



**Submission to the Board of Taxation.**

**Consultation on the Definition of a Charity.**

**1 October 2003**

The Uniting Church in Australia welcomes the Federal Government's commitment to modernise definitions of charity used in law and refers the Government to the Church's input to the *Charity Definitions Inquiry 2001* (see *Attachment A*).

The Church supports the need to:

- scope and clarify a contemporary definition of 'charity' through legislation and
- establish a workable and relevant definition in law.

In particular, the expansion of the meaning of charitable purposes to include the advancement of social or community welfare and of the natural environment are strongly supported, as is the inclusion of child care services and self help organisations within the definition of charitable status.

The Church however, strongly opposes clauses within the draft bill that have the effect of restricting the lobbying and advocacy activities of charities. It is as a matter of social justice and pragmatism that the Church can only support a definition of charity that:

- serves the needs of the community,
- reflects a socially just society and
- recognises advocacy as a legitimate means of furthering charitable purposes by bringing issues affecting the community to the attention of government.

Within the context outlined above, we submit comments (*Attachment B*) on a number of aspects of the draft Bill. It is our view that, if the Bill is to translate to efficient and effective practices at the community level these proposals will strengthen its workability in the charitable sector.

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The Uniting Church in Australia

*Submission to*

Inquiry into the

DEFINITION OF CHARITIES

and

RELATED ORGANISATIONS

January 2001



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## *Executive Summary*

### **Introduction**

1. The Uniting Church in Australia makes this submission as a result of national deliberations across the various national and state based agencies of the Church. The working party is representative of the National Assembly (national council) of the Church, the body responsible for determining matters of doctrine, worship, governance and mission and with representation from the State based Synods, and National Assembly agencies: the Assembly Finance Committee representing the Synod Property and Finance Units; Uniting Education - the national Christian education agency; National Social Responsibility and Justice Committee - the national body committed to guiding and resourcing the church in the areas of social justice; and UnitingCare Australia, the national body for community services. In addition to this submission, some individual agencies of the Church have provided their own submission to the Committee. We commend those submissions in support of this submission.
2. The caring agencies of the Uniting Church are charitable organisations involved in the provision of the relief of poverty, advancement of religion, advancement of education, and other services beneficial to the community.

### **The outcomes**

3. This inquiry in dealing with the meaning and classification structure of charities and related organisations, **has the potential to clarify definitions and principles governing the practice of charities and related organisations to ensure their continuing role as organisations which constitute “pivotal members of the social coalition”.**
4. By examining current definitions of charitable organisations and public benevolent institution (based on the 1601 Statute of Elizabeth, and Pemsel’s “heads of charity” categorisation), the inquiry is examining structures that enhance democracy, civil society, human rights and human dignity. It is therefore imperative that the issues involved in the process of the inquiry are seen as more than technical, financial and legal. Whilst the technical aspects need to be done well, in themselves, they cannot determine the focus and outcome. **The focus of this inquiry must be ethics, values and what it means to enhance civil society, and the outcome, mechanisms and processes to improve civil society.**
5. **Building on this, this inquiry must put in place an ethical framework by which to assess and organise the information and opinions that it receives.** The inquiry, and the government response to it, must address the issues primarily in terms of government responsibility towards citizens - to create a context in which they can flourish through the organisations of civil society.
6. This inquiry must respect the cumulative evidence that already exists in Australian law that recognises the valued contribution of charities and related organisations towards the development and progress of the common good. Building on this, it must offer a consistency for interpretation of charities and related organisations in the legislative and legal institutions and processes.
7. The administration of laws governing charities must achieve accountable and transparent use of public funds. Similarly there must be independent assessment of the eligibility of organisations to receive PBI status. **The Uniting Church proposes the government explore the establishment of a mechanism similar to the Charities Commission for England and Wales, yet independent of government, as a means of promoting charitable activity in Australia, registering and regulating charitable organisations and ensuring public accountability and transparency.**



8. **Clarification of the definition of charity must present a contemporary interpretation of the “four heads of charity” which is inclusive of the special role of religious activity within church based organisations.**
9. **The inquiry must seek to identify the appropriate core substance of the meaning of charity which can withstand the test of time and which is based on the purpose and not-for-profit nature of the activity carried out by the organisation, not on the nature of the activity itself.**
10. In applying the four heads of charity within a contemporary context, the revised definition of benevolence should include those matters that are now recognised as an important part of meeting the needs of the clients of charities and related organisations. **These are: preventive strategies; advocacy which addresses the violation of human rights, social policy that fails to meet needs, and the systemic causes of poverty or disadvantage; and the research required to inform these or any other benevolent activities of Public Benevolent Institutions (PBIs). The revised definition of PBIs must retain the present elements of public and not-for-profit, within a revised understanding of benevolence.**
11. **The definition should be wide enough to include community sector organisations such as ACOSS, the Welfare Rights Centre and community sector activities involved with childcare as PBIs, while excluding organisations whose basic purpose is to promote the interests of business or political parties.**

### **Current Operating Environment**

12. Together with governments, the church, charitable and community service not-for-profit organisations share the common challenge of addressing economic and social problems through developing and providing services which achieve better outcomes for individuals, families and communities. **It must be recognised and supported that these organisations are the major provider of community services critical to the provision of social wealth.**
13. Over the last ten years these organisations have been part of a reform movement which has resulted in changed arrangements for planning, funding and delivering community services. This has established a new experience for the delivery of services which to date has largely gone unevaluated and unresearched.
14. A key feature of the drive towards competitive tendering has been the adoption of business models and practice by the church, charitable and related organisations. This has served to blur the boundaries in the health and welfare sectors around the nature and purpose of the activities carried out by the church, charitable and related organisations. However these sectors must be recognised because of their purpose.
15. **The increased demand on church, charitable and related organisations due to changes in the economic and social environment must be acknowledged.** The widening gap between the rich and poor, the increasing structural changes to the world of work including the loss of unskilled labouring jobs and the increasing reliance on information technology, changes to the traditional sense of community and the increase in the number of social problems such as mental illness, drug dependency and lack of public housing, have all meant an escalating demand on the services provided by organisations in the church, charitable and related organisations.



## Definitions of Charity

### *Religious*

16. The Uniting Church in Australia established in 1977 is defined by legislation, as a religious organisation to advance religion and has as part of its structure multiple activities which work to serve this dominant purpose. The provision of caring services, advocacy and research are part of these core religious activities.
17. The Church is a body of people who throughout Australia, worship in congregations; express their Christian beliefs in a wide variety of ways including schools, community service, pre-schools and child care, hospitals, employment programs, aged care and overseas missions; as well as donate their time, expertise, experience and funds to enable the activities of the Church to prosper and succeed.
18. This legal status and structure of the Church has been largely misunderstood by government.
19. This confusion highlights the reality that church, charities and related organisations are today more complex entities than existed at the time of the passing of the Statute of Elizabeth. The Church has at its core religious activities which are inclusive of caring activities. These activities of benefit to the community, including advocacy and research, are key instruments in building common wealth. The resourcing of this activity involves the need to broaden the income base through a variety of methods such as fundraising, commercial activities, fees and sponsorship.
20. In recent overseas investigations into the area of this inquiry, the position of religion and the larger religious institutions and denominations are considered. Discussion also focuses on situations where charitable trusts or large donations have been made for the benefit of a “religion” and there has been a question as to whether the particular organisation constituted a religion. There have also been questions as to a religion passing the “public benefit” test. In both the Canadian and UK reviews, there was no question that the advancement of religion continued to constitute a valid charitable purpose.
21. **We argue that the churches and equivalent bodies in other religions should be understood as charities. Religion is a worthwhile and charitable end in itself, it is basic to human life.**
22. **Given these realities, it is appropriate for governments to maintain a definition of charity that includes the advancement of religion, and to use those definitions as the basis for encouraging those activities by ensuring that they are not subject to a taxation or administrative burden which damages their capacity to fulfil their purposes.**

## Making Contemporary and Relevant the Definition of Charity

23. The current experience of the Church needs to be appreciated by the Committee of Inquiry as these demonstrate the practice of the Church against the four ‘heads’ of charity identified by Pemsel. It is critical that any new definition be tested against the reality of what constitutes the holistic activities of the Church, as well as charities and related organisations.

### *Taxation and Public Benefit*

24. **Whilst the terms charity, religious organisation and community service organisation are relevant today, they should be encapsulated under a redefined concept of charity inclusive of actions critical to the eradication of poverty such as advocacy, community development and support.**
25. Under past taxation regimes, the achievement of particular classification and approvals under various taxation laws for the purposes of exemption from income tax, sales tax, fringe benefits tax, and



deductibility for donations, meant considerable benefits for organisations and the community. These treatments represent indirect government assistance in progressing the capacity of the organisation to do human good and the cumulative evidence embodied in Common Law recognises these activities of public benefit.

