Submission by

the Australian Christian Lobby

on the* Charities Bill 2013 *Exposure Draft

Representing the following denominations and signatories:

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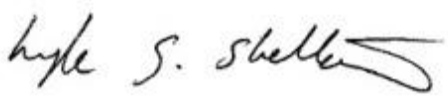

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Executive Summary

The Australian Christian Lobby (‘ACL’) represents a significant constituency in the Australian community. Its supporters are mainly Christians who come from a wide range of Christian denominations across the Catholic, Orthodox, Evangelical and Pentecostal traditions.

The following submissions are made so far as Christian religious organisations are concerned:

ACL commends the government for attempting only to restate the common law in providing a statutory definition of charity. The continuation of the public benefit presumption for the advancement of religion in the draft Bill has been well received.

ACL acknowledges that the law of charities is far from clear in some areas. Providing a succinct statement is therefore sometimes difficult. This submission seeks to assist the government to provide legislation that more clearly and more accurately reflects the common law. It will be evident from the submission that some aspects of the draft Bill do not seem to either accurately or precisely reflect the common law. Further there are aspects of the Explanatory Material which also, it is submitted, ought to be rewritten if it is to accurately reflect the tenor of the common law. By way of summary, ACL submits that:

1. The common law use of the noun ‘advancement' should not be replaced with the verb 'advancing'.
2. Introducing the concept of ‘not-for-profit entity' does not reflect the common law and is problematic for a number of reasons. It should not be an essential requirement for a charity to be a ‘not-for-profit entity’.
3. Many aspects of the drafting of the section dealing with 'Purposes for the public benefit’ do not appear to reflect the common law, including the following – with recommendations on each provided in the paper:
    a. the introduction of a 'universal or common good’ test;
    b. the abandonment of the concept of ‘private benefit’ as a ‘disqualifier’ in favour of a long list of relationships to be taken into consideration including ‘associates' within the meaning of section 318 of the *Income Tax Assessment Act 1936*;
    c. the need to have regard to ‘any possible detriment’ to ‘a member of the general public';
    d. constricting assessment of 'a sufficient section' of the general public to a comparison of only two factors.
4. The introduction of the concept of 'general public' rather than 'public' is not a part of the common law and may connote a different concept such as that of 'ordinary Australians'. Section 6 should be amended to delete the word ‘general’ where it appears.
5. Public benefit is required and was statutorily deemed under the *Extension of Charitable Purposes Act 2004* but seems to be abandoned by section 9.
6. The effect of the disqualifying features might inhibit development of the law and does not reflect the common law in certain regards. Sections 10(b) and 11(2) should be deleted.
7. The language of the Explanatory Material is constricting rather than reflective of the benign attitude of the common law towards charitable purposes. The Explanatory Material requires rewriting in some places to accurately reflect the common law.
8. Delay in release of the draft Bill followed by a short consultation period has not been helpful.

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Introduction to Australian Christian Lobby and the Submission

The Australian Christian Lobby ('ACL') is a charity.

ACL represents a significant constituency in the Australian community. Its supporters are mainly Christians who come from a wide range of Christian denominations across the Catholic, Orthodox, Evangelical and Pentecostal traditions.

This submission has been prepared following discussions with many organisations and with the Assistant Treasurer. The submission is informed by those discussions. The organisations whose names appear on the cover of this submission have reviewed the submission and endorse its content.

ACL would like to begin by acknowledging the very large number of difficult issues that face the government when attempting to provide a statutory definition of charity. The law is far from clear in some areas and international precedent, particularly from the United Kingdom experience, has demonstrated what not to do rather than what should be done.

ACL would like to applaud the government, from the outset, for taking the more measured approach of attempting to restate the common law only, rather than to develop it. In that context it would particularly like to affirm the decision to preserve the presumption of public benefit for certain purposes, including the advancement of religion.

