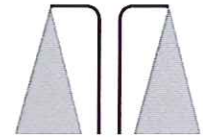


Our Ref: QM:Charity.dec2011

Your Ref:

Reply to:

- Head Office
 Bentleigh Branch
 Cranbourne Branch
 Rosebud Branch



Peninsula Community
Legal Centre Inc

9 December 2011

The Manager
Philanthropy and Exemptions Unit
Personal and Retirement Income Division
The Treasury
Langton Crescent
PARKES ACT 2600

By Email: NFPReform@treasury.gov.au

Dear Sir or Madam,

RE: **A Definition of Charity
Consultation Paper October 2011**

Peninsula Community Legal Centre (PCLC) is a not-for-profit organisation that has been providing free legal services to its community for over 30 years, with a mission "To empower and support disadvantaged community members of the South East and Westernport Region to use the law and legal system to protect and advance their rights and broaden their awareness of their rights and responsibilities."

PCLC's staff and volunteers provide clients with free and accessible legal services, particularly the most disadvantaged and marginalised members of our community who may otherwise be unable to access legal assistance. PCLC's client's life circumstances can be severely affected by their legal problems and they are often not able to access other legal services. Being able to obtain free legal assistance can often help our clients move on with their lives and become active participants in their local communities.

PCLC also has a strong commitment to empowering the broader community through community development and community legal education activities, which are viewed as a core function of the Centre. The Legal Centre is viewed by the local community as its key legal resource, through organising and participating in forums about legal issues, providing customised workshops and reporting on policy issues that affect the community, including through local media. Across the community, PCLC endeavours to improve understanding of legal issues through its education activities, as well as supporting community groups and participating in relevant law reform activities.

In particular PCLC provides support to not-for-profit groups through provision of advice pertaining to legal structures; assistance in obtaining legal status through incorporation; and workshops to assist in understanding legal requirements, governance and taxation implications. PCLC is itself a not-for-profit organisation and has attained 'charitable' status under the common law definition of charity. PCLC is therefore well placed to contribute to the discussion concerning the introduction of a statutory definition of 'charity' and supports the notion of the introduction of such a statutory definition.

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We gratefully acknowledge
the financial assistance of:

- Commonwealth Attorney-General's Department
- Department of Justice (Vic)
- Consumer Affairs Victoria
- Victoria Legal Aid
- City of Casey
- City of Glen Eira
- City of Kingston
- Frankston City Council
- Mornington Peninsula Shire

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Definition of Charity

At present the common law definition of charity is reliant upon the four categories expounded in Pemsel's case¹, namely:

- the relief of poverty;
- the advancement of education;
- the advancement of religion; and
- other purposes beneficial to the community not falling under any of the preceding heads.

The public benefit requirement requires the purported charity to prove that its purpose is for the public benefit. PCLC agrees with the rationale contained in the consultation paper², that a statutory definition would create more clear and consistent principles for not for profit organisations to work with and therefore reduce confusion and the capacity for legal disputes to ensue.

PCLC generally supports the meaning of 'charity' and 'charitable purposes' as enunciated in the *Charities Act 2006* of England and Wales. For convenience a copy of the relevant sections are annexed hereto. The statutory definition in this case maintains a public benefit test, which PCLC considers to be central to the determination of charity, and also includes several examples of what will constitute 'charitable purposes'. Integral to the definition is that the list of examples is not exhaustive and therefore does not exclude not for profits which do not neatly fit within a prescribed definition, but may be nevertheless existing for 'charitable purposes'.

PCLC considers it imperative that the definition allow a degree of flexibility in the determination of the meaning of 'public benefit' in order to accommodate the diversity of the not for profit sector. Given the time required to amend legislation, it is important to introduce legislation which is robust and capable of adapting to changes within the community, without the continual need to recourse to legislative change. In the diverse not for profit sector it is foreseeable that what the public consider to be a 'charitable' organisation will continue to expand in the future.

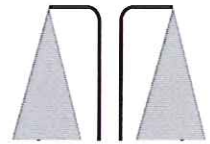
Disqualifying Activities

The 2003 Charities Bill provided that political advocacy was a disqualifying activity if its purpose was more than 'ancillary or incidental' to the usual functioning of the organisation. This reflected the common law position prior to the decision by the High Court in *Aid/Watch*. In *Aid/Watch* the High Court held that the generation of public debate by lawful means, concerning matters arising under one of the established heads of charity, is itself an activity beneficial to the community and that there is no general doctrine in Australia that excludes political purposes from being charitable.

The suggestion within the Consultation Paper which provides for the Charities Bill definition to be altered to remove activities of the type which are attempting to change the law or government policy from being disqualifying activities is supported by PCLC. The definition should also provide that a charity can engage in such political activities but must nevertheless have a purpose that falls within an existing head of charity. This will enable charities to engage in political activities, so long as those activities are in furtherance of their charitable purposes.

¹ *Commissioners for Special Purposes of Income Tax v Pemsel* [1891-1894] All ER Rep 28

² Commonwealth of Australia, *A definition of Charity*, Consultation Paper, October 2011, p.4



Peninsula Community
Legal Centre Inc

In addition, PCLC supports the modification of the definition to prevent a charity from engaging in party political activities even if the activity is ancillary or incidental to its charitable purpose. This would see the incorporation of a feature included in overseas jurisdictions such as England, Scotland and Canada.

PCLC thanks you for the opportunity to provide input and looks forward to involvement in the future stages in the development of a statutory definition of charity.