26. The term Public Benevolent Institution (PBI) has no precedent in common law and was only introduced through Australian income tax legislation in 1926. The term has since developed widespread use and recognition and is now entrenched in State legislation as well. It is synonymous with organisations valued for their contribution to the human good. These developments have not contributed to improvement in understanding. Conversely it has exacerbated confusion of terminology and administration. In one sense, PBIs represent a subset of charitable organisations. However, under close examination, there are many inconsistencies and overlapping of definitions and terminology and official perceptions of what human good and common wealth is developed as a result.
27. In the absence of any specific independent organisation to oversight (regulate) the charity sector, then, by default, the codification process falls to taxation legislators and regulators. As a consequence, all discussion about charities is further forcefully focussed on viewing definitions from the perspective, not only of treasury/taxation, but particularly in terms of protection of the income tax base and therefore to pursue strategies of narrow definitions for qualification purposes for taxation “benefits”.
28. This approach clearly ignores the contribution which charities make to the social capital of the nation in “public benefits” (human good and common wealth). **It is therefore necessary to establish a structure that recognises that a taxation benefit is not a loss of income tax to the government but a saving in the cost of providing those benefits and an enhancement of common wealth.**
29. The term not-for-profit is a very broad category encompassing all organisations which are not conducted for private gain to individuals as either proprietors or shareholders. There are many organisations that although not-for-profit would not qualify as charitable. The terms of reference for the Inquiry refer to “community service not-for-profit” organisations to distinguish the particular category that is being addressed, with the qualifier, “community services” identifying that these organisations’ primary purpose is for public community benefit.
30. The term not-for-profit should not be interpreted to mean that it is inappropriate to produce a financial surplus. Such an approach fails to recognise that a surplus indicates financial prudence and gives some comfort about long term financial survival (assuming that this is seen to be a worthwhile objective), ie if there is no margin, there is no mission.
31. **Any new definition of charity or PBI must clearly indicate that commercial and investment activities are included, provided that the income is used to achieve the purpose of the charity.**

#### *Altruism*

32. Public benevolent institutions, charities (including religious organisations) and community service not-for-profit organisations are important vehicles for the expression of altruism.
33. The point of not-for-profit organisations is that their chief purpose is altruistic, and their economic and commercial activity is a means to that end. Charitable and benevolent organisations have always had to find ways of surviving financially, and that has always meant raising money by a variety of means, including commercial activity, that is, providing goods and services for sale, even if only at the annual fete, where what has been sold was produced by voluntary labour.



34. **It is therefore recommended that the definition of charities and PBIs take into account their not-for-profit status**, in accordance with the understanding set out in the Draft Tax Ruling on Public Benevolent Institutions, namely  
*We will accept an organisation as being non-profit where, by its constituent document or by operation of the law...it is prevented from distributing its profits or assets among members while it is operating and on its winding-up. The organisation's actions must, of course, be consistent with the prohibition.*
35. **In this context, it is important that the ruling be applied equitably and that child care activities such as the delivery of long day care be defined as a benevolent activity.**
36. The ATO in draft ruling TR 2000/d14 #78, gives as examples of appropriate clauses in constituent documents of a non-profit clause and a dissolution clause which transfers assets remaining after liabilities are paid to another PBI. In the case of charities, the appropriate requirement would be that they be paid to another charity.
37. **We believe, however, that the understanding of the needs of those who live in poverty or in other ways in need, and the nature of benevolence, in the ATO draft ruling TR 2000/D14 are totally inadequate and need to be updated.**
38. **We believe that changes in the definition of PBIs and charitable organisations should be first and foremost to ensure that those who live in poverty or in other ways in need experience more effective relief of their situation.**
39. **We believe advocacy should be properly considered as benevolence as it is an activity shaped by the experience and perspective of the recipients of benevolence, and builds on the experience of the work the organisation (or in the case of peak bodies, the member organisations) does directly with those recipients.**
40. **That is, the concept of benevolence must take account of how contemporary society functions and the types of "relief" that people actually require in that context.**
41. **The definition of benevolence with respect to PBIS should be updated to include advocacy and prevention.**
42. **It would be more appropriate to provide definitions in legislation that includes also a mechanism for occasional review of the definitions.** It is the argument of this paper that the definition of charitable, religious, and community service not-for-profit organisations and PBIs must be based on the nature and purpose of the organisation and how the activities and types of service provided contribute to that purpose.
43. **The current definition of benevolence is too narrow and works against the interests of people in poverty or other necessitous circumstances. The definition should be updated to incorporate all those elements that are part of professional best practice by which public, not for profit organisations meet human need, even if this means that some activities are included that are also beneficial to a wider section of society. Such activities include research, advocacy and prevention. It should recognise peak bodies who perform such functions on behalf of member organisations who provide the already recognised forms of benevolence.**
44. Legal definitions can no longer depend so heavily on compassion and pity, but need to draw on other areas in law such as human rights law, child protection legislation, which have articulated the matters more objectively.



## ***1. Introduction***

The Uniting Church in Australia makes this submission as a result of national deliberations across the various national and state based agencies of the Church. The working party is representative of the National Assembly (national council) of the Church, the body responsible for determining matters of doctrine, worship, governance and mission and representation from the State based Synods.

The submission is the result of collaborative thought across agencies of the church such as the Assembly Finance Committee whose representatives are drawn from the Synod Property and Finance Units; Uniting Education - the national Christian education agency; National Social Responsibility and Justice - the national body committed to guiding and resourcing the church in the areas of social justice; and UnitingCare Australia, the national body for community services. In addition to this submission, some individual agencies of the Church have provided their own submission to the Committee. We commend those submissions in support of this submission.

The Uniting Church in Australia came into being on 22 June 1977 as a result of the coming together of the Congregational Union of Australia, the Methodist Church of Australasia and the Presbyterian Church of Australia.

The Uniting Church's approach to mission and service is to stand beside those in need. The agencies of the church are part of local communities, seeking to hear and respond to the voice of the local people, a response that is about offering support, encouragement and empowerment. The caring ministry is born out of Christ's teachings as laid down in the Gospels and affirmed in the *Basis of Union* of the Uniting Church in Australia.

The caring agencies of the Uniting Church are charitable organisations involved in the provision of the relief of poverty, advancement of education, advancement of religion and other services beneficial to the community.

### **1.1. The issues at stake in this inquiry**

This inquiry is about examining the structures that enhance democracy, civil society, human rights and human dignity. It is imperative that the issues involved in the process of the inquiry are seen as more than technical, financial and legal. Whilst the technical aspects need to be done well, in themselves, they cannot determine the focus and outcome. The focus of this inquiry must be ethics, values and what it means to enhance civil society, and the outcome must be the enhancement of civil society.

The nation is a democracy that exists for the common good. At the heart of modern democracy is a belief in the dignity and responsibility of human beings. A modern democracy is a society, a community of interdependent human beings, reflecting a culture expressive of people's humanness and interdependence. Economic activity is a means to that end, not the end in itself. At the very heart of the notion of common wealth is a concept of altruism, a sense that individuals do not exist only for themselves, but for one another, and a society exists to promote the individual's contribution to and participation in the life of the community, thereby being part of the development of the nation's common wealth.

As the international human rights instruments make clear, what makes a government legitimate is not only that it is elected by and accountable to the people, but that it respects and enhances human dignity and human rights. This inquiry highlights some essential questions the answers to which provide an illumination of what it is that is at the core of our common wealth, or in the words of taxation law, "public benefit". Will human beings be encouraged by government to organise themselves to care for one another, or will that human right and human responsibility be sacrificed to political and economic ideologies that allow



economic priorities and business interests to shape and limit civil society? Do we exist as a nation to create profit, or to express our human dignity and citizenship?

This inquiry must recognise the cumulative evidence that already exists in Australian law that recognises the valued contribution of the church and charitable organisations towards the development and progress of the common good.

Building on this, this inquiry must put in place an ethical framework by which to assess and organise the information and opinions that it receives. Public policy is an expression of values. This inquiry, and the government response to it, must address the issues primarily in terms of government responsibility towards citizens - to create a context in which they can flourish through the organisations of civil society.



## ***2. Current operating environment of the church and charitable, non-profit organisations***

There are a number of basic characteristics of the current operating environment for the sector.

The first is that together with governments, **the churches, charitable and community service not-for-profit organisations share the common challenge of addressing economic and social problems through developing and providing services which achieve better outcomes for individuals, families and communities.**

The second is that **these organisations are the major provider of community services critical to the provision of social wealth.** This wealth is based upon the provision of support to individuals, families and communities; providing assistance to strengthening communities, enhancing equity and building social cohesion and providing a voice to those who are disadvantaged. Together with individuals, business, unions and governments, these organisations are a critical plank in the social coalition identified by the Prime Minister.

Over the last ten years these organisations have been part of a reform movement which has resulted in changed arrangements for planning, funding and delivering community services. This has established a new experience for the delivery of services which to date has largely gone unevaluated and unresearched. The deliberations around this inquiry are a step in building a more comprehensive knowledge of the critical contribution made by the sector though greater illumination of the attributes, purpose and behaviours of the organisations.

Thirdly, a key feature of the drive towards competitive tendering has been the adoption of business models and practice by the church and charitable organisations. This has served to blur the boundaries in the health and welfare sectors around the nature and purpose of the activities carried out by the church and charitable organisations.

The fourth is the increased demand on church, charitable and related organisations due to changes in the economic and social environment. The widening gap between the rich and poor, the increasing structural changes to the world of work including the loss of unskilled labouring jobs and the increasing reliance on information technology, changes to the traditional sense of community and the increase in the number of social problems such as mental illness, drug dependency, and a lack of public housing, have all meant an escalating demand on the services provided by organisations in the church, charitable and related organisations.