The Assistant Treasurer made it clear in meetings with him that the object of the proposed *Charities Act 2013* is to restate the common law, as stated in the Explanatory Material accompanying the draft Bill. Having affirmed this object in general terms, the following comments are offered to assist in the better attainment of that object. From advice taken and discussions it seems clear to ACL and many of its constituents that in some places the drafting of the Bill could be clearer to more accurately reflect the common law. It is submitted that if these observations were adopted the draft Bill would better reflect the common law.

Advancement not Advancing

It is the 'advancement' of education and the 'advancement' of religion that are charitable purposes at common law, not 'advancing' religion or 'advancing' education. Replacing the word 'advancement' which is noun (albeit a verbal noun) with a verb 'advancing' is not a correct statement of the common law. The argument that this is necessary for plain English drafting carries little weight in a context where the intention is to restate the common law. This is of particular concern to some in the ACL constituency. The concern is not with grammar. The government is well aware of ongoing disputes between the Australian Taxation Office (ATO) and the voluntary sector over the extent to which purposes are determined by activities. The *Word Investments case*[1] should have settled the matter but the ATO still has not changed its Rulings nor its practices (E.g.TR2005/22),[2] Further, the issue remains an ongoing concern for some charities with the way be Australian Charities and Not-for-Profits Commission (ACNC) is interpreting the law. Whether or not it was intended through this subtle drafting to communicate to the sector that the government supports the ATO on an activities based test, that is the message that some have taken from changing purposes from a noun to a verb. It therefore recommends that the word 'advancing' where it appears in the definition be replaced with 'advancement'. If that is not accepted the Explanatory Material could make this clear.

The meaning of charity and the concept of not-for-profit

The Explanatory Material at paragraph 1.9 sets out a summary of the meaning of charity at common law. It is in the following terms

> 1.9 For a purpose to be charitable within the technical legal meaning of charitable under the common law (which overlaps but does not fully coincide with the popular or dictionary meaning), the purpose must be within the 'spirit and intendment' of the Statute of Elizabeth, and for the public benefit.

So far as ACL is aware this is a correct statement of the common law. Turning then to the draft Bill, we find that this statement of the common law is abandoned and a concept of a 'not-for-profit entity' is introduced and presently is undefined.

We assume that the definition of 'not-for-profit entity' set out in the *Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012* presently before the House of Representatives will be adopted, which for convenience we set out below:

> ***"not-for-profit entity*** means an entity that:
>
> (a) is not carried on for the profit or gain of its owners or members, neither while it is operating nor upon winding up; and
>
> (b) under an Australian law, foreign law, or the entity's governing rules, is prohibited from distributing, and does not distribute, its profits or assets to its owners or members (whether in money, property or other benefits), neither while it is operating nor upon winding up, unless the distribution:
>
> (i) is made to another not-for-profit entity with a similar purpose; or

[1] *Word Investments Ltd v Federal Commissioner of Taxation* (2008) 236 CLR 234

[2] See TR 2005/22, for example.

(ii) is genuine compensation for services provided to, or reasonable expenses incurred on behalf of, the entity."

The first point we make about this definition is that it will be impossible to apply to the classic form of charitable entity, being a charitable trust. Charitable trusts, as trusts for (charitable) purposes not persons, are entities without owners or members. Further, for those entities which do have members or owners (eg a company limited by guarantee), there will in some cases be uncertainty about the scope of the words 'profit or gain' in paragraph (a). If a religious body through its advancement of religion benefits its 'members' in a spiritual way, will it be said that it is carried on for the *gain* of its members? Similarly, if it benefits some of its members in a material way (eg through provision of morning tea after a service, or meals on wheels or financial support to members who are in need) does it then become an entity carried on for the *gain* of its members?

A second, and related, point is that it is not a requirement for a trust to be a charitable trust that it be a 'not-for-profit entity' and so the definition of 'charity' in the Bill is diverging from the legal meaning of charity in a significant and uncertain way.

