– *adding to your ministry*

WA Churches – Charity Definition Submission

Introduction:

On behalf of the several Western Australian Christian denominations and independent Churches who are signatories to this document (see attached letters of authority), Add-Ministry Inc. presents our united concerns regarding the proposed changes to the Common Law definition of charity.

Add-Ministry Inc. exists to help equip and inform the charitable sector and because it shares the concerns now expressed it has been requested to coordinate this submission. Our involvement is across the spectrum of the charitable sector including a large number of independent churches and many charities that do not have a religious background.

In this submission we speak for the –

- Apostolic Church Australia,
- Australian Christian Churches (formerly Assemblies of God in WA),
- Baptist Churches Western Australia,
- Catholic Archdiocese of Perth,
- C3 Church Australia (formerly Christian City Churches),
- Churches of Christ in WA Inc.,
- Church of the Foursquare Gospel,
- Churchlands Christian Fellowship Inc.
- IPHC Ministries (Australia) Pty Ltd,
- Perth Christian Life Centre
- Riverview Church
- Uniting Church in Australia Synod of WA, and
- Victory Life Centre and associated Churches,
- This submission has the support of the Anglican Diocese of Perth who however will also be a party to a submission by the Anglican Church at a national level.

This submission is not only on behalf of the denominations that are signatories but also on behalf of their 717 member churches, which represent around 100,000 regular worshippers. All of these Christian communities are actively involved in charitable and philanthropic activities both within Australia and beyond its shores, motivated by their Christian religious values and commitment.

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It is worth noting that the Christian Churches in Australia provide the highest volunteer input in the whole of society, which extends into most areas of secular not-for-profit activity.

Principal Submission:

Our overview comment is that the proposed changes to the present Common Law position are major and will, of necessity, introduce significant uncertainty to the Charitable Sector. We consider that such a major change to the present position is not needed in the context of the many other legislative changes that are in the process of being introduced by the Government. The new Definition will add heavily to the problems of the Sector, not lighten them. The Common Law tests have served the Sector well for many years and for by far the majority of charities there is clarity in their position.

We also express our strong concern at the large number of consultative documents already issued by Treasury and those proposed in coming weeks. While we recognise the obligation of governments to aim for good accountability of public funds we submit that the public good is to be better served by ensuring the Charity sector is strengthened, not weakened. It is our belief, after discussion together, that the range of proposed legislative changes will seriously hamper the Sector and as a consequence the provision of the breadth of community compassionate services will suffer.

We consider that the consultation process being undertaken is seriously flawed due to –

- The very short period of time allowed for responses to be researched and then submitted, and
- The flood of proposed changes being pressed upon the Sector.

The combination of these two factors severely restricts the consultative process and significantly reduces its value.

To call the advancement of religion into question as a charitable objective is a denial of the religious freedom which underpins our society. The advancement of religion as a primary charitable objective should not be subject to a Public Benefit Test. Many of the major (now) secular charities were originally commenced by religious organisations, E.g. The Red Cross, The Royal Flying Doctor Service. We submit that the denial of the advancement of religion as a charitable objective will erode the long-term growth of future philanthropic organisations for the benefit of the Australian community and the wider world.

As the religious community provides so much of the heart motivation that moves the spirit of compassion in Australia we are deeply concerned.

We ask –

1. **For a significant lengthening of the time for public consultation,**
2. **For a plan that introduces legislative change, if change can be justified, over a period of years, not over a short period of months,**
3. **For a simplification of the proposed changes from the present extensive proposals,**
4. **For the opportunity for the Australian Charities and Not For Profit Commission (ACNC) to have the opportunity of guiding the consultation process, and**
5. **For the preservation of the Common Law to be preserved in the planned amendments.**

It is, in our view, inappropriate for Treasury to be leading the consultation process. It appears that Treasury may not have an understanding of the Sector and this is clearly demonstrated by the short time frames chosen to respond to complex documents distributed in the "consultative process".

We are also seriously concerned about the introduction of laws to define charity in a manner that will cause much of the present Common Law understandings to be lost pending fresh High Court challenges. We argue that the Courts of Australia are a more independent and impartial venue where the determination of "what is a charity" can be judged, in the light of current community understandings. Statute law that replaces well-reasoned Court decisions will inevitably lead to uncertainty, tension, additional administrative obligations and cost. Where, we ask, is the public benefit in these changes? Better accountability can be achieved by a less rigid and more transparent measures.