### **3. *The Uniting Church – charitable, religious and not-for-profit***

The Uniting Church in Australia is defined by legislation, as a religious organisation to advance religion and has as part of its structure multiple activities, which work to serve this dominant purpose.

The Church is a body of people throughout Australia, who worship in congregations; express their Christian beliefs in a wide variety of ways including schools, community service, pre-schools and child care, hospitals, employment programs, youth and family services, counselling, aged care and overseas missions; as well as donate their time, expertise, experience and funds to enable the activities of the Church to prosper and succeed.

The Church was created by State and Territory legislation on 22<sup>nd</sup> June 1977. These laws recognised the existence of the Church, gave the Church the ability to sue and to be sued, and gave authority for the Church to be governed by the Constitution, Regulations and By-Laws which order the life of the congregations, institutions, administration and structures of the Church.

Authority was extended to the Church to constitute organisations as separately incorporated organisations or as unincorporated bodies within a Synod (which approximates an area of a State) such that the Church as a religious institution can consist of many institutions.

Government has largely misunderstood this legal status and structure of the Church. There has been confusion in Government agencies such as the Australian Taxation Office, the Federal Department of Education, Training and Youth Affairs; Employment, Workplace Relations and Small Business; and the New South Wales Government about the legal and operational detail governing the church.

This confusion highlights the reality that church and charities today are more complex entities than existed at the time of the passing of the Statute of Elizabeth in 1601. The Church has at its core religious activities that are inclusive of caring activities. These activities of benefit to the community, including advocacy, are key instruments in building common wealth. This involves the need to broaden the income base through a variety of methods such as fundraising, commercial activities, fees and sponsorship.

The current experience of the Church needs to be appreciated by the Committee of Inquiry as these demonstrate the practice of the Church against the four ‘heads’ of charity identified by Pemsel (See Section 4). It is critical that any new definition be tested against the reality of what constitutes the holistic activities of the Church. Whilst the terms charity, religious organisation and community service organisation are relevant today, they should be encapsulated under a redefined concept of charity inclusive of actions critical to the eradication of poverty such as advocacy, community development and support.

The Australian Taxation Office over the past three years has been inconsistent with its assessment of what is a public benevolent institution which is essential to endorsement of many of our activities as “deductible gift recipients”:

- The Sydney Office has accepted all applications for endorsement even though all but one is an institution constituted within the New South Wales Synod. The exception is a separately incorporated joint venture with the Metropolitan Aboriginal Land Trust to operate as the vehicle for the provision of aged care, employment and training to indigenous Australians.
- In contrast, the Newcastle Taxation Office has rejected all applications, citing that we fail all tests because our applicants are not:
  - (i) “public” - the view being that the Church Councils appoint the governing bodies for our institutions, so the public neither controls our activities nor are we accountable to the local public;



- (ii) “benevolent” as benevolence should be available only to the needy and the provision of aged care to some full fee paying residents means that we have failed that test; and
- (iii) “institutions” as they contend that an Institution cannot be made up of several institutions.

Clearly the Newcastle Office is determined to eliminate “Charities” and “Public Benefit Institutions” and limit “Religious Institutions”.

Similarly the Goods and Services Tax Legislation narrowly defines religious services to services of worship, spiritual retreats and the like whereas our services, based on our religious beliefs, encompass all services we provide, including the supporting of fundraising and administration.

Indeed the recently produced Draft Tax Ruling on *Income Tax and Fringe Benefits Tax: Public Benevolent Institutions* is designed for stand alone organisations and not for church owned and/or run organisations. It is clearly aimed at community based organisations, without acknowledging the Church’s very significant and extensive community involvement.

Thus there is a strong need for government to recognise that the Church is charitable activities and therefore the use of its income, is expenditure undertaken on behalf of governments, thereby encouraging charities (and corporate philanthropy) to provide greater services. (See also 4.3.2.)

The Uniting Church in Australia asserts that Government agencies need to recognise that the dominant purpose of an organisation should be the basis of its definition and all activities must operate to serve that purpose. That being the case then a government agency such as the ATO should be reviewing *how* services are provided rather than narrowly focusing on collecting taxation revenue with no social perspective.

### **3.1. Uniting Church Investment in the Australian Community**

Just under three thousand Uniting Church congregations are today located across every geographic region of Australia. However, the investment of the Uniting Church in the Australian community reaches far beyond the traditional religious services of worship, nurture and evangelism. The Uniting Church is also well known and highly acclaimed for its commitment to multiculturalism, Aboriginal and Torres Strait Islander rights and determination, ecumenism, and for its contribution to health and welfare, social justice and education.

The following summary provides a “snapshot” of the Uniting Church’s investment in schools, hospitals and community services.

#### ***Community services***

- Over 400 agencies, in 500 locations
- 18,000 programs
- 24,000 staff
- 800,000 clients p.a.
- \$1 billion annual operational turnover

#### ***Schools***

- \$230 million annual operational turnover
- 46 schools
- 38,113 students



***Congregations***

- 2921 congregations, located in 51 presbyteries representing all geographic areas of Australia
- 2432 Ministers of the Word
- 114 deacons

Deacons and Ministers are in placements, which include congregations, and a range of chaplaincies in the secular world: prisons, hospitals and welfare agencies, the police force, and emergency services including the fire brigade.

***Hospitals***

- 11 hospitals in 3 states
- \$252 million annual operational turnover
- 150,000 patients
- 4,300 staff



## **4. Definitions of Charity, Public Benevolent Institution and Religious Organisation**

*Questions in the Issues paper focus attention on:*

*Current definitions and their regard to the social and economic environment in which our organisations operate;*

*The continuing relevance of the terms ‘charity’, ‘religious organisation’, and ‘community service not for profit organisation’ in the current social and economic environment;*

*The continuing relevance of the four ‘purposes’ of charity in the common law;*

*The continuing relevance of PBI; and*

*The place for ‘direct’ assistance as distinguished from other forms of assistance?*

The responses to these questions shape this submission. We will address first the issue of charity, and then the issue of PBIs as a particular form of charity rightly provided and supported by additional assistance from government.

### **4.1 The overseas experience**

The primary definition of charity or charitable purposes first set down in the *Charitable Uses Act 1601*, (now referred to as the *Statute of Elizabeth*), included:

*Some for Reliefe of aged impotent and poore people, some for Maintenance of sicke and maymed Souldiers and Marriners, Schooles of Learninge, Free Schooles and Schollers in Universities, some for Repaire of Bridges Portes Havens Causwaies Churches Seabankes and Highwaies, some for Educacion and prefermente of Orphans, some for or towards Reliefe Stocke or Maintenance of Howses of Correccion, some for Mariages of poore Maides, some for Supportacion Ayde and Helpe of younge tradesmen Handicraftesmen and persons decayed, and others for reliefe or redemption of Prisoners or Captives, and for aide or ease of any poore Inhabitanes concerninge paymente of Fifteenes, setting out of Souldiers and other Taxes.*

Although this legislation was subsequently repealed, this list of purposes has been the recognised basis for all subsequent developments in the law relating to charities and charitable purposes. During these subsequent 400 years, there has been a substantial body of case law which has impacted on the understanding and interpretation of these primary charitable purposes. There has also been a substantial body of statute law that has delivered additional and sometimes contradictory impacts.

The 1601 statute remains an important reference even into the 21<sup>st</sup> century. The Charity Law Reform Advisory Group in the UK has commented that the above preamble to the 1601 *Act* was developed as a guide and indicates that objects are deemed charitable because they were included in the preamble or because they are accepted as analogous to objects on that list.

In both statute and case law, it is clear that the meaning and definition of charity has been modified over the centuries consistent with the changes in understanding, expectations and values of the society of the day.



The major challenge is to seek to identify the appropriate core substance of the meaning of charity which can withstand the test of time and which is based on the purpose of the activity carried out by the organisation, not on the nature of the activity.

The most common subsequent reference is that known as the Pemsel test as expressed by Lord Macnaghten in 1891. He identified the four “heads” of charity as

- The relief of poverty;
- The advancement of education;
- The advancement of religion; and
- Other purposes beneficial to the community.

In recent years, after searching inquiries into charities, two reports have been published. The first is the *Report on the Law of Charities* published by the Ontario Law Reform Commission in Canada in 1996.<sup>1</sup> The second is the report of the *Commission on the Future of the Voluntary Sector*, also known as the Deakin Report published in the United Kingdom also in 1996. It is also anticipated that a report from the Charity Law Reform Advisory Group in the UK will be released in February 2001.

Whilst the issues of charitable purposes and organisations have been around for more than 400 years, the above reports confirm that there has never been an adequate means of establishing an unequivocal definition of the term “charity” or “charitable”. Numerous references in the above reports confirm that:

- The form of the *Statute of Elizabeth* has always been acknowledged as a base and guide for subsequent common law determinations.
- The Pemsel test has been similarly recognised as a form of delineation with considerable scope for interpretation under the “other beneficial purposes” heading.
- There are acknowledged difficulties in relying on common law, particularly in terms of the reluctance of the courts to move significantly away from precedent cases to meet the changing conditions in contemporary society.
- Notwithstanding the above, the preferred way forward is to continue to give high recognition to common law.