Third, ACL submits that the introduction of a 'not for profit' requirement is misconceived. The 'not for profit' concept derives from the criteria established under the income tax legislation for an entity to attain tax exempt status rather than the attainment of the legal status of a charity. To include a 'not for profit' requirement in the definition of 'charity' in the Bill would be to confuse these two concepts – ie what is needed for an entity to be charitable and what is needed for it to be entitled to tax concessions under the income tax legislation.

ACL is not aware of any other jurisdiction that has introduced being a 'not-for-profit entity' as a requirement for being a charity. It is also not aware of any case law that sets out not-for-profit status as an essential element. The Explanatory Material does not reference any cases to support this proposition. The ATO and ACNC websites do not offer any cases supporting the proposition either. The ACL has had drawn to its attention one recent case from New Zealand – *Liberty Trust v Charities Commission*[3] – which provides that being a not-for-profit entity is a relevant factor to be taken into account in deciding if an entity is pursuing a charitable purpose. Being 'not-for-profit' is at most a factor, in assessing charity status as ACL understands the law. Subsection (a) of the definition of charity then, goes beyond the common law. The Explanatory Material at paragraph 1.31 seems to acknowledge this and correctly state the law but this is not carried across into the Bill.

As with comments provided under the heading of 'Advancement Not Advancing', this issue, which is of concern to some of the ACL constituents, is not simply theoretical or esoteric. The government is well aware of the deep concern within the voluntary sector over the proposed statutory definition of 'not-for-profit entity' set out in the *Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012.* Many within the sector are concerned that on a plain reading of that proposed legislation a church or other religious organisation will cease to be a not-for-profit if members benefit. The Explanatory Material to the draft *Charities Bill 2013* makes it clear that the common law meaning of not-for-profit will continue to apply until legislation defining 'not-for-profit' is enacted. There is, then, legitimate reason for concern over the introduction of 'not-for-profit' as an essential element of charity within the voluntary sector generally and the religious charity sector in particular.

[3] *Liberty Trust v Charities Commission* [2011] NZHC 577.

In a context where there is not common law acceptance of 'not-for-profit' being an essential element of charity, and where there is a controversial definition of ‘not-for-profit' presently before the Parliament, ACL submits that the Bill is not only more likely to be a more accurate reflection of the common law but also more likely to be acceptable to the Australian community if reference to ‘not-for-profit’ is removed. ACL submits that Australian legislators should be able to find wording that more accurately reflects the common law.

Purposes beneficial to the public

It is submitted that there are a number of elements of section 6 of the draft *Charities Bill 2013* that go beyond the current common law and are of particular concern to charities involved in the advancement of religion.

ACL understands that the introduction of the concept of 'universal or common good' is an addition to the general common law principles. The existing principles are adequately and comprehensively set out in subsection 6(1)(a). ACL submits that subsection 6(1)(b) should be deleted because it is uncertain in meaning and derives no support from the established principles as to what is needed for a charity to be for the public benefit. ACL is concerned that a benefit regarded by some people as ‘universal or common good’ may not be so regarded by others – in other words, like beauty, ‘goodness’ is in the eye of the beholder. No clarity is provided by subsection 6(5) because the concept of what is of ‘real overall value to the public’ is inherently subjective, vague and uncertain in scope. If this test were to be applied to many charitable trusts upheld by the courts in the past, there would be some doubt that they would satisfy the test; eg. a trust for the building of houses for the clergy is charitable, but would it be regarded as creating a benefit which is a universal or common good?

Religion is of a nature that its 'universal or common good’ is either entirely self-evident or impossible to see. The common law has presumed the advancement of religion is for public benefit and little or nothing is achieved by also requiring each religious charity to demonstrate that it is for 'universal or common good' in the event of the presumption being challenged. It is not immediately apparent to the ACL constituency why the government would wish to have religious charities also demonstrate 'universal or common good'. If subsection 6(1)(b) is deleted, as ACL suggests, then subsection 6(5) would also be deleted. Given the comments already made in relation to subsection 6(1)(b), it is obviously of concern to religious charities that they be required, if the onus is challenged, to prove 'real overall value to the public' as required by subsection 6(5). This issue is explored further under the next section, entitled ‘The presumption of public benefit’.

