

Submission received from Mr Alexander Davidson

I am a lawyer who, for the past 20 years, has worked quite extensively to

> determine what bodies are charitable in Canada. I have no experience with

> Australian law, but offer the following quickly-crafted personal comments

> in

> the hope that you will be able to distinguish the wheat from the chaff. >

> Concept - In my country, the federal Income Tax Act confers special income

> tax treatment to charities, but extends such favourable treatment to

> various

> other separately-identified categories such as national arts service

> organizations and registered Canadian amateur athletic associations. In

> our

> federal system, the provinces have a key but different role to play in

> defining what is charitable for purposes within their jurisdiction, such

> as

> the validity of purpose trusts and the *parens patriae* jurisdiction to

> supervise and protect charitable trusts. I am always conscious of the

> risk

> that the federal meaning given to charity may extend past what the

> provinces

> will recognize as charitable. To offer special tax treatment to a distinct

> and separately-defined range of non-charities is conceptually pure,

> although

> it inevitably opens the door to a risk that the general public will become

> confused and fail to recognize the distinction when preparing wills. And

> I

- > am writing of the risk where the special treatment is given to charities
- > and
- > separately-described categories. To include the non-charitable bodies in
- > a
- > definition of what is "charitable" for tax purposes (e.g. culture -
- > s.10(1)(e)) would all but ensure such confusion.
- >
- > Not being familiar with the different levels of government authority in
- > Australia, and the extent to which the present project is intended to
- > govern
- > all levels of government, I cannot say that the public will be faced this
- > competing definitions of what is charitable for different purposes, but
- > raise this for your consideration.
- >
- > s. 4 - In the core definition, paragraph 4(1)(e) requires that the charity
- > not engage in, and "has not engaged in", conduct that constitutes a
- > serious
- > offence. One of the questions that has arisen in my experience is how one
- > should respond to a body that did non-charitable things in the past. In
- > some cases, the body will not have been a charity at the time it engaged
- > in
- > that behavior. Some bodies change their orientation and revise their
- > objects, although they are still the same legal entity. Would this
- > wording
- > prevent present charitable recognition of a body that once engaged in
- > wrongful conduct, but which can establish that it has reformed? Even if
- > it
- > was a charity in the past when the wrongful conduct took place, is it

- > forever after precluded from recognition as a charity despite its
- > reformation?
- >
- > - Let me also note that questions may arise as to the level of proof
- > needed
- > to establish that a body did engage in offensive conduct. Is an actual
- > conviction needed? In the absence of a conviction, will civil authorities
- > draw reasonable conclusions using the civil standard of a balance of
- > probabilities rather than the criminal standard of proof beyond reasonable
- > doubt? And for this purpose, is the body held accountable for the actions
- > of its volunteers (or will the body indicate that it may have incited its
- > volunteers to engage in civil disobedience, but did not directly
- > participate
- > or "engage in" them)?
- >
- > s. 4(2)(b) - Could a religious body engage in closed or contemplative
- > activity which intervenes in a manner other than prayer? For example,
- > could
- > a body engage in non-theistic meditation in order to realign malignant
- > energy levels, or attempt to calm angry deities or ghosts through trickery
- > or ceremonial non-prayer exorcism? Or perhaps the use of the words
- > "religious order" is intended to limit such entities to those of a
- > traditionally Christian structure and approach. In Canada, the meaning of
- > "religious order" was explored in cases that gave meaning to a tax
- > deduction
- > for members of the clergy; do those words include only traditional
- > structures, or modern functional equivalents?
- >

- > s. 5(b) - It is not clear without a broader context what are "particular
- > persons". If this is not a term restricted to human individuals, is it
- > possible that a winding up diocese may need to distribute its assets to
- > member churches? Or a parent body to its municipal chapters?
- >
- > And could not a charity established to offer aid to persons in need of
- > financial assistance distribute its profits or assets in appropriate
- > measure
- > to those persons? The only way to do that under your wording is to ensure
- > that a poverty relief organization does not offer token memberships to the
- > poor. A mission society should ensure that its supported missionaries are
- > not members. And an umbrella group established to fund hospitals should
- > ensure that the said hospitals are not members.
- >
- > Does a not-for-profit body have "owners"?
- >
- > s. 7 - One of the perpetually difficult issues flows from the House of
- > Lords' decision in the Baddeley case. Some judges and academic
- > commentators
- > are convinced that under the fourth head of charity, benefits cannot be
- > limited to, or denied to, members of the public on the basis of some
- > irrelevant personal characteristic. For example, there should not be a
- > bridge over which only Methodists may cross. Nor should a hospital be
- > open
- > only to those of a certain race. A retirement home or a community center
- > limited by ethnic origin seems to fall into the same situation, although
- > such seem to be popular in the general community. The wording "sufficient
- > section" suggests numerical quantity (which of course might vary depending

- > on the purpose at hand) but may not go beyond numbers. I am not sure
- > s.7(3)
- > will be broad enough to draw the line where you want it to be (wherever
- > that
- > is), although the commentary gives examples of family or employment
- > limits.
- >
- > s. 8 - I am sure that careful thought has been given to where to draw the
- > line in respect of political activities and purposes. That the stated
- > test
- > is that of "purposes" may allow more political engagement than if the test
- > were one of activities alone. The three listed activities fall somewhat
- > short of what was considered political in the McGovern case (for example,
- > attempting to prevent change to law or government policy is notably
- > absent)
- > and I assume this is intended.
- >
- > s. 9 - Section 9 may have been intended to include corporations, since
- > commentary 1.17 lists many acceptable structures. However, the section
- > uses
- > the limited word "association", opening the door to a much narrower
- > structure than would the word "entity" used elsewhere.
- >
- > For the purposes of s.9((c), are family members of alcoholics "affected"?
- > And could some self-help groups benefit from having facilitators and
- > interested professionals present as members? Could a self-help prisoner
- > recovery group be made up of ex-offenders and also chaplains or sponsors?
- > Could a group of mental patients or those suffering from physical illness

> not include health professionals with an interest and training? Does

> "made

> up of" leave room for it to be only primarily made up of the needy

> members?

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