

## **Submission to the Board of Taxation Consultation on the Definition of Charity**

Ann O’Connell, Senior Lecturer, Law School, University of Melbourne; Special Counsel,  
Allens, Arthur Robinson, Solicitors; Visiting Senior Research fellow, Deakin University;  
Member Board of Taxation Advisory Panel

I wish to make a number of comments on the exposure draft legislation on the definition of charity (the *Charities Bill 2003*). My interest in the consultation is as an academic and as a practitioner dealing with and advising charities. My comments fall into two categories – those that are concerned directly with issues in the Bill and those that are concerned with issues not addressed in the Bill.

### 1. Issues related to the proposed *Charities Bill*.

I will deal with the issues as they arise in the exposure draft of the Bill. I propose to consider:

1. The definition of entity
2. The not-for profit requirement
3. Disqualifying purpose
4. Charitable purposes
5. Advancement of social and community welfare
6. Advancement of religion
7. Public benefit and altruism

#### **1. The definition of entity**

The definition of “entity” in sec 3(1) of the Bill refers to the meaning given by s 960-100 of the *Income Tax Assessment Act 1997*. The term is further qualified by sec 4(1)(f) which provides that the entity cannot be an individual, a partnership, a political party, a superannuation fund or a government body. Although this is consistent with the approach of the Charities Definition Inquiry Report (“CDI Report”), I would raise two matters:

- The cross-reference to the *Income Tax Assessment Act* appears inappropriate. The definition of charity contained in the Bill is intended to apply for the purposes of all Commonwealth legislation.<sup>1</sup> The Federal Government has also indicated that it

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<sup>1</sup> Treasurer’s Press Release No 49, 29 August 2002.

will seek harmonisation with the States and Territories of the laws defining charities.<sup>2</sup> In that context it seems inappropriate to tie a key definition in the Bill to the income tax legislation. I submit that the legislation should include a self-contained definition of “entity” in the terms proposed in the CDI Report, Recommendation 2;

- Section 4(1)(f) of the Bill provides that a charitable entity must not be a “government body”. The term “government body” is defined to include “a body controlled by the Commonwealth, State or Territory”.<sup>3</sup> The term “control” in this context is insufficiently precise and may result in the exclusion of some bodies that currently are treated as charities. The CDI Report noted that an entity that is established by government or receives government funding or is subject to government regulation could still be a charity. Although the CDI Report noted that no one factor is determinative, it was concluded that based on the decisions in *Metropolitan Fire Brigades Board v FCT*<sup>4</sup> and *Mines Rescue Board of New South Wales v FCT*<sup>5</sup> one of the key issues is whether the government, represented by the relevant Minister, has the authority *to control the operations of the entity*.<sup>6</sup> A more recent decision of the Full Federal Court in *Ambulance Service of New South Wales v DFCT*<sup>7</sup> also supports that view. The Court agreed with the primary judge that the Ambulance Service was not a “public benevolent institution”.<sup>8</sup> However, it was also noted that the connection of a body with government would not necessarily be fatal to its status as a public benevolent institution and may even, in some circumstances, assist towards a conclusion that it is a public benevolent institution.<sup>9</sup> Furthermore it was accepted that there is no principle of law that a governmental characterization of a body is necessarily fatal.<sup>10</sup>

The CDI Report concluded in Recommendation 19:

“The Committee agrees with the principle set out in the *Fire Brigades case* and the *Mines Rescue case* for determining whether an entity is a government body, namely that the entity is constituted, funded and controlled by government.”

The issue of the types of control that will suffice to render a body a government body would probably not be an issue if the courts could have regard to existing case law. However, as Professor Myles McGregor-Lowndes has suggested, if the

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<sup>2</sup> Ibid.

<sup>3</sup> Section 3(1) of the Bill.

<sup>4</sup> 1991 ATC 4052.

<sup>5</sup> 2000 ATC 4580

<sup>6</sup> CDI Report, p 239.

<sup>7</sup> [2003] FCA 161.

<sup>8</sup> The term “public benevolent institution” is used in the tax legislation to determine, inter alia, access to gift deductibility status and the fringe benefits tax concessions. It is similar to but not identical with charity - the CDI Report noted that all public benevolent institution would meet the common law definition of charity even though not all charities would be public benevolent institutions – p 34).

<sup>9</sup> [2003] FCA 161 at para 44.

<sup>10</sup> [2003] FCA 161 at para 37.

Charities Bill is treated as a Code, reference to previous case law may be restricted.<sup>11</sup> I agree with Professor McGregor-Lowndes that it would be better if the legislation expressly preserved existing case law except so far as it is inconsistent with an express provision in the legislation. Alternatively the term “government body” could be defined to include “a body that is constituted, funded and has its operations controlled by government”.

I am also concerned by the wording in sec 3(2) of the Bill which provides that “to avoid doubt, the definitions of terms in this section do not apply in any Act other than this Act”. Does this mean that it will not be possible to refer to the section in determining, for example, whether a body is a government body and therefore not eligible to be a charity under the *Income Tax Assessment Acts*?

