



THE UNIVERSITY OF
MELBOURNE

NOT-FOR-PROFIT PROJECT, UNIVERSITY OF MELBOURNE LAW SCHOOL

SUBMISSION TO THE TREASURY, EXPOSURE DRAFT, CHARITIES BILL 2013

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ABOUT THE NOT-FOR-PROFIT PROJECT

The University of Melbourne Law School's Not-for-profit Project is a research project funded by the Australian Research Council. The project began in 2010 and is the first comprehensive Australian analysis of the legal definition, taxation, and regulation of not-for-profit (NFP) organisations. Appendix A provides further information about the project and its members.

The NFP Project welcomes this opportunity to provide a submission to the Treasury on the Exposure Draft of the Charities Bill 2013. We have been heavily engaged in the consultation process in relation to recent reforms to the NFP sector, including making an extensive submission to the Treasury on the statutory definition of charity in December 2011.¹ This submission and other research papers, submissions and articles on many aspects of Australian and overseas charity law are available on our website <http://tax.law.unimelb.edu.au/notforprofit>.

SUMMARY

The Explanatory Material states that the intention of the Charities Bill is to state a definition of charity based on common law principles with minor modifications which modernise and clarify the common law.² Our submission identifies areas where the Charities Bill does not accurately reflect the common law or does not provide sufficient guidance on key requirements. We raise particular concerns about:

- the omission of an Objects clause and a statement that the Act will apply for all Commonwealth purposes (Recommendation 2);

¹ Not-for-Profit Project, University of Melbourne Law School, *Submission to the Treasury, A Definition of Charity, (Consultation Paper, October 2011)*, 8 December 2011.

² Charities Bill 2013 and Charities (Consequential Amendments and Transitional Provisions) Bill 2013 Explanatory Material ('Explanatory Material'), p. 7; [1.3]; [1.19].

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- the clarity of the definitions in sections 3 and 4 (Recommendations 3-8);
- the lack of guidance in the definition of charitable purposes as to whether certain purposes are charitable (Recommendations 9-10);
- the scope of the disqualifying purposes in section 10 (Recommendations 15-16);
- the departure from the common law test of public benefit and the inclusion of a requirement that a benefit must be a 'universal or common good' (Recommendation 20);
- the extension of the common law presumptions from presumptions of *benefit* to presumptions of *public benefit* (Recommendation 26);
- the lack of alignment between the charitable purposes in section 11 and the presumptions in section 7 (Recommendation 27);
- the status of government entities currently registered as charities and 'poor relations' and 'poor employees' trusts (Recommendations 17 and 28); and
- the approach taken to charities with the purpose of benefiting Indigenous persons (Recommendations 29-30).

We also identify some provisions which we submit might be more clearly drafted to clarify the purpose and effect of the legislation. A list of recommendations is set out in [Appendix C](#).

STRUCTURE OF THE BILL

A key rationale for a statutory definition of charity is that everyone can look at the Act and know, with some degree of certainty, whether something is or is not charitable. As such, the accessibility and readability of the Act is very important. We submit that it would be more logical to rearrange the provisions of the Bill so that all provisions relating to the definition of charity and charitable purposes are grouped together, followed by provisions relating to the public benefit test, as follows:

- Objects clause;
- Definitions that apply for the purposes of this Act (currently sections 3 and 4);
- Definition of charity (currently section 5);
- Definition of charitable purposes (currently sections 11 and 13)
- Disqualifying purposes (currently section 10);
- Charity-like government entities (currently section 12);
- Purposes for the public benefit (currently section 6);
- Certain purposes presumed to be for the public benefit (currently section 7);
- Benefit for indigenous persons (currently section 8);

- When public benefit test does not apply (currently section 9);
- Cy pres schemes (currently section 14).

We also submit that the division of the Bill into parts and divisions is unnecessary, particularly when the Bill is so short.

Recommendation 1: The provisions of the Charities Bill should be re-ordered so that all provisions relating to the definition of charity and charitable purposes are together, followed by provisions relating to the public benefit test. The division of the Bill into ‘parts’ and ‘divisions’ introduces unnecessary complexity.

PRELIMINARY PROVISIONS

Objects clause

The Bill does not include an Objects clause. We submit that an Objects clause outlining the purposes of the legislation would greatly assist the sector and others who will look to the legislation to understand what is and is not charitable. The Objects clause should reflect the stated purposes of the Charities Bill,³ including to:

- set out a meaning of charity and charitable purposes for the purposes of all Commonwealth law.
- preserve the common law principles relating to charity with some modifications to provide greater clarity and certainty.

Recommendation 2: The Charities Bill should include an Objects clause setting out the purposes of the legislation, which should include: to state a definition of charity for the purposes of all Commonwealth law; and to preserve common law principles relating to the definition of charity.

Definitions (ss 3, 4 and 5)

A stated intention of the Charities Bill is to provide a definition of charity and charitable purpose for the purposes of all Commonwealth law.⁴ While the definition of charity is said to apply ‘in any Act’, the definitions in sections 3 and 4 are confined to ‘in this Act’.

We are concerned that some of the definitions set out in sections 3 and 4 in fact feed into the definition of charity and should be used when interpreting the terms of other Commonwealth legislation, such as taxation legislation. In this regard, subsection 3(2) seems to us to serve no real purpose and should be removed.

³ As set out in the Explanatory Material, p 7.

⁴ Explanatory Material, p 7; see also Bill Shorten MP and Tanya Plibersek MP, *Joint Media Release: Making it Easier for Charities to Help Those Who Need It*, 10 May 2011.

We also consider that the Bill should specify that the definition of charity is to apply 'in any Commonwealth Act'. We acknowledge that the Commonwealth can only introduce a definition for Commonwealth purposes but note that the Government is currently consulting with states and territories with the aim of introducing a definition that could be adopted in all jurisdictions.

Recommendation 3: Consideration should be given to whether definitions in sections 3 and 4 that inform the meaning of charity should apply to all Commonwealth legislation and consequently, whether subsection 3(2) is necessary.

Recommendation 4: The Charities Bill should expressly state that the definition of charity applies 'in any Commonwealth Act'.

Definition of 'charity'

Section 5 defines 'charity'. Paragraph (1)(b)(i) of the definition refers to charitable purposes that are for the public benefit. We suggest that rather than having both of these requirements together, public benefit be included as a separate paragraph in the definition. Although clearly still linked, this will emphasise that there are two requirements.

Note 1 to section 5 states that 'In determining the purposes of the entity, have regard to the entity's governing rules, its activities and any other relevant matter'. If this directive is intended to modify the approach to interpreting the definition, we submit that it should be explicitly included as a substantive provision and not as a Note.

Recommendation 5: For greater clarity, the requirements that a charity have (a) charitable purposes and (b) purposes for the public benefit, should be set out in separate paragraphs in section 5.

Recommendation 6: Consideration should be given to whether the matters in note 1 to section 5 should be included as a substantive provision.

Definition of 'charitable'

The definition of 'charitable' in section 5 is not really a definition but rather explains an adjective. The Note/Example also does not assist in understanding what is a charity. In our view, this definition is unnecessary and should be removed. If it is intended that this definition should limit the ordinary meaning of the word 'charitable' wherever found in other Commonwealth legislation to the definition of 'charity' in this Act, we suggest that this should be made explicit.

Recommendation 7: The definition of 'charitable' should be removed or, alternatively, qualified with the words 'as defined in this Act'.

Definition of 'not for profit'

The Charities Bill does not define 'not-for-profit', which is a key component of the definition of charity. A definition of 'not-for-profit' is included in the Tax Laws Amendment (Special Conditions

for Not-for-profit Concessions) Bill 2012, which is currently before Parliament. If this legislation is not passed, not-for-profit will take its ordinary meaning.⁵ If it is intended that 'not-for profit' in the Charities Bill is defined as it will be in proposed new subsection 995-1(1) of the *Income Tax Assessment Act 1997 (ITAA 1997)*, then a note in the Charities Bill explaining this would be helpful. Alternatively, the definition of 'not-for-profit' could be incorporated into the Charities Bill as a core element of the concept of a charity.

Recommendation 8: A note should be included to direct the reader to the definition of 'not-for-profit' in the Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012, should it be passed; or, alternatively, the definition of 'not-for-profit' should be set out in the Charities Bill.