The following extract from the Ontario Report is supportive of these views:

*Despite the force of these arguments, it is the recommendation of the Commission, on balance, that something like the status quo on the question of definition be maintained. Subject to the criticisms set out in the remaining sections of this chapter, the Commission, therefore, endorses the common-law definition and the common-law methodology. We do not think that more than one definition of charity is required or advisable, and we do not believe that it is necessary or advisable to adopt a definition or definitions by statute. We think, despite the cogency of the foregoing remarks about function, that it would be a serious error to explicitly modify the definition of “charity” according to the statutory context, with the effect that an organization’s classification as a charity would depend on the definition in the particular statutory regime at issue. This is not to say, however, that there cannot be or should not be differentiation in treatment among charities of different kinds. We only suggest that the general category “charity” have uniformity in meaning across all the relevant domains of law.*



*We make this recommendation for three reasons. The first is the need for regulatory simplicity. Several definitions and it should be emphasized that the adoption of even a single statutory definition for all provincial laws still results in at least two different definitions, one at the federal level and one at the provincial level would, in our view, cause far more harm (from confusion) than any benefit derived from differentiation in meaning according to context. The second is realism. As the attempt at a real definition illustrates, “charity” is an intelligible concept. In our view, its legal meaning should not, therefore, diverge from its real meaning if the only gain to be had is better targeting of certain statutory regimes. More precise targeting can be achieved, if desired, by differentiation among types of charity. The third reason is that a statutory definition or definitions would just as likely hinder judicial decision-making as help it. Since the range of objects that can be charitable is so incredibly diverse, any statutory definition more specific than the Pemsel test would, in all probability, just confuse matters.*

*If, however, the Legislature believes that for reasons of clarity in the law or for some other reasons, a statutory codification of the common-law definition is required, then we recommend that statutory definition to be a mere codification of the Pemsel test or, better yet, a modestly improved version of it. We say this for two reasons: first, this type of approach will minimize confusion between the federal and provincial regimes, and second, a general definition, such as the one in Pemsel, will give courts sufficient scope to make sound decisions on a case-by-case basis.*

*Report on the Law of Charities, Ontario Law Reform Commission, 1996*

The only prior examination of this area in Australia in recent times has been the report of the Industry Commission: *Charitable Organisations in Australia (No 45, 1995)*. The terms of reference of this inquiry did not require it to review any definition of charity. For its purposes, the definition was given and the term “Charitable Organisations” was deemed to include, in addition to the commonly accepted organisations, organisations which provided advocacy and/or legal services; peak body organisations; and for-profit fund-raising organisations.

**This inquiry provides the opportunity for comparative analysis of the Australian scene with these reports and development of a more comprehensive and uniform understanding of the terms charity, charitable purposes and charitable organisation.**

#### **4.2. Taxation Treatment of Charities and Related Organisations**

It is noted that the Scope of the Inquiry provides that it:

*“is not seeking submissions, and will not be providing comment, on issues related to the taxation or other legislative and administrative treatment of charitable, religious or community service not-for-profit organizations.”*

While this comment is acknowledged, it should also be noted that under past taxation regimes, the achievement of particular classification and approvals under various taxation laws for the purposes of exemption from income tax, sales tax, fringe benefits tax, and deductibility for donations, meant considerable benefits for organisations and the community. These treatments represent indirect government assistance in progressing the capacity of the organisation to do human good and the cumulative evidence embodied in Common Law recognises these activities of public benefit.

The term Public Benevolent Institution (PBI) has no precedent in common law and was only introduced through Australian income tax legislation in 1926. The term has since developed widespread use and recognition and is now entrenched in State legislation as well. It is synonymous with organisations valued



for their contribution to the human good. These developments have not contributed to improvement in understanding. Conversely it has exacerbated confusion of terminology and administration. In one sense, PBIs represent a subset of charitable organisations. However, under close examination, there are many inconsistencies and overlapping of definitions and terminology and official perceptions of what human good and common wealth is developed as a result.

The Income Tax Assessment Act 1997 (ITAA), refers to PBI only as one item (4.1.1) for eligibility for tax deductibility. The ATO definition of a PBI is found in ATO Draft Taxation Ruling 2000/D14 #7:

*A public benevolent institution is a non-profit institution organised for the direct relief of such poverty, sickness, suffering, distress, misfortune, disability, destitution, or helplessness as arouses compassion in the community.*

This is followed by multiple pages of explanation.

In the absence of any specific independent organisation to oversight (regulate) the charity sector, then, by default, the codification process falls to taxation legislators and regulators. As a consequence, all discussion about charities is further forcefully focussed on viewing definitions from the perspective, not only of treasury/taxation, but particularly in terms of protection of the income tax base and therefore to pursue strategies of narrow definitions for qualification purposes for taxation “benefits”.

**This approach clearly ignores the contribution which charities make to the social capital of the nation in “public benefits” (human good and common wealth). It is therefore necessary to establish a structure that recognises that a taxation benefit is not a loss of income tax to the government but a saving in the cost of providing those benefits and an enhancement of common wealth.**

### **4.3. Characteristics of a definition**

#### **4.3.1 Charitable**

The Issues Paper has identified “attributes, purpose and behaviour” as key characteristics in consideration of definition. The 1601 Statute definition established the general intent of charitable activities and purposes. Pemsel attempted to simplify this to the four “heads of charity” – relief of poverty, advancement of education, advancement of religion and other purposes beneficial to the community. In addition, it was still acknowledged that particular cases might need to be interpreted within the case law surrounding these headings.

**The Uniting Church in Australia, clearly articulates its purposes as set down in its Constitution, as adopted by the Assembly of the Uniting Church, 22 June, 1977, which encapsulates all these four areas:**

*4. The purposes of the Church are to provide for the worship of God, to proclaim the Gospel of the Lord Jesus Christ, to promote Christian fellowship, to nurture believers in the Christian faith, to engage in mission, to assist in human development and toward the improvement of human relationships, to meet human need through charitable and other services and to do such other things as may be required in obedience to the Holy Spirit.*

#### **4.3.2. Religious**

In the reports mentioned above, the position of religion and the larger religious institutions and denominations are considered. Discussion also focuses on situations where charitable trusts or large donations have been made for the benefit of a “religion” and there has been a question as to whether the particular organisation constituted a religion.



There have also been questions as to a religion passing the “public benefit” test. In both the Canadian and UK reviews, there was no question that the advancement of religion continued to constitute a valid charitable purpose.

In the UK, major religious institutions are “excepted” organisations and are not required to register with the Charities Commission on the grounds that their size and infrastructure is such as to provide adequate safeguards for donors.

#### **4.3.3. Not-for-Profit**

The term not for profit is a very broad category encompassing all organisations, which are not conducted for private gain to individuals as either proprietors or shareholders. There are many organisations that although not for profit, would not qualify as “charitable”. The terms of reference for the Inquiry refer to “community service not-for-profit” organisations to distinguish the particular category that is being addressed, with the qualifier, “community services” identifying that these organisations’ primary purpose is for public community benefit.

The term not-for-profit should not be interpreted to mean that it is inappropriate to produce a financial surplus. Such an approach fails to recognise that a surplus indicates financial prudence and gives some comfort about long term financial survival (assuming that this is seen to be a worthwhile objective), ie if there is no margin, there is no mission.



## 5. *The Church as Charity*

From the very outset, we wish to argue that the churches and equivalent bodies in other religions should be understood as charities. Religion is a worthwhile and charitable end in itself, it is basic to human life. Its special status is recognised within the international human rights instruments, in Article 18 of the International Convention on Civil and Political Rights, (ICCPR) and in the United Nations Declaration on Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.

Article 18 provides the following minimum standard of national policy:

1. *Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.*
2. *No one shall be subject to coercion that would impair his freedom to have or to adopt a religion or belief of his choice.*
3. *Freedom to manifest one's religion or beliefs may be subject to only such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals, or the fundamental rights and freedoms of others.*
4. *The States Parties to the present Covenant undertake to have respect for the liberty of parents...to ensure the religious and moral education of their children in conformity with their own convictions.*

Article 18 is evidence that religion is understood throughout the world as something which is so basic to human dignity and human flourishing that it requires special recognition and protection. Like education and the family, religion is a fundamental aspect of human life, culture and society. Human life cannot be reduced to the material and the tangible. Human beings may express their religion in different ways, and some may eschew religion altogether, but religion is a recognisable and significant part of human life. Freedom of religion is not freedom from religion. Society must make space for religion if the members of society are to flourish.

The Ontario Report draws on the work of John Finnis to explain that the reason that the relief of poverty, advancement of religion, advancement of education and advancement of other causes of benefit to the community have been considered part of charity is that they are a “basic form of human flourishing to be pursued and realised in all practical activity.” They are among the self-evident and underived human goods that enable one to make sense of life and find meaning and purpose within it.

Christianity sees itself as being about human flourishing. It is about both word and deed – belief and action. The point of Christ's life and work was so that people might have abundant life – in the spiritual rather than material sense. Christianity offers all individuals a relationship with God, and thereby a sense of identity and purpose. It helps them express their humanity in constructive and benign ways. It provides both an experience and an understanding of community, interdependence, caring, personal ethics, social responsibility, social justice, service and accountability. It offers people pastoral care and counselling in a wide variety of ways. It offers a sense of being part of humankind that transcends racial, cultural and national boundaries.