## 2. The not-for-profit requirement

The notion of a not-for-profit entity requires some clarification. The core definition of charity requires such an entity to be a “not-for-profit” entity.<sup>12</sup> Section 5 of the Bill provides:

“An entity is a not-for-profit entity if  
 (a) it does not, either while it is operating or upon winding up, carry on its activities for the purposes of profit or gain to particular persons, including its owners or members; and  
 (b) it does not distribute its profits or assets to particular persons, including its owners or members, either while it is operating or upon winding up.”

Under existing law there is a requirement that an entity be “non-profit” in order to be granted income tax exempt status.<sup>13</sup> Although the legislation does not expressly refer to a charitable institution as needing to satisfy non-profit status, case law suggests that this will be necessary in order for the entity to satisfy the public benefit requirement.<sup>14</sup> The only direct reference to “non-profit” in the legislation is in s 50-70 which provides that certain entities will not be tax exempt unless they are, inter alia, “not carried on for the purpose of profit or gain of its individual members”.

The CDI Report suggested that this requirement be changed to “not-for-profit” to reflect the fact that an entity should be able to generate profit but that what was prohibited was the distribution of those profits to members or other persons associated with the entity.

The two issues in the Bill that I believe need clarification are:

- (i) the nature of the profit or gain to particular persons; and

<sup>11</sup> “Charity Definition Inquiry – How will this affect you?” Paper given at CPNS, 10 August 2002.

<sup>12</sup> Section 4(1)(a) of the Bill.

<sup>13</sup> Under Div 50 *Income Tax Assessment Act 1997*.

<sup>14</sup> See for example, *Incorporated Council of Law Reporting (Queensland) v FCT* (1971) 125 CLR 659 and *CIR v Medical Council of New Zealand* [1997] 2 NZLR 297.

- (ii) when will commercial activities disqualify an entity.

*(i) Prohibition on private profit*

As already noted, the Bill specifies that an entity is a not-for-profit entity if it does not carry on its activities for the purpose of profit or gain to particular persons and does not distribute its profits or assets to particular persons. The Explanatory Memorandum accompanying the Bill also notes that “the *reasonable* payment of wages or allowances to employees, the reimbursement of expenses, payment for services and similar payments would not normally be considered the distribution of profits or assets”.<sup>15</sup> This was also referred to in the CDI Report.<sup>16</sup> However, anecdotal evidence suggests that one way that unscrupulous promoters of charities do benefit is by payment of excessive wages and the provision of benefits. It may therefore give better effect to the Government’s intention as spelt out in the Explanatory Memorandum, to include the reference to wages in the legislation and to make it explicit that only the payment of reasonable remuneration is acceptable.

*(ii) Commercial activities*

The CDI Report noted that the not-for-profit requirement did not prevent an entity from generating a profit. It was specifically recommended:

“That commercial purposes should not deny charitable status where such purposes further, or are in aid of, the dominant charitable purposes or where they are incidental or ancillary to the dominant charitable purposes.”<sup>17</sup>

Although there is no direct reference to “commercial purposes” or “commercial activities” in the Bill, the Explanatory Memorandum notes that the term not-for-profit will not preclude commercial activities provided the profits are directed towards a charitable purpose or they are ancillary or incidental to a charitable purpose.<sup>18</sup> As this restricts the range of commercial activities that an entity may pursue it may be more appropriate to include something in the Bill, for example, under “disqualifying purposes”.

It was also noted in the CDI Report, however, that “competitive neutrality concerns generated by the taxation treatment of charities are issues for taxation policy, not the definition of charity”.<sup>19</sup> Hopefully this means that the issue of whether commercial operations conducted by “charities” are entitled to tax concessions has still to be determined. In this regard, I just note, that although a separate commercial entity may not qualify for income tax exemption, it may currently avoid taxation by making a deductible gift to the charitable entity. Any consideration of the tax status of

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<sup>15</sup> Explanatory Memorandum to the Bill, para 1.27.

<sup>16</sup> CDI Report, pp 91-2.

<sup>17</sup> Ibid, Rec 18.

<sup>18</sup> Explanatory Memorandum to the Bill, para 1.26.

<sup>19</sup> CDI Report, pp 219, 229.

commercial operations associated with charities will need to consider whether this is appropriate.

### 3. Disqualifying purpose

Section 4 of the Bill provides that the entity must not have a “disqualifying purpose”. Section 8(2) of the Bill provides:

“Any of these purposes is a disqualifying purpose:  
 (a) the purpose of advocating a political party or cause;  
 (b) the purpose of supporting a candidate for political office;  
 (c) the purpose of attempting to change the law or government policy;  
 if it is, either on its own or when taken together with one or both of the other of these purposes, more than ancillary or incidental to the other purposes of the entity concerned.”

This particular provision has attracted a significant amount of comment both from those who are concerned that this will restrict the ability of charities to speak out on contentious issues<sup>20</sup> and from the Treasurer who argues that the provision does not change existing law on political purposes.<sup>21</sup> I would just make two comments. First, the reference in para (c) to attempting to change the law or government policy goes beyond what was recommended by the CDI Report. Recommendation 17 provided:

“That charities be permitted neither to have purposes that promote a political party or a candidate for political office, nor to undertake activities that promote a political party or a candidate for political office.”

