SEVENTH-DAY ADVENTIST CHURCH

South Pacific Division

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September 26, 2003

Mr Richard Warburton
Chairman, Board of Taxation
c/- Commonwealth Treasury
Langton Crescent
PARKES ACT 2600

Dear Mr Warburton

DEFINITION OF CHARITY

We enclose a submission on behalf of the Adventist Church in response to the consultation on the definition of charity in the draft *Charities Bill 2003.*

We would like to take this opportunity of placing on the public record our appreciation of the work of the Charities Definition Inquiry undertaken by Mr Justice Sheppard, Mr Robert Fitzgerald and Mr David Gonski.

It is also pleasing that the Prime Minister and Members of Parliament generally are taking such an interest in the role of charity in the creation and maintenance of a truly civil society.

It is our view that charities need to be recognised as independent and co-ordinate vehicles for serving the community and perpetuating civilised and moral values.

We would suggest that the natural outcome, once the definition of charities is settled for Commonwealth purposes, is that this principle of autonomy should be respected by ensuring that all charities are eligible on an equal footing for both income tax-exempt status and for deductible gift recipient status.

We see this inquiry as the first step in this logical process of reform which would bring this country's law on the taxation of charities more into line with legislative practice in other common law countries such as the United Kingdom and United States.

Yours sincerely

RODNEY G BRADY
Chief Financial Officer

Information requested in the submission guidelines:

1. What is the name of your charitable organisation? What are your contact details?

The South Pacific Division of the Seventh-day Adventist Church

Rodney Brady
Chief Financial Officer
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Wahroonga, NSW 2076

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2. What is the dominant (main) purpose/s of your charitable organisation?

The organisation making the submission is the regional office responsible for co-ordinating the churches activities in Australia, New Zealand and the countries of the South Pacific. Within Australia there are different administrative and legal entities (operating under different names) that are responsible for specific functions within their assigned area.

The name of our organisation highlights that it is a church and religious organisation. Christianity kindles a sense of social responsibility to serve. Therefore the dominant purpose could differ on whether the denomination as a whole was looked at or individual units.

The Church in Australia has activities in all aspects of what been defined as charity. The following is some summary statistical information, it is not a comprehensive list of functions and activities:

Church congregations: 489

- Total adult members: 51,000 (we count only those who have decided to become church members. We do not record children or those who attend who have not asked to become a member.)

Education:

- Number of Primary and Secondary schools: 57
- Tertiary Education College: 1
- Total number of students: 9,376

Employees: the combined number of full time employees in Australia exceeds 5,000.

Medical & Health:

- Hospital: Sydney Adventist Hospital located in Wahroonga NSW. Is the largest private Hospital in NSW.
- Aged Care facilities: 20 located throughout Australia
- Health food and nutrition education services provided by many church entities and Sanitarium Health Foods.

Adventist Development and Relief Agency (ADRA) is a PBI: It operates a domestic and international program. ADRA is in the top ten Australian overseas aid agencies. Many churches throughout Australia operate a wide range of local ADRA functions for local community needs.

Media:

- One publishing house that cares for denominational printing and distributes magazines, books, church supplies and stationary.
- One media centre that produces television, radio and film productions for the Church in Australia and overseas. It operates a correspondence school for Bible, health and lifestyle courses.

3. With reference to the preamble on 'workability' (above), do you have any concerns or issues that you wish to raise about the workability of the legislative definition of a charity proposed in the exposure draft Charities Bill 2003?

Covered in submission.

4. Would the Charities Bill 2003 impose any additional administrative burden on your charitable organisation? How? What additional compliance costs do you anticipate?

As we understand it the proposed Bill should not of itself create minimal additional administrative burden. What we have learnt from experience is that as legislation changes the compliance requirements from the Australian Taxation Office and other Government departments increase. It is an issue for us as we note the redirection of increasing resources for compliance work rather than charitable activities.

5. In your assessment, does the Charities Bill 2003 provide the flexibility to ensure the definition can adapt to the changing needs of society?

Covered in submission

6. If the public benefit test were further strengthened by requiring the dominant purpose of a charitable entity to also be altruistic, would this affect your organisation? If so, how?

