

ANFPAN CONFERENCE 2013

THE NEW DEFINITION OF CHARITY

ITS EFFECT ON THE CHARITY SECTOR

In this paper I have quoted small extracts from several different sources. I seek your indulgence as it is difficult to get back to some original sources to provide an accurate bibliography, so I haven't attempted to do so. What I have sought to do is bring together key matters to assist in widening our understanding.

THE HISTORY:

The Statute of Elizabeth 1601:

Much focus has been on this Statute, as refined in *Pemsel's Case*, with good reason. However with the proposed new Definition of Charity now nearly ready to go to the Parliament it is worth our while as professionals working primarily in the Charity Sector to better understand where we were, and what the proposed changes may introduce.

There is no intrinsic legal definition of a charity. Courts can only describe the attributes of charities. An essential characteristic is that a charitable activity must be to the benefit of the public, in other words a charity is not concerned with the conferment of private advantage – hence the essential requirement that it is “not for profit”.

An attempt was made in England to classify or provide guidelines for the identification of charitable purposes in the Preamble to the *Charitable Uses Act 1601*. This Act, referred to as the Statute of Elizabeth, was introduced to address abuses in charitable trusts. The Preamble set out the following charitable purposes:

The relief of the aged, impotent and poor people; the maintenance of sick and maimed soldiers and mariners, schools of learning, free schools and scholars in universities; the repair of bridges, ports, havens, causeways, churches, sea-banks and highways; the education and preferment of orphans; the relief, stock or maintenance of houses of correction; the marriages of poor maids, the supportation, aid and help of young tradesmen, handicraftsmen and persons decayed; the relief or redemption of prisoners or captives; and the aid or ease of any poor inhabitants concerning payment of fifteens, setting out of soldiers and other taxes.

The Preamble was not, even in 1601, an exhaustive list of charitable purposes. Trusts for **the advancement of religion** were omitted as were some other trusts that were **considered to be adequately administered and so not requiring the protection of the Act** (for example, some educational institutions). Purposes much broader than relief of poverty, sickness or distress were also included in the Preamble

By the early 19th century, the courts had ruled that charitable purposes had to be both for the public benefit and within the spirit and intendment of the Preamble to the Statute of Elizabeth. In *Pemsel's case* in 1891 (House of Lords), Lord Macnaghten classified the categories of charitable purposes under four heads:

Charity in its legal sense comprises four principal divisions:

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

This judgement of Lord Macnaghten was a milestone. It stipulated a modern (at that time) classification of charities. However, the four heads of charity are a classification of charity, not a definition.

The Preamble to the Statute of Elizabeth in Australian law was confirmed by the High Court in 1974. The Court held that the existence of the two elements of being for the public benefit and being within the spirit and intendment of the Preamble to the Statute of Elizabeth is both necessary and sufficient to warrant the conclusion that the common law meaning of charity is given to the term `charity' in the various laws dealing with trusts, fundraising, methods of incorporation and taxation.

In Australia there is not as yet a statutory definition of “charity” but this is what is now proposed. The Howard Government attempted to do this, arising from a significant review in 2001, but the Charities Bill of 2003 was withdrawn. It was widely considered to be flawed. In 2004 the Parliament approved the Extension of Charitable Purpose Act which made some minor additions to provide clarification in some areas. Useful, but not providing the widening the Sector sought, nor giving a sharper form

that at least some bureaucrats were apparently seeking.

Extension of Charitable Purpose Act 2004:

This Australian Act was the result of the 2001 Charities Definition Inquiry, and extended the meaning of charity by including -

1. The provision of child care services on a non-profit basis.
2. The provision of a rental dwelling under National Rental Affordability.
3. Self-help groups, and
4. Closed or contemplative religious orders.

The Act also provided that, subject to specific conditions, items 3 and 4 were for the public benefit.

The 2011 Inquiry into the Definition of Charity:

The Charity Sector was given six weeks to express their considered views on a new definition of charity that was intended to establish greater certainty into the meaning of the term “charity”. Given that there was already more than 400 years of substantial case law this was no mean objective. However it was a worthy one as an objective. There were problems with the Consultation Paper, and the Sector identified them. As a consequence the then Minister, Bill Shorten, agreed to ensure there was greater public consultation. He announced that there would be further public consultation and we could anticipate that the matter would be resolved in a new Act of Parliament and that the new Definition would be implemented by 30 June 2013.