The CDI Report specifically drew a distinction between those types of activities, which it was said would affect an entity’s independence, and what they regarded as “non party-political purposes” provided they further, or are in aid of, the charity’s dominant charitable purpose.<sup>22</sup> It was also said that “charities should be permitted to engage in advocacy on behalf of those they benefit. Conduct of this kind should not deny charitable status even if it involves advocating for a change in law or policy”.<sup>23</sup> On that basis, the Bill appears to go further than the CDI Report’s recommendation. Furthermore, Professor McGregor-Lowndes has pointed out that existing case law does not regard lobbying for political change to disqualify an entity from being charitable provided this is incidental to its charitable purpose.<sup>24</sup>

Secondly, the section provides that the purpose will be a disqualifying purpose if it is “more than ancillary or incidental to other purposes”. By contrast; the Treasurer’s Press Release provided:

<sup>20</sup> See, for example, “Treasurer plans gag on charities”, *Australian Financial Review*, 30 July 2003, p 1.

<sup>21</sup> Treasurer’s Press Release “Draft Legislation on the Definition of Charities” 30 July 2003 and see also “Real Charities Need Not Worry” *Australian Financial Review*, 20 August 2003, p 55.

<sup>22</sup> CDI Report, p 218.

<sup>23</sup> *Ibid*, p 217.

<sup>24</sup> “Charity Definition Inquiry – How will this affect you?” Paper given at CPNS, 10 August 2002.

- “(d) the entity must not have a dominant purpose that is:
- (i) advocating a political party or cause;
  - (ii) supporting a candidate for political office; or
  - (iii) attempting to change the law or government policy.”<sup>25</sup>

Although there is not a great deal of difference between the two formulations, the reference to not having a dominant political purpose appears to better reflect the existing case law.

#### **4. Charitable purpose**

Section 10 of the Bill contains the definition of “charitable purpose” which builds on the core definition of “charity”, “charitable institution” and “any other kind of charitable body”.<sup>26</sup> These definitions give effect to the recommendations of the CDI Report. However, only two of the seven categories (“advancement of social or community welfare” and “advancement of religion” discussed below) are spelt out in the legislation.<sup>27</sup> The CDI Report contained non-exhaustive examples of each category. The Explanatory Memorandum to the Bill also contains some examples of each category<sup>28</sup> that are similar to, but not identical with, the examples provided in the Report. (Details of the examples provided in the Report and what is included in the Explanatory Memorandum are contained in an Appendix to this submission.) I submit that it is appropriate to include those examples in the legislation rather than in the Explanatory Memorandum, but to indicate that they are inclusive and not intended to limit what is meant by the various purposes.

#### **5. Advancement of social or community welfare**

Section 11 of the Bill deals with the “advancement of social or community welfare”. It provides that “without limiting what constitutes advancement of social or community welfare, that term includes:

- (a) the care of, and the support and protection of, children and young people; and
- (b) in particular, the provision of child care services.”

Although it is clear that the definition is inclusive, it also does not contain all of the examples provided in the CDI Report. The Explanatory Memorandum does contain a list that is similar but not identical to the CDI Report (see Appendix). The list in the Explanatory Memorandum also refers to the provision of child care services.<sup>29</sup> The inclusion of child care services as a charitable purpose was specifically recommended

<sup>25</sup> Treasurer’s Press Release, No 49, 29 August 2002.

<sup>26</sup> Section 4 of the Bill.

<sup>27</sup> Sections 11 and 12 of the Bill.

<sup>28</sup> Explanatory Memorandum, paras 1.60, 1.63, 1.67, 1.77 and 1.84.

<sup>29</sup> Ibid, para 1.67.

by the CDI Report.<sup>30</sup> This appears to have been the result of administrative practice whereby the provision of such services has been treated as non-charitable.<sup>31</sup> The Government clearly accepted this recommendation.<sup>32</sup> However, given that one type of activity has been singled out for inclusion may raise an inference that other types of activities are less likely to be within that category. For example, concern has been expressed that the legislation contains no reference to aged care services.<sup>33</sup> I would submit that it is preferable for the legislation to contain an inclusive list as recommended in the CDI Report.

## 6. Religion

Section 12 of the Bill deals with religion and provides that “for the purposes of determining whether particular ideas, practices and observances constitute a religion, regard is to be had to:

- (a) whether the ideas and practices involve belief in the supernatural; and
- (b) whether the ideas relate to people’s nature and place in the universe and their relation to things supernatural; and
- (c) whether the ideas are accepted by adherents as requiring or encouraging them to observe particular standards or codes of conduct or to participate in specific practices having supernatural significance; and
- (d) whether, however loosely knit and varying in beliefs and practices adherents may be, they constitute one or more identifiable groups; and
- (e) whether adherents see the collection of ideas and/or practices as constituting a religion.”

Subsection (2) provides that this “does not limit the matters to which regard may be had in determining whether particular ideas, practices and observances constitute a religion”.