Within British and European history, churches were the original charities and benevolent institutions. They provided schools, hospitals, places of refuge and other services and forms of relief at a time when government provided little or nothing. Many of these activities have now become accepted as basic to social functioning and are also provided by government, either directly or indirectly. The origin of these basic services lies in the expression of Christianity, and even today Christianity continues to nurture the charitable dimension of society.



The churches also provide an important contribution to democracy through their advocacy role. As authors such as John Rawls and Jurgen Habermas have argued, no democracy can flourish, and no public policy can have legitimacy unless there is a strong civil society, including religious bodies, in which people examine issues in the light of their ‘comprehensive theories’ or beliefs and out of that discussion contribute to vigorous public debate. The churches take seriously this role of contributing to public debate through their councils and leaders, their specialist agencies, and their members. We encourage people to reflect on the issues facing the nation and to exercise their citizenship in a responsible way, thinking of the common good rather than their own self-interest. In doing so, we have access to millions of members, even though we are not effective in reaching all of them on these matters.

Organisations advancing religion are the very organisations that created and nurtured the concept of charity. Charity is not a technical task, but a central expression of humanness. At the heart of our humanness is religion that encapsulates the search for the transcendent, for values and meanings of our human existence. Members of religious organisations support them through freewill offerings, bequests, and voluntary fundraising such as fetes. They do so out of their after-tax income and individually derive no taxation or other financial benefit from this. They are part of a human journey larger than themselves, and with purposes beyond their immediate purpose. Religion is thus not merely of benefit to the individual.

At a practical level, churches also provide property, facilities and activities that are widely used by members of the wider community. All of this takes financial resources. Many church buildings are heritage buildings, recognised as aesthetically valuable to the whole of society. Simply to maintain a heritage church can require that a local congregation raise millions of dollars – commercial activity such as property development is essential to create such monies, but the benefit is for the enrichment of the whole of society, not individuals.

**Given these realities, it is appropriate for governments to maintain a definition of charity that includes the advancement of religion, and to use those definitions as the basis for encouraging those activities by ensuring that they are not subject to a taxation or administrative burden which damages their capacity to fulfil their purposes.**

The concept of charitable organisation continues to be relevant to the community sector in other ways. The church has over many years worked in association with small community organisations whose very existence depends on their charitable status. Without this, they would not be financially viable and would face administrative problems and compliance costs out of all proportion to their resources.

### **5.1. The church, for-profit and not-for-profit**

The Issues Paper for the Inquiry asks questions which call for a response to:

- *Major social and economic factors affecting the ‘attributes, purpose and behaviour’ of your organisation, and the implications for how your organisation is or should be defined;*
- *The major influences on the environment in the coming decade, and what this might mean for how your organisation is defined;*
- *Whether definitions should be based on the purpose of the activities carried out by the organisation, or only on the nature of the activity;*
- *Whether account should be taken of multiple purposes, or is it appropriate to rely on the sole or dominant purpose of an organisation in order to define it;*
- *The methodology appropriate for determining when a purpose is secondary;*
- *Whether it is appropriate to define the various activities of organisations such as religious organisations with a wide spectrum of activities differently;*
- *Whether it is appropriate to distinguish between commercial and non-commercial activities undertaken by charities and related organisations; and*



- *Whether there is an expectation that charities and related organisations will undertake commercial activities in order to perform their core purpose effectively; how these activities should be defined and if they should have a role in determining the definition of the organisation.*

It is important to recognise that in order to function in the long term, charities and PBIs need to develop their assets and their income stream. In the modern world, a charity cannot function effectively over the long term in Australia without sound financial management. In recent years, the demand on these resources has increased largely because of increased demand for our community services and changes in public policy. The ATO appears to recognise this to some extent at paragraph 21 of TR 2000/11.

*We regard distribution of a substantial part of the income (but not necessarily capital gains) as essential. However, we accept that a charitable fund may use some of its income to acquire assets which, in future, will produce more income for charitable purposes, and may accumulate some of its income for later distribution.*

**Any new definition of charity or PBI must clearly indicate that commercial and investment activities are included, provided that the income is used to achieve the purpose of the charity.**

The Uniting Church in Australia recognises the legitimate and important role of the business sector and the individual and collective dependence upon many of the goods and services that business provides. But economic activity is a means to an end, not an end in itself. The end is human wellbeing. While human beings wither when their basic material and economic needs are not met, the satisfaction of those needs does not in itself ensure that they flourish.

One catechism from our tradition says that the chief end of humankind is to glorify God and enjoy God forever. Behind this religious language is the view that human beings exist for purposes beyond their personal and material agenda. It has always been an essential part of the Christian understanding of God that God calls us to recognise our interdependence on one another, and to care for one another in an altruistic, not self-serving way. Many contemporary psychologists argue that for human beings to flourish, a healthy sense of their own identity and value is not enough. To achieve self-actualisation, to achieve one's full potential, a human being needs to be able to function as an ethical being who can, in appropriate circumstances, subordinate one's own needs to the needs of others.

**Thus whether one takes a religious view or not, altruism is an important dimension of being human. Public benevolent institutions, charities (including religious organisations) and community service not-for-profit organisations are important vehicles for the expression of altruism.**

Business functions for a different purpose. The church welcomes the fact that many businesses are developing a sense of social, economic and environmental responsibility. But it would be naïve to suggest that this changes the fundamental nature and purpose of business organisations. In the end, they exist to make a profit for their owners/shareholders. They exist to provide investors with a return on their investment. Altruism, even where it has become part of the culture of the organisation, is subordinate to the ultimate purpose of making a profit. Sponsorship and donations are part of the business plan, and often are directly under the control of the marketing division. This means that even when activities appear similar in the business and community sector, they are fundamentally different in the way they contribute to the wellbeing of the nation.



The issue of fees should be seen in this context. The ATO draft ruling on PBIs rightly recognises that charging fees should not in itself disqualify an organisation from being a PBI. Where clients can afford to pay, fees can contribute to the viability of the organisation. Sometimes a small fee is seen as being in the interests of both the service and the client. Drop-in centres and soup kitchens may charge a small fee, for example, as a way of removing the sense of dependence and opening the service to people who do not identify as destitute, but need the service for companionship and support. The issues are the purpose of the fee (is it to enrich owners?), the nature of the fee and whether there is a waiver policy. Is the ability to pay, or the need for the service, the determining factor in providing the service to an individual?

**The point of not-for-profit organisations is that their chief purpose is altruistic, and their economic and commercial activity is a means to that end. Charitable and benevolent organisations have always had to find ways of surviving financially, and that has always meant raising money by a variety of means, including commercial activity, that is, providing goods and services for sale, even if only at the annual fete, where what has been sold was produced by voluntary labour.**

John Wesley gave the early Methodists this money advice: make all you can, save all you can, give all you can. In other words, be economically active and astute, but not so that you can become wealthy. Rather be economically active so that you can care for the poor.<sup>2</sup> Benevolence is a core activity of the Christian faith and an essential part of what it means to be a Christian individual and a Christian church. The churches today may finance this work by more complex financial arrangements, but it is still because caring for people is a core activity of being Christian. This principle is evident in the life of not only the Uniting Church, but the Catholics, the Anglicans, the Orthodox, the Salvation Army, the Baptists, and every other member of the National Council of Churches. It is also evident in the programs of both the National Council of Churches and the World Council of Churches.

Churches have for most of their history, relied on a variety of means of raising the finances necessary for their functioning. Commercial activity, voluntary fund raising and financially prudent use of bequests and donations, has always been considered part of running religious and charitable organisations in a responsible way. While the balance between these activities and the exact nature of them has changed over time, the fact remains that churches, public benevolent institutions and charities have always needed to be financially astute, even entrepreneurial.

Current social expectations and experience makes reliance on traditional, voluntary fundraising a less viable approach for several reasons. Higher proportions of people participate in the workforce. People work long hours and often have less time available for voluntary activity. There has been an enormous increase in investment opportunities, and it is sensible to make use of these. At the same time, the costs of providing services have increased. While workers in the community services sector are still inadequately paid compared to the social value of their work, their pay and conditions have improved over the years. Where government funding is provided for services, it is usually limited, with little or no component to address administrative costs.

Bureaucrats find it easier to provide funds for bathing, dressing and feeding people than for time allocated to socialisation. Churches and other community sector organisations usually seek to provide holistic care through their paid staff and through volunteers. They thus depend on a range of mechanisms, ranging from voluntary fund raising (fetes, donations, raffles etc) to investment of bequests and commercial enterprises, to ensure they have the funds they need to provide the care that government funding is insufficient to provide. As the Industry Commission Inquiry into Charitable Organisations noted, community sector organisations tend to be closer to the people who need their services, and to be able to respond in a more flexible way to their needs. It would be naïve to suggest that they could do this without cost. In the modern world, even the use of volunteers involves costs (for organising, supervising, training and insurance, for example).



Granting concessions to appropriately defined charities and PBIs is an investment in civil society. It is the mechanism by which government encourages people to organise care for one another. It can be understood as a form of “mutual obligation” - citizens have an obligation to find ways of caring for one another on the basis of need, not income, and government has the reciprocal obligation of making this financially and legally possible.