Covered in submission

CONSULTATION ON THE DEFINITION OF A CHARITY

SUBMISSION BY THE SEVENTH-DAY ADVENTIST CHURCH

Introduction

We welcome and support the retention of the existing common law definition of "charity".
We also welcome the explicit recognition of the advancement of culture and the natural environment, while recognizing that, in many cases, these would be charitable under the existing charitable headings, most notably education.

We view this Bill as a first step towards putting all charities on a common and equal basis as regards eligibility for both income tax-exempt and deductible gift recipient status.

We believe discrimination against those charities which are not eligible for deductible gift recipient status is long overdue for reform and would bring Australia into line with other common law countries sharing the same history of charitable trusts such as the United States and United Kingdom.

General comments and summary

The concept of charity was embedded in mediaeval English law generations before the Statute of Elizabeth, which may be seen as merely the first attempted codification of a mass of previous case law and practice. There is merit in the "case by case" approach to defining charity as it has inherent flexibility to adapt to social needs. A definition by way of statute therefore needs to be careful not to exclude previously-accepted charitable trusts or to cut off the possibility of natural growth by precedent and analogy. Codification should not lead to exclusion or ossification.

Workability

We are in broad sympathy with the objectives of the Bill as a legislative restatement of the common law, which has stood the test of time, proven to be practical and flexible to match societal needs, while not losing sight of its traditional applications and timeless origins in Christian "caritas", Christian love.

We have made a number of detailed drafting comments and suggestions in areas which we think may not precisely carry out the Bill's purpose, particularly where the specific language used could be clearer and more precise to enhance workability in carrying out the stated aims of this Bill. We believe that the changes proposed will improve the workability of the Bill both in clarifying definitional issues and improving precision and certainty of application.

These areas include -

$ The drafting of dominant purpose

$ Charitable trusts holding property or income on trust for other charities

$ Criminal conduct

$ The presumption of public benefit in the case of traditional charities

$ The definition of public benefit

$ Disqualifying purposes

The drafting of dominant purpose

We suggest this is slightly too narrow and may lead to unintended consequences. For example, should the drafting create a *de facto* "activities test" for dominant purpose which does not exist at common law, unrealistic restrictions may be placed on the permissible scale of the commercial activities a charity might undertake to fund its charitable works, thereby furthering its dominant purpose. This potential difficulty can be rectified by referring to purposes "in aid of *or* are ancillary ..." to the dominant purpose.

Charitable trusts holding property or income on trust for other charities

In practice, charities often organise their divisions through many separately constituted legal entities (or non-entities), be they companies or trusts or unincorporated associations. Often businesses or investments of charities are placed in separate entities to pool administrative costs or for management or legal liability reasons. Existing law recognises a trust as charitable if the trustee holds property and income on trust for exclusively charitable purposes and distributes to other charities.

However, the Bill's current drafting appears to assume only a single legal entity is involved. Difficulties may arise, for example, when one part of a charity may be difficult to ascertain in isolation. As a matter of principle, we suggest that any entity holding its property and income on trust for exclusively charitable purposes, including for another charity, should continue to be accepted as charitable. In other words, it should not matter if a parent charity organises itself into divisions of one entity or, alternatively, creates sub-entities to carry out separate parts of its works.

Criminal conduct

We are concerned that unauthorised criminal conduct by employees or members of a charity could prejudice its status. The Draft Bill is silent with regard to the circumstances in which the conduct of separate parts of a charity or individuals connected to it will result in the charity's loss of status.

There is no requirement in the Bill for conviction of the charity as such of the relevant offence alleged. Where it is alleged there has been conduct constituting a serious criminal offence, all such allegations should be tested and proved in a Court of law before resulting in loss of a charity's status. Nor should vicarious liability in a criminalizing statute be allowed to operate automatically to convict a charity.

The presumption of public benefit in the case of traditional charities

We understand no change in the law is intended but, for the avoidance of doubt and re- litigation of settled law, it is desirable that the public benefit test be *presumed* as having been satisfied if a charity is considered charitable under existing common law.

