*".

Recommendation 1:

The proposed principle (a) could change the common law presumption that the purpose of an institution is charitable if it is established for relief of poverty, advancement of education or advancement of religion. Enacting this principle would introduce undesirable legal uncertainty.

Therefore the proposal that the regulations be required to impose such a principle should be opposed.

3.2 Balancing benefits against detriment or harm

Key principle (b) which the Bill would require to be included in the public benefit test to be made by the regulations would oblige an assessor to balance the "benefit" identified from the aims and activities of an entity against "any detriment or harm". Presumably this is meant to refer to "any detriment or harm" arising from the purpose or activity of an entity.

The common law does provide that "*by definition, a purpose cannot be beneficial if it is harmful to the public*". [8]

The case usually cited in this regard is *National Anti-Vivisection Society v IRC*. In this case Lord Simonds stated:

> *Where on the evidence before it the court concludes that, however well-intentioned the donor, the achievement of his object will* ***be greatly to the public disadvantage****, there can be no justification for saying that it is a charitable object.* [9] [emphasis added]

In this particular case the court was of the opinion that if the National Anti-Vivisection Society succeeded in its aims of stopping all experimentation on live animals this would greatly disadvantage the public through the loss of or delay in important research into diseases and medical treatments.

The proposed formula for principle (b) seems to lack the notion of great or significant disadvantage to the public that is the basis for Lord Simonds remarks in National Anti-Vivisection Society v IRC.

It would also mean a shift away from the current law, under which the presumption of public benefit can be rebutted if there was evidence to the contrary, to an obligatory weighing of benefits and harms.

The phrase "*any detriment or harm*" could be interpreted as giving weight even to detriment or harm that is merely alleged or that is controversial.

For example, it could be considered that a religious institution that actively sought to convert adherents of another religion was doing harm by creating discord in the targeted religious community. Or it might be considered that a religious institution which provides low cost housing to the poor could be doing harm to those providing rental accommodation at commercial rates.

Recommendation 2:

Proposed principle (b) would change the common law test that only a detriment or harm which was 'greatly to the public disadvantage' could outweigh the public benefits of a charity. This change could lead to the denial of the status of a charitable institution based on subjective and controversial decisions about alleged detriment or harms.

Therefore the proposal that the regulations be required to impose such a principle should be opposed.

3.3 Benefit to the public or a significant section of the public

This principle seems to be a reasonable statement of the common law. It is therefore redundant and would add no new requirement to the determination of whether an entity is a charitable institution.

Recommendation 3:

It appears that the proposed principle would not alter the common law. It serves no purpose and is redundant.

Therefore the proposal that the regulations be required to impose such a principle should be opposed.

4. Applying the public benefit test

Proposed new subsection 50-51 (3) is in very broad terms.

> *The public benefit test may contain provisions relating to the manner in which the test is to be applied to the aims and activities of an entity, as well as ancillary and incidental provisions.*

This would allow the regulator to make very specific provisions excluding, or including, certain aims and activities that under the common law are, or are not, understood to be of public benefit.

It is not desirable for the regulator to be given such a broad power.

The regulator could, for example, specify that religious institutions must provide tangible benefits for the public not just the intangible benefits of advancing religion.

Recommendation 4:

The proposed new subsection 50-51 (3) is in very broad terms, which would enable a regulator to exclude or include certain aims and activities from being recognized as of public benefit. It should be opposed.

5. Conclusion

Charity law has developed over several centuries as part of the common law.

The mover of the Bill has made it clear that the Bill is aimed at a single charitable institution – the Church of Scientology. It has been alleged by Senator Xenophon, and others, that the Church of Scientology has caused certain persons detriment and harm.

It is not clear, despite the various allegations made against this institution, that if the Bill were to be enacted that an assessment would necessarily conclude that, in respect of the Church of Scientology the benefits identifiable in its aims and activities were outweighed by detriment and harms brought about by it.

In any case, the uncertainty the Bill would create in the law is not justified by a desire to deny charitable institution status to one particular entity.

Recommendation 5:

The Bill should be opposed as it would create uncertainty in the law for all charitable institutions for no demonstrable purpose.

6. Endnotes

1. *Income Tax Assessment Act 1997*, Section 50-1 and 50-5.

2. *Income Tax Assessment Act 1997*, Section 50-105.

3. "Religious Organisation" in Appendix 1, *ClubPack*, Australian Taxation Office, http://law.ato.gov.au/atolaw/view.htm?docid=SAV/CLUBPACK/00005

4. *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531 at 583.

5. *FC of T v Aid/Watch Incorporated* [2009] FCAFC 128.

6. *Report of the Inquiry into the Definition of Charities and Related Organisations*, June 2001, p. 111-112, http://www.cdi.gov.au/report/pdf/Charities_final.pdf

7. *Cabinet Office Strategy Unit Publications, Private Action, Public Benefit: A Review of Charities and the Wider Not-for Profit Sector* (September 2002), 4.24, p 41; http://www.cabinetoffice.gov.uk/media/cabinetoffice/strategy/assets/strat%20data.pdf

8. *Ibid.*

9. *National Anti-Vivisection Society v IRC* [1948] AC31, House of Lords.