The principles included in sec 12(1) are taken from the judgment of Wilson and Deane JJ in the major High Court case regarding the meaning of religion, *The Church of New Faith v Commissioner of Pay-Roll Tax (the Scientology case)*.<sup>34</sup> The argument in that case was that Scientology was a philosophy rather than a religion. The High Court accepted a broad definition of religion while cautioning against too broad a view. The CDI Report recommended that the definition of religion be based on principles established in that case. However, the judgment they preferred was that of Mason ACJ and Brennan J. Those judges held that a religion “involves:

- belief in a supernatural Being, Thing or Principle; and
- the acceptance of canons of conduct in order to give effect to that belief.”

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<sup>30</sup> CDI Report, Rec 16.

<sup>31</sup> Ibid, p 203.

<sup>32</sup> Treasurer’s Press Release, No 49, 29 August 2002.

<sup>33</sup> P de Haan and J Baillie “Key Issues with the Draft Charities Bill 2003” *Weekly Tax Bulletin 2003*, para [1475] ( 22 August 2003)

<sup>34</sup> (1983) 154 CLR 120.

Those two principles are referred to in the Explanatory Memorandum.<sup>35</sup> The judgments in the *Scientology* case all accepted that it is not necessary for there to be belief in a Supreme Being (that is, a religion does not have to have a God). Although both judgments (Wilson and Deane JJ on the one hand and Mason ACJ and Brennan on the other) are referred to in the CDI Report and are treated as comprising essentially the same view,<sup>36</sup> the CDI Report expressly states that a religion must have the above two characteristics.<sup>37</sup>

The Government appears to have accepted the Recommendation. In the Press Release responding to the CDI Report, the Government stated that in determining whether an entity has the purpose of the advancement of religion, regard is to be had to the principles established by the High Court in *The Church of New Faith v Commissioner of Pay-Roll Tax*.<sup>38</sup>

I submit that the formulation of Mason ACJ and Brennan J, accepted by the CDI Report as spelling out the principles of the *Scientology* case, should be included in the legislation. Alternatively, the legislation could refer to the principles established by the High Court in *The Church of New Faith v Commissioner of Pay-Roll Tax*.

## 7. Altruism

The Board has also been asked to consult on whether the public benefit test in the Bill should require the dominant purpose of a charitable entity to be altruistic. The CDI Report recommended that “the public benefit test be strengthened by requiring that the dominant purpose of a charitable entity must be altruistic”.<sup>39</sup> The CDI Report also noted that “it is not necessary to define the term any more precisely...the concept of altruism is sufficiently understood within the community”.<sup>40</sup> However, it was also noted that “in the context of charity, altruism can be characterized as a voluntarily assumed obligation towards the wellbeing of others or the community generally”.<sup>41</sup> I would suggest that it is not appropriate to require an additional requirement of altruism in the definition of charity. First, I would argue that the term would exclude a number of member-based entities that currently enjoy charitable status. Secondly, the view canvassed in the CDI Report that an altruistic body would require some undefined level of voluntarism<sup>42</sup> is too restrictive. Thirdly, I would argue that the notion of public benefit conveys similar ideas to that of altruism. Finally, I would argue that the term is not sufficiently well understood within the community and that without further definition, such a requirement is likely to create uncertainty.

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<sup>35</sup> Explanatory Memorandum, para 1.70.

<sup>36</sup> CDI Report, pp 176-7.

<sup>37</sup> Ibid, p 178.

<sup>38</sup> Treasurer’s Press Release, No 49, 29 August 2002.

<sup>39</sup> CDI Report, Rec 7.

<sup>40</sup> Ibid, p 125.

<sup>41</sup> Ibid, p 124.

<sup>42</sup> Ibid, pp 124-5.

An alternative would be to recognize different categories of charities for different legislative purposes. For example, it may be that the Government decides that not all charities are entitled to the same tax concessions. The CDI Report suggested that there could be separate categories for Benevolent Charities<sup>43</sup> and Altruistic Community Organisations.<sup>44</sup> The necessary follow-on in the tax context would be to consider whether such bodies were entitled to additional or different tax concessions.

## 2. Issues not addressed in the proposed *Charities Bill*.

I note that the Board has stated that consulting on the “workability” of the of the legislative definition of a charity proposed in the exposure draft Charities Bill, it “does not consider workability to include the administrative arrangements required of government for the implementation of the definition, or the degree of harmonisation with the pertinent laws of the States and Territories”.<sup>45</sup> However, it is important to note that the definition provided in the Bill will not operate in a vacuum and for this reason I wish to raise three important issues that are not addressed in the Bill.

1. The interaction with the tax legislation and operation of tax provisions generally
2. The issue of a responsible entity dealing with charities
3. The adoption of the definition by the States and Territories

### 1. Interaction with the tax legislation

It is clear that the definition of charity will apply for purposes other than for the operation of the tax legislation.<sup>46</sup> What is not clear is how the definition will effect the operation of the tax legislation. The problem arises because the term charity is not used very often in the income tax legislation.

According to the Board of Taxation’s consultation documents, a charity “may be entitled to income tax exemption, the refund of excess imputation credits, and certain fringe benefits tax and GST concessions. It is not expected that the range of tax concessions available to charities will change as a result of the new definition.”<sup>47</sup> The Board has also noted that “the deductibility of gifts to charities and other organizations will also not change as a result of the new definition because the definition of a charity is not used for deductibility considerations”.<sup>48</sup>

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<sup>43</sup> Ibid, Rec 21.