Thus it would be inappropriate and highly destructive to distinguish between the commercial and other activities that churches and community sector organisations undertake, or to equate similar activities conducted by not-for-profits and the business sector when they are clearly for quite different purposes when viewed in the context of the organisation as a whole. The recent ruling issued by the tax office appears to cover this well.

**It is therefore recommended that the definition of charities and PBIs take into account their not-for-profit status, in accordance with the understanding set out in the Draft Tax Ruling on Public Benevolent Institutions, namely**

*We will accept an organisation as being non-profit where, by its constituent document or by operation of the law...it is prevented from distributing its profits or assets among members while it is operating and on its winding-up. The organisation’s actions must, of course, be consistent with the prohibition.*

In this context, it is important that the ruling be applied equitably and that child care agencies such as those delivering long day care be granted PBI status.

The ATO in draft ruling TR 2000/d14 #78, gives as examples of appropriate clauses in constituent documents a non-profit clause and a dissolution clause which transfers assets remaining after liabilities are paid to another PBI. In the case of charities, the appropriate requirement would be that they be paid to another charity.

## **5.2. The meaning of benevolence**

This section looks specifically at issues related to the definition of public benevolent institutions (PBIs).

The ATO in draft ruling TR 2000/D14 #7 says that

*A public benevolent institution is a non-profit institution organised for the direct relief of such poverty, sickness, suffering, distress, misfortune, disability, destitution, or helplessness as arouses compassion in the community.*

Elsewhere, the ruling excludes from the definition of benevolence advocacy, research and prevention, except where these are incidental to providing direct relief.

The purpose of this section is twofold:

- First, to draw attention to the fact that common law in this area is clearly outdated and ill-informed, failing to understand both best professional practice in delivering services to people in necessitous circumstances and recent interpretations in other areas of common law, which take account of international human rights law.
- Second, to call for legislative action to correct this situation, by updating the statutory definition of public benevolent institution.

The Uniting Church affirms the following as essential elements in a definition of public benevolent institutions: public (non-discriminatory services provided on basis of need, not ability to pay or other factors), not-for-profit, and existing for the sake of those who live in poverty or in other ways in need.



***We believe, however, for the reasons set out below, that the understanding of the needs of those who live in poverty or in other ways in need, and the nature of benevolence, in the ATO draft ruling TR 2000/D14 are totally inadequate and need to be updated.***

### **5.2.1. The place of advocacy in benevolence**

At this point there is a crucial methodological issue to be considered. If benevolent institutions exist to meet the needs of those living in poverty, then the questions raised in the issues paper neglect the most important issue - the situation of those who live in poverty or in other ways in need themselves. Any re-interpretation of the nature of PBIs should be first and foremost to ensure that those who live in poverty or in other ways in need experience the benevolence that will most effectively relieve their situation.

***We believe that changes in the definition of PBIs and charitable organisations should be first and foremost to ensure that those who live in poverty or in other ways in need experience more effective relief of their situation.***

The present definition of PBIs and its interpretation seem to belong in the era of poorhouses rather than internationally recognised human rights or the cumulative understanding of common law. It appears concomitant to an era before the academic disciplines of sociology, political science and human rights law. It is totally inadequate for an era in which it is known that there are systemic causes of poverty and disadvantage, and that people have universal and inalienable rights. There is a need for relief from injustice itself, not merely from the symptoms of injustice. This changed understanding requires that the situation of those who live in poverty or in other ways in need be alleviated not only through private charity, but through public policy and public provision of income support and services such as health, housing, workplace relations, community services, and anti-discrimination law.

The research, lobbying and advocacy roles of community organisations are a response to these developments. In international human rights law, poverty and necessitous circumstances are not merely an unfortunate plight, but a violation of fundamental human rights.<sup>3</sup> Some of the judicial rulings about benevolence seem obsolete not only in sociological terms, but also within the wider context of law itself. Justice Brennan argued in *Mabo* that it is appropriate for the common law to take account of international human rights law. In *Teoh*, the judgement was that Australia's ratification of international human rights instruments creates legitimate expectations in citizens. The Aboriginal and Torres Strait Islander Social Justice Commissioner has argued again and again in his reports that what Australia's indigenous people need to relieve their necessitous circumstances is not charity, but public policy and social structures which enable them to enjoy their human rights. Indeed, his argument is that a charity or welfare approach contributes to necessitous circumstances.

*The welfare-based model relies largely on government initiatives and government discretion to identify priorities, formulate policy and deliver programs. It is essentially a model based on a benignly intentioned but destructive paternalism that underpinned past assimilation policies. It is fundamentally antagonistic to the exercise of self-determination by Aboriginal and Torres Strait Islander peoples. (First Report 1993 Human Rights and Equal Opportunity Commission page 7)*

The Uniting Church in Australia has, from its beginnings in 1977, seen advocacy as an essential and integral part of its benevolent activities. We engage in both personal advocacy on behalf of clients, and in social justice advocacy. Personal advocacy is advocacy on behalf of clients to ensure that they are treated fairly as individuals, in accordance with established social policy. For example, WESTS, a UnitingCare NSW.ACT tenancy advice service, represents individual clients at Tenancy Tribunal hearings. Social justice or systemic advocacy is about changing social policy, national, state or local, so that it creates better



conditions for the clients we serve, and for others with similar needs and problems, exemplified by WESTS advocating changes to the landlord and tenancy legislation.

UnitingCare services for the ageing and for children advocate changes in policies that affect the residents and users of our aged care and child care services. In addition to providing numerous direct services, UnitingCare NSW.ACT also includes a research and advocacy unit on more general social justice issues. Most of its social policy advocacy is based directly on a human rights approach. Such advocacy is generally recognised as an essential part of the competent delivery of community services. For this reason, UnitingCare NSW.ACT is an active member of New South Wales Council of Social Service (NCOSS), UnitingCare Australia is an active member of the Australian Council of Social Service (ACOSS), and equivalent units in other synods are similarly involved in their state COSS. Advocacy by councils of social services is an essential supplement to the services delivered by individual community service not for profit organisations.

UnitingCare Burnside's recent submission to the Commission for Children and Young People's *Inquiry into Children with No One to Turn to*, November 2000, includes a major section on "children's citizenship". The submission explains:

*The main barrier to children and young people being able to access the information and support they need is the way our society views them as 'less than' full citizens, with limited rights within the wider society. This view is challenged by the United Nations Convention on the Rights of the Child, in particular the key element of participation (Article 12) which sets out the child's right to express their views in all matters affecting the child, and the child's right to be heard...*

*...Burnside believes that creating the conditions for enabling children to exercise their citizenship rights is the most important pathway to inclusion of children and young people (particularly those who have experienced economic, social and educational disadvantage) in the community in a way that is centred on their needs and desires.*

Burnside sees such advocacy as an intrinsic part of its responsibility towards the children and young people who are their clients:

*As an agency we encourage our staff to be active advocates for the people who use our services and to facilitate clients advocating for themselves within systems. We also invest in a program that pursues social justice through broader policy, research and advocacy aimed at influencing social policy and advocating for structural change in the interests of children, young people and families.*

*...Advocacy is a crucial part of our service and leads to building credibility and giving young people a sense that someone is on their side.*

*It is also about development of strategies that will see change in the long term through changing young people's circumstances (eg access to accommodation, social security) and in helping young people develop the skills to access services, (eg counselling, health).*

The Industry Commission in its report *Charitable Organisations in Australia* recognises the relationship between the provision of services and advocacy:

*The closeness of many Community Service Welfare Organisations to their clients and their circumstances enables them to contribute to and critique social policy. (page xxi)*



The same report comments:

*The Commission does, however, consider that the current tax law in regard to PBI status is archaic and discriminatory, and its administration is often inconsistent. (page xxxiii)*

In this context, it is a major concern that one peak council be granted PBI status when at the same time another like body was refused the status. The Australian Council for Overseas Aid, for example, is a PBI but ACOSS is not, even though ACOSS would satisfy the same criteria. Its member organisations are predominantly PBIs, it has a common purpose with its members, its activities can be properly considered as a step in the benevolent process of the group of organisations, it and its members can be appropriately regarded as one whole enterprise of which the organisation is an integral part. If a more contemporary legal definition of benevolence, along the lines outlined above, were adopted, then ACOSS would satisfy the criterion that its activities are such that if they had been performed by the members themselves they would have been regarded as being carried on in the course of performing their benevolent activities.

This does not mean that all advocacy by all civil society organisations qualifies as benevolence. The definition of benevolence with respect to PBI should be updated to include advocacy and prevention.

**The identifying mark of advocacy that is properly considered benevolence is that it is shaped by the experience and perspective of the recipients of benevolence, and builds on the experience of the work the organisation (or in the case of peak bodies, the member organisations) does directly with those recipients.**

In this sense, ACOSS and the state COSSs stand in contrast to organisations like the Centre for Independent Studies, whose comments are not built on such experience but rather reflect business interests. Similarly, organisations such as National Shelter and NSW Shelter should be included as PBIs. Long term relief of homelessness does not require merely the relief provided by a bed for the night in a shelter or refuge; it requires more adequate provision of housing for people on low incomes. Without organisations like Shelter, homeless people would live without any prospect of a long term systemic solution to their situation.