The definition of public benefit

We are not sure that "practical utility" completely reflects the existing case law. Further, the word "sufficient", when used to limit a particular group of people, could conceivably be used to exclude perfectly legitimate charities for small minorities or classes in the community, be they sufferers from rare diseases or small indigenous communities, to take just two examples. (This is a further reason we have suggested putting the matter beyond doubt to avoid re-litigation over charitable purposes already accepted as charitable).

Disqualifying purposes

We are in broad agreement with the inclusion of the common law proviso that the activities of a charity must further the dominant purpose of the charity and that charities may only engage in "political" advocacy if such activity aids or is ancillary or incidental to the charitable purpose of the body. We also recognise, however, that attempting to codify the case law in this area is an extremely difficult drafting exercise.

Altruism as part of the public benefit test

We acknowledge that altruism, defined as "a voluntarily assumed obligation towards the well-being of others or the community generally", plays a major part in *motivating* the charitable impulse. Altruism motivates most charitable activity. Charitable activity motivated by altruism arises from the love of one's neighbour, a love which in turn flows from a love of God as the Creator of each person. Christ taught that we are to "love our neighbour as ourselves". Charities are one of the principal means by which the commandment to "love one another" is carried out. Charities address each of the essential aspects that make up the whole of human existence – spiritual as well as physical.

Each charity, whatever its area of endeavour, is altruistic by nature, *if by that word we mean aimed at the benefit of humanity generally*. The exercise of true charity toward others may encompass relationships that include provision for groups.

However, we fear that adding a requirement in the law that the dominant "purpose" of a charitable entity must be "altruistic" may turn out to create a complicating and confusing gloss on the existing law.

The reasons for this comment are that -

$ strictly speaking, non-human entities cannot have feelings of love or altruism; and

$ "purpose" may be construed as meaning "motive".

Strictly speaking, only human beings can have purposes, in the sense of motives. A non-human entity cannot have a purpose in the sense of a motive. Its "motives" are those of its creators or controllers.

Using "altruism" as a criterion for charity therefore appears to open the possibility of an inquiry into the subjective motives of donors and others. One is thus drawn towards an examination of the motives of donors, trustees, administrators and workers involved with charities.

But the subjective motives of donors or creators of charitable trusts have never been regarded as the test of a charitable gift. Many charities have been created by persons who have been concerned for their respectability in this world or their fate in the next. The motives of the American "robber

barons" who endowed great foundations and museums may not have been entirely pure at times but no one can question that these great institutions are charitable.

Who is to say what motivates someone to set up a charitable trust in his or her will or to make a gift to establish a new school building to be named after the donor? Would it disqualify a gift creating a hospital for the sick if the donor reflects that he or his family may one day need its services because of some latent inherited disease? Many charitable gifts have been prompted by the first-hand experience of the donor with suffering and the formation of a deep conviction that such suffering should be alleviated or prevented for all persons, including those near and dear.

It is the objective character of the gift rather than the subjective motives of the donor which stamp it as a gift to charity. The dominant purpose (motive) *of a donor* in creating a charitable trust should not disqualify it from charitable status. The purpose which is relevant is, not the motive of the donor, but the *objects* to which the charity is directed. These objects may be very separate from the motives of the donor. And, from the point of view of the trustees of a charitable trust, the obligations they have to administer the trust are not "voluntary" - the law, quite properly, will require them to apply the funds of the charitable trust for its charitable objects. As to the "motives" of those employed by charities we note that many charities rely, necessarily and properly, on the services of professional staff in the provision of services as well as volunteers. As the Committee recognized, the motives of employed staff or volunteers do not determine the essential character of a charity.

We therefore observe that rather than use the ambiguous word "purpose" of the entity, which may mean "motive" or "end", one has to look simply at what the "end" or "object" of a charity is.

When we do so, we see that the "end" of an entity falling into the definition of a charity is already comprehended by the proposed classification of heads of charity and the "not for profit" test. Essentially a charitable entity is a body whose funds are held on trust for charitable purposes, that is to say, the physical, mental or spiritual well-being of humanity or a section of humanity through the heads of charity as defined. The body is not conducted for the profit or benefit of its members or controllers as such (though they may benefit incidentally in common with the section of the public served by implementing the charity's objects).