In relation to subsection 6(2)(b), ACL cannot see how an unidentifiable benefit can be disregarded. To be disregarded, something must first be identified. It may be that subsection 6(2)(b) is really directed at is benefit which is incapable of proof in a court of law (cf *Re Coat’s Trusts; Coats v Gilmour* [1948] Ch 340 at 346) but it does not say that. It is submitted that subsection 6(2)(a) is an important subsection because it requires intangible benefits to be taken into consideration and this is sufficient. Subsection 6(2)(b) ought to be deleted as, arguably, it adds nothing. If the subsection has a meaning it is likely to discount the value of spiritual benefits as, arguably, they may be unidentifiable.

The common law focuses upon private benefit vitiating public benefit not the factors set out in subsection 6(3). If it is intended to restate the common law, ACL submits that alternative wording is to be preferred as this section seems to go beyond the common law. The reference in subsection 6(3)(a) to 'any possible benefit' is very wide and of concern to some religious charities. Many religious charities run schools, and the scope of the section, referring as it does to 'associates' within the meaning of section 318 of the *Income Tax Assessment Act 1936*, suggests that there may well be unintended 'possible benefits' brought within its scope. If unintended 'possible benefits' are brought within its scope then the charity concerned runs the risk of losing its charity status. Take the case of donations to schools by parents of students in schools, or the distribution by a discretionary trust to a school trust. If the donor, or the object of a discretionary trust, falls within the definition of 'associates' then the charitable status of the entity is put at risk. This would seem to go beyond the current law. The current law focuses upon private benefit, not upon the status of 'associates', however remote they might be. ACL submits that the section should be narrowed to be a restatement of the common law.

Subsection 6(4) seems difficult to apply in the context of religious charities, although it is acknowledged that the common law in this area is less than satisfactory. ACL affirms the factors listed in (a) and (b) being taken into account but does not affirm only those factors being considered. This might be satisfactorily addressed by removing the word 'compare' and inserting some other words such as 'take into consideration' or 'have regard to'.

The presumption of public benefit

Having affirmed its support for the general principle of preserving the presumption, ACL and its constituency submits that the protections provided by the presumption can, and should, be strengthened by some further amendment to the draft.

The submissions in this section are informed by the paper by Professor Peter Luxton titled 'Opening Pandora's Box: the Upper Tribunal's decision on Public Benefit and Independent Schools'.[4] This section is also informed by the Irish response to concerns regarding the public benefit presumption and religion which involved including additional sections focussed on protection of advancement of religion in their *Charities Act.*

The position at common law is summarised by Professor Luxton at footnote 46 of his paper as follows:

> As the courts are not equipped to assess the merits of a religion, they have eschewed any attempt to determine whether the nature of a particular religion is for the public benefit, and treat as charitable (and so for the public benefit in the first sense) anybody whose objects meet the definitional criteria for the advancement of religion, except in the extreme case where 'the tenets of a particular sect inculcate doctrines adverse to the very foundations of all religion, and … are subversive of all morality': *Thornton v Howe* (1862) 31 Beav 14, 20; *Re Watson* [1973] 1 WLR 1427. Even the exception for such an extreme case might be characterised as part of the definitional criteria rather than as an aspect of public benefit.

With the introduction of the statutory definition, there is a risk that instead of this eschewing of assessment of particular benefits of religion the ACNC or the courts may be obliged to

[4] Peter Luxton, 'Opening Pandora's Box: the Upper Tribunal's decision on Public Benefit and Independent Schools', *The Charity Law & Practice Review* 15 (2012 – 13).

apply secular tests to assess public benefit. To assess public benefit, and therefore to decide when to set aside at the presumption of public benefit in relation to religion, is more difficult because of the intangible nature of public benefit that is spiritual. As the academic Denis Ong observed: 'How can it ever be possible to prove that any religious (supernatural) purpose is capable of conferring earthly (natural) benefits'.[5] ACL and its constituents are anxious to ensure that secular authorities are not assessing spiritual benefits according to their secular worldview. It is therefore important that the finalised Bill makes it clear that this is not the intent.