<sup>44</sup> Ibid, Rec 23.

<sup>45</sup> Board of Taxation, “Consultation on the Definition of a Charity, Frequently Asked Questions”, para 4.

<sup>46</sup> Treasurer’s Press Release, No 49, 29 August 2002.

<sup>47</sup> Board of Taxation , note 45, para 18.

<sup>48</sup> Ibid.

(i) *Income Tax Exemption*

The current position is that 9 categories of entities are eligible for exemption from income tax under Div 50 of the *Income Tax Assessment Act 1997*. Only one of these categories refers to charities and this is as part of a broader category – “charitable, religious, scientific or public educational institutions”.<sup>49</sup> Furthermore, since 1 July 2000 entities that are charitable institutions or charitable funds are required to be endorsed by the Commissioner of Taxation as income tax exempt.<sup>50</sup> The CDI Report specifically recommended that the terms “religious institution”, “scientific institution” and “public educational institution” not be specifically included within the charities framework on the basis that some such institutions may not have charitable or public benefit purposes.<sup>51</sup> It may, therefore be appropriate for there to be a separate category of “charitable institutions” within Div 50 so that tax policy issues about other non-profit entities can be made on appropriate criteria. It may also be appropriate for the Government to consider whether those other non-profit, non-charitable entities should continue to be exempt from tax.

(ii) *Excess imputation credits*

Since 1 July 2000 certain eligible entities are entitled to a credit for the underlying company tax on franked dividends and can claim a refund.<sup>52</sup> A resident, endorsed charitable institution is within the category of eligible entity.<sup>53</sup> However, it may also be appropriate for the Government to consider whether the range of other entities, including entities that are deductible gift recipients (DGRs), should also receive this concession. There is also an issue concerning the interaction of the refund provisions with the provision that deny imputation credits to exempting entities, where a charitable entity owns or effectively owns the company paying the dividend.<sup>54</sup>

(iii) *Fringe benefits tax*

The main exemption from fringe benefits tax (FBT)<sup>55</sup> does not refer to charities. The term used in the legislation to determine whether the benefit provided to an employee is exempt from FBT is “a public benevolent institution, a public hospital or a private non-profit hospital”.<sup>56</sup> The exemption is subject to limits but the limits are higher for an employee of a public benevolent institution compared with a public or non-profit private

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<sup>49</sup> Section 50-5 of the *Income Tax Assessment Act 1997*.

<sup>50</sup> Section 50-52 of the *Income Tax Assessment Act 1997*.

<sup>51</sup> CDI Report, Rec 22.

<sup>52</sup> Subdiv 207-E of the *Income Tax Assessment Act 1997*.

<sup>53</sup> Section 207-130 of the *Income Tax Assessment Act 1997*.

<sup>54</sup> Div 208 of the *Income Tax Assessment Act 1997*.

<sup>55</sup> See *Fringe Benefits Tax Assessment Act 1986*.

<sup>56</sup> Section 57A *Fringe Benefits Tax Assessment Act 1986*. But note the exemption for certain benefits provided by, inter alia, a “charitable institution”: sec 58G(2).

hospital.<sup>57</sup> It is not clear how the definition of charity in the Bill will fit in here and some clarification is required.

Where benefits are provided and FBT is payable, an employer is liable for tax on the benefit provided, grossed-up to include the FBT payable.<sup>58</sup> An employer is then usually entitled to a deduction for the total amount. Income tax exempt employers (except public benevolent institutions) are entitled to a rebate of FBT equivalent to 48% of the employer's FBT liability.<sup>59</sup> Thus a charitable institution that is not a public benevolent institution may be able to claim the rebate. Again clarification is required as to how these provisions will apply to charities.

(iv) *GST*

Again only some of the concessions apply to charities.<sup>60</sup> Consideration will need to be given as to how the concessions should apply.

(v) *Gift deductibility*

Division 30 of the *Income Tax Assessment Act 1997* provides for income tax deductibility for gifts made to certain entities. The Board of Taxation has noted that "the deductibility of gifts to charities and other organizations will also not change as a result of the new definition because the definition of charity is not used for deductibility considerations".<sup>61</sup> I wish to make two points. First, since 2001 the deductibility provisions do include a reference to "charity". The category of health recipient entities includes "a charitable institution whose principle activity is to promote the prevention or control of diseases into human beings".<sup>62</sup> This means that the definition of charity will be relevant to gift deductibility. Secondly, perhaps the main category of deductible gift recipient (DGR) is a "public benevolent institution". The CDI Report noted that there was significant criticism of the use of that term which was described as "unnecessarily complex and confusing to the public".<sup>63</sup> The term was also described in the CDI Report as "clearly out of date".<sup>64</sup> The CDI Report also noted that government resources are limited and that there needs to be some framework to enable governments to distinguish between competing claims for tax concessions.<sup>65</sup> As a result the CDI Report recommended that "there be a definitional framework to distinguish altruistic entities from other non-profit entities".<sup>66</sup> Specifically it was recommended that within the definitional framework there be "a subset of charities

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<sup>57</sup> Section 5B(1E) *Fringe Benefits Tax Assessment Act 1986*. The annual benefit limits are \$30,000 for a public benevolent institution and \$17,000 for a qualifying hospital.