It is worthy of note that the Christian community contributed significantly and responsibly to the 2011 Inquiry and that the Minister of the day noted their significant concerns.

So today – 8 April - just as I was finalising this paper - came the announcement from the current Minister of the new Consultation, with our responses needed by 3 May 2013.

The Charities Bill 2013:

In the Exposure Draft for the Bill it presents a proposed new definition, to replace all that has gone before, with an effective commencement date of 1 January, 2014.

The new definition proposed states

“In any (Commonwealth) Act:

charitable purpose means any of the following:

- (a) the purpose of advancing health;
- (b) the purpose of advancing education;
- (c) the purpose of advancing social or public welfare;
- (d) the purpose of advancing religion;
- (e) the purpose of advancing culture;
- (f) the purpose of promoting reconciliation, mutual respect and tolerance between groups of individuals that are in Australia;
- (g) the purpose of promoting or protecting human rights;
- (h) the purpose of protecting the safety of the general public;
- (i) the purpose of preventing or relieving the suffering of animals;
- (j) the purpose of advancing the natural environment;
- (k) any other purpose beneficial to the general public that may reasonably be regarded as analogous to, or within the spirit of, any of the purposes mentioned in paragraphs (a) to (j);
- (l) the 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, if:
 - (i) in the case of promoting a change—the change is in furtherance or in aid of one or more of the purposes mentioned in paragraphs (a) to (k); or
 - (ii) in the case of opposing a change—the change is in opposition to, or in hindrance of, one or more of the purposes mentioned in those paragraphs.

Also - Certain purposes presumed to be for the public benefit

In the absence of evidence to the contrary, a purpose that an entity has is presumed to be for the public benefit, if the purpose is any of the following purposes:

- (a) the purpose of relieving illness;

- (b) the purpose of relieving the needs of the aged;
- (c) the purpose of advancing education;
- (d) the purpose of relieving poverty;
- (e) the purpose of advancing religion.

It is somewhat of a surprise that an initial reading of the Bill suggests that the Government have paid careful heed of the result of the 2011 Consultation. The Common Law understandings appear to have been retained as well as the presumption of public benefit. What we need to be aware of however is that the original objectives of the Treasury bureaucrats was inconsistent with their political masters and we know they have long memories. In 2011 there was a significant objective shown to impose onerous obligations on present and future charities to substantiate their claim for the charity concessions in tax law. We have a responsibility to be alert. WE can also derive some comfort for the progress thus far.

Chartered Secretaries Australia have just released this statement on the draft Bill –

“Consultation on statutory definition of charity marks leap forward in NFP reform

The government has announced the next step in the not-for-profit (NFP) regulatory reform framework with the commencement of a public consultation on the draft legislation for a statutory definition of charity (the exposure draft).

The release of the consultation on the exposure draft seeks to provide greater clarity and certainty for charities, the public and regulators in determining whether an entity is charitable.

The exposure draft draws on the basic principles of charity derived from the common law, going all the way back to the Statute of Elizabeth of 1601, and balances both the long-established principles of charity, such as the presumption of public benefit for certain charitable purposes, as well as incorporating more recent court decisions on charitable purpose, such as Aid/Watch Incorporated v Federal Commissioner of Taxation.

The exposure draft also seeks to preserve the flexibility of the common law and has been drafted to allow the courts, and Parliament to continue to develop the definition over time.

Alongside supporting the Australian Charities and Not-for-profits Commission (ACNC) in its role providing guidance and support to charities, the introduction of the statutory definition of charity is also central to:

- *clarifying the sector’s understanding of, and access to, charitable tax concessions and*
- *expressly identifying charitable purposes, as determined through case law.*

Importantly, the government has clarified that the introduction of the statutory definition of charity is not intended to:

- *change the charitable status of existing charities*
- *affect the taxation treatment of charities, nor*
- *extend the range of existing recognised categories of charitable purposes, for example, to include sport and recreation.*

The government has also announced that the proposed start date for the commencement of the statutory definition of charity will be deferred until 1 January 2014, to allow for consultation and feedback on the exposure draft.”

If CSA are correct in their early assessment of the proposed changes we can be encouraged. I can only say to you – “Watch this space” in the years ahead. There are times when the bureaucrats in Treasury have proven to have long memories. The journey over the Definition of Charity has given evidence they have a belief that the concessions granted are being misused by some and they seek to place an onerous burden on all to remedy this.

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