This is achieved to some extent by both the reference to 'intangible' benefits being taken into consideration in the draft Bill and also by comments made in the Explanatory Material. Perhaps foreseeing these challenges over advancement of religion in Ireland, the legislators there went further, spelling out the existence of the presumption in relation to religion in detail, and adding significant further protections. ACL commends the Irish drafting to the Government for consideration, not because of its particular wording, but because of its attempt to ensure that the advancement of religion is not subject to secular assessments as to its public benefit. ACL does not recommend that only the Attorney General, in effect, be able to revoke the charitable status of a religious entity, but it does commend to the government the ideas embedded in subsection 3(6) that public benefit be assessed according to the tenets of religion rather than secular concepts. The relevant provisions are subsections 3(4) – (6) of the *Charities Act 2009* (Ireland):

> (4) It shall be presumed, unless the contrary is proved, that a gift for the advancement of religion is of public benefit.
>
> (5) The Authority shall not make a determination that a gift for the advancement of religion is not of public benefit without the consent of the Attorney General.
>
> (6) A charitable gift for the purpose of the advancement of religion shall have effect, and the terms upon which it is given shall be construed, in accordance with the laws, canons, ordinances and tenets of the religion concerned.

The terms of subsection (4) above are particularly significant – the presumption applies at common law *unless the contrary is proved*: see eg *Re Watson (Deceased)* [1973] 1 WLR 1472 at 1482. This is not the same as section 7 of the draft *Charities Bill 2013* because "in the absence of evidence to the contrary" suggests that if there is some evidence that there is a detriment of some kind however small, the presumption falls away and a balancing exercise to determine whether there is a public benefit overall needs to be undertaken. That is not the position at common law. This is not a mere drafting issue - it has important ramifications for the onus of proof in cases where some kind of detriment is put forward as outweighing the public benefit otherwise presumed to exist. If the presumption is to operate in the same way as it does at common law, those seeking to overturn the presumption have the onus of proof and that is how it should be, given the nature of the charitable purposes to which the presumption applies.

Implicit in the ideas explored in the preceding paragraphs is a deeper philosophic issue. It is: who determines what is, or is not, for the public benefit. If the presumption continues to

[5] Denis Ong, *Trusts Law in Australia* (3rd ed, 2007) 349.

apply, then, as currently is the case, the onus remains on those alleging that an entity within the first three heads of charity is not for public benefit. This is both a demonstration of trust in citizens that purport to pursue charitable purposes and, as the majority of charities are within the first three heads of charitable purpose, also prevents charitable resources from being spent on needless proof of public benefit exercises. The presumption can be rebutted, but the effect of the presumption is to leave most charities without the need to justify their status, free to pursue their purposes as they see fit with minimal government oversight and control.

It is clear that the considerable confusion in the United Kingdom with regard to public benefit has arisen because the requirements regarding the onus of proof have not been clearly spelt out. ACL submits that any amendments to the draft Bill that clearly explain issues of onus of proof are likely to be to the benefit of not only religious organisations, but the Australian community generally. ACL has taken advice on how onus issues might be clearly addressed and sets out below some wording that is informed by the Irish example. It is ACL's understanding that this wording would be an accurate statement of the common law in Australia at present if it is assumed that the last clause, based on the Irish legislative concepts, is a correct statement of the common law.

> Any person alleging that a charity is not a charity carries the onus of proof to the civil standard of balance of probabilities.
>
> In determining whether or not the standard of proof is satisfied, regard must be had to the precedents set out in cases both before and after the commencement of this Act and in particular, to any different requirements for satisfying public benefit for different purposes.
>
> In construing the public benefit of a charitable purpose for the advancement of religion the purpose must be construed in accordance with the laws, canons, ordinances and tenets of the religion concerned and not principally secular conceptions of public benefit.

