

AUSTRALIAN COUNCIL FOR THE DEFENCE OF GOVERNMENT SCHOOLS

PRESS RELEASE 481

AUSTRALIAN CHARITIES AND NOT FOR PROFIT COMMISSION: SHOULD WEALTHY RELIGIOUS SCHOOLS BE LABELLED CHARITABLE'?

Wealthy private schools in both Australia and the UK fit within the legal (not the common dictionary) definition of charity.

They are consequently eligible for taxation exemptions (taxation expenditures) of a considerable magnitude.

In part, this accounts for the obvious wealth of resources and preference in total funding provided by government in comparison with funding and resource provision for public schools.

In the UK the *Guardian* Newspaper reports that, the shadow education secretary, Stephen Twigg claims that a Labour government (if and when it comes into office) could legislate so that private schools not serving the community lose their charitable status.

Stephen Twigg said that private schools were 'a major barrier to achieving a more just society and greater social mobility.'

Most private schools enjoy charitable status and enjoy tax concessions worth at least one hundred million pounds a year.

<http://www.guardian.co.uk/education/2012/jul/19/twigg-private-schools-lose-charitable-status>

The stripping of charitable status in the UK would be done by the Charities Commission under a rigorous 'public benefit' test.

What is the situation in Australia?

As in the UK private schools currently enjoy the assumption of 'charitable' status and the accompanying taxation exemptions

For a long time Australia has lagged behind the rest of the western world in that we have not even established a Charities Commission that might examine the finances of these 'charities' and the amount of taxation expenditures involved.

This situation however is about to change a little. But those wanting transparency and accountability for charitable and not-for-profit organisations should not hold their breath.

The countdown is on until the [Australian Charities and Not-for-profits Commission](#) (ACNC) opens its doors and officially begins operations.

From October 1 2012 the ACNC is set to be up and running. Although the commission will be rolling out some features slowly - including certain governance standards and reporting framework - it will be registering charities from this date.

To provide more clarity and certainty and inform the sector about the up and coming changes, the ACNC recently released its Taskforce Implementation Report.

Susan Pascoe, the government's nominee for the position of Commissioner of the ACNC, published a [media release](#) on June 12, outlining what is included in this report and thanking all the [Australian charities](#) and nonprofits that were involved in the consultation process.

"Today, I am pleased to release the ACNC Taskforce Implementation Report. This report is the culmination of twelve months work, and will outline the implementation process for the establishment of the ACNC," Ms Pascoe explained.

<http://acnctaskforce.treasury.gov.au>

[/content/content.aspx?doc=home.htm](#)

Those concerned about the preferential taxation treatment meted out to 'charitable' religious schools should not expect too much from this Commission.

There have already been extensive consultations and a Bill is before Parliament. Many attempts have been made in past decade to establish such a Commission, but the charities themselves, and in particular, the Roman Catholic Church, has scuttled these.

The religious and educational organisations are concerned that the presumption remains that their church and school enterprises are charitable without question and without a 'public interest' test.

Most non-profit organisations wish the common law position whereby their organisations can engage in profit making business activities remain.

Administrative Implications of Establishment of a Commission

Carrol O'Dea lawyers at <http://www.mondaq.com/australia/x/188228/Charities+Non->

Profits/Australian+Charities+and+NotforP rofits+Commission+Bill+2012

note the following:

On 10 May 2011, a range of measures reforming the NFP sector in Australia were announced in the 2011-12 Budget of the Australian Government, including the creation of the Australian Charities and Not-for-Profits Commission (ACNC). The ACNC will be an independent regulator and will:

- be advised by an Advisory Board chaired by Robert Fitzgerald AM
- report to Parliament through the Treasurer
- be staffed by around 90 officers, with potential for growth if additional functions are added
- be supported by the ATO in the provision of back-office services

The Government has provided \$53.6 million over four years for the establishment of the ACNC and related structural changes required to the ATO.