Hence, we do not see that a requirement of an "altruistic purpose" for a charitable entity carries the definition of charity any further and may, on the other hand, introduce irrelevant inquiries.

It may also be noted that an "altruism" requirement seems potentially inconsistent with the Inquiry's acceptance that self-help groups be accepted as charitable. As the Inquiry recognized, it is no bar to charity that one may benefit incidentally oneself - many an endowed hospital or church has treated its donors or holds them in its graveyard.

As the Inquiry recognized, rather than pure altruism (which few human beings attain), we are looking at practical inclusive altruism where the intention is to benefit humanity without necessarily always excluding oneself. This sort of altruism is consists with the Gospel injunction "to love thy neighbour *as thyself*". We are called to love God, to love ourselves (in the sense of seeking our everlasting good) and love others as ourselves. We are not called to despise ourselves or ignore our immediate neighbours - on the contrary, our charity should start from within and radiate to all.

Incidentally, we note that, from this point of view, the "poor relations" or "poor employees" cases may not be anomalous. Private charity has often begun at home (a profession of love for humanity coupled with a disregard of the needs of those closer might well be regarded as cant or humbug). We also note that there seems to be a practical public benefit in relieving poverty, given that the social security system is stretched to that end.

Reflections such as these suggest that it may not be wise to attempt to incorporate a test that the "dominant purpose" of the "entity" be "altruistic" as part of the public benefit test for charity. Each of these words seems to raise further definitional questions.

While we understand and are in sympathy with the Inquiry in finding the concept of altruism to be important and deserving of emphasis, we do not think it should be - or needs to be - added to the public benefit test as part of legal definition. For the reasons given above, we consider it may become a source of legal confusion.

We therefore submit that to add an express statutory requirement that altruism form part of the definition of public benefit may inadvertently narrow the scope of organizations that may be considered charitable.

Conclusion

We attach detailed comments on the Bill and have included suggestions for possible drafting amendments which may address some of the more technical points raised. These are indicative only, as we are fully aware of the technical difficulties of achieving precise legislative expression in a codifying statute.

The difficulty is even greater, when the subject of the codifying statute is not, as such, a matter of Commonwealth law but properly belongs to the common law of the several States and Territories. On that point, though we have not specifically suggested an amendment, it might also seem desirable to recognize fully the Federal compact by providing that any trust charitable under the law of a State or Territory is recognized as charitable under this Commonwealth Bill.

Charities Bill 2003

SUGGESTED INDICATIVE AMENDMENTS

We have set out our suggested modifications to the Draft Bill in sequential order, which should not be taken to infer an order of importance.

Draft Bill modification

^4 Core definition

(1) A reference in any Act to a charity, to a charitable institution or to any other kind of charitable body, is a reference to an entity that:

(a) is a not-for-profit entity; and
(b) has a dominant purpose that:
  (i) is charitable; and
  (ii) subject to subsections (2) and (3)—is for the public benefit; and
(c) does not engage in activities that do not further, or are not in aid of, its dominant purpose; and
(d) does not have a disqualifying purpose; and
(e) has not been convicted of engaging in conduct that constitutes a serious offence; and
(f) is not an individual, a partnership, a political party, a superannuation fund or a government body; or
(g) an entity which holds its property and income on trust for an entity satisfying subparagraphs (a) to (f) above.

(2) The entity's dominant purpose need not be for the public benefit if the entity is:
(a) an open and non-discriminatory self-help group; or
(b) a closed or contemplative religious order that regularly undertakes prayerful intervention at the request of members of the public.

(3) An entity which is a trust charitable at common law and which is for the advancement of religion, the advancement of education or the relief of poverty, sickness or mental or physical distress shall be taken to be for the public benefit.

(4) An entity shall not be taken to have engaged in conduct that constitutes a serious offence by virtue of the unauthorised or unapproved or independent conduct of one or more of its contractors, subcontractors, employees, servants, members, officers, directors or trustees, notwithstanding any presumption of vicarious viability for the offence in any statute specifying the offence.