'General public'

There is a reference to 'public' in subsection 6(5), but all of the other references in subsection 6(1) are to 'the general public'. There may well be a difference. The common law test is only that the public or a sufficient section of the public be benefitted. Use of the concept of 'general public' may well change the claim to benefit beyond society as a whole in a generic sense for 'ordinary Australians'. That is not the common law. ACL submits that clarifying of the common law required deletion of the word 'general' where it appears as part of the phrase 'general public' in section 6.

In the same vein as the preceding paragraph, subsection 6(3)(b) goes beyond the common law in requiring impact on 'a member of the general public' to be taken into account. This is also a concept that will be difficult to apply in practice. ACL submits that reference to 'a member of the general public' should be removed from section 6(3)(b).

Public benefit deemed or not required?

The drafting in section 9 does not follow the drafting in the *Extension of Charitable Purposes Act 2004*. Section 9 states that the public benefit test is to be 'disregarded', whereas the *Extension of Charitable Purposes Act* 'deemed' certain purposes to be for public benefit. The impact of this on closed religious orders is not immediately apparent. It might be that

the net effect is the same. Conceptually, though, the deeming approach seems more consistent with charity law concepts.

Disqualifying features

In the media release announcing the current public consultation on an Exposure Draft of a *Charities Bill 2013,* the Assistant Treasurer stated that:

> …the draft legislation retains the flexibility inherent in the common law that enables the courts, as well as Parliament, to continue to develop a definition and extend the definition to other charitable purposes beneficial to contemporary Australia.[6]

The reason given for this is to ensure that 'the definition remains appropriate and reflects modern society'. To the extent that the draft defines charitable purpose, it clearly seems to be intended to do this, but concern arises in relation to disqualification. In so far as it scopes purposes which are *not* charitable it seems to limit the common law. For example, prior to the decision in *Aid/Watch,*[7] advocacy was regarded as a prohibited purpose. It is now no longer a prohibited purpose where the advocacy is to advance purposes that enjoy the presumption of public benefit – such as the advancement of religion. Given the reasoning by the majority of the High Court in *Aid/Watch,* it may well be the case that in due course the law of charity will develop to make all advocacy charitable. ACL expresses concern that if the legislation effectively prohibits advocacy by charities beyond that within the scope of the *Aid/Watch* decision, the courts will be constrained from further developing the law in relation to advocacy.

This could become important where, for example, it is questionable whether an organisation is advocating for a religious purpose or a more specific public benefiting purpose. Take, for example non-compulsory voting in Australia. It is a contemporary issue where Christians may hold different views and yet for all of Australia's history as a Commonwealth, some Australian Christians, motivated by their religious beliefs, have conscientiously objected to voting. If they were to form an organisation whose purposes were stated as the advancement of the Christian religion through advocacy of church-state separation, but all of its activities were focused solely on advancing the cause of non-compulsory voting, the ACNC may take the view that its purposes are political and refuse to register the entity as a charity. On appeal to the court system, if the common law only were to apply, an inferior court may well consider itself free to find that this organisation is a charity. If this Bill is passed into law, having regard to the narrowing effect of subsection 11(2), an inferior court may consider itself constrained to not so develop the law given the clarity of Parliament's expression of limitation in that subsection. This is clearly contrary to the intent of the government set out in the media release of the Assistant Treasurer.

The problem is compounded by the effect of subsection 10(b) in the current environment where one of the major political parties supports compulsory voting and the other is in favour of its removal. As subsection 10(b) provides that charity status is lost if a charity engages in 'the purpose of promoting or opposing a political party or a candidate for political office' (irrespective of whether such purpose is incidental or ancillary to its otherwise charitable

[6] The Hon David Bradbury MP, Assistant Treasurer and The Hon Mark Butler MP, Minister for Social Inclusion, *Public Consultation on a Statutory Definition of Charity* (Media Release: 8 April 2013).
[7] *Aid/Watch Inc v Commissioner of Taxation* (2010) 241 CLR 539.