<sup>58</sup> Section 5B *Fringe Benefits Tax Assessment Act 1986*.

<sup>59</sup> Section 65J *Fringe Benefits Tax Assessment Act 1986*.

<sup>60</sup> See for example, Subdivs 38-B and 38-C of *A New Tax System (Goods and Services Tax) Act 1999* cf sec 23-10 which simply refers to a non-profit entity.

<sup>61</sup> Board of Taxation, note 45, para 18.

<sup>62</sup> Section 30-20 of the *Income Tax Assessment Act 1997*, Item 1.1.6.

<sup>63</sup> CDI Report, p 251.

<sup>64</sup> *Ibid*, p 255.

<sup>65</sup> *Ibid*.

<sup>66</sup> *Ibid*, Rec 20.

to be known as Benevolent Charity, that is a charity whose dominant purpose is to benefit, directly or indirectly, those whose disadvantage prevents them from meeting their needs”.<sup>67</sup> It seems unrealistic to have a legislative definition that relates to certain entities in the charitable sector (“charities” and “charitable institutions”) but to have another significant category (“public benevolent institutions”) that are entirely subject to outmoded common law rules. The Government should be urged to accept the CDI Report’s recommendation to create a subset to be known as “Benevolent Charities” within the definitional framework. This would also address the Government’s query as to whether there should be reference to altruism within the legislation.

The Government has foreshadowed some proposed changes to the Income Tax legislation,<sup>68</sup> some of which have been introduced into Parliament. Those changes are as follows:

- The establishment of a new category of deductible gift recipient for charities whose principle activities promote the prevention and control of harmful and abusive behaviour among humans;
- Fringe benefits provided to employees whose duties are exclusively performed in, or in connection with, a public hospital will continue to be subject to the \$17,000 capped fringe benefits tax exemption, whether or not those hospitals are public benevolent institutions (*Taxation Laws Amendment (No 5) Bill 2003* currently before the House of Representatives);
- Charities, public benevolent institutions and health promotion charities will be required from 1 July 2004 to be endorsed by the ATO to access all tax concessions (not just income tax exemption and DGR status) and that status will be attached to its Australian Business Number registration and publicly available;
- From 1 July 2003 future additional to the list of organizations specifically named as DGRs will be able to be prescribed by regulation rather than requiring a legislative amendment (*Taxation Laws Amendment (No 7) Bill 2003* currently before the Senate);
- From 1 July 2003 entities established in perpetuity by the Parliament to be allowed to be endorsed as DGRs (*Taxation Laws Amendment (No 8) Bill 2003* currently before the Senate); and
- The GST law is to be amended to ensure that the current GST concessions for gift deductible entities apply only to DGRs and not to any larger, non-charitable entity that operates the DGR.

However, this is a far from comprehensive review of the tax concessions relating to charities and similar entities and seems to preserve the notion of a public benevolent institution.

The Assistant-Treasurer has also indicated that there is to be a consequential amendments Bill that will deal with “the technical interaction between the Exposure Draft Bill and the

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<sup>67</sup> Ibid, Rec 21.

<sup>68</sup> Treasurer’s Press Release, No 49, 29 August 2002.

current law”.<sup>69</sup> Again this does not appear to address the bigger issue of how the tax provisions are intended to work following the introduction of the definition of charity. Given the relatively minor role that the term “charity” plays in the tax context, it may be many of the complexities currently facing entities in the charitable sector will remain unless the Government undertakes an appropriate process of integration with the tax legislation

## 2 A responsible entity

One of the most significant recommendations of the CDI Report was “that the Government seek the agreement of all States and Territory Governments to establish an independent administrative body for charities and related entities”.<sup>70</sup> This was regarded as necessary to ensure consistency in decision making and assist with Commonwealth/State co-ordination.<sup>71</sup> It was also noted that the charitable status of an entity should stand independently of the tax concessions that may attach to that status.<sup>72</sup> Such a body would be responsible for:

- registration of charities;
- monitoring the accountability of charities;
- providing advice and support for the charitable and related sector; and
- providing an information resource for and about the sector.<sup>73</sup>

The body could also be given responsibility for continuously monitoring the relevance of the definitions and providing policy advice to the Government on the need for any change to the definitions.<sup>74</sup> At present, there is no control at the Federal level<sup>75</sup> that requires funds be disbursed by entities that receive tax concessions. Other jurisdictions do have a requirement that the funds be disbursed within a certain period unless exemption is sought from the appropriate administrative body.

Obviously these tasks extend beyond what a revenue body, such as the ATO, is able to do. This is especially the case in relation to monitoring of activities and ensuring continued compliance with the definitions. The CDI Report also noted that there was a view that it was inappropriate for a revenue agency to be primary decision maker on charitable status<sup>76</sup> and that the ATO believes that it is not necessary for it to retain its role in determining charitable status.<sup>77</sup>

The Government has not explicitly responded to these recommendations although the reference to endorsement by the ATO in the Treasurer’s Press Release responding to the

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<sup>69</sup> Reported in Hansard, Senate, 12 August 2003, pp 13175 and 13185-6.