Comment

4(1) (e)

Disqualifying purpose and serious offences

We note that Draft Section 8 states that a disqualifying purpose includes "*engaging* in conduct that constitutes a serious offence" (emphasis added). Such conduct should only constitute a disqualifying

purpose where a conviction for a serious offence has been recorded by a court of law and only in specific circumstances, so that unauthorised or fraudulent conduct on the part of employees or volunteer members of a charitable entity, particularly where the charity has in place appropriate safeguards and/or reasonable processes to prevent commission of such offences, is not made a disqualifying purpose for the entity itself. It seems unreasonable to deprive the community of the benefit of a charity on the mere opinion of a public official such an ATO officer where there has been no conviction by a Court or jury. The *de facto* penalty arising from loss of charitable status, that is, loss of tax exempt status, ought not to result from the mere assertion, averment or certification of a government department that has not been subjected to testing in a Court of law.

At what point would a charity lose its charitable status? Even the interim loss of status with later reinstatement would give rose to a financial penalty for the duration of the loss of status.

In what circumstances would the charitable entity itself be said to "engage" in a serious criminal offence? Would this occur through the unauthorised or illegal actions of a volunteer member which are not known to the trustee or board of the charity? The Draft Bill does not distinguish between, members, employees, whose actions may cause the charitable entity to be vicariously liable, or those who control and steer the entity or those who may contract with it to perform tasks. A charity should not be penalised for the unauthorised or unapproved misconduct of a member. While it may be appropriate that a charity be vicariously liable civilly for, say, gross negligence in a hospital it is a very different thing to decree that an employee or member's criminal misconduct in contravention of the charity's charter or directions should make the charity itself criminally liable.

The creation of what is most certainly a penalty for an entity requires precise and certain terms as well as clarity, both conceptually and in language. The current Draft Bill is inadequate regarding these. In its current state, it is unknown, for example, at what level of knowledge or acquiescence on the part of the entity is required or whether strict liability offences are included, as well as through whom liability for the commission of a offence will pass to the whole of a charitable entity. The language used does not state whether vicarious liability is included and how far it extends. The absence of any requirement regarding proof that an offence has been committed, such as conviction, is also worrying and may result in injustice. Whether the conviction for, let alone the allegation of engagement in, a serious offence by an individual should be sufficient to disqualify the entire charity is not addressed by the legislation.

To impute criminal liability for the actions of members to a charitable entity would be to create a form of vicarious viability rejected in other contexts. For example, legislatures have been loath to adopt a concept of blanket corporate vicarious liability for "industrial homicide" where an employee of the company is killed through the unauthorised or negligent acts of a fellow employee. It is simply not possible in large organisations for the trustees or directors of committee members of an organisation to control every action of every employee at all times.

The inclusion of "omission" as a serious offence creates a bottomless pit of possible disqualification.

A charity should not be penalised for inadvertent or unintentional conduct. Nor should a charity normally be penalised further merely for a failure to do something. A proved offence carries its own penalty. An offence is normally an active and positive action rather than an omission. Given the charities are often staffed by volunteers, it is easy to imagine circumstances where a charity might unintentionally commit an offence under some modern legislation, for example, not recording full details of a transaction if required by some reporting or taxation legislation. If "omissions" are to be retained it should be clear that only a proved wilful or conscious pattern of omissions by the charity's governing body as such to carry out obligations of statute law should cause it to be penalized further.

Otherwise, a charity which acts in good faith, even on legal advice, might find that one unsuccessfully disputed "omission" causes its status to be lost forever.

Charitable groups and disqualifying purpose

4(1)(g)

A charitable trust can hold investments or conduct a business purely for the purpose of generating income to give away for charitable purposes or to distribute to a charity which "owns" that charitable trust. It is common for charities to set up different operating companies or trusts to conduct different activities. This separate constitution of "divisions" of a charity may be for historical or geographical reasons or for reasons of legal liability (eg in the case of hospitals and nursing homes) or for greater autonomy in terms of management and responsibility for individual activities. The mere fact that a charity conducts its business or investment activities through a separately constituted trust or company should not mean *that* separate division should lose its charitable status merely because it is now a separate legal entity, provided that the property and income of that subsidiary entity is held for exclusively charitable purposes or for an entity which would fall into the previous part of the definition. As presently drafted, the definition appears to presume a unitary structure for a charity, but charities often have associated controlled entities carrying out specific parts of the charity's overall work.