CHARITABLE PURPOSE (S 11)

We acknowledge that the Bill does not set out to extend the range of recognised categories of charitable purposes. In our previous submission we urged the adoption of new charitable purposes such as the advancement of citizenship, community development, sport and recreation, and access to information as part of modernising the definition of charity.⁶ However, we appreciate that the definition of charity is, in the end, a matter for government, and our submission does not, on the whole, challenge the choices underpinning the list of categories of charitable purposes in the Bill.

We are, however, concerned that there is little to no explanation of each charitable purpose listed in subsection 11(1). With the exception of the purpose of advancing social or public welfare, which is elaborated in section 13, the kinds of purposes that fall within each paragraph are not set out. While the Explanatory Material provides some guidance on the kinds of charitable purposes that each paragraph is intended to include,⁷ omitting this detail from the Bill defeats a key rationale for having a statutory definition of charity, namely that everyone can look to the Act and know, to some degree, whether something is or is not a charitable purpose. It also means that some purposes which are clearly part of the legal (or popular) meaning of charity, such as relief of poverty, are not expressly included as a charitable purpose.

We recommend that each paragraph in subsection 11(1) include sub clauses that set out, non-exhaustively, the kinds of purposes that each charitable purpose includes. Recommendation 13 of the Inquiry into the Definition of Charities provides a good model.⁸ This approach would also have

⁵ Explanatory Material, [1.23].

⁶ Not-for-Profit Project, University of Melbourne Law School, *Submission to the Treasury, A Definition of Charity, (Consultation Paper, October 2011)*, 8 December 2011, Rec 1.

⁷ Explanatory Material, [1.84]-[1.104].

⁸ Ian Fitzhardinge Sheppard, Robert Fitzgerald and David Gonski, *Report of the Inquiry into the Definition of Charities and Related Organisations* (2001) <<http://www.cdi.gov.au/html/report.htm>>, Rec 13. See also Not-

the benefit of aligning the purposes that are presumed to be for the public benefit set out in section 7 with the charitable purposes in section 11 (discussed below, Recommendation 27).

Recommendation 9: The definition of charitable purposes in section 11 should include sub clauses that set out the kinds of purposes that fall within each charitable purpose.

Purpose of advancing social or public welfare (s 13)

Section 13 expands on the charitable purpose of ‘advancing social or public welfare’ contained in paragraph 11(1)(c). However, it does not include such things as relief of poverty or caring for the elderly. It has been suggested above that the definition of charitable purpose include sub clauses to give more guidance on what is encompassed by the paragraphs in section 11(1). The relevant sub clauses could then include child protection and disaster relief, as well as things like relief of poverty.

Recommendation 10: Section 13 should be removed and the two purposes referred to should be incorporated as sub clauses in the definition of charitable purpose.

Other charitable purposes

Paragraph 11(1)(k) extends the definition of charitable purpose to include ‘any other purpose beneficial to the general public that may reasonably be regarded as analogous to, or within the spirit of’ any of the charitable purposes listed in subsection 11(1).

The Explanatory Material states that ‘the list is not intended to exclude other charitable purposes that the courts have found to be beneficial to the general public that do not readily lend themselves to grouping’.⁹ The Explanatory Material also states that paragraph 11(1)(k) ‘encompasses other purposes which the courts have found to be charitable, including for scientific and scholarly research, promoting industry, commerce and agriculture in certain circumstances ... and to a locality or neighbourhood, such as the beautification of a township.’¹⁰

We question whether paragraph 11(1)(k) fulfills its intended purpose of encompassing purposes that courts have found to be charitable. We note that the wording of the provision is based on paragraph 3(1)(m) of the *Charities Act 2011* (UK). That provision, however, expressly includes other purposes that are ‘recognised as charitable purposes ... under the old law’.¹¹ While we do not recommend that Australian legislation adopt the expression ‘old law’, we consider that there is merit in expressly stating that charitable purposes include those purposes that courts have in past cases found to be charitable.

for-Profit Project, University of Melbourne Law School, *Submission to the Treasury, A Definition of Charity, (Consultation Paper, October 2011)*, 8 December 2011, 21.

⁹ Explanatory Material, [1.82].

¹⁰ Explanatory Material, [1.106].

¹¹ *Charities Act 2011* (UK) s 3(1)(m)(i).

The reference to purposes that may be regarded ‘within the spirit of’ the listed purposes recalls the language of the common law, which recognises as charitable purposes ‘within the spirit or intendment of the State of Elizabeth’.¹² We submit that the phrase ‘within the spirit of’ is archaic and unnecessary and could be removed from paragraph 11(1)(k) without changing the intent of the provision.

Finally, paragraph 11(1)(k) is intended to be a catch-all provision, and as such should be the final paragraph in the list of charitable purposes.

Recommendation 11: Paragraph 11(1)(k) should be redrafted to:

- (a) include purposes already found by a court to be charitable; and**
- (b) remove the reference to ‘within the spirit of’.**

This catch-all provision should be the final paragraph in subsection 11(1).

Meaning of ‘general public’

Paragraph 11(1)(k) refers to purposes beneficial to the ‘general public’. The term ‘general public’ is also used throughout section 6 and in subsection 9(2).

‘General public’ is not defined. In its ordinary meaning, ‘general public’ tends to suggest ordinary people, especially all the people who are not members of a particular organisation or who are considered specialists in a particular area of knowledge. We submit that the inclusion of the term ‘general’ is potentially misleading, as it suggests that the definition of charity and the public benefit test focus on whether a sufficient number of ‘ordinary people’ benefit, rather than society as a whole. We suggest that the term ‘public’ be used throughout the Bill instead.

Recommendation 12: The term ‘public’ should be used instead of the term ‘general public’ throughout the Charities Bill.

Purpose of promoting or opposing a change to law, policy or practice

The list of charitable purposes includes the purpose of promoting or opposing a change to any matter established by law, policy or practice in the Commonwealth, a state or territory, or another country (paragraph 11(1)(l)). However, such purposes must be in furtherance or protection of one or more of the charitable purposes that are listed in subsection 11(1). In other words, an organisation whose purpose is to support or reform law or policy that is unrelated to one of the listed charitable purposes will not meet the definition.

This provision is consistent with the decision of the High Court in *Commissioner of Taxation v Aid/Watch* which held that the generation, by lawful means, of public debate concerning the

¹² *Morice v Bishop of Durham* (1805) 10 Ves 522; 32 ER 947.

efficacy of foreign aid directed to the relief of poverty is a charitable purpose.¹³ However, the provision fails to reflect the rationale behind the decision in *Aid/Watch*. For the majority, generating public debate about government activities is considered charitable not because of the effect it may have on those government activities, but because public debate is beneficial for Australia's democracy.¹⁴ By preferring the narrow approach, the Charities Bill misses an important opportunity to recognise the public benefit of an informed and engaged citizenry.¹⁵

If it is government policy to maintain this narrow approach, we recommend that for clarity, it be included in a separate subsection of section 11.

The meaning of subsection 11(2) is very difficult to understand. The Explanatory Material provides the following explanation:

1.113 A purpose of promoting or opposing a change to any matter established by law, policy or practice in the Commonwealth, a State, a Territory or another country is not an independent a charitable purpose.

1.114 Where an entity has such a purpose, the purpose will be identified under this category separately from any charitable purpose the entity may have.

We remain confused about the intent and effect of subsection 11(2). One possible reading is that subsection 11(2) excludes from charitable purposes the general purpose of promoting or opposing a change to any matter established by law, policy or practice that is not related to a listed charitable purpose. If this is the case, subsection 11(2) seems to add nothing to what is already stated in paragraph (l), which already requires that the change to law, policy or practice that is being promoted or opposed must be in furtherance or protection of one of the purposes mentioned in paragraphs (a)-(k).

Another possible reading is that subsection 11(2) intends to provide that where an entity has a purpose under paragraph (l), for example law reform in furtherance or aid of advancing education, this is the *only* charitable purpose the organisation can have. So, an entity with the purposes of advancing education may engage in law reform if that is incidental or ancillary to, and in furtherance or aid of, the purpose of advancing education (under section 5). However, under subsection 11(2) an entity cannot have the dual purpose of advancing education and promoting a change in education law, policy and practice.