To support the introduction of the ACNC, an implementation taskforce was established from 1 July 2011. The ACNC Taskforce is a nine member taskforce headed by Susan Pascoe AM with members from the Treasury, ATO and PM&C. Additional support is being received for the activities of the taskforce from:

- ATO which is providing operational support – building the IT portal, separating the registration function from current operations and assisting with the development of a communications strategy.
- The Treasury, which is providing budget and administrative support and accommodation for the Taskforce.

The ACNC Taskforce will engage with the Not-for-Profit sector in an open and collaborative manner on key elements of the establishment and operation of the ACNC as the national regulator.

Treasury is responsible for policy and legislation with respect to regulation and taxation of the NFP sector including:

- Developing legislation for the ACNC.
- Developing legislation for a statutory definition of “charity”.
- Reviewing fundraising legislation and ‘Companies Limited by Guarantee’ (as it relates to charities).
- Implementing reforms to better target NFP tax concessions.
- Restating the ‘In Australia’ special conditions and implementing reforms relating to public ancillary funds

On 10 July 2012, the government referred the next draft of the ACNC Bill to the House of Representatives Standing Committee on Economics for further review over the Winter break. Submissions can be made to the Committee by 20 July 2012.

While the following is not an absolute guarantee, until the Committee makes its recommendations, this last draft of the Bill, contains the following relevant provisions.

SIGNIFICANT EXEMPTION

Basic Religious Charities have been granted exemption from:

- i. Lodging annual financial reports
- ii. Complying with governance standards
- iii. Power of the Commissioner to suspend or remove a director or

trustee (called a "responsible entity")

They have **not** been granted exemption from the need to register as a charity or to lodge an annual information statement.

They have **not** been granted exemption from external conduct standards (ie relevant for activities conducted outside Australia).

Basic Religious Charity is defined as:

- a. a registered entity (on the ACNC register);
- b. an entity with a purpose that is the advancement of religion (**ONLY**)(column 2, item 3 subsection 25-5(5))

Those religious charities which also fall within any of the following categories, are **NOT** exempt:

- a. the relief of poverty, sickness or needs of the aged - such an entity likely to be a public benevolent institution;or
- b. the advancement of education; or
- c. purposes beneficial to the community, or
- d. the prevention or control of diseases in human beings, or for the provision of child care services, or
- e. generally as a public benevolent institution.

A Basic Religious Charity does **not** fit the definition if:

- a. it is a body corporate under the *CORPORATIONS ACT 2001*; or
- b. it is incorporated under an association incorporations act or is an aboriginal corporation or a Norfolk Island corporation;

Nor

If it is a deductible gift recipient;

Nor

If it forms part of a reporting group (either joint reporting or collective reporting);

Nor

If it has received a grant from an Australian government agency either in the current financial year or the (previous two financial years.)

SMALL, MEDIUM, LARGE

Entities (which include individual, body corporate, body politic, unincorporated associations, trusts) fall within the categories now defined as small, medium or large.

- Small - revenue less than \$250,000 per annum;
- Medium -revenue less than \$1,000,000 per annum which is not a small entity;
- Large - any entity that is not small or medium.

REPORTING STANDARDS

Annual information statement

All entities (including a Basic Religious Charity) whether small, medium or large must lodge an Annual Information Statement. This statement will contain increasing levels of detail depending upon whether the entity is small, medium or large and will mainly go to establishing that an entity has performed its objects in the preceding reporting period.

The first Annual Information Statement reporting period will cover the period ending 30 June 2013 and must be lodged within six months of the end of that period.

Financial report

A Basic Religious Charity is exempt

For all other entities:-

- Small entities do not need to lodge financial reports.
- Medium entities need to lodge financial reports but they need not be audited; they can simply be reviewed.
- Large entities must lodge financial reports which are also audited

The first Financial Reporting Statement will cover the period ending 30 June 2014

The Draft Definition

is very wide and includes the presumption of a public benefit *‘unless otherwise proven.’*:

Draft Definition:

S 1. (1) (a) To qualify as a charity, an entity must have a purpose or purposes that are charitable only.