Organisations such as the Welfare Rights Centre and the Public Interest Advocacy Centre should also be included. Legal advice and assistance when the system fails is an essential form of relief. The violation of people's right to social security and other services creates poverty which can only be relieved, in the long term, by the restoration of those rights and facilitating access to services and supports. This may require assisting the individual with an appeal against an administrative decision, but it may also require a change in public policy – a change to the law itself.

**That is, the concept of benevolence must take account of how contemporary society functions and the types of “relief” that people actually require in that context.**

### **5.2.2. Prevention as an essential element of benevolence**

A further area of benevolence that is omitted from the current definitions but is an essential and integral part of the way agencies actually work is prevention, often described as early intervention. It is both financially foolish and professionally incompetent for a government only to recognise “relief” to clients once they have fallen into poverty or necessitous circumstances. While individual agencies may be able to justify financially the delivery of relief rather than prevention, it is utterly impossible for government to justify such an approach – it is far more fiscally responsible to encourage preventive services which reduce problems, than to provide expensive services to deal with the problems once they exist. Family



breakdown, for example, has been estimated to cost Australia billions of dollars each year. Dealing with the results of child abuse and neglect is far more expensive and less effective than strengthening families in the first place. All forms of childcare should therefore be considered benevolent because of the critical role they play in strengthening families.

UnitingCare Burnside comments that there is firm evidence of long term positive results from early intervention in child abuse and neglect for preventing child abuse and neglect and contributing to long term positive outcomes for children's health and educational outcomes. Professionally run early intervention projects are crucial to support families to become more focussed on the needs of their children and to develop skills to assist with parenting, help children learn social, interactive skills to use at school in order to combat disadvantage.

### **5.2.3. Community development**

As the Industry Commission reported following its inquiry into Charitable Organisations, an important aspect of the work of charities and related organisations is community development, which is about empowering people in a community to identify their needs and obtain the resources to meet those needs. It is a style of service planning and delivery that works cooperatively with local communities, rather than imposing services or facilities upon them. It is about empowering local communities and giving ordinary people real options.

The Uniting Church understands itself as working within a community development model. While the synod (state council) or assembly (national council) of the church has agencies that give oversight to all UnitingCare services, local services are developed in consultation with local communities and client groups and usually managed by local boards or committees. We are able to encourage a local community to consider a variety of options which have different financial implications, because we are there to serve the community, not to make a profit - the most appropriate service for a community may not be the one that would make the most profit for business. Because we are not there to make a profit, we are also able to call on a local community to discover its own resources and contribute to the project through ideas, voluntary work, and so on. The relationship between business and a local community is inevitably different and the possibilities for cooperation are more restricted, since business is there in the interests of its owners and shareholders.

Community development is a significant way to develop civil society. It involves cooperation with local people, local government and other community sector organisations. It empowers individuals and communities to take responsibility for their own lives, and to shape the services that are provided. It is about maximising the common good, not simply fulfilling a contract. Inevitably, however, the extent to which charities and related organisations can engage in community development is limited by the funds available.

### **5.2.4. Respect, not pity**

One of the most disturbing facets of the Australian Taxation Office's (ATO) draft ruling TR 2000/D4 on the current definition of PBIs is its dependence on the concept of compassion (paragraph 7) and pity (*see especially the ruling from Evatt J in #28*). We do not question the importance of compassion as a human quality. We question, however, reliance on such concepts in defining benevolence in a legal or public policy context.



Professional best practice requires that direct assistance to people takes place in a milieu of respect for the recipients and for their human rights, that is, the rights articulated in the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

It involves dealing with systemic factors through prevention, community development, and changes in public policy. For example, reputable international aid organisations no longer seek to arouse pity in their advertising. Uniting Church agencies see an important part of their role as equipping people to take control of their lives. In both cases, the approach is about respect, not pity.

Community organisations are also acutely aware of what can be called “compassion fatigue”. It is the experience of many organisations that the public can become so exposed to situations of suffering around the world, that it no longer has much emotional response to such situations. Even without this concern, it seems to be a somewhat subjective matter for politicians and judges to decide what would move the public to pity. It undermines sound public policy by shifting the focus of the policy from the situation the policy is intended to improve – the situation of people with the actual need - to the views of bystanders, who may engage in stereotyping and lack adequate information to understand what they see happening to people. Indigenous people do not want pity - but they need relief in the form of jobs, health services, housing, land rights, and native title. People with disabilities do not want pity – but they need relief in the form of employment or income support, access to building and transport, and so on. People who are homeless need homes and associated services. In providing homeless services our agencies tie these into other supports such as counselling, emergency relief and education and training.

These are matters that have an objective component to them. This is not to suggest that emotion has no part – it can alert people to situations where there is a need to understand and to take action. Legal definitions can no longer depend so heavily on compassion and pity, but need to draw on other areas of law such as human rights law, child protection legislation, and so on, which have articulated the matters more objectively.

It follows from this that the current definition of benevolence cannot deliver adequate relief to those who live in poverty or in necessitous circumstances, and risks violating their human rights. It is inconsistent with their human dignity and human rights to reduce them to objects of pity and to encourage society to see them as objects of pity. The definition of PBIs and its application to organisations must value best practice in providing assistance to people in need.



## 6. *Where should definitions be found?*

### 6.1. Definition in Legislation

The Issues Paper draws attention to:

*Whether the definitions of charitable, religious and community service not-for-profit organisations should be left to the courts or enacted in legislation and asks what are the advantages and disadvantages of the different approaches.*

Government has a responsibility to encourage and facilitate civil society. Voluntary organisations need to know clearly their legal rights and responsibilities and to be able to comply with them in a manner commensurate with their purpose and nature. To leave definitions to the courts is on the one hand to give the courts a law making role that many Australians (and many politicians) do not understand and therefore find questionable, and to embroil voluntary organisations in expensive legal cases. This is not appropriate and diverts them from their purpose. It is evident from the cases on benevolent institutions that the courts have not kept up with developments in the practice of benevolence.

*It would be more appropriate to provide definitions in legislation that includes also a mechanism for occasional review of the definitions.*

*It is the argument of this paper that the definition of charitable, religious, and community service not-for-profit organisations and PBIs must be based on the nature and purpose of the organisation and how the activities and types of service provided contribute to that purpose.*

### 6.2. Segmentation

The Issues Paper also focuses on:

*Whether it is desirable to split out different types of activities into separate entities for definitional purposes, and what would be the implications of such an approach for your organisation?*

For some organisations like the Uniting Church, there is already some splitting of the organisation into separate entities for different definitional and legal purposes. UnitingCare NSW.ACT, for example, is a PBI; most other parts of the NSW Synod structures are not. The Church holds property through national and state property trusts, which also enter into contracts. We accept therefore that some level of segmentation of our Church is necessary if we are to function within the legal framework.

However, we oppose segmentation that is designed to separate activities from the ultimate purpose for which they are carried out. It would sound the death knell of much of the altruistic activity of civil society, for the reasons outlined throughout this paper. The responsibilities of business and civil society are simply different. The fact that civil society cannot effectively function without financial resources does not mean that it is the same as business.

**The current definition of benevolence is too narrow and works against the interests of people in poverty or other necessitous circumstances. The definition should be updated to incorporate all those elements that are part of professional best practice by which public, not for profit organisations meet human need, even if this means that some activities are included that are also beneficial to a wider section of society. Such activities include research, advocacy and prevention. It should recognise peak bodies who perform such functions on behalf of member organisations who provide the already recognised forms of benevolence.**



## Endnotes

- <sup>1</sup> Report On The Law Of Charities 1996. One of the most recent and exhaustive studies on the law of charity was carried out by the Ontario Law Reform Commission. Days after the Report was released, the Commission had reached the end of its term. The Report was published on the Internet and a few hard copies are located in Law Faculties in Canada. About a year later, the Commission's web site was discontinued, making access to the Report very difficult.. The Program on Nonprofit Corporations, Queensland University of Technology, was able to secure the agreement of the Ontario Minister of Consumer and Commercial Relations to publish the material at no charge, provided the source of the material was acknowledged. The Uniting Church expresses thanks to QUT for accessing and printing the material with the consent of the Ontario Government.
  
- <sup>2</sup> See Jennings *Good News for the Poor: John Wesley's Evangelical Economics* Nashville: Abingdon Press 1990, Theodore Runyon *The new creation - John Wesley's theology today* Nashville: Abingdon Press 1998. Ann Wansbrough *Response to Runyon's "Economics and the moral image of God"* paper presented at conference *Wesley and Contemporary Issues*, Wesley College, University of Sydney, September 29 to October 2, 1998, at <http://nsw.uca.org.au/bsr>, links this to the work of the Uniting Church today.
  
- <sup>3</sup> While the present Australian Government has questioned some of the human rights reporting mechanisms, it has not questioned the human rights instruments themselves.

## **COMMENTS ON THE DRAFT BILL**

### **▪ Clarity and connectivity**

The exposure draft would benefit from a statement describing the nature of interaction between the proposed legislation and other Commonwealth State and Territory Legislation, particularly income and indirect taxation legislation.

The Explanatory Memorandum notes the Government intention that the proposed charities definition *will apply to all Commonwealth legislation, replacing the previous common law definition*. However there is no stated connection with similar definitions for related organisations such as *public benevolent institutions* - a critical definition for income tax, fringe benefits tax and GST applications.