purpose) it is foreseeable that charity status could unwittingly be lost by religious organisations participating in this church-state separation debate leading into a referendum on compulsory voting. If a religious denomination in Australia encourages its members to vote in favour of non-compulsory voting for theological reasons, it must of necessity, and will as a question of fact, be promoting one political party and opposing another. To avoid disqualification, a court would have to find that the denomination's advocacy amounted to only 'activity,' not discharging a purpose. That could be quite difficult in this context. More importantly for religious bodies, it is an enquiry into which they do not wish to embark. They should be free to express their theology in this way if the common law permits it.

It follows from the discussion above that subsections 10(b) and 11(2) and should be deleted. (It should be stated in closing this point that this is but an example. ACL acknowledges that there are exemptions for conscientious objectors.)

The Explanatory Material

It will be evident from this submission that the Explanatory Material could also be improved. It is stated in the Explanatory Material that the intent is to restate the common law, and a comparison table is provided. That table is quite basic and arguably not entirely accurate. For example, if 'not-for-profit' is stated to be an essential element of the law, as the draft Bill suggests, then setting out the case law to substantiate this would assist. If ACL is unable to identify the foundations for this assertion, then a court interpreting the legislation may have a similar difficulty. The Explanatory Material could be rewritten so as to clearly state in more detail what is intended and should include, where appropriate, references to establish that the provisions do reflect the common law. The Explanatory Material should also clearly state where some change is intended. The New law/Current law table does not contain sufficient detail for this purpose. These issues might also be addressed by more notes being included in the finalised Bill.

It is also particularly important that the Explanatory Material sets out clearly that in the construction of section 6 it is intended that a regulator or a court seek to give effect to the nuances of the common law understanding of public benefit. It is submitted that the Explanatory Material does not achieve that clearly at this stage. A few examples may assist.

The High Court of Australia, in the *Word Investments case* (2008) 236 CLR 204, set out a process for assessing whether an entity is pursuing a charitable purpose. In summary it was the entity is free to pursue its charitable purposes as it sees fit including by conduct of a business (and nothing else). This freedom of charities to pursue their purposes as they see fit has recently been affirmed in the United Kingdom in the *Independent schools case, [2011]* UKUT 421 (TCC). Rather than spell out this freedom, which is the tenor of charity law cases, the explanatory material is written in a way that constrains rather than enables. With this in mind it is suggested that the following clauses, at least, should be rewritten:1.32, and 1.34 – 1.36.

Take as another example paragraph 1.53. All religions will offer some limitations upon membership and sometimes those limitations can be quite restrictive. The common law accepts this. The wording of the Explanatory Material is that the 'limitation is justified and reasonable having regard to the nature of the benefit'. This statement is not the common law and it is also difficult to imagine how the ACNC or a court is to apply this guidance. Take as

an example say, baptism or circumcision as a religious rite and endeavour to relate it to a ‘particular benefit’. A religious institution may well consider a person unsuitable for baptism or circumcision and thus arguably unreasonably limit membership. It is not currently the common law for the state to impose a condition of reasonableness ‘having regard to the nature of the benefit'.

A comment on delay in release of the draft

As the Explanatory Material points out, the government announced its intent to introduce a statutory definition of charity in May 2011. There has been a significant delay in the release of draft legislation, but yet such a short consultation period so late in the process and so close to the next election which has not helped the government in developing the confidence of the sector. This is very important legislation for the sector and more time should have been allowed for considering it. Further, it would have been very helpful if this legislation had been finalised before the ACNC was established.

Conclusion

If the changes suggested in this submission are adopted, which it is suggested are relatively minor and assist in a more accurate restatement of the common law, then it is likely that many if not most religious charities will support the passage of the draft Bill. There is of course a diversity of views within the Christian community and different factors are weighed more heavily in some quarters than others. In setting out these observations ACL trusts that it assists the government in formulating the best possible restatement of the common law for Australia at this time.