Yours faithfully,

HELEN CONSTAS
CHIEF EXECUTIVE OFFICER
PENINSULA COMMUNITY LEGAL CENTRE INC.

Enc.0



Charities Act 2006

2006 CHAPTER 50

An Act to provide for the establishment and functions of the Charity Commission for England and Wales and the Charity Tribunal; to make other amendments of the law about charities, including provision about charitable incorporated organisations; to make further provision about public charitable collections and other fund-raising carried on in connection with charities and other institutions; to make other provision about the funding of such institutions; and for connected purposes. [8th November 2006]

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

PART 1

MEANING OF "CHARITY" AND "CHARITABLE PURPOSE"

1 Meaning of "charity"

- (1) For the purposes of the law of England and Wales, "charity" means an institution which—
 - (a) is established for charitable purposes only, and
 - (b) falls to be subject to the control of the High Court in the exercise of its jurisdiction with respect to charities.
- (2) The definition of "charity" in subsection (1) does not apply for the purposes of an enactment if a different definition of that term applies for those purposes by virtue of that or any other enactment.
- (3) A reference in any enactment or document to a charity within the meaning of the Charitable Uses Act 1601 (c. 4) or the preamble to it is to be construed as a reference to a charity as defined by subsection (1).

2 Meaning of "charitable purpose"

- (1) For the purposes of the law of England and Wales, a charitable purpose is a purpose which—
 - (a) falls within subsection (2), and
 - (b) is for the public benefit (see section 3).
- (2) A purpose falls within this subsection if it falls within any of the following descriptions of purposes—
 - (a) the prevention or relief of poverty;
 - (b) the advancement of education;
 - (c) the advancement of religion;
 - (d) the advancement of health or the saving of lives;
 - (e) the advancement of citizenship or community development;
 - (f) the advancement of the arts, culture, heritage or science;
 - (g) the advancement of amateur sport;
 - (h) the advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity;
 - (i) the advancement of environmental protection or improvement;
 - (j) the relief of those in need by reason of youth, age, ill-health, disability, financial hardship or other disadvantage;
 - (k) the advancement of animal welfare;
 - (l) the promotion of the efficiency of the armed forces of the Crown, or of the efficiency of the police, fire and rescue services or ambulance services;
 - (m) any other purposes within subsection (4).
- (3) In subsection (2)—
 - (a) in paragraph (c) "religion" includes—
 - (i) a religion which involves belief in more than one god, and
 - (ii) a religion which does not involve belief in a god;
 - (b) in paragraph (d) "the advancement of health" includes the prevention or relief of sickness, disease or human suffering;
 - (c) paragraph (e) includes—
 - (i) rural or urban regeneration, and
 - (ii) the promotion of civic responsibility, volunteering, the voluntary sector or the effectiveness or efficiency of charities;
 - (d) in paragraph (g) "sport" means sports or games which promote health by involving physical or mental skill or exertion;
 - (e) paragraph (j) includes relief given by the provision of accommodation or care to the persons mentioned in that paragraph; and
 - (f) in paragraph (l) "fire and rescue services" means services provided by fire and rescue authorities under Part 2 of the Fire and Rescue Services Act 2004 (c. 21).
- (4) The purposes within this subsection (see subsection (2)(m)) are—
 - (a) any purposes not within paragraphs (a) to (l) of subsection (2) but recognised as charitable purposes under existing charity law or by virtue of section 1 of the Recreational Charities Act 1958 (c. 17);

- (b) any purposes that may reasonably be regarded as analogous to, or within the spirit of, any purposes falling within any of those paragraphs or paragraph (a) above; and
 - (c) any purposes that may reasonably be regarded as analogous to, or within the spirit of, any purposes which have been recognised under charity law as falling within paragraph (b) above or this paragraph.
- (5) Where any of the terms used in any of paragraphs (a) to (l) of subsection (2), or in subsection (3), has a particular meaning under charity law, the term is to be taken as having the same meaning where it appears in that provision.
- (6) Any reference in any enactment or document (in whatever terms) –
- (a) to charitable purposes, or
 - (b) to institutions having purposes that are charitable under charity law,
- is to be construed in accordance with subsection (1).
- (7) Subsection (6) –
- (a) applies whether the enactment or document was passed or made before or after the passing of this Act, but
 - (b) does not apply where the context otherwise requires.
- (8) In this section –
- “charity law” means the law relating to charities in England and Wales; and
 - “existing charity law” means charity law as in force immediately before the day on which this section comes into force.

3 The “public benefit” test

- (1) This section applies in connection with the requirement in section 2(1)(b) that a purpose falling within section 2(2) must be for the public benefit if it is to be a charitable purpose.
- (2) In determining whether that requirement is satisfied in relation to any such purpose, it is not to be presumed that a purpose of a particular description is for the public benefit.
- (3) In this Part any reference to the public benefit is a reference to the public benefit as that term is understood for the purposes of the law relating to charities in England and Wales.
- (4) Subsection (3) applies subject to subsection (2).

4 Guidance as to operation of public benefit requirement

- (1) The Charity Commission for England and Wales (see section 6 of this Act) must issue guidance in pursuance of its public benefit objective.
- (2) That objective is to promote awareness and understanding of the operation of the requirement mentioned in section 3(1) (see section 1B(3) and (4) of the Charities Act 1993 (c. 10), as inserted by section 7 of this Act).
- (3) The Commission may from time to time revise any guidance issued under this section.
- (4) The Commission must carry out such public and other consultation as it considers appropriate –