Public benefit

4(1)(4)
The proposed codification of the public benefit test could potentially have inadvertent and unintended consequences which would result in the removal of charitable status from existing trusts which are charitable at law. For example, there could be debates over the "practical utility" of some kinds of religion or education and there can be debates about the "poor relations" or "poor employees" cases in charity law. There could be debates over whether small charities serving a limited number of people such as small rural nursing homes are for the benefit of a "sufficient" section of the general community. Similarly, a charitable trust for the cure of a rare disease such as Addison's disease could be questioned in theory as not being for the benefit of a "sufficient" section of the general community. These questions are also addressed later.

We understand this Bill is not intended to narrow the definition of charity, but to extend it slightly to cover the advancement of culture and the natural environment. It is desirable to avoid any unintended narrowing of the existing scope of charitable trusts under ordinary charitable trust law. It would be most unfortunate to create a risk of re-litigation of settled law to establish "public benefit" where it has previously been long accepted as existing at common law; the status of charities under existing law should not be subjected to such re-appraisal in the light of a statutory codification that was never intended to alter the law detrimentally. The proposed subsection does not prevent the Courts from finding a trust (e.g. for an idiosyncratic form of education) would not be charitable under existing precedent.

Draft Bill modification

^5 Not-for-profit entities

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; or

(c) holds its property and income upon trust for other entities which are charities or for charitable purposes exclusively.

Comment

Charitable groups

Subparagraph (c) is designed to facilitate recognition of divisions or branches of a charity as sharing in the attributes of the parent charity. As noted above many charities operate through multiple legal entities or funds. Two or more unrelated charities may even operate a common business or investment fund together to economize on costs. Such "sub-entities" should be recognized as being charitable *pari passu* with the "parent" or "parents".

Draft Bill modification

^6 Dominant purpose

(1) An entity has a ***dominant purpose*** that is charitable if and only if:

(a) it has one or more purposes that are charitable; and

(b) any other purposes that it has are purposes that further or are in aid of or are ancillary or incidental to its purposes that are charitable.

(2) An entity has a ***dominant purpose*** that is for the public benefit if and only if:

(a) it has one or more purposes that are for the public benefit; and

(b) any other purposes that it has are purposes that further or are in aid of or are ancillary or incidental to its purposes that are for the public benefit.

Comment

Commercial activities furthering dominant purpose

We agree that a charity must be able to raise funds for its continued work by engaging in profitable activities which, not being for the gain or profit of particular persons, will aid or further the charity's dominant purpose. Since charities do not exist as commercial for-profit entities and are unable to raise funds in equity markets and the like, the ability to engage in commercial activities is crucial for the continuation and development of charitable works.

However, we are concerned that the statutory formula used to codify this principle appears to unnecessarily restrict the scope of commercial activity a charity may engage in to further its dominant purpose. We note that the Inquiry was careful to examine the nature of the nature of a charity's purpose in determining whether or not its purpose was charitable, rather than seeking to emphasize the

nature of its various activities by imposing an "activities test" to determine purpose. An "activities test" was not taken up by the Inquiry. Activities were to be examined in the light of the charity's stated purpose; they were not to become the test itself.

We suggest "and" needs to be replaced by "or" to reflect the existing law more accurately. It is possible that a purpose may be more than ancillary or incidental but still subordinate to a dominant charitable purpose.

Under the current legislative formula, the use in Section 6 of the Draft Bill of the word "and" in "any other purposes that it has are purposes that further or are in aid of, *and* are ancillary or incidental to, its purposes that are charitable" seems to over-qualify the notion of purposes that "further or are in aid of" by requiring these to be "ancillary or incidental" to the dominant purpose as well. It would seem that those activities which "further or are in aid of" are inherently ancillary and incidental. It would seem, however, that the addition of these words, when read with the Explanatory Memorandum, may in fact mean that the words "ancillary or incidental" are not merely redundant additions, but constitute a narrowing gloss upon "further or in aid of".