<sup>70</sup> CDI Report, Rec 25.

<sup>71</sup> Ibid, pp 287-90.

<sup>72</sup> Ibid, p 289-90.

<sup>73</sup> Ibid, pp291-3.

<sup>74</sup> Ibid, p 292.

<sup>75</sup> C/f *Charitable Fundraising Act 1991 (New South Wales)*, secs 20-21.

<sup>76</sup> Ibid, p 287.

<sup>77</sup> Ibid, p 290.

CDI Report suggests that there are no plans for change in this area.<sup>78</sup> The Board has also noted that the ATO will continue to administer federal tax concessions for charitable organizations, but that “the departments and agencies responsible for other legislation relying on the term charity will continue to administer the definition with respect to that legislation”.<sup>79</sup> This is unlikely to result in a uniform approach to the definitions. The Government should be urged to re-consider this matter as an independent administrative body would provide greater certainty for the charitable sector and bring Australia into line with other jurisdictions such as the UK.

### **3. The States and Territories**

The Treasurer has indicated that he “will be writing to the State and Territory Treasurer’s to gauge their interest in achieving harmonisation of laws defining charity”.<sup>80</sup> Clearly a uniform national approach would simplify the position for the charitable sector. I would suggest that it is more appropriate to achieve the harmony before any legislation is introduced into the Commonwealth as this would lessen the likelihood of a lack of consensus at a later stage.

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<sup>78</sup> Treasurer’s Press Release, No 49, 29 August 2002.

<sup>79</sup> Board of Taxation, note 45, para 16.

<sup>80</sup> Treasurer’s Press Release, No 49, 29 August 2002.

## Appendix

### Examples of the types of activities that would fall within each head of charitable purpose as set out in the CDI Report and in the Explanatory Memorandum to the Exposure Draft *Charities Bill* .

CDI Report Recommendation	Explanatory Memorandum to the Exposure Draft <i>Charities Bill</i>
<p><i>Advancement of health</i></p> <ul style="list-style-type: none"> <li>• the care, treatment and rehabilitation of sickness, disease and suffering in humans, including: <ul style="list-style-type: none"> <li>– services provided by acute care hospitals (that is, the provision of medical, surgical or obstetrical services for patients, and care, nursing and other professional services);</li> <li>– services provided by other acute care institutions such as alcohol and drug treatment centres and day hospitals;</li> <li>– services provided by mental health institutions for patients with psychiatric, mental or behavioural disorders;</li> <li>– community health services such as home nursing services, family planning services, alcohol and drug rehabilitation not requiring admission to hospitals or other establishments, and patient transport to hospitals and other treatment centres;</li> </ul> </li> <li>• provision of public health services aimed at advancing the health of whole or specific populations or preventing disease, including health promotion, nutrition services, immunisation and screening for diseases;</li> </ul>	<ul style="list-style-type: none"> <li>• the care, treatment and rehabilitation of sickness, disease and suffering in humans, including the care provided by acute care hospitals, acute care institutions such as alcohol and drug treatment centres, mental health institutions and community health services such as home nursing, alcohol and drug rehabilitation and patient transport services;</li> <li>• the provision of public health services aimed at advancing the health of the general community or sections of the general community, including health promotion, nutrition services, immunisation and screening for</li> </ul>

<ul style="list-style-type: none"> <li>• health research, that is, research related to the nature, prevention, diagnosis, treatment and incidence of disease and other health problems, research into health services, nutritional problems, pharmacology etc.; and</li> <li>• the provision of information, advice and advocacy on health policy.</li> </ul>	<p>diseases; and</p> <ul style="list-style-type: none"> <li>• research related to the nature, prevention, diagnosis treatment and incidence of disease and other health problems, research into health services, nutritional problems, pharmacology and so on.</li> </ul>
<p><i>Advancement of education</i></p> <ul style="list-style-type: none"> <li>• the provision of formal education through preschools, schools and tertiary education institutions, including the provision of buildings and related educational facilities;</li> <li>• research directed towards expanding human knowledge;</li> <li>• non-formal education aimed at the development of citizenship and life skills, particularly in young people, such as through the Scouts and Guides;</li> <li>• the support of education through, for example, the provision of prizes and scholarships; and</li> <li>• the provision and support of facilities and services integrally associated with the operation of educational institutions, such as sporting facilities, student unions and parent organisations.</li> </ul>	<ul style="list-style-type: none"> <li>• the provision of formal education through preschools, schools and tertiary education institutions, including the provision of building and related educational facilities;</li> <li>• research directed towards expanding human knowledge;</li> <li>• informal education aimed at the development of citizenship and life skills;</li> <li>• the support of education, such as through the provision of prizes and scholarships; and</li> <li>• the provision and support of facilities and services integrally associated with the operation of education institutions, such as sporting facilities, student unions and parent organisations.</li> </ul>
<p><i>Advancement of social and community welfare</i></p> <ul style="list-style-type: none"> <li>• the relief, reduction and prevention of poverty;</li> <li>• the care, support, development and protection of children (see Chapter 25 on the inclusion of child care as a</li> </ul>	<ul style="list-style-type: none"> <li>• the prevention and relief of poverty, distress or disadvantage of individuals or families;</li> <li>• the care, support and protection of children and young people and, in particular, the provision of child care</li> </ul>