We can support a widening of the Definition of Charity from its Common Law position utilising a process similar to that followed in the Extension of Charitable Purpose Act 2004, as that expanded the present law without removing the strength of the Common Law position. There were good reasons for the Charities Bill of 2003 being withdrawn. We understand that the increase in complexity coupled with the legal uncertainty that would have prevailed were key factors. The Word Investments decision does not justify the extent of these new proposals, although some further clarity may be needed following that case.

Our comments on the Questions as set out below need to be read in the context of this Introductory Statement.

Response to Consultation Paper Questions:

1. *Are there any issues with amending the 2003 definition to replace the 'dominant purpose' requirement with the requirement that a charity have an exclusively charitable purpose?*

We support the continuance of "dominant purpose" as it has been well tested by the Courts. We see no benefit for either Government or the Sector from the proposed change.

We note firstly that the question implies a ready acceptance of the 2003 Bill's core definition as expressed in Section 4 of that Bill. We do not support some aspects of this core definition. In particular we do not support Section 4 (1) (b) (ii) as it presumes removal of the presumption of public benefit from the first three heads of charity. We also will argue, in relation to Questions 12 & 13, that the "disqualifying purpose" provisions of Section 8 need to be seriously revised. Yet Section 4 purports to retain Section 8. Also, in Sub-section (1) (f) of Section 4 there are limitations on structure that need to be addressed. Please note our comments re Question 14. In other words, Section 4 is in our view seriously flawed in a number of its aspects.

The "dominant purpose" test is already well understood and provides reasonable certainty to the Sector. The term "exclusively charitable" is a significant restriction which, in our view, will create much uncertainty. In our view it is probable the change would bar many worthy entities that are currently eligible from retaining Tax Concession Charity (TCC) endorsement. Many very small charities, particularly in the small rural communities, will be found to have problems primarily introduced by bureaucratic rigidity that pays too much attention to a mere form of words in an Act and pays little or no heed to the actual Objects and activities of the entities concerned, which on examination will be found to pass the "dominant" test. It causes us to ask whether the intent is to substantially reduce the number of qualifying charities, as this does not seem to fit well with Government policies.

The importance of "ancillary and incidental" activities also needs to be strongly emphasised.

2. *Does the decision by the New South Wales Administrative Tribunal provide sufficient clarification on the circumstances when a peak body can be a charity or is further clarification required?*

No. There would be a benefit to a legislative change in this area to remove doubt, as the important role of peak bodies needs to be preserved. Where their focus is on advancing and supporting the Charitable Sector or a significant portion of it they should be granted TCC endorsement.

3. Are any changes required to the Charities Bill 2003 to clarify the meaning of 'public' or 'sufficient section of the general community'?

Yes. We support the Melbourne University NFP Project (MUNFP) submission which states, "As there is significant complexity in the Common Law regarding this element of the Public Benefit Test, there should be some clarification through the statutory definition. We recommend that the Test be re-stated in the legislation in the following manner:

In determining whether there is a benefit for the public or a sufficient section for the public, regard should be had to:

1) The existence of wider benefits to the general community;

2) The nature of any limitations on the class to be benefited, including in particular:

   a. The extent to which the class of potential beneficiaries is open in nature;

   b. The extent to which such limitations are related to the nature of the charitable purpose; and

   c. The practical need for such limitations."

Our further comment is that the 2003 Charities Bill seeks to impose unreasonable restrictions on small groups (see Section 7.2 of the Bill). In Australia there are thousands of small rural communities. A disproportionate number of them are to be found in Western Australia. We submit that regard needs to be given to the size of the community that benefits from the activity. Size needs to be relative to the circumstances of the situation. Section 7.2 of the 2003 Bill needs to be removed or substantially modified in this regard. To deny TCC endorsement to a community whose population is deemed to be "numerically negligible" just on those grounds will have serious implications for our rural and remote communities.