Neither of these readings is clear from the text. More generally, it is not clear why the definition of 'charitable purpose' should be limited in this way. If subsection 11(2) is necessary, one option might be for the Bill to include an example to explain the operation of subsection 11(2) more clearly.

¹³ *Commissioner of Taxation v Aid/Watch Inc* (2010) 241 CLR 539, [47].

¹⁴ *Commissioner of Taxation v Aid/Watch Inc* (2010) 241 CLR 539, [45]. See Matthew Harding, 'Finding the Limits of Aid/Watch' (2011) 3 *Cosmopolitan Civil Societies Journal* 34, 39-40.

¹⁵ Not-for-Profit Project, University of Melbourne Law School, *Submission to the Treasury, A Definition of Charity*, (Consultation Paper, October 2011), 8 December 2011, 15-16.

Recommendation 13: Consideration should be given to:

- (a) broadening paragraph 11(1)(l) to recognise the purpose of promoting or opposing a change to any matter established by law, policy or practice as a charitable purpose in itself; or, alternatively, if the narrow approach is to be maintained, making paragraph 11(1)(l) a separate subsection; and**
- (b) removing subsection 11(2) from the Bill as unnecessary; or, if retained, clarifying its meaning in the Bill and Explanatory Material.**

‘Advancing’ vs ‘promoting’ or ‘protecting’

The charitable purposes listed in paragraphs (a)-(h) of subsection 11(1) use different verbs. ‘Advancing’ is used in the cases of health, education, social or public welfare, religion, culture, and the natural environment; while other listed charitable purposes are ‘promoting’ reconciliation, mutual respect and tolerance between groups of individuals that are in Australia; ‘promoting’ or ‘protecting’ human rights, and ‘protecting’ the safety of the general public.

Section 3 of the Bill defines ‘advancing’ to include protecting, maintaining, supporting, researching and improving’. ‘Promoting’ and ‘protecting’ are not defined in the Bill.

The reason for using different verbs to describe the purposes listed in section 11 is not made clear. It is not clear why, for example, protecting the safety of the general public is a charitable purpose, but promoting such safety is not. It is also not clear why promoting and protecting human rights is a charitable purpose, but not maintaining, supporting, researching and improving human rights. This stands in contrast to the approach taken in the *Charities Act 2011* (UK), which lists the advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity as a charitable purpose.¹⁶

We recommend that the charitable purposes listed in paragraphs (a)-(j) of subsection 11(1) be amended to state ‘the purpose of advancing ...’. This will ensure that some purposes will not be narrowly interpreted by virtue of using ‘promoting’ or ‘protecting’ or other terms that are not expressly defined in the Bill. If it is intended that the purposes in paragraphs (f), (g) and (h) are to be more narrowly confined, the reasons for this should be set out in the Explanatory Material.

Recommendation 14: Paragraphs 11(1)(a)-(j) should use consistent language and provide that the purpose of ‘advancing’ the particular aim is a charitable purpose.

¹⁶ *Charities Act 2011* (UK) s 3(1)(h).

DISQUALIFYING PURPOSES (s 10)

Engaging in or promoting activities that are unlawful or contrary to public policy

Section 10(a) of the Bill provides that ‘the purpose[s] of engaging in, or promoting, activities that are unlawful or contrary to public policy’ are disqualifying purposes. An entity with such purposes cannot be a charity within section 5 of the Bill.

In our previous submission, we raised concerns about the broad scope of unlawful activities and activities contrary to public policy.¹⁷ We noted that there are many shades of unlawfulness, and not all unlawful activities offend against public policy. Further, there may be cases in which this kind of provision might disqualify organisations that promote legitimate causes. For example, abortion remains illegal in parts of Australia¹⁸ and an organisation that promotes women’s health and reproductive rights, including providing advice on abortions, may well infringe this rule.

The scope of ‘public policy’ is potentially much broader, and there is a risk that advocacy of controversial viewpoints will be considered to contravene this provision, stifling debate in a healthy and diverse civil society. In our view, the example and note in subsection 10(a) do not clarify the meaning of public policy or adequately confine its scope.

We consider that it is more appropriate to consider these questions in the overall context of the public benefit test. This enables a more contextual assessment of the strength and value of the law or public policy involved, directed to the ultimate question of whether it benefits the public. We do not consider that it is necessary to include a specific reference to these issues in the statutory definition. However, if it is considered necessary to address this issue in the Bill, we recommend that subsection 10(a) should be restricted to disqualifying illegal purposes.

Recommendation 15: Subsection 10(a) should be removed; or, alternatively, restricted to illegal purposes.

Promoting or opposing a political party or a candidate for political office

Subsection 10(b) provides that the purpose of promoting or opposing a political party or candidate for political office is a disqualifying purpose. We note that the provision is confined to the *purposes* rather than the *activities* of the entity, and so, an organisation with a charitable purpose under section 11(1) may promote a party or candidate as long as this is an activity rather than a purpose of the organisation. To this extent, subsection 10(b) does not seem to add anything to the definition

¹⁷ Not-for-Profit Project, University of Melbourne Law School, *Submission to the Treasury, A Definition of Charity, (Consultation Paper, October 2011)*, 8 December 2011, 48-50.

¹⁸ See generally Victorian Law Reform Commission, *Law of Abortion: Final Report* (March 2008), Ch 2.

of charitable purposes set out in subsection 11(1), and paragraph 11(1)(l) in particular. In our view, subsection 10(b) is superfluous and should be removed from the Bill.

We are also concerned that the paragraphs of the Explanatory Material that relate to subsection 10(b) mistakenly conflate activity and purpose, and recommend that this be clarified.¹⁹

Recommendation 16: Subsection 10(b) should be removed. If retained, its meaning should be clarified.

GOVERNMENT ENTITIES (SS 4, 5 AND 12)

Status of government entities that are currently registered charities

Subsection 5(d) of the Charities Bill provides that a charity is an entity that is ‘not ... a government entity’. As far as we are aware, neither the Bill nor Explanatory Material consider the status of government-controlled entities that are currently registered charities. In order to ensure certainty for such organisations, the status of such entities under the new definition of charity should be made clear.

Recommendation 17: The status of existing government entities that have been recognised as charities should be made clear.

Funding charity like government entities

The intention of section 12 seems to be to deem government entities to be charities, but only for the purposes of determining the charitable status of a ‘fund’ with the purposes of providing money, property or benefits to the government entity. The term ‘fund’ is not defined, but presumably refers to Private Ancillary Funds (PAFs) and Public Ancillary Funds (PuAFs). If this is the intended meaning, it would be preferable to state this.

Under the Model trust deeds for PAFs and PuAFs, PAFs and PuAFs are required to have the purpose of providing money, property or benefits to a Deductable Gift Recipient (DGR) that is charitable. For other entities the requirement is simply that the entity be a DGR. A simpler way of achieving the same result is to amend the Model trust deeds to include a reference to these types of entities. We note that the Model trust deeds use the term ‘eligible recipient’ and this could include these types

¹⁹ Explanatory Material, [1.80]-[1.81] states that: ‘An entity must not engage in partisan political activities that support or oppose a candidate or party for office or other partisan political activities where this can be construed as a purpose... This does not mean that charities cannot engage in activities such as policy debates, advocacy or lobbying activities to further charitable purposes, or publishing comparisons of party policies and how they align with its charitable purpose.’

of entities. This would remove the confusion that may arise from this section about whether charity-like government entities may be a form of charity or may sometimes be charities.

Recommendation 18: Section 12 should be removed (with subsequent changes to PAF and PuAF Model trust deeds).

PURPOSES FOR THE PUBLIC BENEFIT (S 6)

The accepted analysis of the public benefit test is that the test has two limbs: the concept of ‘public’ and the concept of ‘benefit’.²⁰ Section 6, as drafted, is confusing because it does not clearly separate the two limbs: paragraph 6(1)(a) goes to the concept of public; 6(2) to benefit; 6(3)(a) to public; 6(2)(b) to benefit; and 6(4) to public.

The application of section 6 is also not assisted by the directives to ‘disregard’ or ‘regard’ certain matters without explaining the purposes for doing so. For example, subsection 6(3)(b) really goes to the question of whether there is a value or benefit. Under current law, there may be no public benefit if detriment outweighs the benefit, but the subsection does not make this clear. Rather, it requires that regard be had to any detriment without making clear that the consideration of detriment properly goes to determining whether there is a benefit.