The Uniting Church in Australia does not believe it is possible to describe a comprehensive and workable definition of *charity* for taxation purposes without simultaneous adjustment to the definition of *public benevolent institutions* and associated linkages to income tax exempt charity (ITEC) endorsement and deductible gift recipient (DGR) status. This view is supported in the findings of the *Inquiry into the Definition of Charity 2001*. We understand the Commonwealth is also intending to introduce legislation, which may include statutory definition such as *public benevolent institution*. It is important that, as with the current draft Bill, the Australian public is offered the opportunity to assess the connectivity between these issues.

***Recommendation: We recommend that modernisation of charity definition under the terms of the draft Bill extend to and include simultaneous modernisation and adjustment to the definition of Public Benevolent Institutions and associated linkages to ITEC endorsement and DGR status.***

### **▪ Restriction to advocacy and lobbying activities of charities.**

The draft Bill seeks to impose outmoded restrictions on the advocacy and lobbying activities of charities. We note the Bill, in its current form, would exclude charitable organisations having among their purposes the intent to change the law or Government policy or to advocate a cause unless these purposes are no more than ancillary or incidental to the purposes of the organisation. This restriction appears contrary to the Government's own *Inquiry into the Definition of Charity 2001* which recommended that the advocacy work of charities should not be restricted provided that it:

- furthers or aids the organisation dominant charitable purpose;
- is not party political and does not support a candidate for political office.

***Recommendation: We recommend that Clause 8 of the draft Bill be redrafted to reflect the recommendations from the Inquiry into the Definition of Charity 2001.***

### **▪ Altruism**

We do not believe that the inclusion of any specific reference to altruism will add value to the draft Bill's definitions of dominant purpose and public benefit; in fact reference may lead to unnecessary ambiguity and subjective debate (eg about fees, waiver policies, actual practices and profitable services which support unprofitable ones). *Part 2: Section 7 (Public Benefit)* appears to incorporate an adequate meaning of altruism, making separate reference redundant.

## **SPECIFIC COMMENTS RELEVANT TO PART 2: CHARITIES.**

The following comments relate to the Uniting Church in Australia's concerns that the ultimate legislation be workable. Comments refer specifically to our understanding of:

- Best practice in meeting the needs of those who access social services more generally and the specific role of Church agencies in doing so;
- The nature of democracy;
- The terms of the draft Bill, their clarity and transparency.

### **▪ Clause 4: Core definition.**

The Uniting Church in Australia supports the concept that a charity should not have as a purpose, engaging in unlawful activities and that this is adequately covered in Cl 8(1).

However, for the following reasons we believe that Clause 4(1)(e) requires change.

The term "serious offence" is not defined in this Bill and is interpreted differently in the various State and Territory jurisdictions. Therefore the core definition in this Bill would have different application and implications for charities in different jurisdictions. The explanatory material released with the draft Bill (Cl 1.16) indicates that a serious offence is one seen by the relevant jurisdiction as an *indictable offence*. Indictable offences are differently defined in different jurisdictions.

The wording *has not engaged in* appears to forever disbar an organisation which has once committed a serious offence from ever again becoming a charity. We believe this concept of permanent penalty with no possibility of rehabilitation or restoration after punishment to be incompatible with the principles of a just society.

If in conducting its activities or pursuing its charitable purposes a serious offence is committed by an organisation or its staff/agents, the penalty to be paid for that offence should be in accordance with the law relating to that offence. There should not be a double penalty effectively applied under this unrelated legislation.

***Recommendation: That Clause 4 (1) e be removed and by so doing, note that the matter of illegal purpose is covered in Clause 8(1) and the matter of illegal conduct is dealt with by existing laws.***

### **▪ Clause 5: Not for profit entities**

The Uniting Church in Australia is concerned that Clause 5 broadly follows the principles and practices associated with corporate law, and that these are not immediately relevant to the status and structure of most religious denominations. In most cases the denominational structures of the Uniting Church are based on enabling property trust legislation in the States and Territories.

In most cases our activities are run by constituted bodies under regulatory authority of the Church. They are generally not separate legal activities. However we do incorporate some support activities for the reasons of effective risk management and better governance, which in turn are appropriate to special responsibilities, governance requirements and the quarantining of the expertise necessary for such activities.

Some of these activities are established to resource the dominant purpose(s) of other constituted entities. Often, those purposes will most likely pass the Public Benevolent Institutions test, yet Clause 5 would most likely fail them because their dominant purpose could well be to raise funds to finance an acceptable public benevolent institution.

Therefore the Church believes that Clause 5 should have tracing provisions similar to Corporate Law which will recognize a supporting activity and/or entity to comply with the dominant purpose of the supported activity i.e. charitable purpose. An example would be a fundraising activity, such as a Church-owned and incorporated deposit-taking institution, deemed to be a charitable body and whose profits fund the Church's administration and programs (including education, welfare, developing new ministries and theological training).

Currently Clause 5 rejects a fundraising entity because its dominant purpose could be deemed to be for *profit or gain to... its owner* (the Church). This is tantamount to taxing activities that are separately constituted or incorporated by the Church body which fund and/or facilitate the administration of the Church. This taxing situation was never recommended by the Committee of Inquiry which sought to include them in charitable organisations whose dominant purposes are all or some of the areas of advancement of charities such as religion, social or community welfare, education or health.

There is no explanation in Clause 1.25 to 1.27 of the Explanatory Memorandum.

***Recommendation: Introduce tracing provisions similar to corporate law, recognising a supporting activity and/or entity to comply with the dominant purpose of the supported activity.***

▪ **Clause 7: Public benefit**

This clause is closely related to PBI definition and, as previously noted, these connections need to be clarified before the workability of this Bill can be fully assessed.

▪ **Clause 8 (2 c): Disqualifying purposes.**

We support the parts of this clause that refer to advocating a political party and supporting a political candidate.

We oppose the reference to *attempting to change law or government policy and advocating a political cause*. ***That is, we oppose the inclusion of 'cause' in 2 (a), and the entirety of Clause 2 (c).***

We strongly oppose the use of *attempting to change law or government policy and advocating a political cause* as disqualifying purposes. Such activities are valid ways of pursuing the purposes which section 10 acknowledges as charitable and section 7 as being for the public benefit. To disadvantage organisations that seek to fulfil their charitable purposes and to serve the public benefit through such mechanisms is anti-democratic, and contrary to best practice in most areas listed as charitable purposes.

Further, the rationale for our opposition to these clauses is as follows:

- They counter the interests of our service users, who are poorly heard and understood in the public policy process, and who require third party advocacy. Advocacy addresses the systematic and structural causes of disadvantage and marginalisation and is an essential part of the Church's understanding of charitable activity.
- They detract from the capacity of our services to remain viable as laws and policy change. Charities must be able to advocate on laws and policies that affect their work and to bring their experiences to the attention of law and policy makers. Such advocacy is not ancillary but central to the effectiveness, efficiency and evaluation of service delivery within the community sector. Advocacy adds value to the sector.

- Democracy requires a strong civil society and wide-ranging public debate on law and policy. No sector or organisation should be excluded from such debate – this threatens political freedom and civil liberties. The political and civil rights of the users of charitable services often only find voice via the commitment of charities to carry their stories and concerns into public debate and to engage in the political process.
- Advocacy adds value to the work of charities and gives society the greatest return on its investment in their work, as it deals directly with the causes of social problems.
- Christianity understands itself as requiring advocacy in terms of both religious freedom and advancement of religion. Most churches recognise that there are public policy issues on which the church must speak out, as a matter of faith. Such expression is not ancillary to such religious purpose, but a direct expression of it. To make advocacy a disqualifying purpose is to undermine the right of religious organisations to address matters of conscience and moral issues.
- The removal of any current taxation benefits from existing, eligible, not-for-profit organisations will lead to greater demands being made on governments to increase their levels of financial assistance to these organisations in order to compensate for such action.

***Recommendation: That Clause 8 be redrafted to better reflect the findings of the Inquiry into the Definition of Charity 2001 and that the advocacy work of charities should not be restricted providing it:***

- *furtheres or aids the organisation's dominant charitable purpose; and*
- *is not party political and does not support a candidate for political office.*

## **ABOUT THE UNITING CHURCH AND UNITINGCARE AUSTRALIA**

The Uniting Church in Australia and the constituent churches from which it was formed, has had a commitment to the provision of community services for many decades. The Church is a recognised leader in the introduction of new and innovative services in areas such as ageing and aged care, employment, families, children, young people and disability.

UnitingCare Australia is the national agency for the national network of Uniting Church agencies, dedicated to providing assistance to individuals, families and communities. Through its national UnitingCare network of over 400 agencies, the Uniting Church is one of the largest providers of community services and residential aged care in Australia. UnitingCare Australia works to ensure the effective funding and delivery of programs to meet the needs of those in our community that require help and support.

The provision of services is a significant industry in its own right and is accessed by the majority of Australians at some point in their lives. The work of the UnitingCare agencies is based on an ethos of honouring the dignity of all people, working toward the social good in community, restoring human relationships, and advocating for those most disadvantaged in our society. UnitingCare agencies are committed to working towards justice, equity and participation for all Australians. To do so, the Uniting Church commits approximately 60% of the total funding for its community services from its own resources and provides services to over one million Australians.