4. *Are changes to the* Charities Bill 2003 *necessary to ensure beneficiaries with family ties (such as native title holders) can receive benefits from charities?*

Yes. This complex matter needs to be addressed with care or the real purpose of charitable benefit may be watered down. There is a need to ensure there is a benefit available to the whole of the relevant community. Some native title holder entities may not address this issue appropriately.

There is also a need to allow for special interest groups such as Legacy and for disabled persons (such as those for whom the Necessitous Circumstance Fund provisions of taxation law were included).

5. *Could the term 'for the public benefit' be further clarified, for example, by including additional principles outlined in ruling TR 2011/D2 or as contained in the Scottish, Ireland and Northern Ireland definitions or in the guidance material of the Charities Commission of England and Wales?*

The question presumes support for the removal of the presumption of public benefit. The removal of the presumption of public benefit from the first three heads of charity is a position we do not support. We consider it would add a major administrative obligation on the ACNC at substantial cost without any evidence to show benefit from such a change. It would place the burden of proof on the Charitable Sector, again at additional cost, and again without evidence of any benefit. It will present difficulties for those charities who will remain unaware of the changes, and that will inevitably be a very large proportion of the Sector, because of its size, and diversity.

The ACNC will no doubt be given appropriate authority to review instances where there is a clear need to do so. It would be a much simpler and more practical procedure for all concerned to leave the presumption of public benefit unchanged.

If the presumption of Public Benefit were to remain then, as stated in paragraph 79 of the Consultation Paper, the current burden to rebut the presumption means a Government authority would bear the administrative difficulty and cost of this. If the presumption is removed then there will still be a substantial cost for the ACNC as well as significant cost to the whole Charitable Sector. The latter is contradictory with the Government policy intent as outlined in Joint Media Release 143 of 28 October, 2011 by The Hon Bill Shorten MP and Tanya Plibersek, the Minister for Human Services and Social Inclusion, which states in paragraph 8 **"We want not-for-profits to be able to direct their resources to charitable work rather than unnecessarily complex administration…the Government is reducing the compliance burden for the Sector".**

We also note with both interest and concern the recent decision of the UK Tax & Chancellery Chamber in the Independent Schools Case, which called into question the Guidance Notes of the Charities Commission of England & Wales. The Court has questioned the right of the Commission to impose a public benefit obligation on public schools

in a way that the Chamber considered did not accurately reflect the Common Law definition of Charity - as the English Charities Act of 2006 "did not change the Common Law in any material way"!

The English 2006 Act also refers to a charity being established "for charitable purposes only". We note that the well-reasoned MUNFP submission proposes this same description in lieu of "exclusively charitable" or "dominant purpose" in Question 1. It may well be that the MUNFP researchers had not at that time become aware of the Independent Schools Case, which has only just become available in recent weeks.

Any change needs to also consider the intangible and indirect benefits that may exist. For instance the spiritual benefit of prayer needs to be provided for - not only to religious groups, but also to those within the wider community who are often the direct beneficiaries of those prayers. To seek such aid is common among many non-church attendees in times of crisis. There has been psychological research conducted where prayer has been proven to assist particularly in times of crisis or in recovery from major surgery.

6. *Would the approach taken by England and Wales of relying on the common law and providing guidance on the meaning of public benefit, be preferable on the grounds it provides greater flexibility?*

Yes. The approach by the English 2006 Act is in our view a much more helpful approach as it affirms much of the present Common Law position while empowering the Charities Commission of England and Wales to both provide guidance notes and where appropriate, require compliance (subject to our comment above that the Guidance Notes do not in themselves replace the Common Law).

The provisions of the Common Law currently provide a presumption of public benefit in respect to –

- Poverty,
- Education, and
- Religion.

We believe this position should be retained for the reasons of greater flexibility and the removal of onerous administrative obligations not only from the charities but from the bureaucracy as well.

7. *What are the issues with requiring an existing charity or an entity seeking approval as a charity to demonstrate they are for the public benefit?*

We affirm the position of the University of Melbourne which states clearly our significant concerns.

The MUNFP statement reads, "This is perhaps the most difficult and contested issue, as the competing arguments are finely balanced. The principle that all charities should be required to prove public benefit affirmatively furthers objectives of transparency and accountability, and could promote public trust and confidence. The abolition of the presumptions also ensures equality across heads of charity."