(b) To avoid doubt, this does not preclude the existence of other purposes that further, are in aid of, or are ancillary or incidental to these charitable purposes.

(2) Charitable purposes include:

(a) the advancement of health or the saving of lives, including:

(i) prevention or relief of sickness, disease or human suffering;

(b) the advancement of education:

(c) the advancement of social or community welfare, including:

(i) the prevention or relief of poverty;

(ii) the care, support or relief of those in need by reason of youth, age, ill-health, disability, financial hardship, disaster, geographical location or other disadvantage, including by the provision of accommodation;

(iii) the integration of, or participation by, the disadvantaged;

(iv) the care or support of members or former members of the armed forces or the civil defence forces and their families; and

(v) the provision of child care services;

(d) the advancement of religion or analogous philosophical beliefs;

(e) the advancement of arts, culture, heritage, the sciences or philosophy, including:

and must be lodged within six months of the end of that period.

If an entity is already using a substituted accounting/reporting period, it can give notice to the ACNC within six months of 1 October 2013 and those entities can continue to use their alternative reporting period. If a new entity wishes to use a different reporting period to 30 June it must apply to ACNC at the time of application for registration.

(i) the cultures or customs of Indigenous peoples or ethnic or language groups;

(f) the advancement of the natural environment;

(g) the advancement of citizenship or community development, including:

(i) urban or rural regeneration;

(ii) volunteering, the voluntary sector, or the effectiveness and efficiency of charities;

(h) the advancement of sport or the provision of facilities for recreation and leisure;

(i) the advancement of civil or human rights;

(j) the advancement of reconciliation, conflict resolution, harmonious community relations, or equality or diversity, including:

(i) assistance or support for immigrants and refugees;

(k) the advancement of animal welfare;

(l) the advancement of industry or commerce;

(m) the advancement of access to advice or information; and

(n) other purposes beneficial to the community.

(3) In determining whether a purpose is charitable under section 2(n), a court need not consider whether the purpose is within or analogous to a purpose in the preamble of the *Statute of Elizabeth* 1601.

(4) If a purpose is listed in s 2(1)(a) – (m), the purpose is for the public benefit unless otherwise proven.

(5) Prescribed corporate bodies under the *Native Title Act* 1993 (Cth) are taken to be charitable organisations.

Section 3. *Public Benefit*

(1) In determining whether an organization is established to 'benefit' the public, a court should have regard to the following:

- a) the benefit(s) may be tangible or intangible, direct or indirectly present or future;
- b) the benefit(s) should be assessed in the light of contemporary needs and circumstances;
- c) the benefit(s) may, where appropriate, be assessed against potential detriment(s); and
- d) the inquiry is not into the merits of the methods or opinions of the organisation.

(2) In determining whether an organisation benefits 'the public' a court should consider:

- a) Whether there are wider benefits to the general community;
- b) The nature of any limitations on the class to be benefited, and in particular:
 - i. the extent to which the class of potential

beneficiaries is open in nature;

- ii. whether such limitations are reasonably related to the nature of the charitable purpose; and
- iii. the practical need for such limitations.

(3) The Australian Charities and Not-for-Profits Commission must provide guidance on the meaning of public benefit.

(4) Organisations established after the commencement date for the relief of poverty must satisfy the public benefit test.

(5) The purpose of a trust, society, or institution is a charitable purpose if it would satisfy the public benefit requirement apart from the fact that the beneficiaries of the trust, or the members of the society or institution, are related by blood.

(6) Self-help groups may satisfy the public benefit test provided there are no unreasonable restrictions on membership.

(7) Closed or contemplative orders may satisfy the public benefit test even if they do not make intercessory prayers.

For even more up-to date information go to

<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;page=0;query=australian%20charities%20and%20not%20for%20profit%20commission%20bill;rec=0;resCount=Default>

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