The example (Example 1.1) given in the Explanatory Memorandum (EM) postulates a charitable organization which funds its charitable activities by selling second hand clothing. The EM states that such for-profit activity is acceptable if it is furtherance of the dominant charitable purpose, but qualifies this by stating that the activities are incidental "as they are conducted on a small scale to assist with the wider purpose of the entity". It is arguable that what is intended here is that size determines what is incidental or ancillary; if activities which further the charitable purpose are small-scale, they are ancillary. If they are not small-scale, they are not ancillary and therefore may not satisfy the definition of being in aid of or furthering the charitable purpose.

If *scale* determines what is ancillary and if ancillary nature determines what will be in aid of the dominant purpose, then it would appear that an indirect "activities test" ultimately determinative of a charity's true purpose has been inadvertently introduced into the legislation. Such a test was not taken up by the Inquiry and could constitute an unintended departure from common law principles. As noted above, a business or investment held on trust for exclusively charitable purposes is a charity - the purpose which is relevant is what the funds are destined for.

Since the commercial activities of many charities may not be considered "small scale", given that various charitable entities operate numerous second hand clothing outlets, for example, or sell other products on what may be more than a small-scale basis in aid of their charitable activities, would these organisations be disqualified from status as charities? We note that the commercial activities of charities have been assailed by for-profit corporations who have sought to lessen what they perceive to be competition from the charitable sector – a concern that the Inquiry rejected on the basis that the activities which not-for-profit organisations engage in may be commercial, but the purpose of the commercial activities undertaken by charities was fundamentally different than those of for-profit corporations since they were not for the gain of shareholders or proprietors. We reject any retreat from the Inquiry's position that charities may engage in commercial activities, even those which are large scale, if they do indeed further the dominant charitable purpose.

We also observe there is no lack of a "level playing field" in following this established practice. Any shareholders of a for-profit company are free to gain charitable status for that company if they are willing to allow it to declare charitable trusts over its property and to forgo forever the prospect of dividends or capital returns.

We therefore recommend that the word "or" be substituted for the word "and" in Draft Section 6 so that the clause would now state "any other purposes that it has are purposes that further or are in aid of, *or* are ancillary or incidental to, its purpose that are charitable".

Draft Bill modification

^7 Public benefit

(1) A purpose that an entity has is for the ***public benefit*** if and only if:
- (a) it is aimed at achieving a universal or common good; and
- (b) it has practical utility; and
- (c) it is directed to the benefit of the general community or to a section of the general community.

[(2) A purpose is not directed to the benefit of a sufficient section of the general community if the people to whose benefit it is directed are numerically negligible.

(3) Subsection (2) does not limit the other circumstances in which a purpose is not for the benefit of the general community or to a sufficient section of the general community]

Comment

Because of the restrictive words "if and only if", unnecessary debates might be rekindled about the practical utility or broadness of charitable purposes previously accepted under existing trust law. This has been commented on above but it seems desirable to remove the word "sufficient", so that a trust for a rare disease such as Addison's disease or nursing homes in small rural areas or for a small indigenous tribe is not be excluded as a charity for want of a sufficient section of the community as beneficiaries. We also suggest that it is not objectionable that existing case law allows for charitable trusts for "poor relations" or "poor employees". While it might be argued that the support of one's immediate family is not a charitable purpose because there is a legal and moral duty to support one's immediate family, there is not a legal duty to support poor relations or employees and there is clearly a public benefit where charitable trusts relieve such persons and prevent them becoming dependent on the community through the social security system. Just as a trust for the payment of rates or the relief of taxation is charitable, so it is charitable for somebody to take the trouble to see that distant relations for whom he has no legal responsibility are taken care of.

It is suggested subsections (2) and (3) be deleted as they create an erroneous idea that a trust for the relief of suffering of a rare group, eg Siamese twins, would not be charitable. Charity law is not about finding and favouring majorities while unfairly excluding minorities or interest groups. It is about human love as a reflection of Divine love and compassion and even the smallest object of charity deserves recognition as does the "widow's mite" in the Gospels.

Draft Bill modification

^8 Disqualifying purposes

(1) The purpose of engaging in activities that are unlawful is a ***disqualifying purpose***.

(2) Any of these purposes is a ***disqualifying purpose***:
- (a) the purpose of advocating a political party; or

(b) the purpose of supporting a candidate for political office.