<p>charitable purpose);</p> <ul style="list-style-type: none"> <li>• the care, support, development and protection of youth;</li> <li>• the care, support and protection of the aged including the provision of residential and non-residential aged care;</li> <li>• the provision of services to support families;</li> <li>• the provision of services to people with a disability;</li> <li>• the provision of assistance and support to people who are disadvantaged in the labour market;</li> <li>• the provision of assistance and support for indigenous people;</li> <li>• the provision of housing and accommodation support for people with special needs or who are otherwise disadvantaged in terms of their access to housing;</li> <li>• the provision of assistance and support for a particular town, city or region;</li> <li>• the advancement of community capacity building and enhancing the quality of life and social and economic opportunities in disadvantaged communities; and</li> <li>• the provision of other social and community welfare services, including: <ul style="list-style-type: none"> <li>– care, assistance and support of members or former members of the armed forces and the civil defence forces and their families. The civil defence forces include police forces, fire brigades, ambulance services, other emergency services and crews of</li> </ul> </li> </ul>	<p>services;</p> <ul style="list-style-type: none"> <li>• the care, support and protection of the aged and people with a disability, including the provision of residential and non-residential care;</li> <li>• the provision of services to support families;</li> <li>• the provision of assistance and support for indigenous people, refugees and immigrants and prisoners and their relatives;</li> <li>• the provision of assistance and support for people who are disadvantaged in the labour market;</li> <li>• the relief of distress caused by natural disasters and sudden catastrophes;</li> <li>• the promotion of community development to enhance social and economic participation;</li> <li>• the care and support of members or former members of the armed forces and their families; and</li> <li>• the care and support of members of the civil defence forces and their families during a time of emergency (civil defence forces includes emergency service and crews of merchant ships or other private vessels or aircraft used in times of emergency).</li> </ul>
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<p>merchant ships or other private vessels and civilian aircraft used in times of emergency;</p> <ul style="list-style-type: none"> <li>– assistance and support for refugees and immigrants;</li> <li>– assistance and support for prisoners and their relatives;</li> <li>– relief of distress caused by natural disasters or sudden catastrophes; and</li> <li>– the provision of information, advice or advocacy on social and community welfare policy.</li> </ul>	
<p><i>Advancement of religion</i></p> <p>No examples given.</p> <p>It was recommended that the definition of religion be based on the principles established in the <i>Scientology case</i>, namely:</p> <ul style="list-style-type: none"> <li>• belief in a supernatural Being, Thing or Principle; and</li> <li>• acceptance and observance of canons of conduct in order to give effect to that belief.</li> </ul>	<p>No examples given.</p> <p>See sec 12 of the proposed Bill and para 1.70 of the Explanatory Memorandum to the Exposure Draft <i>Charities Bill</i>.</p>
<p><i>Advancement of culture</i></p> <ul style="list-style-type: none"> <li>• the promotion of and participation in the arts, including literature, music, the performing arts and visual arts. This should be taken to include the various art forms currently recognised on the Register of Cultural Organisations, such as craft, design, video, television, film and community art;</li> <li>• the establishment and maintenance of public museums, libraries and art galleries, and movable cultural heritage;</li> <li>• the promotion of Australian indigenous</li> </ul>	<ul style="list-style-type: none"> <li>• the promotion of and participation in the arts, including literature, music, the performing arts and visual arts (including the various art forms currently recognised on the Register of Cultural Organisations under Subdivision 30-F of the <i>Income Tax Assessment Act 1997</i>);</li> <li>• the establishment and maintenance of public museums, libraries and art galleries, and moveable cultural heritage;</li> </ul>

<p>culture and customs;</p> <ul style="list-style-type: none"> <li>• the promotion of the culture and customs of various language and ethnic groups; and</li> <li>• the protection and preservation of national monuments, areas of national interest and national heritage sites and buildings.</li> </ul>	<ul style="list-style-type: none"> <li>• the promotion of Australian indigenous culture and customs;</li> <li>• the promotion of the culture and customs of various language and ethnic groups; and</li> <li>• the protection and preservation of national monuments, areas of national interest and national heritage sites and buildings</li> </ul>
<p><i>Advancement of the natural environment</i></p> <p>No examples given</p>	<p>No examples given</p>
<p><i>Other purposes beneficial to the community</i></p> <ul style="list-style-type: none"> <li>• the promotion and protection of civil and human rights;</li> <li>• the promotion of reconciliation, mutual respect and tolerance between various groups of people within Australia;</li> <li>• the protection and safety of the general public; and</li> <li>• the prevention and relief of suffering of animals.</li> </ul>	<ul style="list-style-type: none"> <li>• the promotion and protection of civil and human rights;</li> <li>• the promotion of reconciliation, mutual respect and tolerance between various groups of people within Australia;</li> <li>• the protection and safety of the general public; and</li> <li>• the prevention and relief of suffering of animals.</li> </ul>