In our view, the drafting of section 6 could be greatly improved by separating the considerations that apply to each limb of the public benefit test, and by expressly stating the purposes for which regard is to be had to the various matters contained in section 6.

Recommendation 19: Section 6 should be redrafted so that the considerations relevant to the ‘public’ limb of the public benefit test are clearly set out and separated from the considerations relevant to the ‘benefit’ limb of the public benefit test.

Remove the requirement that the benefit be a ‘universal or common good’

Subsection 6(1) requires that a charitable purpose must be directed to the benefit of the general public or a sufficient section of the general public, and that this benefit must be ‘a universal or

²⁰ See GE Dal Pont, *Law of Charity*, (Chatswood: LexisNexis Butterworths, 2010), [3.2]; Income Tax and Fringe Benefits Tax: Charities (Taxation Ruling, No TR 2011/4, 12 October 2011), [129]. See also *Independent Schools Council v Charity Commission for England and Wales* [2011] UKUT 421 (TCC) where the UK Upper Tribunal (Tax and Chancery Chamber) stated at [44]: ‘It is possible ... to discern from the cases two related aspects of public benefit. The first aspect is that the nature of the purpose itself must be such as to be a benefit to the community: this is public benefit in the first sense. ... The second aspect is that those who may benefit from the carrying out of the purpose must be sufficiently numerous, and identified in such manner as, to constitute what is described in the authorities as “a section of the public”: this is public benefit in the second sense.’

common good'. Subsection 6(5) provides that to be a universal or common good, the 'benefit must be of real overall value to the public'.

The Explanatory Material seems to suggest that this requirement restates the common law. It states that 'the description of benefit as a universal or common good broadly expresses the character of purposes identified as charitable under the common law. Although individuals may be the direct beneficiaries of a charitable purpose, the purpose contributes to the public wellbeing more generally and is consistent with common contemporary social values and community standards.'²¹

The requirement for, and definition of, 'universal or common good' is not part of the current law of charity. The expression is derived from the 1996 report on charities by the Ontario Law Reform Commission (OLRC), which itself drew on ideas about 'basic human goods' that feature in the work of the natural law philosopher John Finnis.²² The expression 'universal or common good' is found nowhere in the case law defining charity and the requirement in sections 6(1) and 6(5) of the Charities Bill is a departure from the common law of charity. As noted above, there are two limbs to the public benefit test: the concept of 'public' and the concept of 'benefit'. Ideas of universal or common good do not feature in either.

We strongly recommend against introducing this new requirement into the law of charity. First, we do not consider the test to be necessary in light of the charitable purposes that are listed in s 11 of the Bill. There is no need to also describe the character of these purposes as part of the public benefit test. This new provision risks imposing a problematic and untested new requirement on the definition of charity. Proposed subsection 6(5) introduces two further layers of concept or meaning which add complexity to the definition without making the law more clear or certain.

Secondly, introducing this novel requirement risks unintended consequences. We do not know how a decision-maker, if called on to do so, might interpret the requirement that a benefit be 'a universal or common good'. There is a risk that the expansive concept contemplated by the OLRC will be narrowed when these words are interpreted as part of an Australian statute. The key concern is that the expression will be interpreted as requiring that charities provide a 'common or universal' benefit in the ordinary sense of those terms, which tend to imply non-excludable public goods. Such interpretations can only serve to narrow the range of purposes that are regarded as being for public benefit.

²¹ Explanatory Material, [1.47].

²² Ontario Law Reform Commission, *Report on the Law of Charities* (1996) vol 1, 148. The test was also picked up in Ian Fitzhardinge Sheppard, Robert Fitzgerald and David Gonski, *Report of the Inquiry into the Definition of Charities and Related Organisations* (2001) <<http://www.cdi.gov.au/html/report.htm>>, 116–117.

For example, the purpose of providing school education has traditionally been regarded as a charitable purpose for public benefit, so long the class of children educated is a sufficient section of the public, even though school education is not itself a public good. Similarly, many of the religious purposes that have traditionally been regarded as charitable purposes for public benefit cannot be said to entail the provision of ‘common or universal’ benefits. Adding a requirement that purposes entail the provision of ‘common or universal’ benefits runs the real risk of inviting courts to depart from the well-established proposition of charity law that the provision of excludable private goods to a sufficient section of the public can be for public benefit.

While the OLRC report is an important intellectual contribution to our understanding of the law of charity, we do not consider that its approach should be followed in the Australian context. We note that the OLRC in any event recommended against adopting a statutory definition and statutory reform of the ‘public benefit’ test.²³ More importantly, the natural law origins of the approach taken by the OLRC are not easily reconciled with the aims of a liberal state like Australia.

We recommend that this requirement be removed so that the Bill lives up to its stated aim of reflecting the public benefit test as developed and applied in the common law.

Recommendation 20: Subsections 6(1)(b) and 6(5) of the Charities Bill should be removed. The requirement that the benefit be ‘a universal or common good’ that is ‘of real overall value to the public’ is unnecessary and introduces a problematic new requirement that departs from the current law of charity.

Benefits that are tangible or intangible

The directive to ‘disregard’ whether a benefit is tangible or intangible in paragraph 6(2)(a) is misleading. The point is not that the form that the benefit takes is irrelevant; it is that benefits that are either tangible or intangible may satisfy the public benefit test.²⁴ As this paragraph in essence defines ‘benefit’ to include both ‘tangible or intangible’ benefits for the purposes of the Act as a whole, we suggest that this definition should be moved from section 6 to the definitions provision in section 3.

Recommendation 21: Paragraph 6(2)(a) should be redrafted to make it clear that a benefit may be tangible or intangible (not that the tangible or intangible nature of the benefit should be disregarded). Consideration should be given to placing this definition in subsection 3(1) instead of in subsection 6(2).

²³ Ontario Law Reform Commission, *Report on the Law of Charities* (1996) vol 1, 164-166, 176.

²⁴ Explanatory Material, [1.48].

Benefits that are not identifiable

Paragraph 6(2)(b) provides that any benefit that is not identifiable is to be disregarded. This provision makes no sense. How can a decision-maker disregard something that is unidentifiable in the first place? In any case where a decision-maker determines that there is no identifiable benefit, there is nothing to disregard under paragraph 6(2)(b). Paragraph 6(2)(b) should be deleted from the Bill.

Recommendation 22: Paragraph 6(2)(b) should be removed.

Private benefit

Paragraph 6(3)(a) illustrates the problem with the directive to ‘regard’ certain matters without explaining the purposes for doing so. Under the current law of charity, a trust or organisation that confers only private benefits is not charitable.²⁵ Presumably, paragraph 6(3)(a) is intended to assist a decision-maker in deciding whether the benefits are sufficiently public in nature. This could be clarified by modifying the opening language of the provision to state that ‘In determining whether a purpose is directed to the benefit of the public, have regard to...’.

We have two additional concerns about the drafting of paragraph 6(3)(a). First, the provision seems to be quite broad, in that it requires consideration of any ‘possible’ benefit to the persons listed, many of whom might quite legitimately obtain benefits as members of the public or a sufficient section of the public. The provision appears likely to exclude member-based entities, for example Women’s Lawyers Associations.²⁶ In this regard, the word ‘possible’ is superfluous and requires an overly broad inquiry. Secondly, by exhaustively defining the types of persons who might benefit, the statute might operate to exclude consideration of private benefits that accrue to persons other than those listed. These difficulties arise because the subsection does not distinguish between private and public benefit, although this is clearly the intention of the provision and the language used in the Explanatory Material.²⁷

We suggest that the operation of paragraph 6(3)(a) should be clarified by expressly referring to private benefits. One possible re-drafting could require the decision-maker to have regard to ‘any *private* benefit from the purpose, *including to*’ the persons listed in subparagraphs 6(3)(a)(i) and (ii).

Recommendation 23: Paragraph 6(3)(a) should be redrafted to state that in determining whether a purpose is directed to the benefit of the public, have regard to any *private* benefit from the purpose, *including to* the persons listed in subparagraphs 6(3)(a)(i) and (ii).

²⁵ *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297 at 305.

²⁶ Benefits provided to member-based organisations are consistent with the definition of charity where the member benefits are incidental or ancillary to the public benefit: *Victorian Women Lawyers’ Association Inc v Federal Commissioner of Taxation* (2008) 170 FCR 318.