However, we also express reservations about the desirability of removing the presumptions of public benefit. We consider that the presumptions perform some useful functions, including minimising the evidential (and compliance) burden, and assisting in determinations where public benefit is intangible, diffuse, or involves irresoluble conflicts of beliefs and values.

We are also concerned about the removal of the presumptions from a practical and a political perspective. As a practical matter, the determination of public benefit is likely to be resource-intensive, both on the part of charities and on the part of the regulator. We are not convinced that this is the best use of the regulators (or indeed charities') limited resources. From a political perspective, we note that the removal of the presumptions is likely to be interpreted as an expression of scepticism towards certain parts of the Sector, which may undermine support for this reform and harm relations between Government and the Sector.

Of course, even where public benefit is presumed, that presumption can be rebutted. The Australian Charities and Not-for-Profits Commission (ACNC) should have sufficient powers to enable it to require further information from charities where it considers there is a risk that the public benefit test is not met. Further, charities whose purposes do not fall within recognised categories of charities must still prove public benefit, as is currently done."

8. *What role should the ACNC have in providing assistance to charities in demonstrating this test, and also in ensuring charities demonstrate their continued meeting of this test?*

The MUNFP statement reads, "As noted above, the ACNC should be required to provide guidance on the Public Benefit test in a manner similar to that of Charity Commissions overseas. As the charities will report (presumably annually) to the ACNC, the ACNC is also best placed to identify whether charities are continuing to meet this requirement, and should have appropriate powers to request further information where it considers there is a risk it is not meeting such a requirement."

Our further comment is that the reporting obligations need to make provision for different reports for difference in size of charitable entities. The present tiered provisions in the Corporations Act (Cth) and the proposed tiers under the coming amendments to the Associations Incorporation Act of WA and Victoria could be emulated with benefit.

9. *What are the issues for entities established for the advancement of religion or education if the presumption of benefit is overturned?*

In addition to our comments to other questions, unless the present Common Law position is retained there will be uncertainty until the matter is tested in depth before the High Court of Australia. To impose such an onerous burden on the Charitable Sector without proven need is, we submit, an instance where the bureaucracy is seeking to crack a peanut with a sledgehammer.

For the small church in rural and remote Western Australia in particular there will be serious difficulties in satisfying the proposed "sufficient section of the community" test. One small community that comes to mind is Aldersyde, where the "town" consists of a church, a hall, a very large grain bin and two houses. The farming community this little "town" serves is very supportive of its tiny facilities, but numerically they are very small in numbers. Are the Church and other community groups to lose their TCC endorsement despite the fact that they serve the bulk of that tiny community simply because they are "numerically negligible"? There are many similar communities like Aldersyde in this State.

10. *Are there any issues with the requirement that the activities of a charity be in furtherance or in aid of its charitable purpose?*

Yes. The present "dominant" test, if retained, enables the ACNC to review all aspects of a charity and in our view is sufficient. No activities test should be included. The High Court in Word Investments stated that where activities that are not of themselves intrinsically charitable are carried on to achieve a charitable purpose then the activity, in itself, will not deny charitable status. If an activities test is ultimately included, notwithstanding our concerns, then it should merely re-state the present Common Law position.

11. *Should the role of activities in determining an entity's status as a charity be further clarified in the definition?*

No, the inclusion of an activities test in the definition is not needed and adds unnecessary complexity. It would also create an issue with new entities seeking TCC endorsement, as they would invariably not have activities to demonstrate.

12. *Are there any issues with the suggested changes to the Charities Bill 2003 as outlined above to allow charities to engage in political activities?*

Yes. The provisions of Section 8 of the 2003 Bill intrudes on the right to freedom of speech. It also seems it was politically motivated to remove vigorous debate from a section of the community that is often a leader in the

focussing of the community conscience. The Aid/Watch case provided a clear instance where substantial advocacy was seen by the High Court to be appropriate. There will be other substantial instances where free speech must be preserved and the Charitable Sector will need to provide leadership. We also submit that any disqualification in respect to advocacy or political activity should only occur in very extreme circumstances. This proposed Section needs to be removed or substantially modified. The key appears to be that any activity should be clearly related to the Objects of the Charity.