(3) A purposes of attempting to change the law or advocating a political cause is a ***disqualifying purpose*** if it is, either on its own or when taken together with one or both of the other of these purposes more than in aid of or ancillary or incidental to the other purposes of the entity concerned.

Comment

We understand the object of this proposed clause. We also recognise the considerable difficulty of expressing precisely in words the fine distinctions found in the case law. Perhaps it is impossible to do so, as each case greatly depends on its own facts. We accept completely the proposition that charities are not political parties and should not be political parties or branches of political parties. Charities, political parties and parliaments have different roles and responsibilities. Equally, however, they interact with each other and can - and should - cooperate with each other for the common good. We therefore offer the following comments in the hope that they may contribute to a legislative formulation which draws an appropriate boundary.

Essentially, we see a difference between the role of churches as institutions and the role of Christian people acting as individuals in the world. The churches can and must seek to educate the community on moral values. The burden of engaging in practical politics for the purpose of formulating and implementing just legislation is one which Christian and other individuals must undertake in the light of their own consciences, aided by such assistance as Christian teaching can give, while always recognising that the things of this world are inherently corruptible.

8(1)

This should go without saying. However, one might observe in passing that members of churches were active in the then illegal activities of smuggling slaves from the pre-Civil War American South to freedom in Canada, an activity illegal then but now seen as laudable. These actions by pious people would not, however, prejudice the charitable status of their churches - then or now - as those actions were not the purposes *per se* of the churches of which they were members. The point is that a distinction needs to be drawn between the purposes of a charity and the individual acts of its members, acting on their own initiative.

8(2)

It is hard to conceive that a charity as such should advocate a political party or support a political candidate. (One does note, however, that a church might quite legitimately *oppose* a political party in the extraordinary or exceptional circumstance that a party, like the former Soviet Communist Party, was intent upon outlawing religion and imposing atheism on believers and their children.) While the teachings of a church or an educational charity may shape the views of members or students, direct political activity is not the proper field of charity. Separation of Church and State is desirable in this sense, that each respects the proper role of the other.

8(3)

On the other hand, it is equally obvious that a charity may be seen to support a political cause or a change in the law, as a result of its core activities or in the case of the churches, in the light of moral

teachings. This may occur without a church even wishing to embark upon political controversy. The controversy may come to it, for merely having continued to state its long-held beliefs. On reflection, this is hardly surprising. Churches are seeking to teach eternal values and those values are not part of political cycles or changing fashions in political thinking. Like the Prophets of ancient Israel, churches sometimes have to call people back to God and this may not always be a politically fashionable call.

For example, war, slavery, abortion, euthanasia have been among the many subjects on which the Christian churches have sought to give moral guidance. Sometimes, as in the Roman Empire, Christian beliefs were opposed to generally accepted views and for many years Christianity was regarded as a seditious cult by the Emperors. At other times, as in the Evangelical revival in Queen Victoria's reign, law, public opinion and Christian morality were more closely aligned.

However, Christ's Kingdom is not of this world. Christians are enjoined to render unto Caesar that which is Caesar's. In the context of political activity, the influence of churches is to be felt not as political parties (which they are not) but as faithful exemplars of the Christian virtues and Christian morality. Sometimes this may mean publicly saying that a given law is morally right or wrong and should be defended or should be changed but the business of changing it is the business of those Christians and other people of goodwill who directly enter the field of politics.

The distinction may perhaps be seen as too fine–but one that is nonetheless very necessary. Moral teaching is indeed a proper public role of the churches as institutions. The Ten Commandments have not reached a "use by" date. On the other hand, political activity to change law to conform to moral values is the proper role of individual Christians and other people of goodwill who are called to contribute to society in this way.

It will be observed that we have suggested changing "government policy" be omitted as a disqualifying purpose. Unlike the purpose of changing "the law", the concept of changing government policy seems more ephemeral and we are not sure this phrase perfectly reflects the existing case law. Everyone in a free society is entitled to express views on government policy and governments themselves frequently change their policies to adjust to changed circumstances or electoral necessities. Sometimes governments themselves, as well as Parliaments, solicit contributions and opinions from the community including charities on policy or legislation.