²⁷ Explanatory Material, [1.55]-[1.62].

Definition of ‘associates’

We support the requirement that regard should be had to legal or family relationships of the entity claiming public benefit with founders, owners, members, trustees and other relevant parties as set out in subparagraph 6(3)(a)(ii), for the purpose of assessing private benefit. However, we submit that as it contains the definition of charity for all federal legislation, the *Charities Act* should be drafted so as to be capable, insofar as possible, of standing alone. This is not achieved by the cross-reference to a highly technical (and to most users of charity law, extremely obscure) definition of ‘associate’ in section 318 of the old *Income Tax Assessment Act 1936 (ITAA 1936)*, an Act which itself is supposed to be replaced, in full, at some point in the future. We also note that the definition of ‘associate’ in section 318 also requires further significant cross-referencing to other definitions in the *ITAA 1936* and the *ITAA 1997*.

We recommend that the government review and incorporate the relevant portions of the definition of ‘associate’ into the Charities Bill. We set out the full definition in section 318 at [Appendix B](#) to this submission.

Recommendation 24: Section 6 should incorporate a stand-alone definition of ‘associate’ rather than rely on a cross reference to the highly technical definition of ‘associate’ in s 318 of the old *Income Tax Assessment Act 1936*.

Detriment

Paragraph 6(3)(b) requires the decision-maker to have regard to any possible detriment (presumably to determine whether there is a benefit) from the purpose to the general public, a section of the general public or a member of the general public. We have some concerns about the possible consequences of the direction to consider *any possible* detriment to *a member* of the general public. This requirement might encourage a single individual who is disgruntled with a particular charitable organisation to oppose the charity’s registration. While it is likely that the ACNC and the courts would not permit detriment to a single individual to defeat a purpose that is of wider public benefit, there is a risk that the provision, as drafted, will open the door to such claims and place an unreasonable administrative burden on the regulator. To our knowledge, such provisions do not appear in charity legislation in comparable foreign jurisdictions.

We submit that the focus of charitable purpose is on *public* benefit and so the focus of considerations of detriment should be on *public* detriment. Charity law is not the right forum for individuals to assert rights and seek remedies for private grievances. By directing that decision-makers consider harm to ‘a member of the general public’ the provision encourages this misapplication of charity law and risks unintended consequences. The word ‘possible’ is superfluous and should be removed.

Recommendation 25: Paragraph 6(3)(b) should be redrafted to state that in determining whether there is a benefit, have regard to any detriment from the purpose to the public or a section of the public.

PRESUMPTION OF PUBLIC BENEFIT (S 7)

Section 7 of the Bill sets out five purposes that are presumed to be for the public benefit. This means that unless there is specific evidence to the contrary, entities with these purposes do not need to positively demonstrate that they meet the requirements set out in section 6.

Extension of the presumption to public benefit

Presumptions currently operate in common law as presumptions of *benefit* only. Section 7 goes further than the common law by extending the presumptions to the whole of the *public benefit* test, rather than just the ‘benefit’ element of that test. The Explanatory Material notes this extension but does not provide any reasons for extending the presumption in this way.²⁸ We submit that this extension of the common law is unwarranted and may have unintended consequences.

While it is common shorthand to refer to the common law presumptions as ‘presumptions of public benefit’, the case law is clear that the focus of the presumptions is on benefit only. The common law approach was recently clarified by the UK’s Upper Tribunal (Tax and Chancery Chamber) in the *Independent Schools* case.²⁹ The Tribunal surveyed the case law on the presumption and concluded that ‘the courts have never made any assumption about whether a purpose is directed to the public or a sufficient section of the public’.³⁰ Rather, the presumption of public benefit operates to presume that some purposes are of benefit to the community, unless there is evidence to the contrary.³¹

Extending the presumption to encompass ‘public-ness’ as well as benefit might be problematic. For example, an educational trust that provides benefits only to family members will be presumed under section 7 as drafted to be for the ‘public benefit’ even though the benefit in this case is really private. The decision maker will therefore need to find evidence of this private benefit in order to rebut the presumption and to require the trust to demonstrate that it is for the public benefit. The

²⁸ Explanatory Material, p 12 and [1.65].

²⁹ *Independent Schools Council v Charity Commission for England and Wales* [2011] UKUT 421 (TCC).

³⁰ *Independent Schools Council v Charity Commission for England and Wales* [2011] UKUT 421 (TCC), [71]; see also [83].

³¹ *Independent Schools Council v Charity Commission for England and Wales* [2011] UKUT 421 (TCC) [63], citing *National Anti- Vivisection Society v Inland Revenue Commissioners* [1948] AC 31, 41-42 (Lord Wright); 65-66 (Lord Simonds).

decision maker's ability to do this will depend in large part on the kind of information it has access to and will require the decision maker to challenge the presumption.³²

We recommend that section 7 be redrafted to preserve the current approach under the common law in which the presumptions operate only with respect to benefit. A suggestion for redrafting the provision to reflect the common law is as follows:

Section 7. When determining whether a purpose is for the public benefit under section 6, the benefit of the purpose is to be presumed if the purpose is any of the following purposes...

We note that this recommendation may impact on 'poor relations', 'poor employees' and analogous cases. This issue is discussed below (Recommendation 28).

Recommendation 26: Section 7 should be redrafted so that it preserves the current approach under common law in which the presumption relates only to 'benefit' and not 'public benefit'.

Departure from common law categories

At common law, the presumption of benefit applies to the first three heads of charity as stated in the *Pemsel* case, namely the relief of poverty; the advancement of education; and the advancement of religion.³³ The Explanatory Material states that the presumptions in section 7 of the Bill are intended to reflect the common law but also modernise the language by referring to relieving illness as a modern proxy for the relief of the impotent.³⁴ However, by specifically referring to relieving illness and the needs of the aged, other purposes, including analogous purposes that fall within the meaning of 'relief of the impotent' are precluded from the presumption.³⁵ Examples include the needs of the disabled, very young people or people with injuries as a result of a natural disaster.

We also consider that confusion will arise because the presumptions in section 7 are not aligned with the charitable purposes set out in section 11. As note 1 to section 7 explains, some charitable purposes set out in section 11 might include the purposes set out in section 7. However, because the purposes are not aligned, charities and decision-makers will need to conduct a two-stage test, first to determine whether a purpose is a charitable purpose within section 11, and then determine

³² As explained in the Explanatory Material, [1.66]-[1.67].

³³ *Income Tax Special Purposes Commissioners v Pemsel* [1891] All ER Rep 28 at 55 (Lord MacNaughton).

³⁴ Explanatory Material [1.63]-[1.64].

³⁵ The impotent in this sense refers the physically weak, the disabled, the helpless, victims of misfortune, and those who are vulnerable: GE Dal Pont, *Law of Charity* (Chatswood: LexisNexis Butterworths, 2010), [8.33]-[8.34].

if the purpose is within section 7 and so the presumption of public benefit applies. Given that one reason for maintaining the presumption is to assist decision makers and relieve a potentially high administrative burden, this non-alignment seems to increase the categories or subtypes of purpose that charities and the regulator will need to identify and apply, and so seems counter-productive.

We submit that it is preferable to restrict the presumption to those categories recognised as entitled to it at common law. The use of sub-clauses in the definition of charitable purposes (see Recommendation 5 above) will assist in identifying these purposes.

Recommendation 27: Section 7 should be redrafted to refer to those purposes that have had the benefit of the presumption at common law. The purposes that receive the benefit of the presumption should be aligned to the charitable purposes, or sub-clauses to those purposes, set out in section 11.

‘POOR RELATIONS’ AND ‘POOR EMPLOYEES’ CASES

Under the common law, there is an exception to the requirement that charitable purposes be for public benefit in the case of gifts or trusts for the relief of poverty. The so-called ‘poor relations’ and ‘poor employees’ cases confer charitable status on gifts or trusts that provide benefits to a limited range of people closely connected whether because of family ties or a shared employer. We,³⁶ and other commentators,³⁷ have recommended the abolition of this exception on the basis that it is anomalous and reflects a class structure and history that is not relevant to modern Australia and its developed welfare system.

Neither the Bill nor the Explanatory Material deal directly with the question of the ‘poor relations’ and ‘poor employees’ cases. This introduces significant uncertainty, in particular whether the presumption of public benefit for purposes of relieving poverty in subsection 7(d) is intended to achieve the same result as the ‘poor relations’ and ‘poor employees’ cases, or whether such cases are no longer likely to satisfy the public benefit requirement because of paragraph 6(3)(a). If it is intended that the charitable status of gifts and trusts for ‘poor relations’ and ‘poor employees’ is to be removed, there will be a need for a provision to recognise existing trusts for poor relations and poor employees, to avoid unfairly prejudicing trusts which were charitable at the time they were created.

³⁶ Not-for-Profit Project, University of Melbourne Law School, *Submission to the Treasury, A Definition of Charity, (Consultation Paper, October 2011)*, 8 December 2011, Rec 6, p 36.

³⁷ See works cited in GE Dal Pont, *Law of Charity* (Chatswood: LexisNexis Butterworths, 2010), [8.26]; Sheppard, Fitzgerald, and Gonski, *Report of the Inquiry into the Definition of Charities and Related Organisations*, Rec 10.

Recommendation 28: The Bill and Explanatory Material should clarify whether gifts and trusts for ‘poor relations’ and ‘poor employees’ are to be recognised as charitable. If the exception for the relief of poverty in relation to the public benefit test for gifts and trusts for ‘poor relations’ and ‘poor employees’ is to be removed, the legislation should include a specific provision to deem existing trusts in such cases to be charitable.

NATIVE TITLE AND INDIGENOUS GROUPS (S 8)

Section 8 responds to concerns that have been raised about the charitable status of entities for the benefit of native title claim groups or holders. Essentially, we understand that the reform is intended to ensure that entities which have the purpose of benefiting native title claim groups or native title holders should not be disqualified as a charity merely because of common descent or a special relationship among the class of individuals who may benefit.

While we welcome the Government’s willingness to clarify this matter, we have significant concerns about the way section 8 is drafted. We suggest that as drafted, the provision will not achieve the intended purpose and it is both unnecessarily limited and unduly complex. We note further that it depends on the passage of amendments relating to taxation of native title agreements that have not yet passed the Parliament, and this contributes to the limitations and complexity of the provision.³⁸

Entity form is not relevant to charitable purpose

Section 8(1) applies only to a specific kind of entity, namely an ‘Indigenous holding entity’. The limitation of this provision to a specific form of entity is not consistent with the definition of charity in the Bill, which does not define charitable status according to the form of the entity, but by not-for-profit status, charitable purposes and public benefit.

To ascertain the definition of an ‘Indigenous holding entity’ it will be necessary to refer to both the *ITAA 1997* and to the *ITAA 1936*.³⁹ An ‘Indigenous holding entity’ is proposed to be defined in section 59-50(6) of the *ITAA 1997* as:

- (a) a *distributing body; or
- (b) a trust, if the beneficiaries of the trust can only be Indigenous persons or distributing bodies.

A distributing body is currently defined in section 128U of the *ITAA 1936* to mean:

- (a) an Aboriginal Land Council established by or under the *Aboriginal Land Rights (Northern Territory) Act 1976*;

³⁸ Taxation Laws Amendment (2012 Measures No 6) Bill 2012, Schedule 1. The Bill has passed the House of Representatives but has not yet passed the Senate at the time of writing.

³⁹ Assuming the above-mentioned amendments are passed, see above n 38.

- (b) a corporation registered under the Corporations (Aboriginal and Torres Strait Islander) Act 2006; or
- (c) [repealed]
- (d) any other incorporated body that:
 - (i) is established by or under provisions of a law of the Commonwealth or of a State or Territory that relates to Indigenous persons,⁴⁰ and
 - (ii) is empowered or required (whether under that law or otherwise) to pay moneys received by the body to Indigenous persons or to apply such moneys for the benefit of Indigenous persons, either directly or indirectly.

Under this definition, any charity established for the benefit of a native title claim group or holders that is not in one of these entity forms will not benefit from subsection 8(1). In particular, a charitable trust for the benefit of a native title claim group will not satisfy the definition of a 'distributing body'. Nor, we suggest, will it satisfy paragraph (b) of the definition of 'Indigenous holding entity' in section 59-50(6) of *ITAA 1997* because it cannot be for private benefit of individual 'beneficiaries' but must be a trust exclusively for charitable purposes.⁴¹

This seems contrary to the intent of the reform. There are many existing charitable trusts for native title holders and claim groups, as well as other entity forms such as incorporated associations. These existing charitable trusts may now fail the public benefit test.

More generally, we do not understand why other entity forms, such as a company limited by guarantee or an incorporated association, that have charitable purposes intended to benefit a class of native title holders, should be denied the benefit of section 8.

Receipt of native title benefits

Section 8(1)(a) of the Charities Bill requires the entity to be one that 'receives native title benefits'. This wording is unduly restrictive and also requires cross-referencing to multiple other statutes, including the proposed definition of native title benefit in section 59-50(5) of the *ITAA 1997* and concepts regarding native title agreements in the *Native Title Act 1993* (as set out in section 8(2) of the Charities Bill).

There are significant problems with the wording of this provision as a matter of practice. How would a charity be treated, that had received native title benefits 10 years ago but has not received them since? What if a charity is established that may receive native title benefits in the future, but does not receive them yet?

In our view, it is important to ensure that native title claim groups under the *Native Title Act 1993*, should be included in s 8(1) even where native title is not made out. More generally, we submit

⁴⁰ This currently states 'Aboriginals' but is proposed to be amended by the Taxation Laws Amendment (2012 Measures No 6) Bill 2012, Schedule 1 cl 16, as are the remaining references to Aboriginals in the provision.

⁴¹ Halsbury's Laws of Australia, para [430-275], [430-290], available on LexisNexisAU.

that the requirement that the entity receives native title benefits is unnecessary and is contrary to the intention of the reform.

Related individuals requirement not clear

The Explanatory Material states that the reform ‘turns off the “related individuals” element of the public benefit test’.⁴² However, we observe that there is no explicit ‘related individuals’ element in section 6 of the Bill, apart from the requirements that are embedded in the definition of ‘associate’ in section 318 of the *ITAA 1936*. There is a risk that a charity for purpose of benefiting a native title group may also fail on the basis of other aspects of section 6(3)(a) or section 6(4). It is not clear, as drafted, whether section 8 ensures that these provisions are also ‘turned off’ in respect of charities for native title groups. However, we submit that this would be consistent with the stated policy of the reform.

A simpler way to achieve the intended outcome

We submit that the intended purpose of section 8 can be achieved in a much simpler way that requires only cross-referencing to the *Native Title Act 1993*. Either the ‘public benefit’ requirement could be disregarded or deemed not to apply where an entity is established for one or more charitable purposes directed to the benefit of native title holders or native title claim groups, or alternatively, a trust that is directed to the benefit of native title holders or claim groups may be deemed to be for the public benefit. In light of the positive deeming approach that we recommend in our comments on section 9 (below, Recommendation 31) we recommend that a positive deeming approach would be preferable.

Essentially, the provision should deem a charitable purpose of an entity to be ‘for the public benefit if the entity is established and maintained for charitable purposes directed to the benefit of one or more (a) native title claim groups; or (b) persons who hold native title’.⁴³ A cross-reference could then be made to relevant definitions in the *Native Title Act 1993*, without any need to refer to the tax statutes. Relevant definitions for cross-reference would be:

native title has the meaning given by the *Native Title Act 1993 (Cth)* [see s223].

native title claim group has the meaning given by the *Native Title Act 1993 (Cth)*. [see s253 – essentially the group as defined in their “Form 1” or initial application for native title as amended.]

⁴² Explanatory Material, [1.73].

⁴³ We acknowledge the contribution of Alice Macdougall, of counsel, Herbert Smith Freehills, regarding this recommendation.

Recommendation 29: Section 8 should be redrafted to ensure that entities of all forms with charitable purposes directed to the benefit of native title holders or native title claim groups are deemed to be of public benefit.

Extend s 8 to refer to charities that benefit Indigenous people more broadly

We understand that the focus of section 8 is on removing potential barriers for entities with charitable purposes to benefit native title holders or claim groups. However, we are concerned that this policy is unduly limited and will potentially disadvantage other Indigenous charities.

The Explanatory Material seems to imply a broader policy, as it states that section 8 ‘takes into account the nature of Indigenous community structures and familial links with particular geographical areas and turns off the ‘related individuals’ element of the public benefit test so that an entity may provide benefits within a particular community’.⁴⁴ The section as drafted, refers only to native title, and so does not reflect this broader policy goal.

We recommend that the Government consider extending the benefits of s 8 to charities defined to benefit Indigenous groups that are specifically defined with reference to common descent or family. For example, a charitable trust to advance the education of ‘traditional Aboriginal owners’ as defined in the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) defines the class in part with reference to common descent.⁴⁵

Recommendation 30: Section 8 should be extended to ensure that entities of all forms with charitable purposes directed to the benefit of Indigenous persons defined by reference to common descent or family or other special relationship are not disqualified from being a charity only because they benefit people connected by such a relationship.

WHEN THE PUBLIC BENEFIT TEST DOES NOT APPLY (S 9)

Section 9 is intended to incorporate certain provisions of the *Extension of Charitable Purposes Act 2004* into the Charities Bill.⁴⁶ Section 5 of that Act provides that ‘without limiting what constitutes a public benefit, an institution has a purpose that is for the public benefit to the extent that the institution is’ either an open and non-discriminatory self-bodies help bodies and closed or contemplative religious orders offering prayerful intervention at the request of the public to be charitable.

⁴⁴ Explanatory Material, [1.73].

⁴⁵ *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 3(1): ‘traditional Aboriginal owners’, in relation to land, means a local descent group of Aboriginals who: (a) have common spiritual affiliations to a site on the land, being affiliations that place the group under a primary spiritual responsibility for that site and for the land; and (b) are entitled by Aboriginal tradition to forage as of right over that land.

⁴⁶ Explanatory Material, [1.74]; [2.6]; [2.9].

Section 9 of the Charity Bill takes a different approach to the Extension of Charitable Purposes Act, because it provides that the public benefit test is to be disregarded in respect of these two kinds of organisations. We submit that the approach taken in the *Extension of Charities Act 2004*, which deems certain purposes to be of public benefit, is a better approach, because it expresses the fact that the Parliament recognises that these purposes are of public benefit, rather than exempting certain organisations from the public benefit test.

Recommendation 31: Section 9 should be redrafted using the language of the *Extension of Charitable Purposes Act 2004*.

APPENDIX A: THE NOT-FOR-PROFIT PROJECT

The University of Melbourne Law School is undertaking a comprehensive and comparative investigation of the definition, regulation, and taxation of the not-for-profit sector in Australia (the Not-for-Profit Project). The Australian Research Council has funded this project which began in 2010. The project aims have been to identify and analyse opportunities to strengthen the sector and make proposals that seek to maximise the sector's capacity to contribute to the important work of social inclusion and to the economic life of the nation.

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Matthew is an Associate Professor at the Melbourne Law School. His published work deals with issues in moral philosophy, fiduciary law, equitable property, land title registration, and the law of charity. Matthew has also worked as a solicitor for Arthur Robison & Hedderwicks (now Allens).

More information on the project can be found on the website at <http://tax.law.unimelb.edu.au/notforprofit>. For further details or to contact the Project members, email law-nfp@unimelb.edu.au.

APPENDIX B: INCOME TAX ASSESSMENT ACT 1936 S 318

Associates

- (1) For the purposes of this Part, the following are [associates](#) of an [entity](#) (in this subsection called the **primary entity**) that is a natural [person](#) (otherwise than in the capacity of [trustee](#)):
- (a) a [relative](#) of the primary [entity](#);
 - (b) a partner of the primary [entity](#) or a [partnership](#) in which the primary [entity](#) is a partner;
 - (c) if a partner of the primary [entity](#) is a natural [person](#) otherwise than in the capacity of [trustee](#)--the [spouse](#) or a [child](#) of that partner;
 - (d) a [trustee](#) of a [trust](#) where the primary [entity](#), or another [entity](#) that is an [associate](#) of the primary [entity](#) because of another paragraph of this subsection, benefits under the [trust](#);
 - (e) a [company](#) where:
 - (i) the [company](#) is sufficiently influenced by:
 - (A) the primary [entity](#); or
 - (B) another [entity](#) that is an [associate](#) of the primary [entity](#) because of another paragraph of this subsection; or
 - (C) another [company](#) that is an [associate](#) of the primary [entity](#) because of another application of this paragraph; or
 - (D) 2 or more [entities](#) covered by the preceding sub-subparagraphs; or
 - (ii) a majority voting [interest](#) in the [company](#) is held by:
 - (A) the primary [entity](#); or
 - (B) the [entities](#) that are [associates](#) of the primary [entity](#) because of subparagraph (i) of this paragraph and the preceding paragraphs of this subsection; or
 - (C) the primary [entity](#) and the [entities](#) that are [associates](#) of the primary [entity](#) because of subparagraph (i) of this paragraph and because of the preceding paragraphs of this subsection.
- (2) For the purposes of this Part, the following are [associates](#) of a [company](#) (in this subsection called the **primary entity**):
- (a) a partner of the primary [entity](#) or a [partnership](#) in which the primary [entity](#) is a partner;
 - (b) if a partner of the primary [entity](#) is a natural [person](#) otherwise than in the capacity of [trustee](#)--the [spouse](#) or a [child](#) of that partner;
 - (c) a [trustee](#) of a [trust](#) where the primary [entity](#), or another [entity](#) that is an [associate](#) of the primary [entity](#) because of another paragraph of this subsection, benefits under the [trust](#);
 - (d) another [entity](#) (in this paragraph called the **controlling entity**) where:
 - (i) the primary [entity](#) is sufficiently influenced by:
 - (A) the controlling [entity](#); or
 - (B) the controlling [entity](#) and another [entity](#) or [entities](#); or
 - (ii) a majority voting [interest](#) in the primary [entity](#) is held by:
 - (A) the controlling [entity](#); or
 - (B) the controlling [entity](#) and the [entities](#) that, if the controlling [entity](#) were the primary [entity](#), would be [associates](#) of the controlling [entity](#) because of subsection (1), because of subparagraph (i) of this paragraph, because of another paragraph of this subsection or because of subsection (3);
 - (e) another [company](#) (in this paragraph called the **controlled company**) where:
 - (i) the controlled [company](#) is sufficiently influenced by:
 - (A) the primary [entity](#); or
 - (B) another [entity](#) that is an [associate](#) of the primary [entity](#) because of another paragraph of this subsection; or

- (C) a [company](#) that is an [associate](#) of the primary [entity](#) because of another application of this paragraph; or
 - (D) 2 or more entities covered by the preceding sub-subparagraphs; or
 - (ii) a majority voting [interest](#) in the controlled [company](#) is held by:
 - (A) the primary [entity](#); or
 - (B) the entities that are [associates](#) of the primary [entity](#) because of subparagraph (i) of this paragraph and the other paragraphs of this subsection; or
 - (C) the primary [entity](#) and the entities that are [associates](#) of the primary [entity](#) because of subparagraph (i) of this paragraph and the other paragraphs of this subsection;
 - (f) any other [entity](#) that, if a third [entity](#) that is an [associate](#) of the primary [entity](#) because of paragraph (d) of this subsection were the primary [entity](#), would be an [associate](#) of that third [entity](#) because of subsection (1), because of another paragraph of this subsection or because of subsection (3).
- (3) For the purposes of this Part, the following are [associates](#) of a [trustee](#) (in this subsection called the **primary [entity](#)**):
- (a) any [entity](#) that benefits under the [trust](#);
 - (b) if a natural [person](#) benefits under the [trust](#)--any [entity](#) that, if the natural [person](#) were the primary [entity](#), would be an [associate](#) of that natural [person](#) because of subsection (1) or because of this subsection;
 - (c) if a [company](#) is an [associate](#) of the primary [entity](#) because of paragraph (a) or (b) of this subsection--any [entity](#) that, if the [company](#) were the primary [entity](#), would be an [associate](#) of the [company](#) because of subsection (2) or because of this subsection.
- (4) For the purposes of this Part, the following are [associates](#) of a [partnership](#) (in this subsection called the **primary [entity](#)**):
- (a) a partner in the [partnership](#);
 - (b) if a partner in the [partnership](#) is a natural [person](#)--any [entity](#) that, if that natural [person](#) were the primary [entity](#), would be an [associate](#) of that natural [person](#) because of subsection (1) or (3);
 - (c) if a partner in the [partnership](#) is a [company](#)--any [entity](#) that, if the [company](#) were the primary [entity](#), would be an [associate](#) of the [company](#) because of subsection (2) or (3).
- (5) In determining, for the purposes of this section, whether an [entity](#) is an [associate](#) of another [entity](#) at a particular time (in this subsection called the **test time**):
- (a) an [entity](#) (in this subsection called the **public unit trust [entity](#)**) that, apart from this subsection, is the [trustee](#) of a [public unit trust](#) at the test time is to be treated as if it were a [company](#) instead of a [trustee](#); and
 - (b) the [public unit trust \[entity\]\(#\)](#) is taken to be sufficiently influenced by another [entity](#) or other entities if the [public unit trust \[entity\]\(#\)](#) is accustomed or under an obligation (whether formal or informal), or might reasonably be expected, to act in accordance with the directions, instructions or wishes of the other [entity](#) or other entities (whether those directions, instructions or wishes are, or might reasonably be expected to be, communicated directly or through interposed companies, [partnerships](#) or [trusts](#)); and
 - (c) another [entity](#) or other entities are taken to [hold](#) a majority voting [interest](#) in the [public unit trust \[entity\]\(#\)](#) if either of the following percentages is not less than 50%:
 - (i) the percentage of the income of the [trust](#) represented by the [share](#) of the income to which the other [entity](#) or other entities are entitled, or that the other [entity](#) or other entities are [entitled to acquire](#);
 - (ii) the percentage of the corpus of the [trust](#) represented by the [share](#) of the corpus to which the other [entity](#) or other entities are entitled, or that the other [entity](#) or other entities are [entitled to acquire](#).
- (6) For the purposes of this section:

- (a) a reference to an [entity](#) benefiting under a [trust](#) is a reference to the [entity](#) benefiting, or being capable (whether by the exercise of a power of appointment or otherwise) of benefiting, under the [trust](#), either directly or through any interposed companies, [partnerships](#) or [trusts](#); and
 - (b) a [company](#) is sufficiently influenced by an [entity](#) or entities if the [company](#), or its directors, are accustomed or under an obligation (whether formal or informal), or might reasonably be expected, to act in accordance with the directions, instructions or wishes of the [entity](#) or entities (whether those directions, instructions or wishes are, or might reasonably be expected to be, communicated directly or through interposed companies, [partnerships](#) or [trusts](#)); and
 - (c) an [entity](#) or entities [hold](#) a majority voting [interest](#) in a [company](#) if the [entity](#) or entities are in a position to cast, or control the casting of, more than 50% of the maximum number of votes that might be cast at a general meeting of the [company](#).
- (7) In this section and any other provision of this Act that has effect for the purposes of this section, a reference to the [spouse](#) of a [person](#) does not include:
- (a) a [spouse](#) who is legally married to the [person](#) but living separately and apart from the [person](#) on a permanent basis; or
 - (b) a [spouse](#) within the meaning of paragraph (a) of the definition of [spouse](#) in subsection 995-1(1) of the [Income Tax Assessment Act 1997](#) who is living separately and apart from the [person](#) on a permanent basis.

APPENDIX C: LIST OF RECOMMENDATIONS

1. The provisions of the Charities Bill should be re-ordered so that all provisions relating to the definition of charity and charitable purposes are together, followed by provisions relating to the public benefit test. The division of the Bill into 'parts' and 'divisions' introduces unnecessary complexity.
2. The Charities Bill should include an Objects clause setting out the purposes of the legislation, which should include: to state a definition of charity for the purposes of all Commonwealth law; and to preserve common law principles relating to the definition of charity.
3. Consideration should be given to whether definitions in sections 3 and 4 that inform the meaning of charity should apply to all Commonwealth legislation and consequently, whether subsection 3(2) is necessary.
4. The Charities Bill should expressly state that the definition of charity applies 'in any Commonwealth Act'.
5. For greater clarity, the requirements that a charity have (a) charitable purposes and (b) purposes for the public benefit, should be set out in separate paragraphs in section 5.
6. Consideration should be given to whether the matters in note 1 to section 5 should be included as a substantive provision.
7. The definition of 'charitable' should be removed or, alternatively, qualified with the words 'as defined in this Act'.
8. A note should be included to direct the reader to the definition of 'not-for-profit' in the Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012, should it be passed; or, alternatively, the definition of 'not-for-profit' should be set out in the Charities Bill.
9. The definition of charitable purposes in section 11 should include sub clauses that set out the kinds of purposes that fall within each charitable purpose.
10. Section 13 should be removed and the two purposes referred to should be incorporated as sub clauses in the definition of charitable purpose.
11. Paragraph 11(1)(k) should be redrafted to:
 - (a) include purposes already found by a court to be charitable; and
 - (b) remove the reference to 'within the spirit of'.This catch-all provision should be the final paragraph in subsection 11(1).

12. The term 'public' should be used instead of the term 'general public' throughout the Charities Bill.
13. Consideration should be given to:
 - (a) broadening paragraph 11(1)(l) to recognise the purpose of promoting or opposing a change to any matter established by law, policy or practice as a charitable purpose in itself; or, alternatively, if the narrow approach is to be maintained, making paragraph 11(1)(l) a separate subsection; and
 - (b) removing subsection 11(2) as unnecessary; or, if retained, clarifying its meaning in the Bill and Explanatory Material.
14. Paragraphs 11(1)(a)-(j) should use consistent language and provide that the purpose of 'advancing' the particular aim is a charitable purpose.
15. Subsection 10(a) should be removed; or, alternatively, restricted to illegal purposes.
16. Subsection 10(b) should be removed. If retained, its meaning should be clarified.
17. The status of existing government entities that have been recognised as charities should be made clear.
18. Section 12 should be removed (with subsequent changes to PAF and PuAF Model trust deeds).
19. Section 6 should be redrafted so that the considerations relevant to the 'public' limb of the public benefit test are clearly set out and separated from the considerations relevant to the 'benefit' limb of the public benefit test.
20. Subsections 6(1)(b) and 6(5) of the Charities Bill should be removed. The requirement that the benefit be 'a universal or common good' that is 'of real overall value to the public' is unnecessary and introduces a problematic new requirement that departs from the current law of charity.
21. Paragraph 6(2)(a) should be redrafted to make it clear that a benefit may be tangible or intangible (not that the tangible or intangible nature of the benefit should be disregarded). Consideration be given to placing this definition in subsection 3(1) instead of in subsection 6(2).
22. Paragraph 6(2)(b) should be removed.
23. Paragraph 6(3)(a) should be redrafted to state that in determining whether a purpose is directed to the benefit of the public, have regard to any *private* benefit from the purpose, *including* to the persons listed in subparagraphs 6(3)(a)(i) and (ii).

24. Section 6 should incorporate a stand-alone definition of 'associate' rather than rely on a cross reference to the highly technical definition of 'associate' in s 318 of the old *Income Tax Assessment Act 1936*.
25. Paragraph 6(3)(b) should be redrafted to state that in determining whether there is a benefit, have regard to any detriment from the purpose to the public or a section of the public.
26. Section 7 should be redrafted so that it preserves the current approach under common law in which the presumption relates only to 'benefit' and not 'public benefit'.
27. Section 7 should be redrafted to refer to those purposes that have had the benefit of the presumption at common law. The purposes that receive the benefit of the presumption should be aligned to the charitable purposes, or sub-clauses to those purposes, set out in section 11.
28. The Bill and Explanatory Material should clarify whether gifts and trusts for 'poor relations' and 'poor employees' are to be recognised as charitable. If the exception for the relief of poverty in relation to the public benefit test for gifts and trusts for 'poor relations' and 'poor employees' is to be removed, the legislation should include a specific provision to deem existing trusts in such cases to be charitable.
29. Section 8 should be redrafted to ensure that entities of all forms with charitable purposes directed to the benefit of native title holders or native title claim groups are deemed to be of public benefit.
30. Section 8 should be extended to ensure that entities of all forms with charitable purposes directed to the benefit of Indigenous persons defined by reference to common descent or family or other special relationship are not disqualified from being a charity only because they benefit people connected by such a relationship.
31. Section 9 should be redrafted using the language of the *Extension of Charitable Purposes Act 2004*.