We support the complete removal of Section 8 (2) (c). Moreover we consider that seeking to more closely define what constitutes political activity is likely to create greater legal complexity than it may possibly resolve.

We agree that any advocacy activity should be clearly related to the Objects of the Charity.

13. *Are there any issues with prohibiting charities from advocating a political party, or supporting or opposing a candidate for political office?*

Yes, because a charity needs to be free to speak out where an issue comes within its scope. For example there may be an instance where a political candidate has a major platform that is consistent with the Objects of a charity. That may well warrant some identification by the charity. It is not necessarily a political comment but an affirmation of the role of the charity itself. Our comments to Question 12 also apply here.

It is difficult to anticipate what issues may emerge in a future situation, which is why we have discomfort regarding Section 8 as a whole.

Our comments to Question 12 also apply here.

14. *Is any further clarification required in the definition on the types of legal entity which can be used to operate a charity?*

Yes, because noting the following comments. Current Government policy with both State and Commonwealth Governments is placing increasing emphasis on contracting out services previously conducted by Government. Also increased complexity in compliance areas, be it taxation law, industrial law, or occupational health and safety place onerous requirements on even the larger charities.

As a consequence charities are looking at new ways of working. There is a significant increase in the provision of shared services, of joint ventures and similar working arrangements. These need to be allowed for in a way that does not deny such structures from obtaining and retaining TCC endorsement.

Many older charities, including most of the older religious institutions, have been established under Private Acts of the Parliament of one of the States and need to be included.

Provision should also be made for entities established as subsidiary entities of a charity established under such an Act of Parliament. This may well be a Statute of a University or of one of the large Christian denominations.

15. *In the light of the* Central Bayside *decision is the existing definition of 'government body' in the Charities Bill 2003 adequate?*

Yes. Central Bayside established a helpful principle and the 2003 Bill seems to affirm the Court decision. There is no need to take the matter further.

16. *Is the list of charitable purposes in the Charities Bill 2003 and the Extension of Charitable Purposes Act 2004 an appropriate list of charitable purposes?*

No. The omission of the relief of poverty from the 2003 Bill is, in our view, singularly inappropriate. It needs to be re-inserted. Currently the 2003 Bill would leave poverty to the less clear "advancement of social or community welfare" or "other purposes beneficial to the community", which seems to be quite inadequate.

We support the inclusion of the additional heads of charity as described in Section 10 and the retention of the general "other purpose" test of Section 19 (1) (g) with the proviso that the presumption of Public Benefit should apply to all of the core heads and that Public Benefit only be required for a general application under (1) (g) above.

It is our view that any change to the present Common Law definition of Charity should be minimal and follow the lines of the Extension of Charitable Purposes Act 2004.

17. *If not, what other charitable purposes have strong public recognition as charitable which would improve clarity if listed?*

As stated in our Introductory Statement we maintain that the retention of the present Common Law position both has practical merit and embraces legal certainty for most charities. We advocate merely a widening of the definition following similar procedures to the 2004 Act. We consider that both the 2003 Bill (subject to our earlier comment) and the 2004 Act defining objectives were in themselves useful.

18. *What changes are required to the Charities Bill 2003 and other Commonwealth, State and Territory laws to achieve a harmonised definition of charity?*

Given the diversity of definition in other jurisdictions an appropriate widening following the procedures applied in the 2004 Act would be useful. Without such a widening it seems there would be real difficulties in obtaining the desirable harmony of laws across the country.

19. *What are the current problems and limitations with ADRFs?*

The original intent of ADRFs has clearly not been met due to some of the restrictions imposed by the legislation. The tightness of control has impeded the development of a very desirable humanitarian objective. This needs to be addressed to enable the ADRFs to operate more effectively. This also provides a clear message that supports our argument to retain the present clarity from the Common Law. A new Act is not needed. An addition to the Common Law however may well be beneficial.

20. *Are there any other transitional issues with enacting a statutory definition of charity?*

We support minimal changes from the present Common Law position. To expand the meaning of what constitutes a charity to embrace today's needs is a worthy objective. To bring substantive untested bureaucratic obligations at a time when Government is also introducing other major reforms is an onerous and, in our view, unnecessary action.

N E Harding

Chairman

Add-Ministry Inc